

9-30-2011

# Buku Properties v. Clark Clerk's Record v. 2 Dckt. 38561

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Buku Properties v. Clark Clerk's Record v. 2 Dckt. 38561" (2011). *Idaho Supreme Court Records & Briefs*. 3222.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/3222](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3222)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

LAW CLERK

Volume 2

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

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

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 Andrus  
Deputy



COPY

38561

IN THE SUPREME COURT OF THE STATE OF IDAHO

VOLUME 2

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

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

## TABLE OF CONTENTS

	Page
<b><u>Volume 1</u></b>	
VERIFIED COMPLAINT Filed 11/6/2008	12
SUMMONS – JANET C. CLARK Filed 11/6/2008	23
SUMMONS – RAOEL H. CLARK Filed 11/6/2008	25
SUMMONS – ANGUS JERRY PETERSON Filed 11/6/2008	27
SUMMONS – BETTY JEAN PETERSON Filed 11/6/2008	29
ACKNOWLEDGMENT OF ACCEPTANCE OF SERVICE Filed 11/25/2008	31
ANSWER w/COUNTERCLAIM Filed 12/10/2008	33
ANSWER TO COUNTERCLAIM BY BUKU PROPERTIES, LLC Filed 12/29/2008	47
NOTICE OF SERVICE Filed 4/15/2009	56
NOTICE OF SERVICE Filed 4/15/2009	59
NOTICE OF SERVICE Filed 4/15/2009	62
MOTION FOR SUMMARY JUDGMENT Filed 10/6/2009	64
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Filed 10/6/2009	67
AFFIDAVIT OF JARAMIE MAGERA IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT Filed 10/6/2009	81

NOTICE OF HEARING Filed 10/6/2009	108
NOTICE VACATING HEARING AND RESETTING HEARING ON PLAINTIFFS MOTION FOR SUMMARY JUDGMENT Filed 10/15/2009	111
DENIAL OF PLAINTIFFS REQUEST FOR SUMMARY JUDGMENT AND OBJECTION TO CONSIDERATION OF SUMMARY JUDGMENT Filed 11/13/2009	114
DEFENDANTS REQUEST FOR SUMMARY JUDGMENT Filed 11/13/2009	116
MOTION TO STRIKE PORTIONS OF MAGERA AFFIDAVIT Filed 11/13/2009	119
DEFENDANTS MEMORANDUM RE: SUMMARY JUDGMENT Filed 11/13/2009	122
AFFIDAVIT OF JERRY AND BETTY PETERSON IN SUPPORT OF SUMMARY JUDGMENT Filed 11/13/2009	137
AFFIDAVIT OF NAYSHA FOSTER, PLANNING & ZONING COORDINATOR RE: SUMMARY JUDGMENT Filed 11/13/2009	144
AFFIDAVIT OF RAOEL CLARK IN SUPPORT OF SUMMARY JUDGMENT Filed 11/13/2009	154
HEARING NOTICE ON DEFENDANTS SUMMARY JUDGMENT; MOTION TO STRIKE Filed 11/13/2009	159
REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT Filed 12/7/2009	161
MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTION TO STRIKE PORTION OF MAGERA AFFDavit Filed 12/7/2009	178
MINUTE ENTRY Filed 12/14/2009	185
NOTICE OF SERVICE Filed 1/6/2010	185
NOTICE OF SERVICE Filed 1/6/2010	187

NOTICE OF SERVICE Filed 1/13/2010	190
NOTICE OF SERVICE Filed 1/13/2010	193
MEMORANDUM DECISION Filed 1/27/2010	197
NOTICE OF TAKING DEPOSITION DUCES TECUM Filed 2/22/2010	211
NOTICE OF TAKING DEPOSITION OF AUGUS JERRY PETERSON Filed 3/3/2010	213
NOTICE OF TAKING DEPOSITION OF RAOEL H. CLARK Filed 3/3/2010	216
DEFENDANTS OBJECTION TO NOTICE OF DEPOSITION OF RAOEL H. CLARK AND REQUEST FOR PERMISSION TO TAKE TESTIMONY VIA TELEPHONE Filed 3/9/2010	219
NOTICE OF TELEPHONIC HEARING Filed 3/9/2010	222
MINUTE ENTRY Filed 3/12/2010	224
NOTICE OF VACATING DEPOSITION OF RAOEL H. CLARK Filed 3/12/2010	226
NOTICE OF VACATING DEPOSITION OF ANGUS JERRY PETERSON Filed 3/12/2010	229
MEMORANDUM IN OPPOSITION TO DEFENDANTS OBJECTION TO NOTICE OF DEPOSITION Filed 3/12/2010	232
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMO. IN OPPOSITION TO DEF. OBJT. TO NOTICE Filed 3/12/2010	240
AMENDED NOTICE OF DEPOSITION OF ANGUS JERRY PETERSON Filed 4/1/2010	246
AMENDED NOTICE OF DEPOSITION OF RAOEL H. CLARK Filed 4/1/2010	248

**VOLUME 2**

AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF JARAMIE MAGERA Filed 4/2/2010	251
MEMORANDUM IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT Filed 11/16/2010	253
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT Filed 11/16/2010	271
PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT Filed 11/16/2010	290
AFFIDAVIT OF BRAD FOSTER IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT Filed 11/06/2010	293
AFFIDAVIT OF KIPP ARCHIBALD IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT Filed 11/16/2010	298
NOTICE OF HEARING Filed 11/06/2010	307
DEFENDANTS MEMORANDUM RE: SUMMARY JUDGMENT PLAINTIFFS SECOND MOTION Filed 11/29/2010	310
AFFIDAVIT OF JERRY AND BETTY PETERSON IN SUPPORT OF DEFENDANTS POSITIONS Filed 11/29/2011	329
REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT Filed 12/6/2010	348
MOTION TO STRIKE Filed 12/6/2010	360
MEMORANDUM IN SUPPORT OF MOTION TO STRIKE Filed 12/6/2010	363
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MOTION TO STRIKE Filed 12/6/2010	374
NOTICE OF HEARING Filed 12/6/2010	387
NOTICE OF HEARING Filed 12/16/2010	390

MINUTE ENTRY ON MOTION FOR SUMMARY JUDGMENT Filed 1/24/2011	391
JUDGMENT RE: MOTIONS FOR SUMMARY JUDGMENT Filed 2/3/2011	392
MEMORANDUM DECISION RE: MOTION FOR SUMMARY JUDGMENT Filed 2/3/2011	395
NOTICE OF APPEAL Filed 2/17/2011	409
MEMORANDUM OF ATTORNEY'S FEES AND COSTS SUPPORTED BY AFFIDAVIT OF DEANNE CASPERSON Filed 2/22/2011	413
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMORANDUM OF ATTORNEY'S FEES AND COSTS Filed 2/22/2011	418
CLERKS RECORD DUE DATE SUSPENDED Filed 3/3/2011	432
ORDER SUSPENDED APPEAL Filed 3/3/2011	434
DEFENDANT'S OBJECTION TO PLAINTIFFS REQUEST FOR FEES AND COSTS; MEMORANDUM IN SUPPORT OF OBJECTION Filed 3/8/2011	435
CLERK'S CERTIFICATE FILED Filed 3/9/2011	442
NOTICE OF HEARING Filed 3/28/2011	443
DEFENDANTS STATEMENT RE: FINAL JUDGMENT Filed 4/12/2011	444
NOTICE OF HEARING Filed 4/12/2011	451
REPLY MEMORANDUM IN SUPPORT OF ATTORNEY'S FEES AND COSTS Filed 4/18/2011	452
MEMORANDUM IN SUPPORT OF ENTRY OF PLAINTIFFS PROPOSED FINAL JUDGMENT Filed 4/21/2011	460



COURT MINUTES Filed 4/25/2011	472
FINAL JUDGMENT Filed 4/29/2011	473
MEMORANDUM DECISION AND ORDER RE: MOTION FOR ATTORNEY'S FEES AND COSTS Filed 4/29/2011	480
MEMORANDUM OF SUPPLEMENTAL ATTORNEY'S FEES AND COSTS Filed 5/12/2011	491
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMORANDUM OF SUPPLEMENTAL ATTORNEYS FEES AND Filed 5/12/2011	496
OBJECTION TO SUPPLEMENTAL ATTORNEYS FEES AND COSTS Filed 5/18/2011	502
AMENDED NOTICE OF APPEAL Filed 5/31/2011	505
CLERK'S RECORD DUE DATE SET Filed 8/1/2011	509

## INDEX

	<b>Page</b>
ACKNOWLEDGMENT OF ACCEPTANCE OF SERVICE	31
AFFIDAVIT OF BRAD FOSTER IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT	293
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMORANDUM OF ATTORNEY'S FEES AND COSTS	418
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMO. IN OPPOSITION TO DEF. OBJT TO NOTICE	240
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMORANDUM OF SUPPLEMENTAL ATTORNEYS FEES AND COSTS	496
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MOTION TO STRIKE	374
AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT	271
AFFIDAVIT OF JARAMIE MAGERA IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT	81
AFFIDAVIT OF JERRY AND BETTY PETERSON IN SUPPORT OF DEFENDANTS POSITIONS	329
AFFIDAVIT OF JERRY AND BETTY PETERSON IN SUPPORT OF SUMMARY JUDGMENT	137
AFFIDAVIT OF KIPP ARCHIBALD IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT	298
AFFIDAVIT OF NAYSHA FOSTER, PLANNING & ZONING COORDINATOR RE: SUMMARY JUDGMENT	144
AFFIDAVIT OF RAOEL CLARK IN SUPPORT OF SUMMARY JUDGMENT	154
AMENDED NOTICE OF APPEAL	505
AMENDED NOTICE OF DEPOSITION OF ANGUS JERRY PETERSON	246
AMENDED NOTICE OF DEPOSITION OF RAOEL H. CLARK	248
AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF JARAMIE MAGERA	251
ANSWER TO COUNTERCLAIM BY BUKU PROPERTIES, LLC	47
ANSWER w/COUNTERCLAIM	33
CLERK'S CERTIFICATE FILED	442
CLERKS RECORD DUE DATE SUSPENDED	432
COURT MINUTES	472
DEFENDANT'S OBJECTION TO PLAINTIFFS REQUEST FOR FEES AND COSTS; MEMORANDUM IN SUPPORT OF OBJECTION	435
DEFENDANTS MEMORANDUM RE: SUMMARY JUDGMENT	122

DEFENDANTS MEMORANDUM RE: SUMMARY JUDGMENT PLAINTIFFS SECOND MOTION	310
DEFENDANTS OBJECTION TO NOTICE OF DEPOSITION OF RAOEL H. CLARK AND REQUEST FOR PERMISSION TO TAKE TESTIMONY VIA TELEPHONE	219
DEFENDANTS REQUEST FOR SUMMARY JUDGMENT	116
DEFENDANTS STATEMENT RE: FINAL JUDGMENT	444
DENIAL OF PLAINTIFFS REQUEST FOR SUMMARY JUDGMENT AND OBJECTION TO CONSIDERATION OF SUMMARY JUDGMENT	114
FINAL JUDGMENT	473
HEARING NOTICE ON DEFENDANTS SUMMARY JUDGMENT; MOTION TO STRIKE	159
JUDGMENT RE: MOTIONS FOR SUMMARY JUDGMENT	392
MEMORANDUM DECISION	197
MEMORANDUM DECISION AND ORDER RE: MOTION FOR ATTORNEY'S FEES AND COSTS	480
MEMORANDUM DECISION RE: MOTION FOR SUMMARY JUDGMENT	395
MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTION TO STRIKE PORTION OF MAGERA AFFDAVIT	178
MEMORANDUM IN OPPOSITION TO DEFENDANTS OBJECTION TO NOTICE OF DEPOSITION	232
MEMORANDUM IN SUPPORT OF ENTRY OF PLAINTIFFS PROPOSED FINAL JUDGMENT	460
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	67
MEMORANDUM IN SUPPORT OF MOTION TO STRIKE	363
MEMORANDUM IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT	253
MEMORANDUM OF ATTORNEY'S FEES AND COSTS SUPPORTED BY AFFIDAVIT OF DEANNE CASPERSON	413
MEMORANDUM OF SUPPLEMENTAL ATTORNEY'S FEES AND COSTS	491
MINUTE ENTRY	185
MINUTE ENTRY	224
MINUTE ENTRY ON MOTION FOR SUMMARY JUDGMENT	391
MOTION FOR SUMMARY JUDGMENT	64
MOTION TO STRIKE	360
MOTION TO STRIKE PORTIONS OF MAGERA AFFIDAVIT	119

NOTICE OF APPEAL	409
NOTICE OF HEARING	108
NOTICE OF HEARING	307
NOTICE OF HEARING	387
NOTICE OF HEARING	390
NOTICE OF HEARING	443
NOTICE OF HEARING	451
NOTICE OF SERVICE	187
NOTICE OF SERVICE	190
NOTICE OF SERVICE	193
NOTICE OF SERVICE	195
NOTICE OF SERVICE	56
NOTICE OF SERVICE	59
NOTICE OF SERVICE	62
NOTICE OF TAKING DEPOSITION DUCES TECUM	211
NOTICE OF TAKING DEPOSITION OF AUGUS JERRY PETERSON	213
NOTICE OF TAKING DEPOSITION OF RAOEL H. CLARK	216
NOTICE OF TELEPHONIC HEARING	222
NOTICE OF VACATING DEPOSITION OF ANGUS JERRY PETERSON	229
NOTICE OF VACATING DEPOSITION OF RAOEL H. CLARK	226
NOTICE VACATING HEARING AND RESETTING HEARING ON PLAINTIFFS MOTION FOR SUMMARY JUDGMENT	111
OBJECTION TO SUPPLEMENTAL ATTORNEYS FEES AND COSTS	502
ORDER SUSPENDED APPEAL	434
PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT	290
REPLY MEMORANDUM IN SUPPORT OF ATTORNEY’S FEES AND COSTS	452
REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT	161

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS SECOND MOTION FOR SUMMARY JUDGMENT	348
SUMMONS – ANGUS JERRY PETERSON	27
SUMMONS – BETTY JEAN PETERSON	29
SUMMONS – JANET C. CLARK	23
SUMMONS – RAOEL H. CLARK	25
VERIFIED COMPLAINT	12

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)

2019 APR -2 PM 4:50  
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

AMENDED NOTICE OF TAKING  
DEPOSITION DUCES TECUM  
OF JARAMIE MAGERA

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 8:30 o'clock a.m. on the 13<sup>th</sup> day of April, 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.

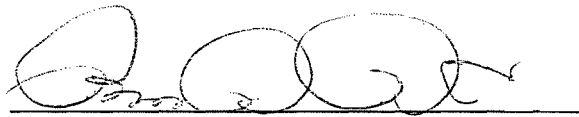
DATED this 2<sup>nd</sup> day of April, 2010.



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 2<sup>nd</sup> day of April, 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

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 NOV 16 PM 5:02

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

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

2010



## **I. INTRODUCTION**

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

## **II. STATEMENT OF FACTS**

Plaintiff has previously supplied the Court with an extensive Statement of Facts in its Memorandum in Support of Motion for Summary Judgment filed on October 5, 2009. Consequently, Plaintiff will not repeat these facts here. However, Plaintiff provides the following facts which are pertinent to this Second Motion for Summary Judgment.

On August 30, 2007, Plaintiff Buku Properties, LLC (hereinafter "Plaintiff" or "Buku") entered into a Purchase and Sale Agreement with Defendants Rael H. Clark and Janet C. Clark (hereinafter collectively referred to as "Clarks") (the "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"). On or about August 30, 2007, Plaintiff also entered into a Purchase and Sale Agreement with Angus Jerry Peterson and Betty Jean Peterson (hereinafter collectively referred to as "Petersons") (the "Peterson Agreement") for the purchase of approximately 73 acres adjacent to Defendant Clarks' property (hereinafter the "Peterson Property").

The Clark Agreement denoted a purchase price for the Clark Property in the amount of \$1,044,075.18. (Magera Aff., ¶ 5, Ex. A). The Clark Agreement provided Buku with a four-month due diligence period for Buku to ensure it was satisfied with the condition of the

property prior to closing. (Magera Aff., Ex. A). The Clark Agreement specified that Buku would provide the Clarks with \$25,000.00 in earnest money, and that such sum would be fully refundable until closing. (Magera Aff., Ex. A). Buku tendered the earnest money to Clarks.

The Peterson Agreement was structured similarly. The Peterson Agreement denoted a purchase price for the Peterson property in the amount of \$980,000.00. (Magera Aff., ¶ 10, Ex. B). The Peterson Agreement provided Buku with a four-month due diligence period to ensure it was satisfied with the condition of the property prior to closing. (Magera Aff., Ex. B). The Peterson Agreement specified that Buku would provide Petersons with \$327,000.00 in earnest money, and that all but \$10,000.00 of such earnest money was fully refundable until closing. (Magera Aff., Ex. B). Buku tendered such earnest money to Petersons.

Pursuant to the Clark Agreement and Peterson Agreement, closing was to occur on December 21, 2007. However, no such closing occurred due to Buku's concerns with the zoning of the properties. Buku demanded its earnest money back from Clarks and Petersons, but Clarks and Petersons refused to return the funds. As a result, Buku filed suit against Clarks and Petersons. Defendants brought various causes of action against Buku in a counterclaim, including a cause of action under the Idaho Consumer Protection Act.

Plaintiff filed its prior Motion for Summary Judgment on October 6, 2009. In its Motion for Summary Judgment, the Plaintiff sought dismissal of all of Defendants' counterclaims, and return of the earnest monies to which it was entitled under the Clark and

Peterson Agreements. Plaintiff's causes of action included (1) Refund of Earnest Money Under Contract, (2) Conversion, and (3) Unjust Enrichment. Defendants' counterclaim included (1) Specific Performance, (2) Breach of Contract, (3) Unjust Enrichment, (4) Estoppel, (5) Promissory Estoppel, and (6) Consumer Protection. The Court heard Plaintiff's Motion for Summary Judgment on December 14, 2009. The Court issued its Memorandum Decision with regard to Plaintiff's Motion for Summary Judgment on January 27, 2010. The Memorandum Decision held that:

[T]he 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 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.

(Memorandum Decision, p. 8-9). Additionally, the Memorandum Decision directly dismissed Defendants' cause of action under the Idaho Consumer Protection Act.

The only contractual agreement alleged in Defendants' Counterclaim are the written Agreements entered into between the parties. (Counterclaims ¶¶ H through X). Defendants have not alleged an oral agreement separate and apart from the written Agreements. Plaintiff now seeks to resolve, as a matter of law, the remaining issues in this case with regard to whether any alleged agreements or arrangements between the parties after the closing date

had any material effect on Plaintiff's entitlement to a return of the earnest money under the terms of the Clark and Peterson Agreements, plus interest.

### 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. THE PLAIN LANGUAGE OF THE CLARK AND PETERSON AGREEMENTS PROVIDES THAT ANY AMENDMENTS OR WAIVER TO THE AGREEMENTS MUST BE IN WRITING AND SIGNED BY THE PARTIES TO BE VALID

The Court delayed ruling on whether Buku is entitled to the return of its earnest money because it had concern that there may have been subsequent agreements between the parties after the Clark and Peterson Agreements failed to close. However, by the very terms of the Clark and Peterson Agreements themselves, such an alleged additional, unwritten agreement is not valid and would not have affected the terms of the contracts entered into between Plaintiff and Defendants. Further, Defendants have alleged in the Counterclaim only the written Agreements enter into by the parties. (Counterclaim ¶¶ H through X).

Paragraph 21 of the Clark and Peterson Agreements states as follows:

**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 [sic] any rights arising by virtue of any prior or subsequent such occurrence.

(Magera Aff., ¶ 10 & 11, Ex. A & B). This paragraph specifically states that no amendments to the Agreements will be valid unless “in writing and signed by the parties.” Although Plaintiff attempted to amend the agreement by offering an extension of the closing date to both parties (*see* Magera Aff., ¶ 20, Ex. E and Ex. F), neither Clarks nor Petersons executed the memorandum to extend the closing date, and in fact outright rejected the offer to extend the closing date. (Magera Aff., ¶ 23, Ex. G). No other attempts were made in writing to amend or modify the Clark or Peterson Agreements, and, further, no written agreements amending or modifying the agreements were ever executed. Because the agreements were never amended or extended in writing and the closing date was never extended, closing had to happen on or before December 21, 2010, for the transaction to occur. However, that date went by without closing occurring as a result of Buku’s concerns after its due diligence review. Clarks and Petersons knew the only way to amend their agreements with Buku was to have a writing signed by the parties. “When the terms of a contract are unambiguous, interpretation of the contract and its legal effect are questions of law.” *Iron Eagle Dev., LLC v. Quality Design Sys., Inc.*, 138 Idaho 487, 491, 65 P.2d 509, 513 (2003). Even if Defendants could prove the parties had a new oral agreement or the parties’ course of

conduct suggested an orally revised agreement, such agreements are invalid according to the clear and unambiguous terms of the Clark and Peterson agreements. Further, it is the written Agreements that govern the return of the earnest monies. Pursuant to paragraph 2(a) of the Agreements, Buku is entitled to a full refund of the earnest money it paid to Clarks and a refund of all earnest money but \$10,000.00 it paid to Petersons, plus prejudgment interest.

**C. ANY ALLEGED ORAL AGREEMENT PERTAINING TO THE SALE OF THE PROPERTY IS PROHIBITED BY THE STATUTE OF FRAUDS**

Even if Clarks and Petersons can assert claims beyond the unambiguous express contract terms, the statute of frauds prohibits their claim of a “new” deal. Pursuant to Idaho Code § 9-503:

No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing.

This proposition has been further reiterated in Idaho case law. *See, i.e., Lawrence v. Jones*, 124 Idaho 748, 750, 864 P.2d 194, 197 (Ct. App. 1993) (stating “a contract for the sale of real property is not enforceable unless it is in writing”). None of the parties involved contend that there are any additional written contracts regarding the sale of the property at issue and Defendants have not alleged a separate oral contract. Defendants’ Counterclaim alleged specific performance and breach of the written Agreements. Even if Defendants had alleged an oral contract in the Counterclaim, pursuant to Idaho Code § 9-503 and Idaho case law, any

alleged oral agreement between the parties regarding the sale of the property would be invalid and unenforceable. Such an agreement could not affect the terms of the Clark or Peterson Agreements. Consequently, the terms of the Clark and Peterson Agreements must be enforced as written, and Plaintiff is entitled to a refund of its earnest monies and interest.

**D. DEFENDANTS CANNOT RELY ON EQUITABLE CLAIMS TO DEFEAT THE WRITTEN AGREEMENTS**

Because the Court has already determined that the written Agreements are clear and unambiguous, Defendants cannot rely on equitable claims for their alleged damages as a result of the Agreements. “Equitable claims will not be considered when an adequate legal remedy is available.” “When parties enter into an express contract, a claim based in equity is not allowed because the express contract precludes enforcement of equitable claims.” *Id.* (citing *In re Estate of Boyd*, 134 Idaho 669, 673, 8 P.3d 664, 668 (Ct. App. 2000)). *Iron Eagle Dev., LLC v. Quality Design Systems, Inc.*, 138 Idaho 487, 492, 65 P.3d 509, 514 (2003) (citing *Thomas v. Campbell*, 107 Idaho 398, 404-05, 690 P.2d 333, 339-40 (1984)). “Only when the express agreement is enforceable is a court precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract.” *Bates v. Seldin*, 146 Idaho 772, 776-77, 203 P.3d 702, 706-07 (2009).

The purpose of a written contract is so that the obligation and expectations are known to all parties. As a result of the written Agreements, Clarks and Petersons were both put on notice that any revisions to the Agreements had to be in writing. Both refused to extend the closing date in writing as requested by Buku so the zoning issue identified as part of Buku’s

due diligence efforts could be potentially resolved. As a result, Clarks and Petersons cannot bring claims of unjust enrichment, estoppel, and promissory estoppel to defeat the clear language of the Agreements. The unambiguous Agreements govern the dispute and Buku should have its earnest monies returned.

**E. ANY INTERACTIONS BETWEEN THE PARTIES AFTER THE CLOSING DATE DID NOT ALTER THE TERMS OF THE CLARK OR PETERSON AGREEMENTS SO AS TO INVALIDATE PLAINTIFF'S RIGHT TO A RETURN OF THE EARNEST MONIES**

Assuming *arguendo* that the unambiguous language of the Agreements does not resolve the dispute, Defendants' claims fail. Defendants have asserted that actions which occurred after the Agreements terminated for failure to close somehow entitle Defendants to retain the earnest monies which should have been refunded pursuant to the terms of the Agreements. Defendants have asserted, among other things, that Plaintiff exercised dominion and control over their properties based upon Defendants' allegations that Plaintiff leased out the Clark Property to a third party, or that Plaintiff's agent farmed the Clark Property in 2008, and/or that Plaintiff or Plaintiff's agent controlled the Peterson home. Defendants have further asserted that Plaintiff orally promised to purchase the Clark and Peterson properties after the Clark and Peterson Agreements terminated, although such an agreement is clearly banned by the statute of frauds and the express language of the written Agreements.

However, Defendants' own testimony and the testimony of Brad Foster, Kipp Archibald and Jaramie Magera prove these allegations untrue. Regarding Defendants'

261



assertion that Plaintiff somehow farmed the Clark property in 2008 or exercised dominion and control over the property, Defendant Clark admitted in his deposition that he allowed Foster Land & Cattle to run his farm ground, he allowed his son to use the house, and he received the proceeds:

- Q. . . . But with regard to your allegation that Buku somehow exercised dominion and control over your property, what are you asserting that they did?
- A. The whole property?
- Q. The whole property.
- A. Well, maybe I assumed this, but I felt that where he's made an offer to buy my property, that that was so. I was going to sell it to him to become his.
- Q. But you received the benefit of the tax assessment that was paid by Mr. Foster, correct?
- A. Yes.
- Q. And you received the benefit of the water assessment payment?
- A. That's correct.
- Q. And you received the benefit of whatever leasing arrangement you had with your son. I don't know whether you required him to pay you or not, correct?
- A. That's okay. I understand that.
- Q. So how did Buku control that property after the agreement did not close in December.
- A. Well, I was hoping that it would continue on. But as to whether – I don't know who owned what. The property never left my ownership, and it wouldn't until it was paid for.
- Q. Okay. And you agreed to allow Mr. Foster to farm that land, correct?
- A. Sure. You know, if you let it go, it turns to weeds. Somebody had to make a call on it.
- Q. And you agreed you were the person that did that?
- A. I did. I mean, I was told by Brad that Mr. Magera asked him to call me and see if it was all right.
- Q. So you're not alleging that Buku actually received any profits off of you property, correct?
- A. I don't know that they did. I don't see how they could.

(Casperperson Aff., ¶ 2, Ex. A (“Clark Depo.”), p. 24-31). Defendant Clark’s testimony indicates that Plaintiff never exercised dominion and control over the property. Foster Land & Cattle farmed the property after getting approval from Clark, not Plaintiff. (Foster Aff., ¶ 6-9). Plaintiff received no compensation for any of the Clark property. (Foster Aff., ¶ 6-9). Rather, as Defendant Clark stated in his deposition, and Mr. Foster is his affidavit, Foster Land & Cattle paid the water assessment and taxes on the Clark property pursuant to the arrangement Clark had made with Mr. Foster. This arrangement also was corroborated by Mr. Magera. Mr. Magera provided in his deposition that Brad Foster approached him about farming the Clark property, but that he informed Mr. Foster that the deal with the Clarks fell through and that he could contact Mr. Clark directly if he were interested in farming the property. (Casperperson Aff., ¶ 4, Ex. C (“Magera Depo.”), p. 31, ln. 6-24).<sup>1</sup> Additionally, Defendant Clark admitted that he leased the home located on the property to his son during the time period in question and that at no point did Buku exercise dominion and control over

---

<sup>1</sup> Q. [MS. CASPERPERSON] Did any farmers ever approach you about farming the Clark property?  
A. [MR. MAGERA] Yes.  
Q. And who was that?  
A. Brad Foster.  
Q. And what information, if any, did you give to Mr. Foster?  
A. Brad Foster took me to lunch, asked me if he could farm another piece of ground we have in Hailey Creek. And he said – he asked me too if – I heard you bought Rael Clark’s piece, could we farm that. And I said no, we didn’t buy it. The deal fell through, I said, but here’s Rael Clark’s number, if you want to call him you can ask him to farm it.  
Q. Did you receive any – you meaning Buku Properties or any entity that you have an interest therein, receive any money from Brad Foster?  
A. For the Clark property?  
Q. Correct.  
A. No.  
(Magera Depo., p. 31, ln. 6-24).

the home. (Clark Depo., p. 28-29, ln. 22-8, p. 35, ln. 20-24). Buku never leased the Clark Property to any third party, nor did any agent of Buku ever farm the Clark Property. Buku never exercised dominion and control over any portion of the Clark Property, as admitted by Mr. Clark, Mr. Foster, and Jaramie Magera. Further, Mr. Foster denied that Foster Land & Cattle has any agency association with Mr. Magera or Plaintiff. (Foster Aff., ¶ 12 & 13). As a result, Clark's previous assertion that Plaintiff exercised dominion and control over their property is unsupported.

Defendants also have asserted that Buku exercised dominion and control over the Peterson property. However, Mr. Peterson testified his son ran the farm and Buku had no control over it. (Casperson Aff., ¶ 3, Ex. B (Peterson Depo., p. 57, ln. 7 - p. 59, ln. 5)). In fact, Mr. Peterson testified as follows:

Q. And specifically tell me what you can recall Mr. Foster told you.

A. Mr. Foster said that Jaramie called him and wanted him to rent the farm. He asked me if it was in pasture. I said yes, but Jaramie hasn't bought the place yet. He said oh, he hasn't. He said I understand he's going to. I said, well, when he buys it, he can do what he wants, but if he don't buy it, why, I'm going to let Steve run it.

Q. And that's what you did, correct?

A. That's what I did.

Q. So any profits that were made with regard to that farmland came to you, correct?

A. That's right.

Q. Why didn't you take actions to lease the house out if you were no longer living there?

A. Because I didn't want to lease it out. It was in good shape, and I didn't want people to move in. If he didn't take it and we got it back, why, then I would sell it.

Q. So you were concerned that any renters would damage the property?

A. Yes.

2014

(Peterson Depo., p. 57, ln. 7 - p. 59, ln. 5). Consequently, Petersons' claim that Buku exercised control over the farm ground is untrue.

More particularly, Petersons claim Buku exercised control over the residence on the Peterson property which is a small portion of the total Peterson Property. Defendants have claimed that Plaintiff actively marketed the property through ERA real estate agent Kipp Archibald and that Defendant Peterson had no involvement with the marketing of the property and no control over the property. However, Defendant Peterson's deposition testimony reflects a different scenario. Defendant Peterson testified that Kipp Archibald called him on January 3, 2008, **to ask him what he wanted to do regarding the continued marketing of the property.** Defendant Peterson instructed Mr. Archibald to speak with his attorney, Robin Dunn, or with Jaramie Magera. (Peterson Depo.,p. 47, ln. 2-8; Archibald Aff.,¶11-17). Further, Mr. Peterson testified he did not want to rent the house because he was concerned about damage from renters. (Peterson Depo.,p.57,ln.7-p.59,ln.5). Thus, Peterson clearly had authority to direct the marketing of the Peterson Property and simply opted not to make any decision themselves with regard to the continued marketing of the Property. Kipp Archibald called Defendant Peterson in August 2008, to again inquire as to what he wanted to do regarding the sale of the property. Defendant Peterson again told Mr. Archibald to speak with Mr. Dunn or Mr. Magera, apparently opting not to make any decision. (Peterson Depo., p. 53-54, ln. 22-2: Archibald ¶ 16).

Defendant Peterson acknowledged that throughout this entire time period, he still held title to the property and that if the property had sold, he would have had to execute all

265

Defendant Peterson acknowledged that throughout this entire time period, he still held title to the property and that if the property had sold, he would have had to execute all documents transferring title to the property. (Peterson Depo., p. 57, ln. 2-5). Further, Defendant Peterson admitted that the only evidence he relied upon in asserting that Plaintiff had dominion and control over the Peterson property was his assumption that Mr. Archibald was acting on behalf of Buku, even though he never had any discussions with Mr. Archibald as to whom he understood he was representing. (Peterson Depo., p. 66, ln. 4-11; p. 67, ln. 12-16). In his deposition, Mr. Magera noted that, although he asked Kipp Archibald to help sell the Peterson home when the Peterson property was under contract, he never asked Mr. Archibald to take any other action, he never had any kind of listing agreement with Mr. Archibald, and he never received any payment of any kind for the lease of any of the Peterson property. (Casperson Aff., ¶4, Ex.C (Magera Depo., p. 30, ln. 5-24; p. 48, ln. 16-19)). Additionally, Mr. Magera testified that he never gave Mr. Archibald any instructions during 2008 (after the Peterson Agreement terminated without closing), and that if Mr. Archibald had called him and asked if he could still show the house after the Peterson Agreement had terminated, that Mr. Magera directed him to call the Petersons. (Magera Depo., p. 37, ln. 4-11).

Finally, Plaintiff never benefitted monetarily or otherwise from the Peterson Property. As mentioned above, Defendant Peterson's property was farmed by Peterson's son Steve during the 2008 farm season. Plaintiff received no rent payments or any other form of payment from the lease of the Peterson property to Defendant Peterson's son. Defendant

Peterson acknowledged he could have rented out the home but did not want to because of damage from renters. Plaintiff did not receive any financial benefit from the residence located on the Peterson property. (Peterson Depo., p. 58-59, ln. 22-5). Further, no offers were received during the time Mr. Archibald marketed the Property. (Archibald Aff. ¶ 20). If an offer had been received and accepted, any proceeds would have gone to the Petersons. Buku did not exercise dominion or control over the Peterson Property.

None of the above-described interactions between the parties in any way indicated that there was a “new agreement” reached with regard to Plaintiff purchasing either Property, nor did any of those interactions indicate that Defendants were somehow entitled to retain the earnest money deposits which should have been returned pursuant to the terms of the Clark and Peterson Agreements. Plaintiff did not exercise “dominion and control” over either the Clark or Peterson properties. Even if Plaintiff had exercised “dominion and control” over the property, the Clark and Peterson Agreements expired without closing and pursuant to the terms of the Agreements, Plaintiff was entitled to a refund of its earnest monies when the sales did not close.

Any modifications or amendments to the Clark Agreement and Peterson Agreements had to be in writing to be valid. Such an amendment was never executed. Further, any agreement for the sale of real property not in writing violates the statute of frauds and is invalid. Thus, any alleged oral agreement to continue with the transaction after the Clark Agreement and Peterson Agreements expired has no bearing or effect on the terms of the

Clark Agreement and Peterson Agreement and could not have materially altered the terms of those contracts. Buku is entitled to the return of its earnest monies, plus interest.

#### IV. CONCLUSION

Plaintiff complied with all terms and conditions of the Clark and Peterson Agreements. Because the earnest monies 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 the due diligence period was not cured, Plaintiff is entitled to the return of the earnest monies. Defendants have no viable causes of action against Plaintiff because the written Agreements control the dispute, and, as such, they should be dismissed.

DATED this 16<sup>th</sup> day of November, 2010.



DeAnne Casperson, Esq.

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of November, 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 SUPPORT OF PLAINTIFF'S SECOND 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\CAH\14918\Pldgs\Summary Judgment.2d.MEMO Rev1.wpd:bel



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 NOV 16 PM 5:02

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  
PLAINTIFF'S SECOND MOTION  
FOR SUMMARY JUDGMENT**

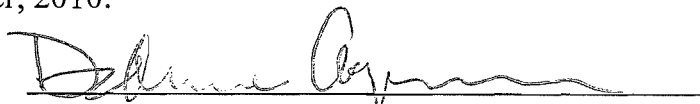
491

STATE OF IDAHO            )  
  )ss.  
County of Bonneville        )

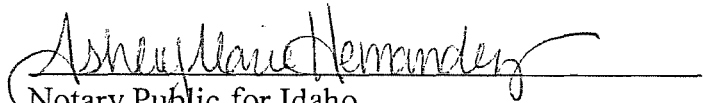
DeAnne Casperson, being first duly sworn on oath, deposes and states as follows:

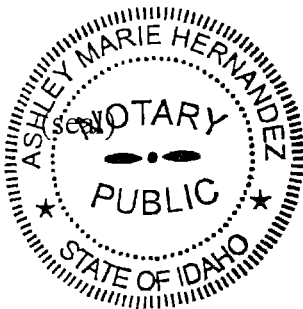
1. I am an attorney with the firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C., and an attorney of record on behalf of Buku Properites, LLC. I submit this Affidavit based upon my own personal knowledge unless otherwise stated, and in support of the Plaintiff's Second Motion for Summary Judgment.
2. Attached hereto as Exhibit A is a true and correct copy of the cover page and relevant portions of the deposition of Rael Clark, taken April 13, 2010.
3. Attached hereto as Exhibit B is a true and correct copy of the cover page and relevant portions of the deposition of Angus Jerry Peterson, taken April 13, 2010.
4. Attached hereto as Exhibit C is a true and correct copy of the cover page and relevant portions of the deposition of Jaramie Magera, taken April 13, 2010.

Dated this 16<sup>th</sup> day of November, 2010.

  
DeAnne Casperson

SUBSCRIBED AND SWORN to before me this 16<sup>th</sup> day of November, 2010.

  
Notary Public for Idaho  
Residing at: Idaho Falls, ID  
My commission expires: 10/22/14



272

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of November, 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 PLAINTIFF'S SECOND 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.

370

# Transcript of the Testimony of **Raoel Clark**

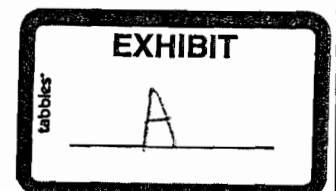
**Date:** April 13, 2010

**Volume:** I

**Case:** BUKU PROPERTIES v. CLARK

Printed On: November 15, 2010

T&T Reporting  
Phone:208.529.5291  
Fax:208.529.5496  
Email:tntreport@ida.net  
Internet: TandTReport@ida.net



2/14

1 MR. DUNN: Objection to the form of the  
2 question, and misstating as this document has no  
3 mention of the Clarks on it.

4 Q. BY MS. CASPERSON: You can go ahead  
5 and answer.

6 A. I don't know on this one. I mean, I  
7 knew that Buku was -- I've gone to Mr. Magera on a  
8 number of occasions and asked him if he would give  
9 me some money, and he said that there was none.  
10 When we first signed the one with Jab, he said I'd  
11 get -- after closing I would get a third payment on  
12 it. But I never received any money.

13 I had -- I had gone to Texas. My wife  
14 had a health problem. We had gone to Texas for  
15 her. And maybe I speculated, but I arranged to buy  
16 us a home based on the fact that we were going to  
17 receive some money. And I borrowed -- it's in  
18 records, I borrowed \$150,000 to make down payment  
19 on a home. And then I -- subsequently when I  
20 couldn't get any funds from whomever, I borrowed  
21 another to pay for the house.

22 And then in doing so I had to  
23 surrender some different funds I had. And then  
24 they -- the people that gave me the money from that  
25 considered it as cash or -- anyway, I had to borrow

1 more money to pay off the additional amount of  
2 money that increased my earnings for the year,  
3 doubled it. I had to borrow money to pay that off.

4 And, anyway, the whole thing has  
5 caused me quite a bit of embarrassment and grief.

6 I approached Mr. Magera on a number of  
7 occasions asking him what we could do, but I never  
8 did receive anything. We'll leave it at that.

9 Q. Did you expect Buku to go through with  
10 an agreement if the value of the property was not  
11 the same as when they entered into the contract?

12 A. I don't know that I did. I knew that  
13 Buku wasn't going to pay me, so I left it at that.

14 Q. And you heard Mr. Magera's testimony  
15 where he indicated that he was at a meeting with at  
16 least the Petersons and counsel in which they were  
17 advised of the risk of using the earnest money  
18 prior to having the agreement closed?

19 A. Yes. But I went to Mr. Magera, and I  
20 said when can we do this. Can you advance me the  
21 25,000. I'll put it down on this home, and it will  
22 save you that much money to pay interest. And he  
23 wrote me a check.

24 Q. And that was the 25,000 earnest money?

25 A. I guess it was earnest money. It was

1 \$25,000.

2 Q. Did you understand based on the  
3 purchase and sale agreement that if the agreement  
4 for some reason did not close that you would have  
5 to give back that 25,000?

6 A. I think that's what this case is over.

7 Q. Did you understand that?

8 A. Yes.

9 Q. Mr. Clark, in paragraph 16 of your  
10 affidavit you state: The plaintiff exercised  
11 dominion and control over the real properties  
12 contained in the written contract of the  
13 defendants/counter-plaintiffs.

14 Can you explain to me how Buku  
15 exercised dominion and control over your property?

16 A. I considered this case to be in kind  
17 of a limbo thing. I frankly didn't know what to do  
18 with the thing. And Brad Foster called me and said  
19 what are we going to do with it. And whether --  
20 whoever ran the thing has to pay the water system  
21 on the taxes on the property.

22 Q. Let me go back. You said that Brad  
23 Foster called you?

24 A. And said that Jaramie had asked him to  
25 ask me.

1 Q. To ask you what?

2 A. What to do with it. I said, this  
3 property is in the process of being sold, and  
4 therefore I don't feel that that's my decision. I  
5 mean, he's offered to buy the thing. It's in  
6 limbo, and I'm going to leave it to him to make  
7 that decision.

8 Q. When did you say that Brad Foster  
9 contacted you?

10 A. About the time that -- about the time  
11 that he called Mr. Magera.

12 Q. So the spring of 2008?

13 A. I'm not sure when it was. But he came  
14 and asked me if it was all right for him to run the  
15 property.

16 Q. Was it shortly before the farming  
17 season would have begun?

18 A. I'm not sure of it. I'm not sure when  
19 it was. It would have to be somewhere around  
20 there.

21 Q. Do you know whether it was past when  
22 the contract was supposed to close?

23 A. No, I don't.

24 Q. Did you have any kind of written  
25 agreement with Mr. Foster to farm the land?

1 A. No.  
 2 Q. Did you receive any payment from  
 3 Mr. Foster?  
 4 A. In the amount of the -- he paid. I  
 5 think he paid for the water assessment. I think  
 6 that's correct. And my son was involved in this  
 7 too. And also the taxes on that property.  
 8 Q. And had you negotiated an agreement  
 9 with Mr. Foster as to what he would pay for that?  
 10 A. It was the going rate, whatever it  
 11 was.  
 12 Q. So in addition to the water assessment  
 13 and the taxes he also paid you whatever the value  
 14 of the lease was?  
 15 A. No. I think he paid the -- he just  
 16 paid the taxes and the water, and it came to about  
 17 the same.  
 18 Q. Oh, and it came to about the same as  
 19 if he had paid you for just farming the property?  
 20 A. Yes.  
 21 Q. So you're not asserting that you  
 22 didn't get paid for the use of your land that year?  
 23 A. I didn't, but someone did.  
 24 Q. You didn't get paid?  
 25 A. Well, he paid Brad Foster or Brad

1 works for Buku?  
 2 A. He indicated that he had -- I don't  
 3 know whether Mr. Magera approached him for use of  
 4 that property or whether it was the other way  
 5 around. But Brad indicated to me that it was okay  
 6 with Mr. Magera if he rented that property.  
 7 Q. What specifically did Brad Foster tell  
 8 you in that conversation that you had with him?  
 9 A. It wasn't very much. He talked to me  
 10 on the phone.  
 11 Q. Isn't it true he simply told you that  
 12 Jaramie had directed him to contact you with regard  
 13 to whether or not he could rent that farmland?  
 14 MR. DUNN: Object to the form of the  
 15 question.  
 16 THE WITNESS: Let me say this. Brad did  
 17 call me and he said -- I don't know which one of  
 18 the other approached the other. But when Brad  
 19 spoke to me, he said that Mr. Magera -- it was all  
 20 right with him if I let Brad farm the thing, that  
 21 Mr. Magera had no care either way.  
 22 Q. BY MS. CASPERSON: And with regard to  
 23 the remainder of the property, which as I  
 24 understand consists of the house and a little bit  
 25 of acreage, are you asserting that Buku had some

1 Foster paid it. But -- all right. We received  
 2 some kind of remittance, yes. All right.  
 3 Q. Because on your behalf he paid your  
 4 water assessment, correct?  
 5 A. Yes.  
 6 Q. And he paid the taxes on your behalf?  
 7 A. Yes.  
 8 Q. And as far as you're aware, Brad  
 9 Foster didn't make any kind of payment to Buku?  
 10 A. I don't know that he did.  
 11 Q. And if I understand your testimony  
 12 correctly is that the value of the water assessment  
 13 and the taxes equaled essentially what the going  
 14 rate would have been to farm the property?  
 15 A. Yes. It's not very much.  
 16 Q. So you're not asserting that there are  
 17 damages that you incurred as a result of Brad  
 18 Foster leasing that property?  
 19 A. Correct.  
 20 Q. Now, in paragraph 17 it states that  
 21 Brad Foster, agent of Magera, and one of the  
 22 plaintiffs farmed the real property in the 2008  
 23 year. Did I read that correctly?  
 24 A. I think so.  
 25 Q. Are you asserting that Brad Foster

1 kind of control or dominion over the house?  
 2 A. No.  
 3 Q. And who did have control and dominion  
 4 over the house?  
 5 A. Me.  
 6 Q. And isn't it true that it was your son  
 7 who was living in that property?  
 8 A. That's right.  
 9 Q. Are you aware of any way then in which  
 10 Buku controlled that property, your property --  
 11 A. The house itself or the whole thing?  
 12 Q. The whole thing.  
 13 A. I don't know what to make of it. When  
 14 I read the name on that after I got studying it a  
 15 while, it was some kind of a shame. That's the way  
 16 I felt about it.  
 17 Q. The name on what?  
 18 A. Buku. It sounded phony to me. That's  
 19 all I'm going to say.  
 20 Q. Okay. I understand that. But with  
 21 regard to your allegation that Buku somehow  
 22 exercised dominion and control over your property,  
 23 what are you asserting that they did?  
 24 A. The whole property?  
 25 Q. The whole property.

1 A. Well, maybe I assumed this, but I felt  
 2 that where he'd made an offer to buy my property,  
 3 that that was so. I was going to sell it to him to  
 4 become his.  
 5 Q. But you received the benefit of the  
 6 tax assessment that was paid by Mr. Foster,  
 7 correct?  
 8 A. Yes.  
 9 Q. And you received the benefit of the  
 10 water assessment payment?  
 11 A. That's correct.  
 12 Q. And you received the benefit of  
 13 whatever leasing arrangement you had with your son.  
 14 I don't know whether you required him to pay you or  
 15 not, correct?  
 16 A. That's okay. I understand that.  
 17 Q. So how did Buku control that property  
 18 after the agreement did not close in December?  
 19 A. Well, I was hoping that it would  
 20 continue on. But as to whether -- I don't know who  
 21 owned what. The property never left my ownership,  
 22 and it wouldn't until it was paid for.  
 23 Q. Okay. And you agreed to allow  
 24 Mr. Foster to farm that land, correct?  
 25 A. Sure. You know, if you let it go, it

1 Q. Well, you understand that we had cross  
 2 motions for summary judgment?  
 3 A. Yes.  
 4 Q. And do you understand that the court  
 5 ruled that the contract was not ambiguous?  
 6 A. Legal terms are ambiguous in any way  
 7 you look at it.  
 8 Q. But you do understand that there has  
 9 been a ruling from the court on this case?  
 10 A. Some ruling. I don't know what it  
 11 was, but yes.  
 12 Q. Let me go to these miscellaneous costs  
 13 and billings that you claim to have lost. What  
 14 lost revenues on farming practices are you  
 15 claiming?  
 16 A. None.  
 17 Q. What lost interest are you claiming?  
 18 A. On the farm itself? Not the agreement  
 19 to buy?  
 20 Q. Yes.  
 21 A. I don't know that I've lost anything.  
 22 Q. So the lost interest that you're  
 23 referring to in this paragraph is only associated  
 24 with the contract, correct?  
 25 A. With the farm.

1 turns to weeds. Somebody had to make a call on it.  
 2 Q. And you agreed you were the person  
 3 that did that?  
 4 A. I did. I mean, I was told by Brad  
 5 that Mr. Magera asked him to call me and see if it  
 6 was all right.  
 7 Q. So you're not alleging that Buku  
 8 actually received any profits off of your property,  
 9 correct?  
 10 A. I don't know that they did. I don't  
 11 see how they could.  
 12 Q. If you look at paragraph 21 of your  
 13 affidavit, it indicates that -- well, let me read  
 14 it to you. It says your affiant has been damaged  
 15 monetarily in the remaining sum of the contract and  
 16 other miscellaneous costs and billings, including  
 17 but not limited to lost revenues on farming  
 18 practices, lost interest, expenses of upkeep and  
 19 utilities, tax assessments, attorney fees and  
 20 costs.  
 21 Now, you understand that the court has  
 22 already ruled on a portion of this litigation,  
 23 correct?  
 24 A. Would you explain that to me, please.  
 25 What part?

1 Q. Let me separate those out. Are you  
 2 claiming lost interest as a result of Buku doing  
 3 something to control that farm after the contract  
 4 didn't close?  
 5 A. I'm not quite getting where you're  
 6 wanting me to go.  
 7 Q. Well, you've indicated in your  
 8 affidavit that you're claiming damages for lost  
 9 interest, and all I'm trying to do is find out what  
 10 lost interest is it you're claiming?  
 11 A. This is the farm or the whole  
 12 contract?  
 13 Q. Well, you're going to have to tell me.  
 14 I don't know. It's your affidavit.  
 15 A. Well, based on -- based on my talking  
 16 with Mr. Magera, I asked him upfront, I said I need  
 17 to get my wife out of this country. And we had a  
 18 daughter that lives in Texas, and that's where we  
 19 went. And we studied a lot of the homes back there  
 20 that we liked. It's a very modest little home, but  
 21 it cost a lot of money. And I borrowed some money  
 22 based on what I hoped Mr. Magera was going to do.  
 23 He talked like he would to me. And after I had  
 24 made the loan, I asked him for money, and he said  
 25 Buku's broke. I paid some interest on a lot of

# Transcript of the Testimony of **Angus Peterson**

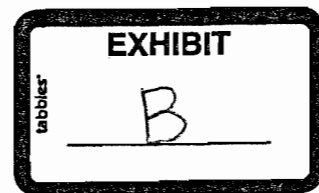
**Date:** April 13, 2010

**Volume:** I

**Case:** BUKU PROPERTIES v. CLARK

Printed On: July 14, 2010

T&T Reporting  
Phone:208.529.5291  
Fax:208.529.5496  
Email:tntreport@ida.net  
Internet:  
TandTReport@ida.net





1 instruct the deponent how to answer.  
 2 THE WITNESS: No. Say that again.  
 3 Q. BY MS. CASPERSON: Are you aware of  
 4 any writing that has been signed by both you,  
 5 meaning you and your wife, and Buku Properties that  
 6 altered or changed this purchase and sale  
 7 agreement?  
 8 A. No.  
 9 Q. You will agree with me that this  
 10 purchase and sale agreement did not close on  
 11 December 21st and has never closed; correct?  
 12 A. That's right.  
 13 Q. And you have still retained all of the  
 14 earnest money, correct?  
 15 A. That's right.  
 16 Q. Now, if we take a look at your notes,  
 17 which was previously marked as Exhibit \*-I, you  
 18 state on January 3rd of 2008 that Kipp Archibald  
 19 called to ask what you wanted to -- what we wanted  
 20 to do with the house; is that correct?  
 21 A. That's right.  
 22 Q. Is that a correct statement of what  
 23 Mr. Archibald said?  
 24 A. That's right.  
 25 Q. And your response to him was to direct

1 I'm asking you is you said that you had a deal  
 2 indicating that they were going to close on it, I  
 3 think is what you said. What are you talking  
 4 about?  
 5 A. Mr. Magera told me that -- I had it  
 6 down here somewhere. He called me and asked me on  
 7 early December if we would take a payoff early. He  
 8 said he had a buyer for the house and it would be  
 9 soon. We said yes. I checked with the title  
 10 company. And he told me to go check with the title  
 11 company. And I went and checked with the title  
 12 company. They said they had it set up, but then  
 13 when the date come to do it, they said no. They  
 14 wasn't -- it had been canceled.  
 15 Q. Okay. Well, let's skip now forward to  
 16 January 3rd of 2008. At this point in time you  
 17 understand that Buku has not closed the property on  
 18 December 21st, correct?  
 19 A. That's right.  
 20 Q. And you understand based on the letter  
 21 that your attorney sent that you were insisting  
 22 that the property be closed, otherwise you would  
 23 institute legal action, correct?  
 24 A. That's correct.  
 25 Q. And on January 3rd, your testimony is

1 him to your attorney; is that correct?  
 2 A. He asked me if I wanted to sell it and  
 3 put part of the payment on -- put the payment on --  
 4 on part payment. I told him I sold the house and  
 5 farm together, so to call our attorney, Rob Dunn.  
 6 I said -- and I also said that Mr. Magera was in  
 7 charge of it. He was the one that still was  
 8 holding the thing on the property.  
 9 Q. Mr. Peterson, why wouldn't you have  
 10 reflected that in your note that you prepared?  
 11 A. I don't know. But that's what I told  
 12 him.  
 13 Q. Now, tell me again what you claim you  
 14 said about Mr. Magera?  
 15 A. I told him, I says, you have to see  
 16 Mr. Magera. He's the one that wants to sell the  
 17 house, because I've already sold it to him.  
 18 Q. Had you closed on that property?  
 19 A. No, I hadn't. But I had a thing that  
 20 they were going to close on it.  
 21 Q. In January 3rd of 2008 you had  
 22 something that said they were going to close on it?  
 23 A. On January 3rd Kipp Archibald called  
 24 and asked what we wanted to do with the house.  
 25 Q. Let me stop you, Mr. Peterson. What

1 that Mr. Archibald called you and asked you what  
 2 you wanted to do with the house, correct?  
 3 A. Yes, he did.  
 4 Q. And at that time you were still the  
 5 owner of that property, correct?  
 6 A. That's right.  
 7 Q. And as the owner of the property, you  
 8 would be the only one who would have authority to  
 9 decide whether or not to sell that property,  
 10 correct?  
 11 MR. DUNN: Objection. Legal conclusion.  
 12 And leading again.  
 13 THE WITNESS: I was the owner of the  
 14 property. But we were still figuring on selling  
 15 it, because he said if it would -- the zoning was  
 16 changed. And the zoning wasn't changed. And so I  
 17 told him to get ahold of Mr. Magera and Mr. Dunn,  
 18 because it wasn't up to me, because I had already  
 19 had a thing that was supposed to be in place, and  
 20 it was -- still hadn't -- completely hadn't gone,  
 21 because he had wanted to go to the 31st of March.  
 22 Q. BY MS. CASPERSON: But this was past  
 23 the 31st of March even -- I'm sorry. You refused  
 24 to sign that document, correct, extending the  
 25 closing date?

1 A. I didn't sign it, no.  
 2 Q. So as it existed that date, there was  
 3 no document extending the closing, correct?  
 4 A. Only that he still wanted the  
 5 property.  
 6 Q. What document can you show me that he  
 7 still wanted the property on that date?  
 8 A. I haven't got a document.  
 9 Q. And you haven't indicated any kind of  
 10 conversation during that time frame that indicated  
 11 that Mr. Magera still wanted the property, correct?  
 12 A. Yes, I did. Because Brad Foster  
 13 called me, and he said that Jaramie wanted him to  
 14 operate the farm this year.  
 15 Q. Let's back up. That happens in March,  
 16 correct?  
 17 A. You're talking about March here too,  
 18 aren't you?  
 19 Q. I'm talking about January.  
 20 A. January.  
 21 Q. Of 2008.  
 22 A. I don't recall anything about that  
 23 other than the thing was still in limbo, because I  
 24 knew -- I knew that he still wanted it if the  
 25 zoning didn't get changed, and it didn't get

1 A. It probably would. That's why I made  
 2 these notes.  
 3 Q. Prior to Mr. Archibald calling you on  
 4 January 3rd, asking what you wanted to do with the  
 5 house, had you had prior discussions with  
 6 Mr. Archibald?  
 7 A. None. He come out -- him and  
 8 Mr. Magera come out before we moved, and they went  
 9 through the house. He took him through the house,  
 10 and they put it up for sale.  
 11 Q. Were you there?  
 12 A. I was there when they went through the  
 13 house. I wasn't in any of their negotiations. I  
 14 didn't know how much they were going to get or  
 15 anything like that.  
 16 Q. You're saying that you never signed  
 17 the listing agreement with Mr. Archibald?  
 18 A. Never. Never talked to him about it.  
 19 Never signed nothing.  
 20 Q. Did you approve the listing of the  
 21 house with Mr. Archibald?  
 22 A. No.  
 23 Q. But you were there?  
 24 A. I was there when he brought it out.  
 25 And then there was no signing done there. He

1 changed.  
 2 Q. How did you know he still wanted it?  
 3 A. He told me that.  
 4 Q. When?  
 5 A. Well, he told me here, and he told me  
 6 on that meeting, that meeting we went to.  
 7 Q. Now, we've specifically been over your  
 8 statement that you prepared for December 12th, and  
 9 during that meeting you had already testified that  
 10 he specifically said that they wouldn't pay if the  
 11 zoning went to five-acre lots, correct?  
 12 A. That's right. But it didn't go to  
 13 five-acre lots. Is that correct?  
 14 Q. And you didn't know that in December,  
 15 did you?  
 16 A. What?  
 17 Q. You didn't know whether it had or had  
 18 not in December of 2008, correct?  
 19 A. I didn't know that it had.  
 20 Q. You didn't know that it hadn't either?  
 21 A. No. So that's why we were waiting on  
 22 this -- it wouldn't make any difference.  
 23 Q. Mr. Peterson, you would agree with me  
 24 that at the time you made these notes your memory  
 25 would have been more accurate than it is today?

1 brought Mr. Archibald out, and they went through  
 2 the house and looked it over.  
 3 Q. How could Buku list a property that  
 4 they didn't own?  
 5 A. I don't know. But when he called me  
 6 up, Jaramie said that he had the house up for sale,  
 7 and he says would you sign it over, because he said  
 8 I need to -- I need you to sign it. I said, yeah,  
 9 sure, I would.  
 10 Q. That you would essentially give Buku  
 11 Properties the authority to market the house?  
 12 A. No. I never give authority to do  
 13 anything until he asked me on early in December.  
 14 But this was before December that they come out the  
 15 first time and put a sign out.  
 16 Q. Did you ever tell Mr. Archibald to  
 17 take that sign down?  
 18 A. Never told him to take the sign down.  
 19 Q. Did you ever tell him to remove the  
 20 lock box?  
 21 A. I never told him to remove the lock  
 22 box. But he called me and in -- he called me -- he  
 23 called me August 6th. He called me on his cell  
 24 phone, asked about selling the house. I told him  
 25 to talk with Jaramie and said we don't know what's

1 going on right now. We've turned everything over  
 2 to our attorney, Rob Dunn. Kipp said Jaramie still  
 3 wanted the farms, ours and Clarks, and the bank had  
 4 cut down on the loaning percentages.  
 5 Q. Mr. Peterson, let me take you back to  
 6 your January 3rd conversation that you had with  
 7 Mr. Archibald. When he asked you what you wanted  
 8 to do with the house and you told him to go talk to  
 9 your attorney, Mr. Dunn, do you have any knowledge  
 10 of whether Mr. Archibald had a conversation with  
 11 your attorney?  
 12 A. I have no idea.  
 13 Q. So you have no idea what Mr. Archibald  
 14 did after that?  
 15 A. No.  
 16 Q. But you do know that he continued to  
 17 have a sign in front of the house?  
 18 A. He had a sign in front of the house,  
 19 yes.  
 20 Q. And he had a lock box on it?  
 21 A. He had a lock box on it.  
 22 Q. And was he giving you notification of  
 23 any showings that took place?  
 24 A. No. He wasn't giving me any showings.  
 25 But I went out there and -- on June 27th, 2008, I

1 evidence of that, correct?  
 2 A. No. No, I don't.  
 3 Q. Did you ever ask Mr. Archibald who he  
 4 was taking his directions from for purposes of  
 5 selling the house?  
 6 A. No.  
 7 Q. And you never asked him to remove the  
 8 lock box, correct?  
 9 A. No.  
 10 MR. DUNN: Objection. Asked and answered.  
 11 Q. BY MS. CASPERSON: And you never asked  
 12 him to remove the sale sign?  
 13 MR. DUNN: Objection. Asked and answered.  
 14 Q. BY MS. CASPERSON: Correct?  
 15 A. No. I never asked him to remove it.  
 16 Q. And if Mr. Archibald had sold that  
 17 property, who would you have expected to get the  
 18 proceeds?  
 19 A. Well, if the property was -- if the  
 20 farm and that would have sold, I would have  
 21 expected him to get the proceeds. But the farm  
 22 wasn't sold, so the house wouldn't have been sold.  
 23 To me, I wouldn't -- I wouldn't have got any  
 24 proceeds because I wouldn't -- I didn't have it up  
 25 for sale. Jaramie is the one that put it up for

1 went out there, found a cell phone in the master  
 2 bedroom of the house. And according to a neighbor,  
 3 Earl Coles, the house was still being shown. The  
 4 blinds in the front rooms were open, which I have  
 5 kept closed. The for-sale sign was still up.  
 6 Q. So you have no idea when that cell  
 7 phone was left, correct?  
 8 A. No.  
 9 Q. You have no idea when the blinds were  
 10 allegedly moved?  
 11 A. No.  
 12 Q. Mr. Peterson, if Mr. Archibald had an  
 13 agreement with Buku Properties to sell the house,  
 14 why would he call you on January 3rd of 2008 and  
 15 ask you what you wanted to do with the house --  
 16 MR. DUNN: Objection, speculation.  
 17 Q. BY MS. CASPERSON: -- to the extent  
 18 that you can testify.  
 19 MR. DUNN: Objection, speculation. How is  
 20 he supposed to know --  
 21 THE WITNESS: I don't know but I'll tell  
 22 you what I thought. I thought Mr. Magera was  
 23 standing right there beside him wanting him to  
 24 call.  
 25 Q. BY MS. CASPERSON: But you have no

1 sale.  
 2 Q. Who would have had to sign the  
 3 documents in order to transfer title to that  
 4 property?  
 5 A. I would have. But if he wasn't going  
 6 to buy the farm, it wouldn't have been sold. I  
 7 didn't have anything to do with selling the  
 8 property -- selling the house. I had nothing to do  
 9 with that. Never talked to Mr. Archibald. He  
 10 called me twice. That's the only times that I  
 11 talked to him.  
 12 Q. So without any understanding as to why  
 13 Mr. Archibald was trying to sell it, you just  
 14 continued to let the sign stay there and the lock  
 15 box stay on it?  
 16 A. I thought that he was trying to sell  
 17 it for Mr. Magera.  
 18 Q. But you never had a conversation with  
 19 him about that?  
 20 A. No. No.  
 21 Q. Now, during this time frame that the  
 22 property, you say, had the sign out front, you were  
 23 taking care of the property, correct?  
 24 A. That's right.  
 25 Q. And, in fact, you leased the farmland

1 to your son for pasture, correct? Is that a yes?  
 2 A. Yes.  
 3 Q. You indicate that in March, you don't  
 4 have a date, that Brad Foster called you; is that  
 5 correct?  
 6 A. That's correct.  
 7 Q. And specifically tell me what you can  
 8 recall Mr. Foster told you.  
 9 A. Mr. Foster said that Jaramie called  
 10 him and wanted him to rent the farm. He asked me  
 11 if it was in pasture. I said yes, but Jaramie  
 12 hasn't bought the place yet. He said oh, he  
 13 hasn't. He said I understand he's going to. I  
 14 said, well, when he buys it, he can do what he  
 15 wants, but if he don't buy it, why, I'm going to  
 16 let Steve run it.  
 17 Q. And that's what you did, correct?  
 18 A. That's what I did.  
 19 Q. So any profits that were made with  
 20 regard to that farmland came to you, correct?  
 21 A. That's right.  
 22 Q. Why didn't you take actions to lease  
 23 the house out if you were no longer living there?  
 24 A. Because I didn't want to lease it out.  
 25 It was in good shape, and I didn't want people to

1 with regard to the sale of the property?  
 2 MR. DUNN: Objection. Form of the  
 3 question.  
 4 THE WITNESS: There was a letter written to  
 5 us, I guess, yes.  
 6 Q. BY MS. CASPERSON: And isn't it true  
 7 that that contained different terms than the  
 8 original terms in the purchase and sale agreement?  
 9 MR. DUNN: Objection. Leading.  
 10 THE WITNESS: Yes.  
 11 Q. BY MS. CASPERSON: What did you  
 12 understand was the difference between the terms  
 13 that were proposed in the letters as opposed to the  
 14 terms in the original purchase and sale agreement?  
 15 A. They wanted to make payments on it.  
 16 Q. And was there ever any contract signed  
 17 as a result of those negotiations?  
 18 A. Not with me.  
 19 (Exhibit \*-J marked.)  
 20 Q. BY MS. CASPERSON: I'll hand you what  
 21 was previously marked as Exhibit \*-J. Do you  
 22 recognize that document?  
 23 A. Yes.  
 24 Q. Can you identify it for me?  
 25 A. Well, it's a letter for the

1 move in. If he didn't take it and we got it back,  
 2 why, then I would sell it.  
 3 Q. So you were concerned that any renters  
 4 would damage the property?  
 5 A. Yes.  
 6 Q. You indicated in your prior testimony  
 7 on August 6 of 2008 that Kipp Archibald again  
 8 called you and asked you about selling the house,  
 9 correct?  
 10 A. That's right.  
 11 Q. And, again, you referred him to  
 12 Jaramie and Mr. Dunn, correct?  
 13 A. That's right.  
 14 Q. And, again, did you have an  
 15 understanding as to why Mr. Archibald would be  
 16 calling you as to what you wanted done with the  
 17 house?  
 18 A. He called me, and I told him  
 19 everything was turned over to our attorney, Robin  
 20 Dunn. And he said Jaramie still wanted the farm,  
 21 along with the Clarks', but the bank had cut down  
 22 on the loaning percentage.  
 23 Q. Isn't it true that later in 2008 that  
 24 there were proposals going back and forth between  
 25 you and Buku Properties to come to a new agreement

1 defendants.  
 2 Q. If you look to the right-hand side of  
 3 this document, it says affidavit of Jerry and Betty  
 4 Peterson in support of defendants' position re:  
 5 summary judgment; is that correct?  
 6 A. Yes, that's right.  
 7 Q. And if you'll look to the back page of  
 8 this document -- or the second to last page, is  
 9 that your signature?  
 10 A. That's my signature.  
 11 Q. And is that also your wife's  
 12 signature?  
 13 A. That's right.  
 14 Q. And you understand that this document  
 15 was your sworn testimony that was submitted to the  
 16 court in this matter?  
 17 A. Yes.  
 18 Q. And you testified, you asserted that  
 19 this was true and correct?  
 20 A. Yes.  
 21 Q. If you'll go to paragraph 12 of your  
 22 affidavit. The first portion of the first sentence  
 23 of paragraph 12 states: The purpose of the  
 24 purchase by the buyers was never communicated to  
 25 the undersigned affiants.

1 agent of Buku was on your property after this  
 2 purchase and sale agreement failed to close?  
 3 A. Well, only Archibald.  
 4 Q. And you never had any discussion with  
 5 Archibald as to who he understood he was  
 6 representing?  
 7 A. Well, I just assumed he was  
 8 representing him because he brought him out to our  
 9 place and went through the house. And they was  
 10 taking notes down and size of the rooms and what  
 11 was done down in the basement and everything else.  
 12 Q. And isn't it true that that all  
 13 happened prior to the contract being closed,  
 14 correct?  
 15 A. That's right.  
 16 Q. And after that happened on January  
 17 3rd, Mr. Archibald specifically called you and said  
 18 what do you want me to do with the property?  
 19 A. Yes. He said -- and I told him he had  
 20 to talk to Magera and to Rob Dunn.  
 21 Q. And you don't have any knowledge as to  
 22 whether he did any of those things?  
 23 A. No. I talked to him twice is all I  
 24 ever talked to him.  
 25 Q. Isn't it true that you specifically

1 phone that you found in there, the blinds being in  
 2 a different position, and then this statement that  
 3 you have from your neighbor that it was shown; is  
 4 that correct?  
 5 A. I've never seen anybody in there  
 6 myself, no.  
 7 Q. And it was true during this time that  
 8 you and your wife were still maintaining and caring  
 9 for the property, correct?  
 10 A. That's right.  
 11 Q. You specifically testified that you  
 12 told Brad Foster that until Buku actually paid you  
 13 the money they weren't going to get to use that  
 14 pastureland, correct?  
 15 A. Yeah. And Brad said he didn't want to  
 16 get in -- I said Magera hadn't bought it yet. When  
 17 he bought it, he could do whatever he wanted with  
 18 it, but until then Steve would run it. And he  
 19 says, well, I don't want to get involved in it  
 20 then.  
 21 Q. Why didn't you tell Mr. Archibald the  
 22 same sort of thing?  
 23 A. Well, I didn't know Mr. Archibald was  
 24 selling the ground.  
 25 Q. But you knew he was trying to sell the

1 gave your son the right to use the pastureland?  
 2 A. That's right.  
 3 Q. So you're not asserting that Buku --  
 4 A. No.  
 5 Q. -- had any kind of dominion or  
 6 control --  
 7 A. No.  
 8 Q. -- over the pasture land -- let me  
 9 finish. You're not asserting that Buku had any  
 10 kind of control over the pastureland, correct?  
 11 A. That's right.  
 12 Q. And your only evidence that Buku was  
 13 controlling the house was your assumption that  
 14 Mr. Archibald was acting on behalf of Buku,  
 15 correct?  
 16 A. That's right.  
 17 Q. And any profits that were made with  
 18 regard to the pastureland came to you, correct?  
 19 A. That's right.  
 20 Q. And you're not aware of any payments  
 21 that Buku received as a result of having any kind  
 22 of control or dominion over that property?  
 23 A. No.  
 24 Q. And you never observed anyone actually  
 25 going through the property other than the cell

1 house?  
 2 A. That's a different property. It was  
 3 different.  
 4 Q. What do you mean it was different?  
 5 A. Selling the house, but he wasn't  
 6 selling the property.  
 7 Q. But the house was still to be sold in  
 8 the original purchase --  
 9 A. That's right.  
 10 Q. -- contract, correct?  
 11 A. And he asked me, he says is it all  
 12 right if we sell this. They thought they had a  
 13 buyer. And if they sold it, the house would get  
 14 out of -- the house would be part payment on the  
 15 properties.  
 16 Q. And that was all prior to the closing  
 17 date of the purchase and sale agreement?  
 18 A. That's right.  
 19 Q. If you would look to page 27 -- or  
 20 paragraph 27 of your affidavit, this paragraph  
 21 specifically states: Your affiants have been  
 22 damaged monetarily in the remaining sum of the  
 23 contract and other miscellaneous costs and  
 24 billings, comma, including but not limited to,  
 25 comma, lost revenues on farming practices, comma,

# Transcript of the Testimony of **Jaramie Magera**

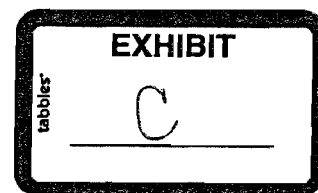
**Date:** April 13, 2010

**Volume:** I

**Case:** BUKU PROPERTIES v. CLARK

Printed On: May 12, 2010

T&T Reporting  
Phone:208.529.5291  
Fax:208.529.5496  
Email:tntreport@ida.net  
Internet:  
TandTReport@ida.net



1 A. No.  
 2 Q. Did you ever have a contract with a  
 3 Realtor on the Clark property?  
 4 A. No.  
 5 Q. What happened to the property of  
 6 Petersons during the 2008 year?  
 7 A. I don't know.  
 8 Q. Did you ever have the property listed  
 9 with a Realtor?  
 10 A. No.  
 11 Q. Did you ever have a contract with a  
 12 Realtor to sell the Peterson property?  
 13 A. No.  
 14 Q. Has ERA via Kipp Archibald or any  
 15 other Realtor ever represented you in this  
 16 particular transaction?  
 17 A. I don't know if they represented me,  
 18 but when we put the property under contract, I  
 19 asked Kipp to try to sell the house.  
 20 Q. And what house are we referring to?  
 21 A. The Petersons' house. During the due  
 22 diligence period I asked him to sell the house. So  
 23 maybe we could sell it and do a one-time close when  
 24 we close with the Petersons.  
 25 Q. Did you ever ask Kipp Archibald to try

1 to sell any of the Clark property?  
 2 A. No.  
 3 Q. Did any farmers ever approach you  
 4 about farming the Clark property?  
 5 A. Yes.  
 6 Q. And who was that?  
 7 A. Brad Foster.  
 8 Q. And what information, if any, did you  
 9 give to Mr. Foster?  
 10 A. Brad Foster took me to lunch, asked me  
 11 if he could farm another piece of ground we have in  
 12 Hailey Creek. And he said -- he asked me too if --  
 13 I heard you bought Rael Clark's piece, could we  
 14 farm that. And I said no, we didn't buy it. The  
 15 deal fell through, I said, but here's Rael Clark's  
 16 number, if you want to call him you can ask him to  
 17 farm it.  
 18 Q. Did you receive any -- you meaning  
 19 Buku Properties or any entity that you have an  
 20 interest therein, receive any money from Brad  
 21 Foster?  
 22 A. For the Clark property?  
 23 Q. Correct.  
 24 A. No.  
 25 Q. Did you receive from Brad Foster any

1 money for the Peterson property?  
 2 A. No.  
 3 Q. Did you indicate to Mr. Foster that  
 4 the Peterson property may be available for farming?  
 5 A. No.  
 6 Q. Did you or your attorney ever meet  
 7 with the Petersons in March of 2008 concerning the  
 8 contract?  
 9 A. No.  
 10 Q. Did you or your attorneys ever meet  
 11 with the Clarks concerning your contract in March  
 12 of 2008?  
 13 A. No.  
 14 Q. Did you ever make any inquiries of  
 15 anyone whether the contract was to be -- contracts  
 16 that were to be closed in December of 2007 were  
 17 still viable after December of 2007?  
 18 A. Repeat that question again.  
 19 Q. Did you believe the contracts were  
 20 viable after the closing date of 2007?  
 21 A. Did I believe our contracts that were  
 22 supposed to close in December were viable after  
 23 that?  
 24 Q. Yes.  
 25 A. No.

1 Q. Did you believe the contracts had  
 2 completely been terminated as of the closing date  
 3 in December of 2007?  
 4 A. Those particular contracts, yes.  
 5 Q. Are there any other contracts  
 6 outstanding with the Clarks or Peterson properties?  
 7 A. No.  
 8 Q. Were there any attempts to revive the  
 9 contracts of 2007 in 2008 with the Clarks or  
 10 Petersons?  
 11 MS. CASPERSON: I'm sorry. Did you say  
 12 revive or revise?  
 13 MR. DUNN: Revive. Come back to life.  
 14 THE WITNESS: I don't know if we ever tried  
 15 to revive the existing contracts. I can't remember  
 16 for sure. I think we made them another offer,  
 17 another contract.  
 18 Q. BY MR. DUNN: And are there any  
 19 documents that reference that offer?  
 20 A. If there are, they're in the -- all  
 21 your paperwork. I think we sent a letter and you  
 22 denied it, demanded us to close. I can't remember  
 23 for sure.  
 24 Q. And if you had any offers to revive or  
 25 revise the contracts, where would we find those

1 documents?  
 2 MS. CASPERSON: Objection. It misstates  
 3 his prior testimony.  
 4 Q. BY MR. DUNN: You can answer.  
 5 A. In your paperwork.  
 6 Q. Do you have any copies of documents  
 7 that would indicate your attempts to revive or  
 8 revise the contracts of 2007 with the Clarks and  
 9 Petersons?  
 10 MS. CASPERSON: I'm going to object to the  
 11 extent that misstates his prior testimony again.  
 12 THE WITNESS: I'm sure you guys have  
 13 everything.  
 14 Q. BY MR. DUNN: The question is do you  
 15 have any documents left in your files on the  
 16 Petersons or the Clarks?  
 17 A. No.  
 18 Q. What, if any, documents exist  
 19 concerning this transaction?  
 20 MS. CASPERSON: I'm going to object to the  
 21 extent it's vague and ambiguous.  
 22 Q. BY MR. DUNN: We'll make it more  
 23 specific.  
 24 There were two contracts presented by  
 25 Jab, Inc., that did not culminate, correct?

1 Q. Through where? A title company? To  
 2 them directly? To what location, if you know?  
 3 A. I don't know for sure. If I remember  
 4 right, I just wrote it to Rael Clark, the name, I  
 5 think.  
 6 Q. And that was drawn on the Buku banking  
 7 account?  
 8 A. I'm pretty sure.  
 9 Q. The \$327,000, how did that money come  
 10 into the possession of the Petersons, if you know?  
 11 A. In the form of a check.  
 12 Q. And was that from the Buku bank  
 13 account that you wrote to them?  
 14 A. If I remember right, yes.  
 15 Q. Was it made -- well, I guess the  
 16 better question I'm trying to ask is did the  
 17 327,000 ever get deposited with a title company, or  
 18 was it made directly to my clients?  
 19 A. It was made directly to them.  
 20 Q. And whatever they did with the money,  
 21 you knew that it was going to a house, but you  
 22 didn't have any further context; is that a fair  
 23 statement?  
 24 A. Correct.  
 25 Q. What, if any, instructions did you

1 A. Yes.  
 2 Q. There were two contracts for Clarks  
 3 and Petersons with Buku Properties that were  
 4 actually signed, correct?  
 5 A. Correct.  
 6 Q. Were there any documents or letters  
 7 subsequent to those two contracts?  
 8 A. After?  
 9 Q. Yes.  
 10 A. Yes.  
 11 Q. And how many, if you know?  
 12 A. I don't know.  
 13 Q. I'm just trying to find out what's out  
 14 there. You don't know?  
 15 A. I don't know.  
 16 Q. Did you ever see a copy of the closing  
 17 of Petersons' home in Idaho Falls?  
 18 A. No.  
 19 Q. Were you ever made aware of any  
 20 documents on their closing of property in Idaho  
 21 Falls?  
 22 A. No.  
 23 Q. The earnest money that was provided to  
 24 the Clarks, how was it paid to them?  
 25 A. In a check.

1 give to Kipp Archibald in the year 2008?  
 2 MS. CASPERSON: Objection. That misstates  
 3 his prior testimony. Lacks foundation.  
 4 Q. BY MR. DUNN: Go ahead.  
 5 A. None. He might have called me and  
 6 asked me can I still show the house. I said call  
 7 Jerry. I don't know. I think he had somebody that  
 8 wanted to look at the house. I said call Jerry. I  
 9 don't know. Our deal was done. I can't remember  
 10 what date it was, if it was 2007 or 2008. It had  
 11 to be 2008 because our deal was over.  
 12 Q. In your affidavit for summary judgment  
 13 you relied upon various newspaper clippings. Where  
 14 did you obtain those newspaper articles?  
 15 A. From the newspaper. From the  
 16 Jefferson Star. I don't know what you're asking.  
 17 Q. That's pretty much it, where you got  
 18 them. You also relied on various statements from  
 19 your banker that you indicated. Were those  
 20 statements that he or she made to you? I assume it  
 21 was a he, but I don't know that you didn't speak to  
 22 more than one person.  
 23 A. Yes.  
 24 Q. In your affidavit you referred to  
 25 various county employees. Were those statements



1 that you heard from them?  
 2 A. Yes.  
 3 Q. And if you know, who was the county  
 4 planning and zoning coordinator during 2007/2008?  
 5 A. I don't know if DaNiel Jose was still  
 6 here or if it was Naysha Foster. I can't remember  
 7 when DaNiel left.  
 8 Q. Did you ever deal with Naysha Foster  
 9 at any point in time on these two particular  
 10 contracts?  
 11 A. I can't remember.  
 12 Q. Now, you've dealt with planning and  
 13 zoning on a number of occasions with many of your  
 14 other businesses; is that a fair statement?  
 15 A. Correct.  
 16 Q. Are you familiar with their policies  
 17 and procedures in a general sense?  
 18 A. Yes.  
 19 Q. And you've made applications for plats  
 20 and subdivisions through other entities, correct?  
 21 A. Yes.  
 22 Q. And that's with the county? I should  
 23 be more specific.  
 24 A. Yes.  
 25 Q. You've obtained building permits from

1 A. It's a purchase and sale agreement for  
 2 Jerry Peterson.  
 3 Q. What date is it signed?  
 4 A. August 30th, 2007.  
 5 Q. And you signed on behalf of Buku  
 6 Properties; is that correct?  
 7 A. Yes.  
 8 Q. And likewise with Deposition  
 9 Exhibit \*-A you signed on behalf of Buku  
 10 Properties?  
 11 A. Yes.  
 12 Q. And who prepared Deposition Exhibit  
 13 \*-A and Deposition Exhibit \*-B?  
 14 A. My attorney.  
 15 Q. And who was that?  
 16 A. Jim Archibald.  
 17 (Exhibit \*-C marked.)  
 18 Q. BY MR. DUNN: Handing you what's been  
 19 marked as Deposition Exhibit \*-C. What is that?  
 20 A. The letter we sent to Jerry Peterson  
 21 and Rael Clark.  
 22 Q. When you say we, who is that?  
 23 A. Buku.  
 24 Q. And who drafted that letter?  
 25 A. Jim Archibald.

1 the county on occasion?  
 2 A. Yes.  
 3 Q. And who do you work with on building  
 4 permits currently with the county?  
 5 A. The girls in the office and Jim Lynch,  
 6 building official.  
 7 Q. I don't have a real good copy of the  
 8 Clark -- you probably have a better copy of the  
 9 Clark purchase and sale agreement. But I'll hand  
 10 you, and we'll mark it in a second here, Deposition  
 11 Exhibit \*-A. Does this appear to be the purchase  
 12 and sale agreement that was signed by the Clarks?  
 13 A. Yes.  
 14 (Exhibit \*-A marked.)  
 15 Q. BY MR. DUNN: When was the agreement  
 16 with the Clarks which has been marked Deposition  
 17 Exhibit \*-A signed? Date?  
 18 A. It looks like August 30th, 2007.  
 19 (Exhibit \*-B marked.)  
 20 Q. BY MR. DUNN: Handing you what's been  
 21 marked as Deposition Exhibit \*-B. Do you recognize  
 22 that particular document? It's not a very good  
 23 copy. Yours is probably better.  
 24 A. Yes.  
 25 Q. And what is it?

1 Q. And you signed that letter; is that  
 2 correct?  
 3 A. Correct.  
 4 Q. And what was the intent of that  
 5 letter?  
 6 MS. CASPERSON: I'm going to object to the  
 7 extent it calls for a legal conclusion.  
 8 Q. BY MR. DUNN: You may answer.  
 9 A. What was the intent of this letter.  
 10 The intent was -- after the contracts were void in  
 11 December, it looks like we're asking them to  
 12 continue -- to do another deal, to try to make it  
 13 work with the banker and try to get the financing.  
 14 Q. Were these ever signed by anyone other  
 15 than yourself?  
 16 A. I don't know.  
 17 Q. Deposition Exhibit \*-C, is it signed  
 18 by anyone other than yourself?  
 19 A. No.  
 20 Q. When you spoke with the Clarks and the  
 21 Petersons, did you always refer to yourself as the  
 22 manager for Buku Properties?  
 23 A. I don't understand the question.  
 24 Q. When you had conversations with  
 25 Clarks, did you refer to yourself as the manager of

1 Q. Do you recall that they were  
 2 specifically advised that they would have to pay  
 3 back the earnest money if the deal did not go  
 4 through?  
 5 A. Yes.  
 6 Q. Who advised them of that?  
 7 A. Robin Dunn.  
 8 Q. You were asked some questions about  
 9 the zoning that took place in Jefferson County and  
 10 your understanding of the zone changes that  
 11 eventually took place. Were the Petersons or  
 12 Clarks involved in any of the meetings that the  
 13 county had to discuss the zone changes?  
 14 A. Yes.  
 15 Q. Tell me what meetings they were  
 16 specifically involved in.  
 17 A. The county announced however they did  
 18 it that they were thinking about that proposed  
 19 countywide zone change. So I called Rael Clark  
 20 and Jerry both and said, hey, this is what the  
 21 county is thinking about. If this happens, the  
 22 deal is off. We can't buy R-5 ground for R-1  
 23 prices. We better go to the meeting. So we went  
 24 to a meeting. They came with me or I met them  
 25 there at the county building. I don't know if it

1 ground and subdivide it into five-acre lots.  
 2 Q. You were asked some questions about a  
 3 real estate agent by the name of Kipp Archibald.  
 4 What is your understanding as to who can enter into  
 5 an agreement to have a real estate agent sell their  
 6 property?  
 7 MR. DUNN: Objection. Legal conclusion.  
 8 Q. BY MS. CASPERSON: You can go ahead  
 9 and answer.  
 10 A. My understanding of who can enter into  
 11 -- the landowner, the property owner, the  
 12 homeowner.  
 13 Q. And at any time was Buku ever the  
 14 owner of the Peterson or the Clark property?  
 15 A. No.  
 16 Q. And as far as you were aware did Buku  
 17 ever enter into any kind of listing agreement with  
 18 Mr. Archibald?  
 19 A. No.  
 20 Q. Did you have discussions with  
 21 Mr. Peterson about possibly trying to sell their  
 22 home?  
 23 A. Yes.  
 24 Q. What were those discussions?  
 25 A. The discussions were if we could

1 was in October or November of 2007.  
 2 Q. When you say they, who are you  
 3 referring to?  
 4 A. Rael Clark and Jerry Peterson came to  
 5 the meeting.  
 6 Q. Do you recall what was specifically  
 7 discussed at that meeting?  
 8 A. Yeah. It was basically a public  
 9 hearing. And every farmer, every landowner, every  
 10 developer -- not every. Many in the county stood  
 11 up and told the county what a dumb idea they  
 12 thought it was, how bad it would affect the  
 13 property values.  
 14 Q. You indicated in your testimony that  
 15 R-1 property is not worth the same as R-5 property.  
 16 Can you explain that?  
 17 A. At the time in the summer of 2007, R-1  
 18 property was worth about anywhere between 9- and  
 19 10,000 an acre. R-5 ground is not worth anything.  
 20 It's farm ground. It's worth 1,500, 2 grand an  
 21 acre, maybe 2,500. We have an R-5 5-acre lot  
 22 subdivision and they're worthless. Nobody wants  
 23 them. If they do want them, they have horses and  
 24 they aren't willing to pay what it's worth. You  
 25 can't make it pencil paying \$10,000 an acre for R-5

1 sell -- if Buku could sell -- Buku or Jerry could  
 2 sell -- if we could sell his house during the due  
 3 diligence period, that there was -- if there was  
 4 some way we could do a one-time close when we  
 5 closed on his property.  
 6 Q. You previously testified that you had  
 7 informed both Clarks and the Petersons that Buku's  
 8 intention was to develop their land into one-acre  
 9 lots. Can you tell us what those discussions were  
 10 or how you put them on notice that that's what  
 11 Buku's plan was?  
 12 A. I don't remember the specific  
 13 discussion. We talked about it a lot of times.  
 14 Rael and Jerry, they knew exactly what we were  
 15 going to do with the property. I think in Rael's  
 16 contract we even -- we went to the extent of -- I  
 17 think we were going to name a park after his  
 18 brother.  
 19 I have the utmost respect for Rael  
 20 Clark, and so it was very important to him and to  
 21 me that we develop his ground in a respectful  
 22 manner. So I put Rael and Jerry in my truck, and  
 23 we drove around and looked at some other  
 24 developments that we'd done so that I could assure  
 25 them we'd do a good job. They full well knew that

Handwritten mark resembling '85' or '88' in the bottom right corner.



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 NOV 16 PM 5:02  
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

**PLAINTIFF'S SECOND 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.

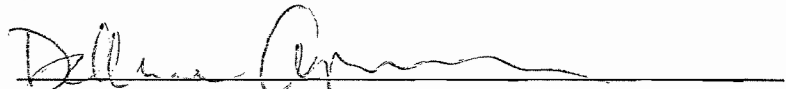
BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

2010

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 of the Idaho Rules of Civil Procedure for Summary Judgment. This Motion is based upon the Affidavit of DeAnne Casperson, Affidavit of Brad Foster, Affidavit of Kipp Archibald and affidavits previously submitted and of record and the Motion is also supported by the Memorandum in Support of Plaintiff's Second Motion for Summary Judgment, filed simultaneous with this Motion.

DATED this 16<sup>th</sup> day of November, 2010.

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

**CERTIFICATE OF SERVICE**


I hereby certify that on this 16<sup>th</sup> day of November, 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:                    PLAINTIFF'S    SECOND    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.

*2/11*

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 NOV 16 PM 5:02

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 BRAD FOSTER IN  
SUPPORT OF PLAINTIFF'S  
SECOND MOTION FOR SUMMARY  
JUDGMENT**

STATE OF IDAHO            )  
  ) ss.  
County of Bonneville        )

BRAD FOSTER, being first duly sworn on oath deposes and states as follows:

1. I am over 18 years of age, have personal knowledge of the following, except to the extent a statement is made on information or belief, and make this Affidavit based on my own personal knowledge.
2. I am a general partner of Foster Land & Cattle Co. (“Foster Land & Cattle”), an Idaho general partnership.
3. In late 2007 or early 2008, Jaramie Magera and I discussed the possibility of Foster Land & Cattle renting a piece of property known as Hailey Creek for the 2008 farming season. I understand the property is owned by a business associated with Mr. Magera and located near what is now South Fork Elementary School in Rigby, Idaho.
4. During this meeting, Mr. Magera and I also discussed two other properties that Mr. Magera believed Foster Land & Cattle might be interested in farming. One property was Rael Clark’s farm. The other property was Jerry Peterson’s farm. Mr. Magera told me to contact the Clarks and the Petersons if Foster Land & Cattle was interested in running either of those properties. I did not know the status of who actually owned the properties.
5. In early 2008, I contacted Jerry Peterson by telephone and inquired as to whether he would be interested in allowing Foster Land & Cattle to run the property. He



informed me that Jaramie Magera was supposed to purchase it, but his son was going to run the farm that year.

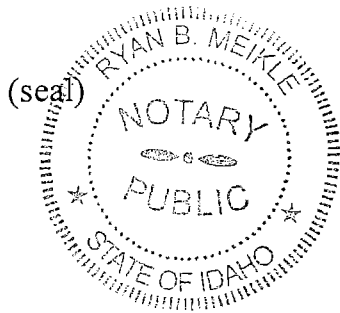
6. About the same time, I also contacted Rael Clark and asked whether he would be interested in allowing Foster Land & Cattle to run the Clark property. Mr. Clark told me Jaramie Magera was supposed to purchase it, but there were some problems. He agreed that Foster Land & Cattle could run the farm to maintain it.
7. As a result of this agreement, Foster Land & Cattle ran the Clark property that year.
8. When it came time for payment, I was unsure who to pay. I talked to Jaramie Magera and he said to pay Rael Clark. When I talked to Rael Clark, he said Jaramie Magera owned the land.
9. After a few months of trying to figure out who to pay, I eventually paid Rael Clark on behalf of Foster Land & Cattle. It is my understanding that Mike Clark has the receipts of Foster Land & Cattle's payments for taxes and water assessments.
10. Foster Land & Cattle never had a written lease with the Clarks for the 2008 lease of the property. Rather, the entire agreement was an oral agreement to run the farm. We have continued with this arrangement for 2009 and 2010.
11. At no point did Foster Land & Cattle make payments to anyone other than Rael Clark for or related to Foster Land & Cattle's farming of the Clark Property.
12. Foster Land & Cattle is not connected with or associated with Jaramie Magera or any entity for whom he might work in any way.


13. At no point have I or Foster Land & Cattle acted as an agent for Jaramie Magera or any entity for whom he might work.

Dated this 6 day of October, 2010.

  
\_\_\_\_\_  
Brad Foster

SUBSCRIBED AND SWORN to before me this 6 day of October, 2010.



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Bonneville County  
My commission expires: 12-21-2015

**CERTIFICATE OF SERVICE**

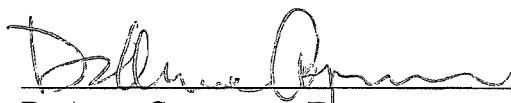
I hereby certify that on this 16<sup>th</sup> day of November, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                    **AFFIDAVIT OF BRAD FOSTER IN SUPPORT OF PLAINTIFF'S SECOND 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\CAH\14918\Pldgs\Summary Judgment 2d Foster.AFF.wpd:bel

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 NOV 16 PM 5:02

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

**AFFIDAVIT OF KIPP ARCHIBALD  
IN SUPPORT OF PLAINTIFF'S  
SECOND 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.

STATE OF IDAHO            )  
  )ss  
County of Jefferson        )

Kipp Archibald, 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 a real estate agent for ERA Archibald Real Estate located in Rigby, Idaho.
4. In the fall of 2007, I was approached by Jaramie Magera to help procure a buyer for Jerry and Betty Peterson's home.
5. In approximately late September/early October of 2007, Mr. Magera, Mr. Peterson, and I met at Jerry Peterson's home located in Jefferson County to discuss the logistics of marketing the home. Mr. Magera explained that Mr. Peterson and Buku Properties, LLC ("Buku") had entered into a purchase and sale agreement in which Buku was going to purchase the Peterson's property for the purpose of creating a new development. Both Mr. Magera and Mr. Peterson explained that the plan was for the Peterson home to be sold simultaneous with the remainder of the property, but that Buku was going to purchase the acreage (the "Development Property") and home, and

hopefully a third-party buyer could be found to purchase the home and a small amount of property surrounding the home (the "Home Site Property").

6. At the meeting Mr. Peterson insisted that the sale of the Home Site Property could only occur if the sale of the remainder of the property to Buku occurred simultaneous with the sale of the Home Site Property because he did not want to incur additional taxes or fees.
7. Additionally, at the meeting, Mr. Peterson gave me authorization to put a lock box on the house, to find a buyer, and provided me a key to the house. As a real estate agent, I could not list a house for sale without the approval of the actual owner. I understood that Mr. Peterson gave me authorization to place the house on the market. I would not have listed it without his approval since he owned the house.
8. I listed the Home Site Property on the Multiple Listing Service ("MLS") website on October 9, 2007. A true and correct copy of the MLS records for the Home Site Property are attached hereto as Exhibit A. I placed a "for sale" sign on the Home Site Property in order to market it as we had agreed.
9. In early December 2007, Mr. Magera informed me that there were problems with the zoning of the Development Property, that the sale of the Development Property was not going to close, and that the contract between the parties was going to expire.
10. After receiving this information, and knowing the direction I had been given that the Home Site Property had to be sold simultaneous with the Development Property, I

took the Home Site Property off of the market and removed the Home Site Property's listing from the MLS service on December 7, 2007. This is reflected in the MLS records attached hereto as Exhibit A.

11. I telephoned Mr. Peterson shortly after Christmas 2007 to discuss with him what he wished to do with the Home Site Property. I specifically asked if he wanted me to continue marketing the property.
12. Mr. Peterson responded that as far as he was concerned Buku had to purchase the Property. Mr. Peterson told me to either speak with his attorney, Robin Dunn, about the matter, or discuss it with Mr. Margera.
13. I never contacted Robin Dunn about this matter because I did not think it was appropriate for me to do so. I did not contact Mr. Margera because he already told me that the purchase agreement has expired. I simply left the Home Site Property off the market because Mr. Peterson had not given me any authority to market the Home Site Property any further.
14. Even though I took the Home Site Property off the market, I did not remove the "for sale" sign and the realtor's key box because I anticipated the zoning issues may get resolved and the parties may enter into a new purchase and sale agreement. The Petersons never asked me to remove the "for sale" sign or the realtor's key box.
15. According to my records, I put the Home Site Property back on the market in April 2008. I put the Home Site Property back on the market because I understood Buku

and the Peterson's were possibly working on a new purchase and sale agreement for the Home Site Property and Development Property.

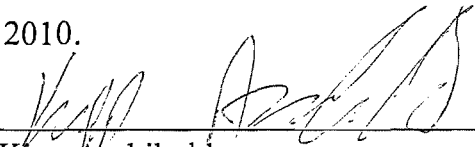
16. After it became apparent that the parties did not intend to enter into a new purchase and sale agreement, I spoke with Mr. Peterson in early August 2008 to ask him if he wanted me to continue marketing the home. Mr. Peterson informed me that he believed Buku was obligated to purchase the Property and that I should speak with his attorney, Robin Dunn, or Mr. Margera.
17. I did not speak with Robin Dunn after this conversation with Mr. Peterson. Again, I did not think it was appropriate for me to contact Mr. Dunn. Rather, I took the Home Site Property off the market.
18. I took the "for sale" sign down some time later in August of 2008.
19. I inadvertently forgot to remove the realtor's key box from the front door of the home and did not remove the realtor's key box until December 16, 2009. The Peterson's never informed me the lock box was still there or asked that I remove it.
20. During the entire time I marketed the Home Site Property for sale, there were no offers to purchase the Property. To the best of my knowledge, the Petersons had full access and control of the Home Site Property. I and my agency did nothing to restrict their use, possession, or control over the house.
21. During the entire time the Home Site Property was listed for sale, I am not aware of any action taken by Mr. Magera or Buku to control or possess the Property. I never



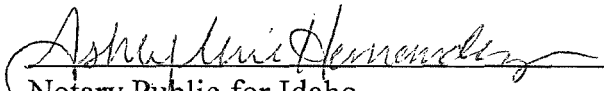
observed Mr. Magera or anyone from Buku at the Home Site Property other than our original meeting with Mr. Peterson in September/October 2007.

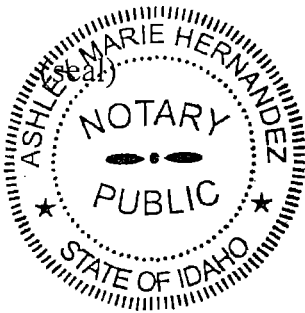
22. The Petersons never contacted me to complain or assert they wanted me to do something different with the Home Site Property or to request that the sign or lock box be removed.

Dated this 4 day of November, 2010.

  
\_\_\_\_\_  
Kipp Archibald

SUBSCRIBED AND SWORN to before me this 4<sup>th</sup> day of November, 2010.

  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Idaho Falls  
My commission expires: 10/31/14



**CERTIFICATE OF SERVICE**


I hereby certify that on this 16<sup>th</sup> day of November, 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 KIPP ARCHIBALD IN SUPPORT OF PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT**





**ATTORNEYS SERVED:**

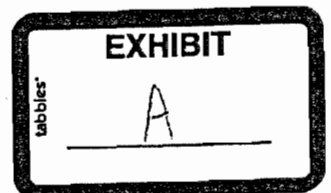
Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

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

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

**146259 (241 N 4200 E)**

Date/Eastern Time	Changed By	Change
10/9/2007 6:54:00 PM	Melissa Archibald (Office Staff)	New Listing (\$259,000)
10/9/2007 7:01:00 PM	NavicaMLS	Photo for Main View Processed
10/11/2007 5:42:00 PM	Melissa Archibald (Office Staff)	Misc. Change 
10/17/2007 1:40:00 PM	Sherilyn Nielsen (Office Staff)	Misc. Change 
10/31/2007 12:15:00 PM	Melissa Archibald (Office Staff)	Misc. Change 
10/31/2007 12:16:00 PM	Melissa Archibald (Office Staff)	Main view Deleted
10/31/2007 12:26:00 PM	NavicaMLS	Photo for Main View Processed
11/30/2007 12:47:00 PM	Kipp Archibald (Agent)	Misc. Change 
12/7/2007 2:44:00 PM	Melissa Archibald (Office Staff)	Withdrawn
3/7/2008 2:04:00 AM	NavicaMLS	Withdrawn marked as Deleted by system
3/16/2008 2:04:00 AM	NavicaMLS	Purged from system



305

**150761 (241 N 4200 E)**

Date/Eastern Time	Changed By	Change
4/21/2008 2:38:00 PM	Melissa Archibald (Office Staff)	New Listing (\$239,000)
4/24/2008 3:35:00 PM	NavicaMLS	Photo for Main View Processed
8/22/2008 5:08:00 PM	Kipp Archibald (Agent)	Withdrawn

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 NOV 16 PM 5:02  
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

NOTICE OF HEARING

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.

PLEASE TAKE NOTICE, that on the 13<sup>th</sup> day of December, 2010, at 2:00 p.m., or as soon thereafter as counsel can be heard, at the Jefferson County Courthouse in Rigby, Idaho, before the Honorable Richard St. Clair, Plaintiff Buku Properties, LLC, in the above-entitled action will call up for hearing its Second Motion for Summary Judgment.



---

DeAnne Casperson, Esq.

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of November, 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.

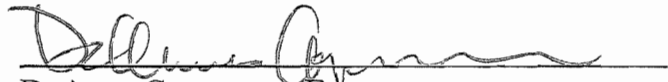
**DOCUMENT SERVED:**

**NOTICE OF 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.

G:\WPDATA\CAJH\14918\Pldgs\Hearing.NOT.wpd

769

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)

2010/03/23 AM 11:11  
 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. )

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' MEMORANDUM  
 RE: SUMMARY JUDGMENT  
 PLAINTIFF'S SECOND MOTION

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  
**MEMORANDUM OF PLAINTIFF-1-**

310



the undersigned attorney, and submit this memorandum in opposition to the Plaintiff's Second Motion for Summary Judgment and in support of the Defendants' Motion for Summary Judgment on the issue of liability. The first Motion for Summary Judgment by the plaintiffs occurred almost one (1) year ago with briefing filed in November of 2009. After the court's decision, nothing was done by the plaintiffs and the matter has sat dormant until this Second Motion for Summary Judgment.

The newest request for summary judgment does not raise any new material other than to attempt to detach Magera (manager of the plaintiff) from the proceedings; and to second guess the court on matters subsequent to the closing date on the contracts discussed hereafter. The co-defendants/counter-claimants attaches a major portion of their earlier briefing to this matter for assistance and ease of the court. The earlier information may assist the court. (The major arguments of these co-defendants/counterclaimants begins on page 11 of this brief.) The briefing is as follows:

#### 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.

**MEMORANDUM OF PLAINTIFF-2-**

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).

**MEMORANDUM OF PLAINTIFF-3-**

5/12

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.

Summary judgment is defined and explained in Rule 56, IRCP as follows:

Rule 56. Summary judgment:

(a) Summary Judgment--For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the service of process upon the adverse party or that party's appearance in the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in that party's favor upon all or any part thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.

(b) Summary Judgment--For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time; move with or without supporting affidavits for a summary judgment in that party's favor as to all or any part thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.

(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

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-4-**

213

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.

(d) Case Not Fully Adjudicated on Motion for Summary Judgment. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits--Further Testimony--Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(f) When Affidavits Are Unavailable in Summary Judgment Proceedings. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits in Summary Judgment Proceedings Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-5-**

211

shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused that party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

IRCP Rule 56, Summary judgment  
----- Excerpt from pages 172-173.

UNDISPUTED/UNREBUTTED MATERIAL FACTS

1. The plaintiff entered into a contract for the sale of real estate with Rael and Janet Clark, co-defendants/counterclaimants. [Complaint, Exhibit A; Magera Affidavit, Exhibit A; See both Peterson and Clark affidavits].
2. The earnest money paid to the Clarks was the sum of \$25,000. [Complaint, Exhibit A; Magera Affidavit, Exhibit A; Clark Affidavit, par. 7]
3. The plaintiff entered into an almost identical contract for the sale of real estate with Jerry and Betty Peterson, co-defendants/counterclaimants. [Complaint, Exhibit B; Magera Affidavit, Exhibit B; See also Peterson Affidavit par. 4].
4. The earnest money paid to the Petersons was the sum of \$327,000. [Complaint, Exhibit B; Magera Affidavit, Exhibit B; Peterson affidavit, par. 7 and 8].
5. The plaintiff knew that the Petersons needed the money to purchase a retirement home in Idaho Falls. Plaintiff reassured the Petersons that the sale would close. [Peterson Affidavit par. 8 and 15].
6. The closing date for the sale on the two (2) contracts was December 21, 2007. [Complaint, Exhibit A and B; Magera Affidavit, Exhibit A and B;]
7. The plaintiff had a period of inspection before the closing. The *only*

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-6-**

2/18

defense tendered by the plaintiff, in the facts tendered to the court, for the non-closing on the two (2) contracts, was that it believed the real estate was being re-zoned from R1 to R5 by Jefferson County. (One acre lots to five acre lots.)

8. The real property was zoned R1 as of the signing of both contracts with the Clark party and the Peterson Party; and also zoned R1 as of the closing date of the contracts. [Naysha Foster Affidavit, par. 4, Peterson Affidavit, par. 11; Clark Affidavit, par. 10]. Plaintiff was well aware the property was zoned R1 and continued to be zoned R1 well after the closing date. [See, Naysha Foster Affidavit, par. 6 with attachments of Exhibits 1 and 2; See also, Exhibit 3 to Naysha Foster Affidavit].
9. Jefferson County reassured the plaintiff that the real property would be zoned R1 and was “grandfathered”. [See entire Affidavit of Naysha Foster with Exhibits 1, 2, and 3.]
10. The plaintiff failed to close the two (2) sales on the real estate pursuant to the two contracts at the time designated in the contracts. [Complaint, Exhibit A and B; Magera Affidavit, Exhibit A and B;]

#### CONTESTED MATERIAL FACTS

1. Plaintiff exercised dominion and control over both sets of real property belonging to Clark and to Peterson. [Peterson Affidavit, par. 18; Clark Affidavit, par. 16].
2. Plaintiff hired the realtor to sell the house located on the Peterson real property and the realtor, at a later date, indicated plaintiff still wanted the

- property. [Peterson Affidavit, par. 23].
3. Brad Foster, a renter on the Clark property, has no bearing on the decision before the court. Brad Foster indicated in his affidavit he did not even know who owned the land. [See affidavit of Brad Foster submitted by plaintiff, par. 4; see also, par. 8].
  4. Plaintiff continued to seek desire to purchase the real property from Clark and Peterson and to seek advice from Jefferson County after the closing date of the transactions for the contracts. [See, Naysha Foster Affidavit, par. 6, 7 with Exhibits 1, 2 and 3].
  5. Plaintiff continued to promise payment of the remaining balance to the defendants/counter plaintiffs. [Peterson Affidavit, par. 22; Clark Affidavit, par. 18; Attorney Letters, Dunn Affidavit].

### INTRODUCTION

In this second motion for summary judgment, the plaintiffs have not alleged any new facts for the court to reconsider. In fact, quite the opposite exists. The plaintiff have merely stated what was set forth by both parties in the original briefing and sworn statements of the parties. The plaintiff is trying to hang its hat on the following language from the court's ruling on the first summary judgment motions:

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 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

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-8-**

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.

A simplistic version of the facts is set forth hereafter which was stated in the first Motion for Summary Judgment:

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 original affidavit on the first request for summary judgment of Magera as Exhibit A-Clark; and as Exhibit B-Peterson. (Exhibits also attached to the complaint). 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 (December 21, 2007) 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 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

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-9-**



the defendants involved in any actions of the plaintiff on financing.

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 in his original affidavit which is already before the court.

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  
**SECOND MEMORANDUM ON SUMMARY JUDGMENT-10-**

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

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-11-**

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.

The plaintiff has attempted to rely 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 in the first summary judgment motion clearly rebuts this position and the issue. 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. The plaintiffs failed to fulfill the contract and simply did not pay the balance. The County of Jefferson made it very clear that the land in question had not been re-zoned; and, as such, the plaintiffs have no legitimate reason to argue that the contract should be voided and the earnest money returned. In fact, quite the opposite exists.

The court, in its earlier summary judgment ruling, was merely stating the obvious that more factual questions exist as to the true intent of Buku; and the reasons or lack of reasons why it demanded a refund of earnest money.

The newest affidavits on this second motion do not shed any new light on the court's earlier decision. Buku continued to exert control and domination over the real properties of both Clark and Peterson. Those facts, even if controverted or contested by Buku, are in the original affidavits before the court.

The newest motion focuses on the lack of control by Buku and tries to place the burden on the defendants. Those are the very facts that a fact-finder would have to determine in rendering a decision. Obviously, the language of the contracts can be placed before the fact-

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-12-**

241

finder. However, the factual assertions on the failure to close by the plaintiff focus on both the zoning designation and the subsequent actions by the parties.

Defendants, on the other hand, are not trying to remove or change the clear language of the original contracts; but rather are trying to show to the ultimate fact-finder that they (defendants) were lead down a path to believe the original contract would be enforced and/or should be enforced as to the damages sustained by the defendants.

2. The defendants/counter-plaintiffs are entitled to summary judgment on the issue of liability 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 court previously ruled that this matter contains facts that would have to be determined at trial. The defendants still believe that Buku breached the agreement without any kind of justification. The court agreed by stating that “issues of fact remain as to Buku’s entitlement to the earnest money.” The court did not dismiss the counter-claims except as to Consumer Protection. Thus, facts exist and the newest and second motion of the plaintiffs does not alter the court’s original ruling.

The defendants/counter-plaintiffs has 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.

The court left in place the following without removing the counter-claims from  
**SECOND MEMORANDUM ON SUMMARY JUDGMENT-13-**

consideration. The plaintiff does not re-address these issues (on the counter-claims) and tries to indicate that the contract entitles Buku to refund of the earnest money. The counter-claim matters will not be re-hashed but are still in place and remain unaffected by the latest attempt by plaintiffs to avoid trial. Those counter-claim issues are as follows:

A. Specific Performance

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.

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).

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.

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

4. The defendant/counterclaimants do not indicate to the court that a “new written agreement” exists.

The defendants/counterclaimants have never alleged that a new written agreement exists. Nor do these parties dispute the clear written language of the original contracts and, in particular, paragraph 21. Nor do these answering parties dispute the statute of frauds language as contained in Idaho Code 9-503. The law is clear on those points and it is believed that the plaintiffs have “missed the point” of the court’s earlier ruling. The court was stating that various facts exist to determine whether there is justification for return of earnest money. If there are not sufficient facts to enable Buku for the return of earnest money, then the fact-finder needs to make such a determination. Both pre- and post- contracts, Buku has lead the defendant/counterclaimants to believe the sale would occur and the balance of money would be paid to these answering sellers.

It is very clear that part-performance creates various remedies under the Statute of Frauds. The plaintiffs began to perform on the promise to purchase. This case was not about zoning but in reality is about the plaintiff’s lender and the willingness to provide additional funding to the plaintiffs. The case has never been about the inability of zoning, despite the

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-15-**

assertions of the plaintiff, or any deficiency on the real properties; or, for that matter, the good faith and fair dealings of the defendants/counterclaimants.

Quite clearly, part performance is explained in more technical terms concerning the Statute of Frauds as follows:

We turn to "part" performance. When we use this term, we mean performance by either or both parties of less than all their respective obligations under the contract. There is no literal foundation in I.C. § 9-505 for the oft-made assertion that part performance takes a contract outside the statute. Plainly it does not. The contract is still within the statute. At least a portion of the contract remains "to be performed" on both sides. Compare I.C. § 9-504 (explicitly referring to part performance of land sale contracts under I.C. § 9-503). Rather, it is more accurate to say that in some circumstances, part performance may establish an equitable ground to avoid the strictures of the statute of frauds.

In *Allen v. Moyle*, 84 Idaho 18, 367 P.2d 579 (1961), discussing contracts for personal services, our Supreme Court implicitly recognized this point:

[T]he equitable doctrine of part performance is not applicable to a contract ... within the statute of frauds.... The mere part performance of such a contract does not take it out of the operation of the statute or permit a recovery under the contract for any part of the contract remaining executory.... [T]o hold that part performance is performance would be a nullification of the statute.

*Id.* at 23, 367 P.2d at 582 (quoting 49 AM.JUR. § 497, at 798). Similarly, in *International Business Machines Corp. v. Lawhorn*, 106 Idaho 194, 198, 677 P.2d 507, 511 (Ct.App.1984), we referred to part performance as a doctrine "grounded in equity." The doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel. Accordingly, we will return to it in the next section of this opinion.

Hovering uneasily between full performance by both parties and part performance by either or both parties is a troublesome hybrid known as "full" performance by one party. American courts and commentators have long disagreed--with varying degrees of awareness and perception--as to whether such performance is akin to full performance by both sides (taking a contract outside the statute of frauds) or more closely resembles part performance (possibly allowing equitable relief from the statute). A majority of courts appear to hold the former view. CALAMARI & PERILLO § 19-23; CORBIN § 457; L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 89 (2d ed. 1965) (hereinafter SIMPSON); 73 AM.JUR.2D Statute of Frauds § 533 (1974) (hereinafter Statute of Frauds ). However, "no ... general principle can be derived from the decisions on this point." WILLISTON § 528. Thus, some courts have held that the statute of frauds does not apply to a contract fully executed on one side, where nothing remains to be done on the other side except to pay money. See SIMPSON § 89. Courts adopting this view may order the contract to be enforced in damages. Other courts, taking an approach analogous to part performance, may consider an equitable or quasi-contractual remedy, such as quantum merit. *Id.*

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-16-**

Although the Idaho courts have not explicitly addressed this issue, our cases strongly point to the equity approach. The Idaho Supreme Court repeatedly has held that when one party has fully performed an oral contract within the statute of frauds, he is not entitled to collect damages for a breach. Rather, he is entitled to the equitable remedy of specific performance. E.g., *Tew v. Manwaring*, 94 Idaho 50, 480 P.2d 896 (1971); *Quayle v. Mackert*, 92 Idaho 563, 447 P.2d 679 (1968).

These cases put Idaho among a minority of states, but we think the equity approach is sound. It offers greater consistency with the literal language of Idaho's [111 Idaho 1010] statute of frauds. For even if one side has fully performed a contract, the contract as a whole remains "to be performed." Moreover, it is the nonperforming party who seeks protection under the statute. [In the instant case, the plaintiff, Buku]. Conceptually, it makes little sense to allow the extent of the opposing party's performance to determine whether the contract is within or without the statute. It makes greater sense, in our view, to examine the conduct of both parties, and the circumstances surrounding the alleged contract, to determine whether the party invoking the statute of frauds is equitably entitled to do so. Accordingly, we hold that the doctrine of full performance by one party, like the doctrine of part performance, does not take the contract out of the statute of frauds. Rather, it should be treated as a form of equitable estoppel.

*Frantz v. Parke*, 729 P.2d 1068, 111 Idaho 1005, (Idaho App. 1986)  
----- Excerpt from pages 729 P.2d 1072-729 P.2d 1073.

The doctrine of part performance works in conjunction with the doctrine of equitable estoppel. "Under Idaho law, part performance per se does not remove a contract from the operation of the statute of frauds. Rather, the doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel." *Lettunich*, 141 Idaho at 367, 109 P.3d at 1109. (citing *Sword v. Sweet*, 140 Idaho 242, 249, 92 P.3d 492, 499 (2004)). Equitable estoppel generally, and the doctrine of part performance specifically, assume the existence of a complete agreement. See *Lettunich*, 141 Idaho at 367, 109 P.3d at 1109.

The language quoted above from cases in Idaho is precisely what the district court was referring to when it stated: "the behavior of the parties" and similar language as stated therein.

This language is identical to the issues propounded by the court cases as highlighted above.

The plaintiffs cannot rely upon mere allegations of zoning issues to defeat the contract. It has already been proven, through the Planning and Zoning Department, via Nasha Foster, that the real property would not be re-zoned. The contractual enforcement rights exist for the benefit of the defendants. The equitable remedies exist due to the aforementioned part

**SECOND MEMORANDUM ON SUMMARY JUDGMENT-17-**



performance theory. Those theories are contained in the counter-claims of the defendants/counter-claimants.

5. The dominion and control theories of the defendant/counterclaimants establish facts consistent with the partial performance of the plaintiffs.

Plaintiffs miss the point of these facts when arguing for their second summary judgment motion. These controverted facts show the surrounding nature of the circumstances of how the plaintiffs dealt; and, that such dealings were not in good faith. The controverted facts still do not solve the unresolved question of whether the plaintiffs could unilaterally terminate a contract, partially performed, by the assumption of zoning issues. The clear testimony is that the zoning issue was a non-issue. Such fact has not been rebutted by the plaintiffs.

#### CONCLUSIONS

The defendants/counter-claimants still believe and allege that they should be granted summary judgment on the issue of liability as there are no material facts to defeat the breach of contract by the plaintiffs.

The newest and second motion for summary judgment does not raise any new factual issues not already answered in the court's earlier decision. This second motion does not remove controverted facts; and, the equitable remedies also available to the defendants/counter-claimants along with the legal remedy of breach of contract.

The second motion for summary judgment by the plaintiffs should be denied.

DATED this 29 day of November, 2010.



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

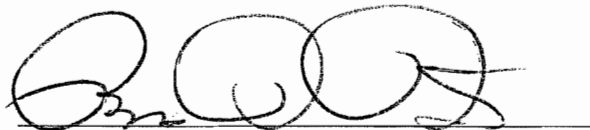
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29 day of November, 2010 a true and correct copy of the foregoing was delivered to the following persons(s) by:

xx Hand Delivery to plaintiff

xx Postage-prepaid mail to judge

     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

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)

2013 NOV 29 AM 11:11  
 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 JERRY AND  
 BETTY PETERSON IN SUPPORT  
 OF DEFENDANTS' POSITIONS  
 RE: SUMMARY JUDGMENT

Second Affidavit on Plaintiff's Second  
 Motion for Summary Judgment

STATE OF IDAHO                    )  
  ss.  
COUNTY OF JEFFERSON         )

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

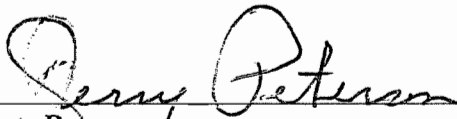
1. They are husband and wife and co-defendants/counter-plaintiffs in the above captioned matter.
2. This affidavit is prepared in opposition to the second summary judgment request of the plaintiff and in support of the summary judgment request of the defendants/counter-plaintiffs.
3. This affidavit is 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.

8. 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.
9. The Brad Foster affidavit states that Mr. Foster contacted Jerry Peterson concerning farming of the Peterson property for the 2008 year. Mr. Foster indicated Jaramie Magera had sent him to me to inquire as to the status. As such, I believed Mr. Foster was acting on directions from Magera as his implied agent. I explained to Mr. Foster that Magera could do whatever he wanted with the real property if the final payments were made on the contract. If payments were not made, then I instructed Mr. Foster that my son was going to rent the ground for 2008. Mr. Foster and myself were both unsure who "owned the ground" as stated in his affidavit. Your affiant believed that Magera was still in control of the real property. I had no further dealings with Brad Foster.
10. Kip Archibald, realtor, was not hired by the undersigned but was hired to sell real estate by Jaramie Magera. Mr. Archibald, Mr. Magera and Magera's wife came to the real property, inspected the house, and listed the property (house) for sale. When Magera, via Buku, LLC paid us the \$327,000 the listing came about and all parties knew we relied upon the earnest money for the purchase of our retirement home in Idaho Falls. I did not give permission to Mr. Archibald to sell the house; but, believed that Archibald was listed through Magera. I had no objection to Magera listing the property. I signed no agreements with Archibald and never had any conversations with Archibald concerning the sale of the house. I had no input whatsoever with any MLD listing and never viewed any such listing. These matters were all handled through Magera and Archibald.

11. Your affiants have seen the real property listed as of August 21, 2008 by Kipp Archibald. Attached as Exhibit AA is a copy of such listing which is contrary to the assertions of Mr. Archibald in his affidavit.
12. Your affiants believe they had no obligation to contact Mr. Archibald, realtor, as we did not hire him and the agreements, if any, were between Kipp Archibald and Magera. We did not tell Mr. Archibald to do anything with the real property. All matters were between Magera and his agent, Kipp Archibald.
13. In early December of 2007, I was contacted about an early sale of the home. Your affiants had no objection to the sale found by Archibald. I only spoke with Kipp Archibald on the early sale of the home except for the request for a key to the house in 2007 which I surrendered to Kipp Archibald. I did tell him to call Robin Dunn on January 3, 2008 as the sale had nothing to do with your affiants. The property, to the best knowledge of the undersigned, was listed as long as August 21, 2008 because of the notice.
14. Your affiants believed that the plaintiff breached the contract by not closing on December 21, 2007. However, we did continue to try and salvage the sale and had our attorney correspond with the attorney for plaintiff. Attached as Exhibit BB is copies of correspondence showing we continued to work with the plaintiff and were still ready, willing and able to sell the real property. The plaintiff would never meet with us and actually failed to appear at a scheduled meeting at Mr. Dunn's office to resolve the contract issues.
15. Your affiants continued to work with the plaintiff because we had totally relied upon the sale and had already committed to the sale and needed the balance to complete our retirement process.

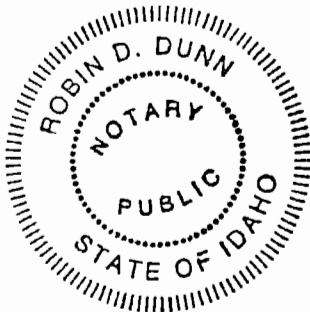
16. Your affiants have been damaged monetarily in the remaining sum of the contract and other miscellaneous costs and billings, including but not limited to, lost revenues on farming practices, lost interest, expenses of upkeep and utilities, tax assessments, attorney fees and costs.
17. Your affiants believe and allege that the plaintiff is liable for damages and/or is requested to perform on the contract (Specific Performance).

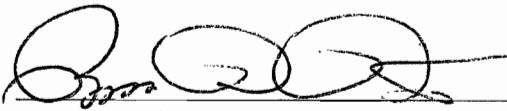
DATED this 29 day of November, 2010.

  
Jerry Peterson

  
Betty Peterson

SUBSCRIBED AND SWORN to before me this 29 day of November, 2010.



  
Notary Public  
Residing at: 121634, FD  
Commission: 10/7/16

CERTIFICATE OF SERVICE

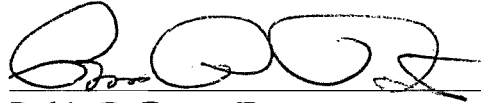
I HEREBY CERTIFY that on the 29 day of November, 2010, a true and correct

copy of the foregoing was delivered to the following person(s) by:

Hand Delivery to plaintiff counsel

Postage-prepaid mail to judge

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



**EXHIBIT** AA

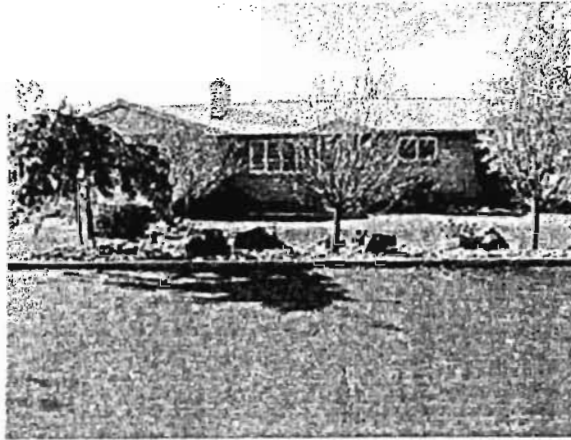
# Snake River

## Main Menu

[Back to Main Search Screen](#)

- This box will guide you through your searching. Look for helpful tips to maximize your searching capability.

<< [Back](#) | Currently Viewing - **MLS Number: 150761**



<p>For more information please contact:</p> <p><b>Kipp Archibald</b>  ERA Archibald-Reece RealEstate  <b>Phone:</b> 208-200-0605 / 208-745-5911  <b>Email:</b> kipp.archibald@era.com</p>
---

## Listing Details

**List Price:** \$239,000

**Total Bedrooms:** 3

**Total Baths:** 2

**Total Half Baths:** 1

**Style:** 1 Story

**County:** Jefferson

**Elementary School:** Jefferson 251EL

**Middle School:** MIDWAY 251JH

**High School:** RIGBY 251HS

**MLS Number:** 150761

**City:** RIGBY

**State:** ID

**Taxes:** 807.10

**Lot Size (Apx SqFt):**

**Apx Acreage:** 2

**Apx Total SqFt:** 2580

**Abv Grade SqFt:** 1500

**Blw Grade SqFt:** 1080

**Public Info:** Beautiful home on two acres with two big shops. Sunroom, large living room and family room on the main level. Mature landscaping and large garden spot. 30x30 shop and 24x30 shop, both with power and insulation. All surrounded by white vinyl fencing.

**Heat Source/Type:** Gas, Forced Air

**Air Conditioning:** None

**Garage # Stalls/Type:** 6+ Stalls, Attached, Detached, Other Type-See Remarks

**Apx Year Built:** 1964

**Zip Code:** 83442

All information is deemed reliable, but is not guaranteed. Consult with your real estate professional to verify the provided information.

The information found on this website is provided as a courtesy to those using www.SnakeRiverMLS.com . Please verify any information found herein.



© Systems Engineering, Inc.

**EXHIBIT** BB

**SWAFFORD LAW OFFICE, CHARTERED**

525 NINTH STREET  
IDAHO FALLS, IDAHO 83404  
TELEPHONE: (208) 524-4002  
FAX: (208) 524-4131

RONALD L. SWAFFORD - ATTORNEY-AT-LAW  
R. JAMES ARCHIBALD - ATTORNEY-AT-LAW  
DARREN S. ROBINS - ATTORNEY-AT-LAW  
LARREN K. COVERT - ATTORNEY-AT-LAW

TWINKIE SWAFFORD - LEGAL ASSISTANT

December 28, 2007

Robin D. Dunn, Esq.  
Fax: (208) 745-8160

RE: Jerry Peterson and Rael Clark

Dear Rob:

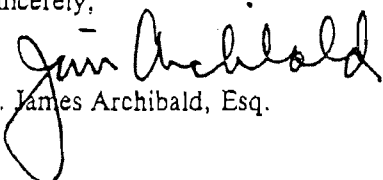
Jaramie Magera received your letter this morning dated December 19, 2007. Why did it take nine days to receive your letter? And why didn't you send it to me? I talked to you about this and don't understand why you didn't send me a copy. On December 18, 2007, Magera and Peterson and Clark were talking about this in friendly terms. I don't why your clients would think Buku is going to simply walk away from this money.

Once the county passed their zone change, the appraiser pulled the appraisal of the property. The bank would not close and Buku does not have the money without borrowing. This is nothing that Buku or Peterson or Clark anticipated. No one could foresee Jefferson County devaluing the property of Peterson and Clark at the time of signing the contract.

Buku intended to subdivide the property and install central water and sewer. If we could get a letter from the county that the Peterson and Clark properties will be accepted for one acre or smaller lots with a central water and sewer system, then we could take that letter to the bank and to the appraiser so that the loan would close.

Since you know the county attorney, can you get that letter for us? With that letter, everyone will win. Peterson and Clark will get their money. The county will get a subdivision with central water and sewer. Buku will sell lots. Then we will proceed to closing. It sounds like a better option than you and I fighting over if the contract is enforceable or voidable. Without the assurance of subdividing, we will sue for the return of the earnest money, as your clients have already agreed that the earnest money is refundable.

Sincerely,

  
R. James Archibald, Esq.

317 2908

338

# DUNN LAW OFFICES, PLLC

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 31, 2007

R. James Archibald, Esq.  
525 Ninth Street  
Idaho Falls, ID 83404

***Sent via facsimile: 524-4131***

Re: Jerry Peterson/Raoel Clark/Buku Properties, LLC

Dear Jim:

I received your facsimile dated December 28, 2007. It is my opinion that your contentions contained therein are misplaced. I will explain as follows:

1. You indicated I had not written directly to you concerning Jaramie Magera and his attempts to alter the contract. As you will note, I only represented Mr. & Mrs. Peterson at the time. Subsequently, Mr. & Mrs. Clark joined in the representation. I believe you need to have a conversation with your client and the manager/member of Buku Properties, LLC (Buku) since there were discussions between Mr. Magera, Mr. Peterson and Mr. Clark. Mr. Magera approached them and tried to have them sign a document which added additional conditions to the contract. The document was on Buku letterhead and there was direct conversations between Buku/Magera and my clients. I merely responded to the request on the letterhead. At no time, did Mr. Magera indicate that conversations should be had with you or with any other attorney. I merely assumed he was representing himself since he used his own letterhead and had direct conversations with my clients. Thus, please discuss this matter with your client and if he desires direct correspondence with you, it would certainly be my intent to do so. However, your assault upon me, in a friendly fashion, was inappropriate given the circumstances.
2. The four corners of the contract are very clear. The contingencies contained therein have been met by my clients. Thus, we fail to understand why a closing did not occur on the date indicated. The letter sent from my office arrived in Texas to the Clarks in three (3) days and to the Petersons in approximately two

339

(2) days. I can only suggest that your client's receipt of mail and/or mailing practices are somewhat different than other individuals. I do not know why he did not receive the letter until nine (9) days from the mailing date since both of my clients received such letter. I can only suggest that either there was a mail problem or your client needs to check his box more regularly.

3. You indicated there are contingencies with the County. Obviously, both you and I have clients other than those we currently represent. However, my representation of other clients has nothing to do with this contract nor with the language in the four corners of the contract. Both sets of my clients have been ready, willing and able to sell the property and close upon the date indicated. Thus, reference to my other clients in other cases has no bearing upon this transaction.
4. My clients have never indicated they were willing to refund the Earnest Money Agreement. They have never said it is refundable and have always maintained they are ready, willing and able to sell the property and continue to do so.

With the spirit of cooperation in mind, both sets of my clients indicated they would extend the closing date contained in the contract without altering any other terms contained therein upon the condition an additional down payment, in a sum to be negotiated, and 7.5% interest of their outstanding monies from the date of closing until the new closing is established.

They also desire the additional money be construed as a down payment and not as earnest money.

Your clients may or may not be speculating on the property it is purchasing. However, my clients express no opinion as to the speculative value of the land in question contained in the contract.

If you desire to litigate, please be informed we feel we are on solid ground as the language in the four corners of the contract seem very clear and definite. Additionally, this would be construed as a commercial transaction and would entitle the prevailing party to attorney fees. Obviously, neither the Petersons or the Clarks desire to enter into litigation as they have always remained loyal to the contract and an attempt to sell to Buku and/or its manager, Magera.

My clients remain on peaceable terms and would like to work out arrangements that are beneficial to all concerned. However, they are very willing to litigate this issue for the substantial sums of money that have been involved. They would not foreclose any remedy including specific performance and/or forfeiture of Earnest Money Agreement with the return of the real property.

R. James Archibald, Esq.

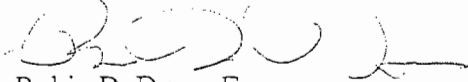
December 31, 2007

Page 3

---

Thus, we have left the matter in your hands.

Sincerely,



Robin D. Dunn, Esq.

DUNN LAW OFFICES, PLLC

RDD/jn

cc: Mr. & Mrs. Peterson

Mr. & Mrs. Clark

**SWAFFORD LAW OFFICE, CHARTERED**

525 NINTH STREET  
IDAHO FALLS, IDAHO 83404  
TELEPHONE: (208) 524-4002  
FAX: (208) 524-4131

RONALD L. SWAFFORD - ATTORNEY-AT-LAW  
R. JAMES ARCHIBALD - ATTORNEY-AT-LAW  
DARREN S. ROBINS - ATTORNEY-AT-LAW  
LARREN K. COVERT - ATTORNEY-AT-LAW

TWINKIE SWAFFORD - LEGAL ASSISTANT

December 31, 2007

Robin D. Dunn, Esq.  
Fax: (208) 745-8160

RE: Jerry Peterson and Rael Clark

Dear Rob:

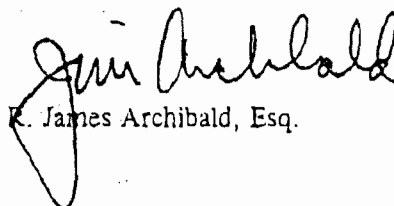
Thank you for your letter dated December 31, 2007. No personal assault upon you was intended.

Your clients have a perfect understanding as to why the contract did not close. Magera, Peterson, Clark, me and you all attended the planning and zoning meetings. We all knew that if the zone change was passed, the million dollar property would be reduced in value to a third of the value. They are now selling something valued substantially less than what was represented to Buku back in August when it was signed. Buku had an obligation under the contract to perform due diligence prior to closing. The due diligence reveals that there is a problem. Buku simply wanted to extend the time to figure it out. Buku prepared a contract extension on December 18 and your letter was prepared on December 19.

Your clients are ready willing and able to sell property which was not bargained for by my client. We all know it. I don't know why your clients are pretending that everything is the same. It has obviously changed. There was a meeting of the minds as to the sale of property zoned one acre. There was not a meeting of the minds as to five acre zoned property. This makes the contract voidable, not enforceable.

The contracts indicate the earnest money is refundable. Please return the money to my office immediately, or continue to work with us in getting the letter from the county which we need to obtain financing.

Sincerely,



R. James Archibald, Esq.



# DUNN LAW OFFICES, PLLC

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

March 17, 2008

R. James Archibald, Esq.  
525 Ninth Street  
Idaho Falls, ID 83404

Re: Jerry Peterson/Raoel Clark/Jaramie Magera

Dear Jim:

I recognize that Jaramie Magera is the owner/operator of a LLC that is attempting to purchase real purchase real property from Raoel Clark and Jerry Peterson. This letter will serve notice that my clients both need to close on the transaction, which is now delinquent approximately three (3) months, because of financial obligations.

Upon the good faith and belief they had a contract that would be closed in December, they have both made other arrangements for housing and have financial obligations which are coming due.

Also, the individuals have to plan for the upcoming months as to farming practices and/or care of the various homes since utilities are a necessity to maintain the integrity of the structures.

Therefore, notice is hereby given if the sum of money due my clients is not paid on or before March 31, 2008, then they will pursue other avenues and consider the earnest money forfeited which was paid on the various contracts.

As indicated previously, my clients have always intended to work with your client and do desire to close this transaction. However, as mentioned above and because of other commitments, they can no longer continue to commit to a contract which is delinquent.

Please let me know your client's thought process in this particular action.

Sincerely,



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

RDD/jn

cc: Mr. & Mrs. Peterson  
Mr. & Mrs. Clark

343

**SWAFFORD LAW OFFICE, CHARTERED**

525 NINTH STREET  
IDAHO FALLS, IDAHO 83404  
TELEPHONE: (208) 524-4002  
FAX: (208) 524-4131

RONALD L. SWAFFORD - ATTORNEY-AT-LAW  
R. JAMES ARCHIBALD - ATTORNEY-AT-LAW  
TREVOR L. CASTLETON - ATTORNEY-AT-LAW  
LARREN K. COVERT - ATTORNEY-AT-LAW

TWINKIE SWAFFORD - LEGAL ASSISTANT

March 31, 2008

Robin D. Dunn, Esq.  
Fax: (208) 745-8160

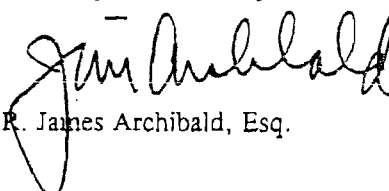
RE: Jerry Peterson and Rael Clark

Dear Rob:

Since the date of your letter of March 17, 2008, I understand that yet another new zoning map has been approved by Jefferson County. I haven't seen the map, but I am told that the Peterson/Clark property is zoned R-5. We have talked to our banker, appraiser, and the Jefferson County Planning and Zoning Administrator. The appraiser needs a letter from a county official so that we can finance the purchase. The administrator has responded that she believes we will be grandfathered in under the old zoning map but she wanted the county attorney to sign off on it. I have placed several calls to the county attorney and have not heard back regarding this issue.

We still want to purchase the property. May we have an extension to close? Once we get the grandfather letter from the county or the county attorney, we can close within 30 days from the date of the letter. Please advise.

Sincerely,



R. James Archibald, Esq.

2/4

**SWAFFORD LAW OFFICE, CHARTERED**

525 NINTH STREET  
IDAHO FALLS, IDAHO 83404  
TELEPHONE: (208) 524-4002  
FAX: (208) 524-4131

RONALD L. SWAFFORD - ATTORNEY-AT-LAW  
R. JAMES ARCHIBALD - ATTORNEY-AT-LAW  
TREVOR L. CASTLETON - ATTORNEY-AT-LAW  
LARREN K. COVERT - ATTORNEY-AT-LAW

TWINKIE SWAFFORD - LEGAL ASSISTANT

May 28, 2008

Robin D. Dunn, Esq. fax: (208) 745-8160

Dear Rob:

As we discussed last week, the bank has approved financing for the purchase of the Peterson and Clark properties. However, since the time that the contract was signed, banking regulations have changed and we cannot borrow as much as was hoped.

We therefore propose a modification and signing a promissory note with the following terms:

Clark property:

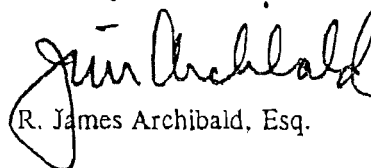
Closing:	June 6, 2008
Money paid down:	\$ 25,000.00
Payment on June 6, 2008:	\$125,000.00
Balance remaining:	\$904,075.18
Interest rate:	Seven Percent (7%)
Term:	To be negotiated
Prepayment:	Permitted

Peterson property:

Closing:	June 6, 2008
Money paid down:	\$327,000.00
Payment on June 6, 2008:	\$ 0.00
Balance remaining:	\$653,000.00
Interest rate:	Seven Percent (7%)
Term:	To be negotiated
Prepayment:	Permitted

Please review and advise as to a time we can all meet to finalize the details.

Sincerely,

  
R. James Archibald, Esq.

345

# DUNN LAW OFFICES, PLLC

ROBIN D. DUNN  
PENNY NORTH SHAUL  
AMELIA A. SHEETS

Telephone: (208) 745-9262

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

Facsimile: (208) 745-8160

June 3, 2008

R. James Archibald, Esq.  
525 Ninth Street  
Idaho Falls, ID 83404

Re: Buku Properties, LLC/Peterson/Clark

Dear Mr. Archibald:

I met with my clients Jerry and Betty Peterson this date and conferenced Rael Clark by telephone into the discussion. Obviously, we have received the proposal from your client and have discussed the same with each party expressing their individual preferences.

Both parties would like to honor the original contract and be paid in full, plus interest and utilities, for the intervening time. That is the best scenario for all concerned since it relieves the contractual obligation. However, your client has apparently encountered difficulties and desires to alter the original agreement.

If the original agreement were altered, then we could discuss the following for Mr. & Mrs. Peterson:

1. They would accept the sum of \$153,000 plus accrued interest and utilities to pay off the balance of the home. If the home were paid off and listed, then my clients would expect any sale of the home which would bring in revenue to be applied directly to the balance outstanding.
2. My clients would carry the \$500,000 balance (\$980,000 - \$480,000) with interest at eight and one-half (8.5%) percent for one (1) year. Upon the conclusion of one (1) year, then the balance of principal and accrued interest would be due and payable.
3. My clients would definitely request a personal guaranty in addition to the LLC business entity.

12/4/08

R. James Archibald, Esq.

June 3, 2008

Page 2

---

As to Mr. Clark, he has the following proposal if the contract were not paid off in full as originally contemplated:

1. \$125,000 plus interest on a note that is outstanding for the purchase of his home in Texas. I believe Mr. Magera has spoken with Mr. Clark on that issue. Also, he would want \$200,000 additional down payment towards the concluding price.
2. With the various payments and payments previously received, the one million forty-four thousand (\$1,044,000) dollars is reduced to \$694,000. If the foregoing is accepted. Mr. Clark would carry the \$694,000 at eight and one-half (8.5%) percent interest for one (1) year wherein principal and accrued interest would be payable in a lump sum. Once again, he would also want a personal guaranty in addition to the LLC contract.

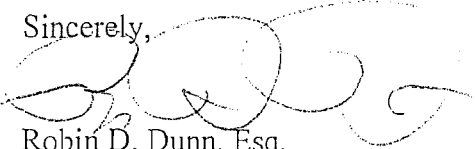
Thus, both of my clients have indicated their preference to honor the original contract, pay the balance due with accrued interest, any utility and expenses associated with upkeep and be done with the entire matter. The second option is their final proposal in this matter. This option remains opened until June 20, 2008. Thereafter, my clients would consider the original contract in total default, the sums forfeited and would pursue other buyers. As to the Petersons, they have already turned down offers of purchase on an installment basis. An installment basis has never been their preference and that is why they have turned down previous offers. However, I am sure they can at least explore those options.

As to Mr. Clark, he purchased a home in Texas in reliance upon the original contract being fulfilled. Thus, he had to take out a note for payment to complete his transaction.

In the event of any type of litigation, we would seek specific performance, accrued interest and principal along with any utility expenses. Likewise, we would also seek attorney fees and costs incurred herein. We would not waive any other remedies which may exist in either law or in equity.

Hopefully, the foregoing proposals will lead to successful resolution for all concerned.

Sincerely,



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

RDD/jn

cc: Mr. & Mrs. Peterson

Mr. Clark

347

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 DEC - 6

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,

Case No. CV-08-941

Plaintiff,

v.

**REPLY MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S SECOND MOTION  
FOR 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,

v.

BUKU PROPERTIES, LLC, an Idaho limited  
liability company,

Counter-Defendants.

348

COMES NOW Plaintiff Buku Properties, LLC (“Buku”), by and through its counsel of record Holden, Kidwell, Hahn & Crapo, P.L.L.C., and submits this Reply Memorandum in Support of Plaintiff’s Second Motion for Summary Judgment. This Memorandum is supported by the Affidavits of Brad Foster, Kipp Archibald, and DeAnne Casperson, and the affidavits previously submitted by Plaintiff to the Court simultaneous with Plaintiff’s prior Motion for Summary Judgment.

### I. INTRODUCTION

Defendants’ Memorandum Re: Summary Judgment Plaintiff’s Second Motion (“Defendants’ Memo”) fails to even remotely address the issues which Buku has brought before the Court in its Second Motion for Summary Judgment. Buku has asked for summary judgment to resolve as a matter of law the remaining issues in this case with regard to whether any alleged agreements or arrangements between the parties after the closing date had any material effect on Buku’s entitlement to a return of the earnest monies under the terms of the Clark and Peterson Agreements, plus interest.

Defendants have failed to address at all the fact that the Agreements require any amendments or waivers to the Agreements to be in writing and signed by the parties. Additionally, Defendants have failed to sufficiently identify any means by which any alleged oral agreement between the parties modified the terms of the original written agreements or would not be barred by the statute of frauds. In fact, Defendants continue to insist that they “are not trying to remove or change the clear language of the original contracts; but rather are trying to show to the ultimate fact-finder that they (defendants) were lead down a path to believe the original contract would be enforced as to the damages sustained by the defendants.”

(Defendants’ Memo, p. 8). However, this is precisely the problem with Defendants’ arguments –

347

once the closing date came and went, the Agreements between the parties were terminated and Buku was entitled to the return of its earnest monies. The Agreements could not be revived absent a later written amendment or waiver. In fact, Buku asked Defendants to extend the closing and Defendants refused. Now, however, Defendants want to claim the contract somehow continued past the closing date and look to inapplicable equitable remedies instead of the language of the parties' Agreements. Defendants have provided no evidence which would entitle them to retain the earnest monies, which are refundable pursuant to the terms of the Agreements, nor have Defendants provided any evidence of separate agreements of any kind, whether oral or written, which would entitle them to retain the earnest monies and/or require that Buku purchase the Properties. Buku is entitled to summary judgment on all of the pending claims and a return of its earnest monies.

## II. ARGUMENT

### **A. Defendants have Failed to Provide Any Evidence of Written Amendments or Waivers to the Clark and Peterson Agreements.**

The purchase and sale agreement between Buku and Clarks ("Clark Agreement") and the plain language of the purchase and sale agreement between Buku and the Petersons ("Peterson Agreement") requires that any amendments or waivers to the Agreements be in writing and signed by the parties to be valid. Because no such written amendments or waivers exist as to the Agreements, the Agreements must be enforced as written. Defendants' have provided no evidence of any written amendment or waiver modifying the Agreements. Rather, Defendants merely argue that Buku breached the Agreements and therefore "is not entitled to summary judgment on its cause of action in the complaint." (Defendants' Memo, p. 10).

In support of its argument that Buku breached the Agreements, Defendants argue that Buku's reliance upon the language of paragraph 3 of the Agreements ("Prior to closing, it is

350



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") does not excuse its alleged breach because the language "and all requirements that the Buyer needs to make for its due diligence purposes" is "so vague it would be impossible for any court to know what 'buyer needs for its due diligence.'" (Defendants' Memo, p. 11). However, in making this argument, Defendants ignore the previous ruling by the Court in which the Court unequivocally stated that such wording "is unambiguous and not so indefinite as to make the contract illusory." (January 27, 2010, Memorandum Decision, p. 8). Further, Defendants' Counterclaim alleges the "contracts were clear and unambiguous . . . ." (Counterclaim ¶¶ K and S). Consequently, any arguments made by Defendants with regard to this language being vague to the extent that it must be construed against Buku, and that, therefore, Buku cannot rely upon such language in opting not to close on the transaction based on its due diligence efforts should be disregarded by the Court. The issue has already been decided by the Court and Defendants judicially admitted the Agreements were clear and unambiguous.

Additionally, the Court impliedly decided the issue of breach of contract for failure to close the transaction, as now argued by Defendants, in its Memorandum Decision on Buku's first Motion for Summary Judgment. The Court specifically stated:

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."

(January 27, 2010, Memorandum Decision, p. 8). Buku has always contended that its reason for opting not to close on the Agreements was the potential zoning change to the Clark and Peterson

251

Properties, and the associated impact on Buku's ability to obtain financing for the purchase of the Properties. Defendants do not disagree with this fact. (*See* Defendants' Memo, p. 12). The Court recognized in its Memorandum Decision that Buku's reason for opting not to close on the Agreements fell under the umbrella of the language of paragraph 3 of the Agreements. (January 27, 2010, Memorandum Decision, p. 8). Buku provided Defendants with notice of the zoning defect, and gave Defendants the opportunity to cure the defect. (Magera Aff., ¶ 22, Ex. E and F). Further, Buku even requested that Defendants consent to extending the closing dates for the Agreements in writing. (Magera Aff., ¶ 22, Ex. E and F). Defendants rejected that request. (Magera Aff., ¶ 23, Ex. G). Buku was entitled to opt not to close on the Agreements if it was unable to "satisfy its interest and concerns regarding the purchase." (Magera Aff. Ex. ¶ 3 A and B, ¶ 3). This is precisely what Buku did when it discovered, during its due diligence investigation, that the zoning of the Clark and Peterson Properties was in question and additionally that Buku would be unable to obtain the necessary financing for the purchase of the Properties due to this issue. (Magera Aff., ¶ 24).<sup>1</sup> The Court fully recognized the legitimacy of this action by Buku pursuant to the terms of the contracts. (January 27, 2010, Memorandum Decision, p. 8). Consequently, Buku did not breach the Agreements in any way, and Defendants' argument should be disregarded. Furthermore, because Defendants have failed to produce any written amendments or waivers which would modify the Agreements in any manner to entitled Defendants to retain the earnest money, Buku's Motion for Summary Judgment on the issue of

---

<sup>1</sup> Defendants repeatedly state that Buku's citing of the zoning problems as the reason for not closing on the Agreements fails because, based on the Affidavit of Naysha Foster, "[t]he subject land was to be treated as R-1 purposes [sic] for this case." (Defendants' Memo, p. 12). Defendants ignore the fact that the *potential* grandfathering in of the Properties was not addressed by Jefferson County until March of 2008, three months *after* the closing failed to occur on the basis of the zoning issues. (*See* Affidavit of Naysha Foster, Ex.3).

specific performance of the contract and refund of its earnest monies and interest, pursuant to the terms of the Agreements, should be granted.

**B. Defendants' Cannot Rely on Part Performance or any Other Equitable remedy to Alter the Terms of the Clark and Peterson Agreements.**

Defendants continue to argue that the parties entered into negotiations after the Agreements terminated and that those negotiations somehow bound Buku to purchase the Properties or forfeit its earnest monies. Defendants provide that they are "not trying to remove or change the clear language of the original contracts; but rather are trying to show to the ultimate fact-finder that they (defendants) were lead down a path to believe the original contract would be enforced and/or should be enforced as to the damages sustained by the Defendants."

(Defendants' Memo., p. 13). Defendants cannot use equitable remedies to avoid the written agreements. *See Bates v. Seldin*, 146 Idaho 772, 776-77, 203 P.3d 702,706-07(2009). Even if promises were made, which Plaintiff denies, Defendants knew revisions to the Agreements had to be in writing. Defendants could not have relied on any statements under the circumstances. Defendants assert that these unwritten alleged oral agreements are enforceable and not barred by the statute of frauds through the doctrine of part performance. In support of this argument, Defendants state that "Buku continued to exert control and domination [sic] over the real properties of both Clark and Peterson."

Defendant's arguments regarding part performance are nonsensical. Part performance is an exception to the statute of frauds which would otherwise bar an oral agreement. *See International Bus. Machines v. Lawhorn*, 106 Idaho 194, 198-99, 677 P.2d 507, 511-12 (Ct. App. 1984). Part performance has no application to a written contract. *See Chapin v. Linden*, 144 Idaho 393, 396, 162 P.3d 772, 775 (2007); *Bob Daniels and Sons v. Weaver*, 106 Idaho 535, 542, 681 P.2d 1010, 1017 (1984) ("[S]uch performance must relate to the oral agreement and may not

be referable to another cause, such as the rights and duties provide by a separate written contract.”) Defendants have pled no cause of action for an oral agreement. To the extent Defendants are alleging part performance somehow alters the plain language of the Agreements, Defendants’ arguments fail.

In spite of their failure to plead an oral agreement, Defendants appear to be arguing that the later negotiations somehow created new oral agreements between the parties, that Defendants partially performed on those new oral agreements, and that therefore, enforcement of the alleged oral agreements is not barred by the statute of frauds based upon Defendants’ part performance. The reality is that, although the parties engaged in negotiations to potentially enter into a later agreement to regarding the purchase and sale of the Properties, the parties never actually came to an agreement. (Magera Aff., ¶ 25). However, assuming *arguendo* that the parties had reached some kind of agreement, Defendants’ argument still fails.

Part performance is predicated on the existence of an oral agreement. *Bauchman-Kingston Partnership, LP, v. Haroldsen*, 149 Idaho 87, 233 P.3d 18, 23 (2008) (citing *Bear Island Water Ass’n v. Brown*, 125 Idaho 717, 723, 874 P.2d 528, 534 (1994)). The agreement, however, must be complete, definite and certain in all its terms, or contain provisions which are capable of being reduced to certainty. *Bauchman-Kingston*, 233 P.3d at 23. For a land sale contract to be specifically enforced, the contract must typically contain the minimum provisions of the parties involved, the subject matter thereof, the price or consideration, a description of the property, and all the essential terms of the agreement. *Chapin v. Linden*, 144 Idaho 393, 396, 162 P.3d 772, 775 (2007) (citing *Hoffman v. SV Co., Inc.*, 102 Idaho 187, 190, 628 P.2d 218, 221 (1981)).

Nowhere do Defendants provide the terms of any alleged oral agreements. There are no allegations as to how the earnest money would be treated under the alleged oral agreements. Nor have Defendants provided any other terms of the alleged oral agreements, such as a closing date, terms of financing, or treatment of the home located on the Peterson Property. In fact, the correspondence between the parties attached to the Affidavit of Jerry and Betty Peterson in Support of Defendants' Position Re: Summary Judgment as Exhibit BB clearly indicates that the terms of any alleged later oral or written agreement were never finalized, and were significantly different from the terms of the original Agreements. In the absence of the alleged terms of the alleged later oral agreements, it is impossible for the Court to even consider the application of past performance.

Even if it is assumed that there was a subsequent oral agreement regarding the purchase of the Properties and that agreement had the same terms as the original Agreements, Defendants can point to no portion of the Agreements under which they have performed. Defendants claim that some alleged exercise of dominion and control over the Property by Buku is sufficient for part performance on the part of Defendants. No where is this addressed as a term of the original Agreements. Moreover, as Buku previously explained in its Memorandum in Support of Plaintiff's Second Motion for Summary Judgment, Buku did not exercise dominion and control over either of the Properties. (*See* Memorandum in Support of Plaintiff's Second Motion for Summary Judgment, p. 19-15). Buku will not repeat those arguments, but it clearly demonstrated the Petersons and Clarks retained control over their properties based on their straightforward admissions in their deposition testimony. Defendants have not partially performed on any agreements which existed between the parties. Therefore, partial performance, cannot save any alleged subsequent oral agreement from being barred by the statute of frauds. Further,

355

Defendants reliance on any other equitable remedy to avoid the written agreements is not permissible. Buku is entitled to summary judgment.

**C. The Facts Before the Court Resolve the Question of Whether Buku Could Terminate the Agreements and was Entitled to a Return of Earnest Monies.**

Defendants argue that “[t]he controverted facts still do not solve the unresolved question of whether the Plaintiffs could unilaterally terminate a contract, partially performed, by the assumption of zoning issues.” (Defendants’ Memo., p 18). Again, partial performance has no relevance to a written agreement. The Court has in front of it all of the facts necessary to resolve this case as to the Agreements between the parties and the return of the earnest monies because nothing more is needed other than the plain language of the Agreements. The Agreements require any amendments or waivers modifying the Agreements to be in writing. The Agreements provide that:

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 Aff., Ex. A, ¶ 3; Ex. B, ¶ 3). Because of the zoning problems that arose, Buku was unable to obtain the necessary financing for the purchase. Buku gave Defendants that opportunity to cure the zoning defect, and offered to amend the Agreements, in writing, in order to allow Defendants sufficient time to cure. However, Defendants refused, the closing date passed without Defendants curing the zoning defect, and the contract terminated. As the Court has already recognized, “[p]otential zoning changes and their impact on financing are precisely the types of issues typically dealt with during the due diligence phase of a real estate transaction.” Contrary to Defendants’ assertions, the zoning defect remained at the time of closing. (See Affidavit of Naysha Foster, Ex. 3, indicating that Jefferson County did not provide Buku with

356

correspondence regarding the *potential* grandfathering of the Properties in question as being zoned R-1 until late March 2008, three months after closing would have occurred). After the closing date passed without Defendants curing the zoning defect, Buku was entitled to a return of its earnest monies, pursuant to the terms of the Agreements. (Magera Aff., Ex. A, ¶¶ 2,3; Ex. B ¶¶ 2,3). No written amendments or waivers were executed. The parties did not enter into any later agreements. Consequently, specific performance of the Agreements requires the return of the earnest monies to Buku and summary judgment in Buku's favor.

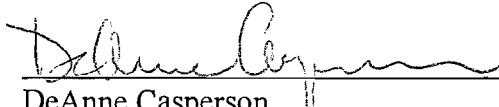
**D. Defendants' Claim and Summary Judgment in Buku's Favor for Summary Judgment is Untimely and Improper, and Should Not Be Considered by the Court**

In Defendants' Memorandum they state: "[t]he defendants/counter-plaintiffs are entitled to summary judgment on the issue of liability on their counterclaims" and further provide, "[s]ince plaintiff breached the contract, the defendants are clearly entitled to liability on their counterclaim for breach of contract." (Defendants' Memo, p. 13). Defendants have not actually filed any motion for summary judgment, nor have Defendants served Buku with a Notice of Hearing indicating that its motion for summary judgment will be heard at the December 13, 2010, hearing on Buku's Second Motion for Summary Judgment. Given Defendants' untimely and improper argument, Defendants claim for Summary Judgment should not be considered by the Court.

### III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court grant its Second Motion for Summary Judgment and order the return of Plaintiff's earnest monies.

Dated this 6<sup>TH</sup> day of December, 2010.

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

G:\WPDATA\CAH\14918\pids\Summary Judgment.2d.REPLY.wpd

3/26



**CERTIFICATE OF SERVICE**

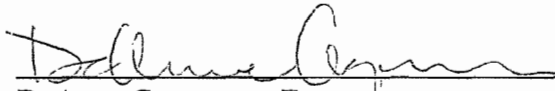
I hereby certify that on this 6th day of December 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:    REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S  
SECOND 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.

351

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 DEC - 6

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

**MOTION TO STRIKE**

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 Plaintiff Buku Properties, LLC ("Buku"), by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, PLLC, and move this Court to strike the portions of the Affidavit of Jerry and Betty Peterson in Support of Defendants' Positions Re: Summary Judgement, filed November 29, 2010; the Affidavit of Jerry and Betty Peterson in Support of Defendants' Positions Re: Summary Judgement, filed November 13, 2009; and the Affidavit of Rael Clark in Support of Defendants' Positions Re: Summary Judgement, filed November 13, 2009. This Motion is supported by Buku's Memorandum in Support of Motion to Strike and the Affidavit of DeAnne Casperson in Support of Motion to Strike, filed simultaneous herewith.

Dated this 6<sup>TH</sup> day of December, 2010.

  
DeAnne Casperson

12/10

## CERTIFICATE OF SERVICE


I hereby certify that on this 6th day of December 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: MOTION TO STRIKE**

**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\CAH\14918\Pldgs\Strike.MOT.wpd

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 DEC - 6

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 SUPPORT OF  
MOTION TO STRIKE**

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 Plaintiff Buku Properties, LLC (“Buku”), by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, PLLC, and submits this Memorandum in Support of Motion to Strike.

## **I. STATEMENT OF FACTS**

Defendants Rael H. Clark and Janet C. Clark (“Clarks”) and Angus Jerry Peterson and Betty Jean Peterson (“Petersons”) (collectively “Defendants”) submitted their Memorandum Re: Summary Judgment Plaintiff’s Second Motion in response to Buku’s Second Motion for Summary Judgment, on November 29, 2010 (“Defendants’ Memorandum”). Along with Defendants’ Memorandum, Defendants submitted the Affidavit of Jerry and Betty Peterson in Support of Defendants’ Positions Re: Summary Judgment (“Second Peterson Affidavit.”). Defendants have also previously submitted to the Court the Affidavit of Jerry and Betty Peterson in Support of Defendants’ Positions Re: Summary Judgment (“Original Peterson Affidavit”) and the Affidavit of Rael Clark in Support of Defendants’ Positions Re: Summary Judgment (“Original Clark Affidavit”). Portions of the such affidavits contain legal conclusions, hearsay, or lack foundation, and further, portions of such affidavits constitute a “sham” and are therefore inadmissible. Consequently, Buku objects to those portions of the affidavits and requests that the Court strike those portions of the affidavits from the record.

## **II. ARGUMENT**

### **A. Second Peterson Affidavit**

Buku moves to strike the following portions of the Second Peterson Affidavit for the reasons specified below:

#### **1. Paragraph 9:**

The Brad Foster affidavit states that Mr. Foster contacted Jerry Peterson concerning the farming of the Peterson property for the 2008 year. Mr. Foster indicated Jaramie Magera had sent him to me to inquire as to the status. As such, I believed Mr. Foster was acting on directions from Magera as his implied agent. I explained to Mr. Foster that Magera could do whatever he wanted with the real property if the final payments were made on the contract. If payments were not made, then I instructed Mr. Foster that my son was going to rent the ground for 2008. Mr. Foster and myself were both unsure who "owned the ground" as stated in his affidavit. Your affiant believed that Magera was still in control of the real property. I had no further dealings with Brad Foster.

(Second Peterson Aff., ¶ 9). This testimony contradicts Mr. Peterson's testimony at his deposition. Mr. Peterson stated the following at his deposition:

Q. (Ms. Casperson) You indicate that in March, you don't have a date, that Brad Foster called you; is that correct?

A. (Mr. Peterson) That's correct.

Q. And specifically tell me what you can recall Mr. Foster told you.

A. Mr. Foster said that Jaramie called him and wanted him to rent the farm. He asked me if it was in pasture. I said yes, but Jaramie hadn't bought the place yet. He said, oh, he hasn't. He said I understand he's going to. I said, well, when he buys it, he can do what he wants, but if he don't buy it, why, I'm going to let Steve run it.

Q. And that's what you did, correct?

A. That's what I did.

[. . .]

Q. You specifically testified that you told Brad Foster that until Buku actually paid you the money they weren't going to get to use that pastureland, correct?

A. Yeah, and Brad said he didn't want to get in – I said Magera hadn't bought it yet. When he bought it, he could do whatever he wanted with it, but until then Steve would run it. And he says, well, I don't want to get involved in it then.

(Affidavit of DeAnne Casperson in Support of Motion to Strike ("Casperson Aff."), Ex. A ("Peterson Depo."), p. 58, l. 7-18; p. 68, ln. 11-20). Mr. Peterson's deposition testimony clearly indicates that he was well aware that he "owned the ground," and furthermore, that Mr. Magera was not "in control of the real property." Mr. Peterson's affidavit contradicts this sworn testimony.

Statements in an affidavit which directly contradict deposition testimony may be disregarded on a summary judgment motion. (See *Tolmie Farms, Inc. v. J. R. Simplot Co.*, 124 Idaho 607, 610, 862 P.2d 299, 302 (1993) and *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 (9<sup>th</sup> Cir. 1991) (explaining the “sham affidavit” rule: “The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.” “[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” (Internal citations omitted)). To the extent that the testimony in Mr. Peterson’s affidavit contradicts his sworn deposition testimony, such testimony in Mr. Peterson’s affidavit should be stricken from the record and should not be considered by the Court.

**2. Paragraph 10(excerpt):**

Kip [sic] Archibald, realtor, was not hired by the undersigned but was hired to sell real estate by Jaramie Magera . . .

(Second Peterson Aff., ¶ 10). The above statement lacks foundation and, further, Mr. Peterson has demonstrated no personal knowledge as to this matter. Therefore, such statement should be stricken from the record and disregarded by the Court.

**3. Paragraph 8:**

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.

**Paragraph 14:**

Your affiants believed that the plaintiff breached the contract by not closing on December 21, 2007.

**Paragraph 17:**



Your affiants believe and allege that the plaintiff is liable for damages and/or is requested to perform on the contract (Specific Performance).

(Second Peterson Aff., ¶¶ 8, 14, 17). The above statements are legal conclusions. Defendants have brought causes of action against Buku for breach of contract and specific performance. Because Mr. Peterson's statements regarding whether Buku breached the contract or whether Defendants are entitled to specific performance are legal conclusions, and not statements of fact, those portions of Mr. Peterson's affidavit should not be considered by the Court.

**B. Original Peterson Affidavit**

Buku moves the Court to strike the following portions of the Original Peterson Affidavit:

**1. Paragraph 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 affiant 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.

(Original Peterson Aff., ¶ 12). This testimony contradicts the deposition testimony of Mr.

Peterson with regard to his knowledge of Buku's intention to develop the Peterson property:

Q. (Ms. Casperson) So if I understand your testimony correctly is that you understood that Buku was purchasing the property for purposes of developing it. You just didn't have any knowledge about how they intended to develop it?

A. (Mr. Peterson) No. I didn't know whether they were going to try to have half-acre lots or whatever. I didn't know.

Q. But you did understand that they were purchasing it for purposes of developing it?

A. Yes.

(Peterson Depo., p. 18, ln. 22 - p. 19, ln. 7). Because Mr. Peterson's affidavit contradicts his deposition testimony, paragraph 12 of Mr. Peterson's affidavit constitutes a "sham." Clearly, Mr.

Peterson was well aware that the Peterson property was being purchased for the purpose of development. (See argument above regarding the legal basis for striking “sham” affidavit testimony). Therefore, to the extent that Mr. Peterson’s testimony in the Original Peterson Affidavit contradicts his deposition testimony, the Court should disregard the testimony in the Original Peterson Affidavit and such testimony should be stricken from the record.

**2. Paragraph 18 (excerpt):**

The plaintiff exercised dominion and control over the real properties contained in the written contracts of the defendants/counter-plaintiffs. . .

**Paragraph 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.

**Paragraph 28:**

Your affiants believe and allege that the plaintiff is liable for damages and/or is requested to perform on the contract (Specific Performance).

(Original Peterson Aff., ¶¶ 18, 26, 28). The above statements are legal conclusions. Defendants have brought causes of action against Buku for breach of contract and specific performance. Because Mr. Peterson’s statements regarding whether Buku breached the contract or whether Defendants are entitled to specific performance are legal conclusions, and not statements of fact, those portions of Mr. Peterson’s affidavit should not be considered by the Court.

**C. Original Clark Affidavit**

Buku moves to strike the following portions of the Original Clark Affidavit:

**1. Paragraph 11:**

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 affiant 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.

**2. Paragraph 16 (excerpt):**

... The real property of the undersigned was used for farming by the buyer throughout the 2008 farm year.

(Original Clark Aff., ¶ 11, 16). This testimony contradicts the deposition testimony of Mr. Clark with regard to his knowledge of Buku's intention to develop the Peterson property and the fact that Buku did not farm the Clark Property in 2008:

Q. (Ms. Casperson) And in 2007 you began having negotiations with Mr. Magera and either Jab Construction or Buku with regard to the purchase of the property; is that correct?

A. (Mr. Clark) Yes.

Q. And isn't it true when Mr. Magera had those negotiations with you that he drove you to other developments that he had done?

A. Yes.

Q. And you understood at the time that the purpose of purchasing that property was to develop it; correct?

A. Yes.

[...]

Q. So how did Buku control that property after the agreement did not close in December?

A. Well, I was hoping that it would continue on. But as to whether – I don't know who owned what. The property never left my ownership, and it wouldn't until it was paid for.

Q. Okay. And you agreed to allow Mr. Foster to farm that land, correct?

A. Sure. You know, if you let it go, it turns to weeds. Somebody had to make a call on it.

Q. And you agreed you were the person that did that?

A. I did. I mean, I was told by Brad that Mr. Magera asked him to call me and see if it was all right.

Q. So you're not alleging that Buku actually received any profits off of you property, correct?

A. I don't know that they did. I don't see how they could.

369

(Casperon Aff., Ex. B (“Clark Depo.”), p. 6, ln. 22 - p.7, ln. 9; p. 30, ln. 17 - p. 31, ln. 11).

Because Mr. Clark’s affidavit contradicts his deposition testimony, paragraphs 11 and 16 of his affidavit constitute a “sham.” Clearly, Mr. Clark was well aware that the Clark Property was being purchased for the purpose of development. Additionally, it is clear that Mr. Clark’s testimony is that Brad Foster farmed the land, not Buku. (See argument above regarding the legal basis for striking “sham” affidavit testimony). Therefore, to the extent that Mr. Clark’s testimony in the Original Clark Affidavit contradicts his deposition testimony, the Court should disregard the testimony in the Original Clark Affidavit and such testimony should be stricken from the record.

**3. Paragraph 16 (excerpt):**

The plaintiff exercised dominion and control over the real properties contained in the written contracts of the defendants/counter-plaintiffs. . .

**Paragraph 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.

**Paragraph 22:**

Your affiant believes and alleges that the plaintiff is liable for damages and/or is requested to perform on the contract (Specific Performance).

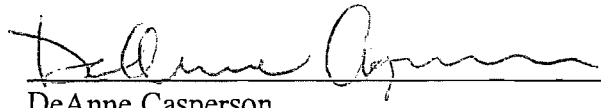
(Original Clark Aff., ¶¶ 16, 20, 22). The above statements are legal conclusions. Defendants have brought causes of action against Buku for breach of contract and specific performance. Because Mr. Clark’s statements regarding whether Buku breached the contract or whether Defendants are entitled to specific performance are legal conclusions, and not statements of fact, those portions of Mr. Clark’s affidavit should not be considered by the Court.

370

III. CONCLUSION

Based on the foregoing, Buku respectfully requests that the Court grant its Motion to Strike.

Dated this 6<sup>th</sup> day of December, 2010.

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

G:\WPDATA\CAH\14918\Pldgs\Strike.MEMO.wpd:ah

1/11

**CERTIFICATE OF SERVICE**


I hereby certify that on this 6th day of December 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 SUPPORT OF MOTION TO STRIKE**

**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.

43

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 DEC - 6

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,

Case No. CV-08-941

Plaintiff,

**AFFIDAVIT OF DEANNE CASPERSON  
IN SUPPORT OF MOTION TO STRIKE**

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.

374

STATE OF IDAHO            )  
  )ss.  
County of Bonneville        )

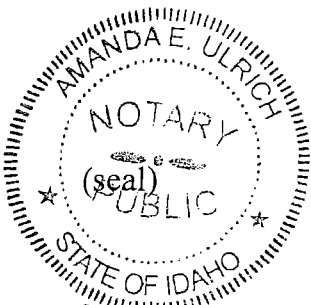
DeAnne Casperson, being first duly sworn on oath, deposes and states as follows:

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 Motion to Strike.
2. On April 13, 2010, I took the deposition of Defendant Angus Jerry Peterson. Attached hereto as Exhibit A are relevant portions of the transcript of such deposition.
3. On April 13, 2010, I took the deposition of Defendant Rael H. Clark. Attached hereto as Exhibit B are relevant portions of the transcript of such deposition.

Dated this 10<sup>th</sup> day of December, 2010.

DeAnne Casperson  
DeAnne Casperson

SUBSCRIBED AND SWORN to before me this 10<sup>th</sup> day of December, 2010.



Amanda E. Ulrich  
Notary Public for Idaho  
Residing at: Idaho Falls, ID  
My commission expires: Oct. 31, 2014

315



**CERTIFICATE OF SERVICE**

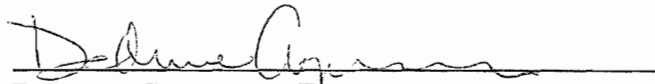
I hereby certify that on this 6TH day of December, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                    **AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MOTION TO STRIKE**

**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\CAH\14918\Pldgs\Strike.DC.AFF.wpd

316

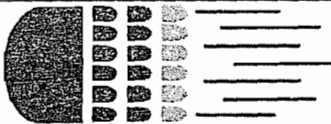
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

BUKU PROPERTIES, LLC, an Idaho )  
limited liability company, )  
 ) Case No.  
 ) CV-08-941  
Plaintiff, )  
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, )  
 )  
Counter-Defendants, )

DEPOSITION OF ANGUS JERRY PETERSON

Tuesday, April 13, 2010, 11:04 a.m.

Rigby, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

**COPY**

REPORTED BY:

Sandra D. Terrill,  
RPR, CSR

PREPARED FOR:

MS. CASPERSON Post Office Box 51020  
IDAHO FALLS, IDAHO 83405

208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

EXHIBIT

A

tabbles

1 selling, I have no idea how much it was.  
 2 **Q. You indicated that you had received an**  
 3 **offer to sell your property several years earlier,**  
 4 **correct?**  
 5 A. That's right.  
 6 **Q. And how much were they going to pay**  
 7 **you per acre?**  
 8 A. They were going to pay me \$5,000 an  
 9 acre for farming ground.  
 10 **Q. And their purpose, was it to develop**  
 11 **it?**  
 12 A. They were going to develop it.  
 13 **Q. And you're not familiar with anyone**  
 14 **else who has sold property for farming purposes and**  
 15 **what the going rate was for that?**  
 16 A. No.  
 17 **Q. Did you have an understanding of what**  
 18 **the going rate was for acreage for purposes of**  
 19 **development?**  
 20 A. I never paid any attention to that,  
 21 only just going by and saying they wanted 30,000,  
 22 40,000 by -- I think it was one of his properties  
 23 over there on the county line. It seemed to me.  
 24 It might be wrong. It seemed like they wanted  
 25 \$40,000 an acre for it.

1 **they intended to develop it?**  
 2 A. No. I didn't know whether they were  
 3 going to try to have half-acre lots or whatever. I  
 4 didn't know.  
 5 **Q. But you did understand that they were**  
 6 **purchasing it for purposes of developing it?**  
 7 A. Yes.  
 8 **Q. Now, in 2007 after you entered into**  
 9 **this agreement with Buku, tell me what your**  
 10 **understanding was as to the county's action with**  
 11 **regard to possibly changing the zoning?**  
 12 A. Mr. Magera called me and said that  
 13 they was having a meeting on planning and zoning.  
 14 They wanted to change it. Wanted us to come to the  
 15 meeting.  
 16 **Q. Had you heard from other people --**  
 17 A. No.  
 18 **Q. Can I finish the question?**  
 19 A. Okay.  
 20 **Q. Had you heard from other people that**  
 21 **the county was interested in possibly changing the**  
 22 **zoning?**  
 23 A. Not until he told me.  
 24 **Q. And did you attend that zoning**  
 25 **meeting?**

1 **Q. And what was your understanding from**  
 2 **the contract that you entered into with Buku what**  
 3 **you were being paid per acre for your property?**  
 4 A. Well, I was paid so much for the  
 5 acreage, and I was paid -- and then I was paid so  
 6 much for the house.  
 7 **Q. Did you have an understanding as to**  
 8 **what you were being paid per acre for the land?**  
 9 A. I was being paid -- I can look it up.  
 10 **Q. You'd have to look at the purchase**  
 11 **agreement; is that what you're saying?**  
 12 A. Yeah.  
 13 **Q. I think there's a copy of it right**  
 14 **here. I think that one is Mr. Clark's. You can go**  
 15 **ahead and take a look at Exhibit \*-B. Do you have**  
 16 **a rough idea of what you were being paid per acre?**  
 17 A. Okay. I was being paid \$653,000.  
 18 **Q. And this was roughly for 73 acres; is**  
 19 **that correct?**  
 20 A. Approximately 73 acres. 72 acres it  
 21 says on the contract.  
 22 **Q. So if I understand your testimony**  
 23 **correctly is that you understood that Buku was**  
 24 **purchasing the property for purposes of developing**  
 25 **it. You just didn't have any knowledge about how**

1 A. I attended that meeting.  
 2 **Q. Did Mr. Magera explain to you why he**  
 3 **wanted you to attend that meeting?**  
 4 A. He said to come in and have anybody  
 5 else that was interested in coming.  
 6 **Q. Did he explain to you what Buku's**  
 7 **concern was with regard to the county changing the**  
 8 **zoning?**  
 9 A. Well, he didn't want it changed.  
 10 **Q. Why didn't he want it changed?**  
 11 A. Well, I'm sure he didn't want it  
 12 changed because he wanted either one-acre lots or  
 13 less.  
 14 **Q. Did you go to that meeting for the**  
 15 **purposes of contesting the county changing that**  
 16 **zoning?**  
 17 A. I went to the meeting, but I never  
 18 said a word.  
 19 **Q. What was your purpose in attending the**  
 20 **meeting?**  
 21 A. He asked me to come and go.  
 22 **Q. That was the only reason you went?**  
 23 A. That was the only reason I knew about  
 24 it.  
 25 **Q. And did you ever attend any other**

DEPOSITION OF ANGUS JERRY PETERSON - 04/13/2010

SHEET 13 PAGE 49

PAGE 51

1 that Mr. Archibald called you and asked you what  
 2 you wanted to do with the house, correct?  
 3 A. Yes, he did.  
 4 Q. And at that time you were still the  
 5 owner of that property, correct?  
 6 A. That's right.  
 7 Q. And as the owner of the property, you  
 8 would be the only one who would have authority to  
 9 decide whether or not to sell that property,  
 10 correct?  
 11 MR. DUNN: Objection. Legal conclusion.  
 12 And leading again.  
 13 THE WITNESS: I was the owner of the  
 14 property. But we were still figuring on selling  
 15 it, because he said if it would -- the zoning was  
 16 changed. And the zoning wasn't changed. And so I  
 17 told him to get a hold of Mr. Magera and Mr. Dunn,  
 18 because it wasn't up to me, because I had already  
 19 had a thing that was supposed to be in place, and  
 20 it was -- still hadn't -- completely hadn't gone,  
 21 because he had wanted to go to the 31st of March.  
 22 Q. BY MS. CASPERSON: But this was past  
 23 the 31st of March even -- I'm sorry. You refused  
 24 to sign that document, correct, extending the  
 25 closing date?

1 changed.  
 2 Q. How did you know he still wanted it?  
 3 A. He told me that.  
 4 Q. When?  
 5 A. Well, he told me here, and he told me  
 6 on that meeting, that meeting we went to.  
 7 Q. Now, we've specifically been over your  
 8 statement that you prepared for December 12th, and  
 9 during that meeting you had already testified that  
 10 he specifically said that they wouldn't pay if the  
 11 zoning went to five-acre lots, correct?  
 12 A. That's right. But it didn't go to  
 13 five-acre lots. Is that correct?  
 14 Q. And you didn't know that in December,  
 15 did you?  
 16 A. What?  
 17 Q. You didn't know whether it had or had  
 18 not in December of 2008, correct?  
 19 A. I didn't know that it had.  
 20 Q. You didn't know that it hadn't either?  
 21 A. No. So that's why we were waiting on  
 22 this -- it wouldn't make any difference.  
 23 Q. Mr. Peterson, you would agree with me  
 24 that at the time you made these notes your memory  
 25 would have been more accurate than it is today?

PAGE 50

PAGE 52

1 A. I didn't sign it, no.  
 2 Q. So as it existed that date, there was  
 3 no document extending the closing, correct?  
 4 A. Only that he still wanted the  
 5 property.  
 6 Q. What document can you show me that he  
 7 still wanted the property on that date?  
 8 A. I haven't got a document.  
 9 Q. And you haven't indicated any kind of  
 10 conversation during that time frame that indicated  
 11 that Mr. Magera still wanted the property, correct?  
 12 A. Yes, I did. Because Brad Foster  
 13 called me, and he said that Jaramie wanted him to  
 14 operate the farm this year.  
 15 Q. Let's back up. That happens in March,  
 16 correct?  
 17 A. You're talking about March here too,  
 18 aren't you?  
 19 Q. I'm talking about January.  
 20 A. January.  
 21 Q. Of 2008.  
 22 A. I don't recall anything about that  
 23 other than the thing was still in limbo, because I  
 24 knew -- I knew that he still wanted it if the  
 25 zoning didn't get changed, and it didn't get

1 A. It probably would. That's why I made  
 2 these notes.  
 3 Q. Prior to Mr. Archibald calling you on  
 4 January 3rd, asking what you wanted to do with the  
 5 house, had you had prior discussions with  
 6 Mr. Archibald?  
 7 A. None. He come out -- him and  
 8 Mr. Magera come out before we moved, and they went  
 9 through the house. He took him through the house,  
 10 and they put it up for sale.  
 11 Q. Were you there?  
 12 A. I was there when they went through the  
 13 house. I wasn't in any of their negotiations. I  
 14 didn't know how much they were going to get or  
 15 anything like that.  
 16 Q. You're saying that you never signed  
 17 the listing agreement with Mr. Archibald?  
 18 A. Never. Never talked to him about it.  
 19 Never signed nothing.  
 20 Q. Did you approve the listing of the  
 21 house with Mr. Archibald?  
 22 A. No.  
 23 Q. But you were there?  
 24 A. I was there when he brought it out.  
 25 And then there was no signing done there. He

1 brought Mr. Archibald out, and they went through  
 2 the house and looked it over.  
 3 **Q. How could Buku list a property that**  
 4 **they didn't own?**  
 5 A. I don't know. But when he called me  
 6 up, Jaramie said that he had the house up for sale,  
 7 and he says would you sign it over, because he said  
 8 I need to -- I need you to sign it. I said, yeah,  
 9 sure, I would.  
 10 **Q. That you would essentially give Buku**  
 11 **Properties the authority to market the house?**  
 12 A. No. I never give authority to do  
 13 anything until he asked me on early in December.  
 14 But this was before December that they come out the  
 15 first time and put a sign out.  
 16 **Q. Did you ever tell Mr. Archibald to**  
 17 **take that sign down?**  
 18 A. Never told him to take the sign down.  
 19 **Q. Did you ever tell him to remove the**  
 20 **lock box?**  
 21 A. I never told him to remove the lock  
 22 box. But he called me and in -- he called me -- he  
 23 called me August 6th. He called me on his cell  
 24 phone, asked about selling the house. I told him  
 25 to talk with Jaramie and said we don't know what's

1 went out there, found a cell phone in the master  
 2 bedroom of the house. And according to a neighbor,  
 3 Earl Coles, the house was still being shown. The  
 4 blinds in the front rooms were open, which I have  
 5 kept closed. The for-sale sign was still up.  
 6 **Q. So you have no idea when that cell**  
 7 **phone was left, correct?**  
 8 A. No.  
 9 **Q. You have no idea when the blinds were**  
 10 **allegedly moved?**  
 11 A. No.  
 12 **Q. Mr. Peterson, if Mr. Archibald had an**  
 13 **agreement with Buku Properties to sell the house,**  
 14 **why would he call you on January 3rd of 2008 and**  
 15 **ask you what you wanted to do with the house --**  
 16 **MR. DUNN: Objection, speculation.**  
 17 **Q. BY MS. CASPERSON: -- to the extent**  
 18 **that you can testify.**  
 19 **MR. DUNN: Objection, speculation. How is**  
 20 **he supposed to know --**  
 21 **THE WITNESS: I don't know but I'll tell**  
 22 **you what I thought. I thought Mr. Magera was**  
 23 **standing right there beside him wanting him to**  
 24 **call.**  
 25 **Q. BY MS. CASPERSON: But you have no**

1 going on right now. We've turned everything over  
 2 to our attorney, Rob Dunn. Kipp said Jaramie still  
 3 wanted the farms, ours and Clarks, and the bank had  
 4 cut down on the loaning percentages.  
 5 **Q. Mr. Peterson, let me take you back to**  
 6 **your January 3rd conversation that you had with**  
 7 **Mr. Archibald. When he asked you what you wanted**  
 8 **to do with the house and you told him to go talk to**  
 9 **your attorney, Mr. Dunn, do you have any knowledge**  
 10 **of whether Mr. Archibald had a conversation with**  
 11 **your attorney?**  
 12 A. I have no idea.  
 13 **Q. So you have no idea what Mr. Archibald**  
 14 **did after that?**  
 15 A. No.  
 16 **Q. But you do know that he continued to**  
 17 **have a sign in front of the house?**  
 18 A. He had a sign in front of the house,  
 19 yes.  
 20 **Q. And he had a lock box on it?**  
 21 A. He had a lock box on it.  
 22 **Q. And was he giving you notification of**  
 23 **any showings that took place?**  
 24 A. No. He wasn't giving me any showings.  
 25 But I went out there and -- on June 27th, 2008, I

1 **evidence of that, correct?**  
 2 A. No. No, I don't.  
 3 **Q. Did you ever ask Mr. Archibald who he**  
 4 **was taking his directions from for purposes of**  
 5 **selling the house?**  
 6 A. No.  
 7 **Q. And you never asked him to remove the**  
 8 **lock box, correct?**  
 9 A. No.  
 10 **MR. DUNN: Objection. Asked and answered.**  
 11 **Q. BY MS. CASPERSON: And you never asked**  
 12 **him to remove the sale sign?**  
 13 **MR. DUNN: Objection. Asked and answered.**  
 14 **Q. BY MS. CASPERSON: Correct?**  
 15 A. No. I never asked him to remove it.  
 16 **Q. And if Mr. Archibald had sold that**  
 17 **property, who would you have expected to get the**  
 18 **proceeds?**  
 19 A. Well, if the property was -- if the  
 20 farm and that would have sold, I would have  
 21 expected him to get the proceeds. But the farm  
 22 wasn't sold, so the house wouldn't have been sold.  
 23 To me, I wouldn't -- I wouldn't have got any  
 24 proceeds because I wouldn't -- I didn't have it up  
 25 for sale. Jaramie is the one that put it up for

388

DEPOSITION OF ANGUS JERRY PETERSON - 04/13/2010

SHEET 15 PAGE 57

1 sale.  
2 Q. Who would have had to sign the  
3 documents in order to transfer title to that  
4 property?  
5 A. I would have. But if he wasn't going  
6 to buy the farm, it wouldn't have been sold. I  
7 didn't have anything to do with selling the  
8 property - selling the house. I had nothing to do  
9 with that. Never talked to Mr. Archibald. He  
10 called me twice. That's the only times that I  
11 talked to him.  
12 Q. So without any understanding as to why  
13 Mr. Archibald was trying to sell it, you just  
14 continued to let the sign stay there and the lock  
15 box stay on it?  
16 A. I thought that he was trying to sell  
17 it for Mr. Magera.  
18 Q. But you never had a conversation with  
19 him about that?  
20 A. No. No.  
21 Q. Now, during this time frame that the  
22 property, you say, had the sign out front, you were  
23 taking care of the property, correct?  
24 A. That's right.  
25 Q. And, in fact, you leased the farmland

PAGE 58

1 to your son for pasture, correct? Is that a yes?  
2 A. Yes.  
3 Q. You indicate that in March, you don't  
4 have a date, that Brad Foster called you; is that  
5 correct?  
6 A. That's correct.  
7 Q. And specifically tell me what you can  
8 recall Mr. Foster told you.  
9 A. Mr. Foster said that Jaramie called  
10 him and wanted him to rent the farm. He asked me  
11 if it was in pasture. I said yes, but Jaramie  
12 hasn't bought the place yet. He said oh, he  
13 hasn't. He said I understand he's going to. I  
14 said, well, when he buys it, he can do what he  
15 wants, but if he don't buy it, why, I'm going to  
16 let Steve run it.  
17 Q. And that's what you did, correct?  
18 A. That's what I did.  
19 Q. So any profits that were made with  
20 regard to that farmland came to you, correct?  
21 A. That's right.  
22 Q. Why didn't you take actions to lease  
23 the house out if you were no longer living there?  
24 A. Because I didn't want to lease it out.  
25 It was in good shape, and I didn't want people to

PAGE 59

1 move in. If he didn't take it and we got it back,  
2 why, then I would sell it.  
3 Q. So you were concerned that any renters  
4 would damage the property?  
5 A. Yes.  
6 Q. You indicated in your prior testimony  
7 on August 6 of 2008 that Kipp Archibald again  
8 called you and asked you about selling the house,  
9 correct?  
10 A. That's right.  
11 Q. And, again, you referred him to  
12 Jaramie and Mr. Dunn, correct?  
13 A. That's right.  
14 Q. And, again, did you have an  
15 understanding as to why Mr. Archibald would be  
16 calling you as to what you wanted done with the  
17 house?  
18 A. He called me, and I told him  
19 everything was turned over to our attorney, Robin  
20 Dunn. And he said Jaramie still wanted the farm,  
21 along with the Clarks', but the bank had cut down  
22 on the loaning percentage.  
23 Q. Isn't it true that later in 2008 that  
24 there were proposals going back and forth between  
25 you and Buku Properties to come to a new agreement

PAGE 60

1 with regard to the sale of the property?  
2 MR. DUNN: Objection. Form of the  
3 question.  
4 THE WITNESS: There was a letter written to  
5 us, I guess, yes.  
6 Q. BY MS. CASPERSON: And isn't it true  
7 that that contained different terms than the  
8 original terms in the purchase and sale agreement?  
9 MR. DUNN: Objection. Leading.  
10 THE WITNESS: Yes.  
11 Q. BY MS. CASPERSON: What did you  
12 understand was the difference between the terms  
13 that were proposed in the letters as opposed to the  
14 terms in the original purchase and sale agreement?  
15 A. They wanted to make payments on it.  
16 Q. And was there ever any contract signed  
17 as a result of those negotiations?  
18 A. Not with me.  
19 (Exhibit \*-J marked.)  
20 Q. BY MS. CASPERSON: I'll hand you what  
21 was previously marked as Exhibit \*-J. Do you  
22 recognize that document?  
23 A. Yes.  
24 Q. Can you identify it for me?  
25 A. Well, it's a letter for the

1 never changed.  
 2 **Q. What does that have to do with Buku**  
 3 **exercising dominion or control over the property?**  
 4 A. You mean I just go sell it and default  
 5 the thing?  
 6 **Q. No. I'm trying to ask you**  
 7 **specifically how Buku was in control over your**  
 8 **property?**  
 9 A. Well, they were in control over the  
 10 house.  
 11 **Q. How were they in control over the**  
 12 **house?**  
 13 A. Had the house locked up.  
 14 **Q. Did you have keys to the house?**  
 15 A. I had a key to the house.  
 16 **Q. Did Buku or Mr. Magera have keys to**  
 17 **the house?**  
 18 A. I gave him the keys.  
 19 **Q. Do you know if he still had those keys**  
 20 **at that time?**  
 21 A. No. He might have gave them to  
 22 Archibald, but he had keys. He had keys and he had  
 23 the door openers. And he's never returned the door  
 24 openers.  
 25 **Q. Are you aware of any time when any**

1 **gave your son the right to use the pastureland?**  
 2 A. That's right.  
 3 **Q. So you're not asserting that Buku --**  
 4 **A. No.**  
 5 **Q. -- had any kind of dominion or**  
 6 **control --**  
 7 A. No.  
 8 **Q. -- over the pasture land -- let me**  
 9 **finish. You're not asserting that Buku had any**  
 10 **kind of control over the pastureland, correct?**  
 11 A. That's right.  
 12 **Q. And your only evidence that Buku was**  
 13 **controlling the house was your assumption that**  
 14 **Mr. Archibald was acting on behalf of Buku,**  
 15 **correct?**  
 16 A. That's right.  
 17 **Q. And any profits that were made with**  
 18 **regard to the pastureland came to you, correct?**  
 19 A. That's right.  
 20 **Q. And you're not aware of any payments**  
 21 **that Buku received as a result of having any kind**  
 22 **of control or dominion over that property?**  
 23 A. No.  
 24 **Q. And you never observed anyone actually**  
 25 **going through the property other than the cell**

1 **agent of Buku was on your property after this**  
 2 **purchase and sale agreement failed to close?**  
 3 A. Well, only Archibald.  
 4 **Q. And you never had any discussion with**  
 5 **Archibald as to who he understood he was**  
 6 **representing?**  
 7 A. Well, I just assumed he was  
 8 representing him because he brought him out to our  
 9 place and went through the house. And they was  
 10 taking notes down and size of the rooms and what  
 11 was done down in the basement and everything else.  
 12 **Q. And isn't it true that that all**  
 13 **happened prior to the contract being closed,**  
 14 **correct?**  
 15 A. That's right.  
 16 **Q. And after that happened on January**  
 17 **3rd, Mr. Archibald specifically called you and said**  
 18 **what do you want me to do with the property?**  
 19 A. Yes. He said -- and I told him he had  
 20 to talk to Magera and to Rob Dunn.  
 21 **Q. And you don't have any knowledge as to**  
 22 **whether he did any of those things?**  
 23 A. No. I talked to him twice is all I  
 24 ever talked to him.  
 25 **Q. Isn't it true that you specifically**

1 **phone that you found in there, the blinds being in**  
 2 **a different position, and then this statement that**  
 3 **you have from your neighbor that it was shown; is**  
 4 **that correct?**  
 5 A. I've never seen anybody in there  
 6 myself, no.  
 7 **Q. And it was true during this time that**  
 8 **you and your wife were still maintaining and caring**  
 9 **for the property, correct?**  
 10 A. That's right.  
 11 **Q. You specifically testified that you**  
 12 **told Brad Foster that until Buku actually paid you**  
 13 **the money they weren't going to get to use that**  
 14 **pastureland, correct?**  
 15 A. Yeah. And Brad said he didn't want to  
 16 get in -- I said Magera hadn't bought it yet. When  
 17 he bought it, he could do whatever he wanted with  
 18 it, but until then Steve would run it. And he  
 19 says, well, I don't want to get involved in it  
 20 then.  
 21 **Q. Why didn't you tell Mr. Archibald the**  
 22 **same sort of thing?**  
 23 A. Well, I didn't know Mr. Archibald was  
 24 selling the ground.  
 25 **Q. But you knew he was trying to sell the**

1 afford, we bought it. And he knew that we were  
 2 buying it.  
 3 MS. CASPERSON: Why don't we take a break.  
 4 (A recess was taken from 12:33 p.m. to  
 5 12:53 p.m.)  
 6 Q. BY MS. CASPERSON: Mr. Peterson, you  
 7 had indicated that you had provided a key and a  
 8 garage door opener to the house. And you said that  
 9 that was to Mr. Magera; is that correct?  
 10 A. That's right.  
 11 Q. And isn't it true that when you  
 12 provided that was at the meeting that you and  
 13 Mr. Archibald and Mr. Magera had at your house?  
 14 A. No.  
 15 Q. When was it that you provided that?  
 16 A. It was before that, I took the key  
 17 over to his office.  
 18 Q. And the garage door opener at that  
 19 time too?  
 20 A. And two garage door openers at that  
 21 time.  
 22 Q. During the time that you negotiated  
 23 this purchase and sale agreement with Buku  
 24 Properties, was your wife ever present?  
 25 A. Yes - no. Not until we got the

1 a few questions. They walked through the house.  
 2 That's all.  
 3 Q. When you looked at the document, I  
 4 think which was previously marked as Exhibit \*-I,  
 5 which was your notes that you prepared from your  
 6 handwritten notes, do any of those conversations  
 7 reflect conversations that your wife had?  
 8 A. No.  
 9 Q. These are all your conversation; is  
 10 that correct?  
 11 A. That's right.  
 12 Q. Did you ever receive any  
 13 correspondence from your attorney regarding any  
 14 risks that you might face as a result of using the  
 15 earnest money prior to the closing of this purchase  
 16 and sale agreement?  
 17 A. No.  
 18 MS. CASPERSON: I have nothing further.  
 19  
 20 EXAMINATION  
 21 BY MR. DUNN:  
 22 Q. Can I have you look at Exhibit \*-J,  
 23 paragraph No. 12. Counsel didn't have you read the  
 24 entire paragraph, took only a portion of it. Could  
 25 you begin with that sentence where my finger is

1 contracts, no.  
 2 Q. When you went to the meeting for the  
 3 county zoning issues, was your wife present?  
 4 A. No.  
 5 Q. And were you typically the one who was  
 6 dealing with any of the issues that have arose as a  
 7 result of the purchase and sale agreement?  
 8 A. We agreed on it. Yeah. We talked  
 9 back and forth, yes.  
 10 Q. What I'm asking you is as between you  
 11 and your wife, were you the one that was handling  
 12 the issues that arose as a result of the purchase  
 13 and sale agreement?  
 14 A. We talked it over. I talked it over  
 15 with her before I done any of it. Yeah, she was --  
 16 I was the one that done it.  
 17 Q. But you were the one who having  
 18 discussions with Mr. Magera?  
 19 A. That's right.  
 20 Q. And you were the one who was having  
 21 discussions with Mr. Archibald?  
 22 A. I had - only when he called me those  
 23 two times, the only time I ever talked to  
 24 Mr. Archibald, other than the time that they come  
 25 out and walked - I said hello to him, and he asked

1 pointing?  
 2 A. Your affiants did know, however, that  
 3 the plaintiffs were in the business of land  
 4 speculation and development. Moreover the sale of  
 5 the real property written by the contract never  
 6 contained any language of speculative purposes or  
 7 of development.  
 8 Q. So you knew that the plaintiffs were  
 9 in the business of land speculation and  
 10 development?  
 11 MS. CASPERSON: Objection. Leading and  
 12 suggestive.  
 13 THE WITNESS: Yes.  
 14 Q. BY MR. DUNN: And you also knew that  
 15 they were going to develop this, correct?  
 16 A. Yes.  
 17 MS. CASPERSON: Objection. Leading.  
 18 Q. BY MR. DUNN: But you did not know,  
 19 however, how they were going to develop it?  
 20 MS. CASPERSON: Same objection.  
 21 THE WITNESS: No, I didn't know how they  
 22 were going to.  
 23 Q. BY MR. DUNN: And you didn't know if  
 24 it would be any type - what type of lots, correct?  
 25 MS. CASPERSON: Same objection. Can I have



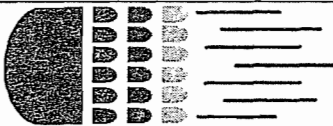
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

BUKU PROPERTIES, LLC, an Idaho )  
 limited liability company, )  
 ) Case No.  
 Plaintiff, ) 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. )  
 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, )  
 )  
 Counter-Defendants, )

**DEPOSITION OF RAOEL H. CLARK**

Tuesday, April 13, 2010, 9:52 a.m.

Rigby, Idaho

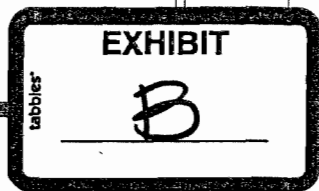


**T&T REPORTING**  
CERTIFIED SHORTHAND REPORTERS

**COPY**

REPORTED BY:  
Sandra D. Terrill,  
RPR, CSR

PREPARED FOR:  
MS. CASPERSON Post Office Box 51020  
IDAHO FALLS, IDAHO 83405  
208.529.5491 • FAX 208.529.5496 • 1.800.529.5491



1 taken before?  
 2 A. No.  
 3 Q. I just want to go over a few ground  
 4 rules, and they're really for me and for you, and  
 5 they help us prepare an adequate transcript. The  
 6 first of which is I can tell you at some point  
 7 throughout this deposition I'm going to ask a  
 8 poorly worded question. If you don't understand  
 9 what I'm asking, please just say will you repeat  
 10 that or have me rephrase, and I will do so.  
 11 A. Okay.  
 12 Q. Otherwise I'm going to assume that you  
 13 understand the question. The second is that I need  
 14 you to answer in a yes or a no or some kind of  
 15 explanation. We have a tendency to nod our head  
 16 and say uh-huh.  
 17 A. Okay.  
 18 Q. And those are very difficult for the  
 19 court reporter to take down. If you can remind me,  
 20 I'll remind you, because I'm sure we'll both do it.  
 21 The third thing is that at any time that you need  
 22 to take a break, although I don't think it's going  
 23 to be a very lengthy deposition, you're welcome to  
 24 do so, although I would ask that you answer the  
 25 question that's currently on the table.

1 Is there any reason why you can't  
 2 testify truthfully today?  
 3 A. I don't know of any.  
 4 Q. Thank you. Can you tell me what your  
 5 current address is?  
 6 A. I live in Frisco, Texas.  
 7 Q. And when did you move to Frisco,  
 8 Texas?  
 9 A. I moved two days after Thanksgiving in  
 10 '77, I think -- 2007. Criminy.  
 11 Q. And prior to living in Texas where did  
 12 you live?  
 13 A. We lived at 286 East 4100 North. Is  
 14 that right? Yes.  
 15 Q. And is that the property that is at  
 16 issue in this litigation?  
 17 A. Nearby, yes.  
 18 Q. And, in fact, you had a house and then  
 19 a substantial amount of farm property; is that  
 20 correct?  
 21 A. Yes.  
 22 Q. And in 2007 you began having  
 23 negotiations with Mr. Magera and either Jab  
 24 Construction or Buku with regard to the purchase of  
 25 that property; is that correct?

1 A. Yes.  
 2 Q. And isn't it true when Mr. Magera had  
 3 those negotiations with you that he drove you to  
 4 other developments that he had done?  
 5 A. Yes.  
 6 Q. And you understood at the time that  
 7 the purpose for purchasing that property was to  
 8 develop it; correct?  
 9 A. Yes.  
 10 Q. Isn't it true that you understood that  
 11 in order for Buku or Jab to pay you the amount of  
 12 money that they offered, that they would need to  
 13 develop that into one-acre lots?  
 14 A. I'm not sure initially I did but just  
 15 developed.  
 16 Q. And when was it that you came to that  
 17 understanding?  
 18 A. I tell you, it really wasn't on my  
 19 mind. I was dealing with Jab. And when this Buku  
 20 was -- I don't know when this came about, but I  
 21 thought this thing was over. I didn't feel -- I  
 22 didn't -- I really don't know what on that. It  
 23 bothered me anyway. Didn't feel right about it.  
 24 But I trusted Jaramie. I had respect for him and I  
 25 did.

1 Q. And you had indicated at some point  
 2 that you came to an understanding that the  
 3 development was going to be in one-acre lots. When  
 4 did that occur?  
 5 A. I didn't know that he had -- well, it  
 6 really came to bear in my mind -- I'd really not  
 7 give it a whole lot of thought. I knew that he  
 8 wanted to develop the property, and I knew that he  
 9 wanted it to be -- to zone with the one, with the  
 10 R-1. I knew that, yes.  
 11 Q. And was that before you entered into  
 12 the contract that you knew that?  
 13 A. If I did, I mis -- it really came to  
 14 bear in my mind when we went to the hearing. I  
 15 didn't know how significant that was going to be  
 16 for this.  
 17 Q. And you would agree with me that  
 18 Mr. Magera's assessment of the value difference  
 19 between R-5 property and R-1 is significant?  
 20 MR. DUNN: Objection. Leading.  
 21 THE WITNESS: The only thing I wondered  
 22 about, about that time this thing was starting to  
 23 cool off, this whole sales thing. So -- but I did  
 24 know that he wanted to make it R-1. I knew that.  
 25 Q. BY MS. CASPERSON: You knew that he

1 kind of control or dominion over the house?  
 2 A. No.  
 3 Q. And who did have control and dominion  
 4 over the house?  
 5 A. Me.  
 6 Q. And isn't it true that it was your son  
 7 who was living in that property?  
 8 A. That's right.  
 9 Q. Are you aware of any way then in which  
 10 Buku controlled that property, your property --  
 11 A. The house itself or the whole thing?  
 12 Q. The whole thing.  
 13 A. I don't know what to make of it. When  
 14 I read the name on that after I got studying it a  
 15 while, it was some kind of a shame. That's the way  
 16 I felt about it.  
 17 Q. The name on what?  
 18 A. Buku. It sounded phony to me. That's  
 19 all I'm going to say.  
 20 Q. Okay. I understand that. But with  
 21 regard to your allegation that Buku somehow  
 22 exercised dominion and control over your property,  
 23 what are you asserting that they did?  
 24 A. The whole property?  
 25 Q. The whole property.

1 turns to weeds. Somebody had to make a call on it.  
 2 Q. And you agreed you were the person  
 3 that did that?  
 4 A. I did. I mean, I was told by Brad  
 5 that Mr. Magera asked him to call me and see if it  
 6 was all right.  
 7 Q. So you're not alleging that Buku  
 8 actually received any profits off of your property,  
 9 correct?  
 10 A. I don't know that they did. I don't  
 11 see how they could.  
 12 Q. If you look at paragraph 21 of your  
 13 affidavit, it indicates that -- well, let me read  
 14 it to you. It says your affiant has been damaged  
 15 monetarily in the remaining sum of the contract and  
 16 other miscellaneous costs and billings, including  
 17 but not limited to lost revenues on farming  
 18 practices, lost interest, expenses of upkeep and  
 19 utilities, tax assessments, attorney fees and  
 20 costs.  
 21 Now, you understand that the court has  
 22 already ruled on a portion of this litigation,  
 23 correct?  
 24 A. Would you explain that to me, please.  
 25 What part?

1 A. Well, maybe I assumed this, but I felt  
 2 that where he'd made an offer to buy my property,  
 3 that that was so. I was going to sell it to him to  
 4 become his.  
 5 Q. But you received the benefit of the  
 6 tax assessment that was paid by Mr. Foster,  
 7 correct?  
 8 A. Yes.  
 9 Q. And you received the benefit of the  
 10 water assessment payment?  
 11 A. That's correct.  
 12 Q. And you received the benefit of  
 13 whatever leasing arrangement you had with your son.  
 14 I don't know whether you required him to pay you or  
 15 not, correct?  
 16 A. That's okay. I understand that.  
 17 Q. So how did Buku control that property  
 18 after the agreement did not close in December?  
 19 A. Well, I was hoping that it would  
 20 continue on. But as to whether -- I don't know who  
 21 owned what. The property never left my ownership,  
 22 and it wouldn't until it was paid for.  
 23 Q. Okay. And you agreed to allow  
 24 Mr. Foster to farm that land, correct?  
 25 A. Sure. You know, if you let it go, it

1 Q. Well, you understand that we had cross  
 2 motions for summary judgment?  
 3 A. Yes.  
 4 Q. And do you understand that the court  
 5 ruled that the contract was not ambiguous?  
 6 A. Legal terms are ambiguous in any way  
 7 you look at it.  
 8 Q. But you do understand that there has  
 9 been a ruling from the court on this case?  
 10 A. Some ruling. I don't know what it  
 11 was, but yes.  
 12 Q. Let me go to these miscellaneous costs  
 13 and billings that you claim to have lost. What  
 14 lost revenues on farming practices are you  
 15 claiming?  
 16 A. None.  
 17 Q. What lost interest are you claiming?  
 18 A. On the farm itself? Not the agreement  
 19 to buy?  
 20 Q. Yes.  
 21 A. I don't know that I've lost anything.  
 22 Q. So the lost interest that you're  
 23 referring to in this paragraph is only associated  
 24 with the contract, correct?  
 25 A. With the farm.

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 DEC - 6  
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

**NOTICE OF HEARING**

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.

PLEASE TAKE NOTICE, that on the 13<sup>th</sup> day of December, 2010, at 2:00 p.m., or as soon thereafter as counsel can be heard, at the Jefferson County Courthouse in Rigby, Idaho, before the Honorable Richard St. Clair, Plaintiff Buku Properties, LLC, in the above-entitled action will call up for hearing its Motion to Strike.



---

DeAnne Casperson, Esq.

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

**CERTIFICATE OF SERVICE**


I hereby certify that on this 6th day of December, 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 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.

SEVENTH JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF JEFFERSON  
210 Courthouse Way, Suite 120  
RIGBY, IDAHO 83442

Buku Properties L L C

)  
)  
)  
)  
)  
)

vs.

Case No: CV-2008-0000941

Raoel H Clark, etal.

**NOTICE OF HEARING**

**NOTICE IS HEREBY GIVEN** that the above-entitled case is hereby set for:

**Motions (2<sup>nd</sup> motion for summary judgment)**

Judge: Monday, January 24, 2011 02:30 PM  
Dane Watkins, Jr.  
Courtroom: Large Courtroom #3

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Thursday, December 16, 2010.

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

US Mail  Hand Delivery

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

US Mail  Hand Delivery

Dated: Thursday, December 16, 2010  
Christine Boulter  
Clerk Of The District Court

By: \_\_\_\_\_  
Deputy Clerk



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

BUKU PROPERTIES, LLC, )  
)  
Plaintiff, )  
)  
vs. )  
)  
RAOEL H. CLARK ETAL, )  
)  
Defendants. )

Case No. CV-2008-941

**MINUTE ENTRY ON  
MOTION FOR SUMMARY  
JUDGMENT**

2011 JAN 24 PM 4:13  
JEFFERSON COUNTY, IDAHO

This matter came on for hearing on motion for summary judgment on January 24, 2011, at 3:05 P.M., before the Honorable Dane H. Watkins, Jr., District Judge, sitting in open court at Riggs Idaho.

Court Reporter was not present. The parties waived the presence of the court reporter.

Ms. Nancy Andersen, Deputy Court Clerk, was present.

Ms. DeAnn Casperson appeared on behalf of the plaintiff

Mr. Robin Dunn appeared on behalf of the defendant.


Ms. Casperson presented argument in supporting the motion for summary judgment.

Mr. Dunn presented argument in opposition to the motion for summary judgment.

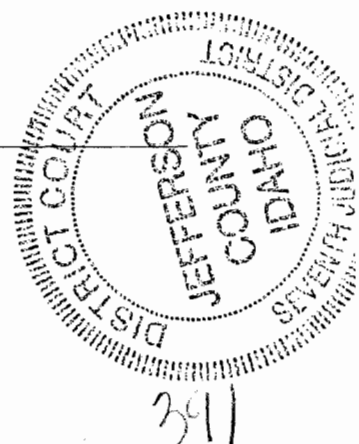
Ms. Casperson responded.

The Court will take the matter under advisement.

Court was thus adjourned.

  
DANE H. WATKINS, JR.  
District Judge

c: DeAnn Casperson, Esq.  
Robin Dunn, Esq.





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

**JUDGMENT RE: MOTIONS FOR SUMMARY JUDGMENT**

*FILED IN CHAMBERS*  
*at Idaho Falls*  
*Bonneville County*  
*Honorable Gregory S. Anderson*  
*February 3, 2011*  
*Date* January 3, 2011  
*Time* 1:27 PM  
*Deputy Clerk* JM

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, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

This cause having come before this Court pursuant to a Motion for Summary Judgment filed by Buku Properties, LLC (hereafter "Buku") on November 16, 2010, and a Motion to Strike filed by Buku on December 6, 2010; this Court being fully advised in the premises, and good cause appearing;

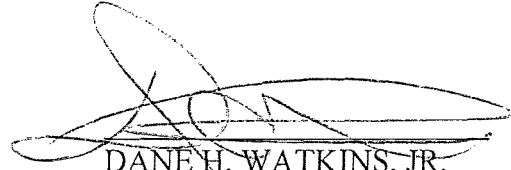
NOW, THEREFORE:

Buku's Motion for Summary Judgment is granted.

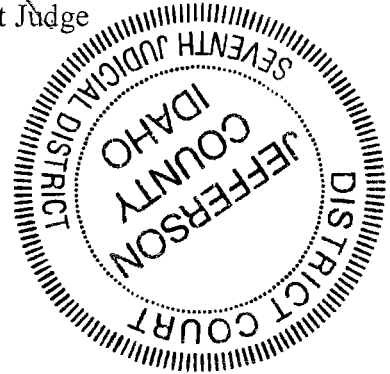
210

Buku's Motion to Strike is denied.

DATED this 3 day of February 2011.



DANE H. WATKINS, JR.  
District Judge



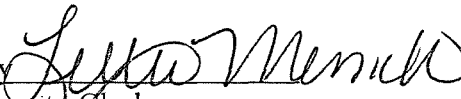
CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of February 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Robin D. Dunn  
DUNN LAW OFFICES, P.L.L.C.  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

DeAnne Casperson  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405

CRISTINE BOULTER  
Clerk of the District Court  
Jefferson County, Idaho

BY   
Deputy Clerk

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, )

Defendant. )

Case No. CV-08-941

**MEMORANDUM DECISION RE:  
 MOTION FOR SUMMARY  
 JUDGMENT**

*FILED IN CHAMBERS  
 at Idaho Falls  
 Bonneville County  
 Honorable Gregory S. Anderson  
 Date January 2, 2011  
 Time 1:27 PM  
 Deputy Clerk JM*

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On August 20, 2007, Plaintiff Buku Properties, LLC (hereafter “Buku”) entered into a Purchase and Sale Agreement (hereafter “Clark Agreement”) with Defendants Rael H. Clark and Janet C. Clark (hereafter collectively “Clarks”) for the purchase of 80.17 acres of property located in Jefferson County, Idaho (hereafter “Clark Property”). The Clark Agreement denoted a purchase price of \$1,044,075.18. The Clark Agreement specified that Buku would provide

Clarks with \$25,000 in earnest money and that the entire amount was fully refundable until closing. The money was tendered on October 15, 2007.

On or about August 30, 2007, Buku entered into a Purchase and Sale Agreement (hereafter "Peterson Agreement") with Angus Jerry Peterson and Betty Jean Peterson (hereafter collectively "Petersons") for the purchase of 73 acres (hereafter "Peterson Property") adjacent to the Clark Property. The Peterson Agreement denoted a purchase price of \$980,000. The Peterson Agreement specified that Buku would provide Petersons with \$327,000 in earnest money and that all but \$10,000 was fully refundable until closing. The money was tendered on August 30, 2007.

At the time the parties entered into each respective Purchase and Sale Agreement, both the Clark Property and the Peterson Property (hereafter collectively "Properties") were zoned Residential-1 ("R-1"), which would allow a minimum density of one acre lots.

Pursuant to both the Clark Agreement and the Peterson Agreement (hereafter collectively "Agreements"), closing was to take place on or before December 21, 2007.

Both Agreements provided Buku with a four month due diligence period to ensure Buku was satisfied with the condition of the Properties prior to closing. During the four-month diligence period, Buku learned of a proposed zoning change, which might have affected the Properties.

Between August 30, 2007 and December 18, 2007, issues arose regarding the Jefferson County Planning and Zoning Commission's plans to possibly change the zoning categorization of the Properties to R-5. The change which would allow a minimum density of five acre lots could have potentially decreased the value of the Properties.

On December 18, 2007, Buku notified in writing the Clarks and Petersons of its objection to the condition of the Properties being zoned R-5. While the parties dispute the relevance of the zoning of the Properties, it was an issue that was discussed prior to the closing date. The December 18, 2007 letter contained an offer to move the closing “date back from December 21, 2007, to March 1, 2008.”

On December 19, 2007, in response to Buku’s offer to extend the closing date, counsel for Clarks and Petersons rejected the offer to extend the closing date by stating, “In the event you choose not to close, my clients would declare the contract in default.”

December 21, 2007, passed without closing on the Properties, and the Agreements were never modified or amended.

On November 6, 2008, Buku filed suit against Clarks and Petersons seeking return of the earnest monies under the terms of the Agreements.

On December 10, 2008, Clarks and Petersons filed a Counterclaim seeking specific performance, breach of contract, and other equitable claims; and asking the Court to grant summary judgment in their favor.

On October 6, 2009, Buku filed for Summary Judgment.

On January 27, 2010, the Court issued a Memorandum Decision (hereafter “First Memorandum Decision”).<sup>1</sup> Among other things, the Court found the Agreements were unambiguous but that summary judgment was premature as to the issues surrounding enforcement of the Agreements.<sup>2</sup>

On November 16, 2010, Buku filed Plaintiff’s Second Motion for Summary Judgment.

---

<sup>1</sup> This case was previously assigned to Seventh Judicial District Judge Moller who issued the January 27, 2010 Memorandum Decision.

<sup>2</sup> The Court granted summary judgment in Buku’s favor as to Defendant’s counterclaim involving the Idaho Consumer Protection Act.

On November 29, 2010, Clarks and Petersons filed Defendant's Memorandum Re: Summary Judgment Plaintiff's Second Motion (hereafter "Defendants' Brief in Opposition").

On December 6, 2010, Buku filed its Reply Memorandum in Support of Plaintiff's Second Motion for Summary Judgment.<sup>3</sup>

The Court heard oral argument on January 24, 2010.

## II. STANDARD OF ADJUDICATION

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). See *Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105; *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2002). The burden is, at all times, on the moving party to demonstrate the absence of a genuine issue of material fact. *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908 (2001).

The United States Supreme Court, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), stated:

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the

---

<sup>3</sup> On December 6, 2010, Buku filed a Motion to strike portions of the following affidavits: Original Peterson Affidavit, Second Peterson Affidavit, and the Original Clark Affidavit. Buku argues that the objectionable portions of the affidavits contain legal conclusions, lack foundation, and that they are conflicting. The Court can sort through the affiants' statements that are conflicting, that lack foundation and contain legal conclusions and disregard them as appropriate. Buku's Motion to Strike should be denied. Moreover, the remaining portions of the affidavits provide the Court with the necessary evidence for its conclusions.

affidavits, *if any*” (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide the claimants and defendants, respectively, may move for summary judgment “*with or without supporting affidavits*” (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

*Id.* at 323, 106 S.Ct. at 2553 (alterations in original).

When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. *Dodge-Farrar v. American Cleaning Services, Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002). In ruling on a motion for summary judgment, a court is not permitted to weigh the evidence to resolve controverted factual issues. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000). Liberal construction of the facts in favor of the non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving party. *Farnworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000); *Madrid v. Roth*, 134 Idaho 802, 10 P.3d 751 (Ct. App. 2000).

If the action will be tried by the court without a jury, an exception to this rule applies. In *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519-20, 650 P.2d 657, 661-62 (1982), our Supreme Court held that summary judgment is appropriate despite the possibility of conflicting inferences if the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of facts. Moreover, in such a situation, the judge is not required to draw inferences in favor of the party opposing the motion for summary judgment. *Id.* “Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party.” *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 124, 206 P.3d 481, 488 (2009).



The Idaho appellate courts have followed the United States Supreme Court's decision in *Celotex*, which stated:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." ...Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

*Id.* at 327, 106 S.Ct. at 2555 (citations omitted); see *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 53 P.3d 330 (2002); *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002).

A party against whom a summary judgment is sought cannot merely rest on his pleadings but, when faced with affidavits or depositions supporting the motion, must come forward by way of affidavit, deposition, admissions or other documentation to establish the existence of material issues of fact, which preclude the issuance of summary judgment. *Anderson v. Hollingsworth*, 136 Idaho 800, 41 P.3d 228 (2001); *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000). The non-moving party's case, however, must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 41 P.3d 220 (2001).

The moving party is entitled to judgment when the non-moving party fails to make a sufficient showing as to the essential elements to which that party will bear the burden of proof at trial. *Primary Health Network, Inc. v. State, Dept. of Admin.*, 137 Idaho 663, 52 P.3d 307 (2002). Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018, (1998). In such a situation, there can be no genuine issue of material fact, since a complete failure of proof

concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.*

### III. DISCUSSION

#### A. The Clark and Peterson Agreements are Unambiguous

When construing a contract, this Court must decide as a matter of law whether the contract is ambiguous. *Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos.*, 7 Idaho 84, 86, 205 P.3d 1220, 1222 (2009). A contract is ambiguous if, when considered in its entirety, it is "reasonably subject to conflicting interpretation." *Rutter v. McLaughlin*, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980); *Murr v. Selag Corp.*, 113 Idaho 773, 781, 747 P.2d 1302, 1310 (1987). If the contract does not appear ambiguous on its face, and if neither party asserts that it contains an ambiguity, then the meaning of the contract and the intent of the parties must be determined from the plain meaning of the words used. *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 46, 72 P.3d 877, 886 (2003). Further, "courts do not possess the roving power to rewrite contracts in order to make them more equitable." *Losee v. Idaho Co.*, 148 Idaho 219, 223, 220 P.3d 575, 579 (2009).

Neither party asserts the Agreements are ambiguous. Clarks and Petersons assert Buku breached the Agreements by refusing to close on or before December 21, 2007. Buku argues, pursuant to paragraph 3 of the Agreements, it was not obligated to close, and that Clarks and Petersons breached the Agreements by failing to refund the earnest money. Paragraph 3 of the Agreements provides as follows:

#### Buyers Obligations:

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 month 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.

Clark and Peterson Agreements at 1-2 & 2 respectively.

In its First Memorandum Decision, the Court stated the following in reference to paragraph 3: "The Court finds that the wording above is unambiguous and not so indefinite as to make the contract illusory." First Memorandum Decision at 8.

Having reviewed Idaho authority and the Agreements, like the previous Court, this Court concludes the language in paragraph 3 of the Agreements is unambiguous and enforceable.

**B. Buyer's Diligence**

Clarks and Petersons assert that since the Agreements are unambiguous, the Agreements' provisions are enforceable; specifically that Buku was required to close on December 21, 2007. Buku argues that it performed the necessary diligence under paragraph 3 of the Agreements by providing notice of the zoning issue to the Clarks and Petersons and asking them to extend the closing date to cure the issue.

In its First Memorandum Decision, the Court previously stated:

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."

First Memorandum Decision at 8.

The language of the Agreements clearly allowed Buku to ensure it was "fully satisfied" with the condition of the Property and "all the requirements" it needed to satisfy its "interests and concerns."

While the provisions, “fully satisfied” and “buyer’s interests and concerns” are potentially broad, they are not ambiguous. During the four month due diligence period, Buku was authorized to satisfy *its interests and concerns* regarding purchasing the Properties. Thus, the Agreements permitted Buku to look into potential zoning changes that would affect its “interests and concerns.” Buku’s efforts to fully satisfy its interests and concerns were expressly permitted under the contract.<sup>4</sup>

Reaffirming the Court’s First Memorandum Decision, this Court concludes Buku’s reason for declining to close on December 21, 2007, was permitted under paragraph 3 of the Agreements. Therefore, Buku did not breach the Agreements by failing to close on December 21, 2007.

**C. Post Closing Date Agreements**

Clarks and Petersons argue they are entitled to “summary judgment on the issue of liability as there are no material facts to defeat the breach of contract by Buku.” Defendants’ Brief in Opposition at 18. They also assert that “Buku continued to seek to purchase the real property from Clark and Peterson and to seek advice from Jefferson County after the closing date of the transactions for the contracts.” Defendants’ Brief in Opposition at 8.

In its First Memorandum Decision, the Court stated:

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.” However, despite the Court’s finding that the contract is unambiguous, the Court cannot grant summary

---

<sup>4</sup> The issue surrounding the diligence provision involved the relationship between the properties’ existing R-1 designation and a proposed R-5 designation and Buku’s ability to obtain financing. The record suggests that if the proposed change were approved, the properties in question would be “grandfathered.” See *Affidavit of Naysha Foster and Exhibit 3*. While the court acknowledges the above facts, the record reflects that the “grandfathering” issue was not addressed by Jefferson County until March 2008, three months after the December 21, 2007 closing date.

403

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.

....

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.

First Memorandum Decision at 8-9.

Buku asserts the plain language of paragraph 21 of the Agreements requires that subsequent agreements be in writing. Buku argues the Court did not consider paragraph 21 when issuing its First Memorandum Decision. Paragraph 21 provides as follows:

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.

Clark and Peterson Agreements at 4 & 5 respectively.

The above language specifically requires that no amendments to the Agreements would be valid unless "in writing and signed by the parties." While Buku attempted to amend the agreement by offering to extend the closing date, neither the Clarks nor the Petersons accepted the written offer. Rather, through counsel, they expressly rejected Buku's offer.

Idaho Code § 9-503 states:

No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law, or a conveyance or other instrument

in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing.

The record contains no evidence that any written agreement subsequent to the December 21, 2007 closing date was ever reached.<sup>5</sup> Furthermore, even if there were oral agreements or modifications, they would be prohibited by Idaho Code § 9-503.

The terms of the Clark and Peterson Agreements must be enforced, including the requirement that subsequent amendments be in writing.

In opposition to Buku's first motion for summary judgment, Clarks and Petersons argued that Buku exercised dominion and control over the Properties. They raise this issue again in opposition to Buku's second motion for summary judgment by stating, "Defendants, on the other hand, are not trying to remove or change the clear language of the original contracts; but rather are trying to show to the ultimate fact-finder that they (defendants) were lead down a path to believe the original contract would be enforced and/or should be enforced as to the damages sustained by the defendants." Defendant's Brief in Opposition at 13.

In support of its claim that Buku exercised dominion and control over the Properties, Clarks and Petersons allege that Buku may have leased the Clark Property to a third party, that a Buku agent farmed the Clark Property, and that Buku controlled the home on the Peterson Property. While the record contains various interactions between the parties surrounding the above allegations, nothing indicates the parties ever reached a new agreement.<sup>6</sup> Even if Buku had exercised dominion and control over either the Clark or the Peterson Property, the closing date passed, and no written amendments were ever executed.

---

<sup>5</sup> Moreover, counsel for Clarks and Petersons conceded at oral argument that there were no such subsequent written agreements.

<sup>6</sup> Based upon the affidavits and exhibits attached with Buku's submissions, the Court questions whether the "dominion and control" arguments asserted by Clarks and Petersons would be established.

Based upon the above authority and discussion, Buku is entitled to summary judgment under the terms of Agreements. Clarks' and Petersons' motions for summary judgment under their breach of contract claims should therefore be denied.

**D. Equitable Claims**

Clarks and Petersons assert that “the Court left in place the following without removing the counter-claims from consideration. . . . The counter-claims will not be re-hashed but are still in place and remain unaffected by the latest attempt by plaintiffs to avoid trial.”<sup>7</sup> Defendant’s Brief in Opposition at 13-14. Further, Clarks and Petersons argue they are entitled to summary judgment on their counterclaims.

In its First Memorandum Decision, the Court stated, “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.” *Id.* at 10.

The Idaho Supreme Court recently stated,

The existence of an express agreement does not prevent the application of the doctrine of unjust enrichment. Only when the express agreement is enforceable is a court precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract. *Id.* (citing *Chandler v. Washington Toll Bridge Auth.*, 17 Wash.2d 591, 137 P.2d 97 (1943); *Hixon, supra*). Once the jury determined that the contract was not enforceable because Appellants had proved an affirmative defense, the jury properly considered Respondents’ claim of unjust enrichment.

*Bates v. Seldin*, 146 Idaho 772, 776-77, 203 P.3d 702, 706-07 (2009).

“Equitable claims will not be considered when an adequate legal remedy is available.

When parties enter into an express contract, a claim based in equity is not allowed because the

---

<sup>7</sup> The Clarks’ and Petersons’ Complaint alleges the following equitable causes of actions: Specific Performance, Unjust Enrichment, Estoppel, and Detrimental Reliance

406

express contract precludes enforcement of equitable claims.” *Iron Eagle Dev., LLC v. Quality Design Systems, Inc.*, 138 Idaho 487, 492, 65 P.3d 509, 514 (2003) (citing *Thomas v. Campbell*, 107 Idaho 398, 404-05, 690 P.2d 333, 339-40 (1984)).


In *Iron Eagle*, Iron Eagle and Heartland entered into an express contract with Quality Design Systems. Iron Eagle and Heartland sued Quality Design for breach of an express contract, breach of an intended third party beneficiary contract, and equitable claims including unjust enrichment, quantum meruit, implied contract, quasi estoppel, and equitable estoppel. The Idaho Supreme Court held that the Plaintiffs were precluded from seeking an equitable remedy against the Defendant because it had an adequate legal remedy under its express agreement with Iron Eagle.

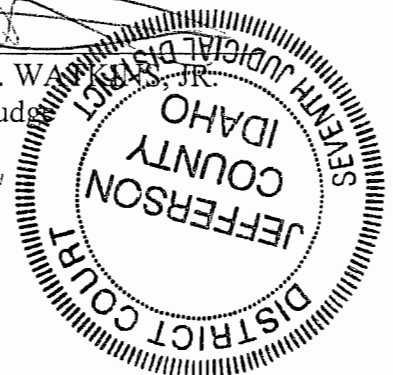
Because this Court has found the Agreements enforceable, Clarks and Petersons cannot rely on their equitable claims. Therefore, Buku’s motion for summary judgment as to Clarks’ and Petersons’ equitable claims is granted.

#### IV. CONCLUSION

Based upon the above authority and discussion, Buku’s motion for summary judgment should be granted.

DATED this 3 day of February 2011.

  
DANE H. WATKINS, JR.  
District Judge





CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of February 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Robin D. Dunn  
DUNN LAW OFFICES, P.L.L.C.  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

DeAnne Casperson  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405

CRISTINE BOULTER  
Clerk of the District Court  
Jefferson County, Idaho

BY   
Deputy 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)

2011 FEB 17 PM 12:23  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Defendants/Appellants

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/Respondent,	)	
vs.	)	NOTICE OF APPEAL
	)	
	)	
RAOEL H. CLARK and JANET C.	)	
CLARK, husband and wife; ANGUS	)	
JERRY PETERSON and BETTY JEAN	)	
PETERSON, husband and wife,	)	
	)	
Defendants/Appellants.	)	
_____	)	

TO: THE ABOVE NAMED APPELLANTS; AND THE CLERK OF THE  
ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants appeal against the above named Respondent to the Idaho Supreme Court from the Summary Judgment, entered in the above entitled action on the 3rd day of February, 2011, the Honorable Dane H. Watkins, presiding.

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

3. The issues on appeal include, but are not limited, to the following:
  - a. Did the court error in interpretation of the real estate contract between the parties?
  - b. Did the court error in granting summary judgment which excluded equitable remedies of the defendants?
  - c. Were there ambiguous terms in the contract which allowed parol evidence?
  - d. Did the court error in using information outside the "four corners" of the contract when the decision indicated the contract was not ambiguous?
  - e. Were the defendants' equitable remedies precluded by the court's ruling in Summary Judgment which required a return of earnest money?

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

5. A reporter's transcript is not requested.

6. The Appellants request that the following documents be included in the

clerk's record in addition to those automatically included under Rule 28, I.A.R.:

-Any minute entries-

-All pleadings by both parties-

-All affidavits of both parties-

-First Summary Judgment Decision (Denial) of Honorable Gregory Moeller

-Second Summary Judgment Decision (Approval) of Honorable Dane Watkins

7. The undersigned certifies:

a. That a copy of the notice of appeal has NOT been served on the reporter since a transcript is not requested;

b. That the Appellants have made contact with the clerk of the district court and are in the process of obtaining the estimated fee for preparation of the clerk's record;

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

d. That appellate filing fee has been paid; and

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

DATED this 16<sup>th</sup> day of February 2011.



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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the \_\_\_\_ day of February, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- \_\_\_ Hand Delivery
- xx Postage-prepaid mail
- \_\_\_ Facsimile Transmission



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

Jefferson County Clerk  
Jefferson County Courthouse  
210 Courthouse Way, Ste. 120  
Rigby, ID 83442

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

Honorable Dane Watkins  
Bonneville County Courthouse  
605 N Capital Ave.  
Idaho Falls, ID 83402

Idaho Supreme Court  
P.O. Box 83720  
Boise, ID 83720-0101

412

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

22 Ma  
2011 FEB 7 PM 1:57  
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 OF ATTORNEY'S  
FEES AND COSTS SUPPORTED BY  
AFFIDAVIT OF DEANNE CASPERSON**

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.

Plaintiff Buku Properties, LLC (“Buku”), by and through its counsel of record, DeAnne Casperson of Holden Kidwell Hahn & Crapo, P.L.L.C., hereby submits this Memorandum of Attorney’s Fees and Costs pursuant to Rule 54 of the Idaho Rules of Civil Procedure. By submitting this Memorandum, Buku is claiming the right, pursuant to contract, Idaho Code §§ 12-120(3) and 12-121, and Rule 54 of the Idaho Rules of Civil Procedure, to recover the costs and fees set forth in the Affidavit of DeAnne Casperson in Support of Memorandum of Costs and Fees from Defendants Rael H. Clark and Janet C. Clark, and Angus Jerry Peterson and Betty Jean Peterson (collectively “Defendants”).

Paragraph 23 of both the Peterson Agreement and the Clark Agreement provides as follows:

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

(See Complaint, Ex. A, ¶ 23; Ex. B, ¶ 23). Consequently, Buku is entitled to its reasonable attorneys fees and costs pursuant to the Peterson Agreement and the Clark Agreement. Additionally, Idaho Code § 12-120(3) provides for the award of attorney’s fees to the prevailing party in any civil action to recover on “any commercial transaction.” I.C. § 12-120(3). Idaho courts have recognized the applicability of this provision to commercial real estate transactions. See *i.e. Dennett v. Kuenzli*, 130 Idaho 21, 31-32, 936 P.2d 219, 230 (Ct. App. 1997); *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 274-75, 869 P.2d 1365, 1369-70 (1994); *Herrick v. Leuzinger*, 127 Idaho 293, 306,

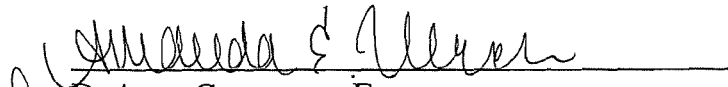
900 P.2d 201, 214 (Ct. App. 1995). The current action is a civil action to recover on a commercial transaction. Buku entered into the Clark Agreement and Peterson Agreement with the intent that the properties be developed, as is denoted in paragraph 25 of each of the agreements. Consequently, Buku is entitled to an award of attorneys fees against Defendants pursuant to Idaho Cod § 12-120(3). Finally, Idaho Code § 12-121 and the Idaho Rules of Civil Procedure, Rule 54, provide for the award of attorneys fees to the prevailing party where provided for by statute. The Judgment entered in this action clearly indicates that Buku prevailed on summary judgment and disposed of all other issues in the case, making Buku the prevailing party and entitling Buku to an award of attorney's fees and costs against Defendants.

To the best of the knowledge and belief of DeAnne Casperson, the amounts set forth herein for costs and fees are correct and such costs and fees are claimed by Buku in compliance with Rule 54 of the Idaho Rules of Civil Procedure. This Memorandum of Costs and Attorney's Fees is supported by the Affidavit of DeAnne Casperson in Support of Memorandum of Costs and Attorney's Fees filed simultaneously with this Memorandum and incorporated herein by reference.

Buku has incurred attorney's fees in the above-entitled action in the amount of \$27,093.61 and costs in the amount of \$724.82, which fees and costs are specifically described and itemized in the Affidavit filed simultaneously with this Memorandum and incorporated herein by reference.



Dated this 22<sup>nd</sup> day of February, 2011.

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this <sup>2nd</sup> day of February, 2011, 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.

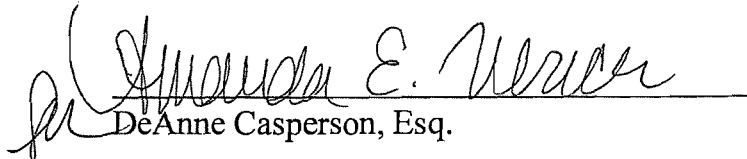
**DOCUMENT SERVED:**

**MEMORANDUM OF ATTORNEY'S  
FEES AND COSTS SUPPORTED BY  
AFFIDAVIT OF DEANNE  
CASPERSON**

**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.

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

22 Mc  
2011 FEB 24 PM 1:58  
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  
OF ATTORNEY'S FEES AND COSTS**

STATE OF IDAHO            )  
  )ss.  
County of Bonneville        )

DEANNE CASPERSON, being first duly sworn on oath, deposes and says:

1. I am a member of the law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C., counsel for Buku Properties, LLC (“Buku”) in this matter.
2. This Affidavit is made on my own personal knowledge, except to the extent of allegations made on information and belief, and in support of Buku’s Memorandum of Attorney’s Fees and Costs Supported by Affidavit of DeAnne Casperson.
3. I have reviewed the time and cost records of Holden, Kidwell, Hahn & Crapo, P.L.L.C. maintained on the above matter, and represent that, to the best of my knowledge and belief, the following items of costs and expenses are claimed in compliance with the Idaho Rules of Civil Procedure, Rule 54(d)(5) and Rule 54(e)(1), and were necessarily expended and incurred in the above entitled action on behalf of Buku:

i. Costs of Right (Rule 54(d)(1)(c)):

Date	Item	Cost
10/15/08	Filing Fee (Jefferson County)	\$88.00
04/26/10	Copy of deposition - Jaramie Magera (T & T Reporting)	\$108.07
04/26/10	Depositions - Rael Clark and Angus Peterson (T & T Reporting)	\$528.75
	TOTAL	\$724.82

1/10

4. The above-listed costs represent the entire costs incurred to date herein.

5. The law firm of Holden Kidwell Hahn & Crapo, P.L.L.C. has expended approximately 176.0 hours in prosecuting the above-entitled action for Buku. An itemization of the legal services provided by Holden Kidwell Hahn & Crapo, P.L.L.C. in connection with such matters is attached hereto as Exhibit "A". The law firm of Holden Kidwell Hahn & Crapo, P.L.L.C. has invoiced Buku for the legal services itemized on Exhibit "A" attached hereto the total amount of \$27,093.61, which is allocated among the following attorneys at the following effective billing rates:

Name	Hours	Effective Hourly Rate	Total Fees
Charles A. Homer	4.20	\$227.03	\$983.50
DeAnne Casperson	85.80	\$183.81	\$15,770.30
Amanda E. Ulrich	86.00	\$112.84	\$9,703.70
TOTAL			\$26,427.50

6. The following computer-aided legal research are claimed in compliance with the Idaho Rules of Civil Procedure, Rule 54(e)(3), and were reasonably and necessarily expended and incurred in the above entitled action on behalf of Buku:

Date	Item	Cost
09/15/08	Computer research for August 2008	\$42.46
01/13/09	Computer research for December 2008	\$0.69
07/14/09	Computer research for June 2009	\$37.89
08/11/09	Computer research for July 2009	\$414.86
01/18/11	Computer research for December 2010	\$170.21

*4/20*

	TOTAL	\$666.11
--	-------	----------

TOTAL ATTORNEYS FEES PLUS COMPUTER RESEARCH: \$27,093.61

7. The sum of \$27,093.61 represents a reasonable sum for the services provided by the law firm of Holden Kidwell Hahn & Crapo, P.L.L.C. in prosecuting the above-entitled action on behalf of Buku. The sum of \$724.82 represents a reasonable sum for the costs incurred in the above-entitled action, allocated for the benefit of Buku.

8. I have practiced law in Idaho continuously since April 24, 2003. I graduated from law school in 1999 and practiced law in both Missouri and Kansas before returning to Idaho. I am familiar with the prevailing charges in this community for legal work similar to that performed by the attorneys in this case. It is my opinion that the prevailing charges in this community for like work are equal to or higher than those indicated above, and that the attorney's fees are reasonable and necessary.

9. Neither me nor anyone else at my firm was aware that the Court issued a Judgment Re: Motion for Summary Judgment ("Judgment") and Memorandum Decision Re: Motion for Summary Judgment ("Memorandum") in Judge Watkins' chambers on February 3, 2011, until the afternoon of February 18, 2011. I learned that the Judgment and Memorandum had been filed because I received Defendants' Notice of Appeal at that time, in which it was mentioned that the Court had filed the Judgment on February 3, 2011.

10. Upon learning that the Court had issued the Judgment on February 3, 2011, I immediately checked the Idaho Court Repository website to see if the Judgment had been docketed. It still had not. Attached as "Exhibit B" is a copy of the docket from the Idaho Court Repository website dated February 18, 2011. I had periodically checked the Idaho Court

Repository since the oral argument and nothing ever appeared relating to the Judgment issued on February 3, 2011.

11. After having received the Notice of Appeal on February 18, 2011, I immediately telephoned Defendants' counsel's office to obtain a copy of the Judgment, and Defendants' counsel's receptionist informed me that she would have "Judy" fax me a copy of the decision. I never received a copy of the Memorandum or Judgment from Defendants' counsel's office.

12. At approximately 1:00 p.m., I telephoned Judge Watkins' clerk, Lettie Messick, to request a copy of the decision. Ms. Messick was not in her office at the time. I left her a voicemail explaining that I had not received a copy of the Memorandum or Judgment and asked her to return my call.

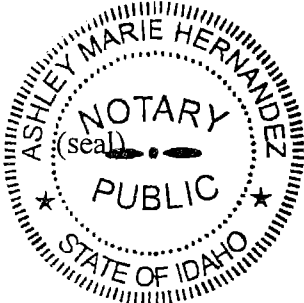
13. At approximately 1:00 p.m., Sandi Mueller, a secretary in my office, called the Jefferson County clerk's office to inquire as to whether I could obtain a copy of the Judgment from Jefferson County. Ms. Mueller informed me that the Jefferson County clerk stated Jefferson County did not have a copy of the Memorandum or Judgment either.

14. Ms. Messick returned my call at approximately 2:00 p.m. I explained to her that I did not receive a copy of the Memorandum or Judgment. Ms. Messick immediately faxed a copy of the Judgment and Memorandum Decision to my office. The faxed copies of the Judgment and Memorandum Decision were the first copies of the Judgment and Memorandum decision my office received. Attached as "Exhibit C" are copies of the faxed Judgment and Memorandum I received from Ms. Messick on the afternoon of February 18, 2011.

Dated this 22 day of February, 2011.

DeAnne Casperson  
DeAnne Casperson

SUBSCRIBED and sworn to before me this 22<sup>nd</sup> day of February, 2011.



Ashley Marie Hernandez  
Notary Public for Idaho  
Residing at Idaho Falls, ID  
My Commission Expires: 10/22/14

G:\WPDATA\CAH\14918\Pldgs\Fees.DC.AFF.wpd



**CERTIFICATE OF SERVICE**

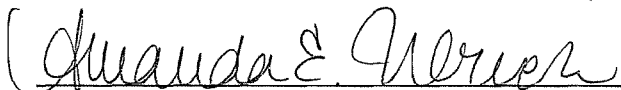
I hereby certify that on this 22<sup>nd</sup> day of February, 2011, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                    **AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMORANDUM OF ATTORNEY'S FEES AND COSTS**

**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.

4/24

Date	Attorney	Explanation	Hours
Jun 17/2008	CAH	Review purchase agreements and proposed correspondence to Robin Dunn prepared by Thel Casper; telephone conference with attorney Thel Casper	0.80
Jun 26/2008	CAH	Email to Thel Casper pertaining to follow-up on correspondence with attorney Robin Dunn	0.10
Jul 1/2008	CAH	Review email from Thel Casper pertaining to dispute with Peterson; review documentation and prepare for conference with Jaramie Magera	0.40
Aug 7/2008	AEU	Receive and review case file; begin drafting complaint	2.60
Sep 16/2008	DC	Review documents and correspondence in file; edit and revise complaint.	2.40
Oct 10/2008	DC	Edit and revise complaint for filing.	0.60
Oct 11/2008	CAH	Review and revise complaint against Peterson and Clark for refund of earnest money	0.50
Oct 14/2008	DC	Edit and revise complaint; finalize complaint for review.	0.50
Oct 15/2008	CAH	Office conference with Jaramie Magera to review and execute Complaint on dispute with Peterson and Clark	0.70
Oct 15/2008	DC	Finalize complaint; conference with client regarding complaint and current status.	0.60
Dec 5/2008	DC	E-mail correspondence to Mr. Magera.	0.10
Dec 12/2008	DC	E-mail correspondence with Mr. Magera.	0.20
Dec 15/2008	AEU	Draft answer to counterclaim; research affirmative defenses	2.60
Dec 16/2008	AEU	Complete draft of Answer to Counterclaim	0.80
Dec 29/2008	AEU	Intraoffice conference regarding affirmative defenses	0.20
Dec 29/2008	DC	Edit and revise draft answer to counterclaim; draft letter to Mr. Dunn regarding filing suit against Mr. Magera.	4.40
Jan 9/2009	AEU	Compose first set of discovery to Defendants Clarks and Defendants Petersons; Edit discovery	2.10
Apr 13/2009	DC	Edit and revise discovery requests.	0.60
Apr 29/2009	DC	Draft e-mail to Mr. Magera.	0.10
Jun 16/2009	DC	Review answers to discovery and documents produced; E-mail Mr. Magera regarding status.	2.10
Jun 26/2009	AEU	Draft Motion for Summary Judgment and Memorandum	0.30
Jun 29/2009	AEU	Prepare documents for Summary Judgment	0.30
Jun 30/2009	AEU	Continue drafting Memorandum in Support of Motion for Summary Judgment; Research case law regarding legal issues for summary judgment	3.30
Jul 1/2009	AEU	Edit summary judgment documents; Research case law on termination on contracts	1.80
Jul 2/2009	AEU	Edit Memorandum in Support of Motion for Summary Judgment; Research case law regarding Defendants' causes of action and issues on summary judgment	4.20
Jul 6/2009	AEU	Research case law regarding termination of contracts	0.90
Jul 7/2009	AEU	Finish research regarding termination of contracts for Summary Judgment Memorandum	1.70
Jul 8/2009	AEU	Research implied termination of contracts	1.30
Jul 30/2009	DC	E-mail correspondence with Mr. Magera	0.10
Sep 16/2009	DC	Edit and revise summary judgment motion and supporting documentation.	3.60
Sep 17/2009	DC	Continue editing and revising summary judgment motion and supporting documentation.	2.90
Sep 22/2009	DC	Edit and revise summary judgment documentation; draft argument regarding frustration of purpose; research additional cases of defect and cure.	4.20
Sep 23/2009	DC	Continue working on summary judgment motion and supporting documentation.	1.80
Sep 24/2009	DC	Continue drafting summary judgment motion and supporting documentation.	3.40
Sep 25/2009	DC	Finalize Mr. Magera's affidavit for review; e-mail affidavit to Mr. Magera.	0.40
Oct 1/2009	DC	E-mail correspondence with Mr. Magera.	0.10
Oct 2/2009	AEU	Meet with Jaramie Magera to review affidavit for Motion for Summary Judgment; Make edits to affidavit; Make edits to Memorandum in Support of Summary Judgment to reflect changes in affidavit	0.80
Oct 2/2009	DC	Finalize documents for filing; e-mail Mr. Magera regarding review of affidavit.	0.30
Oct 14/2009	DC	Telephone conference with Mr. Dunn regarding rescheduling of summary judgment motion due to conflicts; telephone conference with court; review pleading regarding changed date of hearing.	0.30
Nov 6/2009	DC	E-mail correspondence with Mr. Magera regarding summary judgment hearing and motion.	0.20
Nov 19/2009	AEU	Review Defendants' response to Buku's Motion for Summary Judgment and Motion to Strike; Begin drafting brief in reply to Defendants' response to Buku's Motion for Summary Judgment and brief in reply to Defendants' Motion to Strike	2.80
Nov 20/2009	AEU	Continue drafting Memorandum in Reply to Defendants' Response to Motion for Summary Judgment	2.60
Nov 23/2009	AEU	Finish drafting memorandum in reply to Defendants' response memorandum regarding motion for summary judgment	4.50
Nov 23/2009	DC	Conference regarding reply to summary judgment motion.	0.20
Nov 24/2009	AEU	Review and edit Memorandum in Reply regarding summary judgment	0.50

Exhibit "A"  
4/26

Dec 6/2009	DC	Edit and revise summary judgment motion and supporting information.	1.60
Dec 7/2009	AEU	Finalize Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment; Conduct legal research regarding failure of a condition precedent and effect on contract	3.50
Dec 7/2009	DC	Finalize pleadings and arrange for filing.	1.40
Dec 14/2009	DC		
Dec 15/2009	AEU	Prepare outline for summary judgment argument; review caselaw in support of summary judgment; attend summary judgment argument; Review discovery responses from Petersons and affidavits from Petersons and Clarks; Draft Golden Rule letter to Robin Dunn regarding Clarks failure to respond to discovery requests; Draft additional Requests for Admissions	6.40
Dec 15/2009	DC	E-mail correspondence regarding summary judgment hearing.	1.60
Dec 22/2009	DC	E-mail correspondence with Mr. Magera.	0.10
Jan 6/2010	DC	Finalize letter to Mr. Dunn regarding discovery responses; finalize additional discovery request.	0.10
Feb 1/2010	CAH	Telephone conference with Jaramie Magera to discuss pending receipt from court on summary judgment motion; review summary judgment order issued by court	0.20
Feb 2/2010	CAH	Telephone conference with Jaramie Magera to discuss summary judgment opinion	0.70
Feb 2/2010	DC	E-mail correspondence with Mr. Magera regarding decision.	0.20
Feb 2/2010	DC	Analyze decision as compared to pleadings; prepare a discovery plan for purposes of moving forward with litigation.	0.10
Feb 3/2010	CAH	Telephone conference with Jaramie Magera to review summary judgment decision and prepare for on-going litigation	0.90
Feb 3/2010	DC	Prepare for and conference with Mr. Magera regarding summary judgment ruling and other discovery.	0.80
Feb 5/2010	DC	E-mail correspondence with Mr. Magera regarding farming situation.	0.10
Mar 1/2010	DC	Review information regarding depositions; draft letter to Mr. Dunn regarding depositions.	0.20
Mar 11/2010	AEU	Draft Memorandum in Opposition to Defendant's Objection to Notice of Deposition and Request for Permission to Take Testimony via Telephone; Draft affidavit for DC	3.00
Mar 11/2010	DC	Intra-office conference regarding needed discovery from Mr. Archibald and Mr. Foster.	0.30
Mar 12/2010	AEU	Phone call to Dave Chapple; Leave Message; Phone call to Kipp Archibald; Draft Affidavit of Kipp Archibald Affidavit; Conversation with Dave Chapple; Email to Dave Chapple regarding questions to ask Brad Foster	1.30
Mar 12/2010	DC	Prepare for and attend hearing regarding request for telephone deposition; e-mail correspondence with Mr. Magera; telephone conference regarding information from witnesses.	0.50
Mar 16/2010	AEU	Edit and revise Affidavit of Kipp Archibald	0.10
Apr 12/2010	DC	Prepare outlines and exhibits for depositions; conference with Mr. Magera to prepare for depositions;	5.40
Apr 13/2010	DC	Prepare for and take depositions of Mr. Clark and Mr. Peterson; defend deposition of Mr. Magera.	6.20
Jun 4/2010	DC	Telephone conference with Mr. Magera regarding telephone number for Brad Foster.	0.10
Jul 6/2010	AEU	Review Magera deposition, Peterson deposition and Clark deposition in preparation for second summary judgment memorandum regarding interactions with Kipp Archibald	1.00
Jul 7/2010	AEU	Continue reviewing depositions for second motion for summary judgment; Begin drafting Memorandum in Support of Second Motion for Summary Judgment	3.60
Jul 7/2010	DC	Conference regarding summary judgment motion and arguments.	0.20
Jul 8/2010	AEU	Continue drafting Memorandum in Support of Second Motion for Summary Judgment; Prepare correspondence to Dave Chapple and Brad Foster	3.90
Jul 12/2010	DC	Intra-office conference regarding status of summary judgment; e-mail correspondence to Mr. Magera regarding status.	0.20
Jul 12/2010	AEU	Continue drafting Memorandum in Support of Second Motion for Summary Judgment	1.50
Jul 13/2010	AEU	Finish drafting Memorandum in Support of Second Motion for Summary Judgment; Research case law regarding dominion and control over real property	4.80
Jul 14/2010	AEU	Finish reviewing and editing Memorandum in Support of Second Motion for Summary Judgment; Make changes to Kipp Archibald Affidavit and prepare list of questions for Kipp Archibald; Email to Kipp Archibald	3.00
Jul 21/2010	AEU	Phone call with Kipp Archibald; Intraoffice conference	0.70
Aug 3/2010	AEU	Draft Kipp Archibald Affidavit	0.60
Aug 4/2010	AEU	Finish drafting Kipp Archibald Affidavit	0.10
Aug 10/2010	AEU	Phone call to Brad Foster; Leave message	0.10
Aug 15/2010	DC	E-mail correspondence regarding status.	0.10
Aug 16/2010	AEU	Draft Affidavit of Brad Foster	0.80
Aug 17/2010	AEU		
Sep 7/2010	DC	Revise and edit Brad Foster and Kipp Archibald affidavits; Revise and edit memorandum in support of motion for summary judgment	3.90
Sep 8/2010	AEU	Begin editing and revising 2nd motion for summary judgment; conference regarding affidavits in support.	2.80
Sep 8/2010	AEU	Intraoffice conference regarding status of case	0.20

11/11

Sep 8/2010	DC	Continue editing and revising brief; research issue of equitable remedies when adequate recovery at law.	1.40
Sep 9/2010	DC	Continue editing and revising second motion for summary judgment.	0.40
Sep 15/2010	DC	E-mail Mr. Casper regarding settlement proceeds agreement; e-mail Mr. Meikle regarding Brad Foster's schedule for conference.	0.10
Sep 16/2010	DC	Intra-office conference regarding proceeds control agreement; e-mail correspondence with Mr. Casper.	0.30
Sep 20/2010	AEU	Email to Dave Chapple regarding Brad Foster affidavit	0.20
Sep 20/2010	DC	Review e-mail correspondence from Mr. Casper; e-mail correspondences with Mr. Magera and Mr. Ball regarding proceeds control agreement and status of second summary judgment.	0.20
Sep 21/2010	AEU	Intraoffice conference regarding affidavits for summary judgment	0.20
Sep 21/2010	DC	Edit and revise affidavits of Kipp Archibald and Brad Foster; draft e-mail to Mr. Magera; review deposition testimony for affidavits.	2.30
Sep 27/2010	AEU	Send email to Dave Chapple regarding Brad Foster Affidavit	0.40
Oct 1/2010	AEU		
		Draft follow-up email to Dave Chappel regarding Brad Foster Affidavit; Draft email correspondence to GLM regarding Brad Foster Affidavit	0.20
Oct 4/2010	DC	Conference with Mr. Foster to discuss events surrounding use of Clark property.	0.30
Oct 6/2010	DC	Conference with Mr. Foster to review affidavit; edit and revise affidavit for Mr. Foster's signature.	1.70
Oct 11/2010	DC	Edit and revise brief, affidavits, etc. for second summary judgment.	2.80
Oct 13/2010	DC	Edit and revise briefing to include Foster Affidavit.	0.30
Oct 14/2010	DC	Continue editing and revising memorandum in support of second summary judgment motion.	0.20
Nov 1/2010	DC	Edit and revise Mr. Archibald's affidavit for review.	0.20
Nov 4/2010	DC	Conference with Mr. Archibald to finalize affidavit; edit and revise affidavit; finalize affidavit for signing.	1.10
Nov 8/2010	DC	E-mail correspondence with Mr. Magera regarding second summary judgment motion.	0.10
Nov 12/2010	DC	Edit and revise Buku briefing and affidavits.	2.10
Nov 15/2010	DC	Edit and revise briefing and affidavit; file all briefing related to second motion for summary judgment.	1.30
Nov 29/2010	AEU	Review Defendants' Memorandum in Response to Motion for Summary Judgment	0.60
Nov 30/2010	AEU	Begin drafting Reply Memorandum in Support of Second Motion for Summary Judgment	4.00
Nov 30/2010	DC	Intra-office conference regarding reply brief and status of prior ruling.	0.40
Dec 1/2010	AEU	Continue drafting Reply Memorandum in Support of Second Motion for Summary Judgment	4.80
Dec 3/2010	AEU		
Dec 6/2010	AEU	Finish drafting Reply Memorandum in Support of Second Motion for Summary Judgment; Draft Motion to Strike Portions of the Affidavit	2.20
		Finish drafting Memorandum in Support of Motion to Strike; Draft Affidavit of DeAnne Casperson in Support of Motion to Strike; Draft Motion to Strike; Make final revisions and edits to Reply Memorandum in Support of Second Motion for Summary Judgment; Review and edit Memorandum in Support of Motion to Strike, Affidavit of DeAnne Casperson, Motion to Strike and Notice of Hearing on Motion to Strike	6.40
Dec 6/2010	DC	Edit and revise reply brief; finalize reply brief in support of summary judgment.	6.10
Dec 13/2010	DC	Prepare for oral argument on motion for summary judgment; travel to and from Jefferson County for hearing; conference with client regarding outcome and new hearing schedule.	2.40
Dec 20/2010	DC	Telephone conference with Mr. Magera regarding summary judgment and assignment to Judge Watkins.	0.20
Jan 21/2011	DC	E-mail correspondence with Mr. Magera regarding hearing; conference with Mr. Decker regarding concern of being before Judge twice in one day.	0.30
Jan 24/2011	DC	Prepare for and attend summary judgment hearing.	4.70
Feb 15/2011	DC	E-mail correspondence regarding SJ decision.	0.10

TOTAL HOURS 176.00

Totals for CAH	4.20	Fees Billed	
Totals for DC	85.80		953.50
Totals for AEU	86.00		15770.30
			9703.70

### Costs

Sep 15/2008	Computer Research for August 2008	42.46
Oct 15/2008	Filing fee for Complaint - Jefferson County	88.00
Jan 13/2009	Computer Research for December 2008	0.69
Jul 14/2009	Computer Research for June 2009	37.89

Aug 11/2009	Computer Research for July 2009	414.86
Apr 26/2010	Deposition of Jaramie Magera - T & T Reporting	108.07
Apr 26/2010	Deposition of Rael Clark and Angus Petersen - T & T Reporting	528.75
Jan 18/2011	Computer Research for December 2010	170.21
		1390.93

241

**Case History**

Jefferson

1 Cases Found.

**Buku Properties L L C vs. Rael H Clark, etal.**

Case: **CV-2008-0000941** District Filed: **11/07/2008** Subtype: **Other Claims** Judge: **Dane H Watkins Jr** Status: **Pending**  
 Defendants: **Clark, Janet C Clark, Rael H Peterson, Angus Jerry Peterson, Betty Jean**  
 Plaintiffs: **Buku Properties L L C,**

Register Date of actions:

- 11/06/2008 Complaint Filed
- 11/06/2008 Summons Issued Rael Clark
- 11/06/2008 Summons Issued Janet Clark
- 11/06/2008 Summons Issued Angus Peterson
- 11/06/2008 Summons Issued Betty Jean Peterson
- 11/07/2008 New Case Filed - Other Claims
- 11/07/2008 Plaintiff: Buku Properties L L C, Attorney Retained Charles Homer
- 11/07/2008 Notice Of Appearance  
 Filing: A - Civil Complaint for more than \$1,000.00 Paid by: Homer, Charles (attorney for Buku Properties L L C,) Receipt number: 0007034 Dated: 11/7/2008 Amount: \$88.00 (Check) For: Buku Properties L L C, (plaintiff)
- 11/25/2008 Acknowledgment of acceptance of service
- 11/25/2008 Acknowledgment of acceptance of service
- 12/08/2008 Defendant: Clark, Janet C Attorney Retained Robin D. Dunn
- 12/10/2008 Answer and counterclaim  
 Filing: I7 - All Other Cases Paid by: Dunn, Robin D. (attorney for Clark, Rael H) Receipt number: 0007896 Dated: 12/11/2008 Amount: \$58.00 (Check) For: Clark, Rael H (defendant)
- 12/30/2008 Answer to counterclaim by BUKU Properties, LLC
- 04/14/2009 Defendant/Third Party Plaintiff Burtenshaw's 2nd Amended Exhibit List
- 04/15/2009 Notice of Service, Plaintiff's 1st set of Discovery Requests to Defendant
- 04/15/2009 Notice of Service, Plaintiff's 1st set of Discovery Requests
- 06/02/2009 Change Assigned Judge (batch process)
- 06/03/2009 Notice of Service of defendants Peterson answers to plaintiffs first set of discovery requests
- 10/05/2009 Hearing Scheduled (Motions 11/09/2009 03:30 PM) motion for summary judgment
- 10/05/2009 Memorandum in support of motion for summary judgment
- 10/05/2009 Affidavit of Jaramie Magera in support of plaintiffs motion for summary judgment
- 10/05/2009 Notice of hearing
- 10/06/2009 Motion for summary judgment
- 10/14/2009 Continued (Motions 12/14/2009 01:30 PM) motion for summary judgment
- 10/15/2009 Notice vacating hearing and resetting hearing on plaintiffs motion for summary judgment
- 11/13/2009 Denial of plaintiffs' request for summary judgment and objection to consideration of summary judgment
- 11/13/2009 Motion to strike portions of magera affidavit
- 11/13/2009 Defendant's request for summary judgment
- 11/13/2009 Affidavit of Jerry and Betty Peterson in support of defendants positions re: summary judgment

Exhibit "B"

429

- 11/13/2009 Affidavit of Rael Clark in support of defendants positions re: summary judgment
- 11/13/2009 Affidavit of Naysha Foster, Planning and Zoning Coordinator re: summary judgment
- 11/13/2009 Defendants memorandum re: summary judgment
- 11/13/2009 Hearing notice of on defendants summary judgment; motion to strike
- 12/07/2009 Reply memorandum in support of plaintiffs motion for summary judgment
- 12/07/2009 Memorandum in opposition to defendants motion to strike portions of magera affidavit
- 12/14/2009 Hearing result for Motions held on 12/14/2009 01:30 PM: Motion Held motion for summary judgment
- 01/06/2010 Notice of Service of plaintiffs second set of discovery requests to defendants Rael Clark and Janet Clark
- 01/06/2010 Notice of Service of plaintiffs second set of discovery requests to defendants Angus Jerry Peterson and Betty Jean Peterson
- 01/13/2010 Notice of Service of defendant Clarks' answers to plaintiffs second set of discovery requests
- 01/13/2010 Notice of Service defendants Petersons answers to plaintiffs second set of discovery requests
- 01/27/2010 Memorandum decision (BUKU motion for summary judgment is denied)
- 02/25/2010 Notice of taking deposition duces tecum
- 03/03/2010 Notice of deposition for Rael H. Clark
- 03/03/2010 Notice of deposition of Angus Jerry Peterson
- 03/09/2010 defendants objection to notice of de[psotopm pf rael h. clark and request for permission to take testimony via telephone
- 03/09/2010 Notice of telephonic hearing
- 03/10/2010 Hearing Scheduled (Motions 03/12/2010 10:00 AM)
- 03/10/2010 objection to notice of deposition (to be heard in Madison county)
- 03/12/2010 Hearing result for Motions held on 03/12/2010 10:00 AM: Motion Held objection to notice of deposition (to be heard in Madison county)
- 03/12/2010 Notice of Vacating Deposition of Rael H Clark
- 03/12/2010 Notice of Vacating Deposition of Angus Jerry Peterson
- 03/12/2010 Minute Entry
- 03/15/2010 Minute Entry on objection to notice of deposition
- 03/18/2010 Memorandum in opposition to defendants objections to notice of depositin fo Rael H. Clark and request from permission to take testimony via telephonce
- 03/18/2010 Affidavit of deanne casperson in support of memorandum in opposition to defendants objection to notice of deposition fo rael h. clark and request from permission to take testimony via telephone
- 03/29/2010 Change Assigned Judge (batch process)
- 04/01/2010 Amended Notice of Deposition of Angus Jerry Peterson
- 04/01/2010 Amended Notice of Deposition of Rael H. Clark
- 04/01/2010 Amended Notice to taking Deposition Duces Tecum of Jaramie Magara
- 11/01/2010 Hearing Scheduled (Motions 12/13/2010 02:00 PM) motion for summary judgment
- 11/16/2010 Notice of hearing
- 11/16/2010 Affidavit of Kipp Archibald in support of plaintiffs second motin for summary judgment
- 11/16/2010 Affidavit of Brad Foster in support of plaintiffs second motion for summary judgment
- 11/16/2010 Affidavit of deanne casperson in support of plaintiffs second

430

motion for summary judgment  
11/16/2010 Plaintiffs second motion for summary judgment  
11/16/2010 Memorandum in support of plaintiffs second motion for summary judgment  
11/29/2010 Defendants memorandum re: summary judgment plaintiffs second motion  
11/29/2010 Affidavit of jerry peterson and betty peterson in support of defendants positions re: summary judgment  
12/06/2010 Reply memorandum in support of plaintiffs second motion for summary judgment  
12/06/2010 Motion to strike  
12/06/2010 Memorandum in support of motion to strike  
12/06/2010 Affidavit of deanne casperson in support of motion to strike  
12/06/2010 Notice of Hearing  
12/16/2010 Continued (Motions 01/24/2011 02:30 PM) second motion for summary judgment  
12/16/2010 Notice Of Hearing  
01/03/2011 Change Assigned Judge  
01/24/2011 Minute Entry on motion for summary judgment  
01/25/2011 Hearing result for Motions held on 01/24/2011 02:30 PM: Motion Held second motion for summary judgment

Connection: Public

431



IDAHO SUPREME COURT



IDAHO COURT OF APPEALS

Clerk of the Courts  
(208) 334-2210

P.O. Box 83720  
Boise, Idaho 83720-0101

CHRISTINE BOULTER, CLERK  
Attn: NANCY  
JEFFERSON COUNTY COURTHOUSE  
210 COURTHOUSE WAY STE 100  
RIGBY, ID 83442

JEFFERSON COUNTY COURT, IDAHO  
3-11-11 8

**CLERK'S RECORD DUE DATE SUSPENDED**

Docket No. 38561-2011    BUKU PROPERTIES, LLC    Jefferson County District Court  
v. RAOEL H. CLARK    #2008-941

The CLERK'S RECORD DUE DATE is **SUSPENDED** until further notification from this office.

REASON FOR SUSPENSION:    SUSPENDED FOR D.C. FINAL JUDGMENT.

For the Court:  
Stephen W. Kenyon  
Clerk of the Courts

03/02/2011 DB

4/30

# In the Supreme Court of the State of Idaho

FILED MAR -3 PM 1:46  
JEFFERSON COUNTY, IDAHO

BUKU PROPERTIES, LLC, an Idaho limited liability company,  
Plaintiff-Respondent,  
v.  
RAOEL H. CLARK and JANET C. CLARK, husband and wife; ANGUS JERRY PETERSON and BETTY JEAN PETERSON, husband and wife,  
Defendants-Appellants,

ORDER SUSPENDING APPEAL  
Supreme Court Docket No. 38561-2011  
Jefferson County Docket No. 2008-941

On February 25, 2011 this Court received a Notice of Appeal filed by Appellant November 17, 2011 in District Court which appealed the Memorandum Decision re: motion for Summary Judgment and the Judgment re: Motions for Summary Judgment entered by Honorable Dane H. Watkins, Jr. filed February 3, 2011. It appears that a Judgment set forth on a separate document has yet to be entered as provided by I.R.C.P. 58(a) as clarified by the Court's recent decisions in *Spokane Structures v. Equitable Investment*, 148 Id 616, 226 P.3d 1263 (2010) and *IT, Inc. v. Mori*, 148 Id 825, 230 P.3d 435 (2010), and this appeal is premature. As provided by I.R. 17(e)(2), this appeal shall be suspended until entry of judgment or order that on its face states that the order is the final decision of the District Court and represents a final determination of the rights of the parties. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the matter of entry of a judgment as required by I.R.C.P. 58(a) be, and hereby is, REMANDED to the District Court and proceedings in this appeal shall be SUSPENDED to allow for the entry of a judgment, at which time this appeal shall proceed.

4/3/11

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)

2011 MAR -8 PM 12:27  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

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, )

Case No. CV-08-941

DEFENDANTS' OBJECTION  
TO PLAINTIFF'S REQUEST  
FOR FEES AND COSTS;  
MEMORANDUM IN SUPPORT  
OF OBJECTION

OBJECTION-1-



435  
ORIGINAL

COMES NOW, Robin D. Dunn, Esq., attorney for the defendant/counterclaimants and object to the attorney fee and cost request of the plaintiff for the reasoning set forth hereafter:

1. Justice Jesse Walters has written a primer on the award of attorney fees which was an update of the often quoted Lon Davis study. This *Idaho Law Review Article, Vol. 38 (2001) Number 1*, requires three criteria as follows:

A. A prevailing party;

B. A statutory or contractual basis; and

C. Reasonableness of award under Rule 54 of the Idaho Rules of Civil Procedure. For the reasons stated hereafter, no basis exists for the award and the fee request is not reasonable.

2. The plaintiff requested a rescission of the contracts (Clark and Peterson) which were for the sale of the real property. The plaintiff alleged and the court believed that the plaintiff could rescind the contract based upon a due diligence period contained in the contract notwithstanding no evidence was presented of any problems with the real property. In any event, the court granted summary judgment and the contract became a nullity. As such, there was no contract. Thus, no contractual basis exists for the award of fees since there was "no contract" according to the grant of summary judgment.

having dismissed the contract claims, the action could not have been one "to recover on a contract." We affirmed the action of the trial court in Day, stating that "to recover attorney fees under the statute, the action must be one to recover on the contract, not merely an action arising from a transaction relating to the purchase or sale of goods." 115 Idaho at 1018, 772 P.2d at 225. Based upon the interpretation of the statute in Day, the trial court's grant of attorney fees against appellants must be reversed; there being no contract between appellants

**OBJECTION-2-**

430

*Management Catalysts v. Turbo West Corpac, Inc.*, 809 P.2d 487, 119 Idaho 626, (Idaho 1991)

----- Excerpt from page 809 P.2d 491.

3. The same logic holds true for the claim of a commercial transaction under Idaho Code Section 12-120. If there is "no transaction" between the parties because the parties are returned to the status quo, then there is no basis for the award of fees. If the "Agreement" is rescinded, then no transaction occurred. Thus, no basis exists statutorily for the award of fees.

"there is a clear distinction between litigation arising from a commercial transaction and litigation on noncommercial issues that might have future commercial ramifications." > 117 Idaho at 424, 788 P.2d at 239. For reasons different from those given by the district judge, we conclude that an award of attorney fees in this case was not authorized under > I.C. § 12-120(3).

*Edwards v. Edwards*, 842 P.2d 307, 122 Idaho 971, (Idaho App. 1992)

----- Excerpt from page 842 P.2d 309.

This action before the court involved the future purchase of the real property. Although the defendants' disagree with the court's ruling on summary judgment, the case as it stands rescinded the contract and made the future purchase of the real property problematic. Future commercial ramifications do not come under the definition of commercial transactions to be able to award fees and costs.

4. The lack of a contract or a statutory basis prohibits the award of fees and costs.

With respect to the provision allowing attorney fees in a commercial transaction, the statute defines a commercial transaction as all transactions except transactions for personal and household purposes. This Court has held that the test is whether the commercial transaction comprises the gravamen of the lawsuit. > *Spence v. Howell*, 126 Idaho 763, 890 P.2d 714 (1995); *Brower v. [126 Idaho 900] E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 792 P.2d 345 (1990). The gravamen of the lawsuit refers to whether the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover. > *Brower*, 117 Idaho at 784,

**OBJECTION-3-**

451

792 P.2d at 349.

*Property Management West, Inc. v. Hunt*, 894 P.2d 130, 126 Idaho 897, (Idaho 1995)

----- Excerpt from pages 894 P.2d 132-894 P.2d 133.

The claim for reimbursement by the plaintiff was by rescinding the contract. By rescinding the contract to recover the earnest money, no contract existed and could not be, by the court's ruling, the gravamen of the lawsuit since a contract no longer existed and a commercial transaction no longer existed. Thus, fees cannot be awarded.

5. No argument, of a reasonable nature, is made for fees pursuant to any other statute including Idaho Code 12-121. If so, the court should be convinced that nothing done by the defendants was unreasonable, frivolous or without foundation.

6. The request for attorney fees is untimely. The certificate of mailing by the clerk for Judge Watkins, Lettie Messick, indicates she mailed a copy of the memorandum decision and the judgment to plaintiff's counsel, DeAnne Casperson, on February 3, 2011. The memorandum was not filed within 14 days as required by rule.

7. The summary judgment decision did not award fees. Thus, a request for fees should be made to the district court since plaintiff was the prevailing party. No motion was made by plaintiff to request fees. No request was timely made to the court for fees rather an affidavit of fees and memorandum was filed. This is a technical matter the court should consider.

8. Assuming arguendo that the court determines fees should be awarded, reasonableness of fees is governed by Rule 54 of the Idaho Rules of Civil Procedure.

The plaintiff should not be entitled to fees leading up to the ruling on summary

**OBJECTION-4-**

438

judgment by this court.

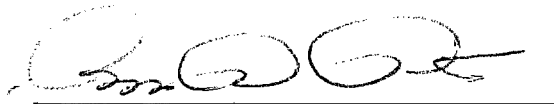
The defendants successfully defended the first summary judgment motion and all allegations until this “newest court” made its ruling. Thus, all fees prior to the briefing on the latest summary judgment motion (second motion for summary judgment) should be denied.

The defendants prevailed on the first motion and the events leading up to that decision. Thus, the plaintiffs could not argue, in reasonable fashion, that it was entitled to fees until the date of July 8, 2010. (The date commencing the preparation for the second summary judgment motion.) Furthermore, the court did not accept the motions to strike, etc. and those matters should not be awarded for the unsuccessful attempt by plaintiff. The plaintiff is only entitled to 68.9 hours according to the affidavit of its attorney commencing July 8, 2010 until February 15, 2011. (Deleting motions to strike, etc.)

#### CONCLUSION

Fees and costs are not awardable from defendants to the plaintiff for the reasons cited above.

DATED this 8<sup>th</sup> day of March, 2011.



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

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8<sup>th</sup> day of March, 2011, a true and correct copy of

**OBJECTION-5-**

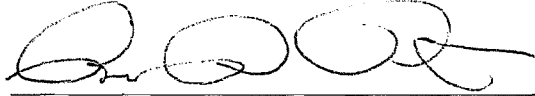
4/3/11

the foregoing was delivered to the following person(s) by:

Hand Delivery

Postage-prepaid mail

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 Dane Watkins (Chambers in Bonneville)

**OBJECTION-6-**

44/0



**IDAHO SUPREME COURT**



**IDAHO COURT OF APPEALS**

*Clerk of the Courts*  
*(208) 354-2210*

2011 MAR - 9 PM 1:29  
PO, Box 83720  
Boise, Idaho 83720-0101

DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

CHRISTINE BOULTER, CLERK  
Attn: NANCY  
JEFFERSON COUNTY COURTHOUSE  
210 COURTHOUSE WAY STE 100  
RIGBY, ID 83442

**CLERK'S CERTIFICATE FILED**

Docket No. 38561-2011      BUKU PROPERTIES,      Jefferson County District Court  
LLC v. RAOEL H.      #2008-941  
CLARK

Enclosed is a copy of the CLERK'S CERTIFICATE for the above-entitled appeal, which was filed in this office on MARCH 7, 2011.

Please carefully examine the TITLE and the CERTIFICATE and advise the District Court Clerk (or the Agency secretary, if applicable) AND this office of any errors detected on this document.

The TITLE in the CERTIFICATE must appear on all DOCUMENTS filed in this Court, including all BRIEFS. An abbreviated version of the TITLE may be used if it clearly identifies the parties to this appeal when the title is extremely long.

For the Court:  
Stephen W. Kenyon  
Clerk of the Courts

03/08/2011 DB

441

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

BUKU PROPERTIES, LLC, and Idaho  
Limited Liability Company,

Plaintiff/Respondent

-vs-

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

Defendants/Appellants.

CLERK'S CERTIFICATE OF APPEAL

SUPREME COURT NO. *38561*

Jefferson County Case No. CV-2008-941

**APPEAL FROM:** 7<sup>th</sup> Judicial District Jefferson County. The Honorable Dane H. Watkins, Jr.  
**CASE NO. FROM COURT:** CV-2008-941  
**ORDER OF JUDGMENT APPEALED FROM:** Summary Judgment dated February  
3, 2011.

**ATTORNEY FOR APPELLANT:** Robin D. Dunn

**ATTORNEY FOR RESPONDENT:** DeAnne Casperson

**APPEALED BY:** Raoel Clark, et al

**APPEALED AGAINST:** BUKU Properties, LLC

**NOTICE OF APPEAL FILED:** 2/17/2011

**AMENDED NOTICE OF APPEAL FILED:** n/a

**NOTICE OF CROSS-APPEAL:** n/a

**AMENDED NOTICE OF CROSS APPEAL FILED:** n/a

**APPELLATE FEE PAID:** Yes

**RESPONDENT OR CROSS RESPONDENT'S REQUEST FOR ADDITIONAL  
RECORD:**

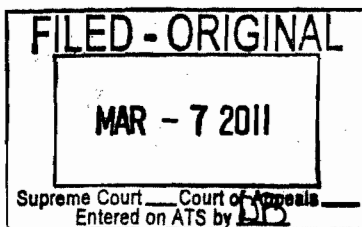
**WAS DISTRICT COURT REPORTER'S TRANSCRIPT REQUESTED?:** NO  
**IF SO NAME OF REPORTER:** N/A

RECEIVED  
IDAHO SUPREME COURT  
OFFICE OF APPELLANTS  
2011 MAR - 7 A 9:21

Dated this 23<sup>rd</sup> day of February, 2011

CHRISTINE BOULTER  
CLERK OF THE DISTRICT COURT

By *Nancy Anderson*  
Deputy Clerk



SEVENTH JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF JEFFERSON  
210 Courthouse Way, Suite 120  
RIGBY, IDAHO 83442

Buku Properties L L C )  
 )  
vs. ) Case No: CV-2008-0000941  
 )  
Raoel H Clark, etal. ) **NOTICE OF HEARING**  
 )

**NOTICE IS HEREBY GIVEN** that the above-entitled case is hereby set for:

**Status Conference regarding Final Judgment**

Judge: Monday, March 28, 2011 1:30 PM  
Dane H. Watkins, Jr.  
Courtroom: Large Courtroom #3

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Wednesday, March 09, 2011.

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

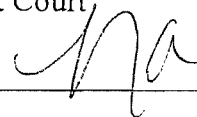
Mailed

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

Courthouse Box

Dated: Wednesday, March 09, 2011  
Christine Boulter  
Clerk Of The District Court

By: \_\_\_\_\_  
Deputy Clerk



2/1/11

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)

2011 APR 12 PM 4:48

DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

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. )

Case No. CV-08-941

DEFENDANTS' STATEMENT  
RE: FINAL 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-Defendant. )

## INTRODUCTION

The above-entitled court entered its Memorandum Decision, dated February 3, 2011, granting summary judgment to the plaintiffs; and, dismissing the counter-claims of the defendants. On the same date, the court entered its “Judgment” completing the process.

The defendants timely appealed the document entitled “Judgment” believing it to be the final position of the court. After that time, the Supreme Court of Idaho requested a final judgment of the court and offered no directions. It is assumed that all parties believed this was a final judgment. The only possible portion of the document that may have been in question was a “certification” pursuant to Rule 54 of the Idaho Rules of Civil Procedure.

The defendants can only assume when a document states “Judgment”, it is the final opinion of the court. Since that time, the plaintiffs have submitted proposed final judgment documents to which the plaintiffs have objected since the judgment documents submitted to the court contain information never explained or elucidated by the court in its memorandum decision.

If the court were now to “change” its judgment, it would be tantamount to a motion to reconsider which neither party requested. The time lines for requesting a new trial and/or reconsideration have expired. The judgment should contain its original language and add the certification pursuant to Rule 54.

In the alternative and given the lack of direction by the Supreme Court, the complaint of the plaintiff should be the starting point to review what was originally requested by such party. The plaintiff requested that the “contract” between the parties be rescinded and the parties returned to the status quo. If so, and taking the

decision of this court into consideration, that is exactly what the court did. Not only did it grant the plaintiff summary judgment; but, it dismissed the counterclaims of the defendants—some of which were equitable in nature and did not depend upon the existence of a contract. Needless-to-say, the defendants disagree with the reasoning of the court and of the decision. However, that determination, at this point, is for another court to review.

If the court now adds language to the “judgment” which was not discussed in the memorandum decision, how can either party defend or argue its position to the higher court. This court should remain consistent with its judgment as previously written and add the conforming language of Rule 54. To add otherwise would prejudice the defendants and have to argue positions never discussed by the district court.

1. Sum certain on money judgment. The plaintiff requests a sum certain in the judgment for refund of earnest money. This position certainly is understandable but does not portray the offsets that the defendants used for the purchase of the “retirement homes” and the expenses (damages) that the court did not consider by virtue of the counterclaims denied by the court. These sums claimed by the defendants, at a minimum, would have required a finding of damages and any offsets. No fact finder has or had the opportunity to determine the damages to the defendants. The refunds that the plaintiff requests are as follows: Peterson \$317,000; Clark \$25,000.
2. Prejudgment interest. A review of court cases indicates that prejudgment interest can be a discretionary decision by this court.

We apply an "abuse of discretion" standard of review in deciding whether prejudgment interest should have been awarded in the present case; it is a question of fairness that is to be answered by balancing the equities. > Wessel v. Buhler, 437 F.2d 279 (9th Cir.1971). The district court's reasoning in following Rodgers is sound. 838 P.2d 323, 122 Idaho 720, Stueve v. Northern Lights, Inc., (Idaho App. 1992)  
----- Excerpt from page 838 P.2d 326.

However, it should also be noted that prejudgment interest has other factors to consider and the following case considers many different matters to-wit:

Idaho statutory law, > Idaho Code § 28-22-104, calls for the award of prejudgment interest on certain types of money claims, and case law likewise calls for prejudgment interest on damages awarded for unjust enrichment. > Jones v. Whiteley, 112 Idaho 886, 889, 736 P.2d 1340, 1343 (Ct.App.1987). Under either the statute or the equitable remedy of unjust enrichment, however, prejudgment interest is allowed only where the damages are liquidated or readily ascertainable by mathematical process. > Id.; > Child v. Blaser, 111 Idaho 702, 706, 727 P.2d 893, 897 (Ct.App.1986). This limitation is based upon "equitable considerations," > Farm Dev. Corp. v. Hernandez, 93 Idaho 918, 920, 478 P.2d 298, 300 (1970), which presumably include the notion that a person who could not determine the amount owed should not be charged interest on the sum that is ultimately found to be due. See 22 AM.JUR.2D Damages § 654 (1988). However, "where the amount of liability is liquidated or capable of ascertainment by mere mathematical processes" interest is allowed from a time prior to judgment, "for in that event the interest in fully compensating the injured [145 Idaho 277] party predominates over other equitable considerations." > Farm Dev. Corp., 93 Idaho at 920, 478 P.2d at 300 (quoting > United States Fidelity & Guaranty Co. v. Clover Creek Cattle Co., 92 Idaho 889, 900, 452 P.2d 993, 1004 (1969)). See also > Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 814, 919 P.2d 334, 343 (1996); > Davis v. Prof'l Bus. Serv., Inc., 109 Idaho 810, 817, 712 P.2d 511, 518 (1985); > Child, 111 Idaho at 706-07, 727 P.2d at 897-98.

The mere fact that a claim is disputed or litigated does not render damages "unascertainable," for if this were the case, a party could delay payment without incurring interest expense by disputing and litigating any claim, and prejudgment interest would never be awarded. > Ace Realty, Inc. v. Anderson, 106 Idaho 742, 751, 682 P.2d 1289, 1298 (Ct.App.1984). See also > Mitchell v. Flandro, 95 Idaho 228, 235, 506 P.2d 455, 462 (1972). Rather, damages are unascertainable where some factor necessary to calculate the amount of damages must be determined by a trier of fact. Conversely:

A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Examples are claims upon promises to pay a fixed sum, claims for money had and received, claims for money paid out, and claims for goods or services to be paid for at an agreed rate.

> Seubert Excavators, Inc. v. Eucon Corp., 125 Idaho 744, 750 n. 2, 874 P.2d 555, 561 n. 2 (Ct.App.1993), aff'd, > 125 Idaho 409, 871 P.2d 826 (1994). There need be no prayer for interest contained in the complaint to justify the award of prejudgment interest. > Farm Dev. Corp., 93 Idaho at 920, 478 P.2d at 300; > Stueve v. Northern Lights, Inc., 122 Idaho 720, 723, 838 P.2d 323, 326 (Ct.App.1992).

The parties disagree about the standard of appellate review applicable to a trial court's order regarding prejudgment interest. Idaho case law has been inconsistent on this point. In the past, the Idaho Supreme Court has suggested that the review is conducted de novo, saying that "[i]nterest should be allowed as a matter of law from the date the sum became due in cases where the amount claimed, even though not liquidated, is capable of mathematical computation." > Taylor v. Herbold, 94 Idaho 133, 137, 483 P.2d 664, 668 (1971) (emphasis added). Many appellate opinions do not squarely address the level of deference to be given to the trial court in these matters, but seem to implicitly apply de novo review. See, e.g., > Magic Valley Foods, Inc. v. Sun Valley Potatoes, Inc., 134 Idaho 785, 792, 10 P.3d 734, 741 (2000). More recently, however, the Supreme Court has articulated an abuse of discretion standard. > Dillon v. Montgomery, 138 Idaho 614, 617, 67 P.3d 93, 96 (2003); > Belk v. Martin, 136 Idaho 652, 660, 39 P.3d 592, 600 (2001). > (FN1) Our inquiry in this case, therefore, is whether the district court abused its discretion in finding that Rick's damages were not liquidated or ascertainable by mathematical process. A permissible exercise of discretion occurs if the trial court (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the specific choices before it; and (3) reached its decision by an exercise of reason. > Sun Valley Potato Growers, Inc. v. Texas Refinery Corp., 139 Idaho 761, 768, 86 P.3d 475, 482 (2004).

178 P.3d 639, 145 Idaho 274, Ross v. Ross, (Idaho App. 2007)  
----- Excerpt from pages 178 P.3d 641-178 P.3d 642.

Even more important, the plaintiffs did not timely prosecute this action.

More than one year passed (1/27/2010 to 2/03/2011) between the successful defense by the defendants herein of the first summary judgment motion filed by the plaintiffs. In these economic times, who would not want to receive a 12% return on money when financial institutions are anywhere between 1% and 3% return on money. The court would be compounding the prejudice to the defendants by allowing such sum (prejudgment interest). The court is supposed to do justice for the parties. The court is well aware that the plaintiffs paid \$317,000 earnest money to the defendants, Petersons. This sum



was not by accident and more than the typical sum for earnest money. Certainly, the court is not blind to this fact which was included in the numerous affidavits on summary judgment. To add prejudgment interest to this summary would be inequitable and totally unfair to the defendants, Peterson. Likewise, even though the refundable sum is lower for the Clarks, prejudgment interest should not be allowed.


3. Attorney fees have been addressed by separate document. Costs of right are not argued by these defendants. The reasoning for the objections to attorney fees are adequately set forth.

#### CONCLUSIONS

The court should not alter its original "judgment" and certify the judgment as final. If the court does add additionally language to the judgment, the plaintiffs do not have the reasoning of the court which should have been included in the original memorandum.

If the court adds additional language, the only matter would be the amount to be returned to the plaintiff. Since a contract did not exist by virtue of the grant of summary judgment to the plaintiff, other items of interest should be rendered moot.

DATED this 12 day of April, 2011.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of April, 2011, a true and correct copy of the foregoing was delivered to the following person(s) by:

Hand Delivery

Postage-prepaid mail

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 Dane Watkins  
605 North Capital  
Idaho Falls, ID 83402



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

18 Na  
2011 APR 18 PM 2:29  
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

**REPLY MEMORANDUM IN SUPPORT  
OF ATTORNEY'S FEES AND COSTS**

## I. ARGUMENT

Plaintiff Buku Properties, LLC (“Buku”), by and through its counsel of record, Holden Kidwell Hahn & Crapo, P.L.L.C., hereby submits this Reply Memorandum in Support of Attorney’s Fees and Costs pursuant to Rule 54 of the Idaho Rules of Civil Procedure. By submitting this Memorandum, Buku is claiming the right, pursuant to contract, statutory authority, i.e., Idaho Code §§ 12-120(3) and 12-121, and Rule 54 of the Idaho Rules of Civil Procedure, to recover the costs and fees set forth in the Affidavit of DeAnne Casperson in Support of Memorandum of Costs and Fees from Defendants Rael H. Clark and Janet C. Clark, and Angus Jerry Peterson and Betty Jean Peterson (collectively “Defendants”).

### A. **Buku is Entitled to Attorney’s Fees and Costs Pursuant to the Parties’ Agreements**

Defendants argue in their Objection to Plaintiff’s Request for Fees and Costs; Memorandum in Support of Objection (“Defendants’ Objection”) that no contractual basis for the award of attorneys fees exists. More specifically, Defendants argue:

[T]he plaintiff alleged and the court believed that the plaintiff could rescind the contract based upon a due diligence period contained in the contract notwithstanding no evidence was presented of any problems with the real property. In any event, the court granted summary judgment and the contract became a nullity. As such, there was no contract. Thus, no contractual basis exists for the award of fees since there was ‘no contract’ according to the grant of summary judgment.

(Defendants' Objection, p. 2). Defendants' argument is without support for several reasons. First, Plaintiff did not seek rescission of either Agreement. In fact, Plaintiff sought enforcement of the Agreements, specifically the provisions requiring the return of the earnest monies. (Verified Complaint, ¶¶ 27-33). The Court has never ruled the Agreements were rescinded. The Court found the Agreements clear and unambiguous and interpreted the plain language to require the return of the earnest monies.

Second, Defendants rely on case law where no contract relationship existed to support as award of attorney's fees. Defendants specifically cite to *Management Catalysts v. Turbo West Corpac, Inc.*, 809 P.2d 487, 119 Idaho 626 (1991), which appears as follows in Defendants' brief:

[h]aving dismissed the contract claims, the action could not have been one "to recover on a contract." We affirmed the action of the trial court in Day, stating that "to recover attorney fees under the statute, the action must be one to recover on the contract, not merely and action arising from a transaction relating to the purchase or sale of goods." 115 Idaho at 1018, 772 P.2d at 224. Based upon the interpretation of the statute in Day, the trial court's grant of attorney fees against appellants must be reversed; there being no contract between appellants

(Defendants' Objection, p. 2). Defendants' reliance upon *Management Catalysts* is misplaced. Here, in no way did the Court dismiss Buku's contract claims. In fact, the entire basis of the Court's decision was that Buku was entitled to have the Agreements between Buku and Defendants enforced, and pursuant to the terms of the contract, Buku was entitled to a return of its earnest monies. The Court specifically enforced the Agreements.

The attorney's fees provisions of both the Clark Agreement and the Peterson Agreement state as follows:

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

(See Complaint, Ex. A, ¶ 23; Ex. B, ¶ 23). Nowhere in that provision is there any exception for a scenario where the sale does not close. It applies to "any action to enforce this agreement." Defendant's argument that the Agreements are a nullity because the sale of Defendants' property did not close completely contradicts the Court's decision, the terms of the contract itself, and the actual claims pled in this case. Based on the parties Agreements, Buku is entitled to attorney's fees pursuant to contract.

**B. Buku is Entitled to Attorney's Fees and Costs as a result of a Commercial Transaction**

Defendants argue that Buku is not entitled to attorney's fees and costs because there was "no transaction" and that therefore Idaho Code § 12-120 cannot apply. Again, Defendants' arguments ignore the Court's order granting summary judgment in favor of Buku based upon the plain and unambiguous language of the Agreements. Defendants cite *Edwards v. Edwards*, 842 P.2d 307, 122 Idaho 971 (Ct. App. 1992) in support of their argument. However, that case did not deal with a contract for the purchase and sale of property to be developed. *Edwards v. Edwards* involved an action for a declaratory judgment, in which the plaintiff requested a ruling as to the validity and enforceability of two written agreements to develop and sell property owned by the plaintiff's children and

his mother's estate. *Id.*, 842 P.2d at 307, 122 Idaho at 971. The agreements themselves were between plaintiff and his parents, and plaintiff's mother and the trust plaintiff managed on behalf of his mother and four of his children. *Id.* Both agreements provided that the plaintiff would develop and promote certain tracts of land owned by his parents and his children, and that he would receive 50% of the net profit. *Id.* Ultimately, the court found in favor of the children, and the children requested attorney's fees, in part, under § 12-120(3). *Id.*, 842 P.2d at 308, 122 Idaho at 972. The court denied the request made under § 12-120(3), concluding that the statute did not authorize attorney's fees because the action sought declaratory relief, rather than a monetary award. *Id.* The Court of Appeals affirmed the lower court's decision, on the basis that neither party was attempting to recover against the other on the basis of any "integral" commercial transaction and that the purpose of the declaratory judgment action was to ascertain whether there existed a binding, contractual relationship between the parties under each of the two disputed agreements. 842 P.2d at 308-09, 122 Idaho at 972-73. There was no money or transaction involved in the agreements at issue in *Edwards*. Rather, they simply involved a promise between two parties to eventually develop some property. *See generally, Id.*

The situation in *Edwards* is entirely different from the scenario in the current case, in which the contract involved a transaction for the sale of property, which, pursuant to the terms of the Agreements themselves, was to potentially be purchased for the purpose

150



of developing the property. No party sought a declaratory judgment, but enforcement of the Agreements. As Buku noted in its Memorandum of Costs and Fees, Idaho courts have, on numerous occasions, recognized the applicability of this provision to commercial real estate transactions such as the one at issue in the agreements here. *See, i.e., Dennett v. Kuenzli*, 130 Idaho 21, 31-32, 936 P.2d 219, 230 (Ct. App. 1997); *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 274-75, 869 P.2d 1365, 1369-70 (1994); *Herrick v. Leuzinger*, 127 Idaho 293, 306, 900 P.2d 201, 214 (Ct. App. 1995). Consequently, Buku is entitled to attorney's fees pursuant to Idaho Code § 12-120(3).

**C. Buku's Request for Attorney's Fees and Costs is Timely**

Defendants also argue that Buku's request for attorney's fees and costs was untimely. This issue is moot at this point in time. No final judgment has been entered in this matter. This fact is confirmed by the Idaho Supreme Court, which suspended the proceedings in Defendants' appeal:

On February 25, 2011, this Court received a Notice of Appeal filed by Appellant November 17, 2011 in District Court which appealed the Memorandum Decision re: Motion for Summary Judgment and the Judgment re: Motions for Summary Judgment entered by Honorable Dane H. Watkins, Jr. filed February 3, 2011. It appears that a Judgment set forth on a separate document has yet to be entered as provided by I.R.C.P. 58(a) as clarified by the Court's recent decisions in *Spokane Structures v. Equitable Investment*, 148 Id 616, 226 P.3d 1263 (2010) and *TJT, Inc. v. Mori*, 148 Id 825, 230 P.3d 435 (2010), and this appeal is premature. As provided by I.A.R. 17(e)(2), this appeal shall be suspended until entry of judgment or order that on its face states that the order is the final decision of the District Court and represents a final determination of the rights of the parties. Therefore, it good cause appearing,

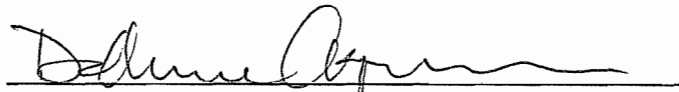
IT HEREBY IS ORDERED that the matter of entry of judgment as required by I.R.C.P. 58(a) be, and hereby is, REMANDED to the District Court and proceedings in this appeal shall be SUSPENDED to allow for the entry of a judgment, at which time this appeal shall proceed.

(Order Suspending Appeal, Docket No. 38561). Pursuant to Idaho Rule of Civil Procedure 54(d)(5), Buku was not required to submit its memorandum of costs and attorney's fees until fourteen days after entry of the Final Judgment. Because no Final Judgment has been entered, Buku's memorandum of costs and fees is timely.

## II. CONCLUSION

Based on the foregoing, Buku respectfully requests an award of attorney's fees in an amount of \$27,093.61 and costs in an amount of \$724.82. Buku further requests leave to file a supplemental memorandum for attorney's fees to recover fees incurred since the filing of the original memorandum of costs and fees.

Dated this 18<sup>th</sup> day of April, 2011.



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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of April, 2011, 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.

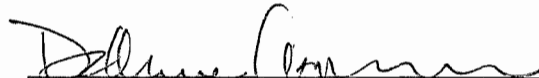
**DOCUMENT SERVED:**

**REPLY MEMORANDUM IN SUPPORT  
OF ATTORNEY'S FEES AND COSTS**

**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\CAH\14918\Pldgs\Fees.REPLY.wpd

4/18

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

21 Ma  
2011 APR 28 PM 1:31  
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

**MEMORANDUM IN SUPPORT OF  
ENTRY OF PLAINTIFF'S PROPOSED  
FINAL JUDGMENT**

On April 12, 2011, Defendants Raoel H. Clark and Janet C. Clark (“Clarks”) and Angus Jerry Peterson and Betty Jean Peterson (“Petersons”) filed a Defendants’ Statement Re: Final Judgment (“Statement”) and a proposed Final Judgment (“Defendants’ Final Judgment”) in this matter. The Statement argued that Plaintiff’s proposed Final Judgment should not be entered for various reasons and that Defendants’ Final Judgment should be entered, rather than the proposed Final Judgment provided to the Court by Plaintiff. Plaintiff now provides this Memorandum in Support of Entry of Plaintiff’s Proposed Final Judgment in response to the Statement and Defendants’ Final Judgment.

## **I. ARGUMENT**

### **A. No Final Judgment has been Entered**

Defendants’ continual argument that the “Judgment re: Motion for Summary Judgment” was a “Final Judgment” has no support and contradicts the Idaho Supreme Court’s explicit directives for the Court to enter a “final judgment.” Defendants provide in their Statement that:

[t]he defendants timely appealed the document entitled “Judgment” believing it to be the final position of the court. After that time, the Supreme Court of Idaho requested a final judgment of the court and offered no directions. It is assumed that all parties believed this was a final judgment. The only possible portion of the document that may have been in question was a “certification” pursuant to Rule 54 of the Idaho Rules of Civil Procedure.

The defendants can only assume when a document states “Judgment”, it is the final opinion of the court.

(Statement, p. 2). Defendants' position that the judgment resulting from Plaintiff's Motion for Summary Judgment was the final judgment in this matter is incorrect and fails to apply Idaho Supreme Court authority. The Idaho Supreme Court has defined a final judgment as "an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the right of the parties. It must be a separate document that on its face states the relief granted or denied." *T.J.T., Inc. v. Mori*, 148 Idaho 823, 203 P. 3d 4325, 436 (2010) (quoting *Camp v. East Fork Ditch Co.*, 137 Idaho 850, 867, 55 P. 3d 304, 327 (2002)). The judgment relating only to the summary judgment does not match that definition. Further, Defendants' assumption that when a document states "Judgment" it is the final opinion of the court in a matter has no basis. Again, Defendants fail to cite to the Court binding authority, which was cited in the Supreme Court's Order Suspending Appeal. The two cases provided in the Court's Order Suspending Appeal explain that the granting of a summary judgment is not a "Final Judgment" because it does not address the relief requested:

Rule 54(c) states that "every final judgment shall grant the *relief* to which the party in whose favor it is rendered is entitled. (Emphasis added). The relief to which a party is entitled is not the granting of a motion for summary judgment. The Rule refers to the relief to which the party is ultimately entitled in the lawsuit, or with respect to a claim in the lawsuit. The granting of a motion for summary judgment is simply procedural step towards the party obtaining that relief.

*Spokane Structures, Inc. v. Equitable Inc., LLC*, 148 Idaho 616, 619, 226 P. 3d 1263, 1266 (2010). In other words, Plaintiff did not plead for the grant of summary judgment.

Plaintiff pled the return of the earnest monies and requested prejudgment interest.

Summary judgment was simply a procedural step towards obtaining the relief.

Moreover, the Judgment was not entitled “Judgment” but “Judgment re: Motions for Summary Judgment.” Clearly, based upon this title alone, the Court was not disposing of all matters of the case by issuing the judgment. It only pertained to the Court’s decision on the Motions for Summary Judgment. In addition, that Idaho Supreme Court has already affirmatively stated that the Judgment entered by the Court on February 3, 2011, is not an appealable final judgment. As such, the Supreme Court remanded Defendants’ Appeal until a final, appealable judgment, which represents the Court’s final determination of the rights of the parties, is entered. (*See* Order Suspending Appeal, Docket No. 38561). Consequently, no Final Judgment has been entered.

**B. The Relief Request by Plaintiff was the Return of the Earnest Monies with Interest**

Defendants argue that the Court cannot enter the proposed Final Judgment submitted by Plaintiff because “the judgment documents submitted to the court contain information never explained or elucidated by the court in its memorandum decision.” (Statement, p. 2). Further, Defendants argue “[i]f the court were now to ‘change’ its judgment, it would be tantamount to a motion to reconsider which neither party requested.” (Statement, p. 2). In order to make such an argument, Defendants again ignore Supreme Court authority and the Idaho Rules of Civil Procedure. In *Spokane*

*Structures, Inc. v. Equitable Investment, LLC*, the Idaho Supreme Court explained the information necessary in a final judgment based on the relief requested:

The “relief to which the party ... is entitled” must be read in connection with other rules. Rule 8(a)(1) provides, “A pleading which sets forth a claim for relief ... shall contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, (3) a demand for judgment for the relief to which he deems himself entitled.” The “demand for judgment for the relief to which he deems himself entitled” obviously refers to the relief that the party seeks in the lawsuit.

148 Idaho at 619; 226 P. 3d at 1266.

In order to determine what relief was requested, the Court must look to the Plaintiff’s Complaint. *See id.* Plaintiff specifically requested the following 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.



(Verified Complaint, p. 9-10). Consequently, the Final Judgment must then set forth the relief granted or denied based on the Court's ruling.

Plaintiff's proposed Final Judgment does not contain information "never explained or elucidated by the court in its memorandum decision." The Judgment re: Motions for Summary Judgment entered by the Court specifically ruled that Plaintiff was entitled to the return of the earnest monies. This is a quantifiable amount, based upon the terms of the Agreements: \$317,000 as against Defendants Petersons and \$25,000 as against Defendants Clarks, as was pled by Plaintiff. Additionally, although unnecessary pursuant to Idaho case law (*see, i.e., Rosecrans v. Intermountain Soap & Chemical Co., Inc.*, 100 Idaho 785, 788, 605 P.2d 963, 966 (1980)), Plaintiff specifically pled pre-judgment interest on these amounts. (*See Verified Complaint, ¶¶ 45-47, and Prayer for Relief*). Pursuant to Idaho Code § 28-22-104, a party is entitled to prejudgment interest at a rate of twelve percent per year in cases of money due on an express contract. I.C. § 28-22-104; *see also Dillon v. Montgomery*, 138 Idaho 614, 617, 67 P.3d 93, 96 (2003). Plaintiff is not asking the Court to "change" its judgment or reconsider its judgment. Rather, it is asking the Court to apply its decision regarding the Motions for Summary Judgment so that a Final Judgment, granting or denying the parties' requested relief, can be entered. Because the Court found Plaintiff is entitled to the return of its earnest monies, which are quantifiable amounts pursuant to express contracts, Plaintiff, by statute, is entitled to prejudgment interest on those amounts.

Regarding Defendants' alternative argument regarding the "lack of direction" by the Supreme Court, and looking to the complaint in this matter as the "starting point" to review what was originally requested, Defendants yet again have argued that Plaintiff had requested that the Agreements be rescinded and the parties returned to their status quo. (Statement, p. 2-3). Defendants fail to cite any pleading or brief wherein Plaintiff asked for rescission of the Agreements. Plaintiff specifically requested that Defendants be required to return the earnest monies, *pursuant to* the Agreements. (Verified Complaint, ¶¶ 9-10 and Prayer for Relief ). The Agreements were not rescinded based upon the Court's decision, as Plaintiff discussed at length in its Memorandum in Support of Award of Costs and Fees.

Finally, Defendants argue "[i]f the court now adds language to the "judgment" which was not discussed in the memorandum decision, how can either party defend or argue its position to the higher court." Nothing in Plaintiff's proposed Final Judgment is inconsistent with the Court's Judgment Re: Motions for Summary Judgment. Again, as mentioned above, the Final Judgment proposed by Plaintiff simply puts into judgment form the relief requested. Further, if Defendants disagree with the terms of the Final Judgment, they can amend their notice of appeal to include whatever additional issues Defendants have with the contents of the Final Judgment.

### C. Plaintiff is Entitled to Prejudgment Interest

Defendants assert that the award of prejudgment interest is discretionary, and cite to *Ross v. Ross*, 145 Idaho 274, 178 P.3d 639 (2007) in support of this argument.

Defendants' reliance upon *Ross* is misplaced, in that it actually supports the award of prejudgment interest in the case at hand, where the amount due is clear pursuant to the terms of the Agreements.

In *Ross*, the Idaho Court of Appeals specifically noted:

Idaho statutory law, Idaho Code § 28-22-104, calls for the award of prejudgment interest on certain types of money claims, and case law likewise calls for prejudgment interest on damages awarded for unjust enrichment. *Jones v. Whiteley*, 112 Idaho 886, 889, 736 P.2d 1340, 1343, (Ct. App. 1987). Under either statute or the equitable remedy of unjust enrichment, however, prejudgment interest is allowed only where the damages are liquidated or readily ascertainable by mathematical process. *Id.*; *Child v. Blaser*, 111 Idaho 702, 706, 727 P.2d 893, 897 (Ct. App. 1986). This limitation is based upon "equitable considerations," *Farm Dev. Corp. v. Hernandez*, 93 Idaho 918, 920, 478 P.2d 298, 300 (1970), which presumably include the notion that a person who could not determine the amount owed should not be charged interest on the sum that is ultimately found to be due. *See* 22 Am.Jur.2D *Damages* § 654 (1988). However, "where the amount of liability is liquidated or capable of ascertainment by mere mathematical processes" interest is allowed from a time prior to judgment, "for in that event the interest in fully compensating the injured party predominates over other equitable considerations." *Farm Dev. Corp.*, 93 Idaho at 920, 478 P.2d at 300 (quoting *United States Fidelity & Guaranty Co. v. Clove Creek Cattle Co.*, 92 Idaho 889, 900, 452 P.2d 993, 1004 (1969)). *See also* *Doolittle v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 805, 814, 919 P.2d 334, 343 (1996); *Davis v. Prof'l Bus Serv., Inc.*, 109 Idaho 810, 817, 712 P.2d 511, 518 (1985); *Child*, 111 Idaho at 706-07, 727 P.2d at 897-98.

The mere fact that a claim is disputed or litigated does not render damages "unascertainable," for if this were the case, a party could delay payment

without incurring interest expense by disputing and litigating any claim, and prejudgment interest would never be awarded. *Ace Realty, Inc. v. Anderson*, 106 Idaho 742, 751, 682 P.2d 1289, 1298 (Ct. App. 1984). Rather, damages are unascertainable where some factor necessary to calculate the amount of damages must be determined by a trier of fact. Conversely:

A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Examples are claims upon promises to pay a fixed sum, claims for money had and received, claims for money paid out, and claims for goods or services to be paid at an agreed rate.

*Seubert Excavators, Inc. v. Eucon Corp.*, 125 Idaho 744, 750 n. 2, 874 P.2d 555, 561 n.2 (Ct. App. 1993), *aff'd*, 125 Idaho 409, 871 P.2d 826 (1994). There need be no prayer for interest contained in the complaint to justify the award of prejudgment interest. *Farm Dev. Corp.*, 93 Idaho at 920, 478 P.2d at 300; *Stueve v. Northern Lights, Inc.*, 122 Idaho 720, 723, 838 P.2d 323, 326 (Ct. App. 1992).

*Ross*, 145 Idaho at 276-77, 178 P.3d at 641-42. *Ross* makes it clear that where the sum due is capable of mathematical computation, prejudgment interest should be awarded pursuant to Idaho Code § 28-22-104. Defendants seems to be confusing the court's discussion in *Ross* regarding the abuse of discretion standard applicable to a lower court's determination as to whether there is a sum due capable of mathematical computation with the award of prejudgment interest being discretionary. *See id.*, 145 Idaho at 277, 178 P.3d at 642. This is simply not the case. When the amount due is capable of mathematical computation, as it obviously is here—in fact the Agreements specifically state the amounts due—the award of prejudgment interest is appropriate pursuant to

statute. From the time they signed the Agreements, Defendants were aware of the amounts they were required to return to Plaintiff in the event that the Agreements did not close. They cannot now claim that these amounts were not ascertainable and that they therefore do not have to pay prejudgment interest after keeping Plaintiff's money for several years.

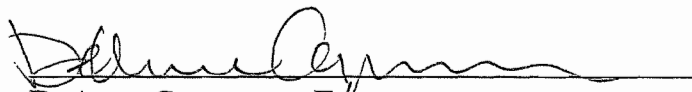
Defendants also complain that "plaintiffs [sic] did not timely prosecute this action. More than one year passed (1/27/2010 to 2/03/2011) between the successful defense by the defendants here-in of the first summary judgment motion filed by the plaintiffs. In these economic times, who would not want to receive a 12% return on money when financial institutions are anywhere between 1% and 3% return on money." (Statement, p. 5). Defendants knew that they could be subject to paying prejudgment interest based upon Plaintiff's Verified Complaint, and the existence of Idaho Code § 28-22-104. Defendants could have requested a trial setting at any time in order to reduce the amount of time prejudgment interest could accrue. However, Defendants chose not to do so. Further, Defendant's response to Plaintiff's first summary judgment required additional discovery, which the parties conducted the year between each ruling on summary judgment. In that discovery, Plaintiff established Defendants' allegations as unsupported and irrelevant. Further, and more importantly, Defendants fail to acknowledge that this situation is one of their own doing. If they had returned the earnest monies in the first place, they would not now be in the position of having to pay interest on the funds which

should have been returned. They could have returned the funds under protest and still sought specific performance of the Agreements. The fact of the matter is, the question of prejudgment interest is not a matter of whether its application would be "fair" to Defendants or Plaintiff. Idaho Code § 28-22-104 specifically provides for the award of prejudgment interest in instances where the amount is readily ascertainable, as it is here. There is no consideration of "fairness." However, if "fairness" were truly a consideration, one has to consider the fairness of the fact that Defendants kept and benefitted from Plaintiff's earnest monies for a period of almost three and a half years. Plaintiff is entitled to prejudgment interest because the dollar amount is spelled out by the contracts and was specifically pled.

## **II. CONCLUSION**

Based on the foregoing, Plaintiff requests that the Court enter Plaintiff's proposed Final Judgment in this matter.

DATED this 26 day of April, 2011.

  
DeAnne Casperson, Esq.

**CLERK'S CERTIFICATE OF SERVICE**


I hereby certify that on this 21st day of April, 2011, 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 ENTRY OF PLAINTIFF'S PROPOSED FINAL 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*
- ( ) *Courthouse Box*

  
DeAnne Casperson

G:\WP\DATA\CAER\14918\9\id\p\PLN. JGMT M\MO.spd

COURT MINUTES

CV-2008-0000941

Buku Properties L L C vs. Rael H Clark, etal.

Hearing type: Oral Argument

Hearing date: 4/25/2011

Time: 1:30 pm

Judge: Dane H Watkins Jr

Courtroom: Large Courtroom #3

Minutes Clerk: Denise Criddle

Party: Buku Properties L L C, Attorney: DeAnne Casperson

Party: Angus Peterson, Attorney: Robin Dunn

Party: Betty Peterson, Attorney: Robin Dunn

Party: Janet Clark, Attorney: Robin Dunn

Party: Rael Clark, Attorney: Robin Dunn

- 01:30 PM Case called and all parties are identified; Attorney: DeAnne Casperson, and client, Jeremy Magara, Attorney: Robin Dunn and his clients,  
No Court reporter in present.
- 01:31 PM Mr. Dunn makes comments to the Court regarding the issue of not having a court reporter.
- 01:32 PM Ms. Casperson begins to make her comments to the court regarding the Summary Judgment and Attorney's Fees.
- 01:43 PM Judge Watkins makes inquiry and Ms. Casperson responds.
- 01:45 PM Mr. Dunn beings his argument(s).
- 02:00 PM Ms. Casperson makes further argument.
- 02:07 PM The Court will issue a decision at a later time.
- 02:09 PM Adjourned

2011 APR 25 PM 2:08  
CLERK PERSON COUNTY IDAHO



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

FILED IN CHAMBERS  
at Idaho Falls  
Bonanza County  
Honorable Judge Walkers  
Date April 29, 2011  
Time 1:05 PM  
Deputy Clerk JM

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

**FINAL JUDGMENT**

On February 3, 2011, the Court issued a Memorandum Decision Re: Motions for Summary Judgment (“Memorandum”) and a Judgment Re: Motions for Summary Judgment (“Judgment”). The Memorandum and Judgment granted Plaintiff Buku Properties, LLC’s (“Buku”) Second Motion for Summary Judgment and disposed of all remaining issues in the case in favor of Buku. Pursuant to the Memorandum and Judgment, Buku is entitled to the return of earnest money in the amount of \$317,000.00 from Defendants Angus Jerry Peterson and Betty Jean Peterson (“Petersons”) and \$25,000.00 from Defendants Rael H. Clark and Janet C. Clark (“Clarks”), plus prejudgment interest at the legal rate of interest of 12% per annum from December 19, 2007 through the date of entry of this Judgment, and post-judgment interest at the rate of judgment interest of 5.625% from and after the date of entry of this Final Judgment until such sums are satisfied.

THE COURT HEREBY ENTERS FINAL JUDGMENT IN THIS CASE as follows:

1. Judgment is entered on behalf of Buku against Petersons, jointly and severally, in the amount of \$444,355.94, consisting of \$317,000.00 in principal plus prejudgment interest accrued to April 25, 2011, in the amount of \$127,355.94. Such judgment amount of \$444,355.94 shall accrue interest from and after the date of entry of this Judgment at a rate of 5.625% per annum or \$68.48 per day until such Judgment is satisfied.

2- FINAL JUDGMENT

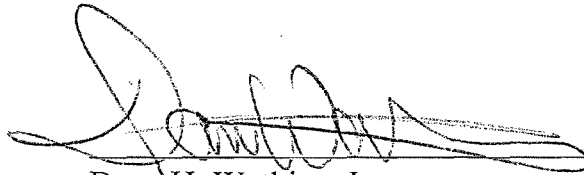
474

2. Judgment is entered on behalf of Buku against Clarks, jointly and severally, in the amount of \$35,043.94, consisting of \$25,000.00 in principal plus prejudgment interest accrued to April 25, 2011, in the amount of \$10,043.94. Such judgment amount of \$35,043.94 shall accrue interest from and after the date of entry of this Judgment at a rate of 5.625% per annum or \$5.40 per day until such Judgment is satisfied.

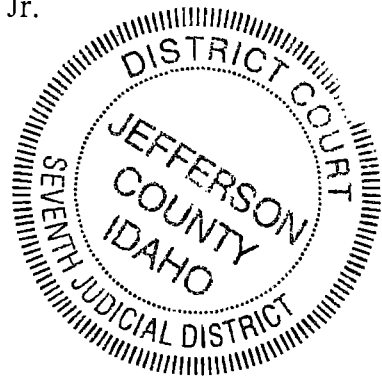
3. Petersons' and Clarks' counterclaims against Buku are DISMISSED WITH PREJUDICE.

DATED this 25 day of April, 2011.

*None Pro Tene*



Dane H. Watkins, Jr.  
District Judge



CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of April, 2011, 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: FINAL JUDGMENT

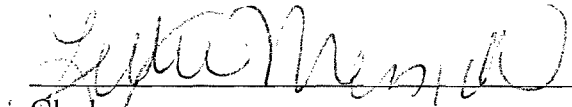
ATTORNEYS SERVED:

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

- First Class Mail
- Hand Delivery
- Facsimile
- Overnight Mail
- Courthouse Box

DeAnne Casperson  
Holden, Kidwell, Hahn & Crapo,  
P.L.L.C.  
1000 Riverwalk Drive, Suite 200  
P.O. Box 50130  
Idaho Falls, Idaho 83405-0130

- First Class Mail
- Hand Delivery
- Facsimile
- Overnight Mail
- Courthouse Box

  
Clerk

476

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-2008-941

**MEMORANDUM DECISION AND  
ORDER RE: MOTION FOR  
ATTORNEY'S FEES AND COSTS**

**FILED IN CHAMBERS**  
at Idaho Falls  
Bonnevillie County  
Honorable Judge Watkins  
Date April 29, 2011  
Time 1:05 pm  
Deputy Clerk JM

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On August 20, 2007, Buku Properties, LLC (hereafter, "Buku") entered into a Purchase and Sale Agreement with Rael and Janet Clark (hereafter, "Clarks") for the purchase of 80.17 acres of real property for the price of \$1,044,075.18. Pursuant to the agreement with Clarks, Buku tendered \$25,000 in earnest money to Clarks on October 15, 2007.

On August 30, 2007, Buku entered into a Purchase and Sale Agreement with Jerry and Betty Peterson (hereafter, "Petersons") for the purchase of 73 acres of real property for the price of \$980,000. Pursuant to the agreement with Petersons, Buku tendered \$327,000 in earnest money to Petersons on August 30, 2007. The purchase and sale agreements will hereinafter be referred to collectively as "Agreements."

During a four month due diligence period provided for in the Agreements, Buku learned of a proposed zoning change that would have affected the value of the properties and hindered

480

Buku's intended use of the properties. As a result, Buku refused to close by the date specified in the Agreements, and Buku requested the Clarks and Petersons refund the earnest money.

Clarks and Petersons both refused to refund the earnest money, so on November 6, 2008, Buku filed suit. On December 10, 2008, Clarks and Petersons filed a Counterclaim seeking specific performance, alleging breach of contract and other equitable claims, and asking this Court to dismiss Buku's complaint with prejudice.

On October 6, 2009, Buku filed for Summary Judgment. On November 13, 2009, Clarks and Petersons filed a motion for summary judgment and a motion to strike portions of an affidavit.

On January 27, 2010, the Court (Judge Moller) issued a memorandum decision which (1) granted summary judgment for Buku regarding Defendants' Idaho Consumer Protection Act counterclaim, (2) denied Buku's motions for summary judgment regarding issues surrounding enforcement of the Agreements, and (3) denied Defendants' motion to strike. Judge Moller's decision did not address Defendants' motion for summary judgment.

On November 16, 2010, Buku filed a second motion for summary judgment asking this Court to dismiss all of Defendants' counterclaims and rule in its favor on its claim for reimbursement of the earnest money. On February 3, 2011, this Court issued a memorandum decision and judgment granting Buku's motion for summary judgment.

On February 24, 2011, Buku filed a memorandum of attorney's fees and costs supported by the affidavit of Deanne Casperson. On March 8, 2011, Defendants filed an objection to Buku's request for fees and costs. On April 18, 2011, Buku filed a reply brief in support of its request for fees and costs. On April 25, 2011, this Court heard oral argument regarding Buku's request for fees and costs.

## II. STANDARD OF ADJUDICATION

An award of attorney fees must be supported by statutory or other authority. *See Webb v. Webb*, 143 Idaho 521, 526, 148 P.3d 1267, 1272 (2006). The amount of attorney fees and costs awarded is generally discretionary. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005).

## III. DISCUSSION

### A. Attorney Fees

Buku claims it is entitled to reasonable attorney fees pursuant to the Agreements and pursuant to Idaho Code §§ 12-120(3) and 12-121. Because this Court finds Buku is entitled to attorney fees pursuant to § 12-120(3), the Court need not address whether the Agreements or other statutes provide a basis for an award of attorney fees.

Clarks and Petersons argue an award of attorney fees under § 12-120(3) is improper because the gravamen of this lawsuit did not arise out of a “commercial transaction.” Moreover, Defendants argue the fees requested by Buku are unreasonable because Buku was not the prevailing party.<sup>1</sup>

#### i. Commercial Transaction

Section 12-120 provides for an award of attorney’s fees to the prevailing party in any civil action arising from a “commercial transaction.” Clarks and Petersons cite *Edwards v. Edwards*, 122 Idaho 971, 842 P.2d 307 (Ct. App. 1992) in support of their argument that this

---

<sup>1</sup> Clarks and Petersons also argue Buku’s request for fees and costs should be denied because it was untimely and Buku did not file a “motion” for fees and costs. I.R.C.P 54(d)(5) provides for a fourteen day window following the entry of judgment wherein the prevailing party may file a “memorandum of costs.” Whereas Buku filed a “Memorandum of Attorney’s Fees and Costs,” which detailed Buku’s claimed expenses, and whereas a final judgment is yet to be entered in this matter, Clarks’ and Petersons’ arguments are without merit.

case did not arise out of a commercial transaction. In *Edwards*, the Idaho Court of Appeals stated,

As we stated in *Idaho Newspaper* [§ 12-120(3)] does not extend to all actions where a commercial *relationship* exists, but rather, “the lawsuit still must seek resolution of a dispute arising from a commercial *transaction* between the parties.” 117 Idaho at 424, 788 P.2d at 239 (emphasis original). With respect to the statute, our Supreme Court recently observed:

[T]he award of attorney’s fees is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit. Attorney’s fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. To hold otherwise would be to convert the award of attorney’s fees from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filed.

*Brower v. E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990).

*Edwards*, at 972, 842 P.2d at 308.

In a fairly recent decision, the Idaho Supreme Court commented on *Edwards*, stating as follows:

First, the *Edwards* case has no application here because there was no commercial transaction which constituted the “gravamen” of the suit. Here, the gravamen of both Freiburger's declaratory judgment action and J-U-B's counterclaim was the enforceability of a covenant contained in an employment agreement. The term “commercial transaction” is defined in § 12-120(3) as “all transactions except transactions for personal or household purposes.” Thus, “[w]here a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3), ... that claim triggers the application of the statute.” *Continental Cas. Co. v. Brady*, 127 Idaho 830, 835, 907 P.2d 807, 812 (1995). There must, however, be a nexus between the commercial transaction and the lawsuit. *Id.* There is no question that a “commercial transaction” as defined in I.C. § 12-120(3) is involved here. Both parties entered into an employment agreement which contained a restrictive covenant. Freiburger brought this action seeking a judicial declaration regarding his potential contractual obligations under the Covenant. This obligation is clearly grounded in a “commercial” contract.

*Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 111 P.3d 100 (2005).

423



In this case, Buku entered into the Agreements with Clarks and Petersons for the purpose of completing a commercial real estate transaction. The properties Buku contracted to buy from Clarks and Petersons was farm land. There is no evidence that Buku was buying the land for personal or household purposes. There is no evidence that Clarks or Petersons thought Buku was buying the land for personal or household purposes. To the contrary, the record indicates Clarks and Petersons knew that Buku intended to develop the property. Buku brought this action to enforce the provisions of the Agreements that provided for the return of earnest money if Buku was not satisfied with the condition of the properties. Thus, in bringing this action, Buku alleged the existence of a contractual relationship of the type contemplated by § 12-120(3) and Buku's claim for reimbursement of the earnest money triggers application of the statute.

**ii. Prevailing Party**

Defendants concede Buku prevailed on its second motion for summary judgment. However, Defendants assert Buku's request for fees is excessive and unreasonable because Defendants "prevailed on the first motion and the events leading up to that decision." Defendants' Brief at 5. Accordingly, Defendants assert Buku would only be entitled to the 68.9 hours of work that were completed after July 8, 2010, the date Buku began preparing for its second motion for summary judgment.

Rule 54(d)(1)(B) of the Idaho Rules of Civil Procedure provides:

(B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner

after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.<sup>2</sup>

The Idaho Supreme Court has identified three areas of inquiry that a court should consider when deciding whether a party “prevailed.”

(a) the final judgment or result obtained in the action in relation to the relief sought by the respective parties; (b) whether there were multiple claims or issues between the parties; and (c) *the extent to which each of the parties prevailed on each of the issues or claims*. If the court determines that a party prevailed only in part, *it may apportion the costs and attorney fees among the parties in a fair and equitable manner* after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

*Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983) (emphasis added).

In determining which party has prevailed, the Supreme Court of Idaho provided the following guidance:

In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed “in the action.” That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.

*Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

In this case, Buku prevailed on its claim of entitlement to reimbursement of the earnest money. All of Clarks’ and Petersons’ counterclaims were denied. This Court concludes Buku was the prevailing party when looking at the outcome of the case from an overall view.

---

<sup>2</sup> Rule 54(d)(1)(B) only speaks of costs. However, Rule 54(e)(1), which pertains to attorney fees, incorporates the Rule 54(d)(1)(B) definition of prevailing party.

### iii. Clarks and Petersons did not Prevail in Part

Clarks and Petersons argue this Court should reduce Buku's fee award because, while Buku prevailed on all substantive claims, they prevailed in all aspects of the case leading up to Buku's second motion for summary judgment.

This Court disagrees with the assertion that Clarks and Petersons prevailed in the case prior to Buku's second motion for summary judgment. Prior to Buku's second motion for summary judgment, both parties filed motions for summary judgment and neither was granted. Additionally, Clarks and Petersons filed a motion to strike portions of an affidavit filed in support of Buku's first motion for summary judgment. That motion was denied. The blanket assertion by Clarks and Petersons that they prevailed in every aspect of the case prior to Buku's second motion for summary judgment is inaccurate.

As stated above, this Court in its sound discretion may determine that each party prevailed in part. Upon so finding, the Court may apportion the costs between and among the parties in a fair and equitable manner. *See Prouse v. Ransom*, 117 Idaho 734, 739, 791 P.2d 1313, 1318 (Ct. App. 1989). In *Nguyen v. Bui*, 146 Idaho 187, 191 P.3d 1107 (Ct. App. 2008) Nguyen was found to be the prevailing party at trial and was awarded attorney fees. Bui asserted it was error to award attorney fees incurred by Nguyen for preparation and presentation of the claims that the Buis successfully defended against. In response to that argument, the Idaho Court of Appeals stated:

This Court rejected a similar argument in *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct. App. 1987). In that case, the plaintiffs had contracted with the defendant for the construction of a home and advanced a sum of money. They elected not to proceed on the project and asked the defendant to return their money less his out-of-pocket expenses. Litigation ensued when the plaintiffs believed that the defendant did not return a sufficient sum. The plaintiffs' complaint alleged causes of action for violation of the Consumer Protection Act, fraud, unjust enrichment, and breach of contract. A jury found for the plaintiffs

upon their theories of unjust enrichment and violation of the Consumer Protection Act. The trial court determined that attorney fees were statutorily awardable only for the Consumer Protection Act violation, and awarded attorney fees that it calculated were attributable to the attorney's work on this theory only. We determined that this was an error. We noted that the plaintiffs had advanced four alternative theories of recovery in an attempt to obtain only one type of relief—the return of their pre-payment. We held that the trial judge improperly split the single “claim” upon which the plaintiffs had prevailed into prevailing and nonprevailing “theories.” In a later case, *Burns v. County of Boundary*, 120 Idaho 623, 818 P.2d 327 (Ct. App. 1990), we contrasted the circumstance where there truly are multiple claims for differing relief that can be parsed in awarding attorney fees, such as distinguishing between a successful claim for injunctive relief and an unsuccessful claim for damages.

Even if Nguyen's various theories should be characterized as separate claims, apportionment of his attorney fees is not necessarily required. For example, in *Decker v. Homeguard Systems, a Div. of Intermountain Gas Co.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983), the defendant argued that it was inappropriate to award attorney fees to the plaintiffs on all of their twenty-eight causes of action when all but six were dismissed before submission to jury. The district court noted that although the plaintiffs had failed on a number of causes of action, they “basically prevailed” on the principal complaints that they had pursued against the defendant. We determined that the district court acted within its discretion in deciding not to apportion attorney fees among the successful and unsuccessful claims. Similarly, in *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 682 P.2d 640 (Ct. App. 1984), where the plaintiff argued that the district court should have awarded him attorney fees for successfully defending against a counterclaim, we said:

[T]he mere fact that a party is successful in ... defeating a single claim does not mandate an award of fees to the prevailing party on that claim. The rule does not require that. It mandates an award of fees only to the party or parties who prevail “in the action.” . . . .

. . . [W]hile the judge in his sound discretion must consider “the final judgment or result of the action in relation to the relief sought by the respective parties . . . and the extent to which each party prevailed upon each of such issue or claims,” [I.R.C.P. 54(d)(1)(B),] he is not compelled to make a discrete award of fees on each claim.

*Id.* at 693, 682 P.2d at 646. The propriety of this approach was confirmed by the Idaho Supreme Court in *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005), where the Court said:

In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed

“in the action.” That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.

*Id.* at 193-94, 191 P.3d at 1113-14.

In this case, Buku’s first motion for summary judgment was denied in part because of a perceived factual dispute. The fact that Clarks and Petersons survived that motion, however, does not equate to them having prevailed on any issue or claim. Even if Clarks and Petersons had prevailed on some claim or issue, this Court would not be obligated to apportion fees between the parties. As discussed above, Buku prevailed on its first cause of action seeking return of the earnest money, and all of Clarks’ and Petersons’ counterclaims were denied.

This Court cannot conclude Clarks and Petersons prevailed “in the action” in any sense.

#### **iv. Reasonable Award**

Rule 54(e)(3) of the Idaho Rules of Civil Procedure requires the Court to consider certain factors when determining the amount of attorney fees to award. Although this Court “is not required to make ‘specific findings demonstrating how it employed any of the factors in Rule 54(e)(3), it is required to consider those factors when determining the amount of the fees to award.” *Sun Valley Potato Growers, Inc., v. Texas Refinery Corp.*, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004); *Perkins v. U.S. Transformer West*, 132 Idaho 427, 430, 974 P.2d 73, 76 (1999). The Court may also “consider any other factor that the court deems appropriate.” *Hines v. Hines*, 129 Idaho 847, 855, 934 P.2d 20, 28 (1997); *see also Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005).

In *Sun Valley*, the Idaho Supreme Court quoted the Idaho Court of Appeals for the proposition that the district court may, when considering the Rule 54(e)(3) factors, draw from “the court's own knowledge and experience” and “the record of the case,” but it is also “incumbent upon a party seeking attorney fees to present sufficient information for the court to

MEMORANDUM DECISION AND ORDER RE: MOTION FOR ATTORNEY’S FEES AND COSTS - 9

018

consider factors as they specifically relate to the prevailing party or parties seeking fees.” *Sun Valley*, 139 Idaho at 769, 86 P.3d at 483 (quoting *Hackett v. Streeter*, 109 Idaho 261, 264, 706 P.2d 1372, 1375 (Ct. App. 1985)).

Buku adequately documented its time and labor spent on this case and provided that information to this Court in an affidavit filed on February 24, 2011. Defendants do not object to Buku’s manner of documentation, method of calculation, fee rate, or amount of work.

As the prevailing party, Buku is entitled to reasonable attorney fees for time and labor spent in this case. This Court has reviewed Buku’s memorandum of fees and costs with its supporting affidavit. In accordance with the above discussion regarding commercial transactions and prevailing parties, and considering the Rule 54(e)(3) factors, Buku should be awarded reasonable attorney fees in the amount of \$27,093.61.

**B. Costs**

I.R.C.P. 54(d)(1)(A) states that “costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.”

Having concluded Buku is a prevailing party under I.R.C.P. 54(d)(1)(B), costs as a matter of right should be awarded to Buku in the amount of \$724.82.


**IV. CONCLUSION**

Attorney’s fees are awarded to Buku in the amount of \$27,093.61.

Costs as a matter of right are awarded to Buku in the amount of \$724.82.

**IT IS SO ORDERED**

DATED this 4<sup>th</sup> day of April 2011.

  
DANE H. WATKINS, JR.  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of April 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

DeAnn Casperson  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405

Robin D. Dunn  
DUNN LAW OFFICES, P.L.L.C.  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

CHRISTINE BOULTER  
Clerk of the District Court  
Jefferson County, Idaho

By   
Deputy Clerk

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

2011 MAY 12 PM 1:24  
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.

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 OF SUPPLEMENTAL  
ATTORNEYS' FEES AND COSTS**



COMES NOW Plaintiff Buku Properties, LLC (“Plaintiff”), by and through its attorney of record Holden, Kidwell, Hahn & Crapo, P.L.L.C. , and submits this Memorandum of Supplemental Attorney’s Fees and Costs. Plaintiff is filing simultaneous with this Motion the Affidavit of DeAnne Casperson in Support of Memorandum of Supplemental Attorneys’ Fees and Costs.

### I. ARGUMENT

On February 3, 2011, this Court issued its decision, granting summary judgment to Plaintiff. Before a Final Judgment was entered, Defendants filed a Notice of Appeal. On or about February 22, 2011, Plaintiff filed its Memorandum of Attorneys’ Fees and Costs. In addition, Plaintiff sent a proposed Final Judgment to the Court for consideration. On March 28, 2011, the Court held a status conference to address the Final Judgment and appeal issues. As a result of that conference, the Court granted leave to Defendants to submit its objections to the proposed Final Judgment and ordered a hearing on April 25, 2011, to address the Memorandum for Attorneys’ Fees and Costs and the Final Judgment.

After the filing of Plaintiff’s Memorandum of Attorneys’ Fees and Costs and proposed Final Judgment, Defendant filed the following:

- a. Defendant’s Objection to Plaintiff’s Request for Fees and Costs; Memorandum in Support of Objection;
- b. Defendant’s Statement Re: Final Judgment.

“Defendant’s Objection to Plaintiff’s Request for Fees and Costs; Memorandum in Support of Objection” contained various arguments stating that Plaintiff was simply not entitled to attorneys’ fees or costs, including that the contract upon which relief was granted to Plaintiff

had been nullified by the Court and no longer existed, that the sale of the property at issue was not a commercial transaction, and that it was simply not fair for Plaintiff to be awarded attorneys' fees in this matter, despite prevailing. Defendants also argued that they were the prevailing party in this matter, at least in part. Nowhere in Defendants' briefing did Defendants make any argument regarding the reasonableness of the amount Plaintiff requested in attorneys' fees and costs. Additionally, "Defendant's Statement Re: Final Judgment," essentially argued that the summary judgment entered by the Court in this matter was a Final Judgment, despite the fact that the Idaho Supreme Court had suspended the appeal filed by Defendants in this action due to the fact that no final judgment had been entered. (See Order Suspending Appeal, Supreme Court Docket No. 28561-2011).

Because Defendants filed the above pleadings, Plaintiff had to file both a Reply Memorandum in Support of Attorneys Fees and Costs, as well as a Memorandum in Support of Entry of Final Judgment. Additionally, Plaintiff's counsel had to attend the hearings on those matters. Responding to Defendants' briefing proved to be difficult and time intensive due to the nature of Defendants' briefing.

Plaintiff has incurred additional costs and attorneys' fees in responding to Defendants' pleadings and arguments. Consequently, Plaintiff is entitled to an award of the additional costs and fees incurred in responding to these additional pleadings and arguments. Plaintiff has incurred an additional \$ 4,638.00 in attorneys fees and \$ 33.70 in costs from February 22, 2011, to present, in this matter, as itemized and set forth in the Affidavit of DeAnne Casperson in Support of Memorandum of Supplemental Attorneys' Fees and Costs filed simultaneous

495

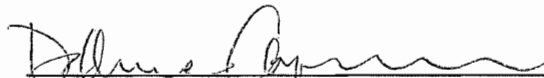
herewith. Plaintiff asserts it is entitled to a supplemental award as a result of briefing and arguments necessary to respond to Defendants' briefing and objections.

Because Plaintiff has already been determined the prevailing party, Plaintiff does not believe a hearing is necessary. Plaintiff asserts the Court could make a determination on the supplemental award of fees and costs based on the briefing.

## II. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant this Memorandum of Supplemental Attorneys' Fees and Costs so that Plaintiff may be compensated for the additional expense Defendants' actions have caused Plaintiff to incur, in the amount of \$ 4,638.00. Plaintiff requests such sum in addition to the costs and attorneys' fees originally awarded by this Court in the amount of \$27,818.43.

DATED this 11<sup>th</sup> day of May, 2011.

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

**CERTIFICATE OF SERVICE**

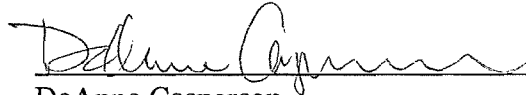
I hereby certify that on this 14<sup>th</sup> day of May, 2011, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:** MEMORANDUM OF SUPPLEMENTAL ATTORNEYS' FEES AND COSTS

**ATTORNEYS SERVED:**

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

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

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

G:\WPDATA\CAH\14918\Fldgs\Fees.Increase.MOT.wpd:ah

195



DEANNE CASPERSON, being first duly sworn on oath, deposes and says:

1. I am a member of the law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C., counsel for Plaintiff Buku Properties, LLC ("Plaintiff"), in this matter.

2. This Affidavit is made on my own personal knowledge, except to the extent of allegations made on information and belief, and in support of Plaintiff's Memorandum of Supplemental Attorneys' Fees and Costs.

3. I have reviewed the time and cost records of Holden, Kidwell, Hahn & Crapo, P.L.L.C. maintained on the above matter, and represent that, to the best of my knowledge and belief, the following items of costs and expenses, in addition to those previously claimed, are claimed in compliance with the Idaho Rules of Civil Procedure, Rule 54(d)(5) and Rule 54(e)(1), and were necessarily and exceptionally expended and incurred in the above entitled action on behalf of Plaintiff:

i. Costs of Right (Rule 54(d)(1)(c)):

Date	Item	Cost
	N/A	N/A
	TOTAL	\$0.00

ii. Discretionary Costs (Rule 54(d)(1)(c)):

Date	Item	Cost
03/28/11	Travel expense - Travel to Rigby, Idaho for hearing	\$16.85
04/25/11	Travel expense - Travel to Rigby, Idaho for hearing	\$16.85
	TOTAL	\$33.70

iii. Total Costs of Right and Discretionary Costs: \$33.70.

4. The above-listed costs represent the costs incurred from February 23, 2011, to the date herein.

5. Since February 23, 2011, the law firm of Holden Kidwell Hahn & Crapo, P.L.L.C. has expended approximately 27.8 hours in providing a defense to various pleadings filed by Defendants. An itemization of the additional legal services incurred since February 23, 2011, provided by Holden Kidwell Hahn & Crapo, P.L.L.C. in connection with such matters is attached hereto as Exhibit "A". The law firm of Holden Kidwell Hahn & Crapo, P.L.L.C. has invoiced Plaintiff for the legal services itemized on Exhibit "A" attached hereto the total amount of \$4,638.00, which is allocated among the following attorneys at the following effective billing rates:

Name	Hours	Effective Rate	Total Fees
Charles A. Homer	0.50	\$235.00	\$117.50
DeAnne Casperson	12.70	\$195.00	\$2,476.50
Amanda E. Ulrich	14.60	\$140.00	\$2,044.00
TOTAL			\$4,638.00

6. The sum of \$4,638.00 represents a reasonable sum for fees for additional services provided by the law firm of Holden Kidwell Hahn & Crapo, P.L.L.C. in prosecuting the above-entitled action on behalf of Plaintiff. The sum of \$33.70 represents additional costs incurred in the above-entitled action allocated for the benefit of Plaintiff.

7. I have practiced law in Idaho continuously since April 24, 2003. I graduated from law school in 1999 and practiced law in both Missouri and Kansas before returning to Idaho. I am familiar with the prevailing charges in this community for legal work similar to that

performed by the attorneys in this case. It is my opinion that the prevailing charges in this community for like work are equal to or higher than those indicated above, and that the attorney's fees are reasonable and necessary.

DATED this 11<sup>th</sup> day of May, 2011.

DeAnne Casperson  
DeAnne Casperson

SUBSCRIBED and sworn to before me this 11<sup>th</sup> day of May, 2011.



Ashley Marie Hernandez  
Notary Public for Idaho  
Residing at Wood Falls, ID  
My Commission Expires: 10/22/14

499



**CERTIFICATE OF SERVICE**

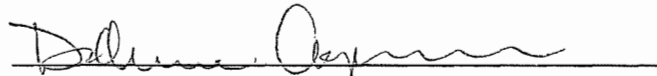
I hereby certify that on this 11<sup>th</sup> day of May, 2011, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:    AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF  
MEMORANDUM OF SUPPLEMENTAL ATTORNEYS  
FEES AND COSTS**

**ATTORNEYS SERVED:**

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

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

  
DeAnne Casperson

G:\WPDATA\CAH\14918\Pldgs\Fees.Increase.DC.AFF.wpd:ah

5-    AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMORANDUM OF SUPPLEMENTAL  
ATTORNEYS FEES AND COSTS

500

Date	Attorney	Explanation	Hours	
Feb 24/2011	AEU	Intraoffice conference with CAH; Revise and edit Final Judgment	0.5	
Feb 24/2011	CAH	Interoffice conference to review and revise proposed Judgment to be issued in connection with Summary Judgment	0.5	
Feb 28/2011	DC	Edit and revise Final Judgment; e-mail correspondence with Mr. Magera about status.	0.6	
Mar 8/2011	DC	Review response to request for attorneys fees by Mr. Dunn.	0.3	
Mar 10/2011	DC	E-mail correspondence with Mr. Magera regarding status.	0.1	
Mar 25/2011	AEU	Intraoffice conference with DC; Recalculate judgment amounts based upon April 25, 2011 hearing date; Draft correspondence to Robin Dunn; Revise Final Judgment to reflect judgment amounts for April 25, 2011	0.6	
Mar 28/2011	DC	Intra-office conference regarding status conference; Prepare for status conference by reviewing final judgment calculations and attorneys fee issues; travel to and from Jefferson County for status conference.	2.1	
Mar 29/2011	DC	Review letter to Mr. Dunn regarding Final Judgment.	0.1	
Apr 7/2011	AEU	Draft Reply Memorandum in Support of Attorneys' Fees and Costs	2.1	
Apr 12/2011	AEU	Review new pleadings from Defendants regarding final judgment	0.7	
Apr 12/2011	DC	Edit and revise reply brief in support of attorneys fees.	1.9	
Apr 14/2011	AEU	Make final edits to Reply Memorandum in Support of Costs and Fees	0.3	
Apr 18/2011	AEU	Draft Reply Memorandum in Support of Final Judgment	1	
Apr 18/2011	DC	Edit and revise brief in support of motion for attorneys' fees.	0.2	
Apr 19/2011	AEU	Finish drafting Memorandum in Support of Entry of Final Judgment	2.5	
Apr 20/2011	AEU	Revise and edit Memorandum in Support of Entry of Final judgment	1.4	
Apr 21/2011	DC	Edit and revise memorandum in support of final judgment; research cases cited in Stay Order; finalize brief for filing.	3.6	
Apr 21/2011	AEU	Research application of prejudgment interest where funds have been deposited with the court; Revise and edit final draft of reply memorandum	1.1	
Apr 25/2011	AEU	Update Final Judgment calculation; Research supersedeas bond issues; Pull research regarding "prevailing party" analysis	0.8	
Apr 25/2011	DC	E-mail correspondence with client regarding hearing; prepare for hearing on attorneys' fees and final judgment; attend and argue hearing on final judgment and attorneys' fees.	3.8	
May 6/2011	AEU	Review time records to determine attorneys fees incurred subsequent to filing of motion for attorneys fees; Review Memorandum Decision and Order from the Court regarding attorneys fees; Review final judgment	0.8	
May 10/2011	AEU	Draft Amended Final Judgment to Include Attorneys Fees; Draft Motion to Supplement and Increase Award of Attorneys Fees and Costs; Draft Affidavit of DeAnne Casperson in Support of Motion to Supplement and Increase Award of Attorneys Fees and Costs; Research recording of judgments.	2.8	
		<b>TOTAL HOURS</b>	<b>27.80</b>	
				<b>Fees Totals</b>
		Totals for CAH	0.50	117.50
		Totals for DC	12.70	2,476.50
		Totals for AEU	14.60	2,044.00
			<b>27.80</b>	<b>4,638.00</b>
		<b>Costs</b>		
Mar 30/2011		Travel Expense 3/28/11 to Rigby for hearing		16.85
Apr 29/2011		Travel Expense 4/25/11 to Jefferson County to attend hearing on final judgment		16.85
				<b>33.70</b>

DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., ISB #2903  
Amelia A. Sheets, Esq., ISB #5899  
Paul D. Ziel, Esq., ISB #7497  
477 Pleasant Country Lane  
P. O. Box 277  
Rigby, ID 83442  
(208) 745-9202 (t)  
(208) 745-8160 (f)

2011 MAY 18 PM 4:51

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. )

OBJECTION TO SUPPLEMENTAL  
ATTORNEYS' FEES AND COSTS

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, defendants, by and through the undersigned attorney, and objects to that Memorandum of Supplemental Attorneys' Fees and Costs for multiple reasons. Those reasons are as follows:

1. Through no fault of the defendants, the Idaho Supreme Court remanded the "Judgment" for a determination of "Final Judgment". Both parties were forced to do additional briefing on various issues.
2. The Memorandum of Supplemental Attorneys' Fees and Costs does not fall under any exceptions or rules allowing attorney fees. More specifically, Idaho Code §12-120(5), has a provision for additional attorney fees in collection of debt. This is not one of those instances.
3. The supplemental attorneys' fees and costs were incurred by both sides for the benefit of final determination which might have been determined in the original judgment. Once again, through no fault of either side, additional fees were incurred to resolve the "Final Judgment" issue.
4. The undersigned objects as the fees are not reasonable under Rule 54 and the subdivisions thereof.
5. This objection is based upon the case law, statutory scheme and the Idaho Rules of Civil Procedure 54.

DATED this 18 day of May, 2011.




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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of May, 2011 a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery to plaintiff
- Postage-prepaid mail to judge
- 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: Hon. Dane Watkins  
District Judge  
605 North Capital  
Idaho Falls, ID 83402

1/18/11

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)

2011 MAY 31 PM 5: 01

DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

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

Robin D. Dunn, Attorneys for Defendants/Appellants

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/Respondent,	)	AMENDED
vs.	)	NOTICE OF APPEAL
	)	
	)	Docket No. 38561-2011
RAOEL H. CLARK and JANET C.	)	
CLARK, husband and wife; ANGUS	)	
JERRY PETERSON and BETTY JEAN	)	
PETERSON, husband and wife,	)	
	)	
Defendants/Appellants.	)	
_____	)	

TO: THE ABOVE NAMED APPELLANTS; AND THE CLERK OF THE  
ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants appeal against the above named Respondent to the Idaho Supreme Court from the Summary Judgment entered in the above entitled action on the 3rd day of February, 2011, the Honorable Dane H. Watkins, presiding. Upon remand, a second amended judgment entitled: "Final Judgment" was dated April 25, 2011 with the hand-written notation below the date, "Nunc Pro Tunc" and a certificate of mailing

500

dated April 29, 2011. The district court also entered a document entitled "Memorandum Decision and Order Re: Attorney's Fees and Costs" dated "49 day of April, 2011" [sic] with mailing, per the clerk, of 29 day of April, 2011.

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

3. The issues on appeal include, but are not limited, to the following:

- a. Did the court error in interpretation of the real estate contract between the parties?
- b. Did the court error in granting summary judgment which excluded equitable remedies of the defendants?
- c. Were there ambiguous terms in the contract which allowed parol evidence?
- d. Did the court error in using information outside the "four corners" of the contract when the decision indicated the contract was not ambiguous?
- e. Were the defendants' equitable remedies precluded by the court's ruling in Summary Judgment which required a return of earnest money?
- f. Was the court incorrect in awarding prejudgment interest along with fees and costs?

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

5. A reporter's transcript is not requested.

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

-Any minute entries-

5/6

-All pleadings by both parties-

-All affidavits of both parties-

-First Summary Judgment Decision (Denial) of Honorable Gregory Moeller

-Second Summary Judgment Decision (Approval) of Honorable Dane Watkins

-Final Judgment of Honorable Dane Watkins.

7. The undersigned certifies:

- a. That a copy of the notice of appeal has NOT been served on the reporter since a transcript is not requested;
- b. That the Appellants have made contact with the clerk of the district court and are in the process of obtaining the estimated fee for preparation of the clerk's record;
- c. That the estimated fee for preparation of the clerk's record has been paid or will be paid;
- d. That appellate filing fee has been paid on the first notice of appeal prior to this Amended Notice of Appeal; and
- e. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 31<sup>st</sup> day of May, 2011.




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



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31<sup>st</sup> day of May, 2011, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission

  
Robin D. Dunn, Esq.  
Attorney for the Defendants/Appellants  
DUNN LAW OFFICES, PLLC

Jefferson County Clerk  
Jefferson County Courthouse  
210 Courthouse Way, Ste. 120  
Rigby, ID 83442

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

Honorable Dane Watkins  
Bonneville County Courthouse  
605 N Capital Ave.  
Idaho Falls, ID 83402

Idaho Supreme Court  
P.O. Box 83720  
Boise, ID 83720-0101

*150*



Clerk of the Courts  
(208) 334-2210

P.O. Box 83720

Boise, Idaho 83720-0101

2011 AUG -1 PM 3:46

DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

CHRISTINE BOULTER, CLERK  
Attn: NANCY  
JEFFERSON COUNTY COURTHOUSE  
210 COURTHOUSE WAY STE 100  
RIGBY, ID 83442

**CLERK'S RECORD DUE DATE SET**

Docket No. 38561-2011

BUKU PROPERTIES,  
LLC v. RAOEL H.  
CLARK

Jefferson County District Court  
#2008-941

The CLERK'S RECORD must be filed in this office by 09-29-11.

For the Court:  
Stephen W. Kenyon  
Clerk of the Courts

07/28/2011  
BY: KML

5/19

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

**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**  
**CLERK'S CERTIFICATE**  
**OF EXHIBITS**

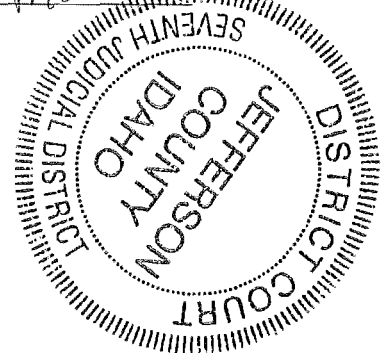
I, Christine Boulter, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Jefferson County, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

NO.	DESCRIPTION	SENT/RETAINED
	None	none

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 24<sup>th</sup> day of August, 2011.

CHRISTINE BOULTER  
 CLERK OF THE DISTRICT COURT

By Nancy Anderson  
 Deputy Clerk





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

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

I, Christine Boulter, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Jefferson, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their Attorney of Record as follows:

ATTORNEY FOR APPELLANT

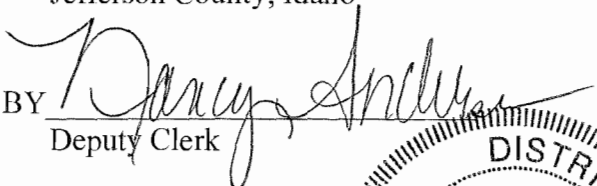
Robin D. Dunn  
P.O. Box 277  
Rigby, ID 83442

ATTORNEY FOR RESPONDENT

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 24<sup>th</sup> day of August, 2011.

CHRISTINE BOULTER  
Clerk of the Court  
Jefferson County, Idaho

BY   
Deputy Clerk

