6-22-2011

Berkshire Investments v. Taylor Clerk's Record v. 2 Dckt. 38599

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

SUPPLEMENTAL MEMORANDUM BRIEF IN OPPOSITION TO DEFENDANTS' DISPOSITIVE MOTIONS

The plaintiffs provide their supplemental brief in opposition to the defendants' pending

dispositive motions as follows:

A. THE DOCTRINE OF RES JUDICATA HAS NO APPLICATION BASED UPON THE DEFENDANTS' FRAUD IN LIGHT OF THE PLAINTIFFS' ACTION FOR DAMAGES AND RELIEF CONSISTENT WITH I.C. § 18-7803, JUDICIAL ESTOPPEL, ESTOPPEL, ETC.

The claims of fraud, abuse of process, judicial estoppel, violations arising from the Idaho Racketeering Statutes, advanced by the plaintiffs prevent the defendants from asserting Res Judicata relating to the prior proceedings. 47 Am. Jur. 2d Judgments § 537, Fraud or Collusion provides:

> Fraud by a party will not undermine the conclusiveness of a judgment unless the fraud was extrinsic, that is, it deprived the opposing party of the opportunity to appear and present his or her case. With respect to extrinsic fraud, the doctrine of res judicata will not shield a blameworthy defendant from the consequences of his or her own misconduct. Accordingly, the principles of res judicata may not be invoked to sustain fraud, and a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of res judicata.

The claims relating to abuse of process, estoppel, violations of the Idaho Racketeering Statutes, have never been addressed by any prior proceedings. These claims relate to the wrongful practices of the defendants in obtaining the judgment based upon their misrepresentations and fraud in obtaining a judgment. The individual Taylors in their deposition testimony establish a lack of any cognizable legal interest in the trust. The alleged beneficiaries testified they were not going to obtain any money from the litigation (pp. 132, 133, 134, of the deposition of Reed J. Taylor) (74, 75 of the deposition of Dallan Taylor). The trust was liquidated and all cash was disbursed to the Settlement Agreement (36, 37 of the deposition of R. John Taylor). The trust corpus was distributed to the only beneficiaries that existed, after the settlement agreement was reached among the various family members. The individual Taylors, Reed, Dallan, and R. John, did not take any proceeds, and

judicially admitted their mother was the "sole beneficiary of the trust".

"The party asserting a claim of fraud on the court must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense." 47 Am.Jur.2d, Judgments § 728 (2006). In the present case the plaintiffs are specifically praying for damages as a result of the wrongful conduct of the defendants. The Idaho Racketeering Statute provides a remedy for the wrongful conduct of the defendants. The court may enter an Order divesting the defendants of any interest, direct or indirect, in the real property consistent with Idaho Code Chapter 18 Title 78, and specifically section 18-7805 (c) (d)(1). The plaintiffs' claims for damages became viable only upon the completion of the wrongful conduct of the defendants in the prior proceeding. The record before this court contains evidence demonstrating the true status of the Taylors.

All the named defendants acted in unison in providing the district court with verified pleadings, and/or executed pleadings which represented the status of the Taylors as beneficiaries. There is abundant evidence in the record that establishes that such was not the case. Their own admissions both under oath and/or through admissions to the court establish the falsehood. A person is subject to liability if he or she does a tortuous act in concert with the other or pursuant to a common design with him. See Restatement (Second) of Torts § 876(a) (1977), Highland Enterprises, Inc. v. Barker, 133 Idaho 330, 341, 986 P.2d 996 (1999).

The plaintiffs have plead claims asserting judicial estoppel, and estoppel generally. The Idaho Supreme Court has adopted the doctrine of judicial estoppel. Idaho Law provides that a

litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter. Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. The policies underlying judicial estoppel are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. Judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts. Heinz v. Bauer, ID-R0128.004 (S.C. 2008 No. 33579), Loomis v. Church, 76 Idaho 87, 277 P.2d 561 (1954).

The Affidavit of Thomas Maile Part III provides attachment from the Idaho Supreme Court matter captioned Taylor v. Maile et. al. The Supreme Court has recently denied a motion to augment the record filed by the Appellants-Cross Respondents (plaintiffs herein). The requested motion to augment contained the transcript from the hearing dated May 2, 2005, before the Honorable Judge Beiter. The transcript is part of the record before this court, and it is asserted by the plaintiffs too contain additional admissions by R. John Taylor, once again under oath indicating the his mother is the beneficiary of the trust. This evidence as well as the prior sworn testimony of R. John Taylor, the deposition testimony above alleged, support the allegations of fraud alleged by the plaintiffs as well as other claims set forth in the amended complaint.

Jurisdiction is "the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." Black's Law Dictionary 856 (7th ed. 1999) (defining

judicial jurisdiction). A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity. Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act. A judgment is void, when there is a want of jurisdiction by the court over the subject matter. A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars anyone, and all proceedings founded upon it are worthless.

50 C.J.S. Judgments § 532, provides:

§ 532. Fraud, collusion, or perjury

> A judgment may be collaterally attacked on the ground of fraud where the fraud goes to the jurisdiction of the court. Where the fraud alleged was inherent in the cause of action, or in the character or procurement of the instrument sued on, it does not furnish a legitimate ground for impeaching the judgment in a collateral proceeding; and, as a broad general rule, where the court has jurisdiction, it is not permissible for a party or privy to attack a judgment in a collateral proceeding because of fraud, such a judgment being voidable only, and not void.
> A judgment obtained by fraud may, however, be void under some circumstances, and subject to collateral attack, as where such fraud appears on the face of the record or goes to the method of acquiring jurisdiction. Likewise, the judgment may be attacked collaterally where fraud has been practiced in the very act of obtaining the judgment, or on the party against whom the judgment was rendered, so as to prevent him from having a fair opportunity to present his case.
> Judgments obtained by extrinsic, rather than intrinsic, fraud may be attacked collaterally. The extrinsic fraud which is required as a basis for collateral attacks on judgments is defined as fraud which is collateral to the issues tried in the case where the judgment is rendered.

A judgment entered by a court without jurisdiction over subject matter is void. Andre v. Morrow, 106 Idaho 455, 680 P.2d 1355, 1361 (1984). See generally 47 Am. Jur. 2d Judgments § 1236 (1969). Purported judgments entered by a court without jurisdiction over the subject matter

are void and as such are subject to collateral attack, and are not entitled to recognition in other states under the full faith and credit clause of the United States Constitution (Restatement of Judgments, § 7 (1942)), State V. Armstrong, ID-0815.098 (C.A. 2008).

CONCLUSION

The plaintiffs have alleged sufficient claims to withstand the defendants' motions for summary judgment. The underlying judgment in Taylor v. Maile, has been produced as a result of fraud and misrepresentations. The record contains ample evidence demonstrating actionable claims against the defendants. The defendants' motions must be denied in their entirety.

Dated this 7 day of January, 2009.

THOMAS G. MAILE, IV.,
Attorney for Colleen Maile and Berkshire Investments LLC and pro se

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Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 0723232 **NOTICE OF NON-OPPOSITION TO MOTION FOR STAY**

COME NOW THE DEFENDANTS Theodore L. Johnson Revocable Trust, John Taylor and Dallan Taylor, by and through their attorney of record and hereby notify the court and counsel that

Defendants' counsel is not available to attend the Motion for Stay hearing Mr. Maile has scheduled for January 27, 2009, but do not oppose entry of a stay in this matter pending the ruling of the Supreme Court in the *Taylor v. Maile*, Supreme Court Docket No. 33781.

Defendants believe it would be best that trial NOT be scheduled in this matter at this time. There is no way of predicting when a decision from the Supreme Court will be received and it would not be in the interest of judicial efficiency to schedule a trial date which would trigger many deadlines.

DATED this 14th day of January, 2009.

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of January, 2009 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 385-5384***

_____
Connie W. Taylor
Attorney for Defendants

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, fka CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION,

Defendants.

Case No. CV-OC-0723232

NOTICE OF NON-OPPOSITION TO MOTION FOR STAY

COME NOW the defendants Connie Wright Taylor, Clark and Feeney, and Paul T. Clark, by and through the undersigned counsel, and hereby notify the court and counsel that they do not oppose entry of a stay in this matter pending the ruling of the Idaho Supreme Court in *Taylor v. Maile,* Idaho Supreme Court Docket No. 33781.

DATED this 20th day of January, 2009.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By /s/ Mark S. Prusynski
Mark S. Prusynski – Of the Firm
Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2009, I caused a true and correct copy of the foregoing **NOTICE OF NON-OPPOSITION TO MOTION FOR STAY** to be served by the method indicated below, and addressed to the following:

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Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION

Defendants.

Case No. CV OC 07 23232

AFFIDAVIT OF CONNIE W. TAYLOR IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Nez Perce)

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law within the state of Idaho and a member of Clark and Feeney, attorneys for the Defendants John Taylor, Dallan Taylor and Theodore Johnson Trust in the above entitled matter. The information contained herein is of my own personal knowledge.

2. I am attaching hereto as Exhibit A, a true and correct copy of the Supreme Court's latest Opinion in *Taylor v. Maile*, Docket No. 33781.

3. The Supreme Court affirmed the District Court's ruling and granted costs to Taylors.

DATED this 5th day of February, 2009.

Connie Taylor

SUBSCRIBED AND SWORN to before me this 5th day of February, 2009.

TAMARA CRANE NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 03/04/2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of February, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 385-5384***

Connie W. Taylor
Attorney for Defendants

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 33781

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs-Counterdefendants-Respondents, Cross-Appellants,

v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants-Counterclaimants-Appellants-Cross-Respondents,

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff-Counterdefendant-Respondent-Cross-Appellant,

v.

THOMAS MAILE IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants-Counterclaimants-Appellants-Cross Respondents.

Boise, November 2008 Term

2009 Opinion No. 15

Filed: January 30, 2009

Stephen W. Kenyon, Clerk

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

District court order granting summary judgment, affirmed.

Dennis M. Charney, Eagle and Law Offices of Thomas G. Maile, Eagle, for appellants. Dennis M. Charney argued.

Clark & Feeney, Lewiston, for respondents. Connie Wright Taylor argued.

EXHIBIT A

BURDICK, Justice

This case concerns an appeal by Thomas Maile IV, Colleen Maile, Thomas Maile Real Estate Company, and Berkshire Investments, LLC (collectively the Mailes) from a district court order granting summary judgment to Reed Taylor, Dallan Taylor, and L. John Taylor (collectively the Taylors). The Taylors cross-appeal the district court's order denying their request for attorney fees. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case has been the subject of a previous appeal. In *Taylor v. Maile*, this Court summarized the facts underlying the lawsuit as follows:

> Thomas G. Maile, IV, is licensed in Idaho as both an attorney and a real estate broker. He provided legal representation to [Theodore L.] Johnson for many years, including advising him on the creation and administration of the [Theodore L. Johnson Revocable] Trust. The Trust owned approximately forty acres of property near Eagle, Idaho. In May of 2002 a third party offered to buy the forty acres for approximately $400,000. Mr. Maile advised Mr. Johnson to reject this offer, and he did in fact reject it. Two months later, on July 22, Thomas and Colleen Maile submitted an earnest money agreement to purchase the property from the Trust on terms and for a price similar to the rejected offer. Mr. Johnson accepted the offer and executed the agreement on behalf of the Trust on July 25.
>
> Mr. Johnson died before the sale transaction could be closed. Approximately a week after Mr. Johnson's death, the successor trustees, Beth Rogers and Andrew Rogers, closed the sale. The Mailes had formed Berkshire Investments, LLC, and assigned their contract rights to that entity, with the approval of Beth Rogers. The Rogers executed the warranty deed conveying the 40 acres to Berkshire over the objections of the Taylors, who are residual beneficiaries of the Trust. The record does not disclose whether the Rogers conducted any inquiry regarding the circumstances of the sale or the basis for the Taylors' objections, or whether the purchase price was at or near fair market value. The Rogers were not only co-trustees of the Trust, but also beneficiaries of the Trust. . . . The Trust took a deed of trust on the property to secure payment of the bulk of the purchase price. Berkshire paid the balance of the purchase price and obtained a release of the trust deed in January of 2004.

142 Idaho 253, 255, 127 P.3d 156, 158 (2005) (*Taylor I*).

On January 23, 2004, the Taylors (as beneficiaries) filed a complaint against the Mailes, alleging breach of fiduciary duty and professional negligence against Mr. Maile in his capacity as both realtor/broker and attorney. The Taylors also sought damages and/or rescission of the land sale. The Mailes moved to dismiss the complaint, and the district court granted their motion based on the Taylors' lack of standing. The Taylors appealed the dismissal, leading to this

Court's decision in *Taylor I* affirming the dismissal of the breach of fiduciary duty claims, but reversing and remanding the dismissal of the professional negligence claim.

While the first appeal to this Court was pending, the beneficiaries of the Trust executed the Disclaimer, Release, and Indemnity Agreement (Disclaimer) in June 2004. In the Disclaimer, the beneficiaries, other than the Taylors, disclaimed any interest in the lawsuit against the Mailes. In addition, the Taylors disclaimed their interest in all other Trust property in favor of their mother, the beneficiaries agreed to an immediate distribution to beneficiaries, the Rogers resigned as trustees, the named successor trustee declined to serve as trustee, and the beneficiaries nominated and appointed the Taylors as trustees.

In December 2005, this Court issued its opinion in *Taylor I*. In response, on March 9, 2006, the district court allowed the Taylors to amend their complaint to comply with the *Taylor I* decision. Two months later, the district court granted the Taylors' motion for summary judgment on the remaining professional negligence claim. On June 7, 2006, the court entered judgment on that claim, quieting title to the Linder Road property in the Trust and dismissing the Mailes' counterclaims and defenses. On July 21, 2006, the court amended the judgment to clarify that the property is in a constructive trust, that Berkshire is entitled to repayment of the purchase price, and that the Mailes' counterclaim for unjust enrichment was the only remaining issue. That same day, the court also entered a decision denying the Mailes' motion for rule 54(b) certification and found the land sale contract void.

In October 2006, the district court held a bench trial on the single remaining issue of unjust enrichment. After hearing two days of evidence, it denied the Mailes' claim for unjust enrichment, finding that the money the Mailes had expended on developing the property did not increase the value of the property. The Mailes then moved for reconsideration and sought prejudgment interest on the monies paid to the Trust. The district court denied this motion on April 4, 2007. The district court also denied the Taylors' request for attorney fees. Both parties appeal from the district court's judgments.

II. ANALYSIS

The Mailes assert that the district court lacked jurisdiction over the Taylors' claims because the Taylors lacked standing and because their claims were moot. The Mailes also contend that the district court erred in granting the Taylors' motion for summary judgment as to the remaining negligence claim. In addition, the Mailes argue that the district court erred by

denying their motion for an award of prejudgment interest. On cross-appeal, the Taylors assert that the district court erred by denying their motion for attorney fees.

A. The Taylors had standing to pursue their claims.

The Mailes argue that the district court lacked jurisdiction because the Disclaimer divested the Taylors of standing to pursue their claims and made the issue moot. We disagree.

We exercise free review over questions of jurisdiction, and such questions must be addressed prior to reaching the merits of an appeal. *Bach v. Miller*, 144 Idaho 142, 144—45, 158 P.3d 305, 307–08 (2007). "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). To satisfy the requirement of standing, "litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.*

The Taylors argue their standing was established by *Taylor I*, making it the "law of the case," and that the Disclaimer did nothing to alter the decision. The "law of the case" doctrine provides that when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." *Suitts v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985) (quoting *Fiscus v. Beartooth Elec. Coop., Inc.*, 180 Mont. 434, 435, 591 P.2d 196, 197 (1979)). The "law of the case" doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 762, 992 P.2d 751, 757 (1999).

In *Taylor I*, this Court determined that the Taylors had standing to pursue their claims as real parties in interest. 142 Idaho 253, 257–58, 127 P.3d 156, 160–61 (2005). Initially, the district court dismissed the Taylors' complaint pursuant to I.R.C.P. 17(a). On appeal, this Court determined that the Taylors were real parties in interest, as required by this rule, because they would be entitled to the benefits of the action if it were successful. *Id.* at 258, 127 P.3d at 161. Additionally, the Court determined that the Taylors could proceed with their negligence claim against the Mailes "for aiding the trustees in disposing of trust property in violation of their

fiduciary responsibilities and receiving the property with knowledge of the same." *Id.* at 261, 127 P.3d at 164. We found the cause of action could be maintained against the trustees and/or the Mailes, and if the trustees refused to act, the Taylors could seek a constructive trust against the Mailes. *Id.* Therefore, under the "law of the case" doctrine, both the issue of whether the Taylors were real parties in interest and whether they could maintain an action against the Mailes without joining the trustees were before this Court. Thus, the principles articulated in *Taylor I* were necessary to the Court's decision.

Nonetheless, the Mailes assert that the procedural posture of the prior appeal—coming to the Court from an I.R.C.P. 12(b)(6) motion—and the Taylors' execution of the Disclaimer after the district court granted their motion to dismiss make the "law of the case" doctrine inapplicable. The Mailes are correct that the Disclaimer could not have been raised in the prior appeal. The Disclaimer was executed by various beneficiaries in June 2004, which was after the district court granted the motion to dismiss that predicated the first appeal in *Taylor I.* As such, the Disclaimer was not part of the record during the first appeal and the Mailes' argument that the Taylors now lack standing because of this document could not have been raised during the course of *Taylor I.* We should thus reexamine the Taylors' standing.

Although the Taylors executed the Disclaimer with the trustees, it does not divest them of standing. The Mailes argue that the Taylors, as beneficiaries, were required to pursue their action against the trustees. However, in deciding *Taylor I,* this Court announced the principle that beneficiaries could maintain a cause of action against the trustee, a third party, or both where the third party receives trust property with knowledge that the transfer is in violation of the trustee's fiduciary duty. *Id.* at 260–61, 127 P.3d at 163–64. While this Court was unable to consider the Disclaimer during *Taylor I,* the principles announced in that decision are still the law of Idaho. Therefore, we hold that the Taylors had standing to maintain suit against the Mailes and were not required to join the Rogers.

Next, the Mailes argue that the Disclaimer made the suit moot because it worked to terminate the purpose of the Trust and to disburse all assets to the beneficiaries. "An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851, 119 P.3d 624, 626 (2005). Mootness applies when an appellant lacks a legal interest in the outcome. *State v. Hoyle*, 140 Idaho 679, 682, 99 P.3d 1069,

1072 (2004). Mootness also applies when a favorable judicial decision would not result in any relief. *State v. Rogers*, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2004).

In the Disclaimer, the Taylors specifically reserved their ownership interest in the lawsuit against the Mailes. Therefore, they have a legal interest in the outcome of the case and a favorable decision will result in relief in the form of title to the Linder Road property. Moreover, under Idaho law, a chose in action is an asset. *See Blake v. Blake*, 69 Idaho 214, 219, 205 P.2d 495, 498 (1949). Here, the current action is an asset that remained in the Trust, so the Disclaimer did not work to terminate the Trust. Thus, the Taylors' lawsuit is not moot and they have standing to pursue this claim against the Mailes.

B. Summary judgment was proper.

The Mailes next contend that the district court erred in granting summary judgment to the Taylors on the remaining claim of negligence. They assert that Beth Rogers was not acting under a conflict of interest, but even if she were, she acted reasonably and prudently. They also maintain that Johnson, as the original trustee, acted reasonably and prudently in his decision to sell the property to the Mailes, and the Rogers acted reasonably in carrying out his decision.

When reviewing a ruling on a summary judgment motion, this Court applies the same standard used by the district court. *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007). "Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to judgment as a matter of law." *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988); *see also* I.R.C.P. 56(c). "In making this determination, all allegations of fact in the record, and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion." *City of Kellogg v. Mission Mountain Interests Ltd.*, 135 Idaho 239, 243, 16 P.3d 915, 919 (2000). If no genuine issue as to any material fact exists, "then all that remains is a question of law over which this Court exercises free review." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 175, 923 P.2d 416, 420 (1996).

In its order granting summary judgment to the Taylors, the district court noted that following *Taylor I* only a single cause of action remained—whether the Mailes had aided the trustees in breaching their fiduciary duty by receiving the property with knowledge that the sale was not approved by the court under I.C. § 68-108(b). It then held that, as a matter of law, Beth

Rogers had a conflict of interest because she was both a trustee and a beneficiary. The lower court also found that a trustee's power to close a land sale was subject to judicial oversight pursuant to I.C. § 68-108(b) and *Taylor I.* Since the sale of the Linder Road property was not approved by a court, the trial court found the contract for the sale of the property was void. Finally, the district court found that the Mailes had actual knowledge that Beth Rogers needed to receive court approval prior to closing the sale.

The Supreme Court exercises free review over issues of statutory interpretation. *Big Sky Paramedics, LLC v. Sagle Fire Dist.*, 140 Idaho 435, 436, 95 P.3d 53, 54 (2004). The Mailes argue that the Idaho Code provides a "reasonable prudence exception" to the requirement of court authorization under I.C. § 68-108(b). However, to accept the Mailes' argument it would be necessary for court authorization under I.C. § 68-108 to be the normal *modus operandi* and "reasonable prudence" under I.C. § 68-106 to be an exception. Instead, under the Uniform Trustees' Powers Act, as adopted in Idaho Code Title 68, a trustee needs only to act with reasonable prudence in most situations and court authorization is the exception. Idaho Code § 68-106(a) provides:

> From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).

Thus, under normal circumstances, a trustee can exercise her powers as trustee without court authorization if such actions are reasonable and prudent.

Nonetheless, Idaho Code § 68-108(b) sets out limits on this power and provides, in pertinent part:

> If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization, except as provided in sections 68-106(c)(1), (4), (6), (18), and (24) upon petition of the trustee.

Consequently, the plain, unambiguous language of the Uniform Trustees' Powers Act provides that even if a trustee's actions are reasonable and prudent, if a conflict of interest exists, the court must authorize the action before the trustee can exercise that power. This includes the power to close a real estate sale under I.C. § 68-106(c)(7). *Taylor I*, 142 Idaho 253, 259, 127 P.3d 156, 162 ("Where a trustee has an individual interest in the trust that poses a conflict in the

exercise of a trust power, such as the power to close a sale of real property, 'the power may be exercised only by court authorization . . . .'" (citing I.C. § 68-108(b))).

Here, there are no issues of material fact that precluded summary judgment. Beth Rogers did not seek court approval before closing the sale of the Linder Road property. It is also uncontroverted that she had a conflict of interest because of her role as both trustee to the Trust and beneficiary under the Trust. As a trustee, she owed the beneficiaries a duty of loyalty. *Taylor I*, 142 Idaho at 260, 127 P.3d at 163 (quoting *Edwards v. Edwards*, 122 Idaho 963, 969, 842 P.2d 299, 305 (Ct. App. 1992)). As a direct beneficiary, Rogers was entitled to an immediate distribution of the monies paid by the Mailes. However, the income and residual beneficiaries had an interest in seeing that the value of the property held in the trust increased. *See Taylor I*, 142 Idaho at 259, 127 P.3d at 162 (noting that the Mailes' briefing on appeal indicated various classes of beneficiaries with different interests). As such, it was necessary for Beth Rogers to receive court approval before closing the sale.

Moreover, it is also uncontroverted that the Mailes had knowledge of this conflict of interest. Thomas Maile, acting as Theodore Johnson's attorney, drafted the Trust that created the various classes of beneficiaries and named Beth Rogers as a successor trustee. *See Id.* at 259, 127 P.3d at 162. Therefore, we affirm the district court's grant of summary judgment.

C. Prejudgment interest was properly denied.

The Mailes also argue that the district court erred by not awarding prejudgment interest on all the money paid to the Trust from September 2002 until January 2004. They contend that pursuant to I.C. § 28-22-104(1), (2), (4), and (5), they are entitled to an award of prejudgment interest. The Taylors maintain that the Mailes are not entitled to prejudgment interest under equitable principles or pursuant to I.C. § 28-22-104. In its order denying the Mailes' claim for prejudgment interest, the district court stated:

> [The Mailes] are not entitled under I.C. § 28-22-104 . . . to an award of prejudgment interest. The $400,000 does not constitute money due by express contract, or money after the same becomes due, or money lent, or money due on the settlement of mutual accounts from the date the balance is ascertained, or money due upon open accounts after three months from the date of the last item. . . . Nor did the [Taylors] retain the money without the express or implied consent of the [Mailes].
>
> The Court finds that the [Mailes] are not entitled to pre-judgment interest under § 28-22-104.

This Court reviews the award or denial of prejudgment interest for an abuse of discretion. *Dillon v. Montgomery*, 138 Idaho 614, 617, 67 P.3d 93, 96 (2003). A three factor test is used to prove an abuse of discretion: "(1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the district court reached its decision by an exercise of reason." *Id.* Idaho Code § 28-22-104(1) provides:

> When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of twelve cents (12¢) on the hundred by the year on:
>
> 1. Money due by express contract.
>
> 2. Money after the same becomes due.
>
> 3. Money lent.
>
> 4. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied.
>
> 5. Money due on the settlement of mutual accounts from the date the balance is ascertained.
>
> 6. Money due upon open accounts after three (3) months from the date of the last item.

The district court correctly found and stated the applicable legal standards and therefore did not abuse its discretion. It acted with the boundaries of its discretion and consistently with the applicable legal standards by examining each factor of I.C. § 28-22-104(1) as it applied to this case. Therefore, we affirm the district court's denial of prejudgment interest.

D. Attorney fees were properly denied.

The Taylors cross-appeal the district court's denial of their request for attorney fees. They maintain that they are entitled to attorney fees under the Earnest Money Agreement. The Mailes assert the Taylors are not entitled to attorney fees because they are not parties to the contract.

An award of attorney fees is "within the discretion of the trial court and subject to review for an abuse of discretion." *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006). Whether a statute awarding attorney fees applies is a question of law over which we exercise free review. *Id.* at 644, 152 P.3d at 5. In addition, attorney fees may be awarded when provided for by contract. I.R.C.P. 54(e)(1).

The district court properly denied the Taylors' motion for attorney fees. The court determined that the Taylors could not receive attorney fees pursuant to I.C. § 12-120(3) because the Earnest Money Agreement was between the Trust and the Mailes and, therefore, the Taylors were not a party to the transaction. Finally, the district court declined to award attorney fees pursuant to I.C. § 12-121 because it found the Mailes had not pursued their claims frivolously, unreasonably, or without foundation. We affirm the district court.

The parties have argued the same basis for attorney fees in this appeal. For the same reasons we affirmed the district court, we deny attorney fees on appeal.

VI. CONCLUSION

We hold that the district court had jurisdiction over the Taylors' claims, the Taylors had standing to pursue their claims, and the Taylors' claims are not moot. In light of our holdings, we affirm the district court order granting the Taylors' motion for summary judgment on the beneficiary claims and the court's denial of the Taylors' request for attorney fees. We decline to award attorney fees on appeal. Costs to Taylors.

Justices J. JONES, TROUT, PRO TEM and KIDWELL, PRO TEM, **CONCUR.**

Chief Justice EISMANN, specially concurring.

I concur in the majority opinion, but write only to point out an issue that was not raised in this case. Theodore Johnson, as trustee, entered into a real estate contract agreeing to sell forty acres of trust property to the Mailes. After Johnson died, Beth Rogers and Andrew Rogers, as successor trustees, closed the sale. Summary judgment was granted upon the ground that Beth Rogers had a conflict of interest that required court approval before she could close the sale. Based upon that lack of court approval, the district court set aside the entire transaction. There has not been any determination that Johnson breached his fiduciary duty by entering into the sale contract. The Mailes have not argued on appeal that the appropriate remedy for closing the sale without court approval would be to set aside only the closing, rather than also setting aside the contract of sale. Thus, we have not addressed the appropriate scope of the remedy for a violation of Idaho Code § 68-108(b).

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants.	Case No. CV-OC-0723232 **SUPPLEMENTAL MEMORANDUM BRIEF IN RESPONSE TO SUPREME COURT OPINION FILED FEBRUARY 4, 2009**

The plaintiffs above named, by and through their attorney of record, Thomas Maile IV, and

provide this Supplemental Memorandum Brief In Response to Supreme Court Opinion filed February 4, 2009 and as additional argument in opposition to Defendants' Motion for Summary Judgement/Motion to Dismiss as follows:

ADDITIONAL FACTS AND SUPPLEMENTAL STATUS OF THE RECORD

The Plaintiffs' further incorporate their Memorandum Brief in Support of Plaintiffs' Motion to Compel & Motion for Attorneys Fees and Costs Motion to Compel filed October 20, 2008 as if set forth in full herein both as to the facts and the law set forth therein. The Taylors have filed an Affidavit with the attached Idaho Supreme Court case captioned Taylor vs Maile. The opinion relates to a portion of the issues surrounding standing and provides that the individual Taylors had standing to pursue their claim based upon the disclaimer of interest wherein they did not disclaim an interest in the litigation. The Supreme Court, however, did not address or specify that the Taylors were or were not beneficiaries after the Settlement and Disclaimer Agreement. The court proceedings in Taylor vs Maile had as it central issue the standing or the beneficiary status of the Taylors as it allegedly affected the Taylors' claim of being deprived notice of the sale of the real property by a successor trustee who had a conflict of interest. Consequently, the issue of their status as beneficiaries has never been adjudicated and is central to the issue of their active misrepresentation before the District Court in maintaining their alleged status as beneficiaries. If the Taylors were, in fact, beneficiaries they alone were the only ones could have complained about being deprived of court approval in 2002 when the property was sold in violation of I.C. 68-108. However, if as they represented to the probate court, they were no longer beneficiaries as of 2004 and their

mother was the sole beneficiary, they no longer had a legitimate interest to complain that they were deprived notice affecting the trust in which they had no interest in after the Disclaimer & Settlement Agreement as verified by them under oath.

Their active misrepresentation to the District Court and the Idaho Supreme Court by asserting that they were "residual beneficiaries" is a central element that has never been litigated in any prior litigation. It was solely as a result of their abuse of process, fraud, and misrepresentation to the court system that they were able to achieve an order rescinding the real estate closing and restoring the property to the trust. Without their active misrepresentation the Honorable Judge Wilper would not have ordered the property restored to the trust. Judge Wilper's Memorandum Decision and Order, on July 28, 2005 (attached to the Affidavit of Thomas Maile Part 2-Exhibit K), establishes that the trustee of the trust acting on behalf of the trust could not rescind the transaction since the action of the trustee, leading up to the closing and acts subsequent to the closing, established that the trust could not have the property restored as it waived that right to restore the real property to the trust. The trust was estopped from rescinding the sale transaction. That judicial determination never was appealed by the Taylors. The only possible way for the Linder property to be restored to the trust was for the Taylors to continue to perpetrate the misrepresentation that they had in interest as beneficiaries of the trust. The issue of their classification as beneficiaries has not been litigated nor has the issue of misrepresentation been litigated. The Supreme Court was provided by the Taylors' counsel of record with a copy of the complaint in the current action (Affidavit of Thomas Maile Part 4-Exhibit Z). The Supreme Court in its recent decision is silent on the issues of the Taylors

misrepresentations and their status as beneficiaries of the trust.

As stated, there are five factors required for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. Ticor Title Co., 144 Idaho at 124, 157 P.3d at 618. The Ticor, supra, case, actually dealt with "issue preclusion", which is also referred to as collateral estoppel. The plaintiffs provided the Supreme Court with a motion to augment the record to demonstrate the inconsistent prior sworn testimony of John Taylor before the probate court, however, the Supreme Court chose not to allow the record to be augmented. The issues of frauds, false pretense, and perjury have never been claims or issues presented in prior litigation. The issue involving the misrepresentations of the Taylors as beneficiaries in 2006, has never been decided, and the reading of the Idaho Supreme Court Decision demonstrates that point. The Supreme Court's Decision does not address, nor decide the issue of the Taylors' misrepresented status as beneficiaries.

A critical component of collateral estoppel is missing in the present matter. Case law has held that the issue was actually decided in the previous litigation and that issue was necessary to the prior judgment. Navarro v. Yonkers, 144 Idaho 882, 885, 173 P.3d 1141, 1144 (2007). Were the Taylors beneficiaries in 2006 as they verified in their pleadings? Their misrepresentation under oath

purportedly gave them a basis to contest the lack of court approval of the real estate closing pursuant to I.C. 68-106, which resulted in the sale be voided. But for their perjury there would not have been a voided real estate transaction. Once again the Honorable Judge Wilper had ruled that the trust itself could not rescind the transaction. The issue of the Taylors status as alleged beneficiaries was not decided nor was it necessary to the judgment affirmed by the Idaho Supreme Court. Consequently, there is no defense of collateral estoppel and/or res judicata available to the defendants.

The Plaintiffs herein have asserted a variety of claims and one only needs to examine the Idaho Racketeering Statute to determine that in the present case there can be no defense based on res judicata since the Plaintiffs were not at any point in time damaged by Taylors misrepresentations until a Judgment was entered based upon the fraud perpetrated by the Taylors and their attorneys verifying under oath to be residual beneficiaries. Without a resulting damage, there could be no cause of action that could exist. A cause of action arising under the Idaho Racketeering Act explicitly contains language that precludes the current Defendants argument of res judicata. The language under I.C. sections 18-7803 and 18-704 clearly provides that a claim only arises as a result of activity amounting to the specific statutory criminal activity that is precisely alleged to have occurred in the present matter. Specifically the Statutes provide:

18-7803 DEFINITIONS.

> As used in this chapter, (a) "Racketeering" means any act which is chargeable or indictable under the following sections of the Idaho Code or which are equivalent acts chargeable or indictable as equivalent crimes under the laws of any other

jurisdiction:

(10) Fraudulent practices, false pretenses, insurance fraud, financial transaction card crimes and fraud generally (sections 18-2403, 18-2706, 18-3002, 18-3101, 18-3124, 18-3125, 18-3126, 18-6713, 41-293, 41-294 and 41-1306, Idaho Code);

(17) Perjury (sections 18-5401 and 18-5410, Idaho Code);

18-7804 PROHIBITED ACTIVITIES -- PENALTIES.

(a) It is unlawful for any person who has received any proceeds derived directly or indirectly from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property.

(b) It is unlawful for any person to engage in a pattern of racketeering activity in order to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property

It is the very actions of the defendants that gives rise to the claims and the trier of fact must determine if the defendants' wrongful conduct is actionable under Idaho Code 18-7803 et. seq. There is no doubt that collectively the defendants entered into a contingent fee agreement (See Affidavit of Thomas Maile Part 4 exhibit "W"), thereby creating an enterprise pursuant to I.C.18-7803(c) to share in the proceeds of the litigation, thereby subjecting themselves to the components of the Idaho Racketeering Statute. In addition, the Plaintiffs have alleged judicial estoppel as a cause of action against the Defendants. Judicial estoppel clearly applies in this matter as the Plaintiffs herein were deprived of their real property as a result of statements made under oath by the Taylors which ultimately contradicted their verified pleadings in January 2006. The Plaintiffs brought the facts surrounding the misrepresentation to the Idaho Supreme Court in their briefing as they alleged that the Taylors had insufficient standing as beneficiaries to rescind the transaction as the Taylors

acknowledged under oath that they were no longer beneficiaries and that their mother was the sole beneficiary. Plaintiffs had a right to have that determined as an issue of standing. Standing is an issue that can be raised at any time at either the District Court level or at the appellate level. The Plaintiffs legitimately raised that issue and the Idaho Supreme Court chose not to address that issue and that issue remains unresolved to this date.

A. THE DOCTRINE OF RES JUDICATA HAS NO APPLICATION AS FRAUD HAS BEEN ALLEGED BY THE PLAINTIFFS AND THE PLAINTIFFS ACTED WITH DUE DILIGENCE.

The case of Farmers Nat'l Bank v. Shirey, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994) provides the standard for the court to apply regarding the allegations of fraud in light of a defense of res judicata. The Shirey, court stated:

> The law in Idaho is that an action for relief on the grounds of fraud will not be "deemed to have accrued until discovery, by the aggrieved party, of the facts constituting the fraud." I.C. § 5-218(4). "[A]ctual knowledge of fraud will be inferred if the allegedly aggrieved party could have discovered it by the exercise of due diligence." Kawai Farms v. Longstreet, 121 Idaho 610, 614, 826 P.2d 1322, 1326 (1992), quoting Nancy Lee Mines, Inc. v. Harrison, 95 Idaho 546, 547, 511 P.2d 828, 829 (1973). More specific to the facts of this case, before a claim of fraud can be dismissed on a motion for summary judgment based on res judicata, a court must first answer the question of whether there is more than one conclusion as to whether the party alleging the fraud has exercised due diligence in discovering the fraud. Id. See also Magic Valley Radiology, P.A. v. Kolouch, 123 Idaho 434, 437, 849 P.2d 107, 110 (1993).

The plaintiffs brought to the attention of the court in the prior proceeding in their briefing that the defendants collectively misrepresented under oath the Taylors' status as beneficiaries as set forth in their verified amended complaint filed in January 2006. (Affidavit of Thomas Maile Part 4, Opening Brief, Reply Brief, Notice of Appeal). The legal premise was the Taylors lacked standing

to set aside the real estate closing as beneficiaries of the trust, as they had admitted under oath that they were no longer beneficiaries of the trust as a result of the Settlement & Disclaimer Agreement. The Taylors changed their testimony from one court to another, to fit what appeared to be necessary at the time. By briefing this very point, the plaintiffs acted with "due diligence" after discovering the fraud which was perpetrated upon the district court. The plaintiffs relied upon established case law in Idaho that standing could be raised at any stage of litigation including appeal. The Supreme Court in its recent determination, did not rule that the Taylors remained beneficiaries after the execution of the Settlement & Disclaimer Agreement. The Supreme Court did determine the Taylors had standing as they "reserved their ownership" in the litigation. The only way the real estate closing could have been set aside was for a beneficiary to assert the protection of I.C. 68-108. The Taylors misrepresented their status as beneficiaries in January 2006 which resulted in the district court entering the "Judgment on Beneficiaries Claim", filed June 5, 2006.

The Notice of Appeal filed December 21, 2006, and the subsequent briefing provides proof that the plaintiffs acted with due diligence in attempting to bring to the attention of the judicially that the Taylors acted improperly in asserting their status as beneficiaries in light of the Settlement & Disclaimer Agreement. A court must first answer the question of whether there is more than one conclusion as to whether the party alleging the fraud has exercised due diligence in discovering the fraud in light of the principle of res judicata. If there are no questions of material fact, the question is one of law. If there is conflicting evidence as to when a fact was known or reasonably should have been known, it is a question of fact. If there is a question of material fact as to whether plaintiffs

should have reasonably discovered the fraud upon the court the doctrine of res judicata does not apply. Kawai Farms v. Longstreet, 121 Idaho 610, 826 P.2d 1322 (1992). If the court finds that there exists more than one conclusion that such party exercised due diligence, then a **material question of fact exists precluding a granting of summary judgment.** Hall v. Forsloff, 124 Idaho 771, 864 P.2d 609 (S.C.1993). The plaintiffs relied justifiably upon their ability to brief the issue of standing before the appellate court as a proper avenue to determine if the fraudulent behavior defeated the Taylors' standing. The Supreme Court did not resolve the issue of Taylors as beneficiaries but instead chose to hold that they had standing in "ownership interest in the lawsuit". But for Taylors misrepresentation concerning their status in 2006 as beneficiaries, I.C. 68-108 would not have been available to set aside the closing of the real estate transaction. The plaintiffs filed their Notice of Appeal approximately 6 months after the entry of the "Judgment on Beneficiaries Claims". Such timing by the plaintiffs should be well within any standard for acting with due diligence.

I.R.C.P. 60(b) also recognizes the district court's authority to entertain an independent action to relieve a party from a judgment on the basis of equity. Compton v. Compton, 101 Id. 334, 612 P.2d 1175, 1181 n. 1 (1980). There is no express time limit for an independent action to relieve a party from judgment. Id., 101 Idaho at 334, 612 P.2d at 1181. The power of the courts to entertain such an action is inherent, and is not, therefore, subject to the time limitations imposed by I.R.C.P. 60(b). Id.; see also Gregory v. Hancock, 81 Idaho 221, 227, 340 P.2d 108, 111 (1959). The independent action must, however, be brought within a "reasonable time". Davis v. Parrish, 131 Idaho 595 at 597, 961 P.2d 1198, 1202 (1998); Compton, 101 Idaho at 334, 612 P.2d at 1181 (citing

Gregory, 81 Idaho at 227, 340 P.2d at 112)).

The plaintiffs' complaint has requested that the title be set aside based upon the defendants' fraud and the title be quieted in the name of Berkshire Investments LLC. The determination whether an independent action was brought within a reasonable time is ordinarily a question of fact to be resolved by the trier of fact. Davis, 131 Idaho at 597, 961 P.2d at 1200 citing Thiel v. Stradley, 118 Idaho 86, 88, 794 P.2d 1142, 1144 (1990), Waller v. State (S.C. 2008 ID-0826.121). By analogy the same determination of what constitutes a reasonable time should apply to the doctrine of res judicata relating to the plaintiffs' due diligence in discovering and acting upon the fraud committed by the defendants.

Furthermore, I.R.C.P. 60(b) specifically preserves the following three means of attacking a final judgment:(1) to entertain an independent action to relieve a party from judgment, ... and (3) to set aside a judgment for fraud upon the court. Compton v. Compton, 101 Idaho 328, 612 P.2d 1175 (1980) Id. at 333-34, 612 P.2d at 1180-81. Claims brought under I.R.C.P. 60(b) are not barred by res judicata because they are one of the recognized "avenues . . . for attacking a judgment." Davis v. Parrish, 131 Idaho 595, 599, 961 P.2d 1198, 1202 (1998). Pursuant to Rule 60(b), intrinsic or extrinsic fraud makes no difference in the court's analysis.

The plaintiffs herein acted within a reasonable period of time in filing the present matter. The Complaint was filed on December 31, 2007. The action was filed while the appeal was pending. The gravamen of the complaint clearly is centered upon the "fraud upon the court" committed collectively by the defendants. The evidence of the fraud, false pretenses, perjury, is amply set forth

in the record. The following illustrates the overwhelming evidence of the actionable misconduct by the Defendants.

1. After the execution of the Settlement Agreement, the alleged beneficiaries testified they were not going to obtain any money from the litigation (pp. 132, 133, 134, of the deposition of Reed J. Taylor) (74, 75 of the deposition of Dallan Taylor).
2. The trust was liquidated and all cash was disbursed pursuant to the Settlement Agreement The trust corpus was distributed to the only beneficiaries that existed, after the settlement agreement was reached among the various family members. The individual Taylors, Reed, Dallan, and R. John, did not take any proceeds, and judicially admitted their mother was the "sole beneficiary of the trust". (36, 37 of the deposition of R. John Taylor).
3. There is no dispute that Connie Taylor, notarized her husband's signature on November 14th 2004, wherein her then husband stated under oath in the verified petition before the probate court, on page two "the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of this trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement". (Affidavit of Thomas Maile Part 2-Exhibit I).
4. A portion of the hearing before the Probate Court wherein John Taylor testified in the hearing before the Honorable Judge Beiter on May 2, 2005 provides:

   page 14, ln 4: Q. Will you explain to the court just briefly why it is that you want to serve?

   6 A. Well, primarily, to pursue the claim for the trust. We have always thought it was a valid claim because I think that, for the benefit -- my mother is the beneficiary of the trust, and we expect that we will eventually win on this claim.

   During that same hearing counsel for the Taylors provided in his closing argument before Judge Beiter on May 2, 2005 provided:

   page 17, ln 12: MR. CLARK: Yes. Just briefly, Judge. It seems to me that, based upon, first, the agreement of the beneficiaries -- they have all indicated that the Taylors should serve as co-trustees. The Taylors, pursuant to that same agreement, have a guarantee in the disclaimer. So they have some interest in the proceeding. Their mother stands to gain and, thereby, they have an interest in the proceeding.

5. Page 1 of the Verified Amended Complaint states under oath, "Reed and R. John Taylor are residents of Nez Perce County, Idaho; Dallan Taylor is a resident of Ada County Idaho. ***All of the plaintiffs are residual beneficiaries of the Theodore L. Johnson Trust.***

6. The Taylors filed their Motion for Summary Judgment on February 9, 2006, and stated "Comes Now Plaintiffs Reed, Dallan, and John Taylor (hereinafter referred to as "the Beneficiary Plaintiffs"). (Affidavit of Thomas Maile Par 2).
7. The Taylors filed their Memorandum Brief in Support of their Motion for Summary Judgment on February 9, 2006, and stated "The Plaintiff Beneficiaries seek summary judgment against the defendants on their constructive trust claim and an order quieting tiltl in the Linder Road property to them". (Affidavit of Thomas Maile Par 2).

There are ample material facts in dispute to warrant a jury determination under these facts. Neither Res Judicata or Collateral Estoppel have application as to any of the defendants and can not be a bar to the present proceedings..

A. THE RULE OF PRIVY RELATING TO THE DOCTRINE OF RES JUDICATA HAS NO APPLICATION TO THE ATTORNEYS WHO PERPETRATED A FRAUD UPON THE COURT.

The lawyers have argued that res judicata bars the plaintiffs from pursuing their claims since they were the attorneys of record in the prior litigation. Such is not established Law in Idaho. Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Corcoran v. Dept. of Social Services, 271 Conn. 679, 709, 859 A.2d 533 (2004), see also 1 Restatement (Second), Judgments § 27, comment (a) (1982) ("rule of issue preclusion is operative where the second action is between the same persons who were parties to the prior action"); 1 Restatement (Second), supra, § 34 (3) ("person who is not a party to an action is not bound by . . . the rules of res judicata"). See Suffield Development Associates Ltd. Partnership v. National Loan Investors, LP, 97 Conn. App. 541, 562, 905 A.2d 1214, (2006). The Suffield, supra, matter involved defendant attorneys who were the attorneys of record for defendants in the prior proceeding. The

Connecticut Court did not allow the doctrine of res judicata to defeat the plaintiffs' subsequent suit. See the case of Cont'l Sav. Ass'n v. Collins, 814 S.W.2d 829 (Tex. App.1991), which held that under Texas law the mere representation of a party in a lawsuit does not establish privity between an attorney and his or her client. There is no showing by the defendants that privy is established by their mere representation of clients. They actively participated in the misrepresentations with their clients and equally committed false pretenses, fraud, and aided in the perjury, when in truth and in fact they prepared pleadings which were signed by their clients under oath affirming that the sole beneficiary was Helen Taylor not their clients.

CONCLUSION

The plaintiffs have alleged sufficient claims to withstand the defendants' motions for summary judgment/motion to dismiss. The recent Supreme Court Decision in Taylor v. Maile, does not establish there was an adjudication of facts and/or law that give rise to the application of res judicata or collateral estoppel. The defendants' motions must be denied in their entirety.

Dated this 12th day of February, 2009.

THOMAS G. MAILE, IV.
Attorney for Colleen Maile and Berkshire Investments LLC and pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 12th day of February, 2009, I caused a true and correct copy of the foregoing (1) SUPPLEMENTAL MEMORANDUM BRIEF IN RESPONSE TO

SUPREME COURT OPINION FILED FEBRUARY 4, 2009, (2) AFFIDAVIT OF THOMAS MAILE PART FOUR, to be delivered, addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

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Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

AFFIDAVIT OF THOMAS MAILE PART FOUR

STATE OF IDAHO)
) ss:
County of Ada)

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is the counsel of record for Berkshire Investments, LLC and Colleen Birch-Maile and in addition is a named plaintiff herein. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. Annexed hereto as Exhibit "W" is a true and correct copy of the Affidavit of Counsel in Support of Motion for Fees and Costs with the attached Contingent Fee Agreement between the attorneys, Clark and Feeney, and the Taylors and the same is made a part hereof as if set forth in full herein.

3. Annexed hereto as Exhibit "X" is a true and correct copy of the Appellants Opening Brief before the Idaho Supreme Court filed September 19, 2007 (excluding the attachments).

4. Annexed hereto as Exhibit "Y" is a true and correct copy of the Appellants/Respondents Reply Brief before the Idaho Supreme Court filed November 14, 2007 (excluding the attachments).

5. Annexed hereto as Exhibit "Z" is a true and correct copy of the Respondents/Cross-Appellants Affidavit in Support for Motion for Sanctions filed before the Idaho Supreme Court on January 17, 2008 (excluding the attachment which was the original complaint in the current case which part of the record herein).

6. Annexed hereto as Exhibit "AA" and incorporated herein by reference as if set forth in full herein are a true and correct copies of pages as 5, 6, 7, 11,12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, of the deposition of Helen Taylor, taken on October 3, 2008, taken in the above captioned matter.

7. Annexed hereto as Exhibit "BB" is a true and correct copy of the Appellants' Notice of Appeal filed on December 21, 2006.

DATED this 10 day of February, 2009.

THOMAS G. MAILE, IV, pro se and
Attorney for Berkshire Investments and Colleen Birch Maile

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 10 day of February, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

PAUL THOMAS CLARK
CONNIE W. TAYLOR
CLARK and FEENEY
Attorneys for Plaintiffs
1229 Main Street
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB No. 4837

COPY

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants.

Case No. CV OC 0400473D

AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR FEES AND COSTS

RECEIVED
JUL 14 2006
BY: Mate

EXHIBIT "W"

STATE OF IDAHO)
) ss.
County of Nez Perce)

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law within the state of Idaho, and one of the attorneys for the Plaintiffs in the above entitled matter. The information contained herein is of my own personal knowledge.

2. Clark and Feeney's representation of the Plaintiffs in this matter initially began as an hourly billing with payment expected on a monthly basis. When monthly payments were not made, it was converted to a contingent fee agreement. I am attaching a true and correct copy of the following documents:

a. July 9, 2003 letter from Connie Taylor to Beth Rogers enclosing a standard fee agreement, which was Exhibit No. 32 to the ex parte deposition Thomas Maile conducted of Beth Rogers.

b. Contingent fee agreement dated April 15, 2006.

DATED this 5th day of July, 2006.

Connie Taylor

SUBSCRIBED AND SWORN to before me this 5th day of July, 2006.

TAMARA CRANE NOTARY PUBLIC STATE OF IDAHO

Tamara Crane
Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 03/06/08

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of July, 2006, I caused to be served a true and correct copy of the above document by the method indicated below, and addressed to the following:

Thomas G. Maile Attorney at Law 380 W. State Eagle, ID 83616	☒ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail Telecopy (FAX)
Jack S. Gjording Gjording & Fouster P.O. Box 2837 Boise, ID 83702	☒ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail Telecopy (FAX)
Dennis Charney 951 E. Plaza Dr. Ste. 140 Eagle, ID 83616	☒ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail Telecopy (FAX)

Connie W. Taylor
Attorney for Plaintiff

LAW OFFICES OF
CLARK AND FEENEY
THE TRAIN STATION, SUITE 106
1229 MAIN STREET
P. O. DRAWER 285
LEWISTON, IDAHO 83501

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RON T. BLEWETT
PAUL THOMAS CLARK
THOMAS W. FEENEY
SCOTT D. GALLINA **
JONATHAN D. HALLY
RUBE G. JUNES *
DOUGLAS L. MUSHLITZ
CHARLES M. STROSCHEIN
CONNIE TAYLOR **
TINA L. KERNAN **

*LICENSED IN WASHINGTON & OREGON ONLY
**LICENSED IN IDAHO & WASHINGTON

July 9, 2003

Beth Rogers
Trustee of the Theodore L. Johnson
Revocable Trust Agreement
10816 Jay Road
Boise, ID 83714

Re: Theodore L. Johnson Revocable Trust

Dear Beth:

I am enclosing an **original and one copy** of Clark and Feeney's standard *Fee Agreement* setting forth the terms and conditions of our representation of you relating to the Theodore L. Johnson Revocable Trust. Please read the *Agreement* over very carefully, and if it meets with your approval, please sign the original and return it to Clark and Feeney. The copy is for your file. Please note that we are required by law to have an agreement on file in all cases we undertake.

I am also enclosing the **original** Complaint that I have drafted pursuant to our discussions last Sunday. I would appreciate it if you would sign the Complaint before a Notary Public and return it to Stacey as quickly as possible, as I do want to be sure that this Complaint is filed before July 22, 2003, if Mr. Maile does not give us a written waiver of the one year statute of limitations he drafted into the earnest money agreement for the purchase of Ted's property.

Please call if you have any questions. I will be checking in with my office periodically while I am out of town, but if there is something urgent you can leave a voice mail message on my cell phone. I don't have cell phone coverage at the ranch, but I will be able to check my messages from a landline.

Sincerely yours,

CLARK and FEENEY

By: Connie W. Taylor

CWT:st
Enclosures
cc: Garth Fisher w/enc.
Dallan Taylor w/enc.

CONTINGENT FEE AGREEMENT

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, individually and as trustees of the Theodore Johnson Trust (hereinafter referred to as "client") does hereby employ and retain the law firm of Clark and Feeney (hereinafter referred to as "attorneys") to render legal services on behalf of Taylors and THE THEODORE JOHNSON TRUST for a lawsuit against THOMAS MAILE IV ET AL.

Said attorneys shall have the power and authority to bring suit or such other legal action(s) at such times as they shall think proper to enforce or collect the above mentioned claim.

In consideration for the services performed and to be performed by said attorneys, the client does hereby agree to pay a contingent fee of Thirty-three and one-third Percent (33.1/3 %) of any settlement, verdict, judgment or recovery, including recovery of any amount as attorneys fees, obtained in such matter.

Our right to the fee described above may be enforced by us against the defendant(s) independent of any right you may have to enforce collection of your share of the Gross Recovery. The purpose of the foregoing provision is to grant an ownership interest in the Gross Recovery that is created by our efforts so that you do not acquire any ownership interest in our share of the Gross Recovery. Nothing herein shall be construed to result in an assignment of income by you to us; as such, our share of the Gross Recovery may not be includable in your income for tax purposes. Further, our interest in the Gross Recovery shall be in addition to any rights granted by the attorney lien statute set forth in Idaho Code Section 3-205. Also, it is agreed that our interest in the Gross Recovery shall be in compliance with

Rule 1.8(j) of the Idaho Rules of Professional Conduct.

Any requirement by the Court that another party pay attorney fees or costs shall not affect this Agreement, except that the fee paid to the attorneys shall be the greater of such fee award collected or the applicable percentage of the total recovery including the fee award. Any court awarded attorneys fees in discovery or other such interlocutory disputes shall be the property of the attorney.

In addition to said attorney's fees the client agrees to pay all out-of-pocket expenses incurred in the investigation and litigation of this claim, including but not necessarily limited to court costs, fees of court reporters, polygraph examination costs, deposition costs, charges for service of all papers, (including subpoenas), witness fees and expenses, and reports, including reports of experts and investigators, long distance phone charges, travel costs, and copying charges. All such expenses shall be payable regardless of the outcome of the matter for which the attorneys are retained. The client agrees to advance to said attorneys at their discretion such sums as may be necessary for the payment of said expenses.

The client agrees that associate counsel may be employed at the discretion of the attorneys and that any attorney so employed may be designated to appear on the client's behalf or undertake representation in this matter.

It is agreed that no settlement shall be made in this matter without the consent of all parties hereto.

It is agreed that the attorneys may withdraw at any time upon giving reasonable notice.

It is agreed that said attorneys shall have a lien upon our cause of action and the proceeds thereof as set forth in Idaho Code Section 3-205, which provides as follows:

The measure and mode of compensation of attorneys and counselors at law

is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between parties before or after judgment.

The client does hereby bind his heirs, executors, personal representatives, legal representatives, and assigns to the terms and conditions set forth herein.

I have read the above contract and fully understand it.

Dated on this 1st day of April, 2005.

REED TAYLOR

DALLAN TAYLOR

R. JOHN TAYLOR

I agree to comply with the terms of this agreement; to evaluate this claim, determine its merits, and thereafter use my best efforts and professional skill with regard to this claim; and to make an accounting for all monies received from or on behalf of the client.

Dated this ____ day of _____, 2005.

Connie W. Taylor
Clark and Feeney
The Train Station, Suite 201
13th and Main Streets
P. O. Box 285
Lewiston, Idaho 83501

is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between parties before or after judgment.

The client does hereby bind his heirs, executors, personal representatives, legal representatives, and assigns to the terms and conditions set forth herein.

I have read the above contract and fully understand it.

Dated on this 15 day of April, 2005.

REED TAYLOR

DALLAN TAYLOR

R. JOHN TAYLOR

I agree to comply with the terms of this agreement; to evaluate this claim, determine its merits, and thereafter use my best efforts and professional skill with regard to this claim; and to make an accounting for all monies received from or on behalf of the client.

Dated this 15 day of April, 2005.

Connie W. Taylor
Clark and Feeney
The Train Station, Suite 201
13th and Main Streets
P. O. Box 285
Lewiston, Idaho 83501

IN THE SUPREME COURT OF THE STATE OF IDAHO

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Respondents/Cross-Appellants, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Appellants/Cross-Respondents.	Supreme Court Docket No. 33781 District Case No. CV OC 04-00473D
THEODORE L. JOHNSON REVOCABLE TRUST, Respondents/Cross-Appellants, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC. Appellants/Cross-Respondents.	

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada

The Honorable Ronald J. Wilper, District Judge presiding

Attorney for Appellants

Thomas G. Maile, IV.
Dennis M. Charney
1191 E. Iron Eagle Drive
Eagle, Idaho 83616

Attorney for Respondents

Connie W. Taylor
Post Office Drawer 285
Lewiston, Idaho 83501

Exhibit "X"

I.

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TABLE OF CASES AND AUTHORITIES

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I. STATEMENT OF THE CASE

A. Nature of the Case

This present matter is an appeal by Appellants, Thomas G. Maile, IV and Colleen Maile, husband and wife, and Berkshire Investments, L.L.C. (hereinafter referred to as "Appellants") from the Summary Judgment and resulting Judgments entered by the lower court voiding a real estate transaction which closed on September 16, 2002. The transaction involved the Theodore L. Johnson Revocable Trust as seller (hereinafter referred to as the "Trust") and Berkshire Investments, L.L.C., as buyer. The Honorable Ronald Wilper, District Judge of the Fourth Judicial District, granted the individual beneficiaries' (Reed Taylor, Dallan Taylor, and R. John Taylor) motion for summary judgment on May 15, 2006. The district court held that the successor Trustee's, Beth Rogers, dual role as Trustee and beneficiary created a conflict of interest as a matter of law, and that court approval of the sales transaction was required under Idaho Code Section 68-108(b) regardless of whether or not the successor Trustee acted in a reasonably prudent manner, and further regardless if there existed exceptions to court approval. (R., Vol. II, pp. 284-85.)

B. Course of Proceedings

This Honorable Court has previously considered certain aspects of this litigation in the case captioned *Taylor v. Maile*, Docket No. 30817. After the appeal was filed by the Taylors in Case No. 30817, the Trust filed its complaint and demand for jury trial on July 19, 2004. (R., Vol. I, p. 5.)

On October 20, 2004, the Appellants filed their Motion to Dismiss Complaint and Demand for Jury Trial/Motion for Summary Judgment relating to the Trust's complaint. (R., Vol. I, p. 63.)

By way of that motion, the Appellants argued that the complaint filed by the Trust should be dismissed because the Taylors had not received the required court appointment to make them successor trustees, pursuant to Idaho Code Sections 68-101 and 68-107 and, as a result, had no authority to file suit on behalf of the Trust. The Taylors initially denied any court appointment was necessary for their appointment as successor trustees. (Certificate of Exhibits (hereafter referred to as C.E.) C.E. #11 exhibit "A.") Then, after receiving the Appellants' Motion to Dismiss, the Taylors obtained an *ex parte* order from the probate court on November 17, 2004, appointing them as successor trustees, retroactive to June 10, 2004. (C.E. #39 exhibit "a" to exhibit "A.")

On February 28, 2005, the Appellants filed appropriate pleadings before the probate court requesting that the *ex parte* Order dated November 17, 2004, be set aside. (C.E. #39 exhibit "C.") In the probate court proceeding, the parties provided extensive briefing regarding the *ex parte* order entered on November 17, 2004. (C.E. #40 exhibits "A" thru "F.") On April 18, 2005, the probate court voided the *ex parte* Order. (C.E. #39 exhibit "D.") Then, on May 2, 2005, the probate court entered another order appointing R. John Taylor, Reed J. Taylor, and Dallan J. Taylor as successor trustees of the Trust. (C.E. #39 exhibit "E.")

Subsequently, the district court entered its order granting in part and denying in part the Appellants' Motion to Dismiss/Motion for Summary Judgment. The district court allowed the Trust to amend its complaint after the successor trustees received the required appointment by the probate court and denied the Appellants' motion regarding that issue of law. The district court also held that the Respondents had waived their rights to rescind the contract as "once a party treats a contract as

valid after the appearance of facts giving rise to a right of recision, the right of recision is waived." (R., Vol. I, p. 149, Ll. 10-12, 20-22.)

The Respondents then moved for summary judgment regarding the Appellants' Counter-claim. (R., Vol. I, p. 84.) The court granted the motion, in part, ruling that the Appellants were entitled to pursue portions of their counter-claim, to wit: tortious interference with contract claims, equitable estoppel, quasi-estoppel, and their claim alleging a fraudulent transfer. (R., Vol. II, p. 244.)

On December 23, 2005, the Idaho Supreme Court issued its decision on the first appeal brought by the individual Taylors. (R., Vol. II, p. 227.) The individual Taylors filed their Amended Complaint on March 9, 2006, alleging "all of the plaintiffs are residual beneficiaries of the Theodore L. Johnson Trust." (R., Vol. II, p. 260.) On March 21, 2006, the Appellants filed their Answer and Counter-claim Re: Plaintiffs Amended Complaint by Beneficiaries incorporating all prior verified answers and counter-claims previously of record. (R., Vol. II, p. 270.)

On February 13, 2006, the individual Taylors moved for summary judgment as to the Amended Complaint, which the Court granted. (R., Vol. II, pp. 255, 281.) Subsequent motions and ultimately a number of Judgments were entered precipitated by the Order granting the individual Respondents' Motion for Summary Judgment.

C. Statement of Facts

Theodore L. Johnson created a Trust in 1997 and at the time transferred a forty-acre parcel (hereinafter referred to as the "Property") into the Trust. Thomas Maile acted as his attorney in the preparation of that Trust instrument. (C.E. #5 dep. Rogers exhibit "2"). There was no additional

involvement between Mr. Johnson and Mr. Maile until May 2002, when Mr. Johnson received an offer from Franz Witte to purchase the property for $400,000.00. Mr. Johnson retained Mr. Maile to represent him in the transaction (C.E. #11). At the time Mr. Johnson received the offer, he had not determined if he wanted to sell the property. (C.E. #5 dep. Beth Rogers, pp. 19-22, and exhibit 23 p.2).

In order to understand the possible tax ramifications of a potential sale, Mr. Maile contacted Mr. Johnson's accountant to explore those issues. (C.E. #11). She provided a letter outlining potential tax issues and Mr. Maile gave that letter to Mr. Johnson. (C.E. 5 dep. Rogers pp. 24-26 exhibit 5). The accountant noted in her letter that she knew of another 40 acres sold in 1996 for a larger sum and wondered if the properties were comparable. The accountant was not qualified nor experienced in real estate valuations. (C.E. #79 Hetherington's dep. pp. 8, 9, 17, 18, 19, 20).

On May 29, 2002, Mr. Maile provided a letter to Mr. Johnson advising of the possibility of submitting a counter-offer to the purchaser to help determine the market value of the property. On June 4, 2002, Mr. Maile provided a letter to Mr. Witte, the potential purchaser, on behalf of Mr. Johnson, in an attempt to determine if Mr. Witte would increase his price without committing to a counter-offer. (C.E. #5 dep. Rogers exhibit 7).

Mr. Witte refused to increase his offer to purchase and indicated he had determined a fair price by researching recent purchase prices of comparable land in the area. This letter was provided to Mr. Johnson. (C.E. #5 dep. Rogers exhibit 6). The last letter received from the potential

purchaser, Mr. Witte, indicated that his offer to purchase the property expired on June 20, 2002. Mr. Johnson decided not to sell to Mr. Witte. (C.E. #5 dep. Rogers p. 92).

Mr. Maile provided Mr. Johnson a bill for his services. Mr. Johnson paid in full, and the representation was concluded by July 1, 2002. (C.E. #5 dep. Rogers pp. 27, 28, exhibit 8.) Relating to the real estate offer, no additional services were provided to the Trust and/or Mr. Johnson after the date of Mr. Witte's letter establishing that his offer was withdrawn as of June 20, 2002. (C.E. #11).

Some time in the first part of July 2002 and after the withdrawal of the offer by Mr. Witte, Mr. Johnson retained a local licensed appraiser, Knife, Janos and Associates, to determine the fair market value of the property. (C.E. #5 dep. Beth Rogers pp. 28-31 exhibit 9). The appraisal firm of Knife, Janos and Associates provided their appraisal report on July 17, 2002. The property was valued at $400,000.00.

A few days later, Mr. Johnson appeared at Mr. Maile's office with a proposal to sell the property to Mr. Maile for the appraised price of $400,000.00. When Mr. Maile was approached by Mr. Johnson, Mr. Maile advised Mr. Johnson he could have an independent attorney to advise throughout the transaction. Mr. Johnson replied that he trusted Mr. Maile with the drafting of the agreement. (C.E. #11 pp.2-3) (C.E. #49 dep. Maile pp.104-105). Mr. Maile thereafter prepared an earnest money agreement containing the terms requested by Mr. Johnson. Mr. and Mrs. Maile executed the agreement. On July 25, 2002, Mr. Maile met Mr. Johnson at his home and again explained that he could retain independent counsel regarding the transaction. Again Mr. Johnson

indicated he did not want to do so and executed the earnest money agreement making a modification on the addendum. (C.E. #49 dep. Maile pp.120-21). The real estate contract provided that the buyers had the right to assign their interests, and thereafter an assignment was executed, whereby Berkshire Investments, LLC was the agreed-to buyer. The written contract provided that Mr. Maile could not represent the interests of the seller. The real estate closing occurred on September 16, 2002.

In August 2002, Mr. Johnson, was hospitalized with a heart attack. Beth Rogers, designated successor trustee under the Trust, executed the assignment of earnest money agreement designating Berkshire Investments as the purchaser. (C.E. #5 dep. Rogers pp. 43, 44). In mid-August 2002, the Mrs. Rogers prudently took the appraisal and the real estate forms for a review by an independent attorney in Boise, Idaho. Independent counsel reviewed the contract, assignment, appraisal and provided some minor proposed changes to the proposed deed of trust. (C.E. #5 dep Rogers pp. 44-49).

No other family members other than Beth and Andy Rogers were involved in the management of the Trust property. In fact, neither Reed Taylor nor John Taylor had seen their uncle for approximately 12 years. During the period of time prior to the closing, the Rogers were in constant contact with Mr. Johnson and advised Mr. Johnson of the meeting with their independent counsel. Mr. Johnson received the input from independent counsel and continued to support his decision to sell the real estate for the appraised value. (C.E. #5 dep Rogers pp.15, 48-52). Even before the executed real estate contract, Beth Rogers was involved with her uncle, Mr. Johnson, and

other family members, discussing the independent real estate appraisal establishing the fair market value of $400,000. (C.E. #38 dep Rogers p. 23; C.E. #5 p.p. 33-34).

Unfortunately, Mr. Johnson died on September 14, 2002, one day before the scheduled closing. Consistent with the agreement, Berkshire Investments paid the Trust $100,000.00 for the down payment. The remaining balance of $300,000.00 was secured with a promissory note and deed of trust. Reed Taylor, a beneficiary, attended the funeral of Mr. Johnson and was informed of the pending real estate transaction involving Berkshire Investments. He was dissatisfied with the purchase price. (C.E. #79 dep Reed Taylor pp. 32, 34). A few weeks after Mr. Johnson's funeral, Reed Taylor, nephew of Mr. Johnson, started negotiations with the Rogers to acquire Mr. Johnson's home place. (C.E. #79 exhibit "A" dep Reed Taylor pp. 16, 17). During this time, the Taylors complained to Beth Rogers about the inadequacy of the price paid for the property acquired by Berkshire Investments. (C.E. #79 exhibit "C" dep D. Taylor pp.15B16).

In the spring of 2003, the individual Taylors continued objecting to the property's sale and advised Beth Rogers not to accept any additional payment from the Appellants. (C.E. #5 dep Rogers pp.57-58). During 2003, the Taylors were aware that Berkshire Investments was attempting to refinance the property. (C.E. #79 dep D. Taylor pp. 60,1). In July 2003, the Taylors requested Beth Rogers pursue legal action against the Mailes. Mrs. Rogers informed the Taylors that the Trust was not interested in pursuing litigation and cashed the check in the amount of $32,357.00, representing the first annual payment from Berkshire Investments. (C.E. #5 dep Rogers pp.57-58 exhibit 15).

On July 7, 2003, Connie Taylor transmitted a letter to Mr. Maile indicating she represented the successor Trustee, Beth Rogers, and the beneficiaries of the Trust and that litigation would be filed over the real estate transaction because the purchase was for less than fair market value. (C.E. #5 dep Rogers exhibit 19). Beth Rogers did not authorize such a letter and maintained that Connie Taylor did not represent the interests of the Trust in July 2003. (C.E. #5 dep Rogers pp. 67-69 exhibit 19).

In July 2006, the Taylors were demanding that Trustee make payment from the corpus of Trust and an additional $50,000.00 payment be disbursed to their mother Helen Taylor. Shortly thereafter, Beth Rogers made separate disbursements of $50,000.00 to Helen Taylor, Aunt Joyce, and Aunt Hazel. (C.E. #5 dep Rogers exhibit 23 paragraph 19). On or about July 22, 2003, Beth Rogers wrote to Connie Taylor indicating the Trust would not be pursuing litigation against the Mailes as outlined in Mrs. Taylor's letter to Mr. Maile. (C.E. #5 dep Rogers exhibit 21). Beth Rogers shared her letter with a cover note to Mr. Maile on the same date, indicating "now they are after us. Nice people." (C.E. #5 dep Rogers pp. 75-76 exhibit 22).

Berkshire Investments, shortly after the sale closed, commenced the process of developing the property. After Berkshire Investments received notification that the Trust was not interested in litigation, the Appellants obtained from the Idaho Independent Bank a construction loan secured with a commercial loan agreement in January 2004. Monies from the new loan were used to pay the Trust in full on or about January 8, 2004. The construction loan was secured by the subject property via recorded deed of trust on January 8, 2004. Under the terms of the new loan, the Appellants were

required to finalize construction by July 8, 2004. (C.E. #4). To that end, The Appellants incurred approximately $177,763.77 in engineering and construction related expenses and approximately $31,111.24 related to the construction of a barn on their home site. (Tr., pp. 86- 94, exhibits 12,13,14).

The Taylors filed their complaint and demand for jury trial on January 23, 2004. The Taylors also filed with the Ada County Recorder's Office their Notice of Lis Pendens. The filing of the Lis Pendens caused Berkshire Investments to default under the terms and conditions of the construction loan. (C.E. #45).

While the Taylors' suit was pending, and while the Appellants undertook the required construction, the Taylors, the Rogers, and the Beneficiaries entered into a global "Disclaimer, Release & Indemnification Agreement." (C.E. #5 dep. Rogers exhibit 25; C.E. #39-Addendum #2). Under the terms of the Agreement the Taylors released the Trustees, Beth and Andy Rogers, from all liability relating to the administration of the Trust. The Agreement further provided that the Taylors would be appointed as successor Trustees. The Taylors did not obtain court approval of their alleged appointment as successor Trustees. The Taylors, as successor trustees, filed litigation on behalf of the Trust on July 19, 2004.

II. ISSUES ON APPEAL

1. Did the Taylors, as individual beneficiaries, have standing to pursue their claims?

2. Did the Taylors, by entering into an Agreement releasing the Rogers, defeat their standing?

3. Did the Agreement terminate the Trust by renouncing any and all interests in the Trust corpus, and agreeing to a full disbursement of the Trust corpus, making the current proceedings moot as a matter of law?

4. Did the district court err by ruling that the Trust, was not able to seek recision but allowed the Taylors as beneficiaries to have the property restored to the Trust and/or themselves?

5. Did the court err by the entry of the summary judgment?

6. Was Beth Rogers acting under a conflict of interest as a matter of law under Title 68 of the Idaho Code, considering the statutory exceptions set forth under Title 68?

7. Did the successor Trustees act in a reasonably prudent manner?

8. Did the court err in ruling that Rogers and/or the Appellants breached a fiduciary duty?

9. Did Theodore L. Johnson's actions amount to a breach of fiduciary to the beneficiaries?

10. Did the successor Trustees act properly in closing the property?

11. Was Berkshire Investment a bona fide purchaser for value?

12. Was the sales transaction void as a matter of law?

13. Did the court err by ruling that the contract was void when its prior orders were inconsistent with its judgment on beneficiaries claim filed June 7, 2006?

14. Did the court err by ruling that the Taylors had properly filed their complaint as successor co-Trustees without court authorization and does the Trust have standing?

15. Did the trial court commit error in determining that Appellant Maile did not inform Mr. Johnson as to his right to seek independent counsel?

16. Did the trial court commit error in not awarding pre-judgment interest on the return of the $400,000.00 paid to the Trust by the Appellants?

17. Are the Appellants entitled to attorney's fees on appeal pursuant to Rules 40 and 41 of the Idaho Appellate Rules and Idaho Code Section 12-121?

III. ARGUMENT

A. The Taylors Lacked Standing to Pursue Their Claims

The issue of standing is jurisdictional, and it may be raised at any time. *See* Tungsten Holdings, Inc. v. Drake, 143 Idaho 69, 137 P.3d 456 (2006). Theodore L. Johnson, as the grantor of the Trust, and the Rogers, as successor Trustees of the Trust, acted in a reasonably prudent manner in selling and ultimately closing the transaction. The only evidence in the record relating to the reasonableness of the grantor and the successor Trustees is contained in the Affidavit of Gary McAllister. (C.E. #81-Addendum #3). Mr. McAllister established that there was no appearance of any improper action on the part of the Rogers in closing the transaction. There is no factual basis supporting a claim of a breach of fiduciary on the part of the Rogers or the grantor in selling the property for the price established by an independent appraisal and agreed to by Mr. Johnson prior to his death.

Some time after filing their complaint in January 2004, the Taylors entered into a settlement agreement with the successor Trustees, captioned "Disclaimer, Release and Indemnity Agreement" which was dated July 15, 2004. (C.E. #5 exhibit "25"-Addendum #1 herein). Prior to that agreement, the Taylors repeatedly advised the Rogers that the sale was in their opinion a violation of

the Trust. Even with such a history, the Taylors entered into the agreement with the successor Trustees releasing the Rogers of all liability.

The Restatement (Second) of Trusts § 282 (1959) comment on subsection (2) provides:

> e. Where the Trustee fails to sue. If the Trustee fails to perform his duty to bring an action at law or suit in equity or other proceeding against a third person (see § 177), the beneficiary can maintain a suit in equity against the Trustee to compel him to perform his duty. In order to settle the controversy in a single suit and avoid multiplicity of suits, the beneficiary can join the third person with the Trustee as co-defendants, and the matter will be disposed of in a single suit.
>
> If the Trustee does not commit a breach of Trust in failing to bring an action against the third person, as for example where it is prudent under the circumstances to refrain from bringing an action (see § 192), the beneficiary cannot maintain a suit against the Trustee and the third person.

The facts reveal that Rogers acted in a prudent manner. Paramount to determining whether a beneficiary has standing to pursue a claim is an examination of the actions of a Trustee. The record is now complete and ready for a determination of the actions of Mr. Johnson, the successor Trustees, and the Appellants.

The facts establish that Mr. Witte's offer in May 2002 to purchase the property for $400,000.00 was taken off the table by the buyer, who affirmed that he was not going to offer any more than what turned out to be the appraised value of the property. The accountant, Mrs. Hetherington, provided testimony which demonstrated that she had no basis to theorize the possible numbers she used in her letter relating to the Witte offer. Mrs. Hetherington's opinions as to pricing were not based upon any credible fact or principle, as she had no training in real estate

valuations. (C.E. 79 dep Hetherington pp.8, 9.) The accountant further provided testimony that there were a number of offers in the grantor's file, from the immediate preceding years all of which were substantially below the appraised valuation. (C.E. 79 dep Hetherington, pp. 13-14). The grantor had information in addition to the appraised value which established that even though he placed his real property in Trust, he was exercising prudence in agreeing to sell the real property for the appraised value. Under these facts there is no doubt that the grantor and the successor Trustees acted in a reasonable prudent manner.

1. The Successor Trustees Were Authorized to Close the Real Estate Transaction and the Taylors Have No Standing to Pursue Their Claims Against the Appellants

The district court seemed to analyze the facts and the law in a vacuum, finding that court approval was required for the conclusion of this transaction pursuant to Idaho Code § 68-108(b). Idaho Code § 68-108(b) requires court approval of a trustee's actions if there is a conflict of interest. Here, no conflict existed. Idaho Code Section 68-106(a) provides that no court approval is necessary under any circumstance when the Trustee acts consistent with "every act which a prudent man would perform." An examination of the action of the grantor and the Rogers establishes that relying upon a licensed independent appraisal that confirms a fair market value which coincidently was the value of a prior offer is totally reasonable and prudent.

Carrying forward with the statutory interruption of Idaho Code Section 68-108(b), there are certain provisions (68-106(c)(1), (4), (6), (18), and (24)) which are specifically excluded from the prospects of any court approval. The successor Trustees were doing nothing more than finalizing a

bilateral contractual obligation which the grantor of the Trust had created. The Rogers had statutory responsibilities under Idaho Code Section 68-106(a) to administer the Trust as a prudent person would do. The specific language of Idaho Code Section 68-106(c)(1) clearly authorized the distribution of the Trust property *without* court approval.

There is no dispute that Mr. Johnson transferred the 40 acres to the Trust, executed the real estate contract, received independent counsel's advice prior to closing and confirmed his desire to sell to Berkshire Investments. The Rogers were doing nothing more than finalizing the transaction as a reasonably prudent person has a right to do under Idaho Code Section 68-106. Under the clear reading of Idaho Code Section 68-106(c)(1), the successor Trustees are specifically and unequivocally empowered under the statute to sell a Trust asset which was placed in Trust by the Trustor, all without court approval.

The Revocable Trust Agreement is now part of the record. (C.E. #5 dep. Beth Rogers exhibit "2"-Addendum #1). The Trust provided for equal classes among Mr. Johnson's siblings. Each living sibling was to receive 20% of the Trust, with the surviving issue of the deceased brother, Richard Johnson, to receive immediately 20% of the property upon the death of Mr. Johnson. In fact, the Trust Agreement provided that the 20% share in which Richard Johnson's issue were to enjoy was not even to be held in Trust but rather was to be immediately vested upon the grantor's death. The issue of Richard B. Johnson were to immediately obtain 20% of the property without it being held in Trust. The four living siblings of Theodore L. Johnson were to receive 20%, with their portions to be held in Trust. Beth Rogers was the daughter of the deceased Richard Johnson. (C.E.

#5 dep. Beth Rogers exhibit 23 page 7). Her portion of the 20% share became vested upon the death of Mr. Johnson. Mr. Johnson died two days prior to the execution of the closing documents by the Rogers. There is no dispute of fact that Andy Rogers, as co-successor Trustee, was not a beneficiary under the terms of the Trust. Consequently, he could not under any theory be in a conflict of interest relating to the beneficiaries or the Trust. Therefore, he was authorized to close the transaction without limitation. There cannot be a conflict on the part of Beth Rogers' role in her role as a co-successor Trustee, as her share immediately vested two days prior to filling the role as co-successor Trustee.

Beth Rogers held an undivided interest in the 40-acre parcel which vested as to her at the time of Mr. Johnson's death on September 14, 2002. The Trust Agreement provided the successors Trustees' absolute discretion in selling property, including undivided interest in any property:

> 9. In any case in which the Trustee is required, pursuant to the provisions of the Trust, to divide any Trust property into parts or shares for the purpose of distribution, or otherwise, *the Trustee is authorized, in the Trustee's absolute discretion,* to make the division and distribution in kind, including undivided interests in any property, ..., and for this purpose to make such sales of the Trust property as the Trustee may deem necessary on such terms and conditions as the Trustee shall see fit.

(Agreement, p. 7 (emphasis added).)

The Rogers were doing nothing more than finalizing the transaction as a reasonably prudent person would and proceeded with the closing without a court order which is specifically mandated under the language of Idaho Code Section 68-106(a)(c)(1) and (4) and the provision of the Trust

Agreement. Beth Rogers was acting as a reasonably prudent investor relying upon the advice of independent counsel and an independent appraisal supporting the sale consistent with Idaho Code Section 68-106(a)(c).

This Court must construe the plain meaning and intention of Idaho Code Sections 68-106 and 68-108 as well as the reasonableness of the grantor, Mr. Johnson, and the Rogers. The interpretation of a statute is an issue of law over which this Court exercises free review. Idaho Fair Share v. Idaho Public Utilities Comm'n, 113 Idaho 959, 751 P.2d 107, 109-10 (1988). When interpreting a statute, the primary function of the court is to determine and give effect to the legislative intent. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990). Such intent should be derived from a reading of the whole act at issue. *Id.* at 539, 797 P.2d at 1387--88. The present statutory scheme under Title 68 is unambiguous. There is no additional language contained in the statute that would defeat Berkshire Investments' rights to rely upon its status as bona fide purchasers of value. The Taylors lacked standing to pursue their claim as there is no breach of duty by the grantor or successor Trustees under these facts.

2. The Restatement of Trust Codifies the Law Regarding the Rights of Beneficiaries to Assert Both Legal and Equitable Claims Against Third Parties and the Facts Established in the Record Defeat the Taylors' Standing to Pursue Their Claims for Either Remedy

The Taylors were advised of the potential purchase of the property the day of the funeral of the grantor on or about September 17, 2002. (C.E. #79 dep. Reed J. Taylor pp. 12-14).

Approximately 15 months later they commenced their individual action against the Appellants. The Taylors pled for damages and for equitable relief against the Appellants.

The District Court Judge ruled that the Taylors were entitled to the equitable remedy, rescinding the transaction between the Trust and Berkshire and restoring the real property to the Trust by declaring the transaction void. As stated in the Restatement (Second) of Trust § 282, Suit In Equity By Beneficiary (1959):

> (1) Where the Trustee could maintain an action at law or suit in equity or other proceeding against a third person if the Trustee held the property free of Trust, the beneficiary cannot maintain a suit in equity against the third person, except as stated in Subsections (2) and (3).
>
> (2) If the Trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity *against the Trustee and the third person.*
>
> (3) If the Trustee cannot be subjected to the jurisdiction of the court or if there is no Trustee, the beneficiary can maintain a suit in equity against the third person, if such suit is necessary to protect the interest of the beneficiary.

In order to have standing, the Taylors were required to proceed with litigation against both the Rogers and the Appellants. *See* Saks v. Damon Raike and Co., 7 Cal.App.4th 41, 8 Cal.Rptr.2d 869 (1992). The Taylors have failed to present any facts to support any theory that the Rogers were negligent in their failure to file suit against the Appellants. A beneficiary may have standing if the Trustee improperly fails or neglects to pursue a legitimate claim. The case of Pillsbury v. Karmgard, 22 Cal.App.4th 743 (1994), illustrates the necessity of a litigant to prove improper action on the part

of the Trustee to empower a beneficiary to have standing to sue a third party. No evidence established that the Rogers breached a fiduciary duty, consequently the Taylors lack standing.

3. The Taylors Entered Into an Agreement With the Successor Trustees Which Defeated Their Claim for Standing

The Taylors were fully aware of the circumstances surrounding the transaction, the role of the grantor and the Rogers, by June 2004, approximately two years after the closing. The Agreement in June 2004, was a release of all claims against the Rogers. Prior to the agreement, the Taylors had repeatedly advised the successor Trustees that the sale was in their opinion a violation of the Trust and further requested in 2003 that Beth Rogers not accept any monies from Berkshire Investments. The Taylors were fully advised by the Verified Answer and Counter-claim filed on February 23, 2004, that Beth Rogers, as successor Trustee, had shared her letter of July 2003, with the Appellants indicating the Trust fully stood behind the land sale transaction. The Taylors also knew the Appellants were asserting claims of estoppel to prevent the reversal of the real estate closing. (Case No. 30817, Vol. I, p. 11, exhibit "C" p. 44.) Even with such a history, the Taylors entered into an agreement with the Rogers, which released the successor Trustees of any and all liability. The Restatement (Second) of Trust § 315 (1959) illustrates:

> Rights of Transferee Where Beneficiary Consent to the Transfer. If the Trustee in breach of Trust transfers Trust property to a third person, and the beneficiary by his consent to the transfer is precluded from holding the Trustee liable for breach of Trust in making the transfer, the third person takes the property free of the Trust.

The Taylors agreed that the Rogers would not be liable for any breach of Trust, and as such had no right to pursue their claims against the Appellants. There was in fact a final accounting and disbursement agreed between the Taylors and the Rogers. The pertinent specific language contained in the Agreement, provides:

> 3. Release of Trustees Estimated Expenses. The undersigned hereby release and discharge Andrew T. Rogers and Beth J. Rogers from all claims or causes of action.... The undersigned further acknowledge that the Trustees have distributed, and he/she has received, all of the property, money and benefits to which he/she is entitled under the terms of the Trust.... The undersigned acknowledge the financial information he/she has received will constitute a final accounting; and he/she waives any right to a court-approved formal final accounting. (Addendum # 2).

By releasing the Rogers, accepting a full accounting, and the full disbursement of the corpus, the Taylors have waived any claim that the property should be returned to the Trust and are barred for lack of standing to pursue such a claim.

4. The Taylors Lacked Standing to Pursue Their Claims Because When They Entered Into the Agreement Their Claims Became Moot as a Matter of Law

The Taylors, by entering into the agreement, terminated the purpose of the Trust. All assets were delivered to the appropriate beneficiaries under the terms and conditions of the agreement. The Restatement (Second) of Trust § 342 (1959) Conveyance by Trustee to or at the Direction of the Beneficiary provides:

> ...if there are several beneficiaries none of whom is under an incapacity and the Trustee transfers the Trust property to them or at their direction, the Trust terminates although the purposes of the Trust have not been fully accomplished.

The entire Trust corpus was distributed in June 2004 to all beneficiaries. All that Mr. Johnson had intended to accomplish by his estate planning was nullified by the June 2004 agreement between the beneficiaries (Addendum 2). The Agreement dispersed all the Trust assets and terminated the Trust as a matter of law. The Restatement (Third), Trusts § 2, comment (I), p. 23 (2003) provides, "if a Trust is created and subsequently the whole of the Trust property ceases to exist, the Trust is terminated because the Trustee no longer holds anything in the Trust." Each and every beneficiary agreed to the final accounting and complete disbursement of the assets of the Trust.

The specific language contained in the Agreement provides:

> 1.2 Disclaimer of All Other Interests....1.2.3: Taylor. Reed J. Taylor, Dallan J. Taylor, Mark J. Taylor, Gloria Rydaich, Virginia Porter and R. John Taylor, comprising all of the children of Helen Taylor, hereby disclaim all interests whatsoever in the Trust, in favor of their mother, Helen Taylor, and hereby approve immediate distribution to Helen Taylor. (C..E. # 5 Beth Rogers deposition exhibit 25).

The Taylors disclaimed all other interests in the Trust, including any right to existing corpus of the Trust. The agreement was created after the Taylors had filed their appeal with this court on June 4, 2004. (Case No. 30817, R., Vol. I, p. 101.) After the execution of the agreement, the Taylors, believing they had properly filled the role of successor Trustee, caused the Trust itself to file its lawsuit on July 19, 2004. (R., Vol. I, p. 5.) The Trust if it continued to exist, arguably became the real party in interest at that time, dispensing with the Taylors' individual claims fulfilling the issues of the real party in interest, under Idaho Rule of Civil Procedure 17.

The reality however, is that the Trust corpus was fully disbursed consistent with the agreement. There was a final accounting and disbursement to all parties, and the Trust terminated as a matter of law. The Taylors by the terms of the agreement received nothing and renounced any right to receive any monies, instead agreeing that all their interests to the Trust corpus, including all monies paid by Berkshire were disclaimed in favor of their mother Helen Taylor. (C.E. #5 dep Rogers exhibit 25 p.1).

Furthermore, another fundamental problem confronting the standing of the Taylors is present. Although all the beneficiaries agreed to the modification and final accounting of the Trust, no action was initiated by the Taylors to seek court approval of the modifications and/or final accounting. The Restatement (Third) of Trusts § 65 Termination Or Modification By Consent Of Beneficiaries (2003) provides:

> (1) Except as stated in Subsection (2), if all of the beneficiaries of an irrevocable Trust consent, they can compel the termination or modification of the Trust.
>
> (2) If termination or modification of the Trust under Subsection (1) would be inconsistent with a material purpose of the Trust, the beneficiaries cannot compel its termination or modification except with the consent of the settlor or, after the settlor's death, with authorization of the court if it determines that the reason(s) for termination or modification outweigh the material purpose.

The purpose of the Trust and intention of Mr. Johnson have been fundamentally altered by the agreement. The probate court has never addressed the issues of the modification of the Trust's material purposes. Mootness applies when a party lacks a legal interest in the outcome. State v. Hoyle, 140 Idaho 679, 99 P.3d 1069 (2004). An appellate court is obliged to raise mootness

sua sponte because it is a jurisdictional issue. Gator.Com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1129 (9th Cir. 2005). The corpus was, pursuant to the agreement, disbursed to Helen Taylor, their mother, according to her agreed-to share of the Trust. In fact, the Respondents themselves admitted to the probate court in their petition for appointment of Trustees, "the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of Trust by virtue of the terms of a Disclaimer, Release, and Indemnity Agreement" (C.E. #39 Exhibit "B"). A judicial admission is a statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact. Sun Valley Potato Growers, Inc. v. Texas Refinery Corp., 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). Mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1069 n.22 (1997). The district court lacked jurisdiction to afford the Taylors the remedy of a constructive Trust and to enter a judgment voiding the real estate transaction.

5. The District Court Had Ruled That the Trust Was Not Able to Seek Recision; the Taylors as Beneficiaries Are Unable to Have the Property Restored to the Trust and/or Themselves

The district court correctly perceived in July 2005, that the Trust had allowed too much time to pass before seeking recision. (R., Vol. I, p. 141.) The successor Trustee, Beth Rogers, had duly notified the Appellants in July 2003, that the Trust was allowing the transaction to stand and that the Trustee saw no merit in the contentions of the Taylors' claims. (C.E. #5 dep. Rogers pp. 72-76

exhibits 21, 22). The Restatement (Second) of Trust § 327 Rights of Beneficiary When Trustee Barred by The Statute of Limitations or Laches (1959) provides:

> (1) Except as stated in Subsection (2), if the Trustee is barred by the Statute of Limitations or by laches from maintaining an action against a third person with respect to the Trust property, the beneficiary is precluded from maintaining an action against the third person.
>
> (2) If the third person knowingly participated in a breach of Trust, the beneficiary is not precluded from maintaining an action against him therefore, unless
>
> (a) the beneficiary is himself guilty of laches, or
>
> (b) a co-Trustee who did not participate in the breach of Trust, or a successor Trustee knowing of the claim against the third person, fails to bring an action against him until he is barred by the Statute of Limitations or by laches.

Even if the Taylors had standing to pursue their claims under the Restatement, above cited, the actions or inaction of the Trustee and/or a successor can be imputed to the beneficiaries. In addition, the beneficiaries themselves can be estopped from asserting a claim by their action or inaction. The Taylors in 2003 advised the Rogers to file suit against the Appellants. The Rogers were aware of the demands of the Taylors. Beth Rogers, fully aware of the intentions of her uncle Ted Johnson, the grantor chose not to file suit and so advised the Taylors of the position of the Trust. In July 2003, Berkshire Investments had the assurances of the successor Trustees, Beth and Andy Rogers, that the Trust was honoring the transaction.

The Taylors opined in September 2002 that the Trust was selling the property to Berkshire Investments for a low price. (C.E. #79, dep. D. Taylor pp. 15-16). The Taylors knew in July 2003 that the Rogers were not going to pursue any claims against the Appellants. The Taylors in 2003

demanded money from the sale from Beth Rogers and accepted those funds from the Trust in 2003. This money was a portion of the $100,000.00 down payment made by Berkshire Investments in September 2002. The Taylors, as well as all other beneficiaries, took all the proceeds of the property sale in the summer of 2004 and accepted the final accounting from the Trustees. As stated by the district court, "once a party treats a contract as valid after the appearance of facts giving rise to a right of recision, the right of recision is waived." (R., Vol. I, p. 149, Ll. 10-12; 20-22, quoting, White v. Mock, 140 Idaho 882, 888, 104 P.3d 356 (2004).) The Taylors waited until after the real property was completely refinanced and full payment was made to the Trust before filing their litigation in January 2004. Berkshire acquired new financing in January 2004, and committed to the new lender that the construction project would be completed within six months. The district court specifically found and so ordered, "the plaintiffs, now with standing as Trustees, did not act promptly to pursue recision once the grounds for it arose." (R., Vol. I, p. 149, Ll. 20, 21.) The district court balanced the equities and correctly ruled that recision for the "plaintiffs" was not proper. Consequently, the Taylors lack standing under the doctrine of laches to pursue the remedies they sought and summary judgment was improper.

6. The Entry of Summary Judgment Was Improper

The Appellants incorporate by reference all the preceding sections relating to the lack of the standing of the Taylors as the same substantive issues of law and facts apply as to whether the district court properly entered summary judgment. When reviewing a district court's grant of summary judgment, the appellate court uses the same standard a district court uses when it rules on a

summary judgment motion. Jordan v. Beeks, 135 Idaho 586, 589, 21 P.3d 908, 911 (2001). Upon review, the Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. Bonz v. Sudweeks, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991).

B. Beth Rogers as Successor Trustee Was Not Acting Under a Conflict of Interest as a Matter of Law Under Title 68 of the Idaho Code However Even if There Was a Conflict of Interest, the Successor Trustee Acted in a Reasonably Prudent Manner

The Appellants incorporate their argument in section I herein, as the same factual and legal issues raised as to standing apply to a determination of the appropriateness of the summary judgment. As examined in the preceding section, there was no conflict of interest on the part of Beth Rogers. Under Title 68, a Trustee is not required to seek judicial approval of a sale if the Trustee is exercising reasonable prudence. In addition, there exist two statutory exceptions to any court approval requirement, both of which can be applied in the present matter.

Theodore Johnson, and Beth and Andy Rogers, all had the benefit of a reliable independent appraisal by Knipe Janoush Knipe, LLC. The question that must be addressed, under Idaho Code Section 68-106(a), is whether relying upon an appraisal from a licensed Idaho appraiser was prudent in this case. As provided by Gary MacAllister, the answer is, "yes." There is no evidence in the record that would indicate otherwise. Likewise, there is nothing in the record set forth by any of the Respondents' legal experts stating that there was a violation of the standard of care by Mr. Maile or by Berkshire Investments that would lead to the conclusion that reliance under the established case

law and the plain reading of Title 68 was inappropriate in purchasing real property, without the successor Trustee obtaining court approval by the probate court.

In addition, the record includes another local licensed real estate appraisal. At the behest of Idaho Independent Bank, Tim Williams provided his appraisal establishing the fair market value of the property to be $410,00.00 in the fall of 2003. (C.E. #23). Examining the record available before this Court, there was a prudent investigation of the fair market value and that Beth Rogers properly closed the transaction. The entry of summary judgment was improper.

C. The Trial Court Erred in Ruling That Beth Rogers and/or the Appellants Had Breached a Fiduciary duty

It is generally held that whether a fiduciary duty has been breached is a question of fact for the jury and not for the trial court on motion for summary judgment. *See* Western Alliance Corp. v. Western Reliance Corp., 57 Or.App. 263, 643 P.2d 1382, 1387 (1982). The case of Johnson v. Jones, 103 Idaho 702, 652 P.2d 650 (1982) provides the generally accepted proposition that there must be a showing of all the necessary elements including damages for any legal malpractice claim. A breach of fiduciary would require the same elements. There is nothing in the record to show any causal connection between any alleged breach of duty and resulting damages in favor of the Trust. There has been no determination that the price paid by Berkshire did not represent the fair market value. There is nothing in the record to infer that Beth Rogers or any of the Appellants knew or should have known that the independent appraisal was not valid. There was no determination by the lower court that the exceptions to any requirement of a court approval did not exist. Nor was there

any determination that the Rogers were not acting in a reasonably prudent manner. Summary judgment was improper.

D. The Original Grantor, Theodore L. Johnson, Had Adequately and Properly Formulated a Basis to Determine Fair Market Value and Consequently His Action in Selling His Property to Berkshire Investment Cannot Be Considered a Breach of Fiduciary Duty.

The record demonstrates that Mr. Johnson acted as a reasonably prudent man in determining his needs and desires to sell a portion of his Trust property for the established fair market value. Fratcher, Scott on Trusts § 330.11 (4th ed. 1989), states, in part:

> The reservation of a power to withdraw property from time to time from the Trust gives the settler power to terminate the Trust completely if he so desires. Where he simply reserves a power in general terms to revoke the Trust, he ordinarily has power to revoke it in part by withdrawing some of the property from the Trust.... Where the settlor reserves power to revoke, alter, or modify the Trust, he can properly withdraw part of the property from the Trust.

Upon the death of one of the settlors, the Trust becomes irrevocable, *see* L'Argent v. Barnett Bank, 730 So.2d 395 (Fla.App. 1999). The Rogers had no power to alter or amend the modifications to the corpus of the Trust that Mr. Johnson had chosen some two months earlier. The district court erred in entering summary judgment.

E. The Successor Trustees Acted According to an Appropriate Standard in Executing the Closing Documentation on the Property

The Rogers properly fulfilled their legal requirements to act in a reasonably prudent manner in conveying the property. The case of Hatcher v. U.S. Nat. Bank of Oregon, 56 Or.App. 643, 643 P.2d 359 (1982) illustrates the law that a Trustee has as a duty to determine the fair market value

of stock, which it could accomplish through appraisals or by "testing the market" to determine what a willing buyer was willing to pay. The Rogers fulfilled all the requirements placed upon them under Title 68 Chapter 5 of the Idaho Code. Idaho Code Section 68-502 provides the standard of care required for a Trustee.

The court's authority to review a Trustee's actions is limited to assuring the terms of the trust are met. The Restatement (Second) of Trusts § 187 (1959) provides:

> Where discretion is conferred upon the Trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the Trustee of his discretion.

Many jurisdictions have applied this rule and have limited review of Trustee actions to determining compliance with the Trust's terms, not replacing the Trustee's judgment with that of the court. "To the extent to which the Trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him." 2 Scott on Trusts (2d ed.1956) § 187 at 1374.

The Rogers, acting with the aid of an independent appraisal, which the grantor himself relied upon, conveyed the subject real property to Berkshire. The language of the agreement, specifically provided "the Trustee is authorized, in the Trustee's absolute discretion, to make the division and distribution in kind, including undivided interests in any property, or partly kind and partly in money, and for this purpose to make such sales of the Trust property as the Trustee may deem necessary on such terms and conditions as the Trustee shall see fit." (Trust Agreement, p. 7 (emphasis added).) Idaho Code Section 68-508 provides:

> Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a Trustee's decision or action and not by hindsight.

What did the record establish at the time the district judge entered summary judgment? The Respondents failed to show and the record is devoid of any evidence to demonstrate that the Rogers failed to act in a reasonably prudent manner. The district court was incorrect in entering summary judgment.

F. Berkshire Investment Was a Bona Fide Purchaser and Purchased the Real Property Not Subject to the Claims of the Beneficiaries

Berkshire paid the price determined by an independent appraisal. The appraisal happened to be the same value as that represented by the withdrawn Witte offer. No argument can be set forth asserting that Berkshire Investment actively participated in any breach of fiduciary committed by Beth Rogers. The existing law at the time of the purchase would have not allowed any purchaser to believe there was a breach of fiduciary by Beth Rogers.

There are specific statutory directives that require a Trustee exercise reasonable prudence. Those directives were met. There are clear exceptions to any court approval requirement, and the language of the Trust authorized the Rogers to proceed to close the transaction. Idaho Code Section 68-110 specifically provides protection to third persons dealing with a Trustee. There are no facts in the record to establish that Berkshire and/or any other Appellant knew there were any requirements to obtain a court order regarding this transaction. The original grantor and Beth Rogers appeared to be acting under a reasonably prudent standard.

There are statutory exceptions that apply to any possible need for a court approval. The Restatement (Second) of Trust § 284 (1959) provides:

> Bona Fide Purchaser: (1) If the Trustee in breach of Trust transfers Trust property to, or creates a legal interest in the subject matter of the Trust in, a person who takes for value and without notice of the breach of Trust, and who is not knowingly taking part in an illegal transaction, the latter holds the interest so transferred or created free of the Trust, and is under no liability to the beneficiary.

As stated in the Restatement (Second) of Trust § 283 (1959):

> Where Transfer Is Not In Breach Of Trust: If the Trustee transfers Trust property to a third person or creates a legal or equitable interest in the subject matter of the Trust in a third person, and the Trustee in making the transfer or in creating the interest does not commit a breach of Trust, the third person holds the interest so transferred or created free of the Trust, and is under no liability to the beneficiary.

There is nothing in the record to establish that Berkshire Investments had any knowing participation of any possible breach of fiduciary involving Beth Rogers. In fact, none of the experts retained by the Respondents provided any opinions stating that any of the Appellants participated in any alleged breach by the Rogers by paying the property's fair market value as set forth in an independent appraisal and/or by not obtaining approval by a probate court. Interestingly, none of the complaints filed prior to the decision in Case No. 30817 provided any reference to any possible violations in the closing procedure, pursuant to Idaho Code Title 68. No one disputes that there was a legitimate closing of real estate documents by the Rogers, based upon the fair market value price and after obtaining independent advice of legal counsel. The entry of summary judgment was inappropriate.

III. THE DISTRICT COURT WAS INCORRECT IN RULING THAT THE SALES TRANSACTION BETWEEN THE TRUST AND BERKSHIRE INVESTMENTS WAS VOID AS A MATTER OF LAW

The Rogers had properly fulfilled their legal requirements to act in a reasonably prudent manner. The case of Edwards v. Edwards, 122 Idaho 963, 842 P.2d 299, 305 (Ct.App. 1992), involved a Trustee who entered into a contract with the Trust for personal profits to himself. In that case the Court of Appeals affirmed the district court ruling that a contract entered into by a Trustee in order to further the Trustee's ability to make profit from the Trust, was voidable, not void. The Edwards case involved entirely different factual issues than the case at bar. In the present case, the Trust settlor Ted Johnson had in fact authorized the sale and entered the real estate transaction based upon an appraised valuation and with the aid of independent counsel prior to closing.

Even in cases in which the facts are somewhat similar to the present case, other jurisdictions have held the contract may be voidable. There is no basis to infer that a contract must be voided. The case of Pratt v Lavender, 319 So.2d 88 (1975) provides that a "failure of Trustee to comply with Trust Accounting Law was not sufficient to render Trustee's conveyance of Trust property to purchasers void, and did not affect the rights of purchasers in dealing with the Trust." There is no statutory directive under Title 68 of Idaho Code, that would authorize the district court to determine the transaction to be void. Other jurisdictions have held that a conveyance by a noncomplying Trustee is valid and not void, in the absence of express statutory language to the contrary, *see* Lentz v. Lentz, 5 N.C.App. 309, 168 S.E.2d 437 (1969). Idaho Law has no express statutory language directing that district court void a transaction made by a successor Trustee, who acted as a

reasonable person. Even if a Trustee should commit a breach of Trust, unlike the case at hand, the transaction may stand.

The Restatement (Second) of Trust § 291 (1959), comment m provides:

> m. Election by beneficiary to affirm. Although the Trustee transfers property in breach of Trust to a person who takes with notice of the breach of Trust, the beneficiary can affirm the transaction.... Similarly, if there are several beneficiaries and if none of them is under an incapacity and they all agree, they can affirm the transaction. If the beneficiary or one of the beneficiaries lacks capacity to make an effective election to reject or affirm the transaction, or if they do not all agree, the court will reject or affirm the transaction as may in its opinion be most conducive to effectuating the purposes of the Trust.

So, even if this Court determines that the actions of Mr. Johnson, the Rogers, and/or any of the Appellants amounted to a breach of fiduciary, the above cited provisions of the Restatement make it clear that the transaction is not void, but only potentially voidable, and then only with a probate court determination to effectuate the purpose of the Trust. To make that determination, the intent of Mr. Johnson must be considered by the appropriate court. Who was in the best position to provide testimony regarding Mr. Johnson's intent and to effectuate the direction of the Trust? Would it have been Mr. Johnson himself, the original grantor, who instigated the real estate transaction? Would it have been the Rogers, who cared for and maintained a close relationship with the grantor? Or would it have been distant relatives who had not maintained any relationship with the grantor for more than 12 years prior to his death? The district court erred in ruling the transaction void.

IV. THE DISTRICT COURT ACTED INCONSISTENTLY WITH ITS PRIOR ORDERS AND ERRED BY RULING THE CONTRACT VOID

The district court on July 28, 2005, ruled that the Respondents had waived rights to rescind the contract as "once a party treats a contract as valid after the appearance of facts giving rise to a right of recision, the right of recision is waived." (R., Vol. I, p. 149, Ll. 10-12, 20-22.).

On February 13, 2006, the district court entered its Order allowing Appellants to proceed on claims of quasi-estoppel and equitable estoppel set forth in their counter-claim. The Order acknowledged the earlier Order of July 28, 2005. (R., Vol. II, p. 249, Ll. 10-13.) The district court recognized that the Appellants were entitled to pursue their counter-claims of estoppel against the Taylors and the Trust under the principles of estoppel.

> The purpose of the doctrines of promissory and quasi estoppel are to prohibit an individual from securing some advantage for himself, ***or to produce some disadvantage to the persons seeking the estoppel***, after a party has been induced to change his position. See Hecla Mining Co. v. Star-Morning Mining Co., 122 Idaho 778, 839 P.2d 1192 (1992).

(Emphasis added.)

The Appellants were assured by the successor Trustees, in July 2003, that the Trust intended to allow the real estate transaction to stand. The Taylors tried for months to get successor Trustee, Beth Rogers, to change her mind, but to no avail. As early as July 2003, the Taylors intended to file a lawsuit. (C.E. # 46, dep R. John Taylor "D" pp. 51-52; dep. D. Taylor exhibit "E" p. 76). In early 2003, Beth Rogers' attorney, Bart Harwood, contacted the Taylors. In September 2003, the Taylors received correspondence from Mr. Harwood, explaining that the Trust and other beneficiaries of the

Trust did not want to pursue legal action seeking recision of the contract. (C.E. # 58, dep. Bart Harwood, exhibit "C" pp. 9-12 exhibit 73).

The Appellants relied upon Beth Rogers' assurances and the Taylors' inaction, and proceeded to incur new financing to pay the Trust in full. The terms of the new financing required construction of the subdivision within six months of the loan. (C.E. # 46, pp.3-5 and exhibit "B"). Idaho Independent Bank considered the loan in default under the terms of loan, as no lots could be released as a result of the Taylors' lis pendens. (C.E. # 45).

Pursuant to the Agreement (addendum-2), the Trust and the beneficiaries took the money and disbursed the funds to all beneficiaries in June 2004. (C.E. # 46, dep. D. Taylor exhibit "E" p. 75). Note, the accounting records of Beth Rogers indicate that in 2003 the beneficiaries each received payments of $50,000.00 from the Trust, and all that was left by June 2004 were the monies paid by Berkshire Investments when the note was paid in full and the payment from the Taylors from the purchase of Ted Johnson's home. All these funds were paid to all the beneficiaries on July 23, 2004, with the individual Taylors renouncing any right or claim to the funds. (C.E. # 66, dep. Rogers exhibit "A" p.117, 118 dep. exhibit "40" and addendum #2). No tender or repayment was even offered to the Appellants by the beneficiaries and/or the Trust. A party seeking to rescind a transaction on the ground of fraud must restore or offer to restore the other party to the status quo before the contract was formed. Watson v. Weick, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005). Once a party treats a contract as valid after the appearance of facts giving rise to a right of rescission, the right of rescission is waived. *See* White v. Mock, 140 Idaho 882, 888, 104 P.3d 356 (2004).

Even prior to the Trust obtaining the full payment on the contract in January 2004, the Taylors in January 2003 demanded and obtained monies from the Trust from the down-payment and the first annual payment made by Berkshire Investments to the Trust. (C.E. #5 dep. Beth Roger pp.64-66). The Appellants incurred considerable expenses associated with the construction costs and time in the development to avoid a default with the Idaho Independent Bank. (C.E. # 66, affidavit of Mr. Maile p. 3). The Taylors waived their right to seek recision by accepting the benefits of the transaction and failing to timely pursue such claims. The district court erred in entering summary judgment (see also section on standing re: laches & estoppel incorporated by reference herein).

V. THE DISTRICT COURT ERRED IN ALLOWING THE TAYLORS TO FILE THE COMPLAINT AS CO-TRUSTEES OF THE TRUST WITHOUT COURT AUTHORIZATION AND THE TRUST LACKS STANDING

The Appellants filed their motion to dismiss/motion for summary judgment on October 20, 2004. (R., Vol. I, p. 63.) The motion related to the improper filing of the complaint by the Trust on July 19, 2004. (R., Vol. I, p. 5.) The legal premise of the Appellants' motion set forth that the Taylors, as alleged successor Trustees, failed to obtain court approval as specifically required under Idaho Code Sections 68-101 and 68-107. The district court thereafter allowed the Trust to amend its complaint after receiving appointment in a probate proceeding and allowed the amendment to relate back to the filing date of the complaint, July 19, 2004. (R., Vol. I, p. 141.) Idaho Code Section 68-101 provides that:

> When a Trust exists without any appointed Trustees or where any or all of the Trustees renounce, die, or are discharged, the district court of the county where the Trust property or some portion thereof

is situated, ***must*** appoint another Trustee to direct the execution of the Trust.

(Emphasis added.) Idaho Code Section 68-107 also specifically provides that the office of Trustee is not transferable:

The Trustee shall not transfer his office to another or delegate the entire administration of the Trust to a co-Trustee or another.

Furthermore, Idaho Code Section 15-7-403 provides additional authority that successor Trustees, not nominated in the Trust documentation, need to apply for court appointment after notice to all interested parties. These provisions clearly provide that a new Trustee cannot simply be appointed by the actions of the Trustee and/or beneficiaries to fill the legal position of a successor Trustee. The only Idaho case law on this subject confirms that where a Trust makes no provision for the appointment of successors, current Trustees are without the authority to fill vacancies. *See* Sherman v. Citizens' Right of Way Co., 37 Idaho 528, 217 P. 985 (1923).

The district court was incorrect in determining that the amended complaint filed after the Taylors' received "proper" probate appointment to serve as successor Trustees, related back to the date of the filing of the Trust litigation. When a successor fiduciary steps into the shoes of a predecessor who, acting in fiduciary capacity, has brought lawsuit in a court vested with jurisdiction over subject matter of the suit, the "stepping in" relates back to the time when the original party had standing to sue, *see* Corbin v. Blankenburg, C.A.6th, 1994, 39 F.3d 650, *cert. denied,* 115 S.Ct. 1256, 513 U.S. 1192, 131 L.Ed.2d 136 (1995). In the present case it was improper for the district

court to allow the amended complaint to relate back since there was no confusion as to the proper party that needed to file suit, and the Taylors and the Trust lacked standing. (*See* Section I (C)(D).)

VI. THE TRIAL COURT ERRED IN DETERMINING THAT MR. MAILE DID NOT INFORM MR. JOHNSON AS TO HIS RIGHT TO SEEK INDEPENDENT COUNSEL

The trial court entered its Findings and Facts and Memorandum Decision, and alluded to a number of items that were not necessary to reach its decision relating to the Appellants' claim of unjust enrichment. (R., Vol. II, p. 352, L. 6.) One such issue was the point that Mr. Maile failed to verbally inform Mr. Johnson of his right to seek independent counsel. (R., Vol. II. p. 351, L. 6.) The testimony of Mr. Maile established that he in fact did so inform Mr. Johnson. Mr. Maile testified that on two occasions him so informed Mr. Johnson. (Tr., Vol. I, pp. 32-33, 137-38.) Unfortunately, Mr. Johnson has passed away. As stated in Chen v. Conway, 121 Idaho 1006, 829 P.2d 1355 (Ct.App. 1991), "A court may not reject the positive, uncontradicted testimony of a credible witness unless her testimony is inherently improbable or impeached," Airstream, Inc. v. CIT Financial Services, Inc., 111 Idaho 307, 723 P.2d 851, *appeal after remand*, 115 Idaho 569, 768 P.2d 1302 (1988). The trial court indicated in its decision that the "court has reached its conclusion and make its finding without regard to the deposition testimony of Beth Rogers." (R., Vol. II, p. 351, L. 23.) There was nothing offered to impeach the testimony of Mr. Maile on that point. There is nothing in the record to infer that his testimony was inherently improbable. The district court determination was clearly erroneous and such a finding should be set aside and not considered in any future proceedings.

VII. THE TRIAL COURT COMMITTED ERROR IN NOT AWARDING PRE-JUDGMENT INTEREST ON THE RETURN OF THE $400,000.00

In the event the court disagrees with the Appellants on the substantive issues of fact and law set forth above, the Appellants request the award of interest on the monies paid by Berkshire Investments. The trial court failed to award pre-judgment interest on the return of the monies paid by the Berkshire Investment to the Trust. The record established a total $442,021.11 was paid on three different payments. (September 2002, May 2003 and January 2004.)

The Appellants should have been granted an award of interest on the monies which the Trust has retained for over five years. Subsections, 1, 2, 4, 5, of Idaho Code Section 28-22-102 have application under the present facts. Prejudgment interest should be awarded on a claim that is "liquidated or ascertainable by mere mathematical process." Ervin Const. Co. v. Van Orden, 125 Idaho 695, 704, 874 P.2d 506, 515 (1993); Seubert Excavators, Inc. v. Eucon Corp., 125 Idaho 409, 415-16, 871 P.2d 826, 832-33 (1994). There is no dispute that the Appellants provided timely payments under the deed of trust and promissory note due and owing to the Trust. Sum payments are liquidated and certain. The law provides for pre-judgment interest on such liquidated and certain sums.

VIII. THE APPELLANTS ARE ENTITLED TO ATTORNEY'S FEES

Pursuant to Idaho Appellate Rule 41, an award of attorney fees on appeal is appropriate when the prevailing party is entitled to attorney fees at the trial court level, pursuant to Idaho Code Section 12-120 or Idaho Code Section 12-121. *See, generally,* Griggs v. Nash, 116 Idaho 228,

775 P.2d120 (1989); Spidell v. Jenkins, 111 Idaho 857, 727 P.2d 1285 (1986). Idaho Code Section 12-121 provides for an award of attorney's fees in civil actions. There is no dispute that the Respondents filed their motion for summary judgment approximately 18 months after they had entered into their agreement with the Rogers and all beneficiaries under the Trust. The Agreement amounted to all beneficiaries disclaiming their full interests in the Trust, the corpus, any interest and/or income as to the corpus assets, and further disavowed any contingent or remainder interests they may have in the corpus of the Trusts assets. The monies paid by Berkshire Investments has been disbursed to all beneficiaries agreed to under the Agreement, and a final accounting has been agreed to by all beneficiaries under the Trust. The Respondents failed to show any factual basis for any breach of fiduciary by the original grantor or the Rogers or the Appellants. The Appellants should be entitled to their attorney's fees and costs incurred herein.

CONCLUSION

The Taylors lacked legal standing to pursue their claims and their claims must be dismissed for lack of jurisdiction. There has been no factual evidence submitted by the Respondents that the original grantor, or the Rogers, committed a breach of fiduciary. The Taylors entered into a release with the Rogers which prevented them from pursuing any claims. The Agreement furthermore amounted to a final accounting of the Trust and as such the Trust was terminated.

In the event this Court believes the Taylors have standing, the matter must be remanded since the district court improperly entered summary judgment. Material facts are in dispute. According to the evidence presented in the record, the Rogers acted in a reasonably prudent manner

in closing the transaction and conducted themselves appropriately under the provisions of Title 68. Berkshire Investment paid the fair market value for the real estate, and was a bona fide purchaser for value. The Taylors have waived their right to seek recision under the facts in the record.

There has never been a factual determination that Mr. Maile breached his fiduciary either with the grantor or with the Trust. The contract specifically indicated Mr. Maile was not representing the Trust. The grantor was advised to seek independent counsel, and chose not to. Thereafter and prior to closing, the grantor and the successor Trustees obtained independent counsel's advice and chose to sell the real property based upon a price arrived at by an independent appraiser. The district court's findings set forth in Section VI were erroneous and must be stricken.

The Taylors wrongfully filed a lawsuit as successor Trustees of the Trust, without court appointment as mandated by Title 68. The Appellants should be awarded their costs and attorney's fees. This matter should be reversed and remanded to the district court consistent the Appellants' arguments contained herein.

DATED this 19 day of September, 2007.

THOMAS G. MAILE, IV., co-counsel, for Appellants, Berkshire Investments, Colleen Maile

DENNIS M. CHARNEY, co-counsel, for Appellant, Thomas G. Maile

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19 day of September, 2007, I mailed two (2) true and correct copies of the foregoing APPELLANTS' OPENING BRIEF, by placing the same in the United States Mail, postage prepaid, addressed as follows:

Connie Taylor
Clark and Feeney
1229 Main Street
Post Office Drawer 285
Lewiston, Idaho 83501
Fax: **(208) 746-9160**

(X) U. S. Mail
( ) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

THOMAS G. MAILE, IV, co-counsel for Appellants, Berkshire Investments and Colleen Maile

IN THE SUPREME COURT OF THE STATE OF IDAHO

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Respondents/Cross-Appellants, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Appellants/Cross-Respondents.	Supreme Court Docket No. 33781 District Case No. CV OC 04-00473D
THEODORE L. JOHNSON REVOCABLE TRUST, Respondents/Cross-Appellants, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC. Appellants/Cross-Respondents.	

APPELLANTS/CROSS-RESPONDENTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada

The Honorable Ronald J. Wilper, District Judge presiding

Attorney for Appellants/Cross-Respondents

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I. STATEMENT OF THE CASE

A. Condensed Course of Proceedings

The lower court has lacked subject matter jurisdiction relating to the Taylors' beneficiaries claims for the last approximate 23 months of litigation. The Judgment on Beneficiaries' Claim was predicated upon a misrepresentation of material facts committed by the Taylors. On January 13, 2006, R. John Taylor provided his verified amended complaint to the lower court. (R. Vol II. p. 260.) On May 15, 2006, the district court entered its Order Granting Plaintiffs' Motion for Summary Judgment on Beneficiaries' Claim. (R. Vol II. p. 281.)

B. Statement of Essential Relevant Facts

The Taylors filed their verified petition in the probate court on November 12, 2004, requesting the probate court to appoint them as trustees of the Theodore L. Johnson Revocable Trust. The petition was executed by R. John Taylor as a verification of the facts contained in the petition. (The petition alone is annexed as appendix 4 without its attachments which are part of the record see C.E. #39 exhibit "B.") Page 2 of the verified petition states under oath, "the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of this trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement."

On March 9, 2006, the Verified Amended Complaint was filed by the Taylors. Page 1 of the Verified Amended Complaint states under oath, "Reed and R. John Taylor are residents of Nez Perce

County, Idaho; Dallan Taylor is a resident of Ada County Idaho. All of the plaintiffs are residual beneficiaries of the Theodore L. Johnson Trust."

The written contract provided that Mr. Maile could not represent the interests of the seller. Thomas Maile complied with the appropriate Idaho Code of Professional Responsibility provisions that were in effect in the year 2002. The Theodore L. Johnson trust obtained independent legal counsel prior to closing the real estate transaction. Theodore L. Johnson was informed of the independent legal counsel's involvement and again approved his desire to sell the real estate based upon the appraised market value. The real estate closing occurred on September 16, 2002. The terms and conditions of the final sales transaction were fair and reasonable.

II. ISSUES ON APPEAL

1. Are the Taylors entitled to their attorneys fees?
2. Are the Respondents entitled to their attorneys fees in defense of the cross-appeal filed by the Taylors pursuant to Idaho Appellate Rules 40 and 41?

III. ARGUMENT

A. The Taylors Lacked Standing to Pursue Their Claims

The issue of standing is jurisdictional, and it may be raised at any time. *See Tungsten Holdings, Inc. v. Drake*, 143 Idaho 69, 137 P.3d 456 (2006). The Taylors' reliance on the case of *State v. Searcy*, 120 Idaho 882, 820 P.2d 1239 (Ct.App. 1991) is misplaced. Jurisdictional issues such as standing and mootness are always subject to review at any stage of proceedings (although

there are some issues which may be waived if not presented on appeal). Generally issues raised for the first time on appeal will not be considered. *State v. Martin*, 119 Idaho 577, 578-79, 808 P.2d 1322, 1323-24 (1991). Litigants, however, cannot waive subject matter jurisdiction, and it may be raised at any time, including for the first time on appeal, *Idaho State Ins. Fund By and Through Forney v. Turner*, 130 Idaho 190, 938 P.2d 1228, 1229 (1997). An appellate court will address jurisdictional issues even though not preserved for appeal by objection in the lower court, *cf.* I.R.C.P.12(h)(3). Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. *State v. Wood*, 125 Idaho 911, 912-13, 876 P.2d 1352 (1993). Subject matter jurisdiction presents a question of law which we freely review. *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440 (9th Cir. 1986); *Gage v. Harris*, 119 Idaho 451, 452, 807 P.2d 1289, 1290 (Ct.App. 1991).

The Taylors' first appeal was filed on June 4, 2004 (Docket No. 30817, R. Vol. 1. p. 101). Many of the issues that are germane to the issue of standing and mootness were not even factual issues existing at the time of the filing of the first appeal. Contrary to the Respondents' contention that the Appellants failed to raise the disclaimer issue before the district court (Respondent's Brief, p. 10), the Appellants did raise the disclaimer issue before the lower court. (C.E. #80.)

The Disclaimer, Release, Indemnity Agreement was executed after the Taylors had filed their first appeal. The Taylors, after the first appeal, filed their petition in probate court in November 2004, requesting their appointment as trustees retroactively to June 10, 2004. The fact that the

Taylors specifically violated Idaho Code Sections 68-101 and 68-107 by failing to obtain judicial appointment to act as successor trustees was not established until discovery was undertaken in the subsequent lawsuit, where the Taylors initially admitted that probate court appointment was not necessary (C.E. #11 exhibit "A").

On April 18, 2005, the probate court, through the Honorable Judge Christopher M. Beiter, entered its Order declaring the ex-parte Order entered on November 17, 2004 void. (C.E. #39 exhibit "D.") On May 2, 2005, Judge Beiter entered an Order appointing R. John Taylor, Reed J. Taylor and Dallan J. Taylor as successor trustees of the Theodore L. Johnson Revocable Trust (C.E. #39 exhibit "E"). *Taylor I* had oral arguments on May 6, 2005.

As this Court indicated in the first appeal, *Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005), the matter was reviewed pursuant to a motion to dismiss with nothing in the record except the bare allegations set forth in the Taylors' complaint.

> A motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975). When reviewing a district court's dismissal of a case under I.R.C.P. 12(b)(6), this Court draws all reasonable inferences in favor of the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). After drawing all inferences in favor of the non-moving party, the Court then examines whether a claim for relief has been stated. *Id.* Where a case has been dismissed because of a lack of standing, this Court must examine "whether Plaintiffs have sufficiently alleged the requisite elements of standing in their complaint to survive a 12(b)(6) motion to dismiss."

Id. at 257, 127 P.3d at 160.

All inferences were rightly given to the Taylors without the benefit of a developed appellate record. The Taylors' reliance on the "law of the case" doctrine is inappropriate when analyzing a court decision stemming from a motion to dismiss.

The Taylors summarily conclude that this Court created "law of the case" which precludes an examination of relevant facts which were not part of the record. The law of the case doctrine states that "upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal...." *Stuart v. State*, 136 Idaho 490, 495, 36 P.3d 1278, 1283 (2001). However, the United States Supreme Court noted that the law of the case doctrine "directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983).

"The rule is well established and long adhered to in this state that where, upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. . . ." *In re Barker v. Fischbach & Moore, Inc.*, 110 Idaho 871, 872, 719 P.2d 1131, 1132 (1986) (citing *Suitts v. First Security Bank of Idaho*, 110 Idaho 15, 713 P.2d 1374 (1985)). The issues discussed surrounding the

necessity of any court approval for a sale consistent with Idaho Code Section 68-108, were not issues of fact or law which were necessary to the decision rendered by this Court. The court in *Taylor I* was granting the Taylors all inferences permissible and stated that given all inferences possible the Taylors had standing to pursue the allegations concerning a breach of fiduciary. It was not necessary to its decision to comment on the particulars surrounding Idaho Code Section 68-108 compliance. In fact this Court never was able to examine the trust agreement itself, the two independent appraisals that supported the purchase price, the facts surrounding the reasonableness of the grantor's decision to sell the property for fair market value, or the reasonableness of the designated successor trustees' action in finalizing the sale of real property which was placed in the trust by the grantor consistent with Idaho Code Section 68-106(c)(1). The principle pronounced in *Taylor I* provided:

> The general rule in trusts is that a third person who "has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust." Restatement (Second) of Trusts, § 326 (1969); *see LaHue v. Keystone Investment Co.*, 6 Wash.App. 765, 496 P.2d 343 (1972); 4 A. Scott, The Law of Trusts, § 326.5 (1967).

Taylor v. Maile, 142 Idaho 253, 260-61, 127 P.3d 156, 163-64 (2005).

There was no opportunity for the Mailes to raise issues outside the limited pleadings which formed the basis of the district court's initial order dismissing the Taylors' complaint in April 2004. How could additional factual issues be raised in an appeal that stems from a motion to dismiss? Consequently, how can the Taylors now argue the Mailes waived their rights to present factual issues (page 14 of Taylors' brief)? Even more perplexing is how the Taylors can argue that the issues of

subject matter jurisdiction are waived. There can be no logical basis for such propositions, as many pertinent facts were generated by the Taylors themselves after the first appeal was filed and this Court was without an appropriate record substantiating relevant facts on the first appeal.

1. The Taylors Are Precluded From Taking a Position Contrary to Their Sworn Statements in the Probate Court

The Taylors petitioned the probate court for their appointment as successor trustees in November 2004. The petition before the probate court was only advanced after the Taylors admitted in discovery responses that they were not required to obtain judicial appointment as successor trustees (C.E. #11 exhibit "A") and the Mailes had filed their motion to dismiss pursuant to Idaho Code Sections 68-101 and 68-107. (R. Vol I. p. 63.) The record is clear and unambiguous, as to what the Taylors represented to the probate court. Under oath, R. John Taylor verified that Helen Taylor was the sole beneficiary of the trust in November 2004 pursuant to the Disclaimer, Release and Indemnity Agreement. To constitute a judicial admission, a statement must be a deliberate, clear, and unequivocal statement of a party about a concrete fact with that party's knowledge. *See Strouse v. K-Tek, Inc.*, 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Ct.App. 1997); *Cordova v. Bonneville County Joint Sch. Dist. No. 93*, 144 Idaho 637, 167 P.3d 774 (2007). Clearly the admission was based both upon R. John Taylor's and his wife Connie Taylor's knowledge, as both were extensively involved in the negotiations and the actual execution of the agreement (appendix 2 to opening brief).

What are the effects of the Taylors' judicial admission? A judicial admission is a statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact. *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). In the present matter both Mrs. Taylor's (as attorney of record) and her husband, R. John Taylor's, admissions dispense with any need to prove the "admitted fact" that from June 2004 to the present date Helen Taylor was the sole beneficiary of the trust. There is no room for the Taylors to argue facts or evidence to the contrary. The verified amended complaint executed under oath on January 13, 2006, by R. John Taylor was an attempt to take improper advantage of the Idaho Supreme Court's decision in *Taylor I.* The Judgment on Beneficiaries' Claim entered on June 7, 2006, was entered pursuant to the misrepresentation of the Taylors as to their status as beneficiaries in January 2006. The Taylors perceived an opening to victory based upon the decision rendered by this Court, and chose to misrepresent their status as beneficiaries under the trust to the lower court. The Judgment must be set aside.

2. <u>The Taylors' Claims Are Moot</u>

It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing. *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1132 (2000). The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated. *Miles v. Idaho Power Co.*, 116 Idaho 635, 641,

778 P.2d 757, 763 (1989). In order to satisfy the requirements of standing, the petitioners must "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.*

An issue is moot "if a favorable judicial decision would not result in any relief or the party lacks a legally cognizable interest in the outcome." *State v. Rogers*, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2004). Idaho jurisprudence parallels that of the United States Supreme Court in identifying that the mootness doctrine applies not only when an issue is dead, but also when the appellant lacks a legally cognizable interest in the outcome because even a favorable decision would not result in relief. *Murphy v. Hunt*, 455 U.S. 478, 102 S.Ct. 1181 (1982); *Bradshaw v. State*, 120 Idaho 429, 432, 816 P.2d 986, 989 (1991).

Mootness has been characterized as "the doctrine of standing set in a time frame." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). There must be a justiciable case or controversy. A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *See Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944 (1969).

The case of *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283, 286, 985 P.2d 1145, 1148 (1999) also involved a case where the litigants claimed no interest in the underlying trust, nor in the property held in the trust. The court in *Scona* stated:

> When an issue of standing is raised, the focus is not on the merits of the issues raised, but upon the party who is seeking the relief. Under the Idaho Rules of

> Civil Procedure, actions can only "be prosecuted in the name of a real party in interest." I.R.C.P. 17(a). This Court has ruled that a real party in interest "is the person who will be entitled to the benefits of the action if successful." *Carrington v. Crandall*, 63 Idaho 651, 658, 124 P.2d 914, 917 (1942).

Scona, 133 Idaho at 288, 985 P.2d at 1150.

The record establishes that the majority of the beneficiaries, as well as the appointed successor trustees, of the trust did not want to pursue litigation that was contrary to the wishes and desires of Theodore Johnson. The Taylors surrendered their standing in the present matter by bargaining with the successor trustees for the control of the trust. By so disavowing their individual beneficiary status to the trust, their claims are moot as a matter of law. The Judgment on Beneficiaries' Claim entered on June 7, 2006, was entered pursuant to the misrepresentation of the Taylors as to their status as beneficiaries in January 2006. The Judgment must be set aside.

3. The Taylors Have Not Provided Any Authority Opposing the Appellants' Additional Claims of Lack of Standing

The are a number of issues relating to standing that have not been addressed by the Taylors. The Taylors seems to be resting on the notion that the "law of the case" has been established. However, the Appellants have previously addressed the issue of standing as it relates to subject matter jurisdiction and as such other standing issues set forth in the opening brief must be considered by this Court regardless of the "law of the case" argument. Various sections of the Restatement of Trusts set forth in the Appellants' previous briefing support the position that the Taylors lack standing. For example, in the Disclaimer Agreement the Taylors released the successor trustees from

liability. This action precludes them from attempting to set aside the sales transaction based upon what they allege to be the successor trustees' breach of fiduciary. Likewise, the questions of reasonableness of both the grantor's and successor trustees' actions are germane to the Taylors' standing.

Even if arguably the earlier decision in *Taylor I* supports the proposition that court approval was required to close the sales transaction, the decision was silent as to the application of any exceptions to court approval of the sale. There are clear statutory exceptions that exist under Idaho Code Sections 68-106(a)(c)(1) and (4) that apply to the present case. Consequently, the exceptions could not be considered a bar to the present appeal as the earlier decision did not address whether exceptions applied. The "law of the case" doctrine cannot have any application to the underlying issue of subject matter jurisdiction and the Taylors' lack of standing.

B. <u>There Are Genuine Issues of Material Facts in Dispute Which Require a Trial in This Matter</u>

The Taylors summarily conclude that this Court created "law of the case" which precludes an examination of relevant facts which were not part of the record. This point has been addressed in Section A. The question of whether any of the Appellants had notice that the trustees were committing a breach of trust could be considered germane to the legal responsibility of the Appellants. However, to conclude that as a matter of law the Appellants knew the successor trustees were committing a breach of fiduciary is not supported by the facts or the law. The point bears repeating, that at the time of the closing of this transaction, there was no case law or statutory law

that would have led any reasonable person to believe that a closing on a real estate transaction by a successor trustee, who was finalizing a transaction created by the trustor, based upon a legitimate appraisal representing fair market value, relating to property which was placed in trust by the trustor himself, required any court approval. Once again, there were no opinions rendered by any experts in this matter, that any of the Appellants violated any standard of care or breached a fiduciary duty in closing this transaction without court approval. In addition there is specific statutory protection for a third party in purchasing property from a trustee. *See* Idaho Code § 68-110.

The case of *Edwards v. Edwards*, 122 Idaho 963, 842 P.2d 299 (Ct.App. 1992) provides:

> In enforcing the duty of loyalty the court is primarily interested in improving trust administration by deterring trustees from getting into positions of conflict of interests, and only secondarily in preventing loss to particular beneficiaries or unjust enrichment of the trustee. Quoting, G.G. BOGERT & G.T. BOGERT, LAW OF TRUSTS § 95 (5th ed. 1973); RESTATEMENT (SECOND) OF TRUSTS §§ 170, 206 (1959); A. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS § 170 (1960).

Id. at 969, 842 P.2d at 305.

Mr. Johnson, Andy Rogers, and Beth Rogers had properly fulfilled their legal requirements to act in a reasonably prudent manner in conveying the subject real property. The case of *Hatcher v. U.S. Nat. Bank of Oregon*, 56 Or.App. 643, 643 P.2d 359 (1982) illustrates the law that a trustee has a duty to determine the fair market value of stock, which could have been done through appraisals or by "testing the market" to determine what a willing buyer was willing to pay.

The successor trustees were acting consistent with the intentions of the grantor and were exercising reasonable prudence upon relying upon the appraisal by a licensed Idaho appraiser, and the advice of retained independent counsel, and closed the transaction on September 16, 2002.

Specifically, Idaho Code Section 68-508 provides:

> Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

The Respondents have argued that Mr. Maile advised his client, Mr. Johnson, not to sell to Franz Witte for $400,000.00. (Respondent's Brief, p. 29.) There is no citation in the record to any supporting facts for such an assertion. In fact Mr. Johnson made his own personal decision not to sell to Mr. Witte. (C.E. #5 dep Rogers p. 92.) Mr. Maile advised Mr. Johnson to submit a counter-offer to determine market value. (C.E. #5 dep. Rogers exhibit "5.") An attempt was made to seek from Mr. Witte an increase in his initial offer to purchase without subjecting Mr. Johnson to a binding counter-offer. (C.E. #49 dep Maile p. 93.) There is no showing in the record that the Appellants breached any standard of care or fiduciary duty to the trust as a matter of law.

1. <u>There Was No Judicial Admission in the Prior Appeal That Beth Rogers Had a Conflict of Interest</u>

The language quoted by the Respondents' Brief, p. 17, relating to the briefing in *Taylor I*, does not constitute a judicial admission that the Appellants in the first appeal admitted to any conflict of interest on the part of Beth Rogers. As stated in the opening brief, Beth Rogers' ownership interest vested at the moment of death of Theodore Johnson. Her interest is classified as an

undivided interest in the real property. Neither Andy nor Beth Rogers were Mr. Johnson's siblings. There were siblings of Mr. Johnson who could arguably have been interested in obtaining income from the corpus versus a contingent-remainder beneficiary of the trust who could have been interested in preserving the corpus. However, the interests of Beth Rogers were not held in trust; she held an undivided interest in the real property (appendix 1). Such argument in briefing cannot, under the authority above cited, be construed to be a judicial admission that Beth Rogers had a conflict of interest that required court approval. Nor can it be argued that the Appellants agreed that none of the statutory exceptions existed which negated any court approval for an alleged conflict by the trustee.

2. There Are Statutory Exceptions to Court Approval Which Preclude the Entry of Summary Judgment

The Respondents argue that there are no exceptions to Idaho Code Section 68-108 and go on to point out that in the Respondents' opinion the current real estate transaction falls within Idaho Code Section 68-106(c)(17). Neither Beth nor Andy Rogers acquired real estate in the name of the trust and such code provision has no application in the present case.

The successor trustees received trust assets which were placed in trust by the grantor. Idaho Code Section 68-106(c)(1) allows them to sell such assets as a reasonably prudent person would sell any assets which were placed in the trust by the grantor, without a court order. The Respondents have not argued against that proposition since there is no dispute. That is exactly what happened in

the present case. Idaho Code Sections 68-106(c)(1) and (4) clearly and unequivocally states that a successor trustee does not need to seek court approval for the following sale of property, to wit:

> (1) to collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made....
> (4) to acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;.

Id.

The successor trustees once again were doing nothing more than finalizing a bilateral contractual obligation created by the grantor of the trust. The successor trustees had statutory responsibilities under Idaho Code Section 68-106 to administer the trust as a prudent person would do, even if there was a conflict. The above-referenced Idaho Code section authorized the distribution of the trust property without court approval, with the caveat that the transaction must be done with a reasonably prudent standard. Nothing in the record set forth by the Taylors rebuts Gary MacAllister's testimony that the successor trustees acted prudently. Their only defense is that "reasonable prudent standard" is not applicable to the present case. (Respondents' Brief, pp. 16, 21, 23.)

The Rogers did not violate their position as trustees of the trust and there is not evidence to suggest that the Appellants participated or had any knowledge of any breach of fiduciary on the part of the trustees. The present matter before the court requires this Court to construe the plain meaning and intention of Idaho Code Sections 68-106 and 68-108. The interpretation of a statute is an issue of law over which this Court exercises free review. *Idaho Fair Share v. Idaho Public Utilities*

Comm'n, 113 Idaho 959, 751 P.2d 107, 109-10 (1988). When interpreting a statute, the primary function of the Court is to determine and give effect to the legislative intent. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 797 P.2d 1385 (1990). Such intent should be derived from a reading of the whole act at issue. *Id.* at 539, 797 P.2d at 1387-88. If the statutory language is unambiguous, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 976 P.2d 477, 483 (1999). The plain meaning of a statute, therefore, will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *George W. Watkins Family*, 118 Idaho at 540, 797 P.2d at 1388; *Driver v. SI Corp.*, 139 Idaho 423, 429, 80 P.3d 1024, 1030 (2003). In the present case there are clear and unequivocal statutory exceptions to any requirement for judicial approval in closing this transaction.

3. The District Court Erred in Ruling That Berkshire Investments Was Not a Bona Fide Purchaser

Under the facts in the record, it is undisputed that Berkshire Investments paid the fair market value for the real estate. There is nothing to establish that anyone, including any of the Appellants, knew or should have known that the Knipe appraisal was flawed in any way. There is evidence in the record that establishes both the Knipe and Williams appraisals were properly conducted and that Mr. Rudd's appraisal was not appropriate in a number of particulars. (C.E. # 99 Corlett Affidavit.) There exists a genuine issue of material fact as to the whether the Appellants were knowingly

participating in a breach of trust when Berkshire Investments had statutory protection to deal with the trustees. Idaho Code Section 68-110 provides:

> THIRD PERSONS PROTECTED IN DEALING WITH TRUSTEE. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee

Sound public policy supports giving effect to contracts entered into with trustees in good faith and for adequate consideration. *In Re Strass Trust Estate*, 11 Wis.2d 410, 105 N.W.2d 553 (1960). Prospective purchasers must be provided the certainty that their contracts will be honored in order for trusts to be able to function effectively. *Evans v. Hunold*, 393 Ill. 195, 65 N.E.2d 373, 376 (1946); *Rock Springs Land and Timber, Inc. v. Lore*, 75 P.3d 614 (Wyo. 2003). In the present matter, the sanctity of the contract is supported by the fact that Berkshire Investments paid the trust in full for the fair market value of the real property and it qualifies as a bona fide purchaser of value.

4. The District Court Erred in Not Affording the Appellants the Opportunity to Pursue Their Affirmative Defenses and/or Claims of Quasi Estoppel/ Equitable Estoppel Against the Beneficiaries

The claims of quasi-estoppel and equitable estoppel were claimed both as affirmative defenses and claims for relief that survived summary judgment at the lower level. However, shortly after concluding that such issues were germane to the ultimate determination between the parties,

the district court struck those equitable principles raised by the Appellants in awarding the beneficiaries judgment entered June 6, 2006, as a matter of law. The ultimate recission of the contract is an equitable remedy and equitable principles should have dictated that the issues of quasi-estoppel and equitable estoppel should be resolved by the trier of fact.

5. The Taylors' Discussion Concerning the Earnest Money as Representing Unreasonable Terms Is Not Relevant

The Taylors have advanced an argument pointing to the earnest money agreement as some sort of basis to show there was unreasonableness on the part of the successor trustees in closing the transaction. (Respondents' Brief, p. 22.) For example, one of the issues raised by the Respondents is the modification of the statute of limitations contained in the contract. This was a provision that applied to both buyer and seller, however, in response to a letter from Ms. Taylor, Mr. Maile, by letter dated July 10, 2003, specifically waived any reliance upon such a term. (C.E. #5 Rogers dep. exhibit 20.) The reality is that the modification of the statute of limitation favored the seller. The Respondents' expert, Richard Mollerup, also provided testimony indicating the provision favored the seller. (C.E. #62 dep. Mollerup pp. 38,39.) None of the provisions contained in the earnest money agreement can be shown by the Respondents to have resulted in any damages to the trust.

The Respondents' argument relating to the terms of the earnest money agreement are misplaced. The successor trustees executed a warranty deed for the closing and Berkshire Investments granted a deed of trust memorializing the debt owing to the trust.

It is an established rule of law that prior agreements between parties are merged into deeds and/or mortgages which are created based upon a contract to convey real property. The terms of the deed and the deed of trust become the new terms and conditions between the parties, as the underlying real estate earnest money is merged into the closing documents. *Estes v. Barry*, 132 Idaho 82, 85, 967 P.2d 284, 287 (1998); *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 414 P.2d 879 (1966).

There is a complete absence in the record to demonstrate that the transaction was not fair and reasonable for Mr. Johnson or the trust. The real estate earnest money has merged into the deed of trust and deed, and has no relevance in light of the unambiguous terms of the deed and deed of trust. The Taylors' attempt to create an issue that the successor trustees acted unreasonably in closing the transaction based upon terms that merged into the closing documents is unfounded and has no relevance to the issues at hand. This is particularly true in light of the fact that the trust received all the monies and a reasonable interest rate for the purchase based upon the fair market value.

Additionally, the record substantiates that the ultimate terms of the note as to the length of the note and interest rate were terms which were fair and reasonable for Mr. Johnson. Mr. Johnson's accountant, Mrs. Hetherington, sent letter dated May 24, 2004, which provides "The five-year balloon and the seven percent interest rate are good provisions in the note." (C.E. #5 Rogers dep. exhibit 4.) Gary MacAllister, an expert in fiduciaries, affirmed that the transaction was fair and reasonable. There is no contradictory evidence submitted by the Respondents.

The Respondents assert that Mr. Johnson and the successor trustees were acting unreasonably by selling the real property for the appraised value and not following the advice of Mr. Maile in obtaining various opinions and averaging the opinions. (Respondents Brief, p. 23.) In fact, Richard Mollerup provided in his testimony that if a client wanted to sell for a certain price he stated: "I don't try to make decisions for people, so I would have said, 'Fine.'" (C.E. #62 dep. Mollerup pp. 53, 54.) An attorney should provide competent advice; however, clients are free to make their own determination, and as such there is nothing unreasonable for either Mr. Johnson or the Rogers to rely upon an independent licensed appraiser's findings as to valuation and selling real property based upon such an appraisal.

C. The Trial Court Erred in Determining That Mr. Maile Did Not Inform Mr. Johnson as to His Right to Seek Independent Counsel

The Respondents have not properly pointed to any conflicting evidence in the record that would warrant the lower court's finding that Mr. Maile did not so inform Mr. Johnson to seek independent counsel. The testimony of Mr. Maile established that he in fact did so inform Mr. Johnson. Mr. Maile testified that on two occasions he so informed Mr. Johnson. (Tr. Vol. I pp. 32-33, 137-138). The Respondents argue and point to the deposition testimony of Beth Rogers as creating conflicting evidence. (Respondents' Brief, p. 11.) The Appellants properly objected to the use of such hearsay testimony and the court sustained their objections. (Tr. Vol. I pp. 133-37, 274-75.) The trial court properly concluded that it was not to be considered and consequently there

was nothing in the record that created any conflicting evidence as to the fact that Mr. Johnson was advised to seek independent counsel. The finding must be stricken.

D. <u>The Trust Received Independent Legal Counsel Prior to Closing and as Such the Taylors Cannot Demonstrate Any Overreaching by the Appellants</u>

The Respondents have argued that Mr. Maile committed violations under the Code of Professional Responsibility, breached his fiduciary duty towards the trust, and as such a constructive trust should. (Respondents' Brief, p. 26.) There is no basis for the Respondents to advance such theories in light of the issues framed by the issues on appeal, the notices of appeals and/or the cross appeal. Consequently, under Idaho Appellate Rule 11, there is no basis for such a discussion advanced by the Taylors. However, in the event this Court disagrees, and without waiving such objection, the following is provided.

The Idaho Rules of Professional Conduct, Rule 1.8, which was in affect during 2002, provided:

> Conflict of Interest: Prohibited Transactions
> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
> (1) the ***transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client*** and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
> (2) the ***client is given a reasonable opportunity to seek the advice of independent counsel in the transaction***; and
> (3) the ***client consents in writing thereto.***

(Emphasis added.)

The record contains the Affidavit of Rory Jones (C.E. #88). Mr. Jones, an Idaho attorney, provided his opinion based upon a review of the pertinent facts and evidence in the record, that Mr. Maile had fully complied with Rule 1.8 of the Idaho Rules of Professional Conduct, and opined Mr. Maile committed no wrongdoing.

The record clearly demonstrates that Mr. Maile advised Mr. Johnson he could have an independent attorney regarding the transaction. Mr. Johnson replied that he trusted Mr. Maile with the drafting of the agreement. (C.E. #11 pp. 2-3; C.E. #49 dep Maile pp. 104-05.) The fact that an attorney has a duty to ensure that a client obtains the advice of independent legal counsel does not automatically invalidate any transaction between attorney and client in which the client has not had the benefit of outside counsel. *See, e.g., Jacobsen v. National Bank of Austin*, 65 Ill.App.3d 455, 382 N.E.2d 277 (1978) (finding of independent counsel is not prerequisite to finding of fairness); *McCray v. Weinberg*, 4 Mass.App. 13, 340 N.E.2d 518 (1976) (holding that there is no rule that in the absence of independent advice a transaction between attorney and client must be set aside).

Independent legal advice is only an evidentiary factor utilized in determining the existence of overreaching or undue influence in a transaction between attorney and client. *Pollock v. Marshall*, 391 Mass. 543, 462 N.E.2d 312 (1984). The *Pollock* court rejected an argument invalidating a transaction in which the client did not have independent legal advice. The presence or absence of independent legal advice is an evidentiary factor which may be weighed, along with other evidence,

in determining whether undue influence was exercised. *Green v. Evans*, 156 Mich.App. 145, 401 N.W.2d 250 (1985).

Thus, even if an attorney has not specifically advised a client to seek advice from an independent legal source, the attorney may be able to show that the omission was of no actual significance by showing that the attorney gave the client the same advice concerning the transaction as he or she would have given had the client been dealing with a stranger. *Gold v. Greenwald*, 247 Cal.App.2d 296, 55 Cal.Rptr. 660 (1966). An attorney must give a client all the advice and information it would give if the transaction were made with a stranger. *Abstract and Title Corp of Florida v. Cochran*, 414 So.2d 284 (Fla.App. 1982); *Goldman v. Kane*, 329 N.E.2d 770 (Mass.App. 1975); *In re Conduct of Bishop*, 297 Or. 479, 686 P.2d 350 (1984).

There is no dispute that the trust received advice of independent counsel prior to closing. Theodore Johnson, with the aid of such advice, chose and directed that the property transaction be consummated as he desired based upon the established fair market value. (C.E. #5 dep Rogers pp. 15, 48-52.) The failure to advise a client to seek advice of independent counsel may be excused if the client voluntarily and knowingly consents to the transaction and the fairness of the transaction. *See, e.g., Pollock*, indicating an attorney may show that any influence over a client which might be presumed to have arisen out of an attorney-client relationship was neutralized by independent advice given to client, or by some other means, such as client's knowledgeable consent and absence of overreaching by attorney. *See also Jacobsen*, which held a transaction was fair despite attorney's

failure to advise client to seek independent counsel since client voluntarily and knowingly entered into the transaction.

An attorney's failure to advise a client to obtain independent counsel may also be regarded as immaterial if the attorney can show that the client in fact obtained independent legal advice concerning the transaction. *Brown v. Pipes*, 366 So.2d 261 (Ala. 1978) (showing of independent advice would clearly rebut claim of undue influence). The case of *Klaskin v. Klepak*, 126 Ill.2d 376, 534 N.E.2d 971 (1989) involved a case where a document was executed without independent counsel; however, the court held that whether a client obtained independent legal advice before completing the transaction at closing was a persuasive factor in determining whether an attorney has rebutted the presumption of undue influence. *See also In re Imming*, 131 Ill.2d 239, 545 N.E.2d 715 (1989).

At the time of granting the Taylors' summary judgment, all that was available to the district judge was the affidavit of Mr. Maile explaining that Mr. Johnson was in fact advised of the right to independent counsel and Mr. Johnson replied by saying he trusted Mr. Maile. The summary judgment entered had no bearing on any alleged breach of fiduciary duty or breach of the Idaho Code of Professional Responsibility.

There is, however, ample evidence in the record that Mr. Johnson was not subjected to undue influence in directing that the real estate transaction be consummated under the price and terms which he wanted. During the period of time prior to the closing, the Rogers were in constant contact

with Mr. Johnson and advised Mr. Johnson of the meeting with their independent counsel, Mr. Wishney. Mr. Johnson received the input from independent counsel and continued to support his decision to sell the real estate for the appraised value. (C.E. #5 dep Rogers pp. 15, 48-52.) Even before the executed real estate contract, Beth Rogers was involved with her uncle, Mr. Johnson, and other family members in discussing the independent real estate appraisal establishing the fair market value of $400,000. (C.E. #38 dep Rogers p. 23; C.E. #5 pp. 33-34.) On or about July 22, 2003, Beth Rogers wrote to Connie Taylor indicating the trust would not be pursuing litigation against the Mailes as outlined in Mrs. Taylor's letter to Mr. Maile and further stated, "we also feel we have a moral obligation to follow Uncle Ted's wishes in the way in which he entrusted us to do." (C.E. #5 dep Rogers exhibit 21.)

Beth Rogers provided an affidavit based upon her own recollection of the records and the same is provided in the record. (C.E. #5 dep Rogers exhibit 22.) In describing her involvement with her uncle and his impressions of the real estate transaction, the relevant portions of her affidavit provide:

> He told several of us in the family that his attorney had offered to buy the property if he ever wanted to sell it, but that he just was not ready....
> I do not recall that Uncle Ted ever specifically mentioned getting another legal opinion, but Andy and I decided to take the paperwork from Mr. Maile to a real estate attorney, David Wishney, to review. Mr. Wishney suggested that Mr. Maile substitute a standard form deed of trust, including a due on sale provision, to the earnest money agreement. I sent a copy of the letter to Mr. Maile and the proper changes were made. Uncle Ted was satisfied with the sale and never seemed interested in other opinions, as he considered it a good sale, I do not know if Mr. Maile told Uncle Ted to get another opinion on the sale, but I was not always

with him at all of their meetings. Meanwhile, Uncle Ted received a letter in the mail from Knipe, Janoush, Knipe, LLC, saying that they performed land appraisals. After what I recall to be a few weeks, Uncle Ted decided to have the property appraised, and the appraisal report was completed on July 10, 2002. The property was appraised for $400,000. When it was finally decided that he would go to an assisted living home, Uncle Ted said he may as well sell the property rather than leave it for Andy and I to have to deal with, and he talked to Mr. Maile about purchasing the land. Uncle Ted was having trouble with his legs, he kept falling and could not easily get back up. We began looking at assisted living centers as an alternative. Because he was a bachelor, Uncle Ted had taken out a good nursing home insurance policy that would help with his financial needs. He was very careful in all of his financial affairs and kept very good records. On July 22, 2002, Uncle Ted entered into an agreement to sell the property to Mr. Maile or Mr. Maile's company for $400,000. He seemed quite pleased with the sale and showed the contract to my brothers and his Sister Hazel Fisher. He even joked to us about whether or not he could live in the nursing home on the $100,000 down payment....

On July 6, 2003, the Taylors called a family meeting that was attended by four of the Taylor cousins, Connie Taylor - who is John Taylor's wife and an attorney in Lewiston, myself, my brother - Scott Johnson, and Garth Fisher. They said that Aunt Helen was closing on her house arid needed $50,000.00 that week. They said they felt that Tom Maile had taken advantage of Uncle Ted in several ways in the sale of the property and wanted to sue him for return of the property plus monetary compensation. They wanted the suit to be named with Andy and myself as plaintiffs, as we are the trustees. The suit would be initiated by Connie Taylor, as the attorney, and she discussed the fee schedule, etc., with us. Garth, Scott and I all said that we would look into the matter but made no commitment at the time. After consulting with the Trust's accountant, I did make a partial distribution of $50,000 to each Aunt Helen, Aunt Joyce and Aunt Hazel. I felt it was only fair that each of the aunts, not just Aunt Helen, receive the money.

20. After a few days, we received a copy of the complaint and the attorney fee schedule for us to sign. After a careful reading of the papers and a discussion with several family members, we decided that the suit really had no merit for the Trust. We had been told repeatedly that Andy and I had a fiduciary duty to the Trust. ***We agreed, and in this case we felt that obligation was to follow Uncle Ted's wishes. He had sold the property the way he had wanted and felt good about it.***

(Emphasis added.)

The family members closest to Mr. Johnson, and the ones entrusted by him to manage his affairs in trust, the Rogers and Garth Fisher chose to uphold his wishes and desires. (C.E. #5 dep Rogers exhibit 21.) These family members knew what their uncle wanted and, based upon the family involvement with Mr. Johnson, there can be no showing of any undue influence on the part of the Appellants. The Taylors had little or no family involvement with their uncle for 12 years. In fact, when Mr. Johnson died, they did not know where he lived. (C.E. #5 dep Rogers pp. 15, 48-52.)

E. <u>There Is a lack of Evidence for the Imposition of the Constructive Trust Remedy</u>

The Respondents have argued that a constructive trust could be imposed based upon Mr. Maile's breach of fiduciary duty. (Respondents' Brief, p. 26.) There is no basis for the Respondents to advance such a theory in light of the issues framed by the issues on appeal, the notices of appeals and/or the notice of cross appeal. Consequently, under Idaho Appellate Rule 11, there is no basis for such a discussion advanced by the Taylors. However, in the event this Court disagrees, and without waiving such objection, the following is provided.

The record is void of any finding at the lower level that Mr. Maile breached a fiduciary duty and/or Mr. Maile committed professional negligence. Once again, to date there has been no determination of all the necessary elements of a breach of fiduciary and/or breach of standard of care. *Johnson v. Jones*, 103 Idaho 702, 652 P.2d 650 (1982). At best, one can argue at this point in time that there is conflicting evidence as to opinions related to the fair market value of the real estate in 2002. The Respondents have failed to demonstrate in the record that any of the Appellants knew or

should have known that the appraisal of Knipe, Janoush and Associates ("Knipe"), was unsupported or improperly conducted. The expert opinions provided by the Respondents failed to make any connection that Theodore Johnson, the Rogers, or any of the Appellants, knew or should have known, that Knipe, Janoush and Associates' appraisal was flawed in any way. The Taylors' retained expert appraiser, Terry Rudd, conducted his assessment approximately three years after the Knipe appraisal and provided a contrary opinion as to market value but rendered no opinion that the Appellants should have known of any alleged deficiencies.

The Knipe appraisal is supported by the Williams' appraisal. Conducted approximately 15 months after the Knipe appraisal, this was provided as a totally disinterested third-party licensed appraisal for the Idaho Independent Bank. There is testimony in the record provided by a third Idaho licensed appraiser, Joe Corlett, who provided opinions as to the underlying invalidity of the Rudd appraisal, based upon improper comparable properties considered by Mr. Rudd. Mr. Corlett, in addition, provided his opinion affirming the Knipe appraisal as an accurate appraisal of the subject property. (C.E. #99.)

The Respondents' argument related to fair market value of the real property at best, has yet to be determined and has limited weight and has no relevance to the issues before this Court as to whether the summary judgment was proper and whether the Taylors have standing as well as the trust to pursue the claims.

Furthermore, the lower court has previously ruled that the trust does not have the remedy available to it of having the real property restored. As stated by the district court, "once a party treats a contract as valid after the appearance of facts giving rise to a right of recission, the right of recission is waived." (R. Vol I. p. 149 LL. 10-12; 20-22.) The Respondents have failed to appeal such a ruling. The Restatement (Third) of The Law Governing Lawyers, § 146, EFFECT OF CLIENT'S LACHES, provides, "But if a client desires to set aside a voidable conveyance to his or her attorney, the client must ordinarily take steps to do so within a reasonable time after the transaction." Once again, the trial court has previously ruled that the trust does not have the remedy of restoring the property.

It is not appropriate for the imposition of a constructive trust without any finding of wrongdoing on the part of the Appellants that resulted in damages to the trust. The authority cited by the Respondents, on page 31, provides that, "when a duty is breached, the former client may bring a cause of action at law." Equitable remedies may be waived and/or a party may be estopped from claiming such equitable remedies.

The imposition of constructive trust is not a proper subject for a motion for directed verdict or a judgment notwithstanding verdict, as the imposition of constructive trust is not an independent cause of action, but rather a remedy if a jury finds that a defendant was unjustly enriched. *See St. Paul Mercury Ins. Co. v. Meeks*, 508 S.E.2d 646 (Ga. 1998). The remedy of a constructive trust, which is alleged to arise from a breach of a fiduciary duty by a defendant, presents questions whether

a fiduciary relationship existed at the time of the wrongful acquisition and is an issue for trier of facts. *Smith v. Bolin*, 271 S.W.2d 93 (Tex. 1954).

As the district court stated relating to the claim of unjust enrichment, "nevertheless, the Court believes that this case can be decided on its merits by analyzing the elements of the unjust enrichment claim, without proclaiming that Mr. Maile is barred from seeking equitable relief based on the doctrine of unclean hands." (R. Vol. 2. p. 352 L. 7.) Mr. Maile should be entitled to have any alleged violations of his duties determined ultimately by the trier of fact in the event this matter is remanded to the district court, as the record is void of any determination of a duty owing, any breach of duty, causation, proximate cause or any assessment of damages based upon a determination of the true value of the real property in September 2002.

The district court has not found any breach of any fiduciary duty by the Appellants and further has not determined if there was a duty which was breached which resulted in a proximate cause of damages. The lower court has ruled that the trust has waived the right to have the property restored. This case has never reached any conclusion that the necessary elements have been provided to show either negligence or a breach of trust. The imposition of a constructive trust is inappropriate.

F. The Taylors Have Failed to Address of the Lack of Standing by the Trust Itself in Failing to Obtain Judicial Appointment of Successor Trustees as Required by Idaho Code Sections 68-101 and 68-107

The Taylors have failed to address the issue raised by the Appellants in their opening brief that the trust itself improperly filed suit since the Taylors had not obtained judicial appointment

pursuant to Idaho Code Sections 68-101 and 68-107. The Taylors are incorrect in their assertion, that the issue surrounding the trust's standing is not an appealable issue. (Reply Brief, p. 1.) The Appellants have properly presented another jurisdictional issue before this Court which may be raised at any time in the proceedings. (See section 1.) The Appellants' argument was previously briefed and the Respondents have failed to address the claim or provide any authority opposing the authority cited in the Opening Brief at pages 35-37. The following illustrates the lack of standing of the trust.

The trust instrument (Appendix 1 of Opening Brief) is silent as to the appointment of successor trustees other than the Rogers and Garth Fisher. Beth and Andrew Rogers, after being threatened by the Taylors with a lawsuit, resigned (C.E. # 5 Rogers dep pp. 75, 76), and Garth Fisher declined to serve as trustee after the resignation of the Rogers. When both the Rogers and Mr. Fisher expressed a disinclination to serve in the office of trustee, appointment of a new trustee became a matter for the court because the trust itself provided no guidance. It is both the general rule and Idaho law that neither beneficiaries nor trustees can simply appoint a new trustee in the absence of a specific provision in a trust allowing them to do so. The general rule is that, "in the absence of power conferred by the trust instrument, the beneficiary of the trust does not have the power to appoint a new trustee." CORPUS JURIS SECUNDUM, TRUSTS, § 292. Similarly "in the absence of authority conferred by the trust instrument, a trustee has no power to appoint his or her successor." *Id.*, § 293. Courts have also held that a trustee simply does not have the power to delegate to others

the power to exercise his discretionary functions. *See, e.g., McNeil v. Bennett*, 792 A.2d 190, 219 n.61 (Del. 2001), *aff'd. in relevant part*, 798 A.2d 503 (2002); *Jacob v. Davis*, 738 A.2d 904, 918-19 (Md.App. 1999); *Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472 (Tex. 1979); *Gillespie v. Seymour*, 823 P.2d 782, 801 (Kan. 1991); *Jennings v. Murdock*, 553 P.2d 846, 863 (Kan. 1976).

The above authority makes clear that in the absence of a provision in the trust instrument allowing for a trustee to appoint his or her successor, the only way a successor can be appointed is by court involvement. The Taylors' attempt, in June 2004, to remove Beth and Andrew Rogers and install themselves as trustees was invalid and without effect. Any actions taken prior to appointment by a court with jurisdiction over the trust, including specifically the filing of the complaint (R., Vol 1, p. 1), filed July 19, 2004, are void. The Taylors' retroactive, and fundamentally flawed, attempt in November 2004 to correct their mistake cannot confer subject matter jurisdiction on the court. On April 18, 2005, the Honorable Judge Christopher M. Beiter, entered his Order declaring the ex-parte Order entered on November 17, 2004, void. (C.E. #39 exhibit "D.") On May 2, 2005, an Order appointing R. John Taylor, Reed J. Taylor and Dallan J. Taylor as successor trustees of the Theodore L. Johnson Revocable Trust was entered, however, it was not made retroactive. (C.E. #39 exhibit "E.")

Numerous courts have held that where an ostensible trustee fails to be properly appointed, either by a court or according to the letter of the trust instrument, or where a trustee improperly

delegates his discretion to a non-trustee, any actions taken affecting the trust are a nullity. For example, in *Citizens Bank of Edina v. West Quincy Auto Auction, Inc.*, 742 S.W.2d 161 (Mo. 1988), the Missouri Supreme Court, sitting *en banc*, held that a sale of property conducted by an individual other than the authorized trustee was void. In so holding, the court stated: "In a private trust . . . [unless otherwise provided in the instrument of trust] the trustee may not delegate a discretionary duty to a co-trustee, and such an exercise will be void as to the trust . . . Certainly, if a trustee cannot delegate a discretionary power to a co-trustee, he cannot delegate such a power to an unauthorized agent." *Id.* at 164 (substitutions in original). *See also Columbia Union Nat. Bank v. Bundschu*, 641 S.W.2d 864, 877 (Mo.App. 1982) (trustee's delegation of a discretionary duty is void); *Morrill v. Trump*, 745 So.2d 559 (Fla.App. 1999). Similarly, *In re Pinney's Estate*, 294 N.Y.S. 29 (N.Y. 1937), the court held, "A trustee may delegate ministerial duties, but if he delegates discretionary powers he becomes a guarantor and if a trust is of a discretionary nature, the trustee will be responsible for all the mischievous consequences of the delegation, and the exercise of the discretion will be absolutely void in the substitute."

Godfrey v. Kamin, 62 Fed.Appx. 693 (7th Cir. 2003) (unpublished opinion) involved a situation remarkably similar to this case. The question in that case was whether a successor trustee had standing to sue the former trustees of a trust. The trust instrument in question provided that after the death of the settlor, it would be necessary to always have two trustees. The plaintiff, Ellen Godfrey, initially brought suit against one of the trust's former trustees, alleging breach of fiduciary

duty. However, because Godfrey was only a contingent remainder beneficiary, the court held she lacked standing to sue. After the case was dismissed, the then-trustees resigned. Thereafter, Godfrey was appointed as one trustee, but a second trustee was not appointed. Godfrey re-filed her lawsuit in her capacity as trustee, but the defendant argued that because the second successor trustee had not been appointed, Godfrey lacked standing to sue on her own. The court agreed, holding that because the trust mandated that a second corporate trustee serve along with Godfrey, Godfrey lacked the authority to bring suit unilaterally, even though she was the only trustee in place at the time. Accordingly, the case was dismissed. *Id.* at 695-97.

The Taylors failed to obtain the required court order to be appointed as successor trustees. The trust instrument did not provide for their appointment. A trust will not fail for want of a proper appointment. Restatement (Third) of Trusts § 31 TRUST DOES NOT FAIL FOR LACK OF TRUSTEE (2003). The filing of the complaint on July 19, 2004, was void under the law as the Taylors lacked standing as proper trustees to file the lawsuit. The district court lacked subject matter jurisdiction, and must be directed to dismiss the trust's claims as it was filed in violation of both Idaho Code Sections 68-101 and 68-107.

G. The Respondents Were Not Entitled to Attorney Fees Before the Lower Court

Respondents argued for the award of their costs and attorneys fees occurred at both the trial level and the appellate level. However, the record before this Court establishes that the beneficiaries' judgment was predicated upon a misrepresentation to the lower court as to their true

beneficiary status. The individual Taylors relinquished any and all rights to the trust and admitted that in their verified petition filed before the probate court. The Taylors' legal standing is now moot before this Court and was moot before the lower court. Consequently, the Respondents are not entitled to attorneys' fees predicated upon a claim that completely lacks merit and is unsupported by the true facts in the record. The Court must consider the Idaho Rules of Professional Conduct, Rule 3.3, which provides:

> Candor Toward the Tribunal
>
> (a) A lawyer shall not knowingly:
>
> (1) **make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;**
>
> (3) offer evidence that the lawyer knows to be false.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding....
>
> Commentary
>
> [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal.
>
> [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, **the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.**

(Emphasis added.)

The Court has the following facts which are germane, relating to whether there was a breach of Rule 3.3 of the Idaho Rules of Professional Conduct, as well as grounds under Idaho Code

Sections 12-121 and/or 12-123, for the award of attorneys fees. Appendix 4 and Appendix 5 provide the misleading statements of fact which were provided to the lower court. The Taylors simply were not beneficiaries under the trust at the time the Taylors attempted to take advantage of this Court's opinion in *Taylor I*. The Taylors, and Mrs. Taylor as their attorney, verified statements of fact under oath that were misleading to the court and to this tribunal. Mr. R. John Taylor is a licensed Idaho attorney and an officer of the court. (C.E. #27- R. Taylor dep. pp. 7, 8.)

Even though an action might be proper at its commencement, facts might thereafter develop which indicate that the case was then pursued frivolously, unreasonably, or without foundation. *See Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 939 P.2d 1382 (1997); *Ortiz v. Reamy*, 115 Idaho 1099, 1101, 772 P.2d 737, 739 (Ct.App. 1989); *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 753, 53 P.3d 330, 336 (2002). There simply cannot be any basis for an argument that the Taylors are entitled to attorneys' fees at the lower level or the appellate level under the facts in the record.

Likewise, the Respondents are not entitled to attorneys' fee pursuant to the contract between the trust and Berkshire Investments and/or the Appellants. The Respondents argued before this Court in *Taylor I* that there could be no claim for attorneys fees and costs in the first appeal since the Taylors were not parties to the real estate contract. (Appellants' Reply Brief, p. 13 executed December 3, 2004.) Specifically, the Taylors and Mrs. Taylor, provided, "The Mailes are not entitled to attorneys' fees under the contract because the Taylors are not parties to the contract and

they are not acting as the Trust. The Taylors are acting as beneficiaries." Once again, a judicial admission not only as to their status as beneficiaries but that they were not parties to the contract and no award of attorneys' fees is permissible.

The Taylors now assert, of course, that they are entitled to attorneys' fees and costs even though they were not parties to the contract and are not beneficiaries of the trust. This Court previously denied attorneys' fees in *Taylor I*, and the court should be consistent with that ruling and deny the same to the Taylors in the present proceeding based upon the real estate contract. Idaho Code §§ 12-120, 12-121, or 12-123.

Honorable Judge Ronald Wilper correctly analyzed the established case law and determined that the case of *Craig Johnson Constr., L.L.C. v. Floyd Town Architects, P.A.*, 142 Idaho 797, 803, 134 P.2d. 648, 654 (2006) applies for the proposition that a non-party to a contract cannot use the contract as a basis for an award of attorneys' fees. The court further correctly held that the Taylors were not part of any commercial transaction which would have justified an award of attorneys' fees under Idaho Code Section 12-120(3), citing *Hausam v. Schnabl*, 126 Idaho 569, 887 P.2d 1076 (Ct.App. 1994).

In addition, there cannot be an award of attorneys' fees associated with a defense to an unjust enrichment claim. *Erickson v. Flynn*, 138 Idaho 430, 438, 64 P.3d 959, 967 (Ct.App. 2002). Finally, there is nothing which could be construed as a frivolous defense or appeal involving this lawsuit by the Appellants. The Appellants are pursuing legitimate issues, not only as to the issues of the legal

standing of the Taylors and the trust, but also the factual and/or legal issues surrounding the entry of the summary judgment.

H. The Respondents Are Not Entitled to Attorney Fees on Appeal

The preceding section is incorporated by reference herein. The same argument against the award for attorneys' fees at the lower level applies to the Taylors' requests on the appeal. The Taylors are not entitled to attorneys' fees on the appeal either as Respondents or cross-Appellants.

I. The Appellants Are Entitled to Attorney's Fees and Costs at the Appellate Level Pursuant to Idaho Code Sections 12-121 and 12-123, I.R.C.P. Rule 11, and I.A.R. 11.1, 40 and 41

The Appellants requested their costs and attorneys' fees in their Opening Brief at page 38. The Taylors have provided no opposition to the Appellants' request in their reply brief. Additionally, the Appellants incorporate the preceding Section G relating to the argument surrounding the misstatements of material facts contained in the Taylors' verified pleadings as additional grounds for the award of the attorneys' fees under Idaho Code Sections 12-121 and 12-123.

In addition, the Appellants request their costs and attorneys' fees in the defense of the cross-appeal filed by the Taylors. The Taylors have advanced absolutely no credible legal position before the Court relating to their appeal. In reality, the Taylors have filed their cross-appeal, requesting attorneys' fees at the lower level and the appellate level after obtaining the Judgment on Beneficiaries' Claim, when they were not beneficiaries and submitted a verified amended complaint

which was false as to their status. The Taylors saw an opportunity to mislead the lower court as to their status as beneficiaries after having disclaimed their interests in the trust by written agreement. The Taylors signed verified pleadings before the probate court stating unequivocally that their mother was the sole beneficiary of the trust pursuant to an agreement they signed. After the decision in *Taylor I*, the Taylors and their counsel executed verified pleadings stating they were beneficiaries of the trust. That was not true as they admitted before the probate court in 2004; Helen Taylor was the sole beneficiary.

The Taylors, after having mislead the lower court, presented their argument for costs and attorneys' fees both before the lower court and before this tribunal which cannot possibly be determined to be meritorious. The Taylors misrepresented facts to the lower court and their action amounts to frivolous behavior. If it looks like a duck, walks like a duck, quacks like a duck, it's a duck.

The Appellants/Cross-Respondents request attorneys' fees pursuant to Idaho Code Sections 12-121 and 12-123, and Idaho Appellate Rule 41. An award of attorneys' fees on appeal is appropriate "if the law is well-settled and the Appellants have made no substantial showing that the district court misapplied the law." *Keller v. Rogstad*, 112 Idaho 484, 489, 733 P.2d 705, 710 (1987), quoting *Davis v. Gage*, 109 Idaho 1029, 1031, 712 P.2d 730, 732 (Ct.App. 1985).

There can be no showing that the Taylors did not actively mislead the district court in obtaining their Judgment on Beneficiaries' Claims. Both under Idaho Code Sections 12-121

and 12-123, the Respondents should be ordered to pay the costs and attorneys' fees incurred in correcting the misrepresentations made by the Taylors before the lower court and this tribunal.

If this Court determines that the Judgment on Beneficiaries' Claims was based upon a complete lack of foundation, this Court should be left with the "abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation" and award attorneys' fees and costs. *See generally, Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990) and *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997). It is the position of the Appellants that should be the outcome. The Appellants should be entitled to their attorneys' fees and costs incurred herein.

IV. CONCLUSION

The Taylors lacked legal standing to pursue their claims and their claims must be dismissed for lack of jurisdiction. Subject matter jurisdiction is never waived. The Taylors actively misrepresented their status as beneficiaries before the lower court after the opinion in *Taylor I* was published. The Taylors verified under oath before the probate court pursuant to appendix 2 to the opening brief that their mother, Helen, was now the sole beneficiary under the trust. The Taylors' beneficiaries claims became moot as a matter of law. Other facts exist in the record that establish the Taylors do not have standing to pursue any claims against the Appellants. The Taylors, in their rush to obtain control of the trust, failed to obtain the necessary appointment as successor trustees

as mandated by Idaho Code Sections 68-101 and 68-107. The actions of the Taylors, as trustees, in filing the litigation on behalf of the trust were inappropriate and the filing of the complaint is void.

In the event this Court believes the Taylors have standing, the matter must be remanded since the district court improperly entered summary judgment. Material facts are in dispute. According to the evidence presented in the record, the Rogers acted in a reasonably prudent manner in closing the transaction and conducted themselves appropriately under the provisions of Title 68. Berkshire Investments paid the fair market value for the real estate and was a bona fide purchaser for value. The Taylors have waived their right to seek recission under the facts in the record.

There has never been a factual determination that Mr. Maile breached his fiduciary duty either with the grantor or with the trust. There is no showing of any undue influence on the part of the Appellants regarding this transaction.

The Appellants must be awarded their attorneys' fees and costs in defending the frivolous claims of the Taylors at the lower level and on their cross-appeal. The Appellants are entitled to their attorneys' fees in this appeal as a result of the Taylors' misrepresentations of fact which resulted in the Judgment on Beneficiaries' Claims. This matter should be reversed and remanded to the district court consistent with the Appellants' arguments contained herein.

DATED this 14th day of November, 2007.

THOMAS G. MAILE IV, co-counsel, for Appellants, Berkshire Investments, Colleen Maile

DENNIS M. CHARNEY, co-counsel, for Appellant, Thomas G. Maile

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of November, 2007, I mailed two (2) true and correct copies of the foregoing APPELLANTS/CROSS-RESPONDENTS' REPLY BRIEF, by placing the same in the United States Mail, postage prepaid, addressed as follows:

Connie Taylor
Clark and Feeney
1229 Main Street
Post Office Drawer 285
Lewiston, Idaho 83501
Fax # (208) 746-9160

(X) U. S. Mail
( ) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

THOMAS G. MAILE IV, co-counsel for Appellants/Cross-Respondents, Berkshire Investments, and Colleen Maile

CONNIE WRIGHT TAYLOR
CLARK and FEENEY
Attorneys for Plaintiffs
The Train Station, Suite 201
13th and Main Streets
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB# 1329

IN THE SUPREME COURT OF THE STATE OF IDAHO

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs/Counter-Defendants-Respondents. vs. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants-Appellants.	Supreme Court No. 33781 **AFFIDAVIT IN SUPPORT OF MOTION FOR SANCTIONS**
THEODORE L. JOHNSON REVOCABLE TRUST, Plaintiffs/Counter-Defendants-Respondents vs. THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants-Appellants.	

Exhibit "Z"

STATE OF IDAHO)
) ss.
County of Nez Perce)

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

1. I submit this affidavit in support of the motion for sanctions addressed in the Taylor's January 7, 2008 memorandum opposing Mr. Maile's Motion to Dismiss.

2. The Taylors request sanctions, including but not limited to costs and attorney fees, for filing a motion which is frivolous and not supported by either the law or the facts.

3. In support of that request, and to demonstrate the Appellant Thomas Maile's continuing course of conduct intended to harass, cause unnecessary delay, and needless increase in the cost of litigation, I attach a true and correct copy of a Complaint and Demand for Jury Trial which Mr. Maile filed in Ada County on December 31, 2007.

4. This Complaint again raises claims which were rejected by the trial court in the matter that is currently before this court, and adds claims against Clark and Feeney, Connie Taylor, and Tom Clark for negligence, negligence per se, and gross negligence.

DATED this 17th day of January, 2008.

Connie Taylor

SUBSCRIBED AND SWORN to before me this 17th day of January, 2008.

TAMARA CRANE NOTARY PUBLIC STATE OF IDAHO

Tamara Crane

Notary Public in and for the State of Idaho.
Residing at Lewiston. Commission expires: 03/04/08

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of January, 2008, I caused to be served a true and correct copy of the above document by the method indicated below, and addressed to the following:

Thomas G. Maile
Attorney at Law
380 W. State
Eagle, ID 83616

- [x] U.S. Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [x] Telecopy (FAX)

Dennis Charney
Attorney at Law
1191 East Iron Eagle Drive
Eagle, ID 83616

- [x] U.S. Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [x] Telecopy (FAX)

Connie W. Taylor
Attorney for Respondents

Whereupon the deposition proceeded as follows:

HELEN TAYLOR
a witness having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION
BY MR. MAILE:
Q. Good morning, Mrs. Taylor. Would you please state your name for the record?
A. Helen Johnson Taylor.
Q. Okay.
And where is it that you currently reside?
A. 9483 West Harmonica Way, in Boise.
Boise, Idaho.
Q. And how long have you been at that residence?
A. Six years.
Q. And prior to that, where did you live, Mrs. Taylor?
A. On Fairview.
MR. TAYLOR: No. No.
THE WITNESS: I can't think of the number. It was 95 something Fairview.
Boise.

Q. (BY MR. MAILE) And how long did you live at that prior residence, how many years?
A. From 1940 -- from 1942.
Q. Did you start in 1942 living there?
A. Yes.
Q. Okay. And that was continuous?
A. Yes.
Q. Up until the time that you moved to your new home?
A. Yes.
MR. MAILE: Going to have this marked as Exhibit No. 1.
(Exhibit 1 was marked.)
Q. (BY MR. MAILE) I'm going to hand you what is marked as Exhibit No. 1 to this deposition, and I'll represent to you that it's a note that's a copy of the Notice of Taking Deposition Duces Tecum of Helen Taylor, and that along with a subpoena that was served on you some time ago.
Do you remember receiving that document?
A. Yes.
Q. Okay. And did you review the entire document? Did you read it?
A. Yes.
Q. And in that, if you could turn to Page 2 of

Exhibit 1, it asks for a series of documents to be produced, and they start with number one.
Do you remember reviewing that, those requests for production of documents?
A. Yes.
Q. And what did you do in order to obtain the documents that you brought with you today?
A. Just went to the place where I had them stored.
Q. Okay.
And where was that?
A. In a chest that I keep for my valuable papers.
Q. All right.
And did you thoroughly read the questions, or numbers 1 through 14?
A. Yes. I think so.
Q. Did you talk to anyone about the documents that were being requested?
A. No.
Q. Did you talk to your brother -- or excuse me. Did you talk to any of your sons?
A. I don't remember if I did or not.
Q. All right.
And I'm asking about conversations you might have had with any of your sons concerning Exhibit No. 1

within the last 45 days.
A. Probably have. I don't know.
Q. Do you remember what might have been discussed with any of your sons concerning the documents requested?
A. No.
Q. Have you talked to anyone about the deposition testimony that you are providing today?
A. (No response from the Witness.)
Q. Let me rephrase that.
Mrs. Taylor, what did you do to prepare for this deposition today?
A. Well, I talked -- I just gathered up this thing, talked to Connie.
Q. Okay.
And when is it that you talked to Connie?
A. Yesterday.
Q. And is that the only time you talked to Connie Taylor about this deposition?
A. I think so.
Q. Now, you brought with you this morning a series of documents that I have gone through. You brought them in a little plastic bag, some which I've taken and had copies made.
So I'm going to ask the court reporter to mark

this as Exhibit 2.
(Exhibit 2 was marked.)
Q. (BY MR. MAILE) And I'll ask you to look at Exhibit 2 and explain to me if that is a series of documents that you found in your house that you brought with you?
A. Oh.
MR. PRUSYNSKI: Is that it, or?
MR. MAILE: Yes. It is.
MR. PRUSYNSKI: Okay.
Q. (BY MR. MAILE) Does Exhibit 2 contain documents that were in your home that you brought with you this morning, a copy of which you brought with you this morning?
A. You mean, did I have those in my house?
Q. Yes.
A. Well, if I brought them, I did.
Q. Okay. And I know that seems a bit -- and I'll ask you a series of questions, but were you able to obtain any documents that you brought with you today that were not at your house?
A. No.
Q. Okay.
For example, none of your sons had any documents that you were able to provide here this morning?

A. No. Everything I brought was from my house.
Q. Okay. Now, an example, the Exhibit 2, it doesn't have anything signed by you?
And review that, and indicate to me if you ever signed any of the paperwork that's contained in Exhibit No. 2.
A. I wouldn't know if I did or not.
I don't know for sure what you are talking about.
Q. Let me ask you a question in general about the way you conduct your affairs.
When you sign documents, do you keep copies of any of your documents with your signatures on them?
A. I don't think so.
Q. All right.
Who would you give those signed documents to?
A. Well, if they said to send them back to the one that sent them to me, that's who I'd send them to.
MR. MAILE: Let's have this marked as Exhibit 3.
(Exhibit 3 was marked.)
Q. (BY MR. MAILE) You've been handed Exhibit 3. That has, if you turn to the back pages of Exhibit 3, there are no signatures on those pages.
Do you remember signing Exhibit 3 and sending Exhibit 3 back to anyone?

A. I probably did.
MS. CONNIE TAYLOR: Just to avoid confusion, this is one of the earlier drafts. This was not the final that everyone signed.
MR. MAILE: I appreciate that.
Q. (BY MR. MAILE) You don't remember if you signed that draft?
This might have been prepared back in 2004. At the bottom it says, "4/7/2004."
A. What was it for?
Q. Well, it's called a Release And Indemnity Agreement. It related to the trust, the Theodore L. Johnson Revocable Trust.
MR. PRUSYNSKI: I don't have any page with a blank for her signature on it.
MR. MAILE: I may not either.
Q. (BY MR. MAILE) Does that help you recall if you received and signed anything, or signed a copy of Exhibit No. 3 that's in front of you?
And if you don't remember, that's fine.
A. I don't remember. I don't know. It was...
MR. MAILE: Mark this.
(Exhibit 4 was marked.)
Q. (BY MR. MAILE) What is the date of that document? Is there a date at the top of Exhibit 4?

A. July 22nd, 2003.
Q. And do you recall receiving that document?
A. I'm sure I did.
Q. And this is something again that you brought with you from your home; is that correct?
A. Yes.
MR. MAILE: And five.
(Exhibit 5 was marked.)
MR. PRUSYNSKI: Tom, just because I've been reading all of these depositions, could you say what Exhibit 4 is, so that it's in the record?
MR. MAILE: Exhibit 4 is a letter dated July 22nd of 2003 from Andy and Beth Rogers to Connie Taylor.
That was Exhibit 4.
MR. PRUSYNSKI: Okay.
MR. MAILE: Now, Exhibit 5, Mrs. Taylor, I'll represent to you, it has on the top the words Assignment Form.
And here again this is a document that you brought with you today.
Q. (BY MR. MAILE) Do you remember signing an Assignment Form like we have on Exhibit 5?
(Witness conferring.)
MS. CONNIE TAYLOR: Just go ahead and tell them

that.
Q. (BY MR. MAILE) Do you remember if you signed or not?
A. I don't know if I did or not. I probably did, if I was supposed to.
MR. MAILE: All right. Mark this as No. 6.
(Exhibit 6 was marked.)
Q. (BY MR. MAILE) For Exhibit 6, you've been handed an exhibit that is labeled Exhibit 6. And it has a January 8, 2004 date at the top, and there's a signature on the bottom.
Can you identify that signature?
A. It's looks right.
Q. All right. And who is Reed Taylor?
A. He's my son.
MR. MAILE: Here you go.
(Exhibit 7 was marked.)
Q. (BY MR. MAILE) Exhibit 7 has been handed to you, and the top says, "Disclaimer of Beneficiary," and then it has, "Beth Rogers, Trustee of the Theodore L. Johnson, Revocable Trust Agreement."
MS. CONNIE TAYLOR: That's the same as Exhibit No. 2.
MR. MAILE: It looks like it. It looks like our copying didn't go as well as it should have.

Let's withdraw that No. 7, because it's the same as No. 2.
So we'll withdraw that No. 7.
Mark this instead.
(New Exhibit 7 was marked.)
Q. (BY MR. MAILE) Mrs. Taylor, we've now handed you a new Exhibit 7 and asked you to identify that.
Exhibit 7 came from a document that you provided me this morning. It's dated April 30th, 2003, and it says, "To whom it may concern."
Do you recall receiving this on or about April the 30th, 2003?
A. If I had it, I guess I received it.
Q. Okay. That's fine.
MR. MAILE: Let's have this marked as Exhibit 8.
(Exhibit 8 was marked.)
Q. (BY MR. MAILE) And if you could take a look at Exhibit 8, and I'll represent to you that it's a copy of a letter dated August 20th, 2003 with the letterhead Law Offices of Clark and Feeney, and your name and address on Wright Street appears.
Do you see where that is on the first page?
A. Yes. Right.
Q. And the back page has a signature line for Connie W. Taylor.

There again, do you recall receiving Exhibit No. 8?
A. Yes.
Q. Now, from the documentation that you brought with you today, it appears as though you have no documents that go past the year 2004.
And I've asked in my Notice of Taking Deposition in the subpoena that you bring with you any and all documents up to the current date relative to the Theodore L. Johnson Trust.
And do you have additional documents that would be up-to-date?
A. I don't have anything else. I brought everything I had.
Q. Do you know that there is a lawsuit that's been filed regarding actions between Berkshire Investments and the Law Firm of Clark and Feeney?
A. Not -- say that again.
Q. Were you aware that there was a lawsuit filed by Berkshire Investments and others against Clark and Feeney and others?
A. Yes.
Q. And how is it that you are aware of that?
A. Well, let's -- I guess either Dallan or Connie or somebody just told me, I guess.

Q. Okay.
A. I'm not sure.
Q. When did you become aware of a lawsuit?
A. I have no idea.
Q. Have you been involved with any family functions in Lewiston for the last year?
A. What kind of functions?
Q. Well, just any family function.
Let me ask it this way.
Have you traveled to Lewiston within the last year?
A. Yes.
Q. And when was that?
A. Clark's, for a funeral.
Q. And that was the only time you traveled to Lewiston?
A. Oh, let's see.
Yes. I think so.
Q. And could you describe for me contact you had with your sons? For example, the calendar year of 2008, this last year, do you see them on a weekly basis?
A. Well, the ones that live around here, I see all the time. The others, I don't see as often.
Q. Okay. Who lives around here that you see quite often?

A. Just Dallan.
Q. All right.
And where do your other sons live?
A. Mark is in Indonesia on a mission; Reed and John live in Lewiston.
Q. And have either Reed or John come down to see you in Boise in 2008?
A. Oh, yes.
Q. And what events do they come down for?
A. Well, I think Reed was going on a trip somewhere, stopped by overnight. And John comes down every once in a while on business, so he always comes out.
Q. All right. And would that be similar for the calendar year 2007?
A. Yes.
Q. And do you file tax returns?
A. Yes.
Q. And who prepares your tax return?
A. Kent Rydalch.
Q. And where is his office?
A. He lives in Denver.
Q. And why do you have your tax returns prepared in Denver?
A. Because he's my son-in-law.

Q. All right.
And what is his occupation?
A. He's retired. He's a CPA. He's vice president of a Great Western Insurance.
Q. All right. And how long has he been doing your tax returns?
A. Twenty years, I guess.
Q. All right.
And let me ask you, if he does, to your knowledge, any tax preparation on behalf of the Theodore L. Johnson Trust?
A. Not that I know of.
Q. Do you know of anybody that does any tax returns for the trust?
A. No.
Q. What is your current involvement with the Theodore L. Johnson Trust?
A. Well, I don't know what you mean.
Q. Okay. What is your interest in it? Do you know?
A. I don't understand.
Q. Well, do you receive any money from the Theodore L. Johnson Trust?
A. No.
Q. Do you pay any expenses related to the trust?

A. I haven't.
Q. Okay. And you've never paid any expenses related to the trust?
A. I don't think so. I don't think I have.
Q. Do you know what the trust consists of? Does it own real estate, or does it have bank accounts?
A. I don't know.
MS. CONNIE TAYLOR: I don't think she's understanding your questions.
THE WITNESS: I don't understand what you are getting at.
Q. (BY MR. MAILE) All right. Do you know if you are a beneficiary of the trust?
A. Of Ted's, I mean?
Q. Ted's trust.
Well, I got some money.
Is that what it was?
MS. CONNIE TAYLOR: I'm sorry. I can't answer it.
THE WITNESS: Well, I got some.
Q. (BY MR. MAILE) Okay. So from your brother's trust; is that correct, the Theodore L. Johnson Trust?
A. Oh, I don't know if it came from there or not.
Q. Okay.
Do you receive any moneys on a regular basis

from the Theodore L. Johnson Trust?
A. No.
Q. When is the last time you might have received money from the Theodore L. Johnson Revocable Trust?
A. Oh, it's been two years or so.
It's probably been -- it's been a long time.
Q. Do you have any conversations with any of your sons about the trust?
A. Yes.
Q. And what is discussed?
A. We just talk about what is going on.
Q. Okay. And what have they been telling you what has been going on?
A. I don't know.
Q. Now, have you retained an attorney to represent you?
A. Connie.
Q. Okay. Is she your attorney?
A. Yes.
Q. And when did you retain her?
A. I don't know how long it's been, two or three years.
Q. Okay. And what has she done? What was she retained for?
A. To take care of this.

Q. And by "this," what do you mean by that, "take care of this"?
A. Of this trust.
Q. And I noticed, or I heard before we started this deposition, Ms. Taylor had indicated there were certain correspondences that would not be produced.
Is that your understanding as well?
A. I don't know what -- I just don't understand what that would mean.
Q. All right. Are there letters, or were there letters that you had in your house that you did not bring with you today from Connie Taylor?
A. Well, I thought I brought everything. I don't know.
MR. MAILE: And Counsel --
THE WITNESS: I don't have anything else.
MR. MAILE: Counsel, you indicated that there were certain correspondences that were not being produced today?
MS. CONNIE TAYLOR: Correct.
MR. MAILE: Okay. And can we have or expect to receive a privileged log --
MS. CONNIE TAYLOR: Sure.
MR. MAILE: -- to be provided on that?
MS. CONNIE TAYLOR: Uh-huh. It will be short.

MR. MAILE: Okay.
And does it just consist of letters?
MS. CONNIE TAYLOR: Yes.
Q. (BY MR. MAILE) Do you remember a deposition that you were involved in back in April of 2005 where I asked you a series of questions and other lawyers asked questions of you?
A. I remember being here.
Q. In a deposition?
A. Right.
Q. At the point in time in 2005, it was indicated in that deposition that you had not retained an attorney.
Do you recall that?
A. No. I don't.
Q. Well, if I represent to you that that deposition testimony had indicated that, or Mr. Clark had indicated on the record that the firm was not representing you, would you disagree with that?
MS. CONNIE TAYLOR: Object to the form.
THE WITNESS: Yeah.
MR. MAILE: Let me try to ask a question concerning when you retained an attorney to represent you, to represent your interests regarding --
THE WITNESS: Oh, that was a long time ago.
Q. (BY MR. MAILE) How long ago?

A. I forgot how long ago it was.
Q. Do you remember receiving any correspondence that was an engagement letter by the lawyers?
A. I don't know if it was a letter or not.
Q. Do you receive any paperwork on an annual basis regarding the trust?
A. Well, I just don't understand what you mean.
Q. You've brought documents with you that go back to 2004 and before, and my question is if you receive or have you received anything related to the trust from the calendar year 2005 to the present date?
A. Well, I wouldn't know of it. You mean -- well, do I receive letters, or?
Q. Contracts, letters, agreements, related to the trust from 2005 to the present.
A. You mean the things like I brought today?
Q. Yes, of course things like you brought today, but from the period of 2005 to the present.
A. Well, I -- I don't know. I brought what I have.
I don't know what the date is on them.
Q. Have you provided any of your sons with a Power Of Attorney?
A. Yes.
Q. And who did you provide the Power Of Attorney

to?
A. Let's see. Dallan has it, and Kent has it.
Kent, Gloria's husband.
I think that's all. I'm not sure.
Q. And when was that Power Of Attorney provided to those two?
A. I don't know. I'd have to look.
Q. Do you have a copy of it at home?
A. Yes.
Q. Has it been recorded in Ada County, for example?
A. Yes.
Q. And who recorded that for you?
A. Well, I did it myself, I think.
Q. And what is the purpose to your understanding of why those two were provided a Power Of Attorney?
A. Well, I wanted them to take care of things when I died.
Q. And do you have a will now?
A. No.
Q. Do you hold title to your real property in your name, or do you have a trust that's set up?
A. It's in my name.
Q. And is there anyone else on the deed with you?
A. I don't think so.

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Attorneys for Defendants/Counter-Claimants

IN THE SUPREME COURT OF THE STATE OF IDAHO

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs/Counter-Defendants/ Respondents, vs. THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants/ Appellants. THEODORE L. JOHNSON REVOCABLE	Case No. CV OC 04-00473D **NOTICE OF APPEAL**

NOTICE OF APPEAL - 1

Exhibit "BB"

TRUST,

Plaintiff/Counter-Defendant/
Respondent,

vs.

THOMAS MAILE IV. and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.,

Defendants/Counter-Claimants.
Appellants.

TO: THE RESPONDENTS ABOVE NAMED, AND THEIR ATTORNEY OF RECORD, PAUL T. CLARK, AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN that the attorney above named, Appellants, Thomas G. Maile and Colleen Maile and Berkshire Investments L.L.C., by through Dennis Charney, and Thomas Maile, attorneys for the Defendants/Counter-Claimants, hereinafter referred to as "Appellants", appeal against the above-named Respondents to the Supreme Court of the State of Idaho, from the Memorandum Decision and Order entered on May 15, 2006 and the subsequent Judgment entered June 5,2006, and the subsequent Order denying the Motion to Reconsider/Motion to Amend, entered on June 20, 2006, and the First Amended Judgment on Beneficiaries claim entered July 21, 2006, in the above-entitled action by Honorable Ronald Wilper and the Court's failure to award pre-judgment interest.

1. Appellants have a right to appeal to the Idaho Appellate Court, from the District Court of the Fourth Judicial District of the State of Idaho, In and For the County of Ada, and the Judgment entered June 5, 2006, and the Order denying the Motion to Reconsider/Motion to Amend entered on

June 20, 2006, and the First Amended Judgment on Beneficiaries claim entered July 21, 2006 described above, are appealable Orders under and pursuant to Rule 11 of the I.A.R., in that there was a final Judgment entered on December 11, 2006 resolving all claims of the parties.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the judgments and orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(2) I.A.R. That pursuant to the Idaho Appellate Rules, jurisdiction is proper for the appeal.

3. That no order been entered sealing all or any portion of the record.

4. A preliminary statement of the issues on appeal which the Appellants intend to assert in the appeal, are as follows:

a. Was the District Court correct in entering the Order Granting the Respondents Plaintiff Beneficiaries' Motion for Summary Judgment and thereafter denying the Appellants' Motion for Reconsideration/Motion to Amend entered in the above-entitled action on June 20, 2006 and entering Judgment on June 5,2006 and thereafter entering it's First Amended Judgment on Beneficiaries claim entered July 21, 2006?

b. Was the Court correct in determining that the Appellants were not bona fide purchasers for value in the real estate contract between the Theodore L. Johnson Trust and the Appellants?

c. Was the Court correct in determining that pursuant to Idaho Code 68-108 a Court Order was required to close the real estate transaction, under the facts of the case established in the record at the time of above referenced Orders?

d. Was the Court correct in determining that the Respondents were entitled to Summary Judgement when the record established that the both the original trustee of the trust and the

successor trustees did not violate their fiduciary to the trust or the beneficiaries inthe selling the real property at the price established by an independent Idaho licensed appraiser?

e. Was the Court correct in denying the Appellants' Motion to Dismiss/Motion for Summary Judgement relating to the role of the successor trustees not obtaining judicial appointment prior to filing suit on behalf of the "trust".

f. Was the Court correct in determining that the Respondents as beneficiaries of the trust had standing to pursue the claims which were ultimately granted by the Beneficiaries' Motion for Summary Judgment?

g. Was the Court correct in determining that the subject real property was being held by the Appellants under a constructive trust?

h. Was the Court correct in determining that the original trustee and the successor breached their fiduciary to the Respondents?

i. Was the Court correct in determining that the Appellants were not bona fide purchasers for value in the real estate contract between the Theodore L. Johnson Trust and the Appellants and that the Appellants had breached a fiduciary and/or had a conflict of interest in the real estate transaction?

j. Was the Court correct in determining that pursuant to Idaho Code 68-106 the underlying real estate transaction was either void or voidable?

k. Did the Court err in failing to consider the effect of the Disclaimer and Indemnification Agreement executed by the Respondents and the successor trustees and the other beneficiaries of the trust relating the claims against the Appellants?

l. Was the Court correct in determining that the Appellants were not able to pursue a suit for specific performance even if the real estate transaction was voidable?

m. Did the Court err in denying the Plaintiff Theodore L. Johnson's and the individual Beneficiaries' motion for Summary Judgment which indicated certain claims were viable asserted in Appellants' Counter-Claim including quasi estoppel and equitable estoppel and thereafter rule in favor of the beneficiaries motion for summary judgment?

n. Did the Court err in not allowing the counter-claims of the Appellants to proceed to trial?

o. Did the Court err in determining that the Theodore L. Johnson Trust was entitled to amend their complaint and relate back the complaint to the date of filing, when the successor trustees had not been properly appointed by Court Order as required pursuant to I.C. 68-101 or 68-107?

p. Did the Court err in not awarding pre-judgment interest to the Appellants on the sums representing payments for the subject real property.

Is a reporter's transcript requested? Yes. The following transcript is requested, and the Appellants request the same to be made a part of the appeal as existing transcripts, to wit:

a. Hearings dated April 3, 2006; June 15, 2006, July 17, 2006 and December 20, 2004;

b. The transcript is requested in standard format and not compressed.

c. That the estimated fee for the preparation of the transcript has been paid.

That the Appellants have paid the estimated costs of the clerk's record.

5. The Appellants request the following documents to be included in the clerk's record:

PLEADINGS ASSOCIATED WITH ADA COUNTY CASE NO. CV OC 2004-03642

1. Complaint and Demand for Jury Trial, filed January 23, 2004;
2. Verified Answer to Complaint and Counter-Claim of Defendant Thomas & Colleen Maile, filed February 23, 2004;
3. Answer to Counter-Claim, filed March 15, 2004;
4. Defendants' Motion to Dismiss, filed March 15, 2004;
5. Memorandum Brief in Support of Motion to Dismiss, March 24, 2004;
6. Plaintiffs Memorandum in Opposition to Defendants Motion to Dismiss, lodged April 6, 2004;
7. Reply Memorandum in Support of Defendants Motion to Dismiss, lodged April 8, 2004;
8. Order Granting Motion to Dismiss, entered April 23, 2004;
9. Civil Appeals to Supreme Court, filed June 4, 2004;
10. Order (to reopen case), entered June 24, 2004;
11. Complaint and Demand for Jury Trial, filed July 19, 2004;
12. Defendant/Counter-Claimants' Motion to Consolidate and Affidavit of Thomas G. Maile in Support of Motion to Consolidate, filed August 12, 2004;
13. Defendants/Counter-Claimants' Renewed Motion to Strike Lis Pendens, Affidavit of Thomas G. Maile in Support of Renewed Motion to Strike Lis Pendens and Memorandum of Thomas G. Maile in Support of Renewed Motion to Strike Lis Pendens, filed and lodged September 10, 2004;
14. Affidavit of Thomas G. Maile as Managing Member for Berkshire West, LLC, filed September 10, 2004;

15. Affidavit of Phillip Collear in Support of Motion for Partial Summary Judgment, executed September 14, 2004;

16. Order Denying Motion to Stay, entered September 16, 2004;

17. Affidavit of Counsel in Support of Objection to Defendant's Renewed Motion to Strike Lis Pendens, executed September 17, 2004;

18. Plaintiffs' Memorandum in Opposition to Defendants Renewed Motion to Strike Lis Pendens, lodged September 20, 2004;

19. Reply Memorandum in Support of Defendants' Renewed Motion to Strike Lis Pendens, lodged September 21, 2004;

20. Order to Consolidate with Ada County Case No. CV OC 04-05656D, entered September 29, 2004;

21. Answer to Counter-Claim, filed October 4, 2004;

22. Order Denying Renewed Motion to Strike Lis Pendens, entered October 7, 2004;

23. Defendants' Memorandum Brief in Support of Motion to Dismiss/Motion for Summary Judgment October 20, 2004;

24. Defendants' Motion to Dismiss/Motion for Summary Judgment dated October 20, 2004;

25. Affidavit of Thomas Maile in Support of Motion to Dismiss/Motion for Summary Judgment, lodged and filed October 20, 2004;

26. Memorandum in Opposition to Defendants Motion for Partial Summary Judgment and Affidavit of Counsel in Opposition to Defendants Motion for Partial Summary Judgment, lodged and filed November 8, 2004;

27. Affidavit of Thomas G. Maile in Support of Motion to Show Cause, filed November 9, 2004;

28. Reply Memorandum in Support of Defendants Motion for Summary Judgment and Memorandum in Support of Defendant's Motion to Strike Affidavits of Dallan Taylor, Reed Taylor, Judd Taylor, Sam Rosti, Connie Taylor and Dennis McCracken, lodged November 12, 2004;

29. Order Granting Motion to Strike, entered November 24, 2004;

30. Order Granting Motion to Strike in Part, entered November 29, 2004;

31. Affidavit of Terry Rudd, filed December 2, 2004;

32. Supplemental Affidavit of Thomas G. Maile in Support of Defendants' Motion to Dismiss/Motion for Summary Judgment, filed December 3, 2004;

33. Affidavit of Beth Rogers, filed December 10, 2004;

34. Affidavit of Tim Williams, filed December 23, 2004;

35. Supplemental Affidavit of Thomas G. Maile in Support of Motion for Summary Judgment, filed February 3, 2005;

36. Affidavit of Thomas G. Maile in Support of Motion for Summary Judgment; Motion for Leave to City Unpublished Opinion; Affidavit of Elaine Lee; Second Supplemental Affidavit of Thomas Maile in Support of Motion for Summary Judgment; and Supplemental Memorandum in Support of Defendants/Counter-Claimants Motion to Dismiss, filed and lodged February 14, 2005;

37. Affidavit of Thomas G. Maile in Support of Defendants/Counter-Claimants Motion for Partial Summary Judgment, Second Supplemental Affidavit of Phillip J. Collaer in Support

of Motion for Partial Summary Judgment and Supplemental Memorandum Regarding Motion for Summary Judgment, filed and lodged February 15, 2005;

38. Motion to Strike, Affidavit of Donna Jones, Affidavit of Richard White, Affidavit of Counsel, Affidavit of Richard Mollerup, Affidavit of Terry Rudd, Summary of Facts and Exhibits and Memorandum in Support of Motion for Summary Judgment, filed and lodged March 3, 2005;

39. Motion for Summary Judgment, Affidavit of R. John Taylor, Affidavit of Elaine Lee, Third Supplemental Affidavit of Thomas G. Maile in Support of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment, filed and lodged May 13, 2005;

40. Defendants' Second Supplemental Memorandum in Support of Motion for Summary Judgment, filed May 16, 2005;

41. Affidavit of Thomas G. Maile in Opposition to Motion for Summary Judgment; Affidavit of Al Knutson in Opposition to Motion for Summary Judgment; and Reply Brief in Opposition to Motion for Summary Judgment, filed and lodged May 24, 2005;

42. Supplemental Memo in Opposition to Defendant's Motion to Dismiss/Motion for Summary Judgment and Motion for Partial Summary Judgment, lodged May 31, 2005;

43. Affidavit in Opposition to Motion to Amend; Reply Affidavit in Support of Motion for Summary Judgment; Supplemental Affidavit of Elaine Lee; Reply Affidavit of Thomas Maile in Support of Motion for Summary Judgment; and Reply Brief in Opposition to Motion to Amend, filed and lodged June 3, 2005;

44. Defendants Motion to Strike Portions of Richard Mollerup Affidavit, Second Supplemental Affidavit of Elaine Lee, Defendants Reply Brief Re: Motion to Dismiss/Motion for Summary Judgment, Second Reply Memorandum in Support of Defendants' Motion for Summary Judgment, Defendants Motion to Strike Affidavit of Richard J. White, Memorandum in Support of Defendants' Motion to Strike the Affidavit of Richard J. White, filed and lodged June 6, 2005;

45. Memorandum Decision and Order, entered July 28, 2005;

46. Defendants Second Renewed Motion to Strike Lis Pendens; Memorandum Brief in Support of Defendants Second Motion to Strike Lis Pendens; Affidavit of Thomas Maile in Support of Motion to Strike Lis Pendens, filed and lodged August 26, 2005;

47. Verified Amended Answer and Counter-claim and Demand for Jury Trial, filed September 7, 2005;

48. Memorandum in Opposition to Renewed Motion to Strike Lis Pendens, filed September 8, 2005;

49. Reply to Defendants Amended Counterclaim, filed September 26, 2005;

50. Amended Complaint, filed September 28, 2005;

51. Amended Motion for Summary Judgment, Affidavit in Support of Amended Motion for Summary Judgment and Amended Reply to Amended counterclaim filed October 3, 2005;

52. Order Denying Motion to Release Lis Pendens, entered October 5, 2005;

53. Memorandum in Support of Renewed Motion for Summary Judgment, Affidavit of Elaine Lee and Defendants Renewed Motion for Summary Judgment, lodged and filed October 7,

2005;

54. Supplemental Memorandum Opposing Second Renewed Motion to Strike Lis Pendens, lodged October 11, 2005;

55. Answer to Amended Complaint and Demand for Jury Trial; Reply Affidavit of Thomas Maile in Opposition to Plaintiffs Amended Motion for Summary Judgment; and Affidavit of Colleen Maile in Opposition to Amended Motion for Summary Judgment; and Defendant/Counter-Claimants' Reply Brief in Opposition to Plaintiffs' Amended Motion for Summary Judgment, filed October 13, 2005;

56. Affidavit of Elaine Lee; Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed and executed October 20, 2005;

57. Corrected Amended Complaint, executed October 21, 2005;

58. Affidavit of Dan C. Grober and Supplemental Affidavit of Dan C. Grober, filed October 24, 2005;

59. Reply Memorandum in Support of Plaintiffs' Amended Motion for Summary Judgment, lodged November 3, 2005;

60. Second Supplemental Affidavit of Dan C. Grober and Affidavit of Elaine Lee, filed November 3, 2005;

61. Judgment Re: Motion for Partial Summary Judgment, entered November 7, 2005;

62. Memorandum Re: Motion to Amend, lodged November 9, 2005;

63. Memorandum in Opposition to Motion to Amend, lodged November 10, 2005;

64. Opinion Lodged by Supreme Court, lodged December 23, 2005;

65. Order for Supplemental Briefing in Light of Remand, entered December 30, 2005;

66. Plaintiffs' Memorandum Re: Supreme Court Remand, executed January 19, 2006;

67. Joint Supplemental Brief in Light of Supreme Court Remand, lodged January 20, 2006;

68. Order Re: Motion for Summary Judgment, entered February 13, 2006;

69. Motion for Summary Judgment on Beneficiaries' Claim, Affidavit of R. John Taylor in Support of Beneficiaries' Motion for Summary Judgment and Plaintiffs Memorandum in Support of Motion for Summary Judgment on Beneficiaries' Claim, filed and lodged February 13, 2006;

70. Brief in Opposition to Motion for Summary Judgment and Affidavit of Thomas Maile in Opposition to Beneficiaries Motion for Summary Judgment, lodged and filed March 14, 2006;

71. Answer to Amended Complaint and Demand for Jury Trial, filed March 15, 2006;

72. Affidavit of Gary McAllister; and Supplemental Memorandum in Opposition to Taylors Motion for Summary Judgment, filed and lodged March 17, 2006;

73. Answer and Counterclaim Re: Amended Complaint by Beneficiaries, filed March 21, 2006;

74. Affidavit of Counsel in Support of Plaintiffs Reply Memorandum and Reply Memorandum in Support of Motion, filed and lodged March 27, 2006;

75. Affidavit of Counsel, filed March 29, 2006;

76. Order Resetting Trial, entered May 1, 2006;

77. Order Granting Summary Judgment on Beneficiaries Claim, entered May 15, 2006;

78. Motion to Reconsider and Memorandum in Support of Motion to Reconsider, filed and

lodged May 30, 2006;

79. Objection to Proposed Judgment, filed June 6, 2006;

80. Judgment on Beneficiaries Claim and Affidavit of Elaine Lee, file June 7, 2006;

81. Plaintiff Beneficiaries' Memorandum in Opposition to Motion to Reconsider; Motion to Strike Portions of Plaintiffs Experts Affidavits; Motion to Shorten Time; Affidavit of Rory Jones, lodged and filed June 8, 2006;

82. Motion to Amend Answer and Counterclaim; and Response to Motion to Strike Portions of Expert Affidavit, filed June 9, 2006;

83. Affidavit in Support of Motion to Amend Answer and Counterclaim filed June 15, 2006;

84. Motion to Amend Judgment Filed June 7, 2006 based upon an Error of Law and/or Motion to Reconsider filed on or about June 20, 2006;

85. Order Denying Defendants' Motion to Reconsider, entered June 20, 2006;

86. Motion for Certification; and Brief in Support of Motion for Certification, filed and lodged June 28, 2006;

87. Objection to Proposed First Amended Judgment, filed July 3, 2006.

88. Affidavit of Thomas Maile July 13, 2006;

89. Memorandum Decision and Order entered July 21, 2006.

90. First Amended Judgment on Beneficiaries Claims entered July 21, 2006.

91. Memorandum Decision & Order entered July 25, 2006.

92. Motion to Amend First Amended Judgment filed on August 1,2006;

93. Affidavit of Brad Knipe dated September 14, 2006.

94. Notice of Hearing re: Motion to Amend Judgment for Pre-Judgment Interest filed October 4, 2006.

95. Judgment entered December 11,2006.

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

DATED this 21 day of December, 2006.

THOMAS MAILE, co-counsel for Appellants/ Defendants/Counter-Claimants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21 day of December, 2006, I caused to be delivered a true and correct copy of the NOTICE OF APPEAL by depositing the same in the U.S. Mail, addressed as follows:

Paul T. Clark Clark and Feeney 1229 Main Street Post Office Drawer 285 Lewiston, Idaho 83501 Fax # (208) 746-9160	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Mr. Jack S. Gjording Gjording and Fouser 509 West Hays Street Post Office Box 2837 Boise, Idaho 83701 Fax # (208) 336-9177	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Mr. Phillip Collaer Anderson & Julian 250 South 5th Street, Suite 700 Post Office Box 7426 Boise, Idaho 83707-7426	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

Dennis M. Charney Attorney at Law 951 East Plaza Drive, Suite 140 Eagle, Idaho 83616 Fax # (208) 938-9504	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Diane Cromwell c/o Tucker & Associates 605 West Fort Street Boise, Idaho 83701	(x)	Facsimile Transmission

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ISB# 1329

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION

Defendants.

Case No. CV OC 0723232

MOTION FOR ORDER REMOVING LIS PENDENS

COME NOW Defendants Dallan Taylor, John Taylor, and the Johnson Trust, by and through their attorney of record, Connie Wright Taylor, and respectfully request that this Court issue an order removing the lis pendens from the Ada County Records.

This motion is made on the grounds and for the reasons that the Idaho Supreme Court has recently affirmed the District Court's order quieting title to the Linder Road property in the name of the Johnson Trust, on the same operative facts as exist in the present case.

Oral argument is requested.

DATED this 13th day of February, 2009.

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2009 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 939-1001*
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 385-5384*

_____
Connie W. Taylor
Attorney for Defendants

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 0723232 **AMENDED ANSWER OF JOHN TAYLOR , DALLAN TAYLOR, AND JOHNSON TRUST** AND **COUNTERCLAIM**

Defendants John Taylor, Dallan Taylor, and the Theodore Johnson Trust, by and through their attorney of record, answer the Complaint as follows:

1. Defendants deny each and every allegation of Plaintiffs' Complaint which is not specifically admitted herein.

2. Defendants admit the allegations as to the residence of the respective parties.

3. With reference to the multitude of allegations relating to documents and/or pleadings filed with the Court, those documents speak for themselves and require no admission or denial; however, Defendants do not accept and specifically deny the Plaintiffs' characterizations of such documents.

4. Defendants admit that the Plaintiffs attempted to purchase property from the Theodore Johnson trust, admit that the purchase was found to be improper by The Honorable Ronald J. Wilper (whose decision was recently upheld by the Idaho Supreme Court), and admit that judgment was entered returning the property to the Johnson Trust. Defendants deny any impropriety on their part in the conduct of said lawsuit.

5. Defendants deny the Plaintiffs' allegation that they were not beneficiaries of the Johnson Trust as it relates to the Linder Road property. The Idaho Supreme Court has ruled that the Release and Disclaimer executed by the successor trustees and all beneficiaries specifically reserved to the Taylors all rights to the lawsuit against these Plaintiffs seeking recovery of the property they had acquired wrongfully.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action against these Defendants upon which relief may be granted.

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

SECOND AFFIRMATIVE DEFENSE

Defendants affirmatively allege that the Plaintiffs failed to take reasonable steps to mitigate their claimed or alleged damages, if any.

THIRD AFFIRMATIVE DEFENSE

The Plaintiffs' claims are barred by I.R.C.P. 12(b)(8) because there is another action pending between the same parties on the same cause.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiffs' claims are barred by the doctrines of res judicata, collateral estoppel, waiver, laches, and unclean hands.

COUNTERCLAIMS

For counterclaims against the Plaintiffs, the Defendants allege as follows:

1. The allegations as to residency and jurisdiction admitted in the Answer above are incorporated herein by reference.

2. **Slander of Title**. Plaintiffs have filed a number of lis pendens against the subject real property, even after the entry of the District Court Judgment quieting title in the Johnson Trust. The filing of these documents constitutes slander of title, as the claim to an ownership interest in the property was a slanderous statement which was false, done with malice, and resulted in special damages to the Defendants (in an amount which will be proved at trial) because it has prevented them from either financing or selling the Linder Road property.

3. **Abuse of Process**. Plaintiffs, in filing this second action relating to the Linder Road property and issuing a lis pendens to prevent the Plaintiffs from having the use of the property, have affirmatively used a legal process primarily to accomplish an improper purpose

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CLARK AND FEENEY
LEWISTON, IDAHO 83501

outside of simply gaining an advantage in the underlying litigation for which the process was not designed (i.e. keeping the real property tied up beyond the time of the appeal of the initial lawsuit in which the property was ordered returned to the Johnson trust). Plaintiffs' actions have prevented the Defendants from selling the property, which has declined in value since the filing of this action, damaging the Defendants by misuse of the process external to the litigation that cannot be compensated in the underlying proceeding.

4. **Intentional interference with a prospective economic advantage .** By prohibiting the Defendants from selling the Linder Road property, Plaintiffs have committed the tort of intentional interference with a prospective economic advantage. Defendants have had several inquiries on the Linder Road property, but have been prevented from selling the property solely because of the Plaintiffs' lis pendens, resulting so far in the loss of an offer to purchase the property for $1.8 million dollars, to date, with additional offers being received. The Plaintiffs' interference was for an improper purpose, and has caused resulting damage to the Johnson Trust.

5. **Attorney fees:** As a result of the actions of plaintiff in this matter, defendants have been required to retain the legal counsel from the law offices of Clark and Feeney, and are entitled to recover their attorneys fees incurred in this matter pursuant to IRCP 11 and Idaho Code sections 12-121 and 12-123.

WHEREFORE, Defendants pray that the Court enter an order granting the following relief:

1. That the Complaint be dismissed and that the Plaintiffs take nothing thereby.

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

2. That Rule 11 sanctions be imposed on the attorney for the Plaintiffs for bringing this frivolous action.

3. That the Defendants be awarded reasonable attorney fees and costs incurred in responding to the Complaint pursuant to I.C. 12-121, 123 and I.R.C.P 11.

4. That judgment be entered against the Plaintiffs in an amount to be determined at trial for slander of title.

5. That judgment be entered against the Plaintiffs in an amount to be determined at trial for abuse of process.

6. That judgment be entered against the Plaintiff for intentional interference with prospective economic advantage.

7. That the Defendants be awarded reasonable attorney fees and costs incurred in bringing their counterclaim pursuant to I.C. 12-121, 123 and I.R.C.P 11.

DATED this 17th day of February, 2009.

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Defendants.

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of Febryary, 2009 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 939-1001*
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 385-5384*

Connie W. Taylor
Attorney for Defendants

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

REPLY TO AMENDED ANSWER OF JOHN TAYLOR, DALLAN TAYLOR, AND JOHN TRUST AND COUNTERCLAIM

COMES NOW the above named Plaintiffs, by and through their attorney, Thomas Maile hereby provide their Reply to Defendant's Amended Answer of John Taylor, Dallan Taylor, and

Johnson Trust and Counterclaim and further complain and allege as follows:

1. Plaintiffs' deny each and every allegation of Defendant's Amended Answer of John Taylor, Dallan Taylor, and Johnson Trust and Counterclaim which is not specifically admitted herein.

2. Plaintiffs admit the allegations set forth in paragraph 1 of the Counter-Claim.

3. Plaintiffs specifically deny paragraphs 2, 3, 4, and 5 of the Counter-Claim.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs affirmatively allege that the defendants have been required to return the purchase price of $400,000.00 by previous court proceedings. The same remains unpaid, including interest thereon and the plaintiffs are entitled to a "vendee's lien" on the subject real property pursuant to the previous court proceedings and further pursuant to Idaho Code section 45-804. That in addition, the plaintiffs herein have previously filed their Lis Pendens in the prior proceedings which remains of record with the Ada County Recorder's Office, as further protection of the vendee's lien. That such liens are superior to the Lis Pendens herein and as such the Lis Pendens filed herein has not impaired the title to the subject real property and as such the claims set forth in the counter-claim are barred in the present action.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have alleged allegations of wrongful conduct in violation of Chapter 18 Title 78 of the Idaho Code. That plaintiffs are availed of certain remedies set forth below including but not limited to:

18-7804 PROHIBITED ACTIVITIES -- PENALTIES.
(a) It is unlawful for any person who has received any proceeds derived

directly or indirectly from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property. Whoever violates this subsection is guilty of a felony.

18-7805 RACKETEERING -- CIVIL REMEDIES.

(a) A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three (3) times the actual damages proved and the cost of the suit, including reasonable attorney's fees.

(c) The district court has jurisdiction to prevent, restrain and remedy racketeering after making provisions for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. Prior to a determination of liability, such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.

(d) Following a determination of liability, such orders may include, but are not limited to:

(1) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

That such potential remedy, including the request for a constructive trust, authorizes the filing a Lis Pendens herein and as such the claims set forth in the counter-claim are barred in the present action.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs allege the affirmative defense of equitable estoppel and quasi estoppel by the action above referenced.

FOURTH AFFIRMATIVE DEFENSE

Defendants failed to take reasonable steps to mitigate the claimed or alleged damages.

FIFTH AFFIRMATIVE DEFENSE

Defendants are not entitled to all or part of the relief they seek by way of their Counter-Claim for the reason that the damages alleged in their claim reasonably could have been avoided by the counter-claimants.

SIXTH AFFIRMATIVE DEFENSE

Pursuant to Rule 11 of the IDAHO RULES OF CIVIL PROCEDURE, all possible affirmative defenses may not have been alleged and set forth herein because sufficient facts are not available at this time to form an adequate factual basis for the defenses, after counter-defendants have made reasonable inquiry to obtain such facts. Therefore, counter-defendants reserves the right to raise additional affirmative defenses as fact-gathering and discovery in this matter progresses.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial upon all facts triable by a jury.

REQUEST FOR ATTORNEYS FEES AND COSTS

Plaintiffs have engaged the services of Thomas G. Maile, IV to defend this action and reasonable attorney fees plus costs should be ordered against the Defendants and Idaho Code 12-120; 12-121; 12-123.

PRAYER

WHEREFORE, Plaintiffs pray for Judgment as follows:

1 That Defendants' Counterclaim be dismissed against the Plaintiffs.

2 For Plaintiffs' reasonable attorney fees, plus costs.

3 For such other and further relief as the Court deems just and equitable in the premises.

DATED this 5th day of March, 2009.

THOMAS G. MAILE, IV., Pro Se and counsel for
Berkshire Investments and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 5th day of March, 2009, I caused a true and correct copy of the foregoing REPLY TO AMENDED ANSWER OF JOHN TAYLOR, DALLAN TAYLOR, AND JOHN TRUST AND COUNTERCLAIM to be delivered, addressed as follows:

Mark Stephen Prusynski
PO Box 829
Boise, ID 83701
Phone: (208) 345-2000
Fax: (208) 385-5384

( ) U. S. Mail
(X) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

Connie W. Taylor
CLARK and FEENEY
P.O. Drawer 785
Lewiston, Idaho 83501
Facsimile: (208) 746-9160

( ) U. S. Mail
(X) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

THOMAS G. MAILE, IV., Pro Se and counsel for
Berkshire Investments and Colleen Birch-Maile

ORIGINAL

RECEIVED
MAR 13 2009
Ada County Clerk

NO. _____ FILED 5PM 1:05
A.M. _____
MAR 13 2009
J. DA[illegible], Clerk
By KAT[illegible]STEHL
DEPUTY

Mark S. Prusynski, ISB No. 2349
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
msp@moffatt.com
17136.0306

Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, fka CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION,

Defendants.

Case No. CV-OC-0723232

AMENDED ANSWER OF CONNIE WRIGHT TAYLOR, CLARK AND FEENEY AND PAUL T. CLARK TO AMENDED COMPLAINT

AND COUNTERCLAIM

KS

COME NOW the defendants, Connie Wright Taylor, Clark and Feeney, and Paul T. Clark, by and through the undersigned counsel, and answer plaintiffs' amended complaint as follows:

1. Plaintiffs' complaint fails to state a claim upon which relief can be granted.

2. These defendants deny each and every allegation of plaintiffs' complaint not specifically admitted herein.

3. Responding to paragraph 1 of plaintiffs' complaint, defendants admit that the Mailes are husband and wife and reside in Ada County, that Berkshire Investments is an Idaho limited liability company, that Clark and Feeney is an Idaho partnership, that Paul T. Clark is an individual, but deny the remaining allegations of said paragraph.

4. Responding to paragraph 2 of plaintiffs' amended complaint, defendants admit that Clark and Feeney, Paul T. Clark and Connie Wright Taylor were at all relevant times licensed Idaho attorneys and were conducting business in the state of Idaho, but deny the remaining allegations of said paragraph.

5. Defendants admit paragraph 3 of plaintiffs' amended complaint.

6. Responding to a multitude of references in plaintiffs' amended complaint to documents and pleadings, those documents or pleadings speak for themselves and require no admission or denial; but defendants do not accept and specifically deny the plaintiffs' characterizations of such documents.

7. Defendant admit that the plaintiffs attempted to purchase property from the Theodore Johnson Trust, admit that the purchase was found to be improper by The

Honorable Ronald J. Roper, and admit that judgment was entered returning the property to the Johnson Trust. Defendants deny any impropriety on their part in the conduct of said lawsuit.

8. Defendants deny the plaintiffs' allegation that they were not beneficiaries of the Johnson Trust as it relates to the Linder Road property. The Release and Disclaimer executed by the successor trustees and all beneficiaries specifically reserved to the Taylors all rights to the lawsuit against plaintiffs seeking recovery of the property they had acquired wrongfully.

9. Defendants deny the remaining allegations of plaintiffs' amended complaint.

FIRST AFFIRMATIVE DEFENSE

10. Plaintiffs' claims are barred pursuant to Idaho Rules of Civil Procedure 12(b)(8) because there is another action pending between the same parties on the same cause.

SECOND AFFIRMATIVE DEFENSE

11. Plaintiffs' claims are barred by the doctrines of *res judicata,* collateral estoppel, waiver, laches and unclean hands.

THIRD AFFIRMATIVE DEFENSE

12. Plaintiffs had no attorney-client relationship with these defendants and therefore lack standing to bring their negligence claims or breach of fiduciary duty claims.

FOURTH AFFIRMATIVE DEFENSE

13. Plaintiffs' tort claims are barred by the economic loss rule.

FIFTH AFFIRMATIVE DEFENSE

14. This action was brought frivolously and without foundation, in violation of Rule 11 of the Idaho Rules of Civil Procedure.

COUNTERCLAIMS

For counterclaims against the plaintiffs, the defendants allege as follows:

1. The allegations as to residency and jurisdiction admitted in the Amended Answer above are incorporated herein by reference.

2. Under the terms of the fee agreement between Clark and Feeney and the defendants, Taylors and Johnson Trust, Clark and Feeney has an ownership interest in the Linder Road real property.

3. **Slander of Title**. Plaintiffs have filed a number of *lis pendens* against the subject real property, even after the entry of the district court judgment quieting title in the Johnson Trust. The filing of these documents constitutes slander of title, as the claim to an ownership interest in the property was a slanderous statement which was false, done with malice, and resulted in special damages to the defendants (in an amount which will be proved at trial) because it has prevented them from either financing or selling the Linder Road property.

4. **Abuse of Process**. Plaintiffs, in filing this second action relating to the Linder Road property and issuing a *lis pendens* to prevent the defendants from having the use of the property, have affirmatively used a legal process primarily to accomplish an improper purpose outside of simply gaining an advantage in the underlying litigation for which the process was not designed (i.e., keeping the real property tied up beyond the time of the appeal of the initial lawsuit in which the property was ordered returned to the Johnson Trust). Plaintiffs' actions have prevented the defendants from selling the property, which has declined in value since the filing of this action, damaging the defendants by misuse of the process external to the litigation that cannot be compensated in the underlying proceeding.

5. **Intentional interference with a prospective economic advantage .** By prohibiting the defendants from selling the Linder Road property, plaintiffs have committed the tort of intentional interference with a prospective economic advantage. Defendants have had several inquiries on the Linder Road property, but have been prevented from selling the property solely because of the plaintiffs' *lis pendens*, resulting so far in the loss of an offer to purchase the property for $1.8 million, to date, with additional offers being received. The plaintiffs' interference was for an improper purpose, and has caused resulting damage to the Johnson Trust.

6. **Attorney fees:** As a result of the actions of plaintiffs in this matter, defendants have been required to retain the legal counsel from the law offices of Moffatt Thomas, and are entitled to recover their attorney fees incurred in this matter pursuant to IRCP 11 and Idaho Code Sections 12-121 and 12-123.

WHEREFORE, defendants pray that the Court enter an order granting the following relief:

1. That the Amended Complaint be dismissed and that the plaintiffs take nothing thereby.

2. That Rule 11 sanctions be imposed on the attorney for the plaintiffs for bringing this frivolous action.

3. That the defendants be awarded reasonable attorney fees and costs incurred in responding to the Complaint pursuant to I.C. 12-121, 123 and I.R.C.P 11.

4. That judgment be entered against the plaintiffs in an amount to be determined at trial for slander of title.

5. That judgment be entered against the plaintiffs in an amount to be determined at trial for abuse of process.

6. That judgment be entered against the Plaintiff for intentional interference with prospective economic advantage.

7. That the defendants be awarded reasonable attorney fees and costs incurred in bringing their counterclaim pursuant to I.C. 12-121, 123 and I.R.C.P 11.

8. For such other and further relief as the Court deems just, including sanctions pursuant to Rule 11 of the Idaho Rules of Civil Procedure.

DATED this 12th day of March, 2009.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Mark S. Prusynski – Of the Firm
Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of March, 2009, I caused a true and correct copy of the foregoing **AMENDED ANSWER OF CONNIE WRIGHT TAYLOR, CLARK AND FEENEY AND PAUL T. CLARK TO AMENDED COMPLAINT AND COUNTERCLAIM** to be served by the method indicated below, and addressed to the following:

Thomas G. Maile IV
LAW OFFICES OF THOMAS G MAILE IV, P.A.
380 W. State St.
Eagle, ID 83616-4902
Facsimile (208) 939-1001
Counsel for Plaintiffs

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(✓) Facsimile

Connie W. Taylor
CLARK AND FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Facsimile (208) 746-9160
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(✓) Facsimile

Mark S. Prusynski

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

REPLY TO AMENDED ANSWER OF CONNIE TAYLOR, CLARK AND FEENEY AND PAUL T. CLARK AND COUNTERCLAIM

COMES NOW the above named Plaintiffs, by and through their attorney, Thomas Maile hereby provide their Reply to Defendants' Amended Answer of Connie Wrigth Taylor, Clark and

Feeney and Paul T. Clark and Counterclaim and further complain and allege as follows:

1. Plaintiffs' deny each and every allegation of Defendants' Amended Answer of Connie Wright Taylor, Clark and Feeney, and Paul T. Clark Trust and Counterclaim which is not specifically admitted herein.

2. Plaintiffs admit the allegations set forth in paragraph 1 of the Counter-Claim.

3. That based upon information and belief, plaintiffs admit paragraph 2, that under the fee agreement all defendants maintain an ownership interest in Linder Road real property.

4. Plaintiffs specifically deny paragraphs 3, 4, 5, 6 of the Counter-Claim.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs affirmatively allege that the defendants have been required to return the purchase price of $400,000.00 by previous court proceedings. The same remains unpaid, including interest thereon and the plaintiffs are entitled to a "vendee's lien" on the subject real property pursuant to the previous court proceedings and further pursuant to Idaho Code section 45-804. That in addition, the plaintiffs herein have previously filed their Lis Pendens in the prior proceedings which remains of record with the Ada County Recorder's Office, as further protection of the vendee's lien. That such liens are superior to the Lis Pendens herein and as such the Lis Pendens filed herein has not impaired the title to the subject real property and as such the claims set forth in the counter-claim are barred in the present action.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have alleged allegations of wrongful conduct in violation of Chapter 18 Title 78 of the Idaho Code. That plaintiffs are availed of certain remedies set forth below including but

not limited to:

18-7804 PROHIBITED ACTIVITIES -- PENALTIES.

(a) It is unlawful for any person who has received any proceeds derived directly or indirectly from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property. Whoever violates this subsection is guilty of a felony.

18-7805 RACKETEERING -- CIVIL REMEDIES.

(a) A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three (3) times the actual damages proved and the cost of the suit, including reasonable attorney's fees.

(c) The district court has jurisdiction to prevent, restrain and remedy racketeering after making provisions for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. Prior to a determination of liability, such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.

(d) Following a determination of liability, such orders may include, but are not limited to:

(1) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

That such potential remedy, including the request for a constructive trust, authorizes the filing a Lis Pendens herein and as such the claims set forth in the counter-claim are barred in the present action.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs allege the affirmative defense of equitable estoppel and quasi estoppel by the

action above referenced.

FOURTH AFFIRMATIVE DEFENSE

Defendants failed to take reasonable steps to mitigate the claimed or alleged damages.

FIFTH AFFIRMATIVE DEFENSE

Defendants are not entitled to all or part of the relief they seek by way of their Counter-Claim for the reason that the damages alleged in their claim reasonably could have been avoided by the counter-claimants.

SIXTH AFFIRMATIVE DEFENSE

Pursuant to Rule 11 of the IDAHO RULES OF CIVIL PROCEDURE, all possible affirmative defenses may not have been alleged and set forth herein because sufficient facts are not available at this time to form an adequate factual basis for the defenses, after counter-defendants have made reasonable inquiry to obtain such facts. Therefore, counter-defendants reserves the right to raise additional affirmative defenses as fact-gathering and discovery in this matter progresses.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial upon all facts triable by a jury.

REQUEST FOR ATTORNEYS FEES AND COSTS

Plaintiffs have engaged the services of Thomas G. Maile, IV to defend this action and reasonable attorney fees plus costs should be ordered against the Defendants and Idaho Code 12-120; 12-121; 12-123.

PRAYER

WHEREFORE, Plaintiffs pray for Judgment as follows:

1 That Defendants' Counterclaim be dismissed against the Plaintiffs.

2 For Plaintiffs' reasonable attorney fees, plus costs.

3 For such other and further relief as the Court deems just and equitable in the premises.

DATED this 17th day of March, 2009.

THOMAS G. MAILE, ~~IV.~~, Pro Se and counsel for
Berkshire Investments and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 17th day of March, 2009, I caused a true and correct copy of the foregoing REPLY TO AMENDED ANSWER OF CONNIE TAYLOR, CLARK AND FEENEY AND PAUL T. CLARK AND COUNTERCLAIM to be delivered, addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV., Pro Se and counsel for
Berkshire Investments and Colleen Birch-Maile

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants.	Case No. CV-OC-0723232 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: DEFENDANTS' COUNTERCLAIM**

COMES NOW, the undersigned, Thomas G. Maile, IV, pro se and attorney of record for Berkshire Investments, LLC and Colleen Birch-Maile herein, and hereby moves this Court to

enter Summary Judgment in favor of the Plaintiffs on the grounds and for the reasons, that the claims set forth in all of the defendants' counterclaim are barred as a matter of law, and there are no material factual issues in dispute.

This Motion is based upon the Affidavit of Thomas Maile in Support of Motion for Summary Judgment and In Opposition to Defendants' Motions for Summary Judgment and the Memorandum Brief in Support of the Motion Summary Judgment, all filed concurrently herewith and further upon the file and record in this matter. Oral argument is requested.

DATED this 17th day of March, 2009.

THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of March, 2009, I served the foregoing (1) MOTION IN SUPPORT OF SUMMARY JUDGMENT, (2) MEMORANDUM BRIEF IN SUPPORT OF SUMMARY JUDGMENT, (3) AFFIDAVIT OF THOMAS G. MAILE, IV. IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, together with the (4) NOTICE OF HEARING by having a true and complete copy personally delivered, by facsimile and/or by depositing the same in the United States Mail, postage prepaid thereon, and addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV.

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

AFFIDAVIT OF THOMAS G. MAILE, IV. IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss:
County of Ada)

AFFIDAVIT OF THOMAS G. MAILE IV., IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - Pg 1

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is a Pro Se litigant in the above captioned matter and attorney of record for the Co-Plaintiffs. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Affidavit of Thomas Maile filed in *Ada County Case No. CV OC 04-00473D, Taylor vs Maile* and the same is made part hereof as if set forth in full herein. involved in either the current litigation and/or the litigation on appeal.

3. Attached hereto as Exhibit "B" is a true and correct copy of the Notice of Lis Pendens filed with the Ada County Recorders office on May 18, 2006, bearing Instrument No. 106078472.

4. Your affiant has never executed any documentation releasing said Notice of Lis Pendens (Exhibit "B") and as of today's date it remains a public record with the Ada County Recorder's Office. There have been no monies received from the Theodore L. Johnson Trust and/or the individual Taylors, relating to the return of the purchase price and/or interest thereon.

5. Attached hereto as Exhibit "C" is a true and correct copy of the Affidavit of R. John Taylor in Support of Beneficiaries' Motion for Summary Judgment in *Ada County Case No. CV OC 04-00473D* which was filed in February 2006.

6. Attached hereto as Exhibit "D" is a true and correct copy of the Affidavit of Terry Rudd, dated November 23, 2004 with the attachment representing his appraisal report, who opined that the Linder Road property was valued at $820,000.00 in *Ada County Case No. CV OC 04-00473D*.

7. That in defense to the claims of the Theodore L. Johnson Trust and the Taylors' claims there were three (3) Idaho licensed real estate appraisers and an Idaho Realtor who were prepared to provide testimony and opinions that the fair market value of the Linder Road property at the time of the purchase was $400,000.00. That your affiant, his wife and Berkshire Investments were preparing the defense to the claims by the trust and the Taylors that the purchase price was fair and reasonable. That consistent with the prior ruling in *Ada County Case No. CV OC 04-00473D* the Honorable Judge Ronald Wilper had ruled that "the Plaintiffs, now with standing as trustees, did not act promptly to pursue rescission once the grounds for it arose" (page 9 of Exhibit "K" to Affidavit of Thomas Maile Part 2). That as a result of the criminal conduct and misrepresentations made to the court by the defendants, your affiant, Berkshire Investments and his wife were not able to defend such claims for money damages.

DATED this 17th day of March, 2009.

THOMAS G. MAILE, IV, Pro Se and
Attorney for Berkshire Investments and Colleen Birch Maile

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 17th day of March, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,
Plaintiffs/Counter-Defendants,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-defendant,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.

Defendants/Counter-claimants.

Case No. CV OC 04-00473D

AFFIDAVIT OF INTEREST COMPUTATION

STATE OF IDAHO)
) ss.
County of Ada)

THOMAS G. MAILE, IV, being first duly sworn upon oath, deposes and says:

EXHIBIT "A'

1. Your Affiant is the attorney for the above-named Defendants/Counter-Claimants and further appears Pro Se, and provides this Affidavit pursuant to Idaho Code 28-22-104. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. That pursuant to the Court's determination that the title to the real property in the subject proceeding was restored to the trust, the Plaintiffs were obligated to Berkshire Investment LLC, to repay the purchase price of $400,000.00. No sums have been received from the plaintiffs to the current date.

3. Your affiant computed interest pursuant to I.C. 28-22-104, on the First Amended Judgment entered in this matter on July 21, 2006, as follows:

Principal amount of Judgment:	$400,000.00
Interest from date of Judgment (July 21, 2006) to and including December 31, 2006 (164 days) at 12.0 percent per annum:	$ 21,567.64
Interest from January 1, 2007 to and including December 31, 2007 (365 days) at 12.0 percent per annum:	$ 48,000.00
Interest from January 1, 2008 to and including December 31, 2008 (366 days) at 12.0 percent per annum:	$ 48,132.66
Interest from January 1, 2009 to and including February 10, 2009 (41 days) at 12.0 percent per annum:	$ 5,391.91
TOTAL AS OF February 10, 2009:	**$523,092.21**
Interest per annum:	$ 48,000.00

Interest per diem: $ 131.51

DATED this 17 day of February, 2009.

THOMAS G. MAILE, IV
Attorney for Defendants/Counter-Claimants

17 SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this day of February, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires July 30, 2014

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT 9.00 3
BOISE IDAHO 05/18/06 04:10 PM
DEPUTY Bonnie Oberbillig
RECORDED-REQUEST OF
Thomas Maile

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Colleen Maile and Berkshire Investments, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REED TAYLOR, DALLAN TAYLOR and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY and BERKSHIRE INVESTMENTS, LLC.,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-Defendants,

vs.

Case No. CV OC 04-00473D

NOTICE OF LIS PENDENS

EXHIBIT "B'

THOMAS MAILE IV. and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.,

Defendants/Counter-Claimants.

TO: ALL INTERESTED PARTIES

RE: LITIGATION AFFECTING THE RIGHTS AND INTERESTS BETWEEN AND AMONGST THE ABOVE-REFERENCED PARTIES

The nature of the action supporting the above-named Defendants/Counter-Claimants' claim to the legal and equitable rights in the real property hereinafter described is a quiet title action, declaratory judgment, estoppel, filed in the above captioned matter in Ada County, State of Idaho, including a claim for damages, determination of title and interests to the real property, costs and attorneys fees.

The above Defendants/Counter-Claimants' claims an interest in said real property or properties described as follows:

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho.

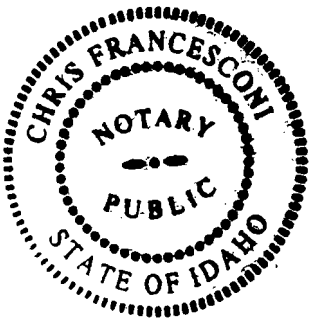
DATED this 16 day of May, 2006.

THOMAS G. MAILE, IV., individually, and as Managing member of Berkshire Investments L.L.C.

STATE OF IDAHO)
) ss.
County of Ada)

On this 18th day of May, 2006, before me, the undersigned, a Notary Public in and for said state, personally appeared THOMAS G. MAILE, IV., known to be the managing member of Berkshire Investments L.L.C., and the individual, and further known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same for Berkshire Investments L.L.C., and for himself individually.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last above written.



Notary Public for Idaho
Residing at Eagle, Idaho
Commission Expires: 9/19/09

CONNIE W. TAYLOR
CLARK and FEENEY
Attorneys for Plaintiffs
1229 Main Street
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB No. 4837

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants.

Case No. CV OC 0400473D

AFFIDAVIT OF R. JOHN TAYLOR IN SUPPORT OF BENEFICIARIES' MOTION FOR SUMMARY JUDGMENT

EXHIBIT "C'

STATE OF IDAHO)
) ss.
County of Nez Perce)

R. JOHN TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am over the age of 18 years and make this affidavit from personal knowledge.

2. I did not learn that the real property on Linder Road was being sold until after the transaction had closed on September 16, 2002, which was two days after Uncle Ted's death. My siblings and I did not learn that the property was owned by a trust in which we and our mother were named as beneficiaries until several months after the sale. There was no court approval of that sale. To my knowledge, the successor trustees did not carefully examine the fairness and propriety of the transaction before closing it. When my brothers and I contacted Beth Rogers about our concerns over the sale, she initially agreed to bring an action on behalf of the trust, then abruptly changed her mind. This occurred right after we had asked her for a copy of the Trust tax return, which she refused to provide. The Rogers agreed to step aside as trustees only after all the beneficiaries agreed not to sue them and to waive any accounting for the Trust.

3. Under the terms of the Trust Agreement, (Exhibit A to this affidavit), the $100,000 down payment made by the Mailes was required to be divided into five equal shares. Because their father (Richard Johnson) had died, Beth Rogers and her brothers were entitled to immediate payment of their $20,000. My mother would have been entitled to only interest income on the $20,000 during her lifetime, at the discretion of the trustees. Of the remaining $300,000 received from the Mailes, Beth and her siblings were entitled to immediate payment of $60,000, while my mother would receive, at most, interest income on her share. Again, this would have been paid only if the trustees elected to do so. My siblings and I were to receive no payment until after our mother's death.

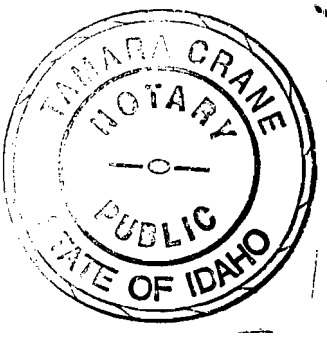
4. If I had been notified that I was a beneficiary prior to the closing of the Mailes' purchase of the Linder Road property, I would have been adamantly opposed to the sale being approved. I was very aware in the fall of 2002 that real property values in the Eagle area were escalating rapidly, and I was shocked when I learned that this 40-acre parcel of prime development land in Eagle had been sold for only $400,000. I knew that this property was in an area zoned for housing developments and was near the new Eagle high school. I was also personally aware of the high-end residential development that was occurring in the Eagle area near this real property.

5. After Ted's death, there was absolutely no urgency to sell the Linder Road property, as there were other assets which were more than sufficient to pay Uncle Ted's debts (which were minimal) and to make substantial distributions. Because the principal of the trust would not be distributed to the members of my family in the foreseeable future, from our point of view it would have been much more financially beneficial for the property to be held by the Trust and then placed on the open market so that its value as development property could be explored and maximized. This is supported by the fact that in September of 2005 (less than three years later) we received an offer to purchase this property for $1.8 million dollars. A true and correct copy of that Real Estate Purchase and Sale Agreement is attached as Exhibit B to this affidavit.

FURTHER your affiant sayeth naught.

R. JOHN TAYLOR

SUBSCRIBED AND SWORN to before me this 7th day of February, 2006.



Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 05/06/08

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of February, 2006, I caused to be served a true and correct copy of this document by the method indicated below, and addressed to the following:

Thomas Maile Attorney at Law 380 W. State Eagle, ID 83616	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Jack S. Gjording Gjording & Fouster P.O. Box 2837 Boise, ID 83702	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Dennis Charney Attorney at Law 951 E. Plaza Dr. Ste. 140 Eagle, ID 83616	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)

Connie W. Taylor
Attorney for Plaintiffs

REVOCABLE TRUST AGREEMENT

THIS TRUST AGREEMENT is made and entered into this 4 day of November, 1997, between **THEODORE L. JOHNSON**, a single person, of Ada County, Idaho, hereinafter referred to as "Grantor", and **THEODORE L. JOHNSON**, hereinafter referred to as "Trustee".

WITNESSETH:

WHEREAS, the Grantor desires to create this Trust Agreement effective this date and the Trustee agrees to act as Trustee thereof;

NOW, THEREFORE, the Grantor and Trustee agree as follows:

ARTICLE I

1. **TRUST NAME:** This trust shall be known as: THEODORE L. JOHNSON REVOCABLE TRUST.

2. **TRUST PROPERTY:** The Grantor hereby transfer, convey and deliver to the trust the property set forth on Schedule "A" which is attached hereto and by reference made part hereof. All the property transferred and delivered to the trust shall, upon written acceptance thereof by the Trustee, constitute the trust estate and shall be held, managed and distributed as hereinafter provided. That no consideration was or will be given by the Trustee for the conveyance or transfer to it of any of the Trust Estate; that the Trustee accepts such title to the Trust Estate as is conveyed or transferred to it hereunder, without liability or responsibility for the conditions or validity of such title; and that the Trust estate has been or will be conveyed or transferred to the Trustee, IN TRUST with power of sale, for the uses and purposes herein provided.

3. **ADDITIONAL PROPERTY:** The Grantor, or any other person, with the consent of the Trustee, may name the trust as beneficiary of life insurance policies, or deposit property with the trust, or devise property to the trust.

ARTICLE II

1. **WITHDRAWALS BY Grantor:** While Grantor is living, the Trust shall distribute to or for the benefit of the Grantor such sums from income and principal as the Grantor may at any time request.

2. **DISTRIBUTIONS BY TRUSTEE:** The Trustee may distribute to or for the benefit of the Grantor, such sums from income and principal as the Trustee deems reasonable for the maintenance, support and health of Grantor.

3. **CHARACTER OF PROPERTY:** All property transferred to this trust by the Grantor shall retain its character as separate property during the lifetime of the Grantor and any withdrawal from the trust by the Grantor of such property shall be his separate property. 4. **LIFE INSURANCE:** The following rights and obligations apply to any life insurance policies which designate the trust as beneficiary.

a. Premium Payment: The owner or owners of any life insurance policies shall

T. J. 11-4-97

pay all premiums and other charges to keep in force life insurance policies which such owner or owners desire to maintain on the life of Grantor. The trust shall be under no obligation to pay premiums or other charges but may make such payments if sufficient cash is available to the trust.

b. Collection of Benefits: Upon the death of the insured, the trust shall collect any benefits. The trust is authorized to take any action to collect the benefits which it deems reasonable and proper. The trust may compromise or settle any claim and may execute any property release or acquittance.

c. Policy Rights: The owner of each policy shall retain and have the right to change the beneficiary and to exercise any option, right or privilege relating to each policy, including the right to borrow in accordance with the provisions of the policy and to pledge the policy as collateral. Nothing herein shall bestow upon Grantor, who does not own any policy, any right, privilege or incident or ownership.

ARTICLE III

1. **RIGHTS OF THE GRANTOR:** The Grantor specifically reserves the following rights:

A. **ADDITION TO THE TRUST ESTATE:** The Grantor may, from time to time, by conveyance, assignment, transfer, or Will, add property of any kind or any part thereof, to the Trust Estate, which shall thereupon be subject to all the terms and provisions of this trust.

B. **ALTERING OR REVOKING TRUST:** While Grantor is living and competent, the Grantor may, at any time or times, by written notice filed with the Trustee:

1. Alter or amend any provision thereof;
2. Revoke this Trust in whole or in part, and in such event, the Trust Estate or portion as Grantor's separate property.

C. **DIRECTION BY THE GRANTOR TO THE TRUSTEE:** While Grantor is living and competent, the Grantor may, at any time or times, direct the Trustee in writing:

1. To retain as part of the Trust Estate, any securities, properties, or investments at any tie held hereunder, for such length of time as such directions may provide;
2. Or to sell, encumber, lease, manage, control, or dispose of any property of the Trust Estate;
3. Or to invest available income or principal in specific securities, properties or investments.

The Trustee shall not be liable for any loss sustained or incurred by reason of its compliance with any such written instruction of the Grantor.

II. **ADMINISTRATION BY THE TRUSTEE:**

A. **THE TRUST BANK ACCOUNT:** Deposits and withdrawals by the Grantor or Trustee to or from Bank or Savings and Loan accounts held by the trust shall automatically be deemed to constitute contributions to or withdrawals from the trust estate.

B. **PAYMENT OF TRUST EXPENSE:** The Trustee shall pay or reserve sufficient funds to pay all expenses of management and administration of the Trust Estate, including:

1. The compensation of the Trustee;

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2. Out of pocket expenses of management and administration of the Trust Estate;

3. Payments of interest and principal on any outstanding notes, whether or not secured by a Deed of Trust, on any real estate which may be part of the Trust Estate;

C. **DISTRIBUTION TO THE GRANTOR**: All of the net income shall be distributed to or for the use and benefit of the Grantor while he shall live, in convenient installments, not less frequently than quarterly, as his separate property. In addition to the net income, the Trustee may pay to or apply for the benefit of the Grantor, out of the principal of the Trust Estate, such sums as trustee deems necessary for his reason- able care, support, health and comfort, if in trustee's discretion, the income to which he is entitled is considered insufficient for such purposes.

a. Distribution: The Trustee shall pay to or for the benefit of the Grantor such sums from the income and principal as the surviving Grantor may at any time request.

b. Grantor Disability: Should the Trustee at any time consider the Grantor to be unable for any reason to direct the Trustee with respect to disposition of such sums from the trust estate, the Trustee is authorized in its sole and absolute discretion to expend for the Grantor such sums from principal or income as the Trustee shall deem necessary or advisable for the Grantor's support, maintenance and health.

D. **UNDISTRIBUTED FUNDS**: All undistributed funds in the Trust Checking Account at the time of the termination of the Trust, shall become a part of the Corpus of the Trust.

III. ADMINISTRATION OF THE TRUST UPON THE DEATH OF THE GRANTOR:

A. **FUNERAL EXPENSES**: Upon the death of the Grantor, the Trustee may pay the expenses of her last illness and funeral, from either income or principal, at the discretion of the Trustee, unless other adequate provision shall have been made therefore.

B. **TAXES AND OTHER CHARGES**:

1. Upon the death of the Grantor, any estate, inheritance, succession or other death taxes, duties, charges or assessments, together with interest, penalties, costs, Trustee's compensation, and attorneys' fees incurred by reason of the Trust Estate or any interest therein being included for such tax purposes, may be paid by the Trustee from the Trust Estate, unless other adequate provisions shall have been made therefore. Any such payments shall be charged to principal of the Trust Estate or the separate trust so included for such tax purposes.

2. The Trustee shall have full power and authority to pay from the Trust Estate any other taxes, charges or assessments for which the Trustee, the Trust Estate, or any interest therein becomes liable, and any such payments shall be made from and charged to either income or principal of the Trust Estate or any share or separate trust thereof, as the Trustee in its discretion deems proper.

3. The Trustee may make any payments directly or to a personal representative or other fiduciary and shall be under no duty to see to the application of an funds so paid.

IV. DISPOSITION OF TRUST ASSETS UPON DEATH OF GRANTOR:

The Trustee shall hold, manage, invest and reinvest the Trust Estate and shall collect and receive the interest, income of profits therefrom for the benefit of Grantor for the life of Grantor and thereafter and upon the death of the Grantor the corpus of the trust and all income and interest acquired hereafter, shall be held, applied and distributed in the following manner:

a. After the death of Grantor, the Trustee shall hold, manage and control the property comprising the trust estate for the benefit of the HELEN TAYLOR (20%); HAZEL FISHER (20%); BETTY FARNWORTH (20%); JOYCE SELLEY (20%), and the surviving issue of the Grantor's deceased brother, RICHARD B. JOHNSON (20%), as follows:

Twenty percent (20%) of the trust estate shall be distributed immediately upon Grantor's death to the surviving issue of the Grantor's deceased brother, RICHARD B. JOHNSON, share and share alike. In the event any of Grantor's nieces or nephews born the issue of RICHARD B. JOHNSON, should fail to survive the death of Grantor, and leaves issue then the issue of such deceased beneficiary will share and share alike in the share of the predeceased beneficiary' share as if said beneficiary were alive.

Twenty percent (20%)of the trust estate shall be held in trust for the lifetime of HELEN TAYLOR and upon her death then the remaining portion shall be distributed to her issue share and share alike. In the event any of her issue should fail to survive the death of HELEN TAYLOR, and leaves issue then the issue of such deceased beneficiary will share and share alike in the share of the predeceased beneficiary' share as if said beneficiary were alive.

Twenty percent (20%)of the trust estate shall be held in trust for the lifetime of HAZEL FISHER and upon her death then the remaining portion shall be distributed to her issue share and share alike. In the event any of her issue should fail to survive the death of HAZEL FISHER, and leaves issue then the issue of such deceased beneficiary will share and share alike in the share of the predeceased beneficiary' share as if said beneficiary were alive.

Twenty percent (20%)of the trust estate shall be held in trust for the lifetime of BETTY FARNWORTH and upon her death then the remaining portion shall be distributed to her issue share and share alike. In the event any of her issue should fail to survive the death of BETTY FARNWORTH, and leaves issue then the issue of such deceased beneficiary will share and share alike in the share of the predeceased beneficiary' share as if said beneficiary were alive.

Twenty percent (20%)of the trust estate shall be held in trust for the lifetime of JOYCE SELLEY and upon her death then the remaining portion shall be distributed to her issue share and share alike. In the event any of her issue should fail to survive the death of JOYCE SELLEY, and leaves issue then the issue of such deceased beneficiary will share and share alike in the share of the predeceased beneficiary' share as if said beneficiary were alive.

Discretionary Payments to Helen Taylor, Hazel Fisher, Betty Farnworth, and Joyce Selley: The Trustee may pay to or apply for the benefit of Helen Taylor, Hazel Fisher, Betty Farnworth, and Joyce Selley such sums from the income of their 20% share of the corpus of the trust, as the Trustee deems reasonable for the maintenance, education, support and health of the said beneficiary during their lifetime. The balance of the income of their respective trust not so distributed shall be accumulated and added to the principal thereof at the end of each fiscal year of the trust.

A. **Income for Grantor's life:** The Trustee shall distribute all of the income of this Trust in convenient installments, but not less frequently than quarter-annually, to or for the benefit of Grantor, so long as he shall live.

B. **Use of Principal for Grantor's life**: So long as Grantor is living, the Trustee, in the sole exercise of the Trustee's discretion, shall distribute to or for the benefit of Grantor, so

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much of the principal of this Trust as Trustee shall deem necessary or desirable for his proper heath, education, maintenance and support.

C. **Creation of Beneficiaries' Issues Trusts if Issue are under the age of 35 years of age**: After the death of HELEN TAYLOR; HAZEL FISHER; BETTY FARNWORTH; JOYCE SELLEY, and the surviving issue of the Grantor's deceased brother, RICHARD B. JOHNSON, and/or in the event any such beneficiary fails to survive Grantor's death and leaves issue who have not attained the age of thirty-five (35) years, the Trustee shall immediately divide all of the remaining principal and undistributed income of this trust into as many equal shares as represent the surviving issue of said beneficiaries, one share to each, per stirpes, and the Trustee shall establish a separate trust (except as to the share of any issue then thirty-five (35) years of age or older) for each issue then living and one for the issue of each deceased issue, to be held and distributed as follows:

1. **Distribution When Separate Trusts for Issue Created.** If any issue of HELEN TAYLOR; HAZEL FISHER; BETTY FARNWORTH; JOYCE SELLEY, and the surviving issue of the Grantor's deceased brother, RICHARD B. JOHNSON shall not have attained the age of twenty-five (25) years at the time of distribution of their respective share of the principal of this trust is to conveyed to said issue, the Trustee shall immediately thereafter distribute absolutely to such issue one third (1/3) of his or her particular share; if any issue shall have attained the age of thirty (30) years at such time, the Trustee shall distribute absolutely to such issue one third (1/3) of his or her share; and if any issue shall have attained the age of thirty-five (35) years at such time, the Trustee shall distribute absolutely to such issue all of his or her share.

2. **Distribution of Income and Principal for issue.** The Trustee shall distribute to or for the benefit of each issue all of the income derived from his or her particular share. In addition, the Trustee, at any time and from time to time, shall distribute to or for the benefit of each issue so much or all or none of the principal of his or her share as the Trustee, in the Trustee's absolute discretion, shall deem necessary or desirable for the proper health, education, maintenance and support of such issue. Further, the Trustee shall distribute absolutely to or for the benefit for any issue one-third (1/3) of the principal of his or her share when such issue attains the age of twenty-five (25), one third (1/3) of the remaining principal when such issue attains the age of thirty (30) years, and the remaining principal and undistributed income of his or her share when such issue attains the age of thirty-five (35) years.

3. **Distribution to Issue of Beneficiaries.** Except as herein provided, if a share of this trust is at any time set apart for surviving issue of Grantor's deceased beneficiaries above named, such share shall be immediately distributed absolutely to such issue, free and clear of any trust unless said issue is under the age of thirty-five (35) years of age.

4. **Distribution Upon Death of Issue.** Should any issue of any of the above referenced beneficiaries die before his or her share has been distributed absolutely to him or her, the then remaining principal and undistributed income of such share shall be distributed, upon the death of the issue, absolutely to his or her then living issue,per stirpes. In the event there are no such issue then living, the then remaining principal and undistributed income of the share of the deceased issue shall be divided among the other beneficiaries above referenced or their living issue, per stirpes; any portion thereof so divided and set apart for any issue who is the beneficiary of a share of this trust which has not yet been fully distributed shall be added to the principal of such share and held in further trusts and managed and distributed as a part thereof under the terms of this Article; and any portion thereof set apart for any issue who is the beneficiary of a share of this trust which has been fully distributed shall be distributed absolutely to such issue. In the event an of the beneficiary's last surviving issue shall die before the entire share set apart for such issue has been distributed absolutely to him or her and none of other beneficiaries issue are then living, the then remaining principal and undistributed income of such

share shall be distributed as follows:

100% thereof to: The lawful heirs of Grantor consistent with the laws of intestate Succession under the Laws of the State of Idaho.

5. **Retention for Minors**. In the event any beneficiary of the trusts created hereunder has not attained majority at the time a share thereof is required under the terms hereof to be distributed absolutely to such beneficiary, the Trustee, in the Trustee's absolute discretion, may retain the share of such minor beneficiary in further trust until he or she attains majority. In such event and during such time, the Trustee shall distribute to or for the benefit of such beneficiary so much of the income and principal of such beneficiary's particular share as the Trustee, in the Trustee's absolute discretion, shall deem necessary or desirable to provide for the proper health, education, maintenance and support of such beneficiary; any income from such share not so distributed shall be added to the principal thereof at the end of each fiscal year of the trust. At the time such beneficiary attains majority, or upon is or her death, whichever occurs first, the trust shall terminate as to such beneficiary's particular share, and the then remaining principal and undistributed income thereof shall be distributed absolutely, free and clear of any trust, to such beneficiary, or, if such beneficiary is then deceased, to his or her estate.

D. **PERPETUITIES AND ALIENATION:**

a. The absolute power of alienation of real property in the State of Idaho shall not be suspended by an provision of this trust agreement for a period longer than the continuance of the lives of the persons in being at the creation of any such limitation or condition and twenty-five (25) years thereafter. This trust agreement shall be construed to eliminate or modify any provisions violating the foregoing sentence, but in such a manner so that the provisions of this trust agreement are carried out to the greatest extent possible.

b. As to real property which is not in the State of Idaho, each trust's interest in such real property shall terminate twenty-one (21) years after the death of the last survivor of such of the beneficiaries thereunder as shall be living at the time of the death of the last Grantor to die, and thereupon such real property which is not in the State of Idaho shall be distributed, discharged of trust, to the persons then entitled to the income of such real property in the proportions to which they are entitled to the income.

E. **CHARACTER OF DISTRIBUTIONS:** Unless otherwise specifically stated, all distributions, whether of trust income or principal, shall be the separate property of each individual distributee. All income, rents, issues, profits, gains and appreciation of property distributed to each individual distributee as separate property, shall also be the separate property of each such distributee.

F. **SPENDTHRIFT PROTECTION:** Neither the principal nor the income of any trust herein created shall be liable for the debts of any beneficiary or issue of a beneficiary, nor shall the same be subject to seizure by any creditor under the writ of proceedings at law or in equity, nor bankruptcy proceedings, nor other legal process. No beneficiary or issue of a beneficiary, shall have the power to sell, assign, transfer, encumber or in any other manner to anticipate disposition of his or her interest in the trust estate or the income produced thereby. As used in this paragraph, the word beneficiary shall refer to any individual having a beneficial interest in the trust and not merely to an individual that the trust may specifically identify as a "beneficiary."

G. **TRANSACTIONS WITH GRANTOR'S ESTATE:** Upon the death of Grantor or any beneficiary the Trustee may, if it deems such action necessary or advisable for the protection of the estate of the deceased Grantor or beneficiary, or in the best interests of any

such estate or this trust and its beneficiaries: (a) purchase securities and other property from the legal representative of such estate and retain such property as part of the trust estate, or (b) made secured or unsecured loans to the legal representative of any such estate. The Trustee shall bear no liability for any loss resulting to the trust estate by reason of any such purchase or loan.

H. **INVESTMENT DIRECTION BY GRANTOR:** The Grantor, during his lifetime, reserve the right to direct the investment of the trust estate. The Trustee shall not be liable for any investments made at the direction of the Grantor or of the surviving Grantor in accordance with the foregoing provisions.

VI. **SUCCESSOR TRUSTEE**: Should THEODORE L. JOHNSON, be unable or unwilling for any reason to continue to act as Trustee, ANDREW and BETH ROGERS, husband and wife shall become co-successor Trustee of this trust and shall have all authority herein granted to the "Trustee." Should ANDREW and BETH ROGERS be unable or unwilling for any reason to act or continue to act as Co-Trustees, GARTH FISHER shall become Successor Trustee of this Trust and shall have all authority herein granted to the "Trustee".

VII. **POWERS OF TRUSTEE**: To carry out the purposes of the trust created under this Trust Agreement, and subject to any limitations stated elsewhere in this Trust, the Trustee is vested with the following powers with respect to the trust estate and any part of it, in addition to those powers now or hereafter conferred by law.

1. To manage, control, convey, exchange, partition, divide, improve and repair trust property.
2. To lease trust property for terms within or beyond the term of the trust;
3. To borrow money, and to encumber or hypothecate trust property by mortgage, deed of trust, pledge, or otherwise, provided sufficient security to manage the trust property.
4. To carry, at the expense of the trust, sufficient insurance in such kinds and in such amounts as the Trustee shall deem advisable to protect the trust estate and the Trustee against any hazard;
5. To commence or defend such litigation with respect to the trust of any property of the trust estate as the Trustee may deem advisable, at the expense of the trust;
6. To compromise or otherwise adjust any claims or litigations against or in favor of the trust;
7. To invest and reinvest the trust estate in every kind of property, real, personal or mixed, and every kind of investments, specifically including, but not by way of limitation, corporate obligations of every kind, stocks, common or preferred, shares of investment trusts, investment companies, and mutual funds, and mortgage participation, which men of prudence, discretion, and to manage the trust property. However, that so long as an income beneficiary is also acting as Trustee herein, he shall not invest in any wasting assets; provided further that during the lifetime of Grantor no real property or other investments shall be sold, traded or disposed of without the written consent of Grantor.
8. With respect to securities held in the trust, to have all the rights, powers, and privileges of an owner, including, but not by way of limitation, the power of voting, give proxies, any pay assessments; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, liquidations, sales, and leases, and incident to such participation to deposit securities with and transfer title to any protective or other committee on such terms as the Trustee may deem advisable; and to exercise or sell stock subscription or conversion rights.
9. In any case in which the Trustee is required, pursuant to the provisions of the trust, t divide any trust property into parts or shares for the purpose of distribution, or otherwise, the Trustee is authorized, in the Trustee's absolute discretion, to make the division and distribution in kind, including undivided interests in any property, or partly kind and partly in money, and for this purpose to make such sales of the trust property as the Trustee may deem necessary on such terms and conditions as the Trustee shall see fit.

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VIII. **BENEFICIARY STATUS:**

A. Upon the death of any beneficiary for whom a trust is then held, any accrued or undistributed net income thereon shall be held and accounted for, or distributed, in the same manner as if it had been accrued or received after the death of such beneficiary.

B. Any instrument executed by the Trustee shall be binding on all parties hereto and on all beneficiaries hereunder. No person paying money to the Trustee need see to the application of the money so paid.

C. The interest of any beneficiary in principal or income of this Trust shall not be subject to claims of his or her creditors or others, or liable to attachment, execution or other process of law, and no beneficiary shall have any right to encumber, hypothecate or alienate his or her interest in this Trust in any manner, except as provided for elsewhere herein. The Trustee may, however, deposit in any bank designated in writing by a beneficiary to his or her credit, income or principal payable to such beneficiary.

IX. **TRUSTEE TO PAY CERTAIN EXPENSES:**

The Trustee shall pay from income or principal of the Trust Estate or partly from each, in his discretion, all expenses, incurred in the administration of the Trust and the protection of this Trust against legal attack, including counsel fees and a reasonable compensation for his own services as such Trustee, which compensation and expenses constitute a first lien on the Trust Estate.

X. **AMENDMENT AND REVOCATION:** The Grantor may at any time during his life amend any of the provisions of this trust agreement by an instrument signed by Grantor and delivered to the Trustee. During the life of the Grantor, the trust created by this agreement may be revoked in whole or in part, by an instrument signed by Grantor and delivered to the Trustee. Upon revocation, the Trustee shall distribute all or the designated portion of the property to the Grantor.

XI. **TRUST TITLE**: This Trust shall be known and referred to as the THEODORE L. JOHNSON TRUST and shall be administered under the laws of the State of Idaho.

XII. **CONSTRUCTION OF AGREEMENT**: The headings and subheadings used throughout this Agreement are for convenience only and have no significance in the interpretation of the body of this Agreement, and the Grantor directs that they be disregarded in construing the provisions of this Agreement.

IN WITNESS WHEREOF, I, THEODORE L. JOHNSON, as Grantor of the foregoing Trust Agreement, have hereunto set my hand and seal on the date aforesaid.

Theodore L. Johnson
THEODORE L. JOHNSON

Witness:

Witness:

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11-4-97

Tina Lyle

ACCEPTANCE BY TRUSTEE

The undersigned hereby accepts the trusts imposed by the foregoing Trust Agreement and agrees to serve as Trustee upon the terms and conditions therein set forth.

Signed, sealed and delivered
in the presence of:

Theodore L Johnson
THEODORE L. JOHNSON, trustee
of THEODORE L. JOHNSON
REVOCABLE TRUST

Witness:

Witness:

Tina Lyle

STATE OF IDAHO)
) ss.
County of Ada)

On this 4 day of November, 1997, before me, the undersigned, a Notary Public in and for said State, personally appeared THEODORE L. JOHNSON, a single person, known or identified to me to be the person whose name is subscribed in the instrument, and acknowledged to me that he executed the same.

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

(SEAL) KATHY A. HENDERSON NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Meridian, Idaho
My Commission Expires: 3/10/99

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A.L.J.
11-4-97

SCHEDULE "A" PROPERTY

I, Theodore L. Johnson, a single person, Grantor, do hereby quitclaim, convey and transfer to the Theodore L. Johnson Revocable Trust dated the ___ day of November, 1997, all of his right title and interest in and to the following described real property, to-wit:

Parcel I:

Government Lot 5 and the Southeast 1/4 of the Northwest 1/4 of Section 6, Township 4 North, Range 1 West, Boise Meridian, Ada County, Idaho.

Parcel II:

The Northwest ½ of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho.

In addition the I provide the following conveyance to the Theodore L. Johnson Revocable Trust dated the 4th day of November, 1997 the following personal property, to wit:

Theodore L Johnson
THEODORE L. JOHNSON

STATE OF IDAHO)
) ss.
County of Ada)

On this 4th day of November, 1997, before me, the undersigned, a Notary Public in and for said State, personally appeared THEODORE L. JOHNSON, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I hereunto set my hand and affixed my official seal in said County the date and year first above written.

Kathy A. Henderson
Notary Public
Residing at: Meridian, Idaho
Commission Expires: 2/16/98

KATHY A. HENDERSON
NOTARY
PUBLIC
STATE OF IDAHO

REAL ESTATE PURCHASE AND SALE AGREEMENT

This Agreement is made effective as of September ___, 2005, between Crandall Law Office ("Buyer"), and the Theodore L. Johnson Revocable Trust, and John, Reed and Dallan Taylor, as co-trustees of the estate ("Sellers").

The parties agree as follows:

1. PURCHASE AND SALE OF PROPERTY.

1.1 Property. Subject to the terms and conditions of this Agreement, the Sellers shall sell to Buyer and Buyer shall purchase the following real property and other assets (the "Property"): The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho known as 3900 Linder Road. The size of the property is approximately plus or minus 40 acres.

1.2 Purchase Price Amount. The purchase price for the Property is One Million Eight Hundred Thousand Dollars ($1,800,000.00) (the "Purchase Price").

1.3 Purchase Price Payment. The Purchase Price shall be paid as follows: Earnest Money Deposit. Upon the execution of this Agreement by the Buyer and the Sellers, the Buyer shall deposit in escrow at Title One Title Insurance Company, Eagle, Idaho ("Closing Agent"), earnest money in the amount of Ten Thousand Dollars ($10,000.00) to be held for the benefit of the Buyer and the Sellers. Such deposit shall be returned by the Closing Agent to the Buyer if this Agreement does not close because of (i) the failure of a condition precedent, or (ii) any reason not the fault of the Buyer. If this Agreement does not close because of any reason not specified in the preceding sentence, all earnest money shall be paid by the Closing Agent to the Sellers as the agreed liquidated damages which shall be the sole and exclusive remedy of the Sellers. The balance of the purchase price shall be paid in immediately available funds delivered at Closing to Closing Agent.

1.4 Conveyance of Title. Title to the Real Property shall be conveyed by a General Warranty Deed. Title to the Property shall be marketable and insurable and shall be free and clear of all liens, encumbrances, and restrictions, exclusive of (i) real property taxes for the current year which are not due and payable on or before Closing, and (ii) liens, encumbrances, and conditions accepted in writing by the Buyer on or before Closing.

1.5 Title Insurance. Upon the acceptance of this Agreement by the Sellers, the Buyer, for the account of the Sellers, shall order a Commitment for Title Insurance ("Commitment") issued by Title One ("Title Company"), covering the Property. If any exceptions shown on the Commitment are not approved in writing by the Buyer prior to Closing and cannot be removed by the Sellers by Closing, then the Buyer shall have the right to terminate this Agreement, in which event all earnest money deposited shall be refunded to the Buyer and each party shall be fully released and discharged from any further obligations under this Agreement.

At Closing, the Sellers shall purchase and deliver to the Buyer an ALTA Owner's Policy title insurance policy ("Policy") satisfying the following specifications: The

EXHIBIT

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Policy shall name the Buyer as the insured in the amount of the Purchase Price. The Policy shall insure the Buyer as the owner of the Property, subject only to the following special exceptions: (i) real property taxes for the current year which are not due and payable on or before Closing, and (ii) liens, encumbrances, and conditions accepted in writing by the Buyer on or before Closing. The Policy shall include the following endorsements: (I) an endorsement deleting the general exceptions to the Policy, (ii) an endorsement insuring that each street adjacent to the Real Property is a public street and there is direct and unencumbered pedestrian and vehicular access to such street from the Property, and (iii) an endorsement insuring that there are no encroachments by or onto the Property with respect to property, easement, or setback lines.

1.6 Possession. Sellers shall deliver actual possession of the Property to Buyer at Closing.

1.7 Risk of Loss. Until Closing, the Sellers shall assume all risk of loss or damage with respect to the Property. In the event of any loss or damage to all or any part of the Property, the, Buyer shall have the right to (i) terminate this Agreement, in which event all earnest money deposited shall be refunded to the Buyer and each party shall be fully released and discharged from any further obligations under this Agreement, (ii) close the purchase of the Property and reduce the Purchase Price by an equitable amount equal to the loss or damage, such reduction to be applied first to the cash payment at Closing to be delivered at Closing, or (iii) close the purchase of the Property and elect to receive all insurance proceeds paid or payable by reason of the loss or damage.

1.8 Prorated Items. The following items shall be prorated as of Closing: (i) taxes and water assessments using the last assessments available prior to Closing; (ii) rents; and (iii) utilities.

1.9 Time for Acceptance. This Agreement shall be null and void and of no force or effect unless a fully executed original of this Agreement is delivered to and received by the Buyer on or before September ___, 2005.

2. REPRESENTATIONS, WARRANTIES, AND COVENANTS OF THE SELLER.

The Sellers represent and warrant to, and covenants with, the Buyer as follows:

2.1 Authority of the Sellers. The execution, delivery, and consummation of this Agreement by the Sellers has been duly approved in accordance with applicable law and any documents or instruments governing the Sellers. The execution, delivery, and consummation of this Agreement by the Sellers will not cause the Sellers to be in violation or breach of any law, regulation, contract, agreement, or other restriction to or by which the Sellers or the Property is subject or bound. If the Sellers are a corporation, the Sellers, at Closing, shall provide to the Buyer (i) a certificate from the State of Idaho dated not more than 45 days prior to Closing indicating that the Sellers are in good standing and qualified to do business in Idaho, and (ii) resolutions of the board of directors of the Sellers authorizing and approving this Agreement and the transactions contemplated hereby. If the Sellers are a partnership, the Sellers, at Closing, shall provide to the Buyer resolutions of the partners of the Sellers authorizing and approving this Agreement and the transactions contemplated hereby.

2.2 Property Ownership. The Sellers own and possess all right, title, and interest in and to the Property free and clear of all covenants, conditions, easements, liens, and encumbrances.

2.3 Condition of Property. All of the Property, including, but not limited to, parking areas, landscape areas, sprinkler system(s), structural components, electrical, plumbing, heating and air conditioning systems, is in good operating condition and repair, subject only to routine maintenance.

2.4 Material Misstatement or Omissions. No representation or warranty made by the Sellers in this Agreement or in any document or agreement furnished in connection with this Agreement contains or will contain any untrue statement of material fact, or omits or will omit to state a material fact necessary to make the statements not misleading.

2.5 No Default. The Sellers are not in default under the terms of any contract, agreement, lease, license or other understanding, and no condition or event has occurred which, after notice, the passage of time, or otherwise, would constitute a default under or breach of any such terms. The Sellers are not aware of any condition that will result in a default under any such terms.

2.6 Broker Fees. Except as disclosed in writing to the Buyer prior to Closing, the Sellers are not obligated to pay any fee or commission to any broker, finder, or intermediary for or on account of the transaction contemplated by this Agreement.

2.7 Information to be Provided. Within ten (10) business days after the date this Agreement is accepted by the Sellers, the Sellers shall deliver to the Buyer the following: All contracts of any kind or nature which shall survive the Closing and which relate to the Property; A copy of all leases relating to the Property, together with any amendments to such leases; A copy of any and all licenses, certificates, permits, approvals, conditions or similar items, in the Sellers' possession relating to all or any portion of the Property.

2.8 Conduct Pending Closing. From the effective date of this Agreement to Closing, the Sellers shall (i) maintain the Property in good repair and in a broom clean condition, (ii) continue to operate the Property in the manner previously operated by the Sellers, (iii) not enter into any contracts or purchase orders relating to the Property, and (iv) perform all acts necessary to insure that the representations, warranties, and covenants of the Sellers shall be true, complete, and accurate in all respects on and as of the date of closing to the same force and effect as if made at Closing.

2.9 Access to Property. After the Sellers' acceptance of this Agreement, the Buyer and the Buyer's authorized representatives shall have reasonable access to the Property for inspection.

3. HAZARDOUS SUBSTANCES. The terms "hazardous substance," "release," and "removal" shall have the definition and meaning as set forth in Title 42 U.S. C. 9601 (or corresponding provision of any future law); provided, however that the term "hazardous substance" shall include "hazardous waste" as defined in Title 42 U.S.C. 6903 (or corresponding

provision of any future law) and "petroleum" as defined in Title 42 U.S.C. 6991 (or corresponding provision of any future law). The Sellers represent and warrant to, and covenants with, the Buyer that: the Property is not contaminated with any hazardous substance, the Sellers have not caused and will not cause the release of any hazardous substances on the Property, there is no asbestos on the Property, and there is no underground storage tank on the Property.

4. CONDITIONS PRECEDENT TO CLOSING. The obligations of the Buyer under this Agreement are, at Buyer's option, subject to the satisfaction of the following conditions:

4.1 The representations and warranties of the Sellers are true, complete, and accurate as of the date of this Agreement and as of the date of Closing as if made as of such date.

4.2 The Sellers have performed all obligations, covenants and agreements to be performed prior to Closing as set forth in this Agreement.

4.3 The Title Company is prepared to issue a policy in accordance with this agreement. The Sellers shall have executed and delivered to the Closing Agent the Warranty Deed and same is recorded.

4.4 The Buyer has obtained financing (effective to the date of Closing) from a bank or other financial institution, for a loan of $1,500,000.00, bearing interest at a fixed rate of not more than six and one-half percent (6 ½ %) per annum, with a maximum of one (1) point payable at funding. The loan shall be repayable in monthly installments of principal and interest amortized over a thirty (30) year term.

4.5 The Buyer has obtained an appraisal of the Property indicating that the fair market value of the Property is not less than the Purchase Price. The Buyer has obtained, at the Buyer's sole cost, an inspection of the Property, including, without limitation, parking areas, landscape areas, sprinkler systems, structural components, electrical, plumbing, heating and air conditioning systems and roofs and has approved the condition of the Property, in Buyer's sole discretion.

4.6 That the Theodore L. Johnson Revocable Trust has been awarded through successful negotiation, settlement or litigation, clear and unencumbered title to the property set forth in paragraph 1.1 of this Agreement.

4.7 The Sellers deliver to the Buyer an affidavit executed by the Sellers under penalty of perjury that provides the Sellers' United States taxpayer identification number, and states that the Sellers are not foreign persons.

5. CLOSING. The Closing Agent for this Agreement shall be Title One Title Insurance Company. ("Closing Agent"). Buyer and the Sellers shall each pay one-half of the Closing Agent's Closing Fees at Closing. Closing shall be at the offices of the Closing Agent on Explorer Drive in Eagle, Idaho on November 3, 2005, or at such other time, date, and place as may be mutually agreed between Sellers and Buyer. Buyer and Sellers shall execute and deliver to the Closing Agent instructions on the form generally provided by the Closing Agent with such modifications as are reasonably made by the Buyer.

6. GENERAL PROVISIONS.

6.1 All notices, claims, requests and other communications ("Notices") under this Agreement (i) shall be in writing, and (ii) shall be addressed or delivered to the relevant address set forth in Section 7 below or at such other address as shall be given in writing by a party to the other. Notices complying with the provisions of this Section shall be deemed to have been delivered (I) upon the date of delivery if delivered in person, or (ii) on the date of the postmark on the return receipt if deposited in the United States Mail, with postage prepaid for certified or registered mail, return receipt requested.

6.2 The Parties agree that if a party is in default under this Agreement, then such party shall pay to the other party (a) reasonable attorney fees and other costs and expenses incurred by the other party after default and referral to an attorney, (b) reasonable attorney fees and other costs and expenses incurred by the other party in any settlement negotiations, and © reasonable attorney fees and other costs and expenses incurred by the other party in preparing for and prosecuting any suit or action. This Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction and agree that Ada County is the proper venue. Time is of the essence with respect to the obligations to be performed under this Agreement. Except as expressly provided in this Agreement, and to the extent permitted by law, any remedies described in this Agreement are cumulative and not alternative to any other remedies available at law or in equity. The failure or neglect of a party to enforce any remedy available by reason of the failure of the other party to observe or perform a term or condition set forth in this Agreement shall not constitute a waiver of such term or condition. A waiver by a party (I) shall not affect any term or condition other than the one specified in such waiver, and (ii) shall waive a specified term or condition only for the time and in a manner specifically stated in the waiver.

6.3 This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, assigns, heirs, and personal representatives. This Agreement, together with the Exhibits, constitutes the entire agreement among the parties and supersedes all prior correspondence, conversations and negotiations. The invalidity of any portion of this Agreement, as determined by a court of competent jurisdiction, shall not affect the validity of any other portion of this Agreement. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instruments. All representations, warranties, and covenants of the Sellers set forth in this Agreement shall survive the Closing and shall survive the recording of the Warranty Deed.

7. **SIGNATURES.**

BUYER

Dated: September 2, 2005

W. Douglas Crandall
(Signature)

Douglas W. Crandall
(Print or Type Name)

202 N. Ninth
(Street # and Name)

Boise Idaho 83702
(City, State and Zip)

SELLER ACCEPTANCE

Dated: _____, 2005

_____
(Signature)

_____
(Print or Type Name)

_____
(Street # and Name)

_____
(City, State and Zip)

Dated: _____, 2005

_____
(Signature)

_____
(Print or Type Name)

_____
(Street # and Name)

_____
(City, State and Zip)

Dated: _____, 2005

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(Signature)

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(Print or Type Name)

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(Street # and Name)

_____
(City, State and Zip)

Dated: _____, 2005

_____
(Signature)

_____
(Print or Type Name)

_____
(Street # and Name)

_____
(City, State and Zip)

PAUL THOMAS CLARK
CLARK and FEENEY
Attorneys for Plaintiffs
1229 Main Street
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB No. 1329

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

Case No. CV OC 0400473D
Case No. CV OC 04-05656D

AFFIDAVIT OF TERRY RUDD

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants.

EXHIBIT "D"

STATE OF IDAHO)
) ss.
County of Nez Perce)

Terry Rudd, being first duly sworn upon oath, deposes and says:

1. I am a Certified General Appraiser, and have been licensed as an appraiser since 1965.

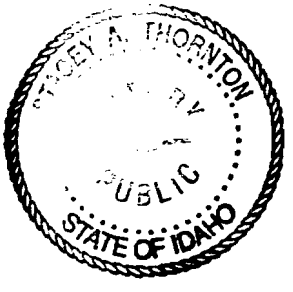
2. I am attaching a true and correct copy of my September 22, 2004, appraisal of the Linder Road property which Berkshire Investments LLC purchased from the Theodore Johnson Revocable Trust.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 23 day of November, 2004.

Terry Rudd

SUBSCRIBED AND SWORN to before me this 23 day of November, 2004.



Stacey A Thornton
Notary Public in and for the State of Idaho.
Residing at Lewiston, WA therein.
My commission expires: 6/23/06

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29 day of November, 2004, I caused to be served a true and correct copy of the above document by the method indicated below, and addressed to the following:

Thomas G. Maile Attorney at Law 380 W. State Eagle, ID 83616	☑ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail ☐ Telecopy (FAX)
Jack S. Gjording Gjording & Fouster P.O. Box 2837 Boise, ID 83702	☑ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail ☐ Telecopy (FAX)
Phillip J. Collaer Anderson, Julian & Hull, LLP P.O. Box 7426 Boise, ID 83707-7426	☑ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail ☐ Telecopy (FAX)

Paul Thomas Clark
Attorney for Plaintiff

APPRAISAL REPORT
FEE SIMPLE INTEREST
COMPLETE APPRAISAL–RESTRICTED-USE REPORT

Theodore Johnson Trust Property

LOCATED AT

Linder Rd.
Eagle, ID

APPRAISED FOR

Connie W. Taylor, Attorney
Drawer 285
Lewiston, ID
83501

CASE

Taylor vs. Maile

DATE VALUE EFFECTIVE

July 10, 2002

PREPARED DATE

September 22, 2004

PREPARED BY

TERRY R. RUDD, MAI
RUDD APPRAISALS
2901 PERRY LANE
CLARKSTON, WA 99403
(509) 758-3515

EXHIBIT
A

TERRY RUDD, MAI

9/29/04

Connie W. Taylor, Attorney
Drawer 285
Lewiston, ID 83501

RE: Taylor vs. Maile
Theodore L. Johnson Trust Property
Linder Rd.
Eagle, ID

In accordance with your request, I performed a Limited Appraisal of the above referenced property as retained The intended use of this report is for internal analysis purposes to determine the value of the property in question. Therefore, I am able to report the conclusions to you in a Restricted-Use format, as you are the only intended user of this report. A self-contained report will be prepared before trial.

This report intends to inform you of my findings in a brief manner. I researched the local market for comparable sales— not only in physical comparison but similar appraisal date as the Knipe et. al. report and subsequent acquisition by Thomas Maile. I provided the results to you verbally (as permitted) on 9/15/04 along with a critique of the Knipe report.

You are already aware of the subject property's characteristics and realize that it is located just inside the minimum 5 acre (subdivided lot) zone. Properties to the west are limited by a 10 acre lot minimum. Everyone I talked with knows that there is a strong market for properties like this today— as well as in 2002; including realtors Dennis McCracken and Craig Van England of Sel Equity, Jack Kramer of Group One/Eagle, Ned Hansen of Century 21 1st place, Mike Sety of ReMax Boise, Rick Sweeney of the Preferred Company and Betty Holton of Keller Williams Realty. The list also includes the other buyers I spoke with that will be included in the transaction presentations of the final report.

2901 PERRY LANE 509-758-3515
CLARKSTON, WASHINGTON FAX 509-758-0629

Essentially the sales fall into two categories. The first one is home site acreages; 5 acre sites with proposed well and septic, but available irrigation, power, phone and road access including smaller sites down to 2 acres plus typical urban lots in subdivisions with central water and sewage.

The second category of properties being actively bought and sold are larger acreages like the subject. The purpose of most such investors is to subdivide into smaller home site parcels which are bringing very high prices.

Supporting this market are historically low interest rates and liberal mortgages for new home construction— plus the ever expanding housing demand in the Boise basin. The subject direction of Boise's expansion is fueled by good existing roads, easily developable soil, permissive zoning, available irrigation water, and pastoral/mountain views.

I valued the subject by two market approaches: larger acreage comparables and smaller home site sales. After investigating the sales and arriving at prices per acre, I reflected the breakdown prices to the subject in a comparable sales grid. That grid includes the most similar sales and adjusts for differences to the subject in time, location, size and utility (development capability).

Time adjustments were small since the sales were matched to the appraisal date. A rate of 3% per year was obtained from Realtors and the Knipe report. Locale adjustments were based on demonstrated market desirability, general access and potential development changes. Size factors were based on a corrective graphic analysis of sales differing in size. This differs from the erroneous presentation in the Knipe report. Utility adjustments included differences in zoning development potential, improvements, water, septic, sewer, road access, etc. The resultant graphic will be in the final report.

Acreage Approach

A quick summary of the best sales developed includes:

Sale1) 10.50 acres sold 9/05/02 from Belau to Mahaffey for $283,500 about 5 miles east of the subject just above Beacon Light on Ballantyne. It was on the market in July '02 which fits for time. It indicates $26,952 per acre which I had to decrease for size (refer to graph study in addenda). Adjusted price reflects to the subject..... $21,562 per acre

Sale 2) 77.9 acres sold 2/24/03 from Harney to SAF, LLC. For $160,000 about 1 mile south of the subject at the northeast corner of Linder and Floating Feather. It was on the market for over 10 months which easily places it in the subject time frame. It indicated $20,536 per acre and adjusting up for size but down for being closer to sewer. The adjusted reflection to the subject is ..... $20,126 per acre

Sale 3) 15.50 acres sold 5/13/03 from Gray Trust to J & G Development less than 4 miles southwest of the subject just outside of Star for $387,500, indicating $25,000 per acre. It was on the market over 2 years which places it in the subject time frame. It's been re-zoned for more intensive development and has a better sewer chance, requiring a downward adjustment in utility.

The adjusted price to the subject is..... $19,000 per acre

Subject Value by Acreage Sales:

Using three sales (and supported by several others) reflects a value of the subject at: $20,300 per acre x 40.00 acres = $812,000

Subdivision Approach

The second avenue I applied was that of home site acreages, applying discounts for subdivision development per the size study:

Sale 6) 5.00 acres was sold 6/24/02 for $147,900 about 2 miles southwest of the subject on Longhorn off Highway 44 reflecting $29,580 per acre. The

only adjustment needed was for size which brought the subject reflection down to ..... $ 19,522 per acre

Sale 7) 5.01 acres was sold 6/24/02 about 2 miles northeast of the subject for $207,000 indicating $41,317 per acre. After deducting for barn and well, a significant size adjustment brings the subject value reflection down to ..... $19,419 per acre

Sale 8) 5.00 acres was sold 2/21/03 but was on the market for 140 days placing it near the subject time frame. It sold for $210,000 indicating $42,000 per acre. It's located on Beacon Light near Eagle requiring a down adjustment in location as well as size and minor time correction. The reflected subject value is ..... $23,100 per acre

Subject Value by Home Site Sales:

Using the three sales presented (supported by more than 30 others) reflects $20,700 per acre x 40.00 acres = $828,000.

Final Subject Value

The correlated and concluded estimate weighting both approaches is-

$820,000

The appraisal conforms to the minimum standards of USPAP (Uniform Standards of the Professional Appraisal Practice). As permitted by the Appraisal Institute, I invoked the Departure Provision as provided within Standard Rule 2-2 (b) addressing reporting requirements. The summary discussions of data, reasoning and analyses were intended to be concise, no more than the requirements stated, for your intended use as loan collateral. All file information has been retained and available further review upon request.

I further certify that I have enlisted no assistance nor taken instruction as to technique, analysis, opinion, or value conclusion other than my own in this assignment. The value estimate is based on highest and best use of the

subject and includes real property, land, improvements, and affixed appurtenances.

No unrealistic assumptions are presented as basis for value presentation. The value estimate was based on the current market and existing condition of the improvements. No inventory, business goodwill or blue sky was included in the value estimate. However, all appurtenant equipment necessary to the current operation of the property was included. It was also assumed that favorable loan financing may be in place and available to any new ownership.

The information gathered was deemed pertinent and correct except as noted. Sufficient data from the marketplace was gathered to substantiate the market analysis. Data sources were referenced and the Assumptions and Limiting Conditions adjusted as necessary in the following pages. I included a certification and Curriculum Vitae. I also treated this appraisal confidentially and have not disclosed this assignment to any other parties.

Regarding the Competency Provision now required by USPAP, I have included an in-depth review of my qualifications in the Curriculum Vitae. I began appraising in 1956 for the Department of Agriculture in Enterprise Oregon. In 1963 I founded a private company which eventually appraised all types of properties throughout the United States. In 1987 I sold that company and continued to appraise independently with two assistants. I am licensed to appraise property in the States of Idaho, Washington, and Oregon, and have appraised a number of properties similar to the subject.

I further certify, as indicated in the Assumptions and Limiting Conditions at the conclusion of the appraisal, that this assignment was not based on a requested minimum valuation, specific valuation, or approval of pending action. No pressure was received from any party to the actions pending the subject property. I also certify that the analyses and presentations are reasonable in light of the information as set forth in this appraisal. Mark Rudd assisted in the preparation of this report.

This appraisal presents and supports current market values, though such transaction would necessarily occur in the future. The required exposure period could allow for a change in the market by way of economic shift. The direction of this change cannot be positively identified, but I anticipate the remainder of the down cycle which began in 1998 to conclude in 2007. Real estate prices in this trend could retest the lows set in the 1980's.

This Restricted Appraisal Report sets forth only my conclusion of value. It is emphasized that this appraisal cannot be understood properly without supporting documentation retained in my file. No extraordinary assumptions or hypothetical conditions were implemented. I'm qualified to perform this appraisal as indicated in the following Curriculum Vitae.

Sincerely,

Terry R. Rudd, MAI

Addenda

CERTIFICATION

I certify that, to the best of my knowledge and belief:
The statements of fact contained in this report are true and correct.

The report analyses, opinions and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial professional analyses, opinions and conclusions.

I have no (or the specified, if indicated), present or prospective interest in the property that is the subject of this report, and I have no (or the specified, as indicated) personal interest or bias with respect to the parties involved.

My engagement in this assignment was not contingent upon developing or reporting predetermined results.

My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.

My analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.

I have (or not, as indicated), made a personal inspection of the property that is the subject of this report. The body of this report contains specific information as to which individuals, if not myself, made contributions to this appraisal which I relied upon and am fully responsible.

No one provided significant real property appraisal assistance to the person signing this certification, except as otherwise specified or by signature.

I certify that to the best of my knowledge and belief, the reported analyses, opinions, and conclusions were developed, and this report has been prepared in conformity with the requirements of the Code of Professional Ethics and the Standards of Professional Practice of the Appraisal Institute.

I certify that the use of this report is subject to the requirements of the Appraisal Institute and to review by its duly authorized representatives.

As of the date of this report, I, Terry R. Rudd, MAI, have completed the requirements under the continuing education program of the Appraisal Institute.

Terry R. Rudd, MAI

ASSUMPTIONS AND LIMITING CONDITIONS

This appraisal is subject to the following assumptions and limiting conditions:

1. The value herein coincides with the definition of market value presented as defined. No other value level is intended, unless presented and defined as located.

2. The subject property was appraised subject to existing easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances and other specifications known to the appraiser as stated in the appraisal assignment.

3. The subject property is assumed to exist under the management of the competency and percentage basis stated.

4. Dimensions, legal descriptions, public record information and on-site investigations were assumed to present the information as would be found by a prudent market participant.

5. The data and conclusions within this appraisal are part of an entirety. No part of this appraisal is intended to stand out of context. Disclosure of information contained herein is governed by the By-Laws and Regulations of the Appraisal Institute.

6. I have no knowledge concerning the presence of any hazardous materials found on the subject site as of the date of appraisal, except as stated otherwise. However, I have not conducted any environmental or engineering inspections to determine whether hazardous conditions or materials exist that were not readily observable from surface conditions or that would be easily and expectedly discovered by a prudent market investor. Any hazardous waste discovered, beyond that presented, could render this appraisal ineffective. Correction thereof or for any errors found is reserved as a future right by this appraiser.

7. The maps included in this appraisal have been relied upon in valuing the property. The engineering survey and conditions presented were relied upon for the conclusions reached. No remeasurement, verification or lot boundaries or survey of the access roads and utility lines was performed.

8. The appraiser assumes that there are no hidden conditions as to the subsurface conditions of the property that would render it less valuable than presented. Again, no engineering study was performed which might otherwise discover such factors. This also applies to any possible infestations from insects such as termites, dry rot, water or earth movement damage not readily apparent upon surface inspection. The property was assumed to be free of such problems, unless otherwise stated.

9. This appraiser assumes no responsibility for legal matters affecting the property other than referenced herein. Nor does this appraiser render any opinion as to the condition of title other than presented. The title is assumed to be marketable, in the hands of a prudent

investor, free of defects, clear of all liens and encumbrances, easements, restrictions and impediments except for those specifically presented in the report.

10. The property is assumed to be held in responsible ownership, competent management and available for whatever highest and best use has been projected. With regards to the Americans With Disabilities Act (ADA) effective January 26, 1992, I have not made a specific compliance survey in analysis of this property with regards to conformance and impact on the value level defined. A detailed compliance survey may indicate non-compliance and such could have a negative impact on the subject value in its current condition. The highest and best use presentation, assumes compliance. Testimony or attendance at any legal hearing or court action is not required by reason of rendering this appraisal unless arrangements have been made in advance.

11. The bifurcation of the valuation between land and improvements may present different figures than that of conjoined use. Separate valuations may have been presented in the approaches, but such was intended to produce a combined value, unless indicated otherwise.

12. Information, estimates and opinions furnished the appraiser in the normal investigation for this report were obtained from sources considered reliable. Any future inaccuracies are not deemed to present an impact on value until re-assessed by this appraiser.

13. The final value concluded is based on the parameters stated herein and limited to the character of the subject property as stated. Any changes in the property's character or the market within which it exists, including but not limited to physical, functional, economic, political and/or financial factors, may affect the value conclusion, whether it occurs within a different time frame or not.

14. The value estimate presented within this report is based on the stated definition and market value level compatible with such function as stated. The location of this level, shown below, identifies itself within the overall subject value range. No liability is assumed for any misapplication of this value as representing any other level:

0	X	INFINITY
Lower Range	Mid Range	Upper Range

15. This appraisal addresses the subject value as of the specified date stated. Value ranges change over time, as well as applications of the levels therein. Thus, the value level defined and the matching value presented may not reflect other reader's intentions or expectations. Also, future change by way of the cyclical nature of the markets may change the location of the range and thus the commensurate value estimate as well.

16. Regarding proposed improvements, this appraisal is based on the specifications and cost projections obtained from the responsible parties referenced. While such information is presumed to be accurate, no means exists to the appraiser to assure such competency or fulfillment. Therefore, the completion of items according to plans and specifications may not fulfill the expectations herein and thus could impact the subject value to the degree of

resultant difference. The valuation does assume local compliance with applicable codes, occupancy and permitted usage.

17. As a preliminary title report may not have been furnished, it's assumed that the legal within, provided by the client or from the courthouse records, matches the lender's intended collateral. No analysis of any conditions or exceptions otherwise was attempted. No leasehold interest either positive or negative was considered if the property is not leased. No detriment of any easements not observable from surface indications was included. The dimensions, legal description, public record information and on-site investigations were assumed to present an adequate information base for the appraisal and as would be found by a prudent market participant.

18. The maps included in the appraisal are for assistance in comprehending the report only. No engineering survey of the building or the land was attempted and thus no assumption or responsibility for discrepancies exists. The structures were measured on the exterior to the nearest foot (rounded). Interior measurements were made only where room size entered into the appraisal or unfinished areas were found.

19. This appraisal addresses the subject value as of the specified date only. Property values range in cyclical fashion over time, as well as at the present. Values also vary per management and utilization. Thus, the value level reflected may not indicate a future user's intentions or expectations. Furthermore, additional cyclical change of the market may affect the subject value and thus render the current opinion invalid.

20. This appraisal, unless otherwise indicated and so adjusted, is based on quiet title and legal access to the property as physically described. All of the improvements purported to exist, including the utilities, water and sewage waste systems have not been separately surveyed. In the absence of an engineering report otherwise, power, phone, TV systems, public or private water systems, sewer, septic systems and/or drain field are assumed acceptable to all government authorities as well as the market and subject application. Additionally, except as indicated herein, all off-site improvements including the access road, are assumed to be fee simple or permanent easement open to year around ingress and egress. Topography, drainage, landscaping and any flood potential are acceptable to both federal agencies, local government, immediate market and full and uninhibited use of the subject property, unless indicated and adjusted for otherwise.

21. All energy storage on-site or off-site delivery, along with any environmental considerations, zoning variances or additional considerations with regard to local government requirements are assumed to be in agreement with all local state and federal agencies involved and find acceptance in the local market as well as being fully acceptable to and utilized by the subject property. Professional inspections of the property in any category where additional concerns may exist are recommended, even if no defects have been made known to the appraiser. This report is not warrantying the condition or status of any physical or market feature of the subject property. This report is presented exclusively for the sole purpose of arriving at a present market value.

22. It was not intended that this appraisal should serve as proof of condition or future expectancy for any of the parties which may be served. This appraisal was prepared for the exclusive use of the client indicated and may reflect lending guidelines specific only to that client. Possession of this report, or a copy thereof, does not carry with it the right of publication. Any purchaser that may be involved should be aware that as of 1994, the States of Idaho and Washington require a "Property Disclosure Form" to be supplied by the grantor. That form and the answers thereto should be confirmed and verified. I did not receive a copy and therefore can offer no input, other than that which was relayed to me by the parties referenced.

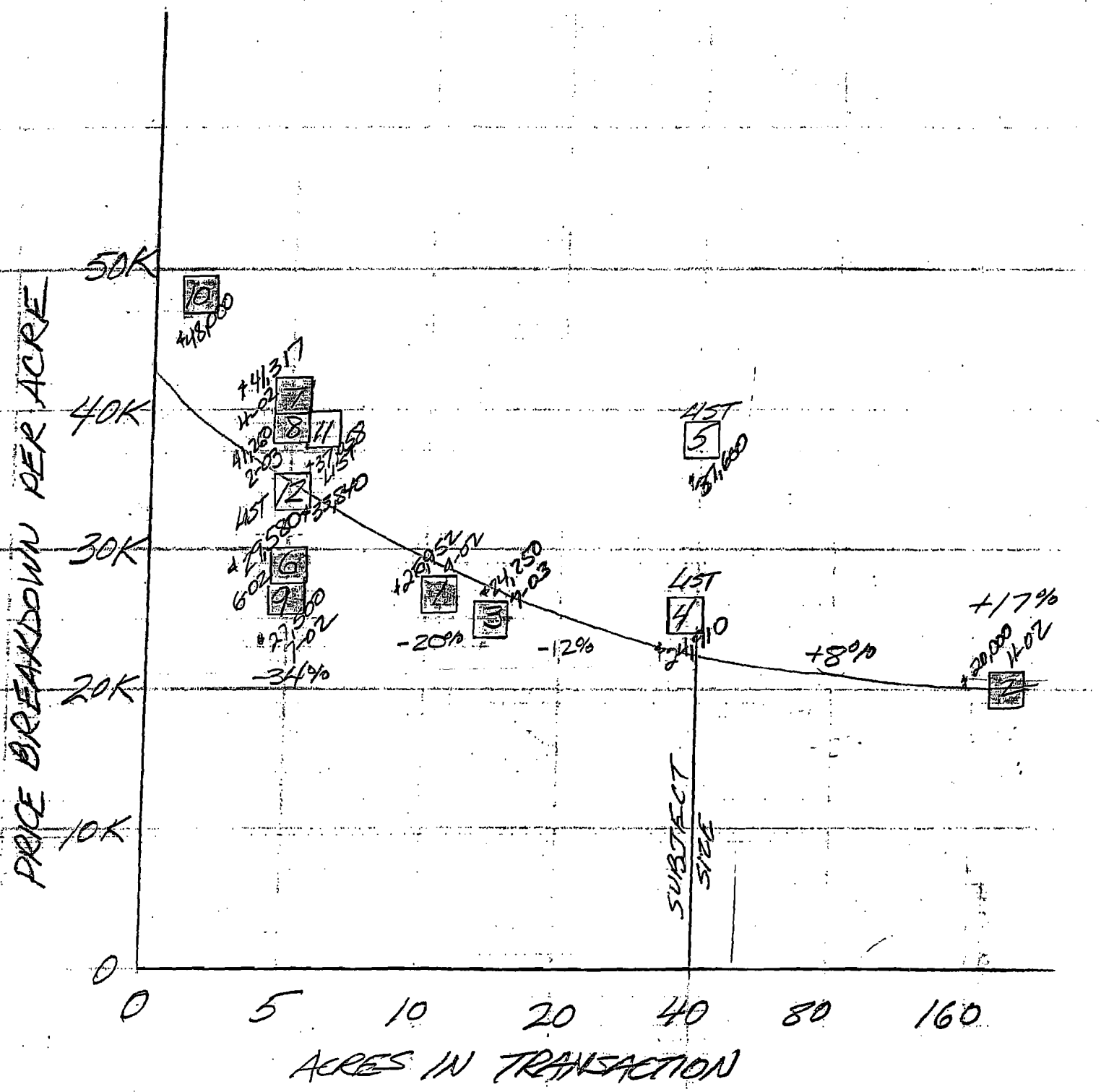
23. It is assumed that there is full compliance with all applicable federal, state, and local environmental regulations and laws. The presence of asbestos, ureaformaldehyde foam insulation, and other potentially hazardous materials or the existence of underground storage tanks may affect the value of the property. I am not qualified to detect such. The value estimate is predicated on the assumption that there are no such materials on or in the property that would cause a loss in value.

24. This appraisal has been developed under the assumption that there has been no discharge, dumping, spillage, uncontrolled loss, seepage, migration, or storage of hazardous substances that would adversely affect the value of the subject property. No responsibility is assumed for any such conditions or for any expertise or engineering knowledge required to discover them. The client is urged to retain experts in such fields as necessary.

25. Mark Rudd, along with others whether identified herein or not, provided assistance in this appraisal/report. Comparable properties, which interiors were not observed, were assumed similar in architecture and condition to their exterior.

SIZE ANALYSIS — TAYLOR EAGLE-STAR CORRIDOR

TIME BASE 7-02



CURRICULUM VITAE

TERRY R. RUDD, MAI
2901 Perry Lane
Clarkston, WA 99403
Phone: Direct (509) 758-0629 Office: (509) 758-3515
Fax: (509) 751-8820 E-Mail: trrudd@imbris.com

EMPLOYMENT EXPERIENCE:

40 Years Independent Fee Appraiser.
5 Years Forest Service Appraiser/Land Manager
10 Years Surveying
20 Years Realtor

EDUCATION:

FORMAL:
Bachelor of Science Degree, Forest Engineering: Oregon State University 1958

APPRAISAL EDUCATION:

Appraisal Institute:
Basic 1-A and 1-B courses/February 1965
Income Analysis/June 1971
Grazing Lands & Cattle Ranches/June 1972
Mortgage Financing/March 1980
Litigation Valuation/March 1986
Capitalization Theory & Techniques, Part A/January 1989
Standards of Professional Practice/February 1989
Standards of Professional Appraisal Practice, Part B/March 1993
Standards of Professional Practice, Part A & Part B/May 1997
Appraising Manufactured Housing/June 1998
The Appraisal of Local Retail Properties/November 1998
30 Specialized Appraisal Issues/May 1998
Uniform Standards Per Appraisal Foundation/June 2001
On-Line FHA & The Appraisal Process/June 2001
On-Line Overview of Real Estate Appraisal Principles/June 2001

Educators:
The Technical Inspection of Real Estate/December 1998
Understanding Limited Appraisals/November 1994
Uniform Residential Appraisals/January 1994
Regression Analysis/February 1998
Does it Pencil I/March 1999
Current Legal Issues/1992

Money & The Monetary System/1992
Applied Sales Comparison Approach/1993
FIRREA Overview and Application/1993
Real Estate School of Washington/1980
Real Estate Law/1992

Real Estate Education Council:
Real Estate Appraisal/November 1982
Ratio Study Statistics/December 1985
Real Estate School of Washington
Real Estate Broker's Education

DESIGNATIONS:
MAI/Appraisal Institute

LICENSES:
Idaho: Certified General Appraisal CGA-65
Washington: Certified General Real Estate Appraiser 1100585
Oregon: State Certified General Appraiser C000419

PUBLICATIONS:
Bell Curve of Value/1981
1929 Again?/1987

APPRAISAL EXPERIENCE:

General:
Fee Simple, Leased Fee, Leasehold Interest, Easements, Right-of-Ways and Appurtenances
Property Type:
Real estate, personal property, personalty, business, manufacturing equipment and rolling stock
Property Categories:
Land/Unimproved: Undeveloped, developed: commercial, industrial, residential, timber land, geophysical, mining and mineral rights

Land/Improved: Ranches, orchards, farms, vineyards, hunting memberships, water frontage, shorelands, lake and riverbeds.

Improved: Office structures, retail stores, shopping centers, medical space, hospitals, recreation facilities, service stations, C-stores, truck stops, auto and vehicle dealerships, governmental structures, military properties, restaurants, lounges, taverns, fast food facilities and greenhouses

Industrial Plants, industrial parks, ports, airports, parking garages, subdivisions, golf courses, sawmills, pulp mills, warehouses, water parks, railroads, terminals and seaport facilities

Single family residential properties, multi-family apartments, condominiums, duplexes, four plexes, retirement centers, convalescent hospitals, shelter care, elder care, nursing homes, and fraternal buildings

Right-of-Ways: Highways, power lines, reservoirs, utility lines, gas lines and water and sewer plants

Revitalization projects, acquisition projects, sales distribution programs, grazing rights, farming leases, air rights and mineral rights

PRIMARY AREAS SERVED:

Eastern Washington
North and Central Idaho
Western Montana
Eastern Oregon
Northern California
Northern Nevada
Western Wyoming

APPRAISAL EXPERTISE:

Value ranges
Consultation
Partitions
Condemnations
Ad Valorem Taxation

FINANCIAL CLIENTELE:

Zions Bank
Wells Fargo Bank
Bank of Latah
Bank of Pullman
Bank of Whitman
First Savings Bank of Washington
First Security Bank
Seaport Citizens Bank
Twin River National Bank
U.S. Bank
Washington Mutual
Metropolitan Mortgage
Westside Federal Savings & Loan
Fidelity Mutual Savings Bank
Mutual Life Insurance Company of New York
Greentree Financial
John Hancock
Safeco Credit
Central Washington Bank
Aetna Finance
Avco Financial Services
Blazer Financial Services
Dial Finance
Transamerica Mortgage
Oregon Mutual Savings Bank
Peoples Mortgage Company
PMI
Lincoln National Life
Bankers Life
Travelers Insurance
Lender's Service, Inc.
Stateline Mortgage

Mountain View Mortgage
U.S. Property & Appraisal Services
Ditech
Aetna Life & Casualty
Pacific National Bank of Washington
Intermountain Mortgage
Bank of America
Southern Pacific General American Credit
Bank of the West
Chesapeake Appraisal
Countrywide
Express Financial Services
Security Bank
US Bank/Oregon
Security Funding
Conseco Financial
National City Mortgage
WA Federal Credit Union
GFS, Inc.
GMAC Mortgage
Transunion Settlement
Evergreen Community Development Assoc.
Corporate Valuation Services
Nova Star Home Mortgages
Platinum Mortgage
Northwest Farm Credit Services
Lone Ranger.Com

Value IT
American Financial
Columbia Mortgage
Citicorp Real Estate
Appraisal & Title Management
Associates Financial Services
Data Comp
Far West Mortgage
Columbia Trust Bank
First Star Home Mortgage
USA Mortgage
Source One Services
Global Credit Union
Market Intelligence
Heartland Mortgage
Qualfin Lending
GESA Credit Union
D.M.I.
Gateway Financial Services
Settle Appraisal Services
Idaho Claims Service
Potlatch #1 Federal Credit Union
National Valuation Services
National Real Estate
SMK Construction
American Lending Network

INSTITUTIONAL CLIENTS:

Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Burlington Northern
Weyerhauser Timber Company
Potlatch Corporation
Wickes Forest Industries
Texaco, Inc.
Atlantic Richfield Company
Chevron U.S.A., Inc.
Shell Oil Company
Mobile Oil
Continental Oil Company
Husky Oil Company
Asarco, Inc.

Tenneco Corporation
Packaging Corporation of America
Washington Water Power
Omark, Inc.
True Value Hardware Stores
Boise Cascade
Eucon Corporation
Norwest Aluminum Projects, Inc.
Team Research and Engineering
Kwik Lok Corporation
Sherwin Williams Company
Payless Stores Northwest
University of Idaho
Washington State University

Battelle Northwest
The Pillsbury Company
Tree Top, Inc.
Fred Meyer
Lomas & Nettleton
Elks Lodge
Moose Lodge
Paffile Trucking
Porter Meyer

INDIVIDUAL CLIENTS:

Thousands of private property owners: homeowners, landlords, attorneys, business owners, developers, investors, buyers, sellers, Realtors, ranchers, farmers, timberland owners, trusts, LLC's, partnerships and numerous corporations.

GOVERNMENTAL CLIENTS:

Local Communities
Bonneville Power Administration
Idaho State Highway Department
BLM
County Ad Valorem Projects/Idaho, Washington, Nebraska, Tennessee, Alabama, Mississippi
Spokane County Parks
US Corps of Engineers
US Forest Service
GSA

PARTIAL LIST OF REFERENCES:

Frances Anderson	800-541-0828-2173
Mary Marasigan	206-577-1423
Michael Green	425-333-4516
Robert Broyles	509-758-3613
Rob Brewster	509-995-7572
Terry Savage	509-324-3555
Ted Potter	509-735-1596 or 531-2121
Rod or Doug Smith	509-882-3377
Skip Sherwood	509-326-8080
Bob Baker	509-758-2708
Joe Delay	800-572-0933
Dustin Ramsey	509-972-1028
Loren or Judy Schademan	509-547-8511
Don Brumfield	525-885-5513

Bureau of Occupational Licenses
Department of Self Governing Agencies

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CERTIFIED GENERAL APPRAISER

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants.	Case No. CV-OC-0723232 **MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RELATING TO THE DEFENDANTS' COUNTER-CLAIM & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The plaintiffs' have filed their Motion for Summary Judgment against all of the defendants' counterclaims. The defendants 'counterclaims asserts claims of slander and title,

intentional interference with a prospective business advantage, and abuse of process counts. The following Memorandum Brief incorporates by reference the affidavits of Thomas Maile as additional facts supporting the current motion for summary judgment, the Statement of Facts, together with the briefing of the plaintiffs in filed opposition to dispositive motions.

STATEMENT OF UNCONTESTED FACTS

The Plaintiffs have previously filed a Statement of Uncontested Facts on October 8, 2008 and the same is incorporated herein as if set forth in full herein. The defendant attorneys, the individual Taylors and the trust entered into a contingent fee agreement on April 15, 2005 (Affidavit of Thomas Maile Part 4 Exhibit "W").

1. STANDARD OF REVIEW: SUMMARY JUDGMENT

In ruling on a summary judgment motion pursuant to I.R.C.P. 56©, all facts are to be liberally construed in favor of the party opposing the motion for summary judgment, IBM Corp. v. Lawhorn, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984). The non-moving party is also given the benefit of all reasonable inferences arising from the evidence in the record. Thomas v. Campbell, 107 Idaho 398, 690 P.2d 333 (1984).

LEGAL ARGUMENT

1. *The Plaintiffs Have Properly Set Forth Allegations in Various Counts Which Cannot Be Considered Actionable by the Counter-claimants.*

The apparent basis of the counter-claims alleges that the filing of the Lis Pendens in the current case is actionable. The publication of the notice of lis pendens is not defamatory. It merely informs the public that the property is involved in litigation. Vanderford Co., Inc. v.

Knudson, 144 Idaho 547, 552, 165 P.3d 261, 266 (2007). The filing of a lis pendens cannot give rise to any actionable claim against the plaintiffs.

In order for slander in title to occur there must be a proper showing of malice on the part of the plaintiffs in filing their complaint and lis pendens requesting restoration of the title to the real property to Berkshire Investments, LLC. In order for the counterclaim to even approach providing any viable claims there must be a determination as to the underlining complaint in the present action.

The complaint sets forth a count of fraud requesting restoration of the title as the result of the fraud by the Taylors and their counsel in providing verified pleadings before the district court wherein they judicially admitted that the Taylors' mother was the sole beneficiary of the Theodore L. Johnson Trust as a result of the Disclaimer, Release & Indemnification Agreement. The plaintiffs have requested a constructive trust be imposed on the real property for the determination of the fraud committed by the defendants in obtaining the title.

In addition to the count of fraud, the plaintiffs have alleged violations of the Idaho Racketeering Statute. This count sets forth allegations of violations of State Law relative to perjury, suborning perjury, and obtaining money by false pretenses by the defendants. The Idaho Racketeering Statue sets forth remedies that specifically provide that property may be restored to anyone that has been subjected to violations of Title 18, Chapter 78 of the Idaho Code.

There cannot be any slander of title, interference with prospective business advantage, nor an abuse of process when the verified pleadings and the records clearly demonstrate that the defendants perpetrated misrepresentations by sworn testimony before the various court

proceedings. The Taylors and their attorney knew full well the facts as set forth in the verified petition before the probate court and the sworn testimony provided before the Probate Court. As a result of the "Disclaimer, Release & Indemnification Agreement" dated July 15, 2004, the Taylors were no longer beneficiaries. They have judicially admitted such a point and R. John Taylor so testified before the probate court.

The verified amended complaint among other counts sets forth allegations of "fraud upon the court", violations of Idaho Racketeering Statute (encompassing allegations of specific criminal activity by all the defendants acting in unison). The amended complaint involves allegations that defendants, Connie Wright Taylor, f/k/a Connie Taylor, and Paul T. Clark, and Clark and Feeney, a partnership participated, directly or indirectly, and engaged in multiple instances of "theft", "false pretense", "perjury" and "suborning perjury", in violation of Idaho Law. Specifically, the allegations of the complaint assert the defendants engaged in multiple instances of "false pretense", "theft" and "perjury" in violation of Idaho Code Sections 18-2403 and 19-2116.

Both of these counts either by case law or by Statute allow the right to file a lis pendens advising the public of the claims relating to the real property.

The elements of the tort of intentional interference with prospective economic advantage have been set forth in Highland Enterprises, Inc. v. Barker, 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999). The elements of slander of title have been set forth in McPheters v. Maile, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). The elements of abuse of process have been set forth in Cunningham v. Jensen (2005 Idaho 31332). The counter-claims relating to each and every

allegation must fail as a matter of law. An allegation that a party acquired title to real property pursuant to a fraud, is justification for relief such as a constructive trust. A constructive trust arises where legal title to property has been obtained through actual fraud, misrepresentations, concealments, taking advantage of one's necessities, or under circumstances otherwise rendering it unconscionable for the holder of legal title to retain beneficial interest in property. A constructive trust can be imposed where property was obtained either fraudulently or through violation of a fiduciary duty. Hettinga v. Sybrandy, 126 Idaho 467, 469, 886 P.2d 772, 774 (1994), Witt v. Jones, 111 Idaho 165, 722 P.2d 474 (1986). The filing of the lis pendens is proper in this case to advise the public that the acquisition of the title is being challenged. The filing of the lis pendens is proper under the facts involved in this litigation and cannot be construed to give rise to any tort claim as asserted in the counter-claim. The following briefing focuses only on two claims for relief pled by the plaintiffs, however, the vast majority of the counts of the complaint, would also allow a lis pendens to be filed when title was obtained through an unconscionable manner.

a. The Claims of Fraud Give Rise to a Legitimate Claim Against the Defendants.

Berkshire Investments has requested relief to set aside the "***Judgment on Beneficiaries' Claims***", as the same was procured by fraud. The term "fraud upon the court" contemplates more than interparty misconduct, and, in Idaho, has been held to require more than perjury or misrepresentation by a party or witness. Compton v. Compton, 101 Idaho 328, 334, 612 P.2d 1175, 1181 (1980). It "will be found only in the presence of such `tampering with the administration of justice' as to suggest `a wrong against the institutions set up to protect and

safeguard the public.'" Id. (quoting Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246 (1944)). The party asserting a claim of fraud on the court must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense. Rae V. Bunce, (S.C. 2008 Docket No. 33996).

The Honorable Judge Wilper had entered the court's Memorandum Decision and Order on July 28, 2005 allowing the "trust" to amend its complaint after the successor trustees received the required appointment by the probate court. The district court in that Decision ruled that the trust had waived rights to rescind the contract, stating "once a party treats a contract as valid after the appearance of facts giving rise to a right of recision, the right of recision is waived." The District Court further found that the Plaintiffs (Theodore L. Johnson Revocable Trust and the Taylors), now with standing as trustees, did not act promptly to pursue rescission once the grounds for it arose. The district court prior to the Supreme Court decision would not allow the trust or the Taylors to rescind the real estate transaction (Affidavit of Thomas Maile Part Two Memorandum Decision and Order on July 28, 2005 Exhibit "K").

The Affidavit of Thomas Maile filed in Support of the Motion for Summary Judgment, provides testimony concerning how the current plaintiffs were denied their defense in the consolidated cases before Judge Wilper. In the prior proceedings the Taylors retained an expert real estate appraiser, Terry Rudd, who opined that the Linder Road property was valued at $820,000.00. That in defense to the claims of the Theodore L. Johnson Trust and the Taylors' claims there were three (3) Idaho licensed real estate appraisers and an Idaho Realtor who were

going to provide testimony and opinions that the fair market value of the Linder Road property at the time of the purchase was $400,000.00. The plaintiffs were preparing the defense to the allegations by the trust and the Taylors. The plaintiffs were prepared to establish that the purchase price paid was fair and reasonable to the trust.

That as a result of the criminal misrepresentations made to the court by defendants, Berkshire Investments and the other plaintiffs were not able to defend such claims for money damages. Without the wilful criminal behavior by the defendants there would have been a trial for alleged money damages. But for the fraud, and criminal activity committed by the defendants, there would have been no "***Judgment on Beneficiaries' Claims***" voiding the real estate transaction. In the prior proceeding the Honorable Judge Wilper found that the property was valued at 1.8 Million Dollars in 2006 (Decision & Order dated November 29, 2006, attached as Exhibit "D" to Amended Affidavit in Support of Motion to Dismiss dated May 14, 2008). Quite a material misrepresentation by the Taylors and their counsel, providing sworn verified pleadings asserting the Taylors' status as beneficiaries to the trust in 2006 after they admitted to the probate court the Taylors' mother was the sole beneficiary. All of which was done in order to acquire the real property versus potential money damages.

The record establishes that the plaintiffs raised the issue of the fraud, as an issue affecting the standing of the individual Taylors to rescind the real estate transaction as beneficiaries under the trust. The Taylors by judicial admissions acknowledged that they had disclaimed their interests in the trust and the mother was the sole beneficiary of the trust. The deposition testimony of Helen Taylor establishes she never was a party or was represented in the litigation in

which the Taylors misrepresented their status as residual beneficiaries of the trust (Affidavit of Thomas Maile Part 1 Exhibit "D" and Affidavit of Thomas Maile Part 4 Exhibit "AA"). Likewise the deposition testimony of Reed Taylor confirms no assignment form was provided from Helen Taylor assigning her interests to the individual Taylors (Affidavit of Thomas Maile Part 1 Exhibit "C").

Defendant Connie Taylor, acting for the benefit of the Taylors in negotiating the terms of the Disclaimer, Release & Indemnification Agreement, drafted a letter to Bart Harwood on April 14, 2004 which stated, "The Taylors are not willing to give up their rights as beneficiaries of the trust unless Beth will affirm her prior factual statements in the form of an affidavit and agree to cooperate in the action against Mr. Maile. If we aren't able to reach an agreement on that, they will seek a full accounting of the trust and a copy of the trust and estate tax returns". (Affidavit of Thomas Maile Part One deposition of Beth Rogers Exhibit "B" referencing deposition exhibit 39). The Taylors got what they wanted from Beth Rogers and agreed to give up their rights as beneficiaries. The Taylors and their attorneys judicially admitted the same in the verified petition in the probate proceedings and in sworn testimony before the probate court.

The Taylors truly were not beneficiaries of the trust in 2006. The Taylors mislead the district court by claiming they were beneficiaries to take advance of the ruling in Taylor v. Maile 1. The Idaho Supreme Court did not address the issue of the fraud in procuring the "***Judgment on the Beneficiaries' Claims***" since the appellate court felt that the Taylors had standing since they specifically reserved an interest in the litigation. The misrepresentations and criminal behavior committed by the defendants was not decided since standing was resolved by the

"Taylors' interest in the litigation".

When an issue of standing is raised, the focus is not on the merits of the issues raised, but upon the party who is seeking the relief. See Miles v. Idaho Power Co., 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). Scona Inc. v. Green Willow Trust, 133 Idaho 283, 286, 985 P.2d 1145, 1148 (1999). In the present case the Supreme Court did not rule on the substantive issue of the fraud and misrepresentation of the Taylors and their counsel before the district court. The Idaho Supreme Court did not have to consider the same on its merits, since the Taylors had standing reserved by an "interest in the litigation". The material misrepresentations and the criminal behavior committed by the defendants have not been considered on the merits. There is no dispute that "but for" the misrepresentations, the current plaintiffs were deprived of their day in court to address the fair market value of the purchase of the Linder Road property. The Taylors may have had standing in the litigation, but that did not give them or their counsel a license to fraudulently misrepresent the Taylors' status as beneficiaries or to commit criminal activity before the district court. Without their misrepresentations as to their status as beneficiaries, the district court would have allowed a jury trial consistent with its earlier decision relating to claim of money damages. The district would not have had entered its "***Judgment on Beneficiaries' Claims***".

There cannot be an dispute of fact that the defendants and their attorneys knew the full status of the facts in both probate and the district court matters. The amended complaint verified in January 2006, was fashioned after the Supreme Court of Idaho authored its decision in Taylor v.s Maile 1. There was a clear motive and intent by the defendants to fashion a verified

amended complaint asserting "All of the plaintiffs are residual beneficiaries of the Theodore L. Johnson Trust."

Specifically, the promoting, drafting, and ultimately filing of the verification of the amended complaint in January 2006 constitutes criminal behavior and/or fraud. The attachments to the present amended complaint and supporting affidavits of record, sufficiently set forth allegations to support the numerous claims pursued in the present matter. The pleadings have verifications by Mr. R. John Taylor from the probate petition and the amended complaint (2006) which were both drafted by the defendant lawyers representing John R. Taylor as well as the other individual Taylors and the trust in the proceedings captioned *Theodore L. Johnson Revocable Trust vs Thomas Maile, IV and Colleen Maile and Berkshire Investments, LLC*, Ada County Case Number CV OC 04-05656D, and *Taylor vs Maile*, Ada County Case Number CV OC 04-00473D. The amended complaint in the Taylor v.s. Maile matter was verified under oath by R. John Taylor in January 2006, and was prepared and finalized by defendant attorneys and/or their staff who were active participates in the probate proceeding.

The fraudulent statements were surely material as the Honorable Judge Wilper had ruled previously that the trust could not seek rescission of the real estate transaction. The Taylors' expert retained had provided an opinion that the real property was valued at $820,000.00, instead of the $400,000.00 valuation obtained by an independent appraiser at the time of the sale transaction. The value of the real property in November 2006 was established by the court as 1.8 Million Dollars. Obviously the difference in valuation was material and the perjured testimony surrounding the Taylors verification that they were residual beneficiaries allowed the court to

enter the "***Judgment on Beneficiaries' Claim***". The actions of the defendants truly amounts to "tampering with the administration of justice" and should be considered as an absolute "wrong against the institutions set up to protect and safeguard the public". The claims of the plaintiffs are legitimate and well grounded in fact and law.

B. The Claim of Idaho Racketeering Violation is a legitimate claim against the defendants.

Title 18 Chapter 78 provides the statutory authority for the present claims against the defendants. Relevant hereto, IC. 18-7803 provides:

> (a) "Racketeering" means any act which is chargeable or indictable under the following sections of the Idaho Code or which are equivalent acts chargeable or indictable as equivalent crimes under the laws of any other jurisdiction:
>
> (10) Fraudulent practices, false pretenses, insurance fraud, financial transaction card crimes and fraud generally (sections 18-2403, 18-2706, 18-3002, 18-3101, 18-3124, 18-3125, 18-3126, 18-6713, 41-293, 41-294 and 41-1306, Idaho Code);
>
> (17) Perjury (sections 18-5401 and 18-5410, Idaho Code);
>
> (b) "Person" means any individual or entity capable of holding a legal or beneficial interest in property;
>
> (c) "Enterprise" means any sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or any group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities; and
>
> (d) "Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one (1) of such incidents occurred after the effective date

There can be no dispute of facts given the judicial admissions made by the defendant R.

John Taylor and his attorneys of record before the probate court. To be a judicial admission a statement must be a deliberate, clear, and unequivocal statement of a party about a concrete fact within that party's knowledge." Strouse, 129 Idaho at 619, 930 P.2d at 1364 (Ct. App. 1997). Judicial admissions may be considered for the purposes which they were made without admission into evidence, ***and a party making an admission may not controvert the statement on appeal.*** Id. at 619, 930 P.2d at 1364. (emphasis added). There was only one beneficiary remaining in the trust after the execution of the "Disclaimer, Release & Indemnification Agreement".

Specifically, the promoting, drafting, and ultimately filing of the verification of the amended complaint in January 2006 constitutes an allegation of criminal behavior and/or fraud. Idaho Code Section 18-5401 provides:

> PERJURY DEFINED. Every person who, having taken an oath that he will testify, declare, depose, or certify truly, before any competent tribunal, legislative committee, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

The underlying offense of suborning perjury is comprised of a corrupt agreement to testify falsely, followed by the wilful giving of material testimony which the witness and procurer know to be false. State v. Gibson, 106 Idaho 491, 492, 681 P.2d 1, 2 (Ct. App.1984), citing 4 C. TORCIA, WHARTON'S CRIMINAL LAW § 607 (14th ed. 1981). The undisputed facts establish that the attorneys prepared the verified petition which affirmatively stated "***the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of this trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement.***". Approximately 14

months later the same attorneys prepared a verified complaint for their clients to execute stating "***All of the plaintiffs are residual beneficiaries of the Theodore L. Johnson Trust.***". All the defendants actively participated in the procuring of a false verification to the court.

Such conduct, by the defendant attorneys and the individual Taylors and the trust leads to the inescapable conclusion they participated and prepared the necessary documents to the district court to attempt to materially affect the legal proceedings. Idaho Code section 18-5410 states:

> SUBORNATION OF PERJURY. Every person who wilfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured.

There is no dispute that Connie Taylor, notarized her husband's signature on November 14th 2004, wherein her then husband stated under oath in the verified petition before the probate court, at page two "the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of this trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement". Immediately above the signature the verification provides, ""R. John Taylor, being sworn, says that the facts set forth in the foregoing petition are true, accurate, and complete to the best of applicant's knowledge and belief". Finally, there should be no doubt concerning the actual subornation of perjury committed by the defendant attorneys. Both Connie Taylor and her then husband R. John Taylor were licensed attorneys at the time of the commission of the specific criminal conduct alleged.

The case of State V. Wolfrum; 175 P.3d 206 (C.A.2007) provides relevant standards involving a criminal case of perjury. Commencing at p. 210 of 175 P.3d Reports, the Idaho Court of Appeals provides:

> The test for materiality is whether the testimony probably would or could influence a tribunal or jury on the issue before it. The false statement relied upon need not bear directly upon the ultimate issue of fact. A statement is material if it is material to any proper point of inquiry, and if it is calculated and intended to bolster the witness' testimony on some material point or to support or attack his credibility. The degree of materiality is not important. Instruction No. 22, which quoted I.C. § 18-5406, stated: It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and ***might have been used to affect such proceeding*** (emphasis added).

The Taylors actively participated in the global disclaimer agreement between the beneficiaries of the trust and the successor trustees. The Taylors and their counsel presumptively read the Supreme Court case involving Taylor v. Maile 1. The Taylors presumptively read the issues of standing contained in the court's decision. R. John Taylor, an Idaho licensed attorney executed under oath the amended verified complaint in January 2006. There can be no disagreement in the record, the verification in 2006 was contrary to his earlier sworn verification.

In addition to the allegations surrounding perjury, the actions of the defendants violated I.C. § 18-2403 which provides:

> (1) A person steals property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.
>
> (2) Theft includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subsection (1) of this section, committed in any of the following ways:
>
> (a) By deception obtains or exerts control over property of the owner;
>
> (b) By conduct heretofore defined or known as larceny; common law larceny by trick; embezzlement; extortion; ***obtaining property, money or labor under false pretenses***; or receiving stolen goods (emphasis added).

The record is abundantly clear. The defendants perpetrated the fraud a number of times

with pleadings asserting the Taylors were residual beneficiaries of the trust in 2006 (See Affidavit of Thomas Maile Part 2 Exhibits "L", "M"). The Taylors acting with and through their attorneys on February 13, 2006, filed their Motion For Summary Judgment On Beneficiaries' Claim. The first sentence of the motion states, "Come Now Plaintiffs Reed, Dallan, and John Taylor (hereafter referred to as "***the Beneficiary Plaintiffs***") (Affidavit of Thomas Maile Part Two Exhibit "L"). The truth and the facts establish they were not (false pretenses). The lawyers and the clients knew the truth from previous court proceedings before the probate court.

The counter-defendants have correctly asserted a colorable claim under the Idaho Racketeering Statute against the defendants. The lis pendens is properly filed in the current action. In alleging wrongful conduct in violation of Chapter 18 Title 78 of Idaho Law, certain remedies are available including but not limited to:

> 18-7805 Racketeering -- Civil Remedies.
> (a) A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three (3) times the actual damages proved and the cost of the suit, including reasonable attorney's fees.
> (c) The district court has jurisdiction to prevent, restrain and remedy racketeering after making provisions for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. Prior to a determination of liability, such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.
> (d) Following a determination of liability, such orders may include, but are not limited to:
> (1) ***Ordering any person to divest himself of any interest, direct or indirect, in any enterprise***;

The facts establish that an enterprise was created by the co-defendants to obtain an

interest in real property (Affidavit Part 4 Exhibit "W" Contingent Fee Agreement between the attorneys, Clark and Feeney, and Taylors). The activities of the defendants in committing perjury, suborning perjury, and filing false pleadings to the courts, asserting the Taylors as residual beneficiaries, amounts to violations of Idaho Law and racketeering activity. I.C. 18-7804 provides that is it is unlawful "for any person who has received any proceeds derived directly or indirectly from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property". Through the combined efforts of the co-defendants, can be no dispute that real property was acquired as a result of the alleged criminal activity.

That such potential remedy, including the request for a constructive trust, authorizes the filing a Lis Pendens herein and as such the claims set forth in the counter-claim are barred in the present action.

2. ***The Lis Pendens Are Properly Filed.***

There are two distinct counts which are authorize the filing of the lis pendens in the current proceeding as set forth above. A lis pendens is allowed to be filed in connection with a request for a constructive trust, where legal title to property has been obtained through actual fraud. In addition the Idaho Racketeering Statute authorizes specific relief, including restoring the real property to Berkshire Investments. A lis pendens is appropriate to safeguard that remedy. The plaintiffs have done nothing more than to provide public notice of their claims relating to the above referenced counts.

The Affidavit of Thomas Maile filed concurrently demonstrates that the trust has not repaid its obligation owing to Berkshire Investments. Berkshire Investments has a statutory right to protect its repayment of the purchase price of $400,000.00. Idaho Law recognizes a vendees lien for the protection of the money which remains unpaid, including interest thereon. Idaho Code section 45-804 provides:

> Lien of Purchaser of Real Property. One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration.

The money paid to the trust remains outstanding, and until returned, Berkshire Investments lawfully has the protection of the statutory right, to maintain its interest in the real property pursuant to Law. Berkshire Investments has done nothing more to assert its statutory right to file a lis pendens to insure the return of the purchase price and interest thereon as may be determined due and owing.

That in addition, the plaintiffs herein have previously filed their lis pendens in the prior proceedings which remains of record with the Ada County Recorder's Office, as further protection of the vendee's lien (Affidavit of Thomas Maile in Support of Motion Exhibit "B"). That the prior vendee's lien is superior to the lis pendens herein and as such the lis pendens filed herein has not impaired the title to the subject real property and as such the claims set forth in the counter-claim are barred in the present action.

The plaintiffs are exercising nothing more than what the above Law grants. The plaintiffs are entitled to avail themselves of the protection of the vendee's lien and the case law generated

for the imposition of a constructive trust. Statutory protection is a defense to any alleged wrongful recording of a notice of claim. See generally, Hewson v. Asker's Thrift Shop, 120 Idaho 164, 167, 814 P.2d 424, 427 (1991). Generally a right which stems from statutory protection is a defense to certain actions. See, generally, Rincover v. State, 128 Idaho 653, 656, 917 P.2d 1293, 1296 (1996).

The case of Clark v. Clark, 56 Idaho 6, 47 P.2d 914 (1935), illustrates, the point of law that acting pursuant to a statutory right, does not amount to malice.

> "It is quite generally held that what a person may lawfully do may be done with or without malice. (Authorities cited.) In other words, there can be no legal malice in contemplation of law where the thing done is lawful and the means employed are lawful. Courts must judge the intent a man has in doing an act by the means he employs and the thing to be accomplished, and if they all be lawful, courts cannot impute malicious or unlawful motives to the actor."

Berkshire Investments claims rights to have the title restored to it and/or for the payment of monies due and owing. The vendee's lien is a creature of statute. In maintaining the lis pendens Berkshire is doing nothing more than the acting consistent with what Idaho Law allows.

CONCLUSION

There is ample statutory authority and case law cited above that warrants the plaintiffs' claims. The filing of the lis pendens to protect their rights both as to the remedies pled and for the repayment of the monies that are still outstanding which are lawfully due and owing to Berkshire Investments is proper. There is no legitimate basis for any of the three (3) counts of the counter-claim. The Counter-defendants are entitled to Partial Summary Judgment as to all counter-claims raised by the defendants.

DATED this 17th day of March, 2009.

THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION

Defendants.

Case No. CV OC 07 23232

SUPPLEMENTAL AFFIDAVIT OF CONNIE W. TAYLOR IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Nez Perce)

SUPPLEMENTAL AFFIDAVIT OF
CONNIE W. TAYLOR 1

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

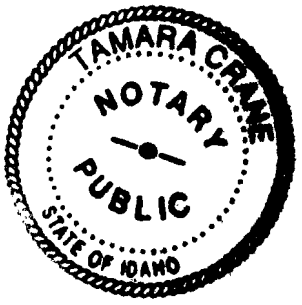
1. I am an attorney duly licensed to practice law within the state of Idaho and a member of Clark and Feeney, attorneys for the Defendants John Taylor, Dallan Taylor and Theodore Johnson Trust in the above entitled matter. The information contained herein is of my own personal knowledge.

2. I am attaching hereto as Exhibit A, a true and correct copy of an Idaho Repository printout with the record of actions for the District Court case, *Taylor v. Maile* CV OC 2004-00473D. This printout does not include all the pleadings filed in the two appeals cases associated with this case.

DATED this 1st day of April, 2009.

Connie Taylor

SUBSCRIBED AND SWORN to before me this 1st day of April, 2009.



Tamara Crane

Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 03/06/2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of April, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV
380 West State Street
Eagle, ID 83616

- [X] U.S. Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy (FAX) ***(208) 939-1001***

Mark Prusynski
MOFFATT THOMAS
101 S Capitol Blvd., 10th Floor
PO Box 829
Boise, ID 83701

- [X] U.S. Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Telecopy (FAX) ***(208) 385-5384***

Connie W. Taylor
Attorney for Defendants

Case History

Ada

1 Cases Found.

Reed Taylor, etal. vs. Thomas Maile Iv, etal.

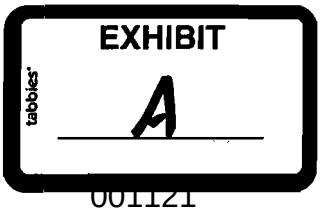
Case: **CV-OC-2004-03642** **Old Case: CV-OC-04-00473*D** **District** Filed: **01/23/2004** Subtype: **Other Claims** Judge: **Ronald J. Wilper** Status: **Closed pending clerk action 02/17/2009**

Defendants: **Berkshire Investments Llc Maile, Colleen Maile, Thomas Iv Thomas Maile Real Estate Company**

Plaintiffs: **Taylor, Dallan Taylor, R John Taylor, Reed Theodore Johnson R, Evocable Tru St**

Pending hearings:	Date/Time	Judge	Type of Hearing
	04/06/2009 4:00 PM	Ronald J. Wilper	Motion

Disposition: Date	Judgment Type	Disposition Date	Disposition Type	Parties	In Favor Of
06/07/2006	Other			Maile, Thomas Iv (Defendant), Maile, Colleen (Defendant), Thomas Maile Real Estate Company (Defendant), Berkshire Investments Llc (Defendant), Taylor, Reed (Plaintiff), Taylor, Dallan (Plaintiff), Taylor, R John (Plaintiff), Theodore Johnson R, Evocable Tru St (Plaintiff)	Unknown
11/29/2006	Other			Maile, Thomas Iv (Defendant), Maile, Colleen (Defendant), Thomas Maile Real Estate Company (Defendant), Berkshire Investments Llc	Unknown



(Defendant),
Taylor, Reed
(Plaintiff),
Taylor,
Dallan
(Plaintiff),
Taylor, R
John
(Plaintiff),
Theodore
Johnson R,
Evocable Tru
St (Plaintiff)

Register of actions:	Date	
	01/23/2004	New Case Filed
	01/23/2004	Civil Complaint, More Than $1000, No Prior Appearance
	01/23/2004	(2)summons Issued
	02/02/2004	Another Summons Issued
	02/11/2004	Affidavit Of Service And Summons 2-5-04
	02/13/2004	Affidavit Of Service And Summons 2-7-04
	02/23/2004	Notice Of Service
	02/23/2004	Verified Answer,(hoagland For T&c Maile No Prior Appearance & Berkshire Invest)
	02/23/2004	Special Motions, Counterclaim, With Prior Appearance
	02/23/2004	Motion For Order Of Disqualification
	02/23/2004	Motion Change Of Venue, Dismissal, & Compel
	02/27/2004	Order For Disqualification Of Judge Copsey
	02/27/2004	Notice Of Reassignment To Judge Wilper
	03/05/2004	Notice Of Status Conf-4/6/04 At 3:45
	03/15/2004	Notice Of Service
	03/15/2004	Answer To Counterclaim (taylor For Taylor)
	03/15/2004	Notice And Stipulation Of Substitution
	03/15/2004	(t Maile For: T & C Maile, T Maile Real Est
	03/15/2004	& Berkshire Investments)
	03/15/2004	Def Thomas Maile's Motion To Dismiss
	03/15/2004	Memo In Support Of Motion To Dismiss
	03/15/2004	Hearing Scheduled - Motn To Dismiss (04/12/2004) Ronald J Wilper
	03/23/2004	Notc Of Assn Of Counsel (collaer For Maile)
	03/24/2004	Notice Of Sub Counsel(points For Thomas Maile
	03/29/2004	Certificate Of Mailing
	04/06/2004	Plaintiffs Memorandum In Opposition Of Motion
	04/06/2004	To Dismiss Lodged
	04/08/2004	Motion To Continue Hearing On Mtn To Dismiss
	04/08/2004	Affidavit In Support Of Motion To Continue Hr
	04/08/2004	Reply Memo In Suppt Of Def Motn To Dismiss
	04/12/2004	Affidavit Of Counsel
	04/12/2004	Motion For Order Shortening Time
	04/12/2004	Hearing Held - Motn To Dismiss
	04/23/2004	Order Granting Motion To Dismiss

05/03/2004 Motion To Amend Order
05/03/2004 Motion For Sanctions,costs & Atty Fees
05/03/2004 Affidavit Of Thomas Maile
05/03/2004 Certificate Of Mailing
05/19/2004 Defendant's Motion To Strike
05/19/2004 Affidavit In Support Of Motion
05/19/2004 Notice Of Hearing (6-10-04 @ 4pm)
06/04/2004 Civil Appeals To Supreme Court
06/24/2004 Reopen (case Previously Closed)
06/24/2004 Order (to Re-open Case)
06/24/2004 Order Denying Motion Re: Lis Pendens
08/04/2004 Notice Of Taking Deposition
08/04/2004 Notice Of Taking Deposition
08/09/2004 Motion For Protective Order
08/09/2004 Motion For Order Shortening Time
08/09/2004 Affidavit Of Counsel
08/10/2004 Motion For A Protective Order Re:disclosure
08/10/2004 Affidavit In Support Of Motion For Prot Order
08/10/2004 Notice Of Taking Deposition Of S Johnson
08/10/2004 Notice Of Taking Deposition Of Bret Johnson
08/10/2004 Notice Of Taking Deposition Of Bret Johnson
08/10/2004 Notice Of Taking Deposition Of Hazel Fisher
08/10/2004 Hearing Scheduled - Motn Fr Protect Order (08/30/2004) Ronald J Wilper
08/10/2004 Amended Motn For Order Shortening Time
08/10/2004 Hearing Scheduled - Notc Of Objt (08/16/2004) Ronald J Wilper
08/11/2004 Motion For Order Shortening Time
08/11/2004 Motion For Protective Order Re:def's Notc Dep
08/11/2004 Affidavit Of Counsel
08/12/2004 Def/counterclaimants Motn To Consolidate
08/12/2004 Affidavit Of T.maile In Spprt Of Motion
08/12/2004 Notice Of Taking Deposition
08/12/2004 Amended Notc Of Taking Deposition
08/12/2004 Notice Of Hearing On Motn To Consolidate
08/12/2004 Note Of Issue/request For Trial
08/12/2004 Amended Motion For Order Shortening Time
08/12/2004 Notice Of Hearing 8/16/04 @ 11 Am
08/12/2004 Affidavit In Support Of Motion For P.o.
08/13/2004 First Motn To Compel Discovery Responses
08/13/2004 Affd Of J Hally In Support Of Motn
08/13/2004 Notice Of Hearing Motn To Compel
08/16/2004 Notice Of Service
08/16/2004 Affidavit Of Tina L. Kernan
08/16/2004 Memo Brief In Support Of Motions
08/16/2004 Certificate Of Mailing
08/16/2004 First Motion To Compel Discovery Responses
08/16/2004 Affidavit Of J.hally In Sppt Motn To Compel
08/16/2004 Notice Of Hearing(08/30/04 @1:30)

08/16/2004	Hearing Held - Notc Of Objt
08/16/2004	Order To Shorten Time
08/16/2004	Motion Fr Order Staying Proceedings Pend Appl
08/16/2004	Hearing Scheduled - Motn For Order (08/30/2004) Ronald J Wilper
08/17/2004	Motion For Sanctions/costs & Attrny Fees
08/17/2004	Affd Of T.maile N Oppstn To Motn To Compel
08/17/2004	**lodg*8 Memo Brief In Oppostn
08/17/2004	Notc Of Compliance
08/17/2004	Certificate Of Mailing
08/18/2004	Order For Protective Order
08/25/2004	Second Amended Notice Of Taking Deposition
08/30/2004	Hearing Held - Motn For Order
08/30/2004	Hearing Held - Motn Fr Protect
08/30/2004	Acceptance Of Service
08/30/2004	Notice Vacating Def's Motion To Consolidate
08/30/2004	2 Amended Notice Of Taking Deposition
09/08/2004	Acceptance Of Service
09/08/2004	Second Amended Notice
09/08/2004	Third Amended Notice
09/08/2004	Notice Of Status Conference (10/26/04 @ 4pm)
09/08/2004	Hearing Scheduled - Renewed Motion (09/27/2004) Ronald J Wilper
09/10/2004	Amended Notice Of Hearing (9-27-04@3:00pm)
09/10/2004	Dfndnts Renewed Motn To Strike Lis Pendens
09/10/2004	Affd Of T.maile In Spprt Of Motn To Strike
09/10/2004	Memo In Spprt Of Dfndnts Renewed Motn
09/10/2004	Dfndnts Motion To Compel&motn For Costs& Fees
09/10/2004	Affidavit Of T.maile In Spprt Of Motn Compel
09/10/2004	Notice Of Hearing On Motn Compel(9-27-04-3:30
09/10/2004	Affd Of T.maile Managing Member Of Berkshire
09/16/2004	Order On Protective Order
09/16/2004	Order To Compel
09/16/2004	Order Denying Motion To Stay
09/20/2004	Pltf's Memo Oppos Motn To Strike Lis Pendens
09/21/2004	Reply Memo In Support Of Def's Renewed Motion
09/21/2004	Certificate Of Mailing
09/23/2004	Notice Of Service
09/23/2004	Notice Of Service
09/27/2004	Hearing Held - Renewed Motion
09/28/2004	Notice Of Compliance
09/29/2004	Hearing Scheduled - Def's Motion (11/22/2004) Ronald J Wilper
09/29/2004	Hearing Vacated - Def's Motion
09/29/2004	Hearing Scheduled - Def's Motion (11/22/2004) Ronald J Wilper
09/29/2004	Order To Consolidate W/cvoc0405656d
10/01/2004	Supplemental Affidavit In Support Of Motion
10/04/2004	Answer To Counterclaim
10/05/2004	Objection To Proposed Order

10/06/2004 Notice Of Compliance
10/07/2004 Order On Motion To Strike Deposition
10/07/2004 Order Denying Motion On Lis Pendens
10/07/2004 (6) Notice Of Taking Deposition
10/07/2004 Amended Notice Of Taking Deposition
10/07/2004 Certificate Of Mailing
10/12/2004 Notice Of Service
10/12/2004 Acceptance Of Service10-7-04 (garth Fisher)
10/12/2004 Motion To Bifurcate Trial
10/12/2004 Hearing Scheduled - Motn To Bifurcate (10/26/2004) Ronald J Wilper
10/15/2004 Notice Of Service
10/19/2004 Affidavit Re: Motion To Compel Answers
10/19/2004 Motion To Compel Answers
10/20/2004 Motn To Dismiss Complaint
10/20/2004 Affidavit In Support Of Motion
10/20/2004 Lodged-memo Brief In Suprt Of Motion
10/20/2004 Hearing Scheduled - Motn To Bifurca (11/15/2004) Ronald J Wilper
10/20/2004 Notice Of Hearing 11/22/04 @ 11am
10/21/2004 Objection To Motn To Bifurcate Trial
10/21/2004 Notice Of Service
10/22/2004 Order On Motion To Strike
10/25/2004 Notice Of Service
10/26/2004 Hearing Scheduled - Motion (12/20/2004) Ronald J Wilper
10/26/2004 Hearing Vacated - Motn To Bifurca
10/28/2004 Notice Of Trial Setting
10/28/2004 Jury Trial Scheduled - (12/07/2005) Ronald J Wilper
11/03/2004 Motion For Protective Order
11/03/2004 Affidavit Of T Maile In Support Of Motion
11/03/2004 Notice Of Compliance
11/03/2004 Certificate Of Mailing
11/05/2004 Notice Of Service
11/05/2004 Motion To Deny Or Vacate Motn For Partial Smj
11/05/2004 Affidavit In Spprt Of Motn To Deny
11/05/2004 Notice Of Hearing On Motn Deny 11-22-04@11am
11/08/2004 Memo In Opposition Of Def's Motion For Psj
11/08/2004 Affidavit Of Counsel In Opposition To Motion
11/08/2004 Affidavit Of Dallan Taylor
11/08/2004 Affidavit Of Reed Taylor
11/08/2004 Affidavit Of Jud Taylor
11/08/2004 Affidavit Of Sam Rosti
11/08/2004 Affidavit Of Dennis Mccracken
11/08/2004 Affidavit Of Richard L Zamzow
11/08/2004 Motion For Appointment Of Discovery Master
11/08/2004 Affidavit In Support Of Motion For Apptment
11/08/2004 Hearing Scheduled - Motn For Apptmt (12/06/2004) Ronald J Wilper
11/09/2004 Motion For Exparte Order To Show Cause
11/09/2004 Affidavit Of T Maile In Support Of Motion

11/09/2004 Amended Notice Of Taking Deposition
11/09/2004 Notice Of Compliance
11/09/2004 Notice Of Service
11/12/2004 Reply Memo In Support Of Def's Motion For Sj
11/12/2004 Memo In Support Of Def's Motn To Strike Affds
11/12/2004 Affd Of Thomas Maile In Support Of Motion
11/12/2004 Memo In Oppos To Pltfs Motion For Contunuance
11/12/2004 Affd Of Thomas Maile In Support Of Motion
11/12/2004 Notice Of Association Of Counsel
11/15/2004 Supplemental Affidavit Of T Maile In Support
11/15/2004 Hearing Held - Motn To Bifurca
11/22/2004 Hearing Held
11/22/2004 Motion To Compel Discovery Responses
11/22/2004 Affidavit In Support Of Motion
11/22/2004 Hearing Vacated - Motion
11/24/2004 Order Granting Motion To Strike
11/29/2004 Order Granting Motion To Strike In Part
11/29/2004 Defendants Notice Of Objection To Plaintiffs
11/29/2004 Motion For Appointment Of Discovery Master
12/02/2004 Notice Of Service(2)
12/02/2004 Affidavit Of Terry Rudd
12/03/2004 Hearing Vacated - Motn For Apptmt
12/03/2004 Supplemental Affidavit Of Thomas G Maile
12/03/2004 Certificate Of Mailing
12/10/2004 Affidavit Of B Rogers
12/14/2004 2nd Amended Notice Of Taking Deposition
12/23/2004 (2)notice Of Compliance
12/23/2004 Affidavit Of Tim Williams
12/23/2004 Certificate Of Mailing
12/23/2004 (2)affidavit Of Service(12/16/04)
12/27/2004 Notice Of Service
12/30/2004 2nd Amended Notice Of Taking Deposition
12/30/2004 3rd Amended Notice Of Taking Deposition
12/30/2004 Certificate Of Mailing
12/30/2004 Notice Of Service
01/05/2005 Hearing Scheduled - (03/17/2005) Ronald J Wilper
01/10/2005 Notice Of Service
01/10/2005 Notice Of Service
01/20/2005 Notice Of Service
02/03/2005 Supplemental Affidavit Of Thomas G Maile In
02/03/2005 Support Of Motion For Summary Judgment
02/14/2005 Second Supplemental Affidavit Of Thomas Maile
02/14/2005 In Support Of Motion For Summary Judgment
02/14/2005 Motion For Leave To Cite Unpublished Opinion
02/14/2005 Affidavit Of Elaine Lee
02/14/2005 Spplmtl Memorandum In Sppt Def Motn Dismiss
02/14/2005 Notice Of Service
02/15/2005 Affidavit Of Thomas Maile In Support Of Def's
02/15/2005 Motion For Partial Summary Judgment

02/15/2005 Second Supplemental Affidavit Of Phillip J
02/15/2005 Collaer In Support Of Motn For Partial Sj
02/15/2005 Supplemental Memorandum Lodged Re:motn For Sj
02/15/2005 Notc Of Hring (03/17/05@3:00)motn:partial Sj
03/03/2005 Motion To Strike
03/03/2005 Memorandum In Support Of Motn For Sum Judgmt
03/03/2005 Summary Of Facts And Exhibits
03/03/2005 Affidavit Of Donna Jones
03/03/2005 Affidavit Of Richard White
03/03/2005 Affidavit Of Counsel
03/03/2005 Affidavit Of Richard Mollerup
03/03/2005 Affidavit Of Terry Rudd
03/07/2005 Fourth Amen Notice Of Taking Deposition
03/08/2005 Hearing Vacated - Motn For Partial Sum Judgmt
03/08/2005 Fifth Amended Notice Of Taking Deposition
03/08/2005 Hearing Scheduled - Motn For Summry (03/17/2005) Ronald J Wilper
03/09/2005 Notice Vacating Hearing Re:motn To Dismiss
03/28/2005 6th Amended Notice Of Taking Deposition
03/28/2005 Hearing Scheduled - Motn Summ Jdmt (06/13/2005) Ronald J Wilper
04/25/2005 Notice Of Taking Deposition
05/06/2005 (2) Notice Of Taking Deposition
05/06/2005 Notice Of Service
05/10/2005 (2) Notice Of Taking Deposition
05/12/2005 Notice Of Hearing(06/13/05@1:30)re:partial Sj
05/13/2005 Notice Of Service
05/13/2005 Motion For Summary Judgment
05/13/2005 Memo In Support Of Motn For Summary Judgment
05/13/2005 Affidavit Of R John Taylor
05/13/2005 Notice Of Hearing (6-13-05 @ 1:30)
05/13/2005 Affidavit Of Elaine H Lee
05/13/2005 3rd Supplemental Affidavit Of Thomas G Maile
05/13/2005 In Support Of Motion For Summary Judgment
05/16/2005 Def's 2nd Supplemental Memo In Support Mosj
05/17/2005 Certificate Of Mailing 5/13/05
05/18/2005 (6) Notice Of Taking Deposition
05/20/2005 Motion For Leave To Amend Complaint
05/20/2005 Lodged Memo In Support Of Motion For Leave
05/24/2005 Certificate Of Mailing
05/24/2005 Affidavit Of Thomas Maile In Opp To Mosj
05/24/2005 Affidavit Of Al Knutson In Opp To Mosj
05/24/2005 Lodged Reply Brief In Opp To Mosj
05/24/2005 Motion To Amend Answer And Counter-claim
05/24/2005 Affidavit In Support Of Motion To Amend
05/24/2005 Notice Of Hearing Re:amend(6/13/05@ 1:30 Pm)
05/27/2005 Memo In Oppostion To Plnt Motion To Strike
05/27/2005 Defendant Maile's Motion For Protective Order
05/27/2005 Defendant's Memorandum Lodged In Suppt Motion

05/27/2005 Affidavit Of Elaine H Lee
05/27/2005 Notice Of Hearing (06/13/05@1:30)
05/31/2005 (4) Affidavit Of Service (5-18-05)
05/31/2005 Affidavit Of Service (5-19-05)
05/31/2005 Affidavit Of Service (5-23-05)
05/31/2005 (6) Notices Of Taking Deposition
05/31/2005 Suppl Memo In Opp To Def's Motn To Dismiss
05/31/2005 Motn For Summ Judg & Part Summ Judg
05/31/2005 Notice Of Hearing- Motn Amend Complaint
05/31/2005 (6-13-05 @ 1:30 Pm)
06/03/2005 Affidavit In Opposition To Motion To Amend
06/03/2005 Reply Affidavit In Support Of Mtn Summary Jdm
06/03/2005 Replly Breif In Oppstn To Mtn Amend Lodged
06/03/2005 Notice To Withdraw Mtn To Amend Answer & Ctcl
06/03/2005 Certificate Of Mailing
06/03/2005 Supplemental Affidavit Of Elaine H Lee
06/06/2005 Def Motion To Strike Portions R.mollerup Affd
06/06/2005 Second Supplemental Affidavit Elaine Lee
06/06/2005 Def Reply Brief Re:motn To Dismiss/ Mosj
06/06/2005 Second Reply Memorandum In Support Of Motion
06/06/2005 For Summary Judgment
06/06/2005 Defendant's Motion To Strike Affidavit Of
06/06/2005 Richard J White
06/06/2005 Memorandum In Support Of Motion Lodged
06/06/2005 Notice Of Hearing(06/13/05 At 1:30 Pm)
06/07/2005 Notice Of Service
06/09/2005 Notice Vacating Deposition
06/09/2005 Objection To Hearing On Motn To Strike
06/10/2005 Lodged Rply Memo Re Motn Protective Order
06/13/2005 Hearing Held - Motn Summ Jdmt
06/15/2005 (2) Notice Of Vacating Deposition
06/17/2005 Notice Of Compliance Re:response To Interrogt
06/17/2005 Notice Of Service
06/29/2005 Hearing Scheduled - Motn Summry Jud (08/15/2005) Ronald J Wilper
06/29/2005 Notice Of Service
06/30/2005 (2) Notice Of Compliance
07/12/2005 (2)notices Of Taking Deposition Duces Tecum
07/12/2005 Notice Of Taking Deposition
07/20/2005 Notice Of Compliance
07/22/2005 Hearing Scheduled - Motn Summry Jud (08/29/2005) Ronald J Wilper
07/22/2005 Hearing Vacated - Motn Summry Jud
07/28/2005 Memo Decision & Order
08/02/2005 Memorandum Of Costs And Attorney Fees
08/03/2005 Amen Notc Of Hearing On Motn Amen Answer Set
08/03/2005 Continued (8-29-05@3pm)motn To Amend
08/08/2005 Notice Of Compliance
08/10/2005 Hearing Vacated - Motn Summry Jud

08/17/2005	Acceptance Of Service (07/12/05)
08/17/2005	(2) Notice Of Compliance
08/24/2005	Stip Re:def Counter Claimts Motn To Amen Answ
08/24/2005	And Counterclaim
08/26/2005	Def 2nd Renewed Motion To Strike Lis Pendens
08/26/2005	Memo Brief Of Def 2nd Motn To Strike
08/26/2005	Affidavit Of Thomas Maile In Support Of Motn
08/26/2005	Hearing Scheduled - 2nd Renew Motn To Strike (09/15 /2005) Ronald J Wilper
08/30/2005	Order Re: Stipulation To Amend
09/01/2005	Notice Of Compliance Re:5th Set Of Requests
09/01/2005	Notice Of Compliance
09/02/2005	Notice Of Service
09/07/2005	Verified Amended Answ & Counterclaim & Demand
09/08/2005	Memorandum Opposing Renewed Motion To Strike
09/09/2005	Notice Of Service
09/14/2005	Hearing Scheduled - (10/03/2005) Ronald J Wilper
09/15/2005	Hearing Vacated - 2nd Renew Motn
09/16/2005	(2) Notice Of Service
09/16/2005	Notice Of Service
09/21/2005	Notice Of Compliance Re: Def's 9th Responses
09/26/2005	Reply To Def Amended Counterclaim
09/28/2005	Amended Complaint Filed
09/30/2005	Notice Of Service
09/30/2005	Notice Of Service
10/03/2005	Order Granting Costs-matter Of Right
10/03/2005	Amended Motion For Summary Judgment
10/03/2005	Affidavit In Support Of Motion
10/03/2005	Lodged-memorandum In Support Of Motion
10/03/2005	Hearing Scheduled - Summ Jdmt Motn (11/03/2005) Ronald J Wilper
10/03/2005	Amended Reply To Amended Counterclaim
10/03/2005	Notice Of Service
10/03/2005	Notice Of Compliance
10/03/2005	Notice Of Compliance
10/03/2005	Defnd Disclosure To 5th & 6th Set Of Interrgs
10/03/2005	Case Taken Under Advisement
10/05/2005	Order Denying Motion To Release Lis Pendens
10/07/2005	Def's Renewed Motion For Summary Judgment
10/07/2005	Memo In Support Of Renewed Motion
10/07/2005	Affidavit Of Elaine H Lee
10/07/2005	Hearing Scheduled - Motion (11/07/2005) Ronald J Wilper
10/11/2005	Supplemental Memorandum Lodged Opposing 2nd
10/11/2005	Renewed Motion To Strike Lis Pendens
10/11/2005	Answer To Amended Complaint And Demand
10/13/2005	Notice Of Compliance Re: Repsonse To Plnt Rqs
10/13/2005	Notice Of Compliance Re:def 12th Response
10/13/2005	Reply Affidavit Of T. Maile In Opposition To
10/13/2005	Pl. Amended Motion For Summary Judgment

10/13/2005 Lodged-reply Brief In Opp To Motn For Sum Jdt
10/13/2005 Notice Of Compliance Re: Def's 11th Splmntl
10/13/2005 Responses To First Set Of Interrogatories
10/13/2005 Certificate Of Mailing
10/13/2005 Affd Of C Maile In Opp To Amen Motn For S Jdt
10/20/2005 Motion To Compel Discovery Responses
10/20/2005 Affidavit In Support Of Motion To Compel
10/20/2005 Motion In Limine
10/20/2005 Lodged Memorandm In Supprt Of Motn In Limine
10/20/2005 Notc Of Hearng Motn In Limine & Mtn To Compel
10/20/2005 (11/03/2005 @ 3:00 Pm)
10/20/2005 Affidavit Of E Lee
10/20/2005 Lodged Memo In Oppstn To Motn For Part Smj
10/21/2005 Hearing Vacated - Summ Jdmt Motn
10/21/2005 Hearing Scheduled - Motn Part Smj & Motn Cmpl (11/10 /2005) Ronald J Wilper
10/21/2005 Affidavit Of Mailing
10/24/2005 Affidavit Of Mailing
10/24/2005 Affidavit Of Dan C Grober
10/24/2005 Lodged Memo In Opposition To Def Renewed Msj
10/24/2005 Notice Of Assoc Of Counsel(charney For Maile)
10/24/2005 Supplemental Affidavit Of Dan Grober
10/25/2005 Sheriff's Affidavit Of Service
10/25/2005 Notice Of Taking Deposition
10/25/2005 Notice Of Taking Deposition
10/26/2005 Motion For Leave To Amend Complaint
10/26/2005 Memorandum In Support Lodged
10/27/2005 Motion To Continue And Notice Of Hearing
10/27/2005 (11/10/05@3pm)
10/27/2005 Motion To Strike And Notice Of Hearing
10/27/2005 (11/10/05@3pm)
10/27/2005 Lodged-brief In Support Of Motn To Strike
10/27/2005 Answer To Corrected Amended Complaint
10/27/2005 Motion To Vacate Hearing
10/27/2005 Affidavit Of Jack S Gjording
10/27/2005 Notice Of Taking Deposition
10/27/2005 Second Notice Of Taking Deposition
10/28/2005 Lodg Memo In Opp To Motn To Compel Discovery
10/28/2005 Affidavit Of Thomas Maile
10/28/2005 (5)affidavit Of Service (10/26/05)
10/28/2005 Affidavit Of Service (10/27/05)
10/31/2005 Answ/26 Entered In Error On 10/27/05
11/01/2005 Notice Of Compliance
11/01/2005 Affidavit Of Service (10/26/05)
11/01/2005 Affidavit Of Service (10/27/05)
11/01/2005 Affidavit Of Service (10/31/05)
11/01/2005 Amended Notice Of Taking Deposition
11/01/2005 Amended Notice Of Taking Deposition

11/01/2005	Amended Hearing Scheduled - Def Renewd Motn (11/17 /2005) Ronald J Wilper
11/03/2005	Lodged Reply Memo In Support Of Amended Mosj
11/03/2005	Amended Hearing Scheduled - (11/07/2005) Ronald J Wilper
11/03/2005	Notice Of Hearing (11-17-05 @ 4:00 Pm)
11/03/2005	2nd Supplemental Affidavit Of Dan Grober
11/03/2005	Opposition To Plaintffs' Motions In Limine
11/03/2005	Affidavit Of Elaine H Lee
11/04/2005	Stipulation To Vacate & Reschedule Def's
11/04/2005	Renewed Motion For Summary Judgement And
11/04/2005	Plaintiff's Motion For Leave To Amend
11/04/2005	Notice Of Service
11/04/2005	(3) Notice Of Taking Deposition
11/07/2005	Notice Of Taking Deposition Of Thomas Maile
11/07/2005	Judgment Re: Motions For Partial Summ Jdmt
11/07/2005	Hearing Vacated
11/07/2005	Hearing Vacated - Motion
11/09/2005	Memorandum Re Motion To Amend Lodged
11/10/2005	Case Taken Under Advisement - Motn Part Smj
11/10/2005	Memorandum Lodged In Opposition To Motn:amend
11/10/2005	Notice Of Service
11/10/2005	Notice Of Service
11/14/2005	Motion In Limine
11/14/2005	Hearing Scheduled - (11/28/2005) Ronald J Wilper
11/14/2005	Brief In Support Of Motion Lodged
11/14/2005	Motion To Amend Caption
11/14/2005	Dfnd Motn In Limine
11/14/2005	Memo In Support Of Dfnd Motn In Limine
11/14/2005	Notice Of Hearing 11/28/05@3:00pm
11/15/2005	Motion To Quash Subpoena, Motn For Protective
11/15/2005	Ordr,and Motn For Sanctions
11/15/2005	Lodged Memo In Support Of Motn To Quash
11/15/2005	Motion To Continue Trial Date
11/15/2005	Notice Of Hearing 11/28/05@3pm
11/15/2005	Amended Notice Of Hearing (11/28/05 @ 3pm)
11/16/2005	Motion For Order Shortening Time For Notice
11/16/2005	Of Hearing
11/16/2005	Hearing Scheduled - Motion (11/17/2005) Ronald J Wilper
11/16/2005	Affd Of T.g. Maile In Oppos To Continue Trial
11/16/2005	(2) Notice Of Compliance
11/16/2005	Defendants' Opposition To Motion For Order
11/16/2005	Shortening Time & Notc Of Hrng (11/28/05)
11/16/2005	Affidavit Of Elaine H Lee In Support Of Defs'
11/16/2005	Opposition To Motn For Order Shortenin Tm
11/17/2005	Hearing Held - Motion
11/17/2005	Hearing Held - Def Renewd Motn
11/21/2005	Hearing Vacated
11/21/2005	Hearing Vacated

11/21/2005	Hearing Vacated - Jury Trial
11/22/2005	Affidavit Of Service 11/07/05
11/28/2005	Order Vacating Trial, Hearings
12/23/2005	Opinion Lodged Supreme Court #30817
12/30/2005	Order For Supplemental Briefing - Remand
01/20/2006	Lodged Joint Supplemental Brief in Light of Supreme Court Remand
01/23/2006	Motion for Leave to Amend Complaint
01/23/2006	Hearing Scheduled (Motion 02/27/2006 03:00 PM)Motn for Leave to Amend Complaint
01/23/2006	Lodged Memo
01/31/2006	Remittitur-Affirmed/Reversed Supreme Court #30817
02/10/2006	Notice of Hearing (Motion for Summary Judgment) (03/13/2006 01:30 PM)
02/13/2006	Order Re: Motion for Summary Judgment
02/13/2006	Motion For Summary Judgment on Beneficiaries' Claim
02/13/2006	Affidavit of R John Taylor In Support Of Beneficiaries' Motion For Summary Judgment
02/13/2006	Lodged Plaintiff's Memorandum in Support Of Motion For Summary Judgment on Beneficiaries' Claim
02/24/2006	Hearing result for Motion held on 02/27/2006 03:00 PM: Hearing Vacated
02/24/2006	Hearing result for Motion for Summary Judgment held on 03/13/2006 01:30 PM: Hearing Vacated
02/24/2006	Amended Notice of Hearing Re: Motion for Summary Judgment on Beneficiaries Claim (4/3/06 at 11)
02/24/2006	Hearing Scheduled (Motion 04/03/06 at 11)
03/02/2006	Request for Trial Setting
03/03/2006	Notice of Scheduling Conf-4/3/06 at 11
03/06/2006	Stipulation RE: Motion For Leave To Amend Complaint
03/06/2006	Lodged Amended Complaint
03/09/2006	Order Granting Motion to File Amended Complaint
03/09/2006	Amended Complaint Filed
03/14/2006	Lodged Brief In Opposition to Motion for Summary Judgment
03/14/2006	Affidavit of T Maile in Opposition to motion for Summary Judgment
03/14/2006	Certificate Of Mailing
03/15/2006	Answer to Amended Complaint and Demand for Jury Trial (Gjording for Defendants)
03/17/2006	Affidavit of G Mcallister
03/17/2006	Lodged Memorandum in Opposition to Taylors Motion for Summary Judgment
03/21/2006	Answer and Counterclaim Re: Amended complaint by beneficiaries
03/27/2006	Affidavit of Counsel in Support of Plaintiffs Memorandum Support
03/27/2006	Lodged Memorandum in Support of Motion
03/29/2006	Affidavit of Counsel
04/03/2006	Hearing result for Motion held on 04/03/2006 11:00 AM: Hearing Held
05/01/2006	Hearing Scheduled (Jury Trial 10/11/2006 09:00 AM)

05/01/2006	Hearing Scheduled (Civil Pretrial Conference 09/26/2006 03:30 PM)
05/01/2006	Order Resetting Trial
05/05/2006	Amended Order Resetting Trial
05/10/2006	Motion for Disqualification of Alternate Judge
05/15/2006	Plaintiffs' Disclosure of Witnesses
05/15/2006	Order Granting Summary Judgment on Beneficiaries Claim
05/30/2006	Motion To Reconsider
05/30/2006	Memorandum In Support Of Motion To Reconsider
05/30/2006	Notice Of Hearing (06/15/06 @ 3pm)
05/30/2006	Hearing Scheduled (Motion 06/15/2006 03:00 PM) Motion For Reconsideration
06/06/2006	Objection to Proposed Judgment
06/07/2006	Judgment on Beneficiaries Claim
06/07/2006	Civil Disposition entered for: Berkshire Investments Llc, Defendant; Maile, Colleen, Defendant; Maile, Thomas Iv, Defendant; Thomas Maile Real Estate Company, Defendant; Taylor, Dallan, Plaintiff; Taylor, R John, Plaintiff; Taylor, Reed, Plaintiff; Theodore Johnson R, Evocable Tru St, Plaintiff. order date: 6/7/2006
06/07/2006	Affidavit of Elaine Lee
06/08/2006	Plaintiff Beneficiaries' Memorandum In Opposition To Motion To Reconsider
06/08/2006	Motion to Strike Portions of Plaintiffs Experts Afffidavits
06/08/2006	Motion to Shorten Time
06/08/2006	Affidavit of Rory R Jones
06/08/2006	Notice of Hearing (6/15/06 @ 3:00PM)
06/09/2006	Motion to Amend Answer and Counterclaim
06/09/2006	(2) Notice of Hearing (6/15/06 @ 3:00PM)
06/09/2006	Response to Motion to Strike Portions of Expert Affidavit
06/15/2006	Affidavit of Thomas G. Maile
06/15/2006	Certificate Of Mailing (06/13/06)
06/15/2006	Memorandum Of Costs And Attorney Fees
06/15/2006	Hearing result for Motion held on 06/15/2006 03:00 PM: Hearing Held Motion For Reconsideration, Motion to Amend Answer and CounterClaim
06/19/2006	Lodged Plaintiff's Supplemental Memorandum in Opposition to Motion to Reconsider
06/20/2006	Order Denying Motion to Reconsider
06/20/2006	Motion to Amend Judgment and/or Motion to Reconsider
06/26/2006	Objection to Memo of Fees and Costs
06/28/2006	Motion for Certification Re: Judgment on Beneficiaries' Claims
06/28/2006	Brief in Support of Motion Lodged
06/28/2006	Motion for Certification Re: Judgment on Beneficiaries' Claims
06/28/2006	Brief in Support of Motion for Certification Re: Judgment on Beneficiaries' Claims
07/03/2006	Plaintiff Beneficiaries' Memorandum In Opposition To Motion To Amend/Reconsider Judgment Filed June 07, 2006
07/03/2006	Amended Memorandum Of Attorneys Fees and Costs

07/03/2006	Hearing Scheduled (Hearing Scheduled 07/17/2006 11:00 AM)
07/03/2006	Objection to Proposed First Amended Judgment
07/10/2006	Response To Defendant's Motion For Certification
07/10/2006	Affidavit Of Counsel In Support Of Motion For Fees and Costs
07/10/2006	Reply Memorandum Of Attorney Fees and Costs
07/13/2006	Affidavit of Thomas G. Maile
07/14/2006	Affidavit of Thomas Maile
07/17/2006	Hearing result for Hearing Scheduled held on 07/17/2006 11:00 AM: Hearing Held
07/21/2006	Memorandum Decision and Order
07/21/2006	First Amended Judgment on Beneficiaries Claim
07/31/2006	(2) Notice Of Service
08/01/2006	Motion to Amend Judgment Filed July 21, 2006 Based Upon and Error of Law-Clerical Error And/Or Motion to Reconsider
08/04/2006	Motion to Strike
08/04/2006	Motion to Amend Scheduling Order and/or Vacate Trial Date
08/04/2006	Affidavit of Dennis M Charney
08/04/2006	Defendant's Supplemental Witness List
08/04/2006	Hearing Scheduled (Hearing Scheduled 08/21/2006 02:00 PM)
08/04/2006	Notice of Hearing (8-21-06 @ 2 PM)
08/11/2006	Memorandum in Opposition to Motion to Amend/Reconsider Judgment
08/17/2006	Notice of Compliance
08/21/2006	Hearing result for Hearing Scheduled held on 08/21/2006 02:00 PM: Hearing Held
08/23/2006	Notice of Hearing (Motion 09/25/2006 04:30 PM) Motion for Leave to Amend Complaint to Seek Punitive Damages
08/25/2006	Motion for Judgment on the Pleadings or for Summary Judgment on Claim
08/25/2006	Memorandum in Support of Motion
08/25/2006	Notice of Hearing re Motion for Judgment (9.25.06@4:30pm)
09/05/2006	Affidavit of Counsel in Support of Motion for Summary Judgment
09/06/2006	Plaintiff's Motion for Extension of Time
09/07/2006	Affidavit of Counsel in Support Motion to Extend
09/07/2006	Notice Of Hearing (09/25/06 @ 4:30pm)
09/07/2006	Plaintiffs Supplemental Disclosure of Witnesses
09/07/2006	(2) Notice Of Service
09/11/2006	Defendants/Counterclaimants Response to Plaintiff's Motion for Judgment on the Pleadings/Motion for Summary Judgment and Response to Plaintiffs Motion for Punitive Damages
09/11/2006	Affidavit of Thomas G Maile in Opposition to Plaintiff's Motion for Judgment on the Pleadings/Motion for Summary Judgment
09/11/2006	Affidavit of Joseph Corlett in Opposition to Plaintiff's Motion for Judgment on the Pleadings/Motion for Summary Judgment Re: Unjust Enrichment
09/11/2006	Defendants/Counterclaimants Second Supplemental Disclosure of witnesses

09/11/2006	Motion to Strike Motion for Leave to Amend Complaint to Seek Punitive Damages
09/11/2006	Notice of Hearing (9/25/06 @ 4:30PM)
09/15/2006	Reply memorandum In Support Of Plaintiff's Motion For Judgment On The Pleadings And/Or For Summary Judgment On Defendant's Claim For Unjust Enrichment And Motion For Punitive Damages
09/18/2006	Defendant/Counterclaimants Pre-Trial Memorandum
09/20/2006	Certificate Of Mailing
09/21/2006	Affidavit of Bradford Knipe
09/21/2006	Plaintiff's/Counter-Defendants Pre-Trial Memorandum
09/22/2006	Plaintiff's Supplemental Pre Trial Memorandum
09/22/2006	Plnt's Pretrial Disclosure of Witnesses and Exhibits
09/22/2006	Plnt's Supplemental Disclosure of Witnesses
09/25/2006	Hearing result for Motion held on 09/25/2006 04:30 PM: Hearing Held Motion for Leave to Amend Complaint to Seek Punitive Damages and Motion for Judgment
09/26/2006	Memorandum Decision and Order
09/26/2006	Hearing result for Civil Pretrial Conference held on 09/26/2006 03:30 PM: Hearing Held
09/27/2006	Plainitiff Supplemental Exhibit List
09/27/2006	Plaintiffs' Supplemental Diclosure of Lay and Expert Witnesses
10/03/2006	Plaintiff Beneficiaries' Memorandum in Opposition to Motion to Amend/Reconsider 7/21/06 Judgment
10/04/2006	Defendant/counter-Claimants' Motion to Strike Late Disclosed Expert Witness John Taylor
10/04/2006	Notice Of Hearing
10/04/2006	Hearing Scheduled (Motion 10/11/2006 08:30 AM)
10/04/2006	Notice Of Hearing (re:Motion to Amend Judgment for Pre-Judgment Interest) (10/11/06@9:00)
10/11/2006	Hearing result for Motion held on 10/11/2006 08:30 AM: Hearing Held
10/11/2006	Hearing result for Jury Trial held on 10/11/2006 09:00 AM: Hearing Held
10/12/2006	Memorandum re Motion in Limine
10/19/2006	Certificate Of Mailing
10/20/2006	Plaintiff's Closing Argument
10/20/2006	Def Proposed Findings of Fact and Conclusions of Law
10/20/2006	Def Closing Argument
10/27/2006	Defendants'/Counterclaimants' Rebuttal
10/30/2006	Plaintiffs Rebuttal Closing Argument
11/29/2006	Memo Decision and Order
11/29/2006	Civil Disposition entered for: Berkshire Investments Llc, Defendant; Maile, Colleen, Defendant; Maile, Thomas Iv, Defendant; Thomas Maile Real Estate Company, Defendant; Taylor, Dallan, Plaintiff; Taylor, R John, Plaintiff; Taylor, Reed, Plaintiff; Theodore Johnson R, Evocable Tru St, Plaintiff. order date: 11/29/2006
12/11/2006	Judgment Denying Unjust Enrichment Claim
12/11/2006	Motion to Amend Order
12/11/2006	Memorandum in Opposition to Motion to Amend November 29 2006 Order

12/13/2006	Second Amended Memorandum of Attorneys Fees and Costs
12/15/2006	Notice of Hearing (1/11/07 @ 3:30 pm)
12/21/2006	Amended Notice of Hearing 02.05.07@ 2:30pm)
12/21/2006	Defendant/Counterclaimants' Motion to Disallow Costs & Attorneys Fees &/or Objection to Costs & Attorneys Fees
12/21/2006	Appealed To The Supreme Court
01/03/2007	Response To Objection To 2nd Amended Memorandum Of Attorneys Fees & Costs
01/09/2007	Motion for Appeal Bond or Order Removing Lis Pendens
01/09/2007	Notice of Lis Pendens
02/01/2007	NOtice of Hearing (Motion 02/22/2007 03:30 PM) Motion to Remove Lis Pendens
02/05/2007	Hearing result for Objection to Attorney Fees and Costs held on 02/05/2007 02:30 PM: Hearing Held
02/15/2007	Objection to Motion for Appeal Bond
02/20/2007	Reguest for Additional Record
02/21/2007	Objection to Request for Additional Record
02/22/2007	Hearing result for Motion held on 02/22/2007 03:30 PM: Hearing Held Motion to Remove Lis Pendens
03/01/2007	Order Denying Motion for Appeal Bond
03/09/2007	Request for Additional Record
03/20/2007	Response To Objection to Request for Additional Clerk's Record and Request for Sanctions
03/20/2007	Appellants' Objection to the Clerk's Record
03/20/2007	Notice Of Hearing 4.2.07 @ 4 pm
03/20/2007	Hearing Scheduled (Motion 04/02/2007 04:00 PM) Motion to reconsider
03/28/2007	Order Denying Request for Attorney Fees
04/02/2007	Hearing result for Motion held on 04/02/2007 04:00 PM: Hearing Held Motion to reconsider
04/02/2007	STATUS CHANGED: closed
04/06/2007	Order Granting/Denying Request for Costs
04/06/2007	Order Granting Request for Additional Record
04/06/2007	Order Clarifying Denial of Request for Pre-Judgment Interest
04/10/2007	Notice of Change of Address
04/11/2007	Supplemental Memorandum on Out of Pocket Costs
04/16/2007	Defendant/Counterclaimants' Objection to Supplemental Memorandum on Out-of-Pocket Costs
04/17/2007	Amended Notice Of Appeal
04/27/2007	Second Request For Additional Record Re: Defendants' Amended Notice Of Appeal
04/30/2007	Notice Of Cross-Appeal
05/10/2007	2nd Amended Judgment on Beneficiaries Claims
06/05/2007	Third Amended Notice of Appeal
06/13/2007	Third Request For Additional Records
02/04/2009	Opinion - Supreme Court Docket No. 33781
02/17/2009	Notice Of Substitution Of Counsel (Maile for Maile and Berkshire Investments)
02/17/2009	Motion fo rOrder Compelling Payment of Sums Due and Owing and Interest
02/17/2009	Affidavit Of Interest

02/17/2009	Memorandum in Support of Motion Compelling Payment
02/17/2009	Notice of Hearing (Motion to Compel 03/09/2009 11:00 AM)
02/17/2009	STATUS CHANGED: Closed pending clerk action
02/20/2009	Motion to Vacate Hearing (set for March 9, 2009 at 11am) and Request for Scheduling Conference
02/20/2009	Affidavit In Support Of Motion to Vacate Hearing and Request for Scheduling Conference
02/20/2009	Notice Of Hearing
02/20/2009	Hearing Scheduled (Motion 03/05/2009 04:30 PM)
02/23/2009	Motion to SHorten Time
02/23/2009	Hearing Scheduled (Motion to Shorten time 03/05/2009 04:30 PM)
02/23/2009	Order Shortening Time
03/05/2009	Hearing result for Motion held on 03/05/2009 04:30 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated: Motion to Shorten Time-50
03/05/2009	Hearing result for Motion to Compel held on 03/09/2009 11:00 AM: Hearing Vacated
03/05/2009	Hearing Scheduled (Motion 04/06/2009 04:00 PM)
03/06/2009	Order to Vacate and Reset Hearing
03/17/2009	Order Awarding Costs - Supreme Court Docket No. 33781
03/26/2009	Affidavit in Opposition to Motion to Compel Payment
03/26/2009	Affidavit of John Taylor in Opposition of Motion to Compel Payment
03/26/2009	Memorandum in Opposition to Motion to Compel Payment
03/31/2009	Reply Memo Brief in Support of Motion for Order Compelling Payment of Sums Due and Owing

Connection: Public

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Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

AFFIDAVIT OF THOMAS MAILE PART FIVE

STATE OF IDAHO)
) ss:
County of Ada)

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is the counsel of record for Berkshire Investments, LLC and Colleen Birch-Maile and in addition is a named plaintiff herein. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. Annexed hereto as Exhibit "CC" is a true and correct copy of the reporter's transcript from the hearing dated October 11, 2006 before the Honorable Ronald Wilper in the Ada County Case No. CV OC 04-000473D.

3. That Berkshire Investment, LLC and your Affiant had invested approximately $260,000.00 in capital improvements on the subject property based, in large part, on the representations of Beth Rogers acting as trustee of the Theodore L. Johnson Trust that the Trust would not seek to rescind the real estate contract and further based upon the fact that Berkshire Investment, LLC had obtained construction financing that required the vast majority of those capital improvements to be made on the Linder property consistent with the terms of the construction loan contract which was incurred by Berkshire Investments, LLC and guaranteed by your Affiant and his wife.

DATED this 2 day of April, 2009.

THOMAS G. MAILE, IV, pro se and
Attorney for Berkshire Investments and Colleen Birch Maile

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 2 day of April, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

BOISE, IDAHO

Wednesday, October 11, 2006, 8:50 a.m.

THE COURT: Please be seated. The Court will take up the case of Taylor vs. Maile, Case No. CV0C 0400473-D. This is the time scheduled for a court trial. The remaining issue in this case, to be tried before the Court, is the issue of unjust enrichment, that has been pled by the Mailes and opposed by the Taylors.

Fair enough?

MR. CHARNEY: Fair enough.

THE COURT: Now, who will be presenting the case on behalf of the Taylors, and who will be presenting the case on behalf of the Mailes?

MS. TAYLOR: Your Honor, I will be presenting on behalf of the Taylors and the Trust.

MR. CHARNEY: And I will be presenting on behalf of the Mailes and Berkshire, Your Honor.

THE COURT: Okay. Would either of the parties -- do we have any preliminary matters before we get started with the trial? I think that there was a motion to strike, and maybe we should get that out on the table, the motion to strike a particular witness that the Taylors wanted to call.

MR. CHARNEY: Yes, Your Honor. There was a motion

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to strike, I believe it was Mr. Taylor, who was going to be called for some measure of accounting expertise. There was very late disclosure of that particular witness, and we've not had an opportunity to depose him or otherwise obtain further discovery, and the 26(b) disclosure was pretty thin, at that. I think it's in the court file. And so, I don't even know if the Taylors still intend to call him as a witness, but we would object to him being called.

THE COURT: Ms. Taylor, how do respond?

MS. TAYLOR: Your Honor, we do intend to call Mr. Taylor as a witness. I disclosed him as an expert in an abundance of caution. They do know he is an accountant. I don't intend to elicit any sophisticated accounting.

What I will ask him is within the knowledge of any layperson. If they get money for this property, they'll have to pay taxes on it. We won't attempt to do any calculations or estimations of the amount.

THE COURT: Is that the only way you can get that evidence in before the Court?

MS. TAYLOR: Yes.

THE COURT: And given that limited purpose for them calling that particular witness, Mr. Charney, to you still object?

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MR. CHARNEY: If it is limited to that, I think that that's acceptable.

MS. TAYLOR: We will have other testimony from the witness, but not in an expert context in any way. Just that -- the fact that the Trust hasn't received any money, nor have the beneficiaries.

THE COURT: Okay. Was he disclosed as a lay witness previously?

MS. TAYLOR: Yes. From the beginning.

THE COURT: All right. Fair enough.

Are there any other preliminary matters?

MR. CHARNEY: Would you like to talk about possible stipulations, things like that?

THE COURT: All right.

MR. CHARNEY: We stipulate to the admission of the exhibits, what are the numbers, 111 through --

MS. TAYLOR: 101 through 134.

MR. CHARNEY: Okay. 101 through 134, we stipulate to the admissibility of those exhibits.

THE COURT: By the Plaintiffs?

MR. CHARNEY: Yes.

THE COURT: Okay. Is there a similar stipulation, by the Plaintiffs, to defense witnesses -- or to defense exhibits?

MR. CHARNEY: They stipulate to all of my

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exhibits, except for Exhibit 7 and Exhibit 9. And I believe that the basis of the objection to 7 is that it violates attorney-client privilege, and the objection to No. 9 is on the grounds of hearsay.

So we can cross that bridge when we go through the exhibit packets, I presume.

MS. TAYLOR: No. 7 was also on hearsay, but I understand they have subpoenaed Mr. Harwood to court on Friday so, obviously, that objection may be addressed.

THE COURT: All right. Thank you. We have three days.

MR. CHARNEY: There's one other stipulation.

THE COURT: Go ahead.

MR. CHARNEY: I believe we have another stipulation that Mr. Maile did, in fact, pay a fair market value for the property, in the sum of $400,000. So the appraisals, I think, would be appropriate considerations for the Court.

Am I mistaken?

MS. TAYLOR: Totally mistaken.

MR. CHARNEY: My bad.

MS. TAYLOR: What I have suggested we stipulate to is that whether or not Mr. Maile paid a fair market value for the property is not at issue in unjust enrichment. That would let us avoid having the testimony as to

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what -- who did what prior to the closing, and all of that.

So I think it's just as irrelevant, given the rulings of the Court, the contract has been set aside. Whether he did or did not pay fair market value, I don't think has any value on the improvements, which is the issue we're here to try.

We did not stipulate to the admission of any appraisals or -- and we did not stipulate that he did pay fair market value. We just don't think that that's an issue that is before the Court.

THE COURT: Mr. Charney, do you believe that the fair market value of the property, at the time that Mr. Maile purchased it, is a relevant, material issue that needs to be proven?

MR. CHARNEY: I don't think, in my case in chief, it does. But I think, if they -- if the defense to the unjust enrichment claim is that Mr. Maile engaged in misconduct that either put the property in his hands, or engaged in misconduct subsequent to the -- to the contract being entered into, then the fair market value of the property, at the time he purchased it, may very well become relevant.

But, as far as my case in chief, initially, no. It would be something to respond to.

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THE COURT: All right.
And, Ms. Taylor, is it your intention to present evidence that would essentially support an unclean hands theory?
MS. TAYLOR: Yes, it is, Your Honor. But not as to the value of the property.
THE COURT: Okay. Are you saying that you are --
MS. TAYLOR: No.
THE COURT: -- stipulating that Mr. Maile did pay fair market value?
MS. TAYLOR: No, I'm not, Your Honor. I'm saying that I don't think whether he did or not is relevant at this time. Our unclean hands argument will go to conduct after --
THE COURT: Subsequent.
MS. TAYLOR: -- after the transaction was closed.
THE COURT: All right. We can cross that bridge when we come to it, as well, then. Let's do this.
Now, we -- I don't know how long the parties intend to take to present their -- their proofs to the Court. This case is scheduled to go for three days.
Mr. Charney, do you believe that we can have this case wrapped up in three days?
MR. CHARNEY: I do.
THE COURT: And, Ms. Taylor, same question?

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MS. TAYLOR: I do.
THE COURT: Very good. All right. We will take a real brief recess, we'll come back in in about 5 or 6 minutes. Will you folks be ready to go?
MR. CHARNEY: Yes, Your Honor.
THE COURT: Okay.
MR. CHARNEY: Do you have a copy of my exhibits?
THE COURT: I have the Plaintiff's exhibits, from Taylor. But that's all I have.
MR. CHARNEY: All right.
THE COURT: Okay.
MS. TAYLOR: Your Honor, I also received a notice of hearing, for 8:30 this morning, on their motion to amend the July 21st judgment. Are we not addressing that?
MR. CHARNEY: We need to take that up at some later point, because I need to look at it, see what it is, if that's okay?
THE COURT: Was that something that you filed, Ms. Taylor?
MS. TAYLOR: No. It was something that the Defendants filed.
THE COURT: Okay.
Mr. Charney, you're not asking to be heard on any other motion at this time?

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MR. CHARNEY: Not at the moment. Could we keep it open, somewhere throughout the course of this proceedings, though, so I can get that back in my head?
THE COURT: Fair enough.
MR. CHARNEY: Okay.
THE COURT: We won't address it right now. Let's do our best to use our time as efficiently as we can. So we'll come back in at 10 minutes until the hour, by that clock. And I think that clock is off. I don't know what time you folks have.
MS. TAYLOR: Depends on what time you have, Your Honor. That's what --
THE COURT: Well, I have 8:42. I just set it to the computer, which is set to the electronic clock in Colorado, so I know that my watch is right. So that thing is about 3 minutes fast. But we're going to take a 5-minute recess, then we'll reconvene.
And we will -- how do the parties intend to proceed? Do you intend to present your evidence first, on your case of unjust enrichment, Mr. Charney?
MR. CHARNEY: Yes, Your Honor.
THE COURT: How many witnesses?
MR. CHARNEY: Two, maybe three.
THE COURT: Okay. And then you'll present your evidence and testimony in opposition to their evidence

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and testimony?
MS. TAYLOR: Correct, Your Honor. It was my understanding that they would use all of the time today, so I don't have any witnesses ready to go until tomorrow morning. If we get done early, I could put Mr. Taylor on. He is here.
THE COURT: Fair enough.
MR. CHARNEY: That may be a likely circumstance.
THE COURT: All right. We'll reconvene in 5 minutes. Thank you.

(Recess taken 8:50 a.m. to 8:56 a.m.)

THE COURT: The Court is again on the record in the case of Taylor vs. Maile.
Are the -- I think I'll just refer to the parties as the Taylors and Mailes. Are the Mailes ready to proceed on their case in chief?
MR. CHARNEY: Yes, Your Honor.
THE COURT: And are the Taylors prepared to proceed?
MS. TAYLOR: Yes.
THE COURT: Very well.
Mr. Charney, if you feel it would be helpful to make an opening statement, you may do so. You're not

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required to.

(Brief discussion between Counsel.)

MR. CHARNEY: You know what, I think that both parties are going to dispense with an opening. I think you probably know a little bit about this case.

THE COURT: Okay.

MR. CHARNEY: So we'll go straight to testimony.

THE COURT: Very good. You may call your first witness.

MR. CHARNEY: We'll call Thomas Maile.

THE COURT: Mr. Charney, you may inquire whenever you're ready.

MR. CHARNEY: Thank you, Your Honor.

THOMAS MAILE,

one of the defendants herein, called as a witness by and on his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHARNEY::

Q. Will you please state your name and spell your last for the court reporter.

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A. It's Thomas Maile, M-A-I-L-E.

Q. How are you presently employed, sir?

A. I'm a licensed Idaho attorney.

Q. Tell the Judge a little bit about your practice as an Idaho attorney.

A. Oh, I was licensed in 1979, clerked with Jess Walters for one year. Went into private practice, and have been in private practice for, I think, 28 years.

Q. Where do you currently practice?

A. My office is in Eagle. Primarily Ada -- Ada County and Canyon County.

Q. Has your practice been primarily in Eagle the entire time that you've been in private practice?

A. My office opened there in 1991.

Q. Are you married?

A. Yes.

Q. And your wife is who?

A. Colleen.

Q. Here in court with you today?

A. She is.

Q. And as far as just identifying other parties in this case, what is Berkshire Investments?

A. Berkshire Investments is a limited liability company that was established in 2002. Its members are my wife, Colleen, and myself.

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Q. Do you also have any expertise in the real estate area?

A. I've maintained a broker's license, in Idaho, since maybe 1980. Back in nineteen -- in the late '70s and early '80s, the Idaho Real Estate Commission provided reciprocity, if you will, so that you didn't need to complete any educational requirements to obtain a license as a real estate broker, or agent, if you, in fact, were a licensed Idaho attorney.

So I've been actively licensed as an Idaho real estate agent for the state of Idaho.

Q. Okay. Did you occasionally buy and sell properties?

A. Yeah. For my -- for our family investments. I can't remember of an occurrence where I bought or sold property for a third party, with the exception of 2004.

If I could elaborate, the real estate -- having a real estate license is just that. But there's another level of real estate called the multiple listing service, which is a fee required to partake of that service. And with that service, you can access the database and look at various sales and activity that are listed by real estate agents.

So in nineteen -- in 2004, I activated that MLS fee with the American Realtors Association, and I did

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sell, I think -- either sold one property for a client, and -- two properties for a client, I think, in 2004. And the intent of reactivating my MLS was to market the property known as Fairfield Estates, after I had developed it.

Q. Is Fairfield Estates the 40 acres that has been the subject of this litigation?

A. Yes; that's correct.

Q. Okay. Let's go back in time a little bit. Did you know an individual by the name of Ted Johnson?

A. Yes.

Q. How did you become acquainted with Mr. Johnson?

A. Ted came to my office in Eagle, in about 1993, as a legal client for some collection work.

Ted had a tenant farmer out in his Star property, where Ted lived. And the tenant farmer had leased the farm ground for a year or two and hadn't paid Ted, so we did a collection effort for the money that was due and owing. And we were able to get a default judgment and ultimately collect on the judgment for Ted. That was in 1993.

Q. Did you do some other legal matters for Mr. Johnson over the years?

A. Right. In 1997, Ted came back to the Eagle

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office and indicated he wanted to do some estate planning. Ted was not married. He had some strong family connections with Beth Rogers, and some of his immediate family in the Valley. So we prepared, and Ted executed, a trust agreement for his estate planning.

And I also think I did a last will and testament and also power of attorney, for Beth Rogers, to kind of act and oversee on his behalf. I can't remember if I did a durable power or a health care proxy, but it was -- it was along that line of work.

Q. When, in the relationship that you had with Mr. Johnson, did you become aware that he had this 40-acre parcel out on Linder Road?

A. Well, back in '93 and then, again, in '97. Ted talked about his two different farms, one in which he lived on in Star and the other one was the 40 acres on Linder Road.

Q. Did you ever have just some general discussions with Mr. Johnson regarding the sale of that property?

A. On the -- on the 40-acre parcel, I can't remember with specific clarity, but I -- it was either '93 and/or '97, because we talked a number of times about, if he ever wanted to sell his property, that my wife and I, and our family, would be interested in buying

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the 40-acre parcel, if he ever decided to sell it.

I told him we had horses, and that we were on an acreage in Eagle, and the kids were getting older, and it would have been nice to enlarge our property in Eagle.

Q. All right. So the idea would be, you and Colleen would live on one parcel and maybe your kids would live in the same area?

A. Yeah, that's true. But that wasn't really communicated with Ted until 2002, that I can remember.

Earlier, in '93 and '97, it was just generally discussing the prospect of Ted, if you ever want to sell your property, let me know. I would be interested in buying it.

Q. Okay. Nevertheless, did there come a point in time when Ted came to you with an unsolicited offer to purchase the property?

A. In May of 2002, Ted, who I hadn't seen for a few years, came to my office, either by scheduling an appointment or just showed up, I can't remember which, but I remember he filled out a client information sheet.

And he had a real estate contract that was given to him by his, as I recall, his tenant farmer, Sam Rosti. And it was from Franz Witte, the landscaping contractor in Boise, for the 40-acre parcel on Linder Road. And this occurred in mid-May, May 22nd, I

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think is when the first conference was.

Q. What did you do in response to Ted bringing you that information?

A. Well, we sat and talked about it. And Ted -- you know, I was reviewing the contract on one side of my desk, and Ted was sitting on the other. And Ted, during the course of the discussion, he goes, well, this is the 40 acres that you and I had talked about you some day buying, if you wanted to.

I said, oh. I said, well, does that create a problem? The fact that I've expressed an interest in buying this property, that could be construed as a conflict. Does that bother you, in me representing you in dealing with this potential buyer?

And Ted said, no, no. Not at all.

Q. What happened next?

A. So, from that point, in that discussion, Ted really didn't know what he wanted to do. By that I mean, he didn't know if he wanted to buy it -- or sell it or keep it, and we talked about pricing of it. And I told him, I said, well, you have a $400,000 offer on the table. Do you know what it's worth?

He says, well, I really don't know. I said, I don't really know either, Ted.

I said, there's a variety of ways that you

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can try to establish a good opinion on fair market value. You can have a combination of real estate agents, or an appraiser or two, give you some opinions as to what it's worth.

The long and short of it, at the end of the conference, was that we came up with somewhat of a strategy that we would -- I would write his accountant to find out what tax ramifications he would have, relative to if he sold the property versus whether he retained it and held it during -- at the time of his death. Because, if you hold property at the time of your death, you get a stepped up basis, so there is an advantage to that.

So before responding to the attorney representing the buyer, the potential buyer, I called Ted's accountant, Imogen Harrington, and talked with her about the issues of tax and the valuation of the property. And, then, she did a follow-up letter to both Ted and I, one -- I think the original came to my office and Ted got a copy of the letter. And she outlined the tax consequences, if Ted held the property versus Ted selling the property.

Q. So what happened next?

A. Well, we had another telephone conference in that period of time. And then, ultimately, I think at the end of May -- because all this took about a week, to

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get the accountant on line, to get the letter from the accountant -- I met with Ted. And then, at that point in time, Ted still really didn't know what he wanted to do, buying -- or selling or retaining the property.

So I said, well, the only thing we can do is see if we can keep the ball rolling for you, Ted, in so many words, and write a letter to the potential buyer, and indicating we think your offer is low, and let's see, Ted, if he'll come up without even presenting a counteroffer to him.

Because I explained to Ted that, if you -- you have a $400,000 offer on the table, and if you present a counteroffer for X amount of dollars and he accepts it, you've got basically a contract. So I said, this is a safe way to see if there's any budge, or any movement, in the potential buyer to get them up and above $400,000.

So we did that letter, or I did the letter, and Ted got a copy of it. And that went out of my office at the end of May, 2002.

Q. Did Mr. Witte budge on his offer?

A. No. In fact, he was pretty -- we got a reply letter back that was very certain that he had done his research and $400,000 was his top end. He would not go any higher than that. And in fact, his research, that

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the adjoining property sold for $7,300 an acre.

Q. As opposed to?

A. $10,000 an acre is what he was offering.

Q. Okay. So what happened after Mr. Witte refused to raise his offer?

A. Well, I didn't -- I had no more contact from Ted. I sent Ted the letter from Mr. Witte. And I think the letter to Mr. Witte said, this offer of $400,000 will only stand until June 20th, or thereabouts, and our family was on vacation, in New York. And when I came back, the letter was a little late getting out to Ted. But I got it out before that deadline of the 20th, and Ted never responded. I never heard from Ted again.

I had sent him bills for my legal work, and he had paid the bills. And I think my last statement was in July, and it showed that it was paid in full as of July 1st, I think.

Q. So after that, tell Judge Wilper what happened next.

A. Well, now --

MS. TAYLOR: Excuse me, Your Honor. I neglected to do a housekeeping issue at the beginning. We had previously filed a motion objecting to Mr. Maile relating any conversations he had with Mr. Johnson under hearsay and the dead man statute.

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I should have put on the record, at the beginning of this trial, I would like a continuing objection on the same grounds, and also on the grounds that, under the cause we're going forward on now, unjust enrichment, the manner in which he initially acquired the property is not relevant. So I would like a continuing objection to that.

THE COURT: Okay. I'm going to overrule the objection on relevance. It may be true that the fair market value might end up not being relevant on the issue of unjust enrichment. It may be so.

But, on the other hand, I think that to rule this early in this proceeding that the manner in which the property was acquired is irrelevant is -- is perhaps premature.

I think that the manner in which the property was acquired is relevant, for purposes of this proceeding. So that objection is overruled on the grounds of relevance.

Now, we might -- I think it would be appropriate to listen to both sides' argument on the issue of statements attributed to Ted Johnson before his death.

Now, Ms. Taylor, you have suggested that any statements by anybody other than Ted Johnson, on what

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Ted Johnson allegedly said at a certain time before his death, are objectionable and they should not be heard; correct?

MS. TAYLOR: That is correct.

THE COURT: You're basing that objection on --

MS. TAYLOR: Primarily, Your Honor, on the dead man statute. And we have argued that previously, the Court found it didn't apply.

We were in a completely different context at the time. Now, we're solely looking at a cause of unjust enrichment, which I think is virtually identical to a claim against an estate.

Because of the fact that Mr. Maile was the one that did the estate planning, there was a pour over will, all of the assets went into the trust. Essentially, the trust is the estate and the situation is indistinguishable from filing a claim against the estate. He is seeking repayment from the trust.

THE COURT: Okay.

How do you respond, Mr. Charney?

MR. CHARNEY: I would disagree with the assertion that the dead man statute operates to prohibit the statements regarding Mr. Johnson. But it's also important to note that most of what we're talking about here, with respect to the unjust enrichment claim, and

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what Mr. Johnson did or didn't say, isn't being offered for the truth of what he did or didn't say, but rather just to explain why Mr. Maile took the next steps along the way as he proceeded to purchase the property.

And, as the Court is aware, most of this case is going to involve things that occurred after Mr. Johnson's death anyway. So everything we have done thus far is kind of historical groundwork and foundation, if you will, to explain why Mr. Maile, and the other parties defended here, are entitled to the moneys that they're going to be talking about later on.

THE COURT: All right.

The objection is overruled, to the extent that the information elicited from this witness is not being offered for the truth of the matter asserted in the statements by Ted Johnson, but simply to explain why Mr. Maile took action that he took.

MR. CHARNEY: Exactly.

THE COURT: All right. I'll overrule the objection.

Q. BY MR. CHARNEY: So where I was, Mr. Maile, was asking you to tell Judge Wilper about the next time that Mr. Johnson showed up in your office. I believe this was the unannounced visit.

A. Right. Approximately six weeks had gone by

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since I had seen Ted, or heard from Ted, and he was in my lobby of my office in Eagle. And I think my door was open, so I saw him out there, and I just came down the hallway. I remember waving at him. I said, Ted, what are you doing here?

And, of course, he stood up. And he goes, well, I want to talk to you. So we ended up having a conference. And he said, are you still interested in buying the property?

I said, well, Ted, I've always been interested in buying your property.

And he said, well, I had an appraisal done. I said, oh? Well, how much do you want for your property? And he handed the appraisal to me, and he goes, I want the appraised value.

So I said okay. I looked at it. And, at that point in time, I said well, Ted, you know, I need to check this out with my wife. You always have to do that. And I said, we'll get back to you. But I would be very interested in buying the property.

I said I can prepare the real estate contract, but since I have represented you in the past, I said, I have an obligation, ethically, to tell you that you have the right to seek independent counsel.

To which he replied, you know, if you do the

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contract, it's fine. I trust you on that. Just do the same terms that were in the other contract, as far as the length of time, the down payment.

I said, well Ted, it will take me a couple of days. I'll get back to you, or Beth, because he had referenced that he wanted either -- well, I had asked him, I said, do you want Beth involved with this transaction?

He goes, yeah. That's --

Q. Could we stop just a second. We've talked about Beth having some interplay here with Ted Johnson. But, did you know Beth Rogers at this point?

A. No. No. I don't believe I had ever met her prior to July of 2002.

Q. Who was Beth Rogers, in relation to Mr. Johnson?

A. Well, I -- he had described her as someone that was very active in his life. It was a niece. You know, her and her husband, Andy, had cared for Ted's cows out on the Star property. They were active in his health care issues, you know. And I know that he had put a lot of trust in her.

Q. You know, another thing we haven't established in this record is, how old was Mr. Johnson? Was he a young guy, middle-aged?

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A. No, no. I had a father-in-law, at the time, that was probably 88. Ted was quite a bit younger, then. I think he was in his early 70s, like 73 or somewhere in that neighborhood.

Q. All right. Still capable of living on the farm, making decisions for himself?

A. Oh, sure.

Q. Okay.

A. He drove himself to the office. You know, he was astute, very alert.

Q. All right. So going back to the conversation, then. I departed for a moment.

A. Well, we -- again, I know, in this conference, I talked to Ted specifically about how much money he could make on the property. I said well, you have the potential of developing the property, because in the appraisal itself, it had indicated that the highest and best use, the most likely purchaser, would be a developer.

And that kind of made sense. You really -- and I always recall saying, and I said this to Ted, well, you can't grow onions on ground that's worth $10,000 an acre. It just doesn't pencil, there's no economics to it. I said, well Ted, you could make more money doing different things on the property, perhaps even developing

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it for yourself.
And it just wasn't -- it wasn't his desire to do that. He didn't want -- I don't think he used the word, he didn't want to jump through the hoops, but it was along that line, that he just didn't want to deal with the governmental issues resolved in trying to take a piece of property and getting it developed.
So, I think the conference concluded after that. And I told him, I said, I -- you know, we'll prepare a contract and we'll call Beth up and she can come and pick it up.
So, I think that probably happened in July, 19th as best as I can remember. I never -- I never noted anything in my calendar, never filled out a new client sheet, because it wasn't -- but I'm pretty sure it's July 19th that he was at my office. The appraisal was dated the 15th, I think, of July.
Q. Did you eventually enter into a written contract with Mr. Johnson?
A. Well, my wife and I went out there, and we walked the property. And, you know, we said well, this -- this could work. This is a nice location. It was about three miles diagonally from where we had been living for 20 years.
So I went back, prepared a contract from some

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of the computer forms that I had in my electronic file base. And prepared the contract, and called Beth Rogers up, and indicated that there was a contract prepared for her and Ted's review.
Q. What was the purchase price reflected?
A. Oh, it was $400,000, the appraised value.
Q. That was consistent with the appraisal?
A. Yes. Exactly.
Q. Did you have any participation, whatsoever, in the preparation of that appraisal?
A. None. Didn't even know it was going -- didn't know it was being done.
Q. Did you have any -- did you make any efforts to solicit Ted to sell you the property after the Franz Witte offer died?
A. Not before and not after.
Q. And after you received the appraisal, did you ever attempt to negotiate a better price with Ted Johnson, anything less than $400,000?
A. No. I kind of remember that -- that conferencing, telling him and asking him, are you comfortable with this price?
And he said yes. And he said he didn't want to pay for an additional appraisal, didn't want to get real estate commissions involved. But to me, it seemed

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like a fair price. It was an appraised value.
Q. This was even in light of Mr. Witte's letter, where he said he didn't think it was worth that amount?
A. It was six weeks after that, yeah.
Q. All right. Let's move to the exhibit packet then, if we can. Do you have a packet in front of you?
MR. CHARNEY: No, no. I've got one and I've got one for the Judge. Do you need another one?
THE COURT: This is the original; correct?
MR. CHARNEY: That is the original.

(Exhibit packet handed to the witness.)

Q. BY MR. CHARNEY: So, let's start looking at these exhibits, then, and start with Exhibit 1, under the first blue sheet?
THE COURT: As a housekeeping matter --
MR. CHARNEY: Yes?
THE COURT: -- the parties had stipulated, I believe, that Defendant/Counter-Claimants', that is Mailes' Exhibits 1 through 6, and No. 8, and 10 through 16, would come in without objection, is that accurate; Ms. Taylor?
MS. TAYLOR: That is, your Honor.
THE COURT: But you're reserving your right to

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object to Exhibits 7 and 9?
MS. TAYLOR: Correct.
THE COURT: Very well. Then, for the record, Defense Exhibits -- are you moving the admission of these at this point?
MR. CHARNEY: I will offer the -- those exhibits, Your Honor.
THE COURT: And reserving -- I won't make any ruling on 7 and 9, at this time. I'll take some argument on it at the appropriate time. But other than that, without objection from you Ms. Taylor, I will admit Defendants, or Maile's, Exhibits 1 through 6, and No. 8, and 10 through 16, inclusive. They are admitted.

(Exhibits No. 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 15, and 16 admitted.)

Q. BY MR. CHARNEY: Before we get to Exhibit 1, one other question I had, the appraisal that you looked at, was that the one that was prepared by Tim Williams, Tim Williams and Brad knight?
A. No. It was Brad Knipe.
Q. Brad Knipe.
A. That's correct. It was -- it was appraised -- the report of July 15, 2002.

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Q. All right. Now, let's take a look at Defendant's Exhibit No. 1. What is Exhibit No. 1?
A. This is a real estate contract that I pulled out of my computer and modified for the contract with Ted Johnson and my wife and I.
Q. Is that the first four pages, which constitutes the contract, at least the initial contract?
A. That's true.
Q. And did Mr. Johnson sign that in your presence?
A. He did. I had called Beth Rogers, she came in and picked it up. My wife and I had signed it. So she must have picked it up the 22nd. I remember meeting her, for the first time, in the hallway of my office. I said, here's the contract.
I remember specifically telling her, too, if you want to take it to an attorney to have it reviewed, feel free to do that. So she called back -- Beth Rogers called back, probably the 24th or 25th, and said everything looked fine, and they had reviewed it.
I said, does Ted want to come to the office or what does he want to do? She said, oh, you can go out to his house. So I didn't know where he lived. So I ended up calling Ted, asking Ted the same thing, do you want to come in the office or do you want me to go out to

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the house.
He said, come on out here. So I ended up going out to his house.
Q. All right. Signed in your presence though?
A. Yeah. We had a long conference about it. I went over the substance of the contract. I explained the essential terms with Ted. And during that conference, I again advised Ted, I said, do you want to seek an independent lawyer, because I represented you in the past? And he declined that, and he said everything looked fine with the exception of one provision.
Q. And that's what I wanted to talk about next. There's some handwriting on the first page of the document entitled Addendum to Real Estate Agreement, which I believe is the fifth page of Exhibit 1?
A. Right.
Q. Talk about that, if you would.
A. Well, Ted had leased his ground to Sam Rosti, for five acres of onion seeds, and the balance of 34 acres was in alfalfa seed.
And I didn't know this at the time, but onion seeds take 3 to 5 years to make them commercially viable and profitable, and Mr. Rosti was in his fourth year. He had one more good year of onion seeds, whatever the math worked out to be.

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So Ted was concerned that Sam Rosti should have the benefit of going through and having another year of seeds off of his onions. So I said, that's not a problem. I said, it's going to take a long time to get the governmental applications through. Five acres, down in the corner, is not a problem to keep his onion seed there.
So we initialed that as agreement that he could have -- Mr. Rosti could have five acres of onions.
Q. And, then, are the last 2 pages just the form Deed of Trust that you had on your computer?
A. Yes. It was -- well, they were one of them, yeah. This Exhibit A-2 was attached to the contract --
Q. All right.
A. -- as a form.
Q. Now, let's move to Defendant's Exhibit No. 2. What is Exhibit 2?
A. Exhibit 2 is the assignment that was referenced in the Exhibit 1. I explained to Ted, on Exhibit 1, that the first paragraph gives Colleen and I the right to assign. And I explained to Ted that we would be setting up an LLC to hold title to the property, which ultimately happened.
And, then, sometime in mid-August, maybe the -- just mid-August, I sent a letter to Beth Rogers

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indicating that we had prepared the assignment, consistent with Exhibit 1, and it had been signed, I think, August 15th, by my wife and I.
Q. Now, I note that Beth Rogers signed it and she put title, power of attorney. Was Ted still alive at that point or had he passed away?
A. Oh, he was alive.
Q. Did Beth Rogers have the authority to sign that? Did she have, in fact, have the power of attorney from Mr. Johnson?
A. I believe so.
Q. Okay. Moving to Exhibit No. 3. Can you tell Judge Wilper what Exhibit No. 3 is.
A. Exhibit 3, down to the corner, is initialed with my name T. Maile, 8-20-02.
This was the pre-application hearing required of Ada County to start this subdivision process. And this neighborhood meeting was scheduled for a certain date. We did a mailing consistent with Ada County Developmental Services. You have to do a mailing to the adjoining property owners, and to the titled owners, which would have been the Theodore L. Johnson Revokable Trust, indicating your intention of doing a subdivision application.
And, at this stage, I had referenced eight

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lots of five acres each, and that was ultimately reduced down to seven lots of 5-plus acres each.
Q. Okay. Moving to Exhibit 4, what is Exhibit 4?
A. This is the warranty deed received, from the Trust, to Berkshire Investments LLC, September 16, 2002, regarding the subject property.
Q. Now, I note that that is signed by Beth and Andy Rogers, as trustees. Had Ted Johnson passed away at that point?
A. Yes. He had passed away, I think, two or three days prior to this. Well, I think they signed -- I think his death was September 13th.
Q. Okay. Now, after Mr. Johnson passed on, did you then begin to undertake development efforts for the property in question?
A. Well, I started actually earlier. And I -- the contract itself, Exhibit 1, had a provision that said I had to do certain due diligence. I have a backhoe, so I went out and did backhoe tests, perk tests.
We knew -- we -- we believed, based on Ted's comments, that there was high water in this area. High water is a real problem for development.
So probably in early August we went out, I went out, and physically dug seven test holes with the

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backhoe. I enjoyed working the backhoe, so I went out and did that.
So I started early on, pursuant to the contract. And, of course, we did the work with Ada County. And, of course, I had the engineer involved in early August, 2002, as well.
Q. What other steps did you take?
A. Well, we had the neighborhood meetings, through the fall of 2002, working extensively with Ada County Developmental Services and with the engineering staff.
In 2002, the water was a huge problem for the property. And by that I mean, it was -- the water table was so high on the southwest corner of the 40 acres, the engineering staff and I concluded that we had to enlarge the lots on the south side of the road, on the road to be constructed, so that people can put a septic tank closer to the center of the property, because the southwest corner of the property was so high with water table.
So, we worked with the water -- soil conservationists, and engineers, and specialists in water, ground water. We had to monitor the ground water for DEQ and Idaho Department of Environmental Quality.
And it was touch and go, as far as the level of water goes. But, ultimately, after -- they make you

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run tests for a -- basically a full irrigation season. So all of 2003, either I, or my staff, or other folks, would go out there and measure the water table in our test holes to determine the fluctuation of ground water.
So we did that all during 2003. The engineering continued to progress through 2003.
Once we received a preliminary plat approval from Ada County, which was in 2003, we then, with the engineers, started work on the construction drawings and construction criteria to satisfy Ada County Highway District, satisfy DEQ, Ada County, City of Eagle. All of that is a tremendous amount of work to oversee and accomplish before you even get to the construction phase.
Q. All right. Now, the transaction was closed in the late summer of 2002. And recognizing that there has been a court order already, indicating that Beth Rogers had an obligation to go seek court approval to close the transaction, did you personally know of that obligation at that time?
MS. TAYLOR: Objection; relevance.
THE COURT: Overruled.
THE WITNESS: On the contrary. There's been a Supreme Court -- is that the --
Q. BY MR. CHARNEY: The question is, did you know of -- did you know that you needed to tell Beth to

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go get court approval?
A. No. I did not tell her. And no, I did not believe she needed it. And she was represented by David Wishney at the time of the closing. She had retained another attorney, which I had conversation with in August or early September, 2002.
Q. Okay. Had you thought that court approval would be required, would you have simply advised, Beth, go have a judge sign off on this contract so we can go forward?
A. Had I believed that -- if something is required under the law, I most certainly would have advised somebody to follow the law.
Q. And, in fact, had you known that or done that, those files -- piles of files right there probably would not exist, if I'm not mistaken; correct?
A. I don't know. Rephrase that question.
Q. I'm sorry. It was more of a point of argument than anything else.
So let's, then, move on. Did you, then, become aware that the relatives in the Lewiston area were making some waves about the sale, sometime after it occurred?
A. Well, we have Exhibit 5.
Q. Which I was going to get to. But prior to

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Exhibit 5, were you aware of any consternation, from the northern relatives, that maybe this sale shouldn't have gone through?
A. Maybe in March or April of 2003, I had a letter, either from Connie Taylor, representing her husband as a beneficiary and her mother-in-law, wanting some sort of accounting, financial accounting, concerning the trust. So I knew that -- and Beth had referenced something, perhaps, in March of 2003.
Q. Okay.
A. Because I had to do something, I had to pull files. I had to pull files in the spring of 2003 because Beth wanted information to pass on to some of the beneficiaries about the financial aspects of the trust.
Q. Moving, then, to July 7, 2003 and Exhibit 5, did you recognize Exhibit 5?
A. You bet.
Q. What is Exhibit 5?
A. I received this on or about July 7, 2003. And it was an indication that Beth Rogers, acting on behalf of the Trust, was -- had asserted, through her apparent attorney, Connie Taylor, that I had violated certain rules of professional conduct.
Q. Let me -- let me stop you there. After July 7, 2003 did you continue to invest money and effort

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into the development of the property?
A. It was ongoing.
Q. All right. Now --
A. It actually became more work, in my life, than the practice of law for that year, I would say.
Q. All right. But did you continue to invest your time resources and your finances to continue to develop this particular parcel of property?
A. Yes.
Q. All right. Now, let's talk about this letter. The first few words of the letter indicate that I am -- Connie Taylor says, I am representing Beth Rogers, the successor trustee of the Theodore Johnson Revokable Trust.
Did you later determine that was a false statement?
A. I did.
Q. Was that one reason why you continued to develop the property?
A. Well, Beth Rogers --
Q. We'll get forward. Don't jump ahead. I know you're a lawyer, too, but -- was that one reason why you continued to do the development, because, in fact Ms. Taylor was not representing Ms. Rogers?
A. That's true. I found that out shortly

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thereafter.
Q. Now, the second paragraph indicated that it is apparent that you had purchased the property for far less than the fair market value. Was that also a statement that you believed to be false?
A. Absolutely.
Q. Based on what?
A. Well, Ted had the benefit of getting the appraisal from Brad Knipe and Associates, who I knew to be a very reputable and qualified appraisal company in the Valley.
Q. And, at that point in time, had you also had a second appraisal done, reflecting nearly the same purchase price?
MS. TAYLOR: Objection; hearsay.
THE WITNESS: That was done later.
THE COURT: Well --
MS. TAYLOR: Move to strike.
THE COURT: Hang on. How do you respond to the hearsay objection to the appraisal?
MR. CHARNEY: It was -- actually, I'll withdraw the question, because it was my mistake. I thought that that second appraisal had come prior to this letter. So I'll withdraw the question.
THE COURT: All right.

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Q. BY MR. CHARNEY: But, in any event, you did have the first appraisal, and you disagreed with the assertion that you purchased the property for far less than the fair market value; is that fair?
A. Absolutely.
Q. Okay. So did you, then, after looking at the assertions in this letter, decide that you were going to continue to develop the property?
A. At some point in time, yes.
Q. Now, moving to Exhibit No. 6. Do you recognize Exhibit 6?
A. Yes.
Q. What is Exhibit 6?
A. This is a letter that I received. It was -- there was two parts to this Exhibit 6. The first part is the letter dated July 22, 2003, signed by Beth Rogers.
And then there's a note that was -- a sticky note that's -- the original is on our counter over there. Beth Rogers had put a sticky note on top of -- on top of this letter that she sent on off to Connie Taylor.
And the sticky note provided that she wasn't at all in support of the theories by Connie Taylor, and just made it pretty apparent that she didn't like what they were doing.
Q. All right. Was Beth still the trustee at

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that point in time?
A. Her and Andy were co-trustees; that's correct.
Q. In reading that portion of the July 22nd letter, it says, we know we have a fiduciary duty to the beneficiaries of the Trust to act in their best behalf, but we also feel we have a moral obligation to follow Uncle Ted's wishes in the way in which he entrusted us to do.
Did that give you further support, I guess, for the conclusion that it was safe to go forward and develop the property?
A. Absolutely. Because I kept believing, or thinking, that maybe these people from northern Idaho don't believe that I had -- that there was an independent appraisal on this property.
So I said, combination of the fact that I paid fair market value, as established by an independent appraisal, and that the grantor of the Trust was doing what he wanted to do, in the guidelines of being a reasonably prudent person, I said, it just doesn't make sense to me.
Q. Okay. Moving to Exhibit 7, and we actually need to first talk about the third page of Exhibit 7, which I don't believe there's an objection to; is that

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fair?
MS. TAYLOR: Pardon me.
MR. CHARNEY: The Wishney letter?
MS. TAYLOR: Exhibit 7 is the Harwood letter.
MR. CHARNEY: Well, there's two letters on there.
MS. TAYLOR: No. Actually the third page, only, of Exhibit 7, I don't have an objection to.
THE COURT: All right. For the record, Defendant's Exhibit 7 consists of three papers. The first and second papers appear to be pages 1 and 2 of the two-page letter dated September 5th 2003, on the letterhead of Hall, Farley, Oberrecht, and Blanton, addressed to Ms. Connie Taylor.
And I have not read it. I have it in front of me. It's been offered. Well, it hasn't actually been offered yet, but anyway, page 3 of Defense Exhibit 7 is a one-page letter, dated September 5, 2002, on the letterhead of David Wishney.
Ms. Taylor, are you saying that you have no objection to the admission of page -- this third page, this September 5th, 2002 letter?
MS. TAYLOR: Correct, Your Honor.
THE COURT: All right.
And you're moving its admission?
MR. CHARNEY: I will offer this document, at this

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point, and then we're going to go back and talk about the Harwood letter in a moment.
THE COURT: Very well. Then, for sake of the record, I have those original exhibits before me. And I am going to mark on the lower, left-hand corner of the third page that this is Defendant's Exhibit 7-A. And it is admitted.

(Exhibit No. 7-A admitted.)

Q. BY MR. CHARNEY: Mr. Maile, talking about this particular exhibit, did there come a point in time when you became aware of the September 5, 2002 letter?
A. It was during litigation that I received a copy of the letter.
Q. Were you still in the process of developing the property when you received this letter?
A. Yes.
Q. After looking at this letter, did you see any indication that the Trust needed to seek court approval, after Mr. Wishney looked at the documentation?
A. No.
Q. Did that lend further support to your conclusion that everything, as far as the closing went, was okay?

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A. Yes.
Q. Now, we need to talk about the Bart Harwood letter.
MR. CHARNEY: And I understand, Your Honor, that the objection by the Taylors, in this case, is simply that this is a privileged communication, subject to the attorney-client privilege.
THE COURT: Let's find out.
Ms. Taylor, Mr. Charney has now moved the admission of the remainder of Defendant's Exhibit No. 7; is that correct, Mr. Charney?
MR. CHARNEY: I will offer that at this point.
THE COURT: Okay.
And, Ms. Taylor, let's hear your objection.
MS. TAYLOR: My objection is not only attorney-client privilege, but also hearsay.
THE COURT: Okay.
MS. TAYLOR: If it's not offered to prove the truth of the matters asserted, it's not relevant.
THE COURT: Okay.
Mr. Charney, how do you respond to those two objections?
MR. CHARNEY: The hearsay argument is hard to get around, so I'll simply just have to call Mr. Harwood or, unfortunately, perhaps Ms. Taylor, which I don't care to

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do. If there is really truly a hearsay objection to this, I can establish the authenticity and get over the hearsay issue.

As far as the privileged issue, so that we don't call Mr. Harwood here and then that be an exercise in futility, I think that the privilege issue is a red herring. The attorney-client privilege applies to communications between an attorney and a client that are intended to be confidential in nature.

Here we have Mr. Harwood, after meeting with the Trustees in this case, communicating some thoughts regarding the matter to Connie Taylor. And I would point out that, while Ms. Taylor does represent the Trust right now, the previous trustees clearly had intended that this communication, this letter, be sent to somebody else and there is no indication whatsoever that there is any confidential, or attorney-client privilege type of communications in here. So I think that the privilege argument just rings hollow.

THE COURT: Well, I haven't read the letter.

MR. CHARNEY: And that's the bind you're in.

THE COURT: Correct. I think the best thing to do, at this point, is reserve ruling on the issue completely. Let me make a couple of comments.

Mr. Charney, you said that you thought that

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you could call, apparently, the author of this letter, Bart Harwood, okay, to get over the hearsay objection or to establish the authenticity.

It seems to me if you called Bart Harwood to testify about what Bart Harwood said in this letter, that certainly gets over the hearsay issue, but it doesn't necessarily allow you to admit the document.

MR. CHARNEY: True.

THE COURT: Now --

MR. CHARNEY: I've got the business records exception, which I think would be --

THE COURT: Perhaps you could get around a hearsay objection to the letter in that fashion, by calling Mr. Harwood; okay.

Now, with respect to the attorney-client privilege, I really want to discuss this at some greater length. And, again, I -- and I promise all the parties. I truly have not read the contents of this letter.

I'm looking at the date, the letterhead, it's obviously from a law firm. There's no dispute about that. It's written to Ms. Connie Taylor, at Clark and Feeney, in Lewiston. And just so the record is clear, there is no question but that Connie Taylor is an attorney.

I suppose the question is, perhaps I would

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need some foundation to determine in what -- and maybe you could clear this up for me, Ms. Taylor. Who -- is it your contention that Bart Harwood was representing you, as an individual, or was representing a client of yours -- can you help me out -- when he wrote this letter?

MS. TAYLOR: When he wrote this letter, Your Honor, he was representing the trustees of the Trust.

THE COURT: The trustees, Beth Rogers and Andrew Rogers.

MS. TAYLOR: Correct. And the Trust, as an entity, was his client.

The trust, as an entity, is now my client. And I believe he needs the current trustee's permission to disclose any confidential information.

And where I'm getting at with this objection, Your Honor, is -- the other objection I have to this is relevance. Because --

THE COURT: Well, wait a minute, really truly.

MS. TAYLOR: Okay. One at a time.

THE COURT: If someone who is entitled to rely on the attorney-client privilege waives that privilege by disclosing the otherwise protected communication with other people, doesn't that waive the privilege? In other

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words, if the trustee -- if the then trustee of the Trust, Beth and Andrew Rogers, receive a letter from the attorney representing them as trustees, and they take that letter and they communicate it and disclose it to other people, how is that consistent with relying on that privilege that they're allowed to keep these communications confidential, at that point?

Do you see what I mean?

MS. TAYLOR: Yes.

THE COURT: And then, realizing that there are successor trustees now, you're saying, well, now they -- that the new trustees want to assert the Trust's attorney-client privilege.

It just seems to me that if the cat's already out of the bag, if that attorney-client privilege has previously been waived by the people who were, then, acting as the trustees for the Trust, that it's gone forever, isn't it?

MS. TAYLOR: As to that isolated document, yes.

THE COURT: Yeah.

MS. TAYLOR: It is, Your Honor.

The problem I am seeing is, it's clear, from the way this case has progressed, what the Defendant is going to try to do is infer, from this letter, that because of this position, there weren't other discussions

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between Beth Harwood -- or Beth Rogers and Bart Harwood as to whether the Trust had the power to do the sale, whether the they needed court approval, all of that -- all of that will be privileged.

We will be prevented from answering this inference. And they shouldn't be allowed to do that, when they know that we won't be able to counter it.

THE COURT: But you're representing the Trust. You don't have to rely on the privilege. I mean, as -- Mr. Charney, let me ask you a question.

MR. CHARNEY: Yes.

THE COURT: Are you trying to get the Harwood letter in, in order to show the effect that the knowledge of this letter -- I mean, are you going to find out -- are you going to elicit testimony from Mr. Maile, this morning, to the effect that Mr. Maile was aware of the contents of this letter and relied on it, in some way, in further activity that he took?

MR. CHARNEY: There are a couple of points, Your Honor.

THE COURT: Okay.

MR. CHARNEY: First off, that there was some knowledge about the letter, and -- well, it's difficult for me to talk about it in a vacuum.

THE COURT: Well --

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MR. CHARNEY: But there's indications in here that, we will just simply argue, led him to feel safety about continuing to invest in the property.

THE COURT: Okay. So what -- I'm taking your comments as, essentially, an offer of proof --

MR. CHARNEY: Yes.

THE COURT: -- that -- are you telling me, then, that Mr. Maile will testify, if asked, that he was, in fact, aware of this letter, that it was disclosed to him, by Beth and Andrew Rogers, while they were still trustees?

MR. CHARNEY: Not at the time, but at a later point in time.

THE COURT: While they were still trustees though?

MR. CHARNEY: I think I need to confer before I can -- with Mr. Maile before I could state, clearly, the answer to that question.

THE COURT: Okay. Well, if you are able to establish that the people to whom this letter was addressed, that those folks revealed this letter to others, to Mr. Maile, while they were still the trustees, then I think that I would overrule the attorney-client privilege objection to the admission of this letter.

Now, there may be a question, still, as to relevance. And there may still be a question as to,

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frankly, hearsay, and whether or not you're offering it for the truth of the matter or the affect that it had on the hearer.

MR. CHARNEY: Well, there's no doubt the document's hearsay.

THE COURT: Okay.

MR. CHARNEY: So, if I have to deal with that objection, I would just deal with it with an appropriate witness.

Let me ask Mr. Maile this question about the letter.

Q. BY MR. CHARNEY: Mr. Maile, when did you come into possession of September 5th, Bart Harwood letter.

A. The years kind of run together, but I really think it happened during the deposition of Bart Harwood. So it probably was -- this is 2006. It was probably in preparing for last year's trial, maybe September of '05.

Q. September of '05?

A. Yeah. I think so.

Q. Now, how did you come into possession of the letter?

A. I took Bart Harwood's deposition.

Q. He brought this with him?

A. Yes, he did.

Q. Was there any claim of privilege at the time

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of the deposition, when he disclosed it?

A. No.

Q. Was Ms. Taylor there at the deposition?

A. I think Mr. Clark was.

Q. That would be Paul Clark?

A. Yes.

Q. Who is also in Ms. Taylor's firm --

A. Yes.

Q. -- and represents the trustees?

A. Yes.

Q. Okay.

MR. CHARNEY: I guess then, Your Honor, it seems to have been voluntarily disclosed and no objection being raised when it was initially disclosed.

Another point in the offer of proof has to do with -- I don't want to talk about the contents of the letter too much until you rule on it, but the absence of any indication that one would have had to seek court approval to close the sale.

Just about a year after the sale was closed, which is also seeming to be an area where the Court has obviously had concern, but we've had -- this letter, I think, would demonstrate, one attorney looked at it, Mr. Wishney looked at it, Mr. Maile looked at it, and nobody ever had said, hey, there's a -- you know, red

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alert here. You needed to have a judge sign off on this. And that would be a secondary reason for offering this letter as the absence of that point, as well.

THE COURT: Well, I wouldn't let it in just for that, over an objection based on attorney-client privilege.

Ms. Taylor, let me ask you, how do you respond to the argument that this letter was disclosed, without objection, during a deposition?

MS. TAYLOR: I don't think that I can argue that it isn't -- that the attorney-client privilege prohibits it from being admitted, just the letter itself.

But again, where we're headed is an attempt to raise an inference that, because something isn't in here, conversations that would absolutely be privileged didn't occur.

THE COURT: Okay. Well, what I'm --

MS. TAYLOR: That's our issue.

THE COURT: -- going to do then -- okay.

MR. CHARNEY: Your Honor --

THE COURT: No. I don't think there's any more argument required. The issue facing me, right this moment, is the admissibility or inadmissibility of the two-page letter that has been marked for identification as Defense Exhibit 7.

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I had previously overruled the objection, with respect to -- to relevance. Well, maybe I didn't. Maybe what I said was, I really had to wait and see how Mr. Charney wanted to handle the objection on hearsay and relevance; okay? But the attorney-client privilege was the issue that was most concerning to me.

Now, based upon the fact that this letter was produced during a deposition, the attorney-client privilege has been waived, given the fact that Ms. Taylor had an opportunity, during the depositions -- as I understand the testimony, that Ms. Taylor was present at the deposition where Mr. Harwood disclosed the letter, and didn't assert any attorney-client privilege.

Is that untrue, Ms. Taylor?

MS. TAYLOR: Actually, Mr. Clark was there, but it would have the same affect.

THE COURT: Thank you.

So the attorney-client privilege is waived; therefore, the objection based on attorney-client privilege is overruled.

Now, we still have two other issues, one is hearsay. I suppose Bart Harwood could come in and -- or the custodian of this particular record could come in and establish the authenticity of the letter.

But that's not the real question, is it?

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It's not authenticity, it's more relevance; isn't it? You tell me why you want -- why you think I need to see this. Are you offering it for the truth of the matter or why are you offering this?

MR. CHARNEY: I'm offering it, as I stated, for two basic reasons. One, to demonstrate that -- to defeat any claim that -- let me back up.

Mr. Maile is here on an unjust enrichment claim, because he continued to develop property after knowing that there was at least a threat of litigation.

And I think it's important for the Court to recognize that David Wishney looked at the transaction and didn't see the need for court approval. Mr. Harwood looked at the transaction and didn't see the need for court approval.

THE COURT: Now, is that last assertion what you believe will be established by the admission of his letter?

MR. CHARNEY: I believe in part, yes. And then, finally, I think that the letter, to the extent that Mr. Maile had it in his possession and may have continued to develop the property, after seeing this and knowing some of the facts that were set forth in this letter, also demonstrates his good-faith reliance on the trust not going forward with litigation against him, in

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continuing to develop the property.

So what I would ask you to do is, on the relevance, whether the Court views it as marginal relevance or, you know, overwhelming relevance, it's still relevant to the issues here.

On the hearsay, I'm going to ask the Court to conditionally admit it, just so we can continue to proceed in an orderly fashion. And I will backfill and call Mr. Harwood if, in fact, we can't work out the hearsay issue on some kind of a break.

THE COURT: Well, I think that what you're suggesting is that if Mr. Harwood had thought that there was a need to get court approval before the sale had gone there, that that would have been contained in this letter.

Now, maybe this letter says, I've checked it out and you don't need court approval or something like that. But even at that --

MR. CHARNEY: It doesn't say that. I mean, it doesn't say that. It talks -- well, I want to be careful that I don't tell you what is in the letter, unless you want to --

THE COURT: That's all right.

Ms. Taylor, you have risen to your feet. Did you have something to enlighten me with?

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MS. TAYLOR: Well, I actually just never sat down since the last time, Your Honor.

But I -- I'm in the same position that Mr. Charney is in. Without discussing what is in the letter, I think it's improper and irrelevant to try to infer that a conversation hadn't occurred between Mr. Harwood and his clients, at the time, just because he chose not to put it in a letter that he was writing to someone who was at odds with that client.

THE COURT: Well, I --

MS. TAYLOR: This letter is long after the sale had closed.

MR. CHARNEY: And Mr. Harwood can come testify, and they have the right to waive the privilege. And if Mr. Harwood has notes that said, they should have got court approval, and I had this conversation with Beth and Andy Rogers, then you would think that that would be testimony that would be offered by the Plaintiffs or -- yeah, by the Plaintiffs in this case, and they would want to put that before the Court.

So we're not making any inference. If they've got that type of evidence, then let's -- I would think that that would be very important.

THE COURT: Well, that can go to argument. I am not going to admit the letter, at this time. As both

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attorneys are -- it's obvious that I don't want to know exactly what's in this letter, because I'm in this position of being the finder of fact, as well as the Judge determining, as a rule of law, what evidence makes it into this record, and what evidence the finder of fact considers.

I don't want to consider this letter from Bart Harwood, at this time. It seems to me there hasn't been any showing that Bart Harwood would not be an available witness. There's no showing that -- at this point, that Mr. Maile relied on certain assertions that were contained in a letter that he was aware of at a certain point in time.

So, I'm going to just have you move on from here, Mr. Charney. There may be another way to get Mr. Harwood's, you know, belief in, later on in the trial, at an appropriate spot. But I'm not going to let it in at this point.

MR. CHARNEY: All right.

THE COURT: Okay.

MR. CHARNEY: I'll move forward.

Q. BY MR. CHARNEY: Mr. Maile, let's turn to another aspect of your testimony, not Exhibit 8 as you just did.

A. I'm just ready for you.

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Q. Yes. What I want to know is, after closing the transaction, you sought financing for the property in question through Idaho Independent Bank?

A. Yes, I did.

Q. Why did you do that, and when did you do that?

A. Well, in mid-2003, I had approached Beth by phone, and I asked Beth if she would consider -- if she wanted to modify the promissory note and deed of trust to allow the Trust to be paid off in what's called lot splits. So, when I would sell a lot, I could pay a portion of the balance owing to the Theodore L. Johnson Trust.

Q. Would this have been a modification of the prior agreement?

A. Yes.

Q. All right.

A. And she said she would talk to her accountant about it, because it could have had advantages to the Trust, in addition to having advantages to us.

Anyway, she got back maybe a week or 10 days later. I either called her as a follow-up, or she called me back and said, basically, the accountant wasn't interested in adjusting anything. And they just wanted to be paid off in full.

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So that caused us, my wife and I, to consider different avenues with financing, for construction financing on the project.

So we went to -- I went to a couple of banks. And Idaho Independent Bank was the bank that expressed an interested in doing the take-out financing, to pay off the Trust and to provide construction financing for the project, Fairfield Estates.

Q. All right. Now, turning to Exhibit 8, is Exhibit 8 the deed of trust that was entered into between Idaho Independent Bank and Berkshire Investments, and I believe it's the second line, on January 8th, 2004?

A. I was looking for the Ada County Recorder's stamp on it. It's on the first page. It was recorded on or about that, January 10, 2004. Yes. It is signed by my wife and I, as member managers of Berkshire Investments LLC.

Q. Now, I note, from the deed of trust, that it reflects a loan in the amount of $531,150. Is that the amount of money that you borrowed? That's the top line, I believe, right under where it says deed of trust.

A. That was the extent of what was available to us. Initially, we borrowed, in January, just a sufficient amount of money to pay off the Theodore L. Johnson Trust in full.

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Q. And then you had a credit line for the balance?
A. That's true.
Q. What was the credit line for?
A. Construction. We --
Q. Go ahead.
A. The way the commercial loans work is that you provide the lending institution with estimated costs of construction and development by a certified engineer, Joe Canning in this case, outlining -- so the bank would be comfortable in realizing what the costs would be in developing the project. The dollar amount to pay off the Trust, plus those estimated costs, represent the dollar amount of $531,000.
Q. All right. And for lack of any better term, did you tap out that loan, meaning did you borrow the maximum amount?
A. Yeah. I don't think we actually used all of it. It was, you know, a combined effort of money in, money out, and just trying to keep your interest payments down as best as you could. So I can't remember, but I don't think we tapped it out.
Q. Okay. And the deed of trust having been recorded January 8, 2004, was there a development portion of the loan that required you to have the property split,

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developed, ready for sale by a certain point in time?
A. Right. The -- Al Knudsen, with Idaho Independent Bank, and the banking documents, provide that there has to be construction done within six months, and the lots have to be marketable within six months, which really puts your feet to the fire to get everything done.
Q. What is the purpose of that?
A. Well, the bank, through regulators, they just have to have the assurances that, when they loan money, things are getting done and there's going to be a finished product that will pay back the bank, up to the amount that it's borrowed by my wife and I.
Q. Turning to Exhibit No. 9.
A. Yeah, I'm there.
Q. Do you recognize Exhibit No. 9?
A. Yes, I do.
Q. What is Exhibit No. 9?
A. Well, what had happened --
Q. No, no. Just what is Exhibit No. 9?
A. It's a letter from Idaho Independent Bank.
Q. Is it addressed to you?
A. Yes.
Q. Is it signed by Al Knudsen, Vice President of Idaho Independent Bank?
A. Yes, it is.

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Q. Is this a record that was kept in the ordinary course of Berkshire Investments' business?
A. Yes.
Q. Was Berkshire Investments' business the development of Fairfield Estates on Linder Road?
A. Yes.
MR. CHARNEY: At this time, I would offer Exhibit No. 9.
THE COURT: Any objection?
MS. TAYLOR: Yes, Your Honor. I object on hearsay. The business record exception doesn't apply to the person who just has it in their file. It applies to the person who created it.
THE COURT: Right. That's a fact. I mean, the business records exception is a valid exception to the hearsay rule. But, an otherwise hearsay document doesn't -- you know, it doesn't become admissible merely because the person who has it kept it in the ordinary course of business. It's still hearsay. It's authentic, but it's still -- it's still hearsay.
Do you have any other exception that you want to offer it under?
MR. CHARNEY: Well, I could try 803.24, but I haven't given the appropriate advance notice. So I'll call Mr. Knudsen for purposes of getting this in.

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THE COURT: The objection is sustained, and Exhibit 9 is not admitted.
Q. BY MR. CHARNEY: After receiving Exhibit No. 9 -- well, let me say. Before receiving Exhibit No. 9, did you feel a certain pressure to get this project, at least the development portion of Fairfield Estates, completed?
A. You bet.
Q. Why?
A. Well, the bank -- I advised the bank -- I thought it was my obligation to go tell the bank, Al Knudsen, in February or March of 2004, after the lawsuit was filed, that these folks had filed a lis pendens on the project.
So I went to Al and I said, well, you know, this is filed. But, by golly, we feel pretty optimistic about it and we're going to try our best to get it resolved in court quickly. And we're still trying to do that.
But he -- we -- I had conversation with him --
MS. TAYLOR: Objection; hearsay.
MR. CHARNEY: I'm not asking what Mr. Knudsen said.
MS. TAYLOR: I may have been premature, but...

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THE COURT: Okay. You would object to this witness testifying as to what Mr. Knudsen may have said? Okay. And I don't think that was the tenor of the question, yet. So you're acknowledging that your objection was premature, Ms. Taylor?
MS. TAYLOR: Yes.
THE COURT: All right.
Q. BY MR. CHARNEY: Go ahead, Mr. Maile.
A. Okay. So I felt obligated to tell Al what was going on. And we had a number of phone conversations throughout the following months, February, March, April May of 2004, because my reading of the commercial loan documents that I had executed, Exhibit 8, that, you know, we had certain obligations to the bank.
And we had to pursue development or they were going to -- they had the right to call the loan due, not only for nonpayment of the amount, but any liens that were filed against it, and anything that would give them a sense of insecurity about the project, including me not doing construction.
Q. If they called the note due, did you have the funds liquid to pay it off in order to protect the property?
A. No.
Q. Had they called the note due, could they have

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simply foreclosed on the property and Idaho Independent Bank would be the owner now?
A. Absolutely. Well, somebody would --
Q. Somebody --
A. Someone would have purchased it at the foreclosure sale, I'm sure of that.
THE COURT: Mr. Charney, let me ask you to establish something else, and I may have just missed it during the testimony.
MR. CHARNEY: That's all right.
THE COURT: Did you have Mr. Maile testify as to the date of the lis pendens, when he first was informed?
MR. CHARNEY: I was -- I have a big star right by that very question.
THE COURT: Okay.
Q. BY MR. CHARNEY: I want to talk about -- go back to refresh your memory on -- Exhibit 8 was entered into January 8th of 2004; correct?
A. Yes.
Q. When was it that you got sued and the lis pendens filed in this case?
A. I think it was January 23, 2004.
Q. So well after you had already obligated yourself to Idaho Independent Bank?
A. About two weeks after the Trust received the

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pay off.
Q. And in the first few months of the litigation, was there any indication, by way of any court orders or anything else the Plaintiffs had done, that would lead you to conclude that the appraised value was bad, or you had engaged in any misconduct which was going to undo the sale?
A. No. And, in fact, the court order was entered dismissing ground one, or the Taylors' complaint. That was in about April of 2004. Beth Rogers and Andy Rogers were still at the helm, as trustees, and everything was thumbs up from them.
Q. Had Idaho Independent Bank also commissioned their own appraisal regarding this property before doing this deal?
A. Yes. That was completed in December of 2003, by Williams.
Q. Was the appraised value that was set forth in the December '03 report also an indication to you that you had, in fact, paid fair market value for the property?
MS. TAYLOR: Objection; calls for hearsay as to the amount of the -- the appraisal is not in evidence. It has not been submitted as an exhibit.
THE COURT: Okay. But that -- as I understand the

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question, the question was not asking how much the thing appraised for. The question was whether or not there was anything, including an appraisal or anything else, that would have put Mr. Maile on notice that he might lose the property, or that the sale would be rescinded in some way.
Is that essentially what you were asking.
MR. CHARNEY: It is, Your Honor. And it's also offered to show the effect on the listener, or on the reader, as to why he felt comfortable continuing to develop in light of allegations, at the time, that he had paid less than fair market value.
THE COURT: All right. Now, I'm going to overrule the objection. And, Ms. Taylor, it's difficult for me to see, just because of the configuration of the courtroom.
MR. CHARNEY: I'm sorry. I'll move aside when she objects, Your Honor.
THE COURT: I'm going to overrule the objection because, as I take it, the amount of the appraisal is not being offered for the truth of the matter asserted.
In other words, I don't know what that is, but assuming it's say $400,000, it's -- it's not being offered to establish to the finder of fact, or the trier of fact, that the thing really was worth $400,000. It is being offered to show the effect that it would have had

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on the person who, you know, is being charged with proceeding in spite of this contrary knowledge.
Do you see what I mean? So I'm going to overrule the objection.
MS. TAYLOR: Okay.
THE COURT: Go ahead.
Q. BY MR. CHARNEY: So let's -- so that we're clear, did part of that first lawsuit allege that you had paid less than fair market value for this property?
A. Yes, it did.
Q. It was a significant allegation against you, wasn't it?
A. Seemed to be.
Q. So we already know, from the record, that we had the initial appraisal from Mr. Johnson at $400,000. A year and a half later, how much was Mr. Williams' appraisal?
A. Well, that was done for Idaho Independent Bank. And it said, at that point in time, the property was worth $410,000 in the unimproved state that I had -- that we had acquired it in.
Q. So, with the two appraisals, and then entering into the deed of trust that obligated you to go forward, and then a lawsuit that said you had paid less than fair market value, did you feel comfortable going

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forward with the development, on one hand comfortable because of the appraisals, and on the other hand, uncomfortable because you had to develop to maintain consistency with your obligations under the loan?
A. Well, to this day, I know that I paid a fair market value for the property. And I did back then, as well.
And I also know the pressure from the lending documents, that I had to get the job done or it was going to be called due. I was between the proverbial rock and the hard place.
Q. Okay. Let's move to Exhibit 10. What is Exhibit 10?
A. Exhibit 10 is just a docu -- part of the documentation referencing, from B and A Engineering, the Fairfield Estates Subdivision, which is the 40-acre parcel that's the subject of this litigation.
Q. What does it take to get, I guess, a project, a development project, to this state where you've got it? Is this a preliminary plat, or is this a final plat? That's a question to you.
A. It is a question to me. It looks like part of the date is deleted from this sheet.
There really isn't much change between the preliminary plat and the final plat, other than the

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construction being done for the final plat, and all the governmental hoops that have been approved; highway district, irrigation districts, U.S. Department of Geology.
So I think this is all -- for all intents and purposes, the final plat.
Q. I would note that it appears that the road goes into the center of the subdivision, and maybe -- it looks like most of the driveways, then, would peal off of a center court there?
A. Each lot would be serviced, have a driveway on West Cornerstone Lane, except those that are on the cul-de-sac. But the entire road is called West Cornerstone Lane, and it's a private road as opposed to a public road.
Q. Is it developed with the center, I'll call it a cul-de-sac if you will, because of the septic issues and that's the way it needed to be designed to deal with the septic issues you talked about?
A. The center issue, ultimately, was going to be a landscape area that had a pond that was dug, and an irrigation system was going to be hooked up in the center area. And that was going to be the irrigation source for the seven lots.
So -- and quite a bit of the work had been

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done to effectuate that, except the actual installation of the pump and the final landscaping.
Q. Now, I understand you began construction on a barn?
A. Yes. Up in Lot 1.
Q. Was Lot 1 to be your lot?
A. My wife and I; that's correct.
Q. Was there any obligation, under the Idaho Independent Bank note, for you to build the barn?
A. No.
Q. That was something you chose to do?
A. Right. I wanted to build the barn first, and we had plans drawn up for the house. We were -- that was going to be our home site.
Q. Had you, at some point in the litigation, decided that it would be a wise idea to stop construction on the barn?
A. Well, including paying your bill and a variety of other reasons, yeah. I stopped construction of the barn.
MR. CHARNEY: Your Honor, I might ask, can we take, maybe, a five-minute break? We're going to move into a lot of the drier stuff --
THE COURT: Sure.
MR. CHARNEY: -- about expenses and stuff like

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that. And it would be good to just sit for a couple minutes.
THE COURT: All right.
MR. CHARNEY: Just five minutes.
THE COURT: Fair enough.
MR. CHARNEY: Thanks.
THE COURT: Court will be in recess.

(Recess taken 10:14 a.m. to 10:25 a.m.)

THE COURT: Please be seated.
Are you all set, Mr. Charney?
MR. CHARNEY: I am all set.
THE COURT: Okay.
Q. BY MR. CHARNEY: Mr. Maile, a couple of follow-up questions, here, before we get into the finances.
With respect to both of the complaints that had been filed, the one that we talked about in '04, January of '04, and the second one, was there ever an allegation, in either of those complaints, that the sale should be undone because the trustees did not seek prior court approval?
A. No.
Q. So you wouldn't have had an opportunity to

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research that, to see if there was any validity to that claim, prior to making all the investments in the property?
A. Based on the complaint, I had no reason to research that issue, because it wasn't raised in the complaint.
Q. All right. Finally, on that point, was all of the development that you are seeking reimbursement for, by way of this proceeding, completed, done prior to the point in time when there were court rulings indicating that that might have been an issue?
A. That's true. The Supreme Court ruled, in December of '05, that -- on that narrow issue, and the subdivision was fully completed and platted in October of '04.
Q. Let's continue to move through the exhibits, then. I think we had left off at 10. So let's move to Exhibit No. 11. There are several pages in Exhibit No. 11.
What is Exhibit No. 11?
A. It should be a record of the tax payments that my wife and I were making on the property since the acquisition.
Q. Have you, in fact, kept the taxes current on all of the tax years in question?

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A. Up through the Supreme Court's ruling, yes.
Q. And it appears to me that the second to last page of this summarizes those amounts?
A. Well, for the calendar year -- no, it doesn't summarize the entire amounts. Let me -- let me try to explain it. Going through Exhibit 1 --
Q. 1?
A. Excuse me, 11, page 1, shows that in the calendar year 2004, there was a total of -- of two payments made of $406.02.
Q. Okay.
A. We made those payments on the property.
The next page of Exhibit 11, actually, one, two, three, four five, the next five pages of Exhibit 11 come from the Ada County tax records, showing what the assessed values are after the subdivision is platted. You go from agricultural base ground in 2004, and now, in 2005, the Ada County Assessor's Office is basing it on an improved subdivision.
And then, the page, the following page --
Q. Let's back up, just so that we're clear about this. It appears that the property address on the second page, for example, is 4680 West Cornerstone, the third page is 4602 West Cornerstone and so on, and so forth; is that fair?

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A. That's true.
Q. So are these the assessments for the individual lots?
A. Yes.
Q. And have you kept those current?
A. Up through -- paying in December '05, I paid $9,527.69 for that tax year, '05.
Q. And then the final sheet in page -- in Exhibit 11, I should say, is what?
A. It shows the calendar year 2003. My wife and I paid $702.98 for real estate taxes on the subject property.
Q. As far as the unjust enrichment claim goes, do you believe that you should be repaid by the Trust for making these tax payments?
A. Yes, I do.
Q. Why is that?
A. Well, the Court has ruled that it's their -- the title is in the Trust, currently, and they would have had to have made those payments. And I was acting under the color of title, if you will, that the property was ours. So I made the payments during that period of time.
Q. Let's move to Exhibit 12. Do you recognize Exhibit 12?
A. Exhibit 12 was a document prepared in

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discovery, in response to interrogatories, that tries to give a summary, a reconstruction of the various items for construction that were incurred, and when they were paid. This would be for Fairfield Estates, partial costs.
Q. When did you prepare this?
A. Probably in 2005.
Q. Does this reflect all of the expenses associated with the development of Fairfield Estates?
A. No. I don't -- I don't think it did because, the work sheet, Exhibit 13, probably is a better overall of the -- of what I consider to be expenses associated with the development of the Fairfield Estates Subdivision.
Q. Okay.
A. But we could not make a paper trail for the entirety of Exhibit 13. So some of the items in 13 were not included in 12, because we didn't -- we couldn't figure out when they were incurred, for example. Exhibit 13 shows when they were paid.
Q. And the incurred demonstrates, for example, if we look at 2003, B and A Engineers, this was incurred December of 2002, in the amount of $2,143.25?
A. Right.
Q. So this is to help the Court understand when you were actually incurring the expense, as opposed to

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when it was actually being paid?
A. That's true.
Q. Okay. Let's move to Exhibit No. 13. Do you recognize 13?
A. Yeah. It's a business record of our QuickBooks program that we use. It's labeled, it's printed 2/02/05. But it's a transaction history, and up on the top, left-hand corner it says Construction Costs Fairfield Estates.
Q. Yes?
A. So this Exhibit 13 was our internal bookkeeping, to try to show what items went into Fairfield Estates. And they also include payments. For example, on 6/1/2003, Theodore L. Johnson Trust was paid $32,357. That was a combination of interest and principle on the note.
Q. Do you believe that that's fairly included in the unjust enrichment claim, since I think it's an agreed upon, between the parties, that you will get the $400,000 for the initial purchase price of the lot?
MR. CHARNEY: Actually, before I ask that question, is that an agreed upon, that part of the order in this case? We're not disputing the $400,000, his entitlement to the $400,000?
MS. TAYLOR: We're not. But we're asserting an

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offset for attorney fees.
MR. CHARNEY: All right.
Q. BY MR. CHARNEY: But for purposes of this, we're assuming that we're talking about funds above $400,000. So, as far as that entry, 6/1/03, for 32,357, is that really included in the $400,000 that the parties have already agreed to?
A. Well, no. Because we have, before the Court, A request for prejudgment interest on that $400,000. So some of that -- well, excluding the prejudgment interest, just back out the $32,000, because I know that there will be testimony from Joe Corlett on the evaluation of the improvements.
Q. Okay.
A. I don't know if that answers the question.
Q. In other words, on the second page we have a total amount of costs associated with Fairfield Estates of $210,120.77. My question is, should that be reduced downward by the Court by $32,357, since the $400,000 is already accounted for?
A. Yes. In that sense, yeah. But, there's one thing I want you to also look at. On the entry, for example, 10/22/2004.
Q. Okay. So second page, about third from the bottom.

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A. Yeah. It's an entry called Hope Development Company.
Q. Okay.
A. And that was mislabeled, and I know Joe Corlett didn't catch that. It's employees' fees for construction of remodel. That's not true. Hope Development is a construction company that -- that I -- that is a family-run construction company. And in this case, in developing Fairfield Estates, we had -- Hope Development was retained, by Berkshire Investments, to handle certain portions of the construction.
So Hope Development hires its employees, and they did work out on Berkshire property for the -- a portion of it, certainly, was related to grading, excavating, and also the installation of pipe, for example.
If I can just back up to the plat and subdivision --
Q. Exhibit 10?
A. Right. I can explain. On Exhibit 10 -- I alluded to it a little bit before, but Exhibit 10 has this circular plat. And in the middle of the platted area is an irrigation lake or pond.
The irrigation system used to be flood

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irrigation out on this property, as agricultural land. In order to do lots, and make them commercially reasonable for resale, nobody has time, that lives on a 5-acre parcel, to irrigate land by flood irrigation. So you have to have pressurized systems.

So Hope Development, in addition to doing grading with backhoes, bulldozers, they also were commissioned to install gate pipe, buried pipe, that was up from the northeast corner.

Water came down the northeast corner of Lot 10, down a cement irrigation line. And from that point, which is between Lots 3 and 4, there is buried pipe that goes to service this irrigation area in the center of the subdivision.

So the entry, for example, Hope Development on 10/22/04, each year, historically, my company in this case, Thomas Maile Real Estate Company, pays Hope Development, typically annually, for its contract services for any development that I might do.

So this $23,000 was done for the installation of the irrigation system and other items.

So that --

Q. Can I -- was this money paid to you, or paid to the actual people that did the work?

A. Well, Hope Development is my family company,

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but -- so one arm of my family paid, in essence, another arm of my family business. But, as a lawyer, I don't hire construction workers. So Hope Development hires construction workers to do construction work. I think Joe Corlett missed that in his analysis.

But here, again, when -- this was for internal bookkeeping. If this was done by a private contractor, the fees would be quite a bit higher than what Hope Development charged our family.

Q. Okay. So you think that that's a valid charge?

A. Oh, absolutely.

Q. Okay. It all --

A. That -- the entry says 5811 Airport Road, because Hope Development also did work out there. But it had the line item for -- the secretary didn't delete 5811 Airport Road. It should have been deleted.

Q. All right. So there's that error. And your belief, as far as the unjust enrichment portion of this, is that the 210,120.77 should be reduced by the 32,357?

A. Yes.

Q. Okay.

A. And there might be some -- a different reduction, too.

Q. And that's, at least, as far as your hard

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costs invested into this property?

A. Yes.

Q. Let's, then, move to Exhibit No. 14. Do you recognize Exhibit 14?

A. Exhibit 14 is basically the same scenario, as far as our internal accounting system, that shows what was done on Lot 1, where the barn -- where our home was to be built and the barn is back built.

Q. Is it a fact there's a barn that's partially built on the property right now?

A. I would like to think it's 90 percent done. The barn was started in October of '03. We had excavation work done in October of '03. We had footings formed in '03 and poured.

And then, in November, the framing crew went out, and they started to actually put the sticks up on the barn, through November and December. Then the bad weather hit, so the sticks, depicted in the pictures, were in the -- just up in the air.

The lawsuit hits. We have quite a bit invested in materials. So, here again, if you don't cover up what you've done in construction, the wood is going to warp and a variety of problems.

So I felt that it was prudent to finish the barn, at least to the point where it's up and shingled,

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the siding is up and painted, the concrete is poured. We didn't put on the exterior doors, because it just -- it just didn't -- at that point in time, we said okay. I intended to enclose to keep the trespassers out, but we got some doors done. But the big overhead doors at both ends, we haven't -- we haven't gotten those done.

Q. Is it fair to say, then, that Exhibit 14 reflects that you spent $31,111.24 on the barn, to date?

A. Yes. Well, you have to back out -- the barn -- the Classic Cottage Company, any entry with Classic Cottage Company relates to the home design that we had out there.

Q. Oh.

A. So you have to back those out.

Q. Okay. So, I see the first entry and the third entry --

A. Right.

Q. -- should be backed out?

A. Right. Because that relates to a house that we have plans for, but isn't being built right now.

Q. Let's move to Exhibit 15. Do you recognize Exhibit 15?

A. This shows a -- as of February 8, 2006, that there is a total due of $1,476 on irrigation.

Q. Has this since been paid?

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A. I thought $637 was paid, but I didn't -- we had paid, in the years 2003, 2004 -- it works out to be $801 a year. Anyway, we have not paid the last, 2006.
Q. So how much have you paid for irrigation, then?
A. I would say three years at $801 a year.
Q. All right. And the Trust would have had to pay that --
A. Yes.
Q. -- if they were in possession of the property?
A. Yes.
Q. So three years at $801 -- is it $801.60 actually?
A. That's what I think, yes.
Q. Okay. Finally, let's move to Exhibit No. 16. Do you recognize Exhibit 16?
A. Yes.
Q. What is Exhibit 16?
A. It's a calculation relating to prejudgment interest on monies paid to the Trust.
Q. If you can, walk the Judge through items 1, 2, and 3 on Exhibit 16.
A. Okay. We paid -- Berkshire Investments, my wife and I, paid $100,000 on September 17, 2002. That

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was the date of closing.
So, everything related to Paragraph 1 shows what prejudgment interest is, on that dollar amount, for the three years following, including a per diem for this last year. I have assumed that a decision may not be rendered until October 19th, but I just chose that date somewhat arbitrarily. That equals $1,478.08 on the per diem of that $100,000 paid, for that portion of this third year.
On line item 2, we have paid the Trust thirty-two -- we paid the Trust $32,357 on May 19, 2003.
So on that dollar amount paid to the Trust, prejudgment interest, it's a liquidated undisputed amount, and a 12 percent interest applies for that following year, to take you to May 18, 2004. That totals $3,882.84.
And so, too, with the second year, shows a $4,348.78 amount. And the third year shows $4,870.63. And the per diem, from May 19th, is fourteen -- excuse me, May 19, 2006, is $14.95. Taking that to October 19th equals $2,242.50.
And then, finally, Paragraph 3 shows, on January 8th, when Idaho Independent Bank paid off the Trust, $2,390 -- 848.03 was paid as a -- and we assert that that's a liquidated amount that's subject to

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prejudgment interest. And the following year would yield $28,781.76.
The next bold item is for the next year, from January 8, 2005 through January 7, 2006. That amounts to $38,715.37.
The next entry is going from January 8, 2006. The per diem rate on that dollar amount is $118.80 per day. Going to October 19, 2006 equals $33,382.80, for a total $156,717.68 for prejudgment interest on the purchase price paid, in the increments when they were paid, in three different installments, because there were, basically, three different payments, at three different dates, that the trust was finally paid off.
Q. You initially had to borrow money to purchase this property; is that fair to say?
A. Yeah. We had a line of credit, yes.
Q. And had you paid interest on that line of credit?
A. Yes.
Q. Do you still owe any money on it, at this point?
A. No. On that line of credit, we've paid it off.
Q. Did it roll into something else that you have been paying interest on in the interim, or is that paid

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off and, in the absence of a court order to the contrary, would you own this property free and clear right now?
A. I would own it free and clear now.
Q. Okay.
MR. CHARNEY: Usually, before any of my questions, I consult with my client and he is usually over there, Judge. Can I just approach Mr. Maile, just briefly, make sure we have covered everything?
THE COURT: Yes.

(Discussion between Counsel and Mr. Maile.)

MR. CHARNEY: Your Honor, I don't have further questions.
THE COURT: Very well.
Are you ready to cross-examine, Ms. Taylor?
MS. TAYLOR: I am, Your Honor. If I could have just a moment.

CROSS-EXAMINATION
BY MS. TAYLOR::
Q. Mr. Maile?
A. Yes?
Q. Are you ready to proceed?
A. If you would give me a second, I seem to have

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made a mess out of this exhibit binder that I have. Okay.
Q. I would like to start with the year 2002. At that time, you had been an attorney for about 25 years; is that right?
A. 24, 25, yes.
Q. And in the course of your representation, you had handled a considerable number of lawsuits?
A. At times, yes.
Q. You appealed a number of cases to the Supreme Court?
A. I have appealed cases to the Supreme Court.
Q. And you are aware, as an attorney, that there's never a guarantee on what will happen in litigation?
A. I think some cases are, yeah.
Q. You have lost cases you thought you should have won?
A. Yes.
Q. You have lost cases, on appeal, you thought you should have won?
A. Yes.
Q. So, in this case, you knew that there was never a guarantee that you would prevail?
A. That's true.

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Q. And you, in fact, did not prevail?
A. Not currently.
Q. And in 2002, you handled real estate matters?
A. For clients?
Q. For clients.
A. Yes.
Q. And you also had handled estate planning?
A. Yes.
Q. Can you turn to Exhibit No. 105 in the Plaintiff's Exhibit folder?
THE COURT: Is there any estimation among the parties -- we may have covered this early -- is there a stipulation with respect to these exhibits?
MS. TAYLOR: Yes. They have all been stipulated as admitted.
THE COURT: Is that correct?
MR. CHARNEY: That is correct, yes. The Plaintiff's binder can be offered and admitted.
THE COURT: For the record, then, Plaintiff's Exhibits -- let's see, how are they numbered again?
MS. TAYLOR: 101 through, I believe, 134.
THE COURT: Okay.
MS. TAYLOR: Yes, 134.
THE COURT: 101 through 134, without objection, are all admitted then.

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(Exhibits No. 101 through 134 are admitted.)

Q. BY MS. TAYLOR: Mr. Maile, you -- this is a copy of Mr. Johnson's Last Will and Testament; correct?
A. Yes.
Q. And you prepared that?
A. Yes.
Q. Would you look at Paragraph 402, on page 2.
A. Yes.
Q. Is that what is known as a pour over provision?
A. Yes, it is.
Q. Under the terms of that, if Mr. Johnson had any assets that hadn't been transferred into the Trust, upon his death, they would be transferred into the trust?
A. That's what the intent is yes.
Q. The intent is to avoid the necessary -- necessity of probate?
A. Yes.
Q. Can you turn to page 106 -- or Exhibit 106, please.
A. Okay.
Q. Is that a copy of the revokable trust agreement that you prepared for Mr. Johnson?
A. Yes.

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Q. And you were aware of the fact that Beth Rogers was one of the beneficiaries under that trust, were you not?
A. At the time I drafted this, sure.
Q. And throughout all of the dealings with the Trust, you knew that she remained a beneficiary under the trust?
A. We -- say that again.
Q. That situation didn't change?
A. I assume it didn't change.
Q. Okay. And you knew that under the Trust, as you had drafted it, there were different classes of beneficiaries?
A. I did at the time, yes.
Q. There were direct beneficiaries, which would be the children of Ted Johnson's siblings, if the sibling had already died?
A. Okay. That's true.
Q. And did you know what class of beneficiaries Beth Rogers fell into?
A. For what period of time?
Q. At the time this was drafted.
A. At the time it was drafted, sure.
Q. And which category was she in?
A. Beth Rogers?

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Q. Um-hmm.
A. I have to look and see.
THE COURT: Can you point him to the provision to answer the question?
MS. TAYLOR: Yes, I can. It's Roman numeral 4, Subparagraph, A on page 4.
Q. BY MS. TAYLOR: Well, I may be able to ask a question that would be a little more clear.
Were you aware that Beth Johnson's father was Ted Johnson's brother, that she was Mr. Johnson's niece?
A. I knew that, yes.
Q. Were you aware that her father had died?
A. When?
Q. At the time this was prepared.
A. Back in '97?
Q. Um-hmm. Just to assist you, the second paragraph, under Number A, talks about an immediate distribution to the surviving issue of Richard Johnson.
A. Okay. I see that.
Q. Were you aware that Beth Johnson was Richard Johnson's daughter?
A. No.
Q. Did you ever ask who her father was?
A. Ask Beth Rogers?
Q. Um-hmm.

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A. No.
Q. Did you ever ask Ted Johnson who the children of Richard Johnson were?
A. In '97?
Q. In '97.
A. I don't believe so.
Q. Okay. And as this transaction was -- with the Linder Road property was being developed, at that time did you ask what class of beneficiaries Beth Rogers would have fallen into?
A. At the time the Linder Road was being developed?
Q. When you were buying the Linder Road property?
A. In July of 2002?
Q. Yes.
A. No.
Q. You didn't ask?
A. No.
Q. After Ted Johnson died, you were informed that he had died; correct?
A. Yes.
Q. At that point, did you make any effort to determine which class of beneficiaries Beth Rogers belonged to?

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A. I don't believe so, no.
Q. And you -- you were aware, prior to this transaction being closed, that Ted Johnson had died?
A. Yes.
Q. You received a telephone call informing you of that fact?
A. I remember -- I can't remember if I called because I saw it in The Statesman, or whether I received a call. But I knew he had passed away.
MS. TAYLOR: May I have a moment, Your Honor?
THE COURT: You may.
Q. BY MS. TAYLOR: Can you turn to Exhibit 114, please.
A. Okay.
Q. Is that a copy of a message record, from your office, that you printed out and provided in discovery?
A. Yes.
Q. And in looking at this, on the third entry down, you were informed on August 2nd of 2002 that Ted Rogers had had a heart attack?
A. Yes.
Q. And you had never had any contact -- I said Ted Rogers. I meant Ted Johnson. You had never had any contact with Mr. Johnson after the signing of the earnest money agreement on July 25, 2002?

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A. I don't think so.
Q. So after Ted Johnson died, you knew that Beth Rogers and her husband, Andy, were co-trustees of the Trust?
A. No. I knew that they were exercising the capacities as co-trustees in August, because they signed -- or Beth signed an assignment as co-trustees of the Trust.
Q. Okay. Let's go back and look at that assignment. I believe it was your Exhibit No. 10. I'm not sure on the number.
Actually, that is Defendant's Exhibit No. 2. And looking at page 3 of that assignment, Beth Rogers didn't sign as a co-trustee, did she?
A. No, she didn't.
Q. She signed as a power of attorney?
A. That's true.
Q. But there's no question that by the time this transaction closed, she and her husband were the co-trustees?
A. That's true.
Q. And the Supreme Court has ruled that that created a conflict of interest; correct?
A. That's the way you read it. I don't read it that way.

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Q. This Court has ruled that it created a conflict of interest; correct?
A. I would have to look at that decision. You know, I read that Supreme Court decision probably eight times, I've read Judge Wilper's opinion a couple of times. I would have to read it again.
Q. Would you like to take the time to do that now?
A. If you want.
THE COURT: Well, maybe you can make your point in a quicker manner.
MS. TAYLOR: Okay.
Q. BY MS. TAYLOR: The written decision issued by the Supreme Court, and Judge Wilper, both have indicated that her dual role as a trustee and beneficiary created a conflict of interest. I'm not asking whether you agree with that.
A. Yes.
Q. I'm just asking you to confirm that that's the decisions.
A. I don't think it is. I think -- I think they were saying that court approval was necessary.
Q. And you drafted the real estate documents for the closing?
A. Yes.

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Q. You knew that Mr. Johnson had died?
A. Yes.
Q. You had a duty, at that time, to draft those documents in a way that complied with Idaho law?
A. After his death?
Q. At the time you drafted the documents.
A. Okay. Yeah. I had a duty to draft proper documents, yes.
Q. You knew that the sale had not been approved by a court?
A. When? Well, it hasn't. Not to this day it hasn't, sure.
Q. And you knew that?
A. When?
Q. You have always known that.
A. Yes, that's true.
Q. You knew that David Wishney's review of these documents had occurred prior to Ted Johnson's death?
A. I knew, at least, he met with him one time prior to death. I don't know if he was in contact with Beth Rogers after that. I don't know.
Q. You haven't received anything to indicate that he was?
A. That's true.
Q. You didn't advise either of the Rogers that,

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as the new trustees, they had an independent duty to look into this transaction?
A. By that, you mean look into the transaction of the fair market value of the property, or the real estate contract itself?
Q. The entire propriety of the transaction, after Mr. Johnson's death.
A. No. I didn't advise them.
Q. Okay. And after the sale was closed, you proceeded to take possession of the property?
A. Yes.
Q. And you have had possession of the property from that date until -- formally, until the court ruling on July 21st of 2006; correct?
A. Yes.
Q. You have made use of the property during that time?
A. Well, I -- I haven't been able to use it entirely. I have done things on the property. I haven't been able to build a home there, because I can't get financing. The title is clouded.
Q. But you've had access to the property?
A. That is true.
Q. You have had hay cut from the property?
A. That's true.

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Q. You have hay stored on the property?
A. Yes.
Q. You, to this day, have hay stored on the property?
A. It's no longer hay. It's something. You can't feed it to anything, but there's something there.
Q. There's a big pile of something there?
A. That's true.
Q. That you placed there?
A. That's true.
Q. There's also some equipment there, at this time?
A. Yes. There's probably -- there's a tank there that needs to be removed, and also a tractor part, yes.
Q. Prior to the Court's decision July 21st of 2006, the -- none of the Plaintiffs had access to this property; did they?
A. Well, I think, of course, they did, like anybody, the public. There was no trespassing signs. But they couldn't plow a field out there, if that's what you mean.
Q. Right. And they couldn't rent the property out?
A. That's true.

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Q. At the time you bought the property, there was a farmer named Sam Rosti leasing the property?
A. Yes.
Q. And the Trust has not been able to obtain the income from that lease after you took possession; correct?
A. Well, I think he paid the Trust for the year following on the onions. That would be the crop year of 2003.
Q. And that was the term you negotiated between you; right?
A. Between me?
Q. Between you and -- at the time of -- the earnest money agreement was signed, you talked about the problem with the onion seeds?
A. Right.
Q. But other than that, this is not property that the Trust, or the individual Plaintiffs, could take any action regarding?
A. Not until there has been a court resolution, that's true.
Q. You've already stated that under the Idaho Independent Bank loan, there wasn't a requirement that you build a barn on the property?
A. That's true.

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Q. You were building that for your own purposes?
A. That's true.
Q. All right. Exhibits number 13 and 14, those are just a summary of your costs; correct?
A. They represent payments that I have made to vendors. Costs, I think that's -- yeah. You could say that.
Q. And you were developing this property for yourself, for your family; correct?
A. Yes.
Q. And the purpose of making the improvements, and getting the plat approved was so you could sell the other lots at a profit?
A. Yes.
Q. So the development was done for your purposes and for the financial gain of Berkshire Investments?
A. And it was a necessity to pay off the Trust.
Q. Certainly, yes. But your plan was to keep two lots and sell off five lots?
A. Sometimes it was to keep two or three. Yeah, we would sell the balance.
Q. And the plan was to sell the lots for between $185,000 and $215,000 each?
A. I would say that -- without looking at the documentation, that seems like the right range.

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Q. And that is a profit that you could not have made without doing the development?
A. I couldn't sell them unless I did the development, that's true.
Q. Now, one of the conditions of the Idaho Independent Bank loan was that you get a deed of reconveyance from the Johnson deed of trust; correct?
A. Yes.
Q. Without that, you would not have been able to draw on the loan to make any improvements?
A. No. Without that, they wouldn't have loaned. It was simultaneous.
Q. Okay. You wouldn't have gotten the loan, period?
A. Yeah. The banks have to be in first position.
Q. Can you turn to Exhibit No. 121, please.
A. Yes.
Q. Can you tell the Court what this is.
A. Well, it appears to be a request for full reconveyance, signed by the Rogers, as trustees, on or about September 16, 2002.
Q. And that was addressed to Alliance Title and Escrow Company as the trustee?
A. Yes, it is.

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Q. September 16, 2002 is the date of the closing of the sale on the Linder transaction; correct?
A. Yes.
Q. Can you turn to -- actually, it would be easier to me if I could have you turn to our Exhibit 116, which is a copy of the earnest money agreement. I know that you have it, too, but my cross-indexing works better this way.
A. Sure, sure.
Q. And that earnest money agreement indicated that the parties would enter into a deed of trust, did it not?
A. Yes.
Q. And the deed of trust that was to be entered into was attached as an exhibit to the earnest money agreement?
A. Yes. That was the form that was to be used, yes.
Q. That form indicated that Alliance Title would be the trustee?
A. That's what it said on the attachment, that's true.
Q. And this would have been the document that was reviewed by Dave Wishney?
A. Well, I assume so. I mean, it appears that

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Beth Rogers and Andy Rogers took documents, the appraisal and this, among other things, to David Wishney.
Q. And Wishney reviewed the documents at some point in time; correct? You don't know the date of the office meeting; is that right?
A. Well, in discovery I think it was known to be sometime in late August, 2002.
Q. And in your Exhibit No. 7, there's a copy of a letter from Mr. Wishney, dated, I believe, September 5th of 2002?
A. Yes.
Q. And did you receive a copy of this letter around that time?
A. No.
Q. You received it in discovery?
A. Yes. Well, Beth might have given it to me, but it was during litigation.
Q. But you did receive a telephone call, did you not, indicating that Mr. Wishney wanted a standard deed of trust form substituted for the one you drew?
A. Dave Wishney and I spoke, and we talked about a new provision being added that would protect the beneficiaries, under the deed of trust, for any delinquent taxes that weren't being paid by my wife and I. I think he approved of the form, he just wanted extra

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protection as to delinquent taxes.
Q. Can you turn, again, to page -- or Exhibit No. 114 in the Plaintiff's book?
A. I'm there.
Q. Again, this is a message ledger, from your office, that you printed out and provided in discovery?
A. Yes.
Q. All right. Do you see the entry on September 5th, 2002? That's the same date as the Wishney letter.
A. Yes.
Q. On that date, you received a telephone call, from Beth Rogers, indicating needs a standard deed of trust form added to the real estate agreements?
A. That's what our office notation said on our messages, yes.
Q. And you never made the requested changes to the deed of trust, did you?
A. I spoke with Dave Wishney, and I just indicated what him and I talked about. And I don't know how it happened, but another form was used that was, in essence, the same form, except Steve Shearer's name was added, instead of Alliance Title.
So, in answer to that, no. I didn't put any language in about protecting the beneficiaries from tax

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deficiencies or delinquencies.
Q. And you indicate that, at the time of the closing, the deed of trust you provided listed Steve Shearer as the trustee.
A. I did. I sent that into the title company sometime prior to closing.
Q. A copy of that deed of trust is at Plaintiff's Exhibit 120.
A. Yes.
Q. You had never discussed, with Beth Rogers, substituting a different deed of trust -- or a different trustee on the deed of trust, did you?
A. No. I did not.
Q. You say that was just another mistake that was made?
A. I'm saying that my office -- I knew that I wanted to modify the deed of trust to include a beneficiary -- for protection for the beneficiary on tax delinquency. Either I did this, or my office staff did this. In the search of trying to find another form, I think that's how it was substituted with Steve Shearer. But I'm not sure.
Q. And I believe my question was, you never informed Beth Rogers that you were substituting a different trustee?

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A. I say no. I already answered that no.
Q. And Mr. Shearer is a friend of yours?
A. He has been, yes.
Q. You have socialized in the past?
A. Many years ago, yes.
Q. You have shared calendars?
A. We have shared calendars.
Q. And you were present during Beth Rogers' second deposition, weren't you?
A. I think so.
Q. Do you recall, at that deposition, when she was shown this second deed of trust and she said that she had never seen it before?
A. I don't recall that.
MS. TAYLOR: If I could have a moment, Your Honor?
THE COURT: All right.
MS. TAYLOR: I think we may be short one copy. I have submitted this to the clerk under the requirements of the Rule that we just submit the portions of the depositions we're planning to use.
Would it be okay with the Court if I approach and Mr. Maile and I read off of this together? I don't have an extra copy for him.
THE COURT: I don't have any objection. What you are attempting to establish, I take it, is that

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Beth Rogers testified, during her testimony, that she had not seen the second deed of trust; correct?
MS. TAYLOR: Correct, Your Honor. And if it would be acceptable to the Court, I can just read from this and cite --
THE COURT: Well, let me ask you this question. Perhaps you could ask your witness, here, questions that would -- I take it that it's not that you're attempting to elicit testimony from Mr. Maile, here, that Beth Rogers did or did not ever see this second deed of trust, but his knowledge about whether or not she had made that representation. Do you see what I mean?
MS. TAYLOR: Correct, yes.
THE COURT: Could you ask your witness a question like this, I will represent to you that Beth Rogers testified at her deposition that she never saw it. Something like that.
MS. TAYLOR: That could be --
THE COURT: If you believe the evidence would bear you out.
MS. TAYLOR: Certainly. All right.
THE COURT: I'm just trying to save a little time here, because we don't have a jury, and I get where you're going. But I want to be fair to Mr. Maile, too. And if he has a -- if he contends that that was not the

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testimony, feel free to show it to him.
MS. TAYLOR: Okay.
Q. BY MS. TAYLOR: Mr. Maile, I'll represent to you that when Mr. Clark took Beth Rogers' deposition, the second deposition, he provided her with a copy of the deed of trust with Mr. Shearer as the trustee, and asked her if she had seen it before. She said, I don't think I recognize this, sir.
He explained what it was, and asked if anyone had discussed it with her. And she said, no, sir.
Do you agree that you had not discussed that or shown it to her?
A. Well, I know I didn't discuss it with her, but I -- I will not agree to that. Because I -- I'm 101 percent certain that I faxed over, or provided the title company with what documentation I was going to sign.
And I don't know if they didn't show it to her. I know I didn't show it to her. But the purpose of a closing is to provide this material, and the title company signed off on -- or not signed off, but they received our deed of trust dated September 16, 2002.
Q. You weren't present when the Rogers signed?
A. No, no. I'm 101 percent certain I wasn't, because normally closings don't happen that way.

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Q. All right. And you have no idea whether Alliance Title showed her the one with Steven Shearer, or the one that you had sent previously, with Alliance Title?
A. No.
Q. You had taken Beth Rogers' deposition in this case; correct?
A. Yes.
Q. At the time you took that deposition, you knew that Plaintiffs didn't have any counsel available?
A. No. I had correspondence with a Mr. Hally, or Hileigh, from the Lewiston area, indicating that his office would have to have someone down there at the deposition.
Q. They asked you to continue that deposition because I was not available?
A. I think you filed a motion with the Court. I may be confused on another date, but...
Q. No. You're absolutely correct. We filed a motion with the Court, asking for protective order and moving to quash the subpoena, so that the deposition would not go forward.
A. For Beth Rogers' deposition?
Q. Yes. For Beth Rogers. You knew that that had been filed?

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A. I'll take your word for it, based on memory. I know there was a lot of discovery depositions that I was trying to do at that point in time, yes.
Q. Okay. But you knew a motion had been filed to prevent you from going forward with those?
A. I knew, yes, there was a motion.
Q. You know it was scheduled for hearing?
A. I -- I can't say that. I think -- I would have to see the documents. But I can't say that it was -- that I remembered, today, that it was scheduled for a hearing. This was in, probably, 2004, August of 2004. I know that we had a hearing.
MS. TAYLOR: I'll ask the Court to just take judicial notice, from the court record, that our motion to quash the subpoena was, indeed, scheduled for a hearing in August of 2004. If we can take a little break, I could come up with a date on it, or we can backfill on that.
THE COURT: Okay. I'm hesitant to take judicial notice of that point right now. Your contention may be true, Ms. Taylor, that there was a hearing scheduled on a motion to quash a subpoena on a particular date.
I don't have any independent recollection of that, myself, so I'm hesitate to say well, yes, I'll take judicial notice. The record is what it is, and you may

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be able to establish, at an appropriate time, that such was the case.
But, for the purposes --
MS. TAYLOR: Rather than stop now and search for the record, Your Honor, I will just come back to that, if that's okay?
THE COURT: Yes. It seems to me, for purposes of your cross-exam questions of Mr. Maile, that -- I don't know if you need to establish that fact in order to lay a foundation for further questioning along this same line or not.
MS. TAYLOR: I don't believe I do.
THE COURT: Okay.
MS. TAYLOR: If it's obvious I do, then we need to take a break.
THE COURT: Okay.
MS. TAYLOR: And I hope not.
THE COURT: Okay. And, at this point, I just can't tell. And absent an objection from Mr. Charney, you know, on the question of foundation for subsequent questions, I just won't do anything.
But you've asked me to take judicial notice of this fact. And, as you can see from my bench here, I have numerous files and many thousands of pages of documents that I would rather not go through right now.

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Q. BY MS. TAYLOR: Mr. Maile, you took Beth Rogers' deposition prior to the hearing objecting to you taking it in Plaintiff's absence?
MR. CHARNEY: Objection; relevance.
THE COURT: What is the relevance?
MS. TAYLOR: It goes to the unclean hands argument, Your Honor.
THE COURT: Restate your question again.
Q. BY MS. TAYLOR: I -- I want him to confirm the fact he took an ex-parte deposition of Beth Rogers without Plaintiff's counsel being present.
THE COURT: Okay. I will overrule the objection. The witness can answer the question.
THE WITNESS: I provided notice, pursuant to the Rules of Civil Procedure, to the respective parties involved in the litigation.
Q. BY MS. TAYLOR: Actually, Mr. Maile, I think you're trying to start back at the beginning. My question was simply, you took her deposition without Plaintiff's counsel being present?
A. Yes. You were not there.
Q. And you had 49 exhibits at that deposition?
A. Could be, that's true.
Q. And you did not submit the deed of trust that Steven Shearer had signed as an exhibit at that

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deposition?
A. Probably not. Steven Shearer didn't sign the deed of trust.
Q. You had received a letter from my office, from me, in early July of 2003, informing you that I represented the beneficiaries and the trustees of the Johnson Trust?
A. In 2003?
Q. Yes, 2003.
A. Yes.
Q. And that is at Exhibit 124 for the Plaintiffs?
A. Yes.
Q. And in that letter, we informed you, first, that we felt the property -- or the price you paid for the property was not fair market value. Also informed you that we believed that your purchase constituted professional negligence, didn't we?
A. Yes, you did.
Q. Can you turn to Exhibit No. 125, please.
A. Yes.
Q. This is your response to the letter that you received from my office?
A. Yes, it is.
Q. It's dated July 10th of 2003?

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A. Yes.
Q. And in that letter, you do not, at any point in time, state that you advised anyone relating to the Johnson Trust to -- that there was a conflict of interest, do you?
A. Well, I thought -- that's not true. I thought I addressed it on the last sentence of the first paragraph. Finally, your clients sought independent legal counsel prior to closing and your client chose to close the transaction, even after consulting an attorney.
Q. But you don't say that you advised the client that there was a conflict of interest?
A. It was inferred in the fact that they had legal counsel, independent, prior to closing. I didn't go into the detail, that's true.
Q. Yes. You didn't say, I told them there was a conflict of interest?
A. I didn't believe it was a position that I needed to explain to you, other than the elements that I explained in the first paragraph.
Q. You didn't say, I advised them of the need for independent counsel?
A. I didn't say that in my letter.
Q. And, in fact, David Wishney was -- was seen after the earnest money agreement had closed, or had been

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signed?
A. Yes.
Q. He was seen after the assignment to Berkshire Investments had been signed?
A. That's true.
Q. David Wishney's letter to you indicates -- or the letter that we have seen from David Wishney, your Exhibit No. 7, last page, indicates, because the agreements have already been executed by the respective parties, it is really too late for me to provide any substantive input, doesn't it?
A. That's what it says.
Q. As far as you were concerned, this was a binding contract?
A. Now, as far as I'm concerned, what is that? In relation to the letter of September 5th, or just the real estate?
Q. Actually, I had moved on. As far as you were concerned, as soon as Ted Johnson signed the earnest money agreement, there was a binding contract?
A. I believe there was, yeah.
Q. And as soon as Beth Rogers had signed the assignment, that was also binding?
A. I believe it was, yes.
Q. And you never explained this assignment to

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Beth Rogers?
A. It seems, though, I mailed it to her.
Q. Can you turn to Plaintiff's Exhibit No. 118.
A. Okay.
Q. That is a copy of a letter from you, dated August 15, 2002?
A. Yes.
Q. And it is addressed to Theodore Johnson, but in the salutation it says Dear Ted and Beth?
A. Yes.
Q. And this was after the time that Beth Rogers had told you that Ted had had a heart attack, was in a nursing home, and you needed to have all your dealings with her; correct?
A. Yeah. On my -- on Exhibit 114, I was advised of that on August 2nd, that he had a heart attack.
Q. In the letter of August 15th, you don't go into any detailed explanations about the assignment?
A. I don't go into detail, that's true.
Q. You don't point out the fact that this assignment would relieve you and your wife of any liability, under the terms of the original earnest money agreement?
A. That's true. I don't say it in the letter.
Q. And the assignment did do that, didn't it?

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A. As I explained to Ted, when I met with him, that we would be assigning this -- that it would accomplished that. So he was fully advised of that. That the letter --
Q. So only Berkshire Investments would be responsible for payment of the deed of trust?
A. That's true.
Q. Berkshire Investments had -- had just barely been formed at that time?
A. That's true.
Q. It had virtually no assets, other than perhaps a little cash and a line of credit it could draw on to make the down payment?
A. It had a line -- it had the resources for a line of credit, and my wife and I were standing behind it, so sure.
Q. You didn't advise either Mr. Johnson, or Beth, that they should have that assignment reviewed by an attorney, did you?
A. No. I felt I covered that in a meeting with Ted.
Q. I would like to go back to those meetings. You indicate that there were two different times that you talked to Ted, in detail, about the conflict of interest and the possibility of him consulting an independent

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attorney?
A. Well, I think there were three, but...
Q. Okay. Well, let's focus just on the conversations we've already -- of you purchasing the property.
A. Okay. There would be two.
Q. There were two. One was a few days before the earnest money agreement was prepared and signed by you and your wife?
A. That's true.
Q. And the other one was when you say that you took the earnest money agreement out to Mr. Johnson's home for him to sign?
A. Yes.
Q. And you indicated that just you and Mr. Johnson were present at both of those meetings?
A. Yes.
Q. And I will represent to you that Beth Johnson testified in her deposition, her second deposition, that she was present at both of those meetings, that the signing occurred in your office, not at Mr. Johnson's home, and that you did not, at any point, say that there was a conflict of interest or a need for independent counsel.
A. My recollection of her testimony was that she

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said she was present at one of the meetings. She told me to go to her house -- to go to Ted's house, so she knew she wasn't present then. But she is mistaken about where it was executed. She was not there.
Q. So you acknowledge that in her deposition she stated that she was present, it was signed in your office, and that you didn't make those explanations?
A. She asserts that, yes. That's true.
Q. She also said she was present when he came in and offered to sell you the land, and you didn't make those explanations?
A. I don't know about that. I don't think she said that, because he was by himself again.
MS. TAYLOR: Your Honor, may I approach the witness?
THE COURT: Yes.
Q. BY MS. TAYLOR: Mr. Maile, I'm showing you a copy of the transcript of Beth Rogers' second deposition. It is under Tab 1-C of the submission of transcripts -- submission of deposition transcripts we've submitted to the Court.
Can you just read this along with me and tell me if I read it correctly?
MR. CHARNEY: What page are you on?
MS. TAYLOR: I'm on page 25, starting at line 7,

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on Tab 1-C.
Q. BY MS. TAYLOR: The question was:
Question: So when is the next meeting you remember with Mr. Maile?
Answer: It was sometime after that when Uncle Ted went in to tell him he thought he would like to sell.
Question: Did you go in at that time?
Answer: Yes, sir.
Is that what her testimony was? Or did I read that correctly?
A. I think you're reading this out of context. I think she recalled -- this is regarding the Witte sale. But she -- she wasn't there.
Q. But her testimony was that she went in when he came in to tell you he would like to sell?
A. At the second meeting.
Q. Yes.
A. That's not the meeting where he came with the appraisal, if that's what you're asking.
Q. All right. He came with the appraisal and said, I would like to sell this to you?
A. Yes.
Q. She indicates that she was present.
A. That transcript doesn't say that. It says

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the second meeting.
Q. Okay. And it was -- and she says it was just prior -- it was when he came in to tell you he wanted to sell the land; correct?
A. That's what she says.
Q. And was there any other meeting when Mr. Johnson came in to tell you he wanted to sell the land?
A. Well, we had a second meeting, back in May, when Ted came back to my office after receiving the correspondence from Imogen, and we discussed the attempt to solicit a higher offer from Mr. Witte. That was our second meeting. She wasn't there for that either.
Q. Okay. This one, she is talking about a meeting that happened about three weeks before the exhibit -- or the earnest money agreement was signed.
You're saying that that was not the one where he came in with the appraisal?
A. No. It would -- the appraisal -- he came in with the appraisal six weeks after having his second meeting about the Witte offer.
Q. But you -- you just disagree that she was present at the signing and that it happened in your office, rather than at his home?
A. I know that it didn't happen that way. I'd

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never been to Ted's house before.
Q. And she also asserted that when she was present at the signing, you just gave them the earnest money agreement --
MR. CHARNEY: Objection; hearsay. All the stuff Beth Rogers said --
THE COURT: Well, I -- do you want to respond?
MS. TAYLOR: Yes. I do want to respond. I am using this to impeach.
THE COURT: I understand. The objection is overruled.
You are -- as I understand it, this entire line of questioning, Ms. Taylor, is your attempt to impeach Mr. Maile's testimony regarding what he says he told Ted Johnson about, at two different meetings, in connection with the sale; correct?
MS. TAYLOR: Correct.
THE COURT: You're attempting to impeach that by showing that another witness, at another time, said that these meetings occurred at a different location and no such thing was -- was discussed; right?
MS. TAYLOR: Correct.
THE COURT: Have you made your point?
MR. CHARNEY: That is not a proper manner in which to impeach somebody. She needs to call that witness to

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come in and say he's not being truthful about that.
THE COURT: Well, essentially though, as I see it, Ms. Taylor is making these assertions to the witness, to Mr. Maile, and has said, look, this other witness said that, how do you explain it, essentially.
MR. CHARNEY: That's different.
THE COURT: Right. She's not offering this Beth Rogers transcript testimony, the deposition testimony, for the truth of the matter that's asserted or as substantive proof of where these meetings took place and what was discussed, but just attempting to knock Mr. Maile off his pins, with respect to his prior testimony in court today; right?
MS. TAYLOR: Correct.
THE COURT: Okay. I'm with you. I -- now, when I say I'm with you, what I mean is, I understand the reasons for this line of questioning.
The objection that this is improper impeachment is overruled. The reason I explained my take on what you're doing here, on this line of questioning, is to demonstrate that I'm not confused about how this is being used.
I think it would be problematic in a jury trial; you know what I mean? But I think that I understand what you're doing here. And I understand that

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you must know, Ms. Taylor, the limitations of what you're doing here.
If you want to get Beth Rogers in, in front of me to testify in the trial, you're certainly free to do so. And I understand that you're just using her testimony for the limited purpose of making an assertion, to this witness, that on another occasion somebody who might know has said something different than what you're saying.
And he has answered those questions; right.
MS. TAYLOR: Correct.
THE COURT: Okay.
MS. TAYLOR: I have a couple more questions in the same line.
THE COURT: Okay. you may proceed.
Q. BY MS. TAYLOR: Mr. Maile, you have testified that you went over the earnest money agreement with Mr. Johnson and explained it to him?
A. Yeah.
Q. I will represent to you that Beth Rogers said, when they came into the office, you handed it to them, asked them to read it, and asked if there were any questions.
She was asked if anything else was said, she says, not that I can remember.

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THE COURT: Is that a question?
MS. TAYLOR: Yes.
THE COURT: What is the question?
Q. BY MS. TAYLOR: How to you square her testimony with what you have said?
A. Well, I'm the one that drove the car to his house. She wasn't there. I just don't think she remembers it accurately.
Q. Let's go to your Exhibit No. 1, the earnest money agreement. You indicate that you recognized there was a potential conflict of interest on two counts; you had expressed an interest in buying this property, yourself, for years, and you also had represented the Trust in regard to the Witte offer; correct?
A. No. I advised Ted. I said, in that first conference concerning the Witte offer, that I could have a conflict here, because we had expressed a willingness for you to sell and me to buy, if you ever decide to sell it. And do you have a problem with me representing you with the Witte offer, and he said no.
So that's the issue there.
Q. Okay. Was that the only conversation you had about there being a potential conflict of interest?
A. No. When I explained on the two other occasions that he had the right to seek independent

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counsel, it was -- I can't remember if I used the word conflict of interest on the second time. I certainly used it on the first time, saying that I had represented him in the past. And his current offer deals with property that we had talked about buying and selling, so there's a conflict there.
And on the other occasions, specifically told him that he had the right to seek independent counsel, if he chose to.
Q. You agree that as -- that Mr. Johnson was a former client?
A. Yes.
Q. At the time you entered into your earnest money agreement?
A. Yes.
Q. And you agree that under the ethical rules, you had an obligation to only enter into an agreement that was fair and reasonable?
A. That's true.
Q. If you'll turn to page 2 of the earnest money agreement.
THE COURT: Defense Exhibit 1; correct?
MS. TAYLOR: Yes. Defense Exhibit 1. I'm sorry, Your Honor.
THE WITNESS: Okay.

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Q. BY MS. TAYLOR: You elected to include a provision wherein the parties would waive a trial by jury, didn't you?
A. I didn't elect to include this. This was a form that I had used on a number of times, for both buyers and sellers. So there was nothing interjected here. This was one of my standard real estate forms.
Q. You drafted the agreement?
A. Yes.
Q. And you included that provision?
A. Yes.
Q. You also included a provision that the parties would submit to the jurisdiction and venue in Canyon County, didn't you?
A. Yes. It says that in there.
Q. And is that fair and reasonable, when all the parties live in Ada County and the property is Ada County?
A. It was included and not corrected. It has nothing to do with being fair and reasonable. It's a clerical mistake.
Q. It was a mistake?
A. Yes.
Q. That you did not catch?
A. Could have caught it. Didn't really consider

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it significant.
Q. But you agree that that would have been inappropriate, to try to have any proceedings in Canyon County, under the circumstances?
A. I suspect you can have an agreement that people agree to litigate their issues in any county.
Q. But there was no reason for it to be there; right?
A. In Canyon County, no.
Q. After the Trust filed the lawsuit, you filed a motion for change of venue to Canyon County, didn't you?
A. Sam Hoagland and I did that, that's true.
Q. And you also included, in your pleadings, that Ada County wasn't the appropriate venue under the terms of the earnest money agreement?
A. We did initially, that's true.
Q. Even knowing that that was just a mistake you had made?
A. That's true.
Q. Going on -- and these provisions, by the way, are all included in the paragraph entitled Attorneys Fees and Costs, aren't they?
A. Yeah, they are. Yep.
Q. Then, beginning at the bottom of page 2, and

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going on to page 3, you included a provision in this agreement that would limit the statute of limitations to one year?
A. That's right.
Q. Regardless of whether damages were otherwise, as of said date, calculatable, didn't you?
A. Yes. That was included, yes.
Q. And as an attorney, at the time 25-some years of practice, you knew that the statute of limitations on a written agreement was five years?
A. Yeah. That's true.
Q. That is not a provision that is fair and reasonable?
A. Well, I think it cuts both ways. It was a form that I had -- that I had used a number of times, and -- both for buyers and sellers, and I think it cut both ways. So I didn't -- I really didn't have a problem with it as being unfair or unreasonable.
Q. Okay. Can you name a single cause of action, in the state of Idaho, that has a one year statute of limitations?
A. Not off the top of my head, no.
Q. And when you were initially contacted, the attorney for the trustees and the beneficiaries had to ask you to waive that one year statute of limitations,

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didn't they?
A. And I agreed to do that, yes.
Q. You also included a provision requiring that the parties agree to binding arbitration in lieu of court proceedings?
A. That's included in the agreement.
Q. And you also asserted that in the motion you filed, when the beneficiaries first filed their suit, said the Court doesn't have the right to hear this?
A. It was never noticed for hearing. It was filed, that's true.
Q. It was filed, and it was also asserted in your pleadings?
A. Part of the filing, yes.
Q. And you were aware of the fact that Mr. Johnson had not had this reviewed by an attorney prior to the time he signed it?
A. He declined, that's true.
MS. TAYLOR: Could I -- how are you doing on time, Your Honor? Are you wanting a break? I'm not sure what the timing is.
THE COURT: Oh, you know, we're going until 2:00 today, and we're going to take, probably, just one more break. How are you doing, in terms of how much longer you intend to do your cross?

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MS. TAYLOR: I have quite a bit.
THE COURT: Quite a bit left? Well, let's just take a little break. Let's take 10, and we'll reconvene at noon by that clock, so 10 minutes from now.

(Recess taken 11:49 a.m. to 12:04 p.m.)

THE COURT: Please be seated.
MR. CHARNEY: We have an agreement to take Mr. Corlett out of turn, since he's here and just as --
THE COURT: Okay. And is Mr. Corlett Ms. Taylor's or your witness?
MR. CHARNEY: My witness.
THE COURT: Okay. No problem.
MS. TAYLOR: No problem, Your Honor.
THE COURT: Okay. Then you may call your second witness, with there being no objection from the other side.
MR. CHARNEY: We'll call Joe Corlett.
THE COURT: Mr. Charney, are you going to need the exhibits for this witness?
MR. CHARNEY: No. I may just need our exhibit number --
MS. TAYLOR: 17?
MR. CHARNEY: -- 13.

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THE COURT: That's in the packet; right?
MR. CHARNEY: That's in the packet.
THE COURT: Okay.
THE CLERK: Did you want this marked?
MR. CHARNEY: Please.
THE CLERK: As?
MR. CHARNEY: As 17.
THE COURT: Okay. You may inquire whenever you're ready, Mr. Charney.

JOE CORLETT,
called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. CHARNEY:
Q. Will you please state your name and spell your last for the Judge.
A. Yes. My name is Joe Corlett, C-O-R-L-E-T-T.
Q. Mr. Corlett, how are you presently employed?
A. I'm a principal in Mountain States Appraisal and Consulting, here in Boise.
Q. Tell Judge Wilper a little bit about your background and training in the appraisal business.

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A. I graduated from the University of Idaho in 1973, and there began a career in Boise, in 1974, in the appraisal business. So that's 32 years of practice in the appraisal business. I'm a commercial appraiser. I'm an MAI, an SRA. Those are professional designations from the Appraisal Institute.
I've had, actually, hundreds of hours of continuing education and basic education to achieve those designations. I've been an MAI designee since 1981, so that's about 25 years there.
We do appraisals in Idaho. And I'm also certified by the State of Idaho as a CJA-7, and I'm also certified in the state of Oregon.
Q. And so that we're clear, are you a real estate appraiser?
A. That is true. I'm a real estate appraiser.
Q. How long have you had your current business, Mountain States?
A. Mountain States was incorporated, I believe, in 1976. And prior to that, it was Corlett Associates, in 1974.
Q. Have you been called upon, in the recent months, to provide some analysis, for the Court's consideration, regarding the value of the improvements made on the Linder Road property that is the subject of

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this particular action?
A. Yes, I have.
Q. Describe, if you will, first, the property address that you have had an opportunity to look at.
A. Okay. The property in question is located in the Eagle District, and it's known as the Fairfield Estates Subdivision, which is accessed by West Cornerstone Lane.
It is on the east side of Linder Road, and I believe it's northerly of Beacon Light Road.
The site includes approximately 38.72 acres, and has been effectively subdivided into seven single-family lots, and has a partially finished barn improvement on one of the lots.
Q. All right. Did you, prior to coming to court, summarize your findings and conclusions in a report?
A. Yes, I did.
MR. CHARNEY: Mr. Bailiff?

(Exhibit No. 17 is handed to the witness.)

Q. BY MR. CHARNEY: The bailiff is handing you what has been previously marked as Exhibit 17. Do you recognize Exhibit 17?

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A. Yes, I do.
Q. What is Exhibit 17?
A. It is the analysis of the contributory improvement value for the subdivision improvements on the Fairfield Estates Subdivision, on West Cornerstone Lane.
Q. Did you prepare that yourself?
A. Yes, I did.
MR. CHARNEY: At this time, I would offer Exhibit 17, Your Honor.
THE COURT: Is there any objection?
MS. TAYLOR: Your Honor, I'm inclined to object, because what this basically is is the opinion of an expert, who is here to testify to it.
I believe the appraisal is cumulative. Obviously, it would be of more concern if we had a jury present. But I do object to the report, itself, being admitted.
THE COURT: It is hearsay, Mr. Charney. How do you respond to the objection?
MR. CHARNEY: As far as it being hearsay, Your Honor, I can certainly ask another couple of follow-up questions regarding if it's produced in the ordinary course of his business, at which, certainly the obvious answer.
But if the real problem is cumulative, I

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think that, realistically, Your Honor, it may come a point, while you're doing your own deliberations, where instead of referring to, necessarily, notes or testimony, there might be something that comes up that is -- would ease the finder of fact in rendering its decision.
THE COURT: Ms. Taylor, is your primary objection, or is your only objection, that it's cumulative?
MS. TAYLOR: Yes, Your Honor. If we -- if we had a jury here, I would be objecting a lot more strongly, because I think there's a chance that they will misread documents. And in my experience, expert reports don't go to the jury.
But as far as in a court trial --
THE COURT: It can. It just depends on whether or not they're admitted as exhibits.
The issue, in a situation like this, is that the -- when an expert compiles a report, that report is -- by definition it's hearsay.
It is an out-of-court written statement that is offered for the truth of the matter asserted there in.
It might be an efficient way to get things in. But, on the other hand, the witness is here and is subject to cross-examination. And I think it's fair enough to allow the opponent to have a crack at the witness on cross.

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So I'm going to sustain the objection. And if you want to renew your motion for the admission of that exhibit at a later time, you can do so.
But, I mean, from what you're telling me, this entire exhibit, Exhibit 17, is his appraisal report; right?
MR. CHARNEY: That's true.
THE COURT: It's not components of it or photographs. But I mean what I'm saying is, this is -- I'm familiar, somewhat, with real estate appraisal reports.
MR. CHARNEY: Right.
THE COURT: And so, what you're representing to me then, Mr. Charney, is that this report is the report that an appraiser would do when doing his work and conducting an appraisal of real property, and he would like to submit the entire thing as an exhibit.
MR. CHARNEY: Yes, sir.
THE COURT: The objection is hearsay, and cumulative; right --
MS. TAYLOR: Right.
THE COURT: -- as I've heard it from Ms. Taylor. I'm going to sustain the objection, at this time, because it is hearsay.
You can elicit whatever opinions you can from

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the witness. If, then, you want to have it come in, it may just be objectionable because it is cumulative; do you see what I mean?
MR. CHARNEY: All right. If I establish the hearsay exception, as far as the business records exception, is there going to be an issue, at that point, on the hearsay? I mean, that's cleared up with two questions.
THE COURT: Ms. Taylor?
MS. TAYLOR: Your Honor, I have no question but that they can establish that this was prepared in the ordinary course of business.
THE COURT: And that it would, therefore, satisfy the hearsay exception?
MS. TAYLOR: The hearsay exception. The problem we run into is, if they submit the exhibit, his testimony is cumulative on direct. I would get to cross-examine. If they question him first, and then submit the exhibit, the exhibit is cumulative.
THE COURT: Well, go ahead and lay your foundation to overcome the hearsay objection, if you care to.
MR. CHARNEY: All right. And the point -- a lot of the questions that I'm going to ask are going to be discussion about explaining some of the things that are found in the exhibit, Your Honor.

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For example, there's an indication in here about Marshall Evaluation, which is sort of the appraiser's Blue Book, if you will. So it's not going to be entirely cumulative. But I'll cover the hearsay issue.

Q. BY MR. CHARNEY: Mr. Corlett, with respect to Exhibit No. 17, is this a document that is prepared in the ordinary course of -- is this the type of document that is prepared in the ordinary course of your business as a real estate appraiser?

A. Yes, it is.

Q. In fact, can you even really do your job without preparing a report such as this?

A. Actually, I can.

Q. Okay. How often is that accomplished?

A. Actually, portions of this assignment have been oral, up to this point. So I have not prepared a written document. So, I would say that maybe in a small fraction of my assignments, that they would be oral with no written report. But then reduced to a file memorandum upon completion.

Q. Nevertheless, is this a true and accurate copy of the document that is in your own original file, if you will, that has been created in the ordinary course of your business?

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A. Yes, it is.

Q. And is it the regular practice of your business to put appraisal reports in writing and to retain them in your file?

A. Yes.

Q. Okay.

MR. CHARNEY: At this time, I would reoffer Exhibit 17, Your Honor.

THE COURT: All right. Is there any further objection?

MS. TAYLOR: Not at this point, Your Honor.

THE COURT: All right. I'm going to admit Exhibit 17.

(Exhibit No. 17 is admitted.)

Q. BY MR. CHARNEY: Turning to page 1 of your report, you have identified in your report several, I guess, highlighted paragraphs as we go through it; correct?

A. Yes, I have.

Q. We have talked about identification of the property. And then we talk about the section entitled Property Rights Appraised. What does that cover?

A. It's a requirement, under the Uniform

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Standards of Professional Appraisal Practice, to define the value that you're seeking to attain. Sometimes you may be asked to do a lease fee value, which would represent the lessor's interest in real property, or you may do the fee simple, which is the unencumbered property title, subject to the governmental restrictions. In other words, all the sticks in the bundle of rights.

Q. And in this case, we're analyzing only the improvements that were placed by Mr. Maile; correct?

A. Yes, sir.

Q. Moving to the dates of value estimate, what does that section cover?

A. I did a retrospective analysis that goes back to October, 2005, and then, subsequently, to June 1, 2006.

Q. Why did you use that time frame?

A. I was requested to complete the analysis effectively as of that date.

Q. Turning to page 2, we have Purpose of the Appraisal section. What is the purpose of this particular appraisal?

A. Again, it informs the reader of what I'm doing, as far as why am I doing this. Is it to estimate market value, rental value, reproduction cost? And it more or less gives you an idea of what I'm doing.

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Q. And in this case, what was the purpose of the appraisal?

A. To estimate the contributory value of the improvements placed by Mr. Maile.

Q. Okay. We have Function and Intended Use of the Appraisal. That section is, basically, for litigation?

A. Yes, sir.

Q. Moving to Appraisal Development and Reporting Process. What is that section supposed to cover?

A. This is the scope of work. And it more or less outlines what has transpired since being initially contacted by the client, and subsequently, the -- the acts that I went through to get to the value conclusions.

Q. Moving, we're going to skip one, going to the Market Value Defined section, what does that typically cover?

A. That tells you, if you're seeking market value for a fee simple title type of property, that's a standard definition offered by the Appraisal Institute in their Dictionary of Real Estate Appraisal.

Q. Moving to page 3, Exposure Time Defined. What does that cover?

A. Again, this is another requirement from use path. What it does is it informs the reader of the time

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effectively preceding the date of appraisal, whereas marketing time is differentiated by saying that's the amount of time, from the date of appraisal forward, that it would take to market the property.

Exposure time effectively says, if this property was offered, or appraised as of this date, which would be June or October as I previously stated, that it should take one year or less to market the property.

Q. Property Data section, it just describes the property?

A. Yes, sir.

Q. And, in this case, if you could provide a description of the property for Judge Wilper?

A. Okay. It's 38.72 acres. It's a sectional shaped parcel. It has been subdivided into seven single-family lots.

The lots are accessed by a cul-de-sac known as Cornerstone Lane. This cul-de-sac has a 24 foot width and approximately 1,300 lineal feet of asphalted concrete paving. The subject also has power boxes, gas stubs, and telephone to each of the sites.

I was unable, during my inspection, to determine whether there was, in fact, an irrigation system in the property, and I assumed that there was not.

Q. Have you had further consultation indicating

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that there is?

A. Yes, I have.

Q. All right. Keep going.

A. Lot 1 is also improved with a free-standing frame structure. It's what I would call a clear story type of barn. I estimated the square footage in the structure about 2,000 square feet, based on aerial photography.

The structure is not quite finished. The doors are not placed on the ends, and it would be considered more or less a farm building at this point.

Q. You have a prop -- I'm sorry. Go ahead. I cut you off.

A. Other than that, that pretty well describes the subdivision. The average site size is approximately 5.33 acres, or somewhere in there.

Q. You have a Property History section indicating it was purchased in August of '02 for $400,000; correct?

A. Yes; that's correct.

Q. What is the Highest and Best Use section supposed to cover?

A. The highest and best use is initially defined as that use that is most profitable, economically feasible, physically possible, and legally possible.

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And that addresses the structure of the valuation analysis.

It tells the reader what the appraiser has considered, based on market evidence, to be the highest and best use. In other words, would this be better served as a farm field, or would it be better served as a subdivision.

And that is analyzed in the highest and best use section of the report.

Q. With respect to this particular property, is the highest and best use agriculture, or is the highest and best use subdivision?

A. It's clearly subdivision.

Q. Could it be subdivided into even smaller lots, for example, to get even more money out of it?

A. Possibly it could have been.

Q. All right. But that would be up to an individual who is doing the development?

A. It would be not only up to the individual, but it would be up to the zoning authorities or the police power, so to speak, evident.

I believe the property zoned Rural Urban Transitional, which is a 5-acre density. It also would depend on the proximity of central utilities, such as water and sewer, and possibly the percability (sic), or

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whatever, of the soils with regard to maybe an on-site type of system, and the relative size of the property, whether that would be feasible.

Q. In your experience, would it have been more difficult to get even smaller lots out of this 40 acres, or are the 5.33-acre lots pretty consistent with what we're seeing in that particular area at this time?

A. I believe the 5-acre site dimension is a proper and normal type of development in that area.

Q. We're seeing other divisions with large lots in that area, as well?

A. Yes.

Q. All right. Moving to the page 4 Analysis Section, you talked about analyzing the value of the improvements Mr. Maile has made. And we've talked about the value of the property and the value of the barn itself.

You used something called Marshall Valuation Handbook. Can you describe for Judge Wilper what the Marshall Valuation Handbook is.

A. Yes, I will. The Marshall Valuation Handbook is -- comes in two forms, one is residential and the other is commercial.

And the commercial manual includes everything from subdivision costs, paving, component costs for every

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type of building imaginable. It also includes yard subdivision type of costs. And it's very detailed.
You can do either a calculator method or a segregated cost method. So you can quite -- you can define quite well what you're looking at.
Q. Okay.
A. Also, it's updated, I believe, monthly or quarterly, and you'll see the adjustment factors in my report. And they do that as a basis of surveying.
MR. CHARNEY: If we could -- Mr. Bailiff, if you could hand Exhibit 17 to Judge Wilper.

(Bailiff complied.)

THE BAILIFF: The whole packet?
MR. CHARNEY: Just the report. And, then, this one to the witness. Oh, you've got it. Okay. We're good.
THE COURT: I have, now, what has been admitted as Defense Exhibit 17. This is the Court's original now.
MR. CHARNEY: If we could go to page 4, Your Honor.
THE COURT: And the witness has one, too?
THE WITNESS: I do.
MR. CHARNEY: He does.

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Q. BY MR. CHARNEY: I would like to go to the section that says, following are the subdivision costs estimated in section 66, on page 1 of the manual; all right?
You've got one, two, three -- looks like seven different items there. And I'm curious to know how you arrived at the values for each of those items by utilizing the Marshall Valuation Handbook?
A. The Handbook segregates these costs. And what we're looking at is, the initial cost is 26 cents. That's based on a square foot cost estimate. The rock base is on top of that.
Q. Grading is 26 cents a square foot?
A. That's correct.
Q. And that you have at 31,200 square feet?
A. Yes, sir.
Q. For a total value of $8,112?
A. That's correct.
Q. How does that actually comport, though, with Mr. Maile's actual costs?
A. His actual costs are actually contained in this exhibit. And I saw some land costs, I thought that were in there, as well as one that had a different address, and I backed those off.
So I estimated that those costs were about

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$114,147. And those were aggregate costs, according to his QuickBooks program.
Q. Okay. So we move then to rock base?
A. Yes.
Q. Talk about that, if you would.
A. That's the substructure for future paving. It's compacted. That would also include 31,200 square feet.
Q. How did you come to the conclusion that 31,200 square feet would be what you used?
A. I believe if I took 24 feet in width, for the right-of-way, and an extended distance of 1,300 lineal feet, you will come up with about that number.
Q. Moving to paving. Talk about that, if you would.
A. Paving is the asphalt concrete type of paving that is rolled and placed, as the surface, over the rock base. And that also is 31,200 square feet.
Q. Gas main?
A. The gas main was calculated based on the lineal footage of the cul-de-sac. And the cul-de-sac is actually a round type of cul-de-sac, so there's a void in the center.
And it's pretty much grown over, when I last looked at it. It looked like, maybe, a depression for a

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pond.
Q. Okay. Electrical main line underground?
A. That was estimated, based on the Marshall Handbook, at 419.10 per lineal foot, again 1,300 lineal feet.
Q. Is that for digging the trenching, putting in the power line, all that stuff?
A. Yes, sir. That's the composite cost.
Q. Electrical lateral lines?
A. Yes. These are the individual stubs into the lots, the seven lots. And I estimated that based on about 20 feet per lot.
Q. And, finally, we have telephone.
A. And that's about an $8.30 cost for 1,300 lineal feet.
Q. Now, I note one thing that is not included in here would be a pressurized irrigation system. If that, in fact, were included, what would be the estimate as to the expenses associated with that per foot?
A. I really don't have that information in front of me. And I believe it -- and I'm not exactly sure of the number, but approximately $56,000, or something, dollars were spent in that component by Mr. Maile.
Q. And is that included in your calculations here, where you come to the total?

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A. No, it is not.
Q. So that would be exclusive of that, then?
A. Yes, it would.
Q. All right. Now, you have a total here of 129,302. And maybe, if I can analogize this to you, Marshall Valuation, is that to you what Blue Book might be to a used car dealer?
A. I think it is. It's quite a bit more sophisticated.
Q. But still, this would be your book to turn to to figure out values, whereas the Blue Book would be where a car dealer would turn to?
A. It is the book of choice.
Q. All right. So you've come to the 129,302, and then you have a current multiplier of 1.06. What is a multiplier?
A. That effectively updates the pages that come in the Marshall, so they don't have to replace them on every update. And they just say, if you're in the western U.S., it's this section, 66, page 1, you multiply the answer you got from the manual by 1.06.
Q. How often is the actual book, itself, updated where you don't have the supplement, if you will?
A. I believe it's on a quarterly basis.
Q. You, then, have included a 30 percent

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developer's incentive. What is that?
A. That is the entrepreneurial return, or the profit, garnered on a component of a subdivision. In other words, in a subdivision, when you sell a lot, you have a percentage of that going to the land cost underneath the lot, and the development costs, in other words the roads, the water, sewer, all that, and then a component for the entrepreneurial return, which is, in this market, generally measured between 25 and 35 percent of the finished lot value.
So what I've done here is, I've brought this hard cost component into the mix, and I've added the incentives on top of that, because -- because we're not doing the actual developed sites.
Q. Right. And you come to a total of $178,178?
A. Yes, that's correct.
Q. So that's what somebody, in today's market, would have to pay to get the property into that shape?
A. I believe that they would, yes.
Q. Turning to page 5 -- and with the one exception that you have not included in here irrigation?
A. Correct.
Q. So this underrepresents the value?
A. It would, yes.
Q. Moving, then, to page 5, we have barn costs.

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It appears you have also used Marshall Valuation, as well. How does that interplay with, I guess, a structure?
A. Well, as you can see, it's not section 66 anymore, it's section 13. And this deals with outbuildings.
And on page 31 of that, I believe the barn was estimated based on an average quality, frame structure. And I believe I modified it a little bit for the lack of finish. And so the estimate there was $26.02 per square foot.
Q. And, then, you have a modifier again?
A. Yes, sir. I do.
Q. And that is also to compensate for the difference between the manuals as they get updated?
A. Yes, that's true?
Q. For a total barn value of how much?
A. The total barn is $55,683.
Q. And so, then, when we add the two together, we come to $235,000?
A. Yes, that's correct.
Q. And why did you round it up?
A. I generally round to the closest $5,000.
Q. Okay. Now, the Retrospective Analysis, what is that?

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A. The retrospective more or less takes the value I estimated as of October 18, 2005, and I took it back to, I believe, June of 2005. And so, all you do is, you take your adjustment factor and go backwards with it.
Q. In other words, you're basically taking inflation out of the equation, if you will?
A. Yes, sir. I am.
Q. You come to exactly $220,000?
A. Yes, that's correct.
Q. In that case, you actually round down a little?
A. Yes, sir.
Q. Have you also done an analysis as to the current value of the 40-acre parcel if it were still raw land?
A. I have done a preliminary analysis, yes.
MS. TAYLOR: I would like to object, at this point. This witness has only provided a proposal. We've not been given any documentation to support him, haven't seen an appraisal of the underlying land.
THE COURT: Mr. Charney?
MR. CHARNEY: I don't think I was required to provide them documentation on every bit of his potential testimony. And clearly, in the witness disclosure that we made, this type of testimony was going to come up.

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THE COURT: Well, I'm sure that my pretrial order said that any expert testimony, any expert opinion, would have to be disclosed pursuant to Rule 26(b)(4), did I not? I usually do.

MR. CHARNEY: I need to look at it, because we've had, as you know, a series of orders in the case.

THE COURT: What I want to find out is whether or not this witness' anticipated -- well, that his opinion was given to the opponents, when they asked for it in discovery. And he'll be limited to the opinions that were disclosed in discovery.

MR. CHARNEY: Well, let me read to the Court what has been disclosed, and you can make your call.

THE COURT: Okay.

MR. CHARNEY: Substance of testimony. In addition to previous disclosures of Mr. Corlett's testimony, he will provide an opinion regarding the value of improvements and enhancements of the real property provided by the Defendants/Counter-Claimants after acquiring title to the real property, procuring improvements on the property, and final platting of the property, based on his review of the Multiple Listing Service data and market analysis, based on comparables of similar improvements and lots throughout the Treasure Valley.

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The witness will render an opinion that the improvements created a market value of $1.4 million for the real property, as opined by Joe Williams in his appraisal. That additional opinion will be provided. However, to date, the expert has not finalized his report and the same will be provided once the same has been completed.

Now I'll make the offer of proof. What I want to demonstrate for the Court is, what the value of the land would be in -- today, if it was raw land that had not been touched by Mr. Maile because, obviously, $400,000 is no longer a valid price for this property. And, then, to compare that to the value of the individual lots and what the property could turn around and sell for right now.

And I think that that's clearly been disclosed, as a basis for his opinion, and if they wanted to depose him, I suppose they could. But I think that that's another way for the Court to analyze the unjust enrichment to the Plaintiffs in this case -- oh, yeah. To the Plaintiffs.

I think to simply say right now the lots would sell for a particular sum, and to compare that to the old price, would be unfair to them, actually. I think we need to compare the current raw price to the

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salable price in its current condition. And I think we've disclosed that.

THE COURT: And, Ms. Taylor, you disagree?

MS. TAYLOR: I sure do, Your Honor. All this says is that he is going to adopt an opinion from a different expert, Joe Williams, who has -- we sat here, in this courtroom, and talked about who would be called as witnesses. Joe Williams is not going to be called as a witness, his appraisal has not been submitted as an exhibit, and would clearly be hearsay if it were.

I was afraid this would come up, so I have prepared a bench brief on this subject, Your Honor. If I may come forward?

THE COURT: Sure.

MS. TAYLOR: I researched this issue, and one expert may not be called to simply adopt the opinion of other experts. Even if they were going to be here to testify, that would be improper. It would be based on hearsay.

This expert has not provided us with an appraisal that has any background, any facts, any documentation of any opinion he would have as to the underlying value of the real property. This disclosure was made before we got the appraisal. The appraisal we have, that you have submitted, is only as to the

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improvements.

And it's improper to try to sandbag us and get in three experts for the price of one, when he would be relying on the opinions of two others who aren't here. It deprives me of the opportunity to cross examine.

MR. CHARNEY: I think she -- Ms. Taylor's missing the point. I'm not asking this witness a single question about the Williams appraisal or the Knipe appraisal.

THE COURT: In your disclosure, I think you -- the final sentence, or final paragraph of your disclosure, you mentioned something about a Williams disclosure. Did you mention an amount?

MR. CHARNEY: I did.

THE COURT: What did that say, again?

MR. CHARNEY: Well, the disclosure says, the witness will also render an opinion that the improvements created a market value of $1.4 million for the real property, as opined by Joe Williams in his appraisal.

I'm actually not going to do that. Where I'm going with this is, Mr. Williams providing an opinion regarding the value of improvements and enhancements of the real property. And this squarely fits within that disclosure.

I would agree with their motion in limine. I don't think he can bootstrap in others that -- well, if

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he is an expert, he probably can. But I'm not intending to go there.

In fact, previously, the Plaintiffs in this case had agreed that the affidavit of Tim Williams, which had the $410,000 appraisal, could be admitted as an appraisal and there's an affidavit with it. And we may wind up offering that at some later point.

THE COURT: All right.

Well, Ms. Taylor, I'm going to overrule the objection for this reason.

I think that the disclosure that's been made is adequate. I think that your side was on notice that this witness would be asked questions regarding the increase -- his opinion on the increase in the fair market value of the property due to the improvements that were allegedly done by Maile.

And I'm going to allow him to testify with respect to that.

Now, Mr. Charney, you may go ahead and restate your question for the convenience of the witness.

MR. CHARNEY: All right.

Q. BY MR. CHARNEY: Mr. Corlett, have you had an opportunity to come to an opinion with respect to the value of the 40 acres in question, if it was simply raw land, as of today's date?

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A. Yes, sir, I have.

Q. What types of information did you consider in coming to that opinion?

A. I considered the sales in that Eagle Bench area, running towards Middleton and Star, raw land sales without utilities, such as the sewer and water.

I've also analyzed some sales of developed 5-acre sites for the purpose of doing a subdivision type of analysis on the property, much as other experts have done.

Q. All right. With respect to the raw land analysis, sitting there today, what is your opinion as to a potential range of values for the raw parcel, as it sits there today?

A. Well, my most probable estimate would be in the $35,000 per acre range. But there are sales out in that district that range up to, actually, over $100,000. But I think, in this market as we speak today, fifty -- $50,000 per acre would probably be a cap for the lack of utilities.

Q. Which would equate to a total sum of how much for the 38.22 acres?

A. Well, it would be based on about a $1.3 million, as what I think is probably the most realistic. And perhaps if it were offered, like I say in the $50,000

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per acre, that would be about a million 900,000.

Q. But you think that $1.3 is the closest?

A. I can support that better through subdivision analysis, which analyzes the gross sell out, selling expenses, profits, and infrastructure cost.

Q. Now, with the improvements that Mr. Maile has made to the property, and recognizing that you haven't thought about the irrigation so we'll exclude that for the moment -- not through any fault of your own, it's buried -- but with that in mind, what would be the value of each individual lot, of the seven lots right now, if they were sold on the open market? And I also want you to exclude the barn on Lot 1.

A. Yes. And I didn't really include that in the subdivision analysis. That would be about $347,700 per lot, based on an average price per acre of $66,963.

Q. $66,900?

A. $63 per acre for each of the sites.

Q. So, then, what is the difference between the 1.3 million, if it was raw land, versus if all seven of these parcels were sold right now?

A. That would be the gross aggregate retail sales amount, the 2.4 million. And the 1.3 would be a residual land value, without improvements.

Q. So is that -- the difference, then, is

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1.1 million?

A. That would be about right.

Q. So without putting words in your mouth, is it fair to say, though, that the value of the improvements that Mr. Maile has made to the property have increased it from a current raw land price of 1.3 million, to a current salable price of 2.4 million?

A. That would be the end result, yes.

MR. CHARNEY: Mr. Corlett, I don't have further questions, but Ms. Taylor will.

THE COURT: Ms. Taylor, go ahead.

CROSS EXAMINATION

BY MS. TAYLOR::

Q. Mr. Corlett, you didn't do any written appraisal report on the value of the land itself, did you?

A. No, I have not.

Q. You haven't provided us with a listing of the comparables you looked at?

A. I don't believe that -- I don't know whether counsel has given you the sales that I have sent them.

Q. You sent them documentation on how you reached the underlying values of the land itself?

A. I believe that I have done that, just in the

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course of the past few days.
MS. TAYLOR: Your Honor, I would like to move, again, to strike any of this witness' testimony about the value of the underlying land. They, obviously, had information they did not disclose to us.
And, in addition, the disclosure indicated he would be testifying to a value of 1.4 million after improvements. His testimony differed significantly. He talked about 2.4 million. The disclosure did not adequately alert us as to what this witness would be testifying to.
THE COURT: Mr. Charney, how to you respond to the motion to strike this witness' testimony regarding this $1.1 million increase in value that he has just opined about?
And that's your motion, isn't it, Ms. Taylor, is to strike that part?
MS. TAYLOR: Yes.
MR. CHARNEY: The 1.1 million increase, Your Honor, the request to strike that, is still not inconsistent with the disclosure that had been previously made.
THE COURT: Okay. As I understand this witness' testimony on cross, he has testified that he provided your side with data from which he would be rendering the

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opinion that he testified to today. And Ms. Taylor's request for discovery would have included, as I understand it, and the court order, would have required all expert testimony to be backed up with that raw data; do you see what I mean? Let me tell you what I mean.
MR. CHARNEY: Okay. I have -- I do have some E-mail that transpired back and forth between this individual and I three days ago. I believe that's what Mr. Corlett is referring to.
THE COURT: Okay. And I take it what you're saying is, in the E-mail, the testimony that he has just given today, that he did provide some -- it sounds like he provided some values of comparable properties or some that he used for comparison.
MR. CHARNEY: That's correct.
THE COURT: And that hasn't been disclosed to Taylors' side.
MR. CHARNEY: Not since -- let's see, October 10th. No. That would not have been disclosed.
THE COURT: Well, just let me take a peek at Rule 26(b)(4).
MR. CHARNEY: Yes. I received this yesterday. I'm sorry.
THE COURT: Okay. I want to look at Rule 26(b)(4) of the Idaho Rules of Civil Procedure. Idaho Rules of

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Civil Procedure 26(b)(4) deals with trial preparation and experts, and it reads, in relevant part: Discovery of facts known and opinions held by experts expected to testify, otherwise discoverable under the provision of Subdivision (b)(1) of this rule, and acquired or developed in anticipation of litigation or for trial, may be obtained by interrogatory and/or deposition.
Now, I take it that there was an interrogatory that was propounded by your side, Ms. Taylor, to the Maile side, requesting opinions of experts?
MS. TAYLOR: Yes. We have a standard interrogatory asking for the underlying data.
THE COURT: Okay. The disclosure should include a complete statement of all opinions to be expressed, and the basis and the reasons therefore, the data or other information considered by the witness in forming the opinions.
So it looks to me like the data or other information considered by the witness in forming the opinions was discoverable and should have been disclosed to Taylors when it was received by the Mailes. I mean, I don't know how I can read that rule any other way.
Mr. Charney, what you have represented to me is that you have received some information from this

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witness, upon which he based his opinion as to the 1.1 million in increased value, and that that has not been disclosed to the Taylors.
MR. CHARNEY: It was information received to me late. I met with Mr. Corlett Monday, and asked him for a little bit of follow-up information, because I was interested in a different way to analyze this.
And I did advise Ms. Taylor, prior to court this morning, that I would be attempting to offer this type of information. And she indicated she would be objecting to it.
THE COURT: Okay.
MR. CHARNEY: So yes. I've had this information for less than 48 hours.
THE COURT: Okay.
Let me ask you, Mr. Corlett, did you -- you have supplied some information to Mr. Charney within the last few days?
THE WITNESS: Yes, sir. I did.
THE COURT: Okay. Now, did you supply him that information because that was the information that you were using to make your calculations on the value?
THE WITNESS: Yes, sir.
MR. CHARNEY: Okay. The second portion of his testimony, Your Honor. Not --

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THE COURT: Understood. And I understand the motion is to strike this witness' -- not the witness' entire testimony, but only the testimony with respect to the opinion that the 38-plus acres has increased in value by roughly $1.1 million because of the work done by Maile; right?
MR. CHARNEY: Correct.
MS. TAYLOR: And, Your Honor, another basis for this I may not have made clear, his testimony does not comply with the information we were given in the disclosure.
They said that he would testify that the improvements created a market value of 1.4 million for the real property. The numbers he had -- he has given are significantly different.
THE COURT: 2.4 million, didn't he?
MS. TAYLOR: Pardon? Yeah. He said --
MR. CHARNEY: Yeah. He didn't say the improvements made it worth 2.4 million. He said that the improvements increased the difference by 1.1 million.
THE COURT: My understanding of the witness' testimony that is the subject of this motion to strike, is that, had this ground just sat there, from the time it was purchased until when the appraisal was done, was it would be worth about 1.3 million today.

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But, now, because of the improvements which have been made, it's worth about 2.4 million, according to the method that he used in calculating it, which is a difference of about 1.1 million.
Your motion is to strike that portion of the testimony because it was not revealed pursuant to your discovery requests?
MS. TAYLOR: Correct. And it's inconsistent with the opinion they said he would be holding, which we relied on in determining not to --
THE COURT: Get your own appraiser --
MS. TAYLOR: -- take the -- this deposition.
THE COURT: -- right?
MS. TAYLOR: Our appraiser will be here tomorrow. He will not be testifying as to the value of the underlying land after the improvements, however.
MR. CHARNEY: Well, your Honor, if -- I would suggest, then, is you hold back on the motion to strike. Let them present this information to their appraiser, and he can either agree or disagree.
What I would point out is that I asked Mr. Corlett for this analysis and he was able to come up with it just by -- just pull comps in the local area. It's not particularly time-consuming or difficult to come up with.

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And if the issue is they don't have time to meet this evidence, let's see if their appraiser, after reviewing this evidence, has the ability to do so. And, then, if he doesn't have the ability to do so, that's when this becomes unfair.
THE COURT: Let me ask you this -- and this is a question for you, Ms. Taylor -- you're telling me that the response to your discovery request about expert -- about this expert's opinion addressed only the information contained in Exhibit 17, the appraisal report; right?
MS. TAYLOR: No. They did also include a sentence saying, the witness will render an opinion that the improvements created a market value of 1.4 million for the real property.
THE COURT: Okay.
Well, let me ask you that, then, Mr. Charney. If that's a fact, if you said that this witness was going to opine that the fair market value of the property was 1.4 million, and he comes in today and says one point -- or 2.4 million, how is that fair to the other side?
MR. CHARNEY: Well, it's the witness will also render an opinion that the improvements created the market value. That's -- I guess, maybe, it wasn't worded as artfully as it could have been. And, in fact, it

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turns out to be 1.1, as opposed to 1.4.
But, we also said, as opined by Joe Williams in his appraisal.
Now, that's not an area that we wanted to go -- that's not a path that I wanted to go down with respect to this. But, instead, I have just wanted to have him provide an opinion regarding the value of improvements and enhancements of the real property provided by them -- by the Defendant/Counter-Claimants, and that's where his testimony went.
So, once again, I don't think his testimony is at all inconsistent with the disclosure, nor is it inconsistent with his affidavits that have been previously submitted. And I would, once again, point out that the Plaintiffs in this case have a full and fair opportunity to meet this evidence. And if they don't, then maybe the motion to strike should be reconsidered at that point.
THE COURT: Well, it concerns me that you didn't supply the material that you just received from Mr. Corlett within the last 48 hours or so.
MR. CHARNEY: I will point out that I did attempt to contact Ms. Taylor's office on Monday. It was closed. I got an answering service, and they had no forwarding number for her. Yesterday, quite honestly, I was deer

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hunting. I mean, I was out.
THE COURT: All right.
Let me ask you this question then, Ms. Taylor. You have an appraiser who is coming tomorrow. Is that appraiser prepared -- if you called him right now, is that appraiser to address the opinion that this witness has just testified to, and the opinion is on the precise issue of how much the ground is worth now, versus how much the same ground would have been worth had none of the improvements been made?
Is he ready to testify about that or she ready to testify?
MS. TAYLOR: No, Your Honor. None of this has been disclosed to him. We gave him a copy of the appraisal of the underlying improvements. We have prepared for trial based on what had been disclosed to us.
I don't think it's fair to say, well, we sprung this on you. Now you have to stop the preparation for the rest of your trail and -- and start over.
THE COURT: Right.
Here's the problem I see. I hate to -- I mean, the two competing issues here are, on the one hand, you know, the Court wants as much relevant information as it can get. And on the other hand, I have to insist that

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the parties comply with the rules of discovery, you know, in order to be fair.
The disclosure that was made by your side, Mr. Charney, didn't -- I didn't ever hear it say that this witness will testify that the fair market value of these seven lots on this ground is going to be about 2.4 million, as compared to 1.3 million. I just never heard that opinion rendered in response to the discovery requests.
And so, the -- this witness' testimony, with regard to that issue only, is going to be stricken, because it is beyond the scope of that which was disclosed in discovery.
So the motion to strike is granted. And you may move on with the next question.
MS. TAYLOR: Thank you, Your Honor.
Q. BY MS. TAYLOR: Mr. Corlett, was your appraisal based on an assumption that these improvements will remain in place?
A. Yes. It would be.
Q. If that assumption isn't correct, would the value of the improvements change?
A. I haven't made that analysis, so I'm not sure.
Q. Let me give you a hypothetical. If a

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different developer is going to buy this and have the property replatted, and the road and the barn will be removed, would you agree that they have no value to the Plaintiffs?
A. They would probably have no value to a future investor, but they would probably still hold value to the owner.
Q. If they were going to remain in place?
A. Yes.
Q. And you have only done an estimate of the cost approach for putting these in place; correct?
A. Yes.
Q. You haven't attempted to place a value on the actual benefit that any individual would receive from the improvements?
A. That's kind of hard to do from a sales comparison approach, because when -- improvements just don't sell by themselves. They sell with the underlying land, the creation of the subdivision.
And so I can -- I looked at the subdivision analysis, and these numbers that we were just talking about, that's the macro analysis of the subdivision.
Q. Right. So it's based on theoretical analysis?
A. Yes.

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Q. The actual value improvements would have -- could vary, according to the potential buyer, couldn't it?
A. They could, sure.
Q. If someone wanted to put onions, to plant onions on the land, they're not going to want a barn, they're not going to want a pond, they won't want a road?
A. They probably wouldn't want that property, because it would be too expensive to be a farm.
Q. That's true. But let's say you already owned the property and you just wanted to go back to farming it. Would there be any benefit to the improvements that you have analyzed here?
A. As a farm, probably not.
Q. All right. For example, if a -- if someone is looking at a piece of property, and they don't have horses, they don't want horses, they don't want a barn, is having a barn on the property going to be of any benefit to that person?
A. Not to a particular person perhaps.
Q. And you haven't attempted to talk to the current owners of the property?
A. I wasn't exactly sure who the owners of the property were when I got involved.
Q. You haven't talked to anyone from the Johnson

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Trust?
A. I don't believe so.
Q. Did the defense disclose to you that there's a perspective purchaser for this property?
A. I -- I have a vague recollection of that, saying something like that. I don't think I have it in my notes.
Q. But you didn't attempt to talk to that person?
A. No.
Q. So you don't know, at this point, whether these improvements will be left in place at all?
A. That's true.
MS. TAYLOR: If I could have a moment, Your Honor?
Q. BY MS. TAYLOR: Mr. Corlett, as part of your placing a cost value on these improvements, you were provided with a list of payments that Mr. Maile made; correct?
A. Yes, I was.
Q. And I have made a blowup of that, that is --
MS. TAYLOR: If I can approach, Your Honor?
MR. CHARNEY: Is this your 101?
MS. TAYLOR: It's -- I actually thought I would jump straight to 103.
MR. CHARNEY: Okay.

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(Exhibit No. 103 handed to the witness.)

Q. BY MS. TAYLOR: Mr. Corlett, I'm handing you what has been marked and admitted as Plaintiff's Exhibit No. 103. And I will represent to you that that's a document we received in disclosure. Does it look familiar to you?
A. Yes, it does.
Q. And I would like to focus, specifically, on the -- as I understand it, the first two pages are the costs expended on the barn; is that correct?
A. Yes. That appears to be correct.
Q. And in looking at -- I would like you to look at the first six items. I'll represent to you that those were incurred prior to the time that Mr. Maile received a letter telling him the sale was being challenged.
Can you look at those six items and tell me whether any physical improvements had been made to the property at that time?
A. It looks like these were primarily permitting and plan costs.
Q. Some of those were relating to a prospective home that was never built?
A. Yes.
Q. Item number 6 is a building permit fee for

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$2,631. Is it fair to assume that that would have been for the home that was never built?
A. It appears to be, yes, ma'am.
Q. Looking down further, to the second line that is drawn by item number 14, if you can review those items, is it correct to say that, at that point, the only physical improvements that had been made on the property was putting in a foundation?
A. That would appear to be correct, but it also includes the soft costs of the barn permit certification.
Q. And that takes us to the date that a lawsuit was filed against Mr. Maile.
At that point in time, would the work that had been done on the property constitute a benefit, in and of itself?
A. I haven't really made that analysis. What you're asking is if somebody would purchase this, based on him having done this. Possibly yes, it could have some value.
Q. If nothing further was done, if work had been stopped at that point, would we be looking simply at the value of a foundation with nothing on it?
A. And the ability, perhaps, to build a home.
Q. Okay. But the home was never built?
A. Okay.

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Q. In placing a value on this barn, you have used the Marshall's Valuation?
A. Yes, I did.
Q. Does that assume that the building was actually completed?
A. Made some modifications there, through some adjustments in my calculations, saying that, you know, it wasn't quite finished yet. And that's where that $26 per square foot figure comes from.
Q. And you have seen this barn?
A. Yes.
Q. It -- it isn't done, is it?
A. No, it is not.
Q. There are parts of it that siding has never been put on?
A. Correct.
Q. It has been left open to the elements?
A. The two barn doors were missing, yes.
Q. Has birds roosting in it?
A. Right.
Q. You haven't included any deduction for depreciation or deterioration of the barn, have you?
A. No, I didn't. Other than through the adjustment of the reproduction cost.
Q. You said that -- in your report, that the

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reason you used the Marshall's Valuation for the barn was because it did not appear that Mr. Maile had paid himself for labor?
A. That's -- that's true.
Q. Did you -- in looking through these summaries, did you see reference to labor paid to Hope Development Company?
A. I did, and I think I excluded that.
Q. Are you aware that Hope Development Company is a corporation, a family-owned corporation, with Mr. Maile and his wife?
A. I believe so, yes.
Q. So under the analysis you received, he did actually pay himself for the work done?
A. Okay.
Q. If you would like to turn to the third page of Exhibit 103. Starting with Item No. 49, an expenditure for pipe at Silver Creek. Did you, by chance, notice that that expense was incurred months before the property was actually purchased?
A. Yes. I believe I saw that.
Q. Did you, I presume, deduct the $2,500 in earnest money payment?
A. Yes, I did.
Q. Okay. And also the other payments that

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clearly were just for acquisition of the property?
A. Yes, ma'am.
Q. In looking at this page, page number 3, if we go down to Item No. 59 -- and I'll represent to you that those are the items that fall before the time Mr. Maile was provided with the letter telling him that the sale was being challenged.
Looking at those expenditures, were any improvements made to the real property prior to that time?
A. There were, in fact, engineering services provided. And so, if you talk about physical improvements, I can say no. But there -- there were infrastructure, or soft costs, expended, based on engineering and planning.
Q. And that was all planning for the work that was eventually put into place?
A. I believe so.
Q. If the work had been stopped at that point, would the engineering that had been done be of benefit to anyone?
A. I believe so.
Q. If they developed it in the same way as had been planned?
A. As legally permitted, yes.

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Q. Okay. And if they have elected not to develop it, or it's developed in a completely different way, you need to redo the engineering, don't you?
A. If it were redone, yes.
Q. And in looking at these expenditures, would you agree that the primary improvement on the land itself, as opposed to the barn, would be the construction of the road?
A. The road and subdivision infrastructure are probably the most prominent improvements, yes.
Q. And would you agree, by looking at the last page of Exhibit 103 that you have there, that the payments to Capital Paving weren't made until July 28th of 2004?
A. That's what the exhibit indicates, yes.
MS. TAYLOR: May I have a moment, Your Honor.
THE COURT: You may.
Q. BY MS. TAYLOR: You talked about the developer's incentive --
A. Yes.
Q. -- that you added in. That -- because Mr. Maile was the developer in this case, that essentially would be profit to him?
A. Yes.
Q. You have no knowledge, do you, about the

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expenses that the Plaintiffs have incurred in getting this property back?
A. I have no knowledge.
MS. TAYLOR: If I can have a moment, Your Honor. We have no further questions.
THE COURT: No further questions, you say?
MS. TAYLOR: No further questions.
THE COURT: Very well. All right.
Mr. Charney, do you have any redirect?
MR. CHARNEY: I do not have redirect.
THE COURT: Very well. May the witness be excused?
MR. CHARNEY: Yes, Your Honor.
THE COURT: All right, sir. You are excused.
THE WITNESS: Thank you.
THE COURT: Is that 103?
THE WITNESS: 103, Judge.
THE COURT: Just stick that back in the sleeve. That'll be good. Okay. Thank you, sir.

(The witness left the stand at 1:12 p.m.)

THE COURT: And, Mr. Maile, I suppose it's time for you to retake the stand, and you were under cross; correct?

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THE WITNESS: That's correct.
THE COURT: So, at this time, we will resume the cross-examination of the Defendant/Counter-Claimants' first witness, Mr. Maile.
Do you need a minute to set up?
MS. TAYLOR: I do, Your Honor.
THE COURT: Let's take about five minutes, and then we'll reconvene. And, hopefully, we'll finish with Mr. Maile today, direct and cross. We have to end at 2:00, and I have court in here again at 3:00; okay? All right.

(Recess taken 1:13 p.m. to 1:20 p.m.)

THE COURT: Please be seated.
Ms. Taylor, when you're ready, you may continue with your cross-examination of Mr. Maile.

CROSS-EXAMINATION (Cont'd)
BY MS. TAYLOR:
Q. Mr. Maile, we were talking earlier about the fact that getting a deed of reconveyance to -- from the Johnson Trust was an absolute requirement to your loan with Idaho Independent Bank.
A. That's true, yes.

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Q. And the trustees had signed a standard form deed of reconveyance at the time of the closing, we have looked at that.
At the time that you were getting the construction loan from Idaho Independent Bank, you were still aware of the fact that there were some beneficiaries who were disgruntled over the sale, weren't you?
A. I would have on say no, because that letter in July of 2003 had represented that Beth Rogers was spearheading this -- this contention. And, then, of course Beth Rogers reaffirmed to me that that was not the case.
Q. You had Steven Shearer sign a release and reconveyance?
A. Yes, I did.
Q. At the time you had him sign that, you told him there were some disgruntled beneficiaries, didn't you?
A. I had said to him there had been some in the past, that's for sure.
Q. That was January 9, 2004?
A. I don't know the date. I don't know.
Q. Would you turn to Exhibit No. 126, please.
A. Okay. I'm there.

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Q. And this is a release and reconveyance that you drafted for Mr. Shearer's signature?
A. Yes.
Q. This release and reconveyance does considerably more than the standard deed of reconveyance that the Rogers had signed at the closing, doesn't it?
A. It's a point of contention. This is a form that I --
Q. My question was, it does considerably more than that one, does it not?
A. I'm not sure it does.
Q. Does this release and reconveyance purport to release you and your wife from any and all liability, any claim, liability, demand, and judgment of an kind or nature, or any claims that could have or may have been asserted?
A. Well, let me explain.
Q. Well, does -- is that the correct language?
A. I want to explain that this was an error. My wife and I weren't the grantors of the Trust. So as soon as I figured that out, I had made a mistake on this. I did a second one that was related to Berkshire Investments.
Q. Let's finish talking about this one first.
A. Sure.

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Q. The language in this one purports to release you and your wife from any claim, of any kind whatsoever, relating to the purchase of this property, does it not?
A. As it relates to the deed of trust, yes.
Q. Only as to the deed of trust?
A. I was -- I started using this larger release and reconveyance about two or three years prior to this being executed, because I felt that it better -- it better explained the circumstance of an accord and satisfaction.
And that, to me, is the essence of what a deed of reconveyance does. It is an accord and satisfaction. And I -- and this is a form that I had seen over the years used by deeds of trusts, or related to deeds of trust. And I started using this at least two or three years before Steve Shearer signed this one.
And this one is in error as to the names of the parties.
Q. But this purported to release you from any liability relating to claims, as to the real property, as well, doesn't it?
MR. CHARNEY: I'm going to object at this point on grounds of relevance?
THE COURT: Does it go to unclean hands?
MS. TAYLOR: Yes.

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THE COURT: I'll -- no. I'm going to overrule it. I think that that's in the mix, quite frankly.
MR. CHARNEY: Would you entertain more argument on that point?
THE COURT: Sure. Go ahead.
MR. CHARNEY: My point is that the contract, and the deed of trust, no matter whether or not they were defective or contained some terms that seem unconventional, like the demanding litigation on one hand and arbitration in the same paragraph, isn't a relevant inquiry any more because the Trust was paid its full $400,000, on time, as it was suppose to have been paid.
THE COURT: I think the point is, though, Mr. Maile, and the Mailes as a group -- and I'm lumping them all together -- are seeking damages under a theory of unjust enrichment, which is an equitable theory.
MR. CHARNEY: Yes.
THE COURT: And the doctrine of unclean hands has been raised as a defense to an equitable remedy. And, therefore, any evidence that has some relevance to the issue of unclean hands, it seems to me, is coming in.
MR. CHARNEY: But if -- I guess I would agree with the Court to the point that, if there was a demonstration that he got the property in an improper manner. But whether or not the documents are sound, or defective, or

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what have you, doesn't really answer that question.
I would agree that unclean hands, if Tom had gone to Ted in a nursing home on his deathbed and said, just sign right here --
THE COURT: Oh, sure.
MR. CHARNEY: -- that clearly would be a relevant inquiry. But that's not the evidence in this case.
THE COURT: What I'm doing, here, in overruling the objection as to relevance is just telling you that I'm taking a look at the entire transaction, really, from beginning to end.
And I understand what Ms. Taylor is attempting to elicit. She's attempting to elicit evidence, present evidence to me, that demonstrates that Mr. Maile was just doing too much self-dealing and that he wasn't looking -- that he was drafting documents that protected himself and his interests, to the detriment, perhaps, of his former client or to the Trust.
And --
MR. CHARNEY: The argument in response to that is, he was equally bound by the exact same terms.
THE COURT: Okay. Right. And all that is perfectly good argument --
MR. CHARNEY: Okay.
THE COURT: -- with respect to the effect of all

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of this. But right now, it's just a simple relevance issue, and relevance is pretty easy. And I'm explaining why I think it's relevant, and why I'm ruling it is.
So I'll allow you to go ahead and continue, Ms. Taylor.
MS. TAYLOR: Thank you, Your Honor.
Q. BY MS. TAYLOR: Mr. Maile, I'm going to try to reconstruct my question so I don't have to ask the court reporter to read it back.
Isn't it true that this release and reconveyance purported to release you and your wife from any liability, whatsoever, regarding any claim relating to the real property, not just to the deed of trust?
A. No. Because why -- if that was my intention, to have such a global release, why would I, as your exhibit packet shows, February 16, 2004, propose a mutual release to be signed by the Trust?
I knew that this release and reconveyance form was not a global resolution for our family to pay off the deed of trust. And it has been a form that I had used on other transactions.
Q. Okay. So you didn't show it to Beth Rogers?
A. I sent it to Steven Shearer as trustee.
Q. Did you advise Steven Shearer that he needed to show it to Beth Rogers?

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A. No. I'm sure I didn't.
Q. And you're aware that he did not ever show it to Beth Rogers?
A. I don't think he did.
Q. And as you stated, this one was incorrect, wasn't it? You drafted it incorrectly, with the wrong parties; right?
A. My staff put my wife's name and my name in, and it was corrected in Exhibit 130 and sent out again. It took us a month to figure out we had the wrong names on the form.
Q. Okay. So let's go to Exhibit No. 130. You prepared that as well?
A. Yes. The staff did, under my direction, yes.
Q. It also included all of this release language?
A. Included what?
Q. The release language --
A. Yes, it did.
Q. -- that we had talked about previously? And you agreed that that release language is not in a standard deed of reconveyance?
A. It's not -- I don't know what a standard is, because I had received this type of form from other attorneys related to a deed of trust. It is not like the

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one used at Alliance Title.
Q. It's not like the one Beth and Andy signed at the closing?
A. I don't know if they signed it. When they do closings, they break the buyers and sellers up into different rooms, and at different times. So I don't know what she got.
Q. Would you please turn to Exhibit No. 121.
A. Yes.
Q. Do you recognize that to be the request for full reconveyance that the Rogerses signed at the time of the closing?
A. I've seen this in discovery. I -- it is my belief that Alliance Title and Escrow retained the original in their files. I never saw it until discovery in this case.
Q. Okay. But you'll agree that the release you drafted is far more broad than the one they signed?
A. It had been my practice to use this type of release and reconveyance for a couple years prior to doing it here.
Q. Okay. So the suit by the beneficiaries was filed on January 23rd of 2004?
A. Sounds right.
Q. You knew that that suit had been filed?

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A. Yes.
Q. You knew that there was a lis pendens recorded?
A. By the Taylors, yes.
Q. And you knew that the lis pendens constituted a breach of the terms of your bank loan, and that pay off was the only alternative?
A. That was -- that was part of the conditions of the bank loan, that I keep it free of liens.
Q. And by this time, you knew that Beth Rogers had an attorney?
A. In January?
Q. No. We're in February now.
A. Well, I thought you said it was filed in January, 23rd.
Q. You're right. I'm going to the date of the release and reconveyance, which was February 18, 2004.
A. Exhibit 130, okay.
Q. Yes. You knew that Beth Rogers had an attorney?
A. I'm pretty sure, yes. I think she told me, in this period of time, that she was with Bart Harwood.
Q. Can you turn to Exhibit No. 128, please.
A. Yep, I'm there.
Q. Is that a copy of the letter you wrote to

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Bart Harwood, as her attorney, on February 16th of 2004?
A. Yes.
Q. That letter encloses a mutual release that you're asking that they sign; correct?
A. I was asking Bart Harwood to have his client, Beth Rogers, to sign the mutual release, yes.
Q. And that release would have released you -- you, doing business as your real estate company and Berkshire Investments, from any liability relating to your purchase of this property; correct?
A. This was intended to be a global release from the Trust, yes, with the Theodore L. Johnson Revokable Trust.
Q. And you didn't provide Mr. Harwood with a copy of the release and reconveyance that you had Mr. Shearer sign over a month earlier?
A. I don't think I did. And it's the one that had my name and my wife's name incorrectly on it. Is that the one you mean?
Q. After this letter of February 16th, you talked to Mr. Harwood and he told you that the Trust was not going to sign your mutual release, didn't he?
A. At some point in time, he made it clear that he didn't -- he was walking a tight rope and he didn't want Beth and Andy to get sued.

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Q. That release was never signed?
A. That's true.
Q. But you prepared a new release and reconveyance, releasing Berkshire, for Steven Shearer's signature two days later, on February 18th?
A. Two days later? Yeah about this point in time, I realized that I had put the wrong names on the release and reconveyance and it should have said Berkshire Investments.
Now, I don't know when I heard that the mutual release wouldn't be signed. I was trying to get a meeting with everybody.
So I don't know when it was actually determined that Bart said there won't be a mutual release signed.
Q. Okay. But this Exhibit No. 30, that release and reconveyance you never provided to Beth Rogers?
A. I'm pretty sure I didn't. I thought it was the trustees' obligation to clear the title. What I was trying to do was clear the title, even though, as I recall, the bank didn't catch the error that I put my name and my wife's name on it.
It took me 30 days to figure out, wait a second, we put the wrong name on there. So I tried to make sure Berkshire Investments was -- because they were

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the titled owners.
Q. You didn't provide a copy of this second release and reconveyance to Bart Harwood, even though you knew he was the Trust attorney by that time?
A. I don't think I did.
Q. When you provided this second release and reconveyance to Steven Shearer, you didn't tell him that you had been sued?
A. I can't remember.
Q. You didn't tell him that the Trust had an attorney?
A. Probably not. I can't remember.
Q. Then, if you can turn to Exhibit No. 131. On February 24, 2004, you wrote to Bart Harwood, again, telling -- urging him to get the mutual release signed and back to you; correct?
A. Where -- what paragraph is it in?
Q. I'm just summarizing the entire document.
A. It says, I would also appreciate your input regarding the proposed mutual release.
Q. Okay. So you didn't have a signed release at that point in time?
A. That's true.
Q. If we turn back to Plaintiff's Exhibit No. 130 --

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A. Yes.
Q. -- the release and reconveyance, the recording stamp indicates that you recorded it -- it was recorded, at your request, the day after your letter to Bart Harwood; correct, on February 25th of 2004?
A. Well, that's what the recorder stamp said. But it would be highly -- it could have been sent back to my office. But I can't remember if Steve Shearer signed it and filed it, or whether -- most times, the --
Q. The document says --
A. I don't know whose request it was done at. I don't know.
Q. Doesn't it say right on it, at the top on the stamp, recorded, request of Thomas Maile Real Estate?
A. Well, that's only because I could have enclosed a check for the $6, knowing it's $3 a page. It could have been my check that accompanied the runner to the Ada County Recorder's Office with the release of reconveyance. It doesn't mean I was standing there, physically filing it.
Q. But you intended that it be filed?
A. Sure. It had to be.
Q. And, at this point in time, you knew that there was a good chance that the beneficiary Plaintiffs would be substituting in as trustees, and suing you, as a

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Trust, didn't you?
A. Now, I don't think that really developed -- there was some issues, even in April, from what I can recall, that the taxes had to be filed by the Trust in April. And Beth and Andy were doing that work, so I don't know.
And Beth appeared at the motion to dismiss, with us, when the Taylors were dismissed in the first complaint, and that was in April.
And -- no. So even in April, Beth and Andy were very friendly with my wife and I. And, you know, they were act -- they were the trustees of the Trust.
Q. So in the middle of February, you didn't have any inkling there was a risk that the Taylors would be replacing the trustees?
A. I didn't see it -- I didn't see it that way in February. Certainly developed that happened.
Q. Can you turn to Exhibit No. 129, please.
A. Yeah.
Q. This is a letter that you authored, dated February 16, 2004?
A. Yes.
Q. Talking about your opinion of what may happen in this lawsuit?
A. (No verbal response.)

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Q. Would you like me to ask a different question?
A. Yeah. Go on.
Q. I'll direct your attention to page 2, the second page of that exhibit, bottom paragraph.
A. Yes.
Q. Starting with the italicized language that is highlighted.
February 16th of 2004, you stated, the risk, from my perspective, is the Trust has been paid in full in January 2004, relative to the dead of trust on the subject property, the money is believed to have remained in the Trust account. Bart Harwood has indicated that Trust may be liquidated, and the current trustees will be discharged or resign. The plaintiffs may creatively pick up the pieces and become the successor trustees and have, arguably, a more colorable claim.
A. Okay. That's probably accurately recites my thinking on or about February 16th.
Q. And on or about February 16th, you had not put very much money, at all, into the development of this property, had you?
A. I don't know what the percentage would be, but there was, in my estimation, a considerable amount.
Q. Well, will you turn to Plaintiff's Exhibit

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No. 103.
A. You bet. Okay.
Q. If you look at the first page, through item number 14, those would have been the expenses you incurred prior to this February 16th letter acknowledging the risks of the Plaintiffs becoming the trustees.
I'll represent to you that I have added these and re-added them, and that the total amount incurred at that point in time was $13,080.80.
A. Okay.
Q. That is not excluding the items that Mr. Corlett said had been excluded because they related to your home.
A. Okay.
Q. And the answer and counterclaim you filed in this case asserted that there was an absolute bar to a lawsuit against you because of the releases and reconveyances that Steven Shearer had signed, didn't it?
A. Now, say that again.
Q. I'm sorry. That was a very long question.
You filed an answer and counterclaim?
A. Yes.
Q. In that answer and counterclaim, you raised the fact that Mr. Shearer had signed these releases and reconveyances, didn't you?

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A. Yes.
Q. And you claimed, in the lawsuit, that they were a bar to any lawsuit against you or your corporation -- or your LLC, didn't you?
A. My position is, and has been, that when somebody is paid in full for an obligation it's an accord and satisfaction. So I couldn't see where you folks were coming from, asking for a recision of the contract when it's a year and a half, two years after the contract and you have been paid in full on it.
Q. So is that a yes?
A. Yes.
Q. And you asserted that defense vigorously?
A. I don't know.
Q. We filed a motion for summary judgment, you opposed the motion for summary judgment?
A. I would say I contested this case.
Q. Yes. And you continued to pursue a claim that these releases were a bar against any type of lawsuit against you?
A. No. I think in my briefing for summary judgment, it doesn't say that. It still argues accord and satisfaction in relation to those releases.
Q. There's been a lis pendens in place in this case since January 23rd of 2004?

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A. Yes.
Q. And you have been aware of the lis pendens, obviously?
A. Yes.
Q. You have been aware, from the beginning, that the Plaintiffs were seeking a return of the property?
A. Because the property was purchased for a grossly undervalued sum. That was the basis of your pleadings.
Q. And also negligence in preparation of the documents and self-dealing in the transaction; correct?
A. The negligence, if any, in creating documents was no damage to you folks.
Q. I'm not asking you for your legal opinion. I'm just saying, you were aware that the Plaintiffs wanted the property back.
A. Yes. And then the Court entered an order, at some point in time, saying recision wasn't a remedy for the Plaintiffs.
Q. You never informed any of the Plaintiffs that you expected them to pay for improvements you were making, as they were being made, did you?
A. No. I relied on the title.
Q. You didn't tell them you were starting a barn?

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A. No.
Q. You didn't tell them you were putting in a road?
A. No, I did not.
Q. And the road wasn't put in until after the Trust had filed against you; correct?
A. I'm not sure on that. Let's look.
Q. Okay.
A. The road doesn't come in overnight. There was a lot of bidding, there's preparation. Trust filed in July. I would think the road was in, or substantially in.
Q. Well, let's look at Exhibit number 103.
A. It would be line item 728, 2004, Capital Paving.
Q. Which item? I'm sorry?
A. It's 101. Your handwritten notation, 101, dated July 28, 2004, the last page of Exhibit 103, Capital Paving was paid $20,000.
Q. Okay. And that didn't happen until approximately two weeks after the Trust had filed their lawsuit?
A. I don't know. It was in July that the Trust filed a lawsuit.
Q. And I'll represent to you that it was on

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July 15th.
A. It could have been.
Q. And you knew, when we were in court on the motion to dismiss on April 12th, that the trustees were resigning and that the Trust would be filing?
A. That's what you had said.
Q. Well, the trustee was present, as well, and confirmed that; correct?
A. On which hearing is that, ma'am?
Q. On your motion to dismiss the beneficiaries.
A. I think my wife and I attended that hearing. And there wasn't any statement made by Beth Rogers, in court, that she was going to be resigning.
Q. You don't remember us talking about how long it would take to get the signatures, and Beth Rogers being in the gallery and discussing it?
A. I remember you discussing it. It could very well be. The transcript would speak for itself. I -- I don't recall if she volunteered that.
Q. But in any event, you didn't seek or receive improvement from the Trust -- I'm sorry.
You didn't seek approval of making these improvements, from the Trust, before you made them?
A. No. I did not.
Q. And you didn't expect that they would be

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paying you for what you did, at the time that you did it?
A. At the time, we were the titled owners. I had no expectation of anything from the Trust.
Q. Okay. And during the course of this case, you have, on three different occasions, tried to get the lis pendens removed?
A. A number of times, two or three.
Q. And each time it was left in place?
A. When I was filing the motions to remove the lis pendens, I had the bank loan. And I kept telling the -- I kept talking to the bank, telling them we were trying our best to get the cloud removed. I was obligated to the bank to clean up the title.
Q. You continued to make improvements after each of your unsuccessful attempts to get the lis pendens removed?
A. (No verbal response.)
Q. I'll represent to you --
A. I -- I don't think many improvements. I know that there was a lot done in September of '04, and the Court, with all due respect, denied our motion to remove the lis pendens. And the subdivision, at that point in time, was substantially constructed.
Q. Let's look at Exhibit No. 103. If you'll look at line item 94, I'll represent to you that the

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court order denying your motion to remove the lis pendens was entered on June 21st of 2004.
A. That was based solely on the fact that the beneficiaries' lis pendens was the only thing of record, and the case had been dismissed, and you folks were talking about appealing the case. So it was a very -- there was really no evidence before this Court, but it was denied.
Q. Thank you. That was my question, it was denied on June 21st. At that point in time, you had put approximately $60,000 into improvements; correct?
A. Well, I'll qualify that by saying, the Exhibit 103 shows the date of payment, not necessarily the date of when it was incurred. But for sake of argument, it would have been approximately $60,000.
Q. And following that first dismissal, you continued to make improvements?
A. Let me clarify that, actually, the paving was on a 30-day account. So that probably was started, as I recall, sometime in May. I didn't have to pay for it until July 28th.
So maybe $60,000 is a little light on your last series of questions, because I think somewhere in there is that Capital Paving charge that was being incurred.

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But, yes. I continued, as the bank required, that the subdivision be completed.
Q. Okay. You knew that the lawsuit had been filed very quickly after you had gotten the loan from Idaho Independent Bank?
A. Yep. The beneficiaries filed a lawsuit.
Q. Yep. And, at that point, all Idaho Independent Bank had done was pay off the balance owing on the deed of trust; correct?
A. That was enough.
Q. Okay. And one of the options you had, at that point in time, was to seek different financing which wouldn't have had a six month requirement for development, didn't you?
A. Impossible. You can't go to a lending institution with a lis pendens and get financing on property.
Q. Well, you refinanced the loan, after making all the draws for improvements, in December of 2004, didn't you?
A. I refi -- no, no. I begged, borrowed, and stealed -- and stole from various assets to pay off the Trust. Remortgaging our home, doing a variety of things, just any way I could do to pay off the Trust. So it wasn't a refinance, no.

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Q. So those are all things you could have done rather than drawing on the line of credit with Idaho Independent Bank?
A. No. And I'll tell you why. A good majority of the money that was used in December of '04 to pay off Idaho Independent Bank came from properties that were listed for a year prior to that, that just were not selling.
And I would have to say that, just out of the blue, that those properties, fortunately, sold to free up enough equity to move from one piece of property to pay off the Trust.
So, it wasn't as if I wasn't trying to raise money, because I certainly needed to raise money to pay for improvements on Fairfield Estates. It just was -- it was a good timing that things sold when they did, to pay off the bank.
Q. You didn't make any effort to refinance before you put the improvements in, did you?
A. Refinance the Linder Road property?
Q. Find another way to pay off Idaho Independent Bank?
A. I couldn't find -- I had tried. I couldn't find -- but the property having a claim clouding the title, no bank would loan on it. And we were leveraged

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with everything else.
MS. TAYLOR: May I have a moment, Your Honor?
Q. BY MS. TAYLOR: Would you go to your Exhibit No. 16.
A. Okay.
Q. This is your calculation for prejudgment interest?
A. Yes, it is.
Q. Do I understand correctly that it's your position you're entitled to this under Idaho Code 28-22.104?
A. Yes.
Q. And this is the payments that you made to the Trust; correct?
A. Yes.
Q. They were made under the terms of the deed of trust?
A. Or under the real estate contract. The first payment, technically, was paid under the real estate contract.
Q. There was not an order, or any other requirement, that the Trust repay you this money until July 21st of 2006, was there?
A. No, no. There wasn't.
Q. Your calculations, here, are actually

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compounding interest at 12 percent, aren't they?
A. Well, I added the interest rate from one year to the next, and figured a new 12 percent rate. So I guess it could be called compounded annually. It's not compound daily, that's true.
Q. It's compound annually?
A. It appears that's what I did.
THE COURT: It's 2:00 o'clock. Ms. Taylor, are you about finished? If you're not, that's fine. If you have any more than a minute or two, we'll just recess now and come back tomorrow morning.
MS. TAYLOR: No. I can do it in two minutes.
THE COURT: Okay. Go.
Q. BY MS. TAYLOR: I would like to go back to the beginning of this transaction.
A. You would like to go back where?
Q. To the beginning of the transaction, when Mr. Johnson came to you with the Franz Witte offer.
A. Yes.
Q. Will you turn to Exhibit No. 111, please.
A. Yes.
MR. CHARNEY: Which one?
MS. TAYLOR: 111.
Q. BY MS. TAYLOR: That is a letter that you received from Mr. Johnson's accountant?

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A. Yes. Both Ted and I received it.
Q. And in that letter, she raised a concern. She said, I believe the sales offer for $400,000 is too low; correct?
A. She says that, yes.
Q. Then turn to Exhibit No. 113, please.
A. Yes.
Q. That is a letter that you sent to Mr. Witte's attorney, Eric Haff, on June 4, 2002?
A. Yes.
Q. And in that letter, you state that based upon comparable values in the area, we feel your offer is extremely low.
A. That's what it says.
Q. And you bought the land for the same price about six weeks later?
A. I paid the appraised value for the property, that's true.
MS. TAYLOR: I have no other questions, Your Honor.
THE COURT: Thank you.
Mr. Charney, do you have any redirect? If you have some extensive redirect, I don't want to push you into jumping into it right now because, frankly, we're over time.

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MR. CHARNEY: Right. I probably have five minutes of redirect, so it's your call. We can do it first thing in the morning. I know you have a huge calendar.
THE COURT: I do, at 3:00. If you can do it in five minutes, I'll give you five.
MR. CHARNEY: Are you sure, Inga? I'm asking the real boss.

REDIRECT EXAMINATION

BY MR. CHARNEY:
Q. Mr. Maile, a couple of points that have been raised in about the last half an hour.
First off, with respect to the lawsuits that had been filed by the Taylors, the one that had initially been dismissed and the follow-up one that exists today, did any of the original theories of recovery ever pan out?
A. Not in my opinion.
Q. We had negligence claims; correct?
A. Oh, yes.
Q. We had claims against you as a real estate agent?
A. Oh, yes.
Q. We had claims that you had paid less than fair market value for the property?

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A. Oh, yes.
Q. It was not, in fact, until December of 2005 that the Supreme Court offered a theory that eventually led to the Trust recovering the property?
A. That's true.
Q. And as of December 2005, had you completed the improvements that we're talking about in this trial?
A. I had to, for the bank.
Q. Ms. Taylor also asked you questions about, did you ever ask the Trust for permission to improve -- make the improvements on the property. The question to you is, why would you ask the Trust to improve property that you owned?
A. Well, that's what I had indicated. We were the titled owners on the property, and we were proceeding on what both Ted and Beth knew we were going to do since 2002.
Q. Okay. Then, finally, the Plaintiffs have shown you the letter from the accountant, Ms. Hetherington, and then your follow-up letter, which somewhat parroted Ms. Hetherington's letter, back to Mr. Witte's attorney, where you indicated that the property -- that you thought the value, or the offer, was extremely low.
Upon what did you base that decision?

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A. Okay. Ted wasn't sure what he wanted to do in our second conference, May 29, 2002. It was our attempt to flush out, to see if we could get a rise in price by Mr. Witte, without committing to a counteroffer.
I had conversation with Imogen, the accountant, in addition to receiving the letter. And she did talk about a 40-acre parcel. And it was -- come to find out, it was at McMillan, developed into a high-density subdivision.
Q. So not really a true comp, if you will?
MS. TAYLOR: Objection; leading.
THE COURT: Sustained.
Q. BY MR. CHARNEY: Was it a true comp, comparing the property in the high-density area to the rural area that this property was?
A. I didn't feel that it was. I guess the argument could always be made, as we'll see -- an argument can always be made that comparables are in the eye of the beholder.
Q. And so, finally, when the Franz Witte offer sort of died on the vine, if you will, you then paid the same amount of money that you had previously reflected as extremely low.
What changed to lead you to the conclusion that that was, in fact, fair?

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A. Well, there was a licensed real estate appraisal that was done, that was qualified, had a good reputation, and it was truly the fair market value in 2002. Things have changed.
Q. Did Ted try to get more money than the 400?
A. He never -- not to my knowledge.
Q. From you. In other words, did he ever say, Tom, I've got an appraisal for four, I'd like you to pay five?
A. No.
Q. Did you say, I see an appraisal at four. I'll pay you three?
A. No.
Q. You both agreed, buyer and seller came together and agreed on the appraised value?
A. We did.
MR. CHARNEY: No further questions.
THE COURT: Thank you.
All right. You may step down, then, Mr. Maile.
MR. CHARNEY: Oh, I have --
THE COURT: Listen, do you need to confer? Go ahead and confer, and then, if you have another question after that conference, we'll take it.

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(Discussion off the record.)

THE COURT: Go ahead.
MR. CHARNEY: As far as Exhibit 16 goes -- I don't know if the Plaintiffs will have an objection -- he would like an opportunity to rework that was simple interest, instead of the compounding. I don't think he did that on purpose, so he would like to probably offer a revised 16-A, if you will, that removes that annual compounding, because that would not be appropriate under the statute.
THE COURT: Would you otherwise be resting at this point?
MR. CHARNEY: My client is shaking my head no at me.
THE WITNESS: No. I'm shaking my head.
MR. CHARNEY: That's true.
Can I rest in the morning, after we've had a chance to confer? I would say that there's a high likelihood that we would be resting, but I need to rework the exhibit. And if they're not going to stipulate to it, then I may need a little bit more testimony.
THE COURT: I'll give you a little bit of --
MR. CHARNEY: Okay.
THE COURT: I'll give you a little bit of leeway.
MR. CHARNEY: There won't be a lot of time in the

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morning.
THE COURT: Okay. Fair enough. We will be in recess, now, until 9:00 o'clock tomorrow morning. I have just been told we're not certain that we'll be in this room, but you'll be packing up anyway, because we have a room full coming in at 3:00. But we may be in this room, hopefully; okay?
All right. We'll see you folks tomorrow morning at 9:00.

(The proceedings adjourned at 2:05 p.m.)

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BOISE, IDAHO
Thursday, October 12, 2006, 8:59 a.m.

THE COURT: Good morning.
MR. CHARNEY: Good morning.
THE COURT: When we finished yesterday, Mr. Charney, the question was whether or not the Plaintiff was going to rest. And you indicated that you might want to get one other exhibit in, to substitute for the -- I think it was Exhibit 16, wasn't it?
MR. CHARNEY: It was.
THE COURT: So, what do you want to do this morning?
MR. CHARNEY: Well, we have a couple matters to bring up.
THE COURT: All right.
MR. CHARNEY: I guess we can talk about exhibits and things like that, first.
The first one is, as far as some additional exhibits, 16-A, which is a refiguring of the calculation of the interest. And I don't believe there's an objection from the Plaintiffs on that.
MS. TAYLOR: There is not.
THE COURT: No objection?
MS. TAYLOR: We're not agreeing it's owing, but we

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stipulate --
THE COURT: No objection to the admissibility?
MR. CHARNEY: Correct.
THE COURT: Okay. 16-A is admitted.

(Exhibit No. 16-A is admitted.)

MR. CHARNEY: Okay. As far as other exhibits we have an agreement on, I believe we will stipulate to the admissibility of Defendant's 18, which is the appraisal prepared by Mr. Knipe.
MS. TAYLOR: Based on the understanding that Mr. Knipe is not going to be a witness, there won't be any testimony. We're just agreeing they could meet the business records exception to the hearsay rule.
THE COURT: Okay. So that Exhibit 18 would come in, and it is a written appraisal.
MS. TAYLOR: Correct.
THE COURT: Offered by the Counter-Claimants, essentially.
MS. TAYLOR: Yes.
THE COURT: Offered by Maile against Taylor, and no objection to the admissibility of 18; is that right, Ms. Taylor?
MS. TAYLOR: Correct. Based on our understanding.

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THE COURT: Okay. Then Exhibit 18 is admitted.

(Exhibit No. 18 is admitted.)

MR. CHARNEY: We'll come back to 19.
THE COURT: Okay.
MR. CHARNEY: We have Exhibits 20 and 21, Your Honor, which we have agreement on. And these are other examples of the release and reconveyance form that was offered previously, other times when Mr. Maile has used the identical form in other situations.
THE COURT: All right.
MR. CHARNEY: I'll make argument about that, and I believe the Plaintiffs stipulate to the admissibility of those documents.
THE COURT: Is that right, Ms. Taylor?
MS. TAYLOR: Well, it's my understanding there will be testimony to go along with them. They are not just being entered in a vacuum; is that correct.
THE COURT: Okay. Well, I guess that would be the question.
Did you intend to call Mr. Maile back and lay some groundwork, lay some foundation for the admissibility and relevance of these?
MR. CHARNEY: Well, I didn't know the

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admissibility was this big of a deal, but I can certainly have Mr. Maile talk about the representations I just made, very briefly. I don't want to belabor the issue, but a couple moments of testimony on that point.
THE COURT: So your offer of proof is that -- to rebut a suggestion, or an inference, that Mr. Maile had made up a new reconveyance form for this case only --
MR. CHARNEY: Exactly.
THE COURT: -- and to bolster his testimony that he has used that same form in the past, you want to put him back on the stand, to lay foundation for Exhibits 20 and 21, which you contend -- or which he will contend are reconveyance forms similar to the one that was used in this case, that he has used in the past?
MR. CHARNEY: That's perfectly correct.
THE COURT: Okay.
And, Ms. Taylor, is that your understanding, as well? You're not -- well, I guess, then, my question would be, what is the stipulation with respect to these documents, to these exhibits?
MS. TAYLOR: I won't be objecting to them being admitted, but I will have some limited cross-examination.
THE COURT: Okay. All right. You will not be or you will be objecting to their admission?
MS. TAYLOR: I will not be.

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THE COURT: You will not be. Okay, very good. I'm not going to admit those right now, then. You're going to have to put Mr. Maile on --
MR. CHARNEY: Okay.
THE COURT: -- to lay a foundation for admission of those and, then, that will subject him to some cross-examination. Okay.
MR. CHARNEY: Exhibit 22, which is the last one we have a stipulation on, that is the letter from Franz Witte, with a cover letter from Mr. Maile to Mr. Johnson.
THE COURT: Is there a stipulation for the admission of Plaintiff's 22?
MS. TAYLOR: Yes, there is.
THE COURT: There is. Okay. Then No. 22 is admitted.

(Exhibit No. 22 admitted.)

MR. CHARNEY: Okay. Now, I want to also offer, Your Honor, Defendant's Exhibit 19, which is an affidavit of Tim Williams and the Tim Williams appraisal that was done in December of '03, the one that referenced yesterday, appraising the property --
THE COURT: Hang on just a minute.

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MR. CHARNEY: Okay.
THE COURT: I have to catch up.
MR. CHARNEY: No problem.
THE COURT: Okay. I'm ready to go, now, with your argument on No. 19. What is No. 19?
MR. CHARNEY: No. 19 is the Tim Williams appraisal that was done about 18 months after the purchase. I'm sorry, 18 months after the Knipe appraisal, appraising the property of $410,000.
Late in October of last year, I sent Ms. Taylor an E-mail -- or I'm sorry -- a letter, with an affidavit of Mr. Williams, that was an authenticating affidavit of business records, under Rule 902.
I received a letter from Ms. Taylor, dated November 4, 2005, which reads: Dear Dennis, thank you for your October 28, 2005 regarding the appraisal of Timothy Williams. We will stipulate to allow Mr. Williams' appraisal to be admitted as an exhibit at trial. There was also other commentary about another unrelated matter.
This is that affidavit and that appraisal. Based on that letter, I did not subpoena Mr. Williams, and we believe, given the Court's comments yesterday about wanting to understand the entirety of the transaction, I believe that the appraisal has relevance.

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So I'm going to offer this appraisal, at this point.
I don't think that she's disputing that this is not, in fact, a copy of the appraisal. But I'm offering it based on the previous stipulation entered into between the parties.
THE COURT: Thank you.
And, Ms. Taylor, do you object to the admission of Exhibit 19?
MS. TAYLOR: Yes, Your Honor. After the issues were narrowed down, we knew we were only coming in on unjust enrichment. I informed Counsel that we were no longer willing to stipulate to the admission of this. This is not an authenticating affidavit.
THE COURT: Hang on. You -- when did you inform Counsel that you were no longer stipulating to the admissibility of the Williams appraisal?
MS. TAYLOR: In our pretrial memorandum, which was --
THE COURT: When was that submitted?
MS. TAYLOR: I don't know that I still have it in my notebook. Let me see.
THE COURT: Well --
MS. TAYLOR: I have it right here, Your Honor.
THE COURT: Okay.
MS. TAYLOR: But I don't have the date it was

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signed. I have my yellow copy. It was in early September.
MR. CHARNEY: I don't know -- what's the relevant portion, because I don't think there was anything in there that said that we're no longer going to abide by the stipulation they entered into November of last year.
THE COURT: But your objection would be relevance; right?
MS. TAYLOR: Yes, exactly. My objection is relevance. The affidavit did not authenticate it as a business record. I don't think it's relevant. He was appraising it for purposes of the development costs, for the bank. It was done long after the transaction was entered into, about a year and a half after the initial transaction. So I don't think it's relevant.
The Knipe appraisal, I don't think I can make that argument because it's valuing it at the time it was purchased, and our appraiser will give his value at the time it was purchased.
But this was done in December of 2003. It's an appraisal value as of March of 2004. And I just don't see its relevance to a transaction that happened in 2002.
THE COURT: Okay. Well, relevance is not a difficult standard to overcome. I mean, maybe standard is the wrong word. But even something that is -- you

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know, that just has any tendency to establish a fact at issue has -- is relevant.
Now, there's -- you know, there's certainly a question about whether or not relevant evidence should be excluded, because it tends to muddy the water, it tends to confuse things, or waste time, or inappropriately focus on something that is not really the contested issue of fact.
I think, in the context of this court trial, I would overrule the relevance objection. But you also suggested that there was another objection, and that is foundation.
MS. TAYLOR: Foundation --
THE COURT: You said that there was an affidavit attached to the exhibit, that Mr. Charney contends is an authenticating affidavit under Rule 902 of the Rules of Evidence, and you dispute that contention, Ms. Taylor.
MS. TAYLOR: It doesn't contain the necessary elements. It just says, I'm an appraiser and attached is my appraisal.
THE COURT: Okay. Now, it doesn't contain the language about, this is a true and correct copy of the appraisal that I did, and I keep it in the ordinary course of business, and this is the kind of stuff that we rely on, the professionals in my profession rely on in

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making these -- in rendering these opinions, that sort of thing; right?
MS. TAYLOR: Correct. And Mr. Williams will not be here as a witness.
THE COURT: Okay. I guess, then, it boils back down to whether or not you should be sort of estopped from challenging the fundamental requirements of this exhibit, because of your letter from last year where you said, we will not be objecting to the admission of this particular appraisal report.
Is there any contention that this is not the same appraisal report?
MS. TAYLOR: No. There isn't, Your Honor. But, at that time, I assumed that Mr. Williams would be here as a witness to testify, and I would be able to cross-examine him. Now that I know he won't be here as a witness, I think that -- that just introducing it in a vacuum, in light of my questions on relevance, makes this very different from the Knipe appraisal.
And I have located the language from my pretrial memorandum, under -- at the bottom of page 4, Mr. Charney. Under stipulated facts, what I stated was, prior to this Court's ruling on the beneficiaries's motion for summary judgment, the parties had agreed that the appraisal report of Tim Williams would be admitted as

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an exhibit. It is the Plaintiff's position that the appraisal is not relevant to the sole defense issue remaining, which is the value of the improvements, nor the value of the underlying real property. So, I believe that gave him notice that we were not longer stipulating.

THE COURT: Okay. How difficult would it be to get Williams in here?

MR. CHARNEY: To establish the -- well, actually, a couple points first.

The letter that I sent Ms. Taylor last year clearly stated that we were not going to be calling Mr. Williams, and because we had the authenticating affidavit.

The affidavit that's appended to Exhibit 19 is not the authenticating affidavit. The authenticating affidavit, I believe, is in the Court file, which does contain that 902 language that is required. And we can spend some time, later on, digging that out instead of wasting time, here at this point.

I don't know how difficult it would be to get Mr. Williams here or not, because I hadn't anticipated the objection.

And it appears that the objection, from the memorandum, to the extent that there is one, is on relevance grounds, not on hearsay grounds, that this is

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not what it purports to be. So, if that is the objection, and now she's just sort of bootstrapping and saying, well, it's hearsay and just trying to find another way, I don't think that's reasonable, given the tenor of this case. And I would ask you to accept the exhibit.

THE COURT: All right.

And, Ms. Taylor, if I allowed in No. 19, admitting a particular piece of evidence is -- you know, speaks to its admissibility, obviously, and not necessarily to its weight.

You would still be able to make the argument that the Court should give, perhaps, no weight at all to that particular exhibit, because it's so marginally relevant.

Do you see what I mean?

MS. TAYLOR: Yes. I do see what you mean, Your Honor.

THE COURT: I want to find out too, Ms. Taylor, did you -- you actually did receive the Williams appraisal report some time ago, so you've had an opportunity to look it over; right?

MS. TAYLOR: Oh, yes. Definitely.

THE COURT: Okay.

MS. TAYLOR: But, Your Honor I do not recall

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Mr. Charney's letter saying that he would not be there as a witness. I only recall a request that we stipulate to admission. If he can pull that letter out, I'm perfectly willing to be proven wrong on that, but that is not my recollection.

THE COURT: Well, let's hold off on 19, for now then. And maybe during the next break you can see if you can get Williams down here to testify. But I'm keeping all of my options open and all of my considerations.

This trial is only going to go for three days. We have to finish with our evidence tomorrow because -- well, I suppose I could consider, you know, bifurcating the trial or something, if we had to. But I don't want to do that because we have attorneys from out of town.

And I am not able to spill into next week, I just can't. I've got a big med mal case going, and I have to be out of town for half a day. It's not going to work.

So the time consideration is terribly important in this case, and I want the parties to know I'm taking that into account, too. If bringing Mr. Williams in to lay some foundation and subject him to cross-examination would, in my view, unreasonably extend the length of the trial, I'll take that into

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consideration in ruling on the admissibility of what may be -- or at least what is arguably a marginally relevant document, for purposes of the issues confronting this Court.

MR. CHARNEY: Okay.

THE COURT: So let's hold off on 19, for now. And during the next break, you can see if you can get ahold of Williams, see if he might be available to come down and lay some foundation for the admissibility.

But as far as the relevance objection, I've ruled on that one. I find that it's relevant. How much weight I am going to put on that appraisal, that opinion, is -- I suppose that's subject to argument later.

MR. CHARNEY: All right. One other --

THE COURT: Go ahead.

MR. CHARNEY: -- matter very briefly. Exhibit No. 129, from the Plaintiff's, was a letter from Mr. Maile to Mr. Hoagland. It clearly stated, on the top of it, that it was a privileged communication. I had not seen that, and I mistakenly stipulated to its admissibility yesterday.

Mr. Maile -- and as the Court is aware, I stepped into this case kind of late, given the whole tenor of the case. And I did not know that that letter had ever been disclosed. And Mr. Maile testified about

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it yesterday, but we spoke immediately afterwards and were troubled by, how did they get their hands on this letter?

Nevertheless, we do claim privilege with respect to that letter, and are going to ask the Court to strike the letter from the exhibit binder and to strike any testimony relating to Mr. Maile's discussion about that letter.

And I don't know --

THE COURT: Has there been testimony already about the letter?

MR. CHARNEY: There was.

THE COURT: I'm going to deny the motion, to the extent that the cat's out of the bag. It would be -- I think it would be too difficult for me to, you know, purge from my own mind any testimony, and so forth, any notes that I have taken and that kind of thing.

So, like it or not, you stipulated to the admissibility of certain exhibits. This particular one, that you now claim is privileged, was among those exhibits. It's in.

MR. CHARNEY: Okay.

THE COURT: The motion is denied.

MR. CHARNEY: For the record, it wasn't an inadvertent stip.

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THE COURT: Okay.

MR. CHARNEY: So, I will recall Mr. Maile to discuss Exhibits 20 and 21.

THE COURT: Now, before you do that, Ms. Taylor, do you have anything else, preliminarily, before we wrap up Mr. Maile's case in chief?

MS. TAYLOR: I do not, Your Honor. I was planning to let Mr. Charney know -- we got busy -- I believe that I can narrow my case down to only calling three witnesses today.

THE COURT: Okay.

MS. TAYLOR: I planned on, perhaps, five. So as far as planning our time frames, I can never anticipate how long cross-examination may be. But I -- in my mind, I think we could be done before 2:00 o'clock today.

THE COURT: Okay, great. We'll see what we can do then. Okay.

Now, go ahead and call -- Mr. Maile, you're still under oath. You may retake the stand.

And you may inquire of your witness whenever you're ready, Mr. Charney.

(Exhibits No. 20 and 21 handed to the witness.)

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THOMAS MAILE,

the witness at the time of the evening recess herein, was examined and further testified as follows:

RE-DIRECT EXAMINATION (Continued)

BY MR. CHARNEY::

Q. Mr. Maile, the bailiff has handed you Exhibits 20 and 21. Do you recognize those exhibits?

A. Yes, I do.

Q. What are those exhibits?

A. Well, as -- as discussed yesterday, my form file had changed a few years prior to the release and reconveyances that Steve Shearer ultimately signed in this case, which he signed in January and February of '04.

So Exhibit 21 is an example of that release and reconveyance form that I had started using, as I indicated, a few years before. And it is one that I was able to locate, because it also had Steve Shearer as signing that document, on March 28, 2001, in a transaction that was involving my wife and I granting a deed of trust to Hope Land and Livestock Company.

And that related back to a 1992 deed of trust that was ultimately, as I recall, paid off earlier, but we never got the release and reconveyance done.

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And then, we went to refinance our home, in ninety -- in 2001, and I think the title company said, hey, you've got to get a release and reconveyance for that. So that's what 21 is representing. It has Exhibit A on the bottom, which was created because it was attached to an affidavit that was filed in one of these pleadings.

Exhibit 20 is the same form as 21, which is also the same form of the other releases and reconveyances. And it related to a deed of trust from my wife and I, again, where Steve Shearer was a trustee, and it's a 1997 document. But this deed and reconveyance, again, was needed to be filed for, I think, refinancing on a piece of property back in 2003.

So that form continued to be used by my office for deeds of reconveyance, releases and reconveyances.

Q. Had you used that same form for other, unrelated clients, as well?

A. I believe I have.

Q. All right. In other words, you didn't create that particular form for this case?

A. No.

Q. All right.

MR. CHARNEY: No further questions.

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THE WITNESS: Nor the other releases that were talked about yesterday.
MR. CHARNEY: All right.
THE WITNESS: Obviously, this is unrelated to this case.
THE COURT: Okay. So you're moving the admission?
MR. CHARNEY: Oh, yes. I will offer 20 and 21. Is that right?
THE COURT: Yes, 20 and 21.
Ms. Taylor, do you have any objections?
MS. TAYLOR: I do not.
THE COURT: All right. Then 20 and 21 are admitted.

(Exhibits No. 20 and 21 admitted.)

THE COURT: Anything else?
MR. CHARNEY: No, Your Honor.
THE COURT: Would you like to cross-examine the witness on this small point?
MS. TAYLOR: Yes. Very briefly, Your Honor.
THE COURT: Go ahead.
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RECROSS-EXAMINATION
BY MS. TAYLOR::
Q. Mr. Maile, in both of these exhibits, No. 20 and 21, you and your wife are the grantors?
A. Yes.
Q. And in the release and reconveyance you prepared in relation to this matter, you and your wife, or your LLC, were the grantors?
A. Just the LLC was the grantor. We inadvertently -- our office inadvertently put Tom and Colleen on the first release.
Q. Okay. So you have not provided the Court with any documents like this that don't relate to a transaction in which you were the grantor?
A. That's true. I testified there probably are others, I just couldn't locate them.
Q. You just couldn't find them? Okay. And in each of these cases, the beneficiary of the deed of trust was an entity that you were very close to; correct?
A. Well, one entity was our daughter. And the other entity was our construction company.
Q. Right. And you hadn't -- you didn't have any reason to think that either your daughter or your construction company would be bringing a lawsuit against you, did you?

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A. No, I really didn't. No. Our family is very close.
Q. All right. So these were not entered into in the same situation that the ones in this transaction were entered into, were they?
A. Now say that again? I'm sorry.
Q. The situation on these releases was not comparable to the situation in this case, were they?
A. Well, it involved a deed of trust. In both -- all these examples involved reconveyances on a deed of trust, so they are similar. Not the same entities, of course. Not the same individuals, of course.
Q. Right. And you have never provided -- or you have not provided a release and reconveyance with this type of language where anyone other than Steve Shearer was the trustee?
A. I had not provided anything else to you, and I had tried to explain that these are easier for me to locate because Steve Shearer was involved on these. But I know that I have used some forms similar to this for other clients, involving other trustees.
Q. And at the time these exhibits, No. 20 and 21 were prepared, you hadn't received a letter from your daughter, or your development company, saying that the

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transaction was being challenged, had you?
A. No.
MS. TAYLOR: No other questions.
THE COURT: All right.
Any redirect at all?
MR. CHARNEY: No redirect.
THE COURT: Very well. You may step down, then, Mr. Maile.
THE WITNESS: Thank you.
THE COURT: And I'll take those from the bailiff.

(The witness left the stand at 9:28 a.m.)

THE COURT: Does the Counter-Claimant have any additional evidence or testimony, Mr. Charney?
MR. CHARNEY: As long as we can reserve ruling on Exhibit 19.
THE COURT: Yeah. Fair enough.
Ms. Taylor, any problem with doing it that way?
MS. TAYLOR: No, Your Honor. If I can talk to my client a little, I -- we may be able to work something out.
THE COURT: Okay.
MS. TAYLOR: May I?

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THE COURT: Sure.

(Conference between Plaintiffs and Counsel.)

MS. TAYLOR: Your Honor, we don't want to take a chance of delaying the trial. We will stipulate that Mr. Williams would be able to lay the foundation to meet the business records exception to the hearsay rule and agree to admissibility, subject to the Court advising us that we obviously have the ability to argue, either in verbal closing or written closing, as to the relevance.

THE COURT: All right. And that is the ruling. The Court will admit, then, counter -- Defendant's Exhibit 19. As I say, I do find that it has some relevance.

And in reviewing the matter, and in taking the entire thing in context, which obviously, Ms. Taylor, you'll have an opportunity to do in your argument and by presentation of other evidence -- I mean, you just have that -- you are aware of your right to do that, that admitting this does not mean, necessarily, that the Court is swallowing it whole, or putting too much reliance on it.

Now, Mr. Charney is certainly free to argue that this is the Holy Grail, in this case, and that this

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document proves a lot. And both of you have the opportunity to do that.

But it just seems to me that, in a court trial, the Court can exercise, you know, just a little bit more leeway, especially on the relevance issue, because the likelihood of it causing confusion for the trier of fact is less; okay?

MS. TAYLOR: We don't want to delay, Your Honor.

THE COURT: Fair enough. Okay. Based on all those considerations, Exhibit 19 is admitted.

(Exhibit No. 19 admitted.)

THE COURT: Okay. With that, Mr. Charney?

MR. CHARNEY: With that, the Defendants will rest.

THE COURT: Very well.

Are you ready to call your first witness, Ms. Taylor?

MS. TAYLOR: I am, Your Honor. I will need to go get him.

THE COURT: Okay.

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DAN GROBER,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MS. TAYLOR::

Q. Would you state your name, please.

A. Dan Grober.

Q. Spell your last name for the record.

A. G-R-O-B, as in boy, E-R.

Q. Mr. Grober, we have retained you as an expert witness in this case; is that correct?

A. That's correct.

Q. And what opinions are you here to testify to?

A. I'm here to testify to opinions as to attorney standard of care, ethics implications of attorney conduct, those sorts of things.

Q. Can you give the Court a little bit about your educational background.

A. I have a bachelor's degree in English and journalism, from Eastern Illinois University. I have a Master of Arts Degree from Boise State University. And my Jurist Doctorate from the University of Idaho.

Q. What has been your professional work

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experience?

A. When I initially began practice, I was involved in general practice in the Twin Falls/Magic Valley area for a time. I also spent some time as the Jerome County Public Defender.

Thereafter, in October, early to mid-October of 1989, I became Assistant Bar Counsel for the Idaho State Bar, and I held that position until, I believe, October 31 of 1996. Whereupon, I left Bar Counsel's Office, moved to Homedale, where I have since that time been engaged pretty much in a general practice of law, locally.

Q. What were your duties when you were Assistant Bar Counsel?

A. Essentially, my duties as Assistant Bar Counsel involved investigating complaints of alleged attorney misconduct, prosecuting many of those complaints, if it was determined that rules of professional conduct were breached.

I was also -- shared responsibilities with Chief Bar Counsel for providing ethics advice to Idaho attorneys, and was -- also shared responsibility for traveling around the state, giving ethics seminars, so that attorneys in the state could meet their CLE requirements.

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Q. Okay. After leaving the Idaho State Bar, has your practice continued to have any component involving attorney disciplinary matters?
A. Yes. I -- a rather significant part of my practice, since going back into private practice in Homedale, involves disciplinary defense work in State Bar proceedings.
Q. As part of your professional practice, to you handle real estate transactions?
A. I do on a regular basis.
Q. And what documents, in general, have you reviewed in forming your opinions in this case?
A. I have reviewed at least some of the pleadings. I have reviewed at least excerpts of depositions. I have reviewed various correspondence and various exhibits provided to me.
I think I've detailed the majority of those in an affidavit that I have submitted in this case.
Q. And as a result of your investigation, did you reach an opinion as to whether Mr. Maile met the standard of care required for attorneys in the state of Idaho in relationship to the Johnson transaction?
A. Yes. I have reached an opinion.
Q. What is that opinion?
MR. CHARNEY: Objection; foundation.

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THE COURT: All right. I'm going to sustain the objection. I believe that the -- well, I'm just going to leave it at that.
MS. TAYLOR: Okay.
THE COURT: I'm going to give you leave to lay additional foundation --
MS. TAYLOR: All right.
THE COURT: -- if you're able to do so.
MS. TAYLOR: I am able to do so.
Q. BY MS. TAYLOR: Mr. Grober, let's talk more in detail about the items you looked at in reaching your opinions in this matter.
First of all, what concerns did you have when looking at the initial purchase between Mr. Johnson and Mr. Maile?
A. My concerns, when I looked at the initial purchase agreement were, first and foremost, conflict of interest issues and whether or not those conflicts were properly dealt with.
I also had other concerns with the contract, because I found language in -- and I believe -- excuse me. I've been fighting a cold. I found language in a paragraph, as I recall, which was captioned attorney fees, but had all kinds of other -- other provisions in there.

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Q. Okay. Are there any special considerations you look at when it's a business transaction between an attorney and someone they have represented?
A. Yes. And those concerns, again, I hinted at those as being conflicts of interest because, clearly, conflicts of interest exist when an attorney begins doing business with a client, and most especially when the attorney has been involved with the matters, representing that client, that lead to the business transaction.
Q. And your investigation showed that that had, in fact, occurred in this case?
MR. CHARNEY: Objection; leading.
THE COURT: Sustained.
Q. BY MS. TAYLOR: Did your investigation indicate that there had been a previous transaction in this case?
A. Yes.
Q. Can you explain that to the Court.
MR. CHARNEY: Objection; hearsay and foundation.
THE COURT: Well, I'll sustain the objection on the ground of lack of foundation.
You can lay some additional foundation, if you care to.
Q. BY MS. TAYLOR: Mr. Grober, as part of your investigation in this matter, did you review documents

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from Franz Witte?
A. From -- I'm sorry?
Q. From a Franz Witte, relating to a purchase offer on the Linder Road real property?
A. Yes. I believe I did. He, through his counsel, as I recall.
Q. Were you done with the answer?
A. You asked me if I had reviewed documents. Yes, I had.
Q. And what knowledge did you have, from your review of the documents provided, as far as the prior transaction on the Witte property -- or on the Linder Road property?
A. As to the Linder Road property, I reviewed documents that indicated, as I recall, that Mr. Johnson had received an offer to purchase the Linder Road property, as I recall, for a figure of $400,000. I think that offer came through Mr. Witte's counsel. I believe that was Eric Haff.
And I recall a letter from Mr. Maile, I believe, back to Mr. Haff, indicating that the $400,000 purchase price was -- I think the language was extremely low or very low.
Q. But what concern does that raise in your mind?

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A. Well, the concern in my mind arose when the materials I reviewed subsequently told me that Mr. Maile, in fact, offered to purchase, and ultimately purchased, the property for that same amount.
Q. Does that raise ethical implications, in your mind?
A. Well, yes, it does. Would you like me to elaborate on --
Q. Yes.
A. Any time an attorney begins to do business with a client, significant ethical red flags are raised. Conflict of interest red flags, clearly.
And that is one of the -- one of the reasons why, if attorneys are going to do business with a client, such as this, they need to make absolutely certain that they have properly dealt with the conflicts, such that the client, if the client chooses to go ahead with the transaction, has had all of the implications fully explained and has waived any conflict, so that the client is fully aware of all of the implications and aspects of that transaction.
Q. As part of your review in this matter, did you see a letter from Mr. Johnson's accountant, Imogen Hetherington, to Mr. Maile, dated May 24, 2002?
A. I did.

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Q. Did that letter raise any concerns or ethical implications?
A. Again, as I recall the letter -- and certainly the letter will speak for itself. But as I recall the letter, the letter informed Mr. Maile that the property in question was worth $1 million, based upon comparable sales to developers.
Q. And that letter has been admitted as Plaintiff's Exhibit No. 111.
What concern does that letter raise?
A. Well, to me, the concerns are somewhat obvious. Looking at that letter in the context of the things I have already testified to, we have a situation where Mr. Maile, on the one hand, informs Mr. Haff, with respect to the Witte offer, that $400,000 is very low or extremely low.
Mr. Maile appeared to have that letter from Imogen Hetherington, I believe was her name, that tended to substantiate the fact that that offer was very low. But then, as I recall, within a manner of just a few weeks, maybe six weeks or so, Mr. Maile ended up as a party to a purchase agreement for the same property for that very price.
Q. In reviewing the documents provided to you, do you recall what advice Mr. Maile has indicated he gave

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to Mr. Johnson on how to determine a purchase price on the property?
A. If there's -- I'm sorry?
Q. Do you recall the advice Mr. Maile has indicated he gave to Mr. Johnson on how to determine a fair price on the property?
A. I believe that there was correspondence, or communication, to -- to Mr. Johnson regarding maybe having -- looking at comparables or having the property appraised.
Q. Do you recall Mr. Maile saying that he should get three comparables and some appraisals and average them?
A. Yes. I -- that's what I alluded to in my previous answer.
Q. Is it a concern, in your mind, if an attorney gives different advice on valuation, if he is buying the property, than he did when a third party was looking at buying it?
MR. CHARNEY: Objection; leading. The question should be, what are his concerns based on the evidence that he has reviewed?
THE COURT: All right. I'll sustain the objection.
Q. BY MS. TAYLOR: What are your concerns, based

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on the evidence you have reviewed?
A. My -- my concerns are that it seems highly -- the transaction, to me, appears highly suspect when the attorney advises the client of the wisdom of obtaining appraisals and averaging, and then the attorney, himself, in this case, ends up purchasing the property without those -- those safeguards. I saw nothing that those safeguards had been done, that the appraisals had been given and averaged.
Q. And you mentioned before concerns that you had, as far as the terms in the earnest money agreement. Can you elaborate on those? That is Plaintiff's Exhibit No. 116.
A. Excuse me. If I could take a minute and get a drink of water.
Thank you. Could you repeat the question, please.
Q. Yes. I was going back to something you had mentioned earlier, about terms in the earnest money agreement that you may have had some concerns on. Can you elaborate on that?
A. As I recall, I recall a provision in the earnest money agreement which -- I'll try to recall each of these -- which again, it was under, as I recall, a paragraph titled Attorney Fees.

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And yet, within that paragraph, there was a provision that purported to waive jury trial if there was any ultimate litigation involving the transaction. It purported to shorten the statute of limitations to one year. It indicated that, I think, arbitration would have to be sought rather than, or prior to, litigation.

And I think it also -- there was language in that same paragraph, as I recall, that indicated that venue for any litigation would be proper in -- in Canyon County, I recall.

And my -- my concerns, when I read those provisions, were several. First of all, each of those terms appeared, to me, to be greatly disadvantageous, or at least potentially, greatly disadvantageous, to the sellers.

I was also concerned that each of those provisions again, as I recall, were -- were lumped into a paragraph captioned Attorney Fees, and were positioned in the contract such that absent extreme, and very cautious, and careful explanation about those terms, and pointing those terms out to the sellers, that -- that they could be totally unaware that those provisions were in the contract.

Q. Is there a particular Rule of Professional Conduct that this raises concerns about?

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A. Primarily Rule 1.8. And I -- I think it's Section A. That rule, I think, delineates specific conflicts of interest for an attorney. And, in fact, I think the caption refers to them as prohibited transactions.

If a lawyer is going to engage in -- in this type of business arrangement with a client, that rule clearly requires that, among other things -- and it would be helpful if I looked at the Rule -- but among things, that the terms and conditions of the deal be -- be, you know, fair to the client on their face, that they all be explained to the client any -- any -- the issues of the conflict between the lawyer doing business -- the lawyer doing business with the client in that transaction be fully explained, and that the client consent to the transaction in writing.

I found nothing, in the materials that I reviewed, to suggest to me that those requirements were met.

Q. And in looking at whether a transaction with a client meets the standards in Rule 1.8, what time frame do you look at?

A. The transaction is to be objectively viewed, at the time of the transaction.

Q. So, based on your review and the rules you

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have cited, did you make a determination as to whether this transaction was fair and reasonable?

A. I did.

Q. What is your opinion on that fact?

MR. CHARNEY: Objection; foundation.

THE COURT: Can you articulate that objection in a little more detail, Mr. Charney?

MR. CHARNEY: The question as to whether or not -- well, actually foundation and relevance. As far as foundation goes, this individual isn't called as a witness to testify as to whether or not the transaction was fair or reasonable. That's ultimately, I think, for the Court to determine.

But as far as the foundation goes, he -- his expertise isn't in whether or not this was fair and reasonable. We understood he was being called to testify that there were Rules of Professional Responsibility that were violated by Mr. Maile, and that that somehow bears on the question of unclean hands.

But the question of whether it's fair and reasonable is the ultimate question for you to decide, and not for this witness to opine on.

THE COURT: Any response to that argument, Ms. Taylor?

MS. TAYLOR: Yes, Your Honor. The affidavit of

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Mr. Grober that was submitted goes into this in great detail as the whether the transaction was fair and reliable. We believe it's relevant, to show the issue of clean hands, whether Mr. Maile entered into this transaction initially with clean hands, as well as the conduct following the transaction.

And expert witnesses are allowed to give opinions on the ultimate questions of fact.

THE COURT: Okay. Well, here's what I'm going to rule on on this issue. I'm going to overrule the objection, but I want to let you know why.

Any expert witness is called, in a trial, to assist the finder of fact in determining a question that is technical and so forth. It may be difficult for the trier of fact to figure out without some expert testimony.

And I want to point out that it's important, in this case, to recall that this case is being tried to the Court, without -- without the benefit of a jury. And because the subject matter is -- the subject matter that Mr. Grober is testifying to happened to be the Idaho Rules of Professional Responsibility, that require attorneys to deal fairly with their clients, in all of their proceedings, I think that Mr. Grober -- Mr. Grober's expertise, that has been established thus

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far, makes him the kind of expert witness whose opinions can assist the trier of fact in this regard.

Now, certainly, the Court is not bound by any opinion that the Defendant may render today.

MR. CHARNEY: The witness, you mean?

THE COURT: I'm sorry, the witness. I meant the witness. I misspoke, sorry.

No. Obviously, the Court is not bound by the witness' opinion. But the question is whether or not it's relevant, within the meaning of Idaho Rules of Evidence, and specifically Rule 702, the expert witness rule.

Because of the nature of the issues in this case, I do think that it's relevant. And keep this in mind. Mr. Charney, your argument is well understood, in that if I believed that this witness was being asked a question just to determine, hey, what do you think is -- do you think this was fair or not, if it were not already in the context of the Rule that he has talked about, which says hey, look, there's a specific rule for attorneys which absolutely requires them to deal fairly with their clients, his -- I think his testimony, or the question that is being asked, is properly coached in terms of a connection to that very specific rule.

So I'm going to overrule the objection and

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allow him to answer the question. And you'll certainly have an opportunity to cross-examine him.

Hang on just a second. Hang on for just about 30 seconds. We're going to grab a book here.

MS. TAYLOR: Your Honor, we were just confirming that there were witnesses present in the room, and we don't have any objection to that.

THE COURT: Okay. I noticed that there are people in the room who I thought might be called and witnesses, and there has never been a motion in this case to exclude witnesses. And I suppose what you're telling me, Ms. Taylor, is that's because the parties have agreed that they're not going to make any such motions?

MS. TAYLOR: It hadn't become an issue until now, but we've agreed we're not making the motion.

THE COURT: Very good. Okay. Thank you. Give me just one more second here.

MS. TAYLOR: Your Honor, may I approach the witness and give him a statute book to use as a reference?

THE COURT: Uh-huh.

MR. CHARNEY: Your Honor, as you're looking at that, I want to note for the record -- I want to make sure that the Court is looking at the same rule that was in effect at the time of this transaction.

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THE COURT: Oh, good point. Good point.

MR. CHARNEY: Some of them had changed. I don't know if the one we're talking about now had changed or not. But I think you're looking at the current book, and that may or may not apply. I know that the Rule, with respect to the disclosure being required to be in writing, or not, has definitely changed.

THE COURT: Okay. That's a real good point. I was -- I'm just being looking at the official publication of the Idaho State Bar Association, which is the desk book directory. And I was -- I had that in front of me, open to the Idaho Rules of Professional Conduct, which were adopted in 2003.

I think that the Idaho Supreme Court adopted the ABA Model Code of Responsibility, probably with a few little tweaks here and there, sometime after the transaction in question here. So it may be necessary to take a look at that.

MS. TAYLOR: Your Honor, I'm sorry to interrupt, but both versions of the Rules are in the book, they're in back-to-back. The old version is what we will refer to, but they are both contained in there.

THE COURT: Fair enough. Okay. Well, your comment is noted, and the record will reflect that the Court does have, in front of the Court, you know, that

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particular Code of Professional Responsibility, which apparently contains both versions, and I'll allow both of you folks to flesh that out for the Court; okay?

You may continue, Ms. Taylor.

MS. TAYLOR: I would ask the Court reporter to read the question back.

THE COURT: Okay. Court reporter?

(The requested portion of the record was read.)

THE COURT: Okay. You may answer the question. Did you understand it?

THE WITNESS: My opinion is that the transaction was not fair and reasonable.

Q. BY MS. TAYLOR: Can you just briefly summarize the basis of that opinion?

A. Okay. Again, it goes back to the things to which I have testified. Rejecting an offer of $400,000 for the property, on the one hand, as being very low, and turning around and buying the property, or entering into a sales agreement, within just a matter of weeks, to purchase the property, from your client, at that same amount.

The provisions that I testified to, that

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appeared in the attorney fee paragraph of the fee agreement, did not appear to be fair and reasonable for the client, were certainly disadvantageous to the client, or potentially disadvantageous to the client.

Q. Mr. Grober, I would like to turn your attention to an assignment that was entered into this case. It is Plaintiff's Exhibit No. 117.

In forming your opinions in this case, did you have an opportunity to review that assignment of the earnest money agreement?

THE COURT: I don't think the witness has that exhibit in front of him.

THE WITNESS: It would help -- if you're going to refer to it, it would help if I could look at it.

MS. TAYLOR: Your Honor, I'm not sure what happened to our exhibits. May I approach, Your Honor?

THE COURT: You may.

(Exhibit No. 117 handed to the witness.)

Q. BY MS. TAYLOR: The record should reflect I'm handing this witness Plaintiff's Exhibit No. 117. Would you like a few moments to look it over, Mr. Grober?

A. Yes. Just a moment, please. Okay.

Q. Is this one of the documents you reviewed in

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this matter?

A. It is.

Q. What concerns, if any, did it raise?

A. My concerns were these, in order to explain those. Throughout this transaction, Mr. Maile was required to -- to meet his obligations, his fiduciary obligations, to his client, who in this case was the seller. Part of that fiduciary obligation is full and complete disclosure of all elements of the transaction.

So, one of the concerns that I had was that I found nothing, in the information I reviewed, to suggest that Mr. Maile ever disclosed to the trustees that everything would be assigned to Berkshire Investments. He had a duty, in my opinion, to do that.

And then, secondly, my concern was, somewhere in the materials I reviewed, I believe I learned that Berkshire Investments had no -- no assets at this time, which was another concern to me. I do understand, ultimately, that the purchase price was paid. But in viewing the conduct at the time it occurred, it's not a no harm, no foul.

The fact that the purchase price was ultimately paid, in my opinion, did not relieve Mr. Maile of his obligation to disclose that he was going to make this assignment. And secondly, the concern that

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Berkshire had no assets, from the materials I reviewed, gave me further concern about the fairness, or the reasonableness, of the transaction and potential disadvantage to the seller.

Q. Turning your attention to the second page of that assignment, what, if any, concerns did you have about the fact that it included a novation of the Mailes from personal responsibility for the debt?

A. Well, that was -- that was my concern, not only that the fact of this assignment was not disclosed to the seller, but that the transaction was entered into by the Mailes and then was assigned to an LLC which, as I understand it, had no assets and raises the issue of ability to pay for the property.

Q. Now, I will represent to you that Mr. Maile has testified he did not discuss this assignment with Beth Rogers. What, if any, concerns does that raise?

A. Again, in any kind of business transaction with a client, the attorney maintains the fiduciary relationship with his client, such that it requires absolute and complete disclosure and -- and candor, with the client, as to every aspect of the transaction.

Q. In reviewing the documents provided to you, were you able to reach any conclusions as to whether, in your opinion, Mr. Maile met the duty to advise the client

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of conflict of interest and give reasonable opportunity to seek independent counsel?

A. Was I able to reach an opinion?

Q. Yes.

A. Is that your question? Yes.

Q. What factors did you look at in forming your opinion?

A. I looked at two -- two or three specific factors come to mind. As I reviewed the portions of the record that I was provided, it seems that I recall that Beth Rogers, who was one of the trustees of the Trust, testified that she was present, with Mr. Johnson, during, I think, two meetings at Mr. Maile's office.

MR. CHARNEY: Your Honor, I'm going to object to this, upon assuming facts not in evidence. They were trying to get this in yesterday, through Mr. Maile's cross-examination, and I objected. And I'm going to object again.

THE COURT: Well, the question of the witness was what facts he took into account in rendering an opinion, and he is explaining what he believed to be the case. Do you see what I mean?

MR. CHARNEY: I do.

THE COURT: So I'm going to overrule the objection.

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MS. TAYLOR: If the Court has concerns, I do have the deposition of Beth Rogers. I could open it up and represent to him that this is what she said. It's the same passage --

THE COURT: Well, I think the witness has just testified that he reviewed Beth Rogers' testimony, and I assume that means he reviewed her deposition testimony; right?

MS. TAYLOR: Correct.

THE COURT: Okay. You can go ahead and continue.

Q. BY MS. TAYLOR: You can answer.

A. Thank you. I believe that Beth Rogers testified, in her deposition, that there were two meetings involving she, Mr. Johnson, and Mr. Maile, at Mr. Maile's office. And I believe she said the second meeting was the meeting where the documents were signed. And she testified that at neither of those meetings were the terms of the sales agreement, or anything relating to the agreement, detailed or explained by Mr. Maile.

My recollection of the deposition testimony of Mr. Maile, at least that I reviewed, indicated that he said something to the effect that there may be a conflict of interest here, so you, you know, have the right, or you can seek the advice of independent counsel.

That does not go nearly far enough to -- he

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was obligated to fully explain the conflicts, what those conflicts were. If he was going to seek waiver of those conflicts, he needed to provide a meaningful, thorough explanation of what all the conflicts were.

And then, something tells me that the sales agreement itself, or an addendum thereto, was -- was only good -- the offer was good to a specific date. I understand that to be the very date that the agreement was signed. And I believe Mr. Maile testified that it was during that meeting, that the signatures were obtained, that he advised his client that there may be a conflict and you may need to seek independent counsel.

The timing is, it doesn't -- it doesn't -- if the offer is only good until the very day it is signed, and on that day you give that tersery (sic) advice, there may be a conflict, you may want to seek independent counsel, it's not really a reasonable time for the client to decide whether or not they want to seek, or should seek, independent counsel.

Q. Mr. Grober, I would like to read to you from the affidavit of Thomas Maile, dated October 20, 2004, that was filed with this Court, the following language:

When your affiant was approached by Ted Johnson, your affiant advised Ted Johnson that if he wanted, he could have an independent attorney prepare the

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paperwork for the real estate transaction, to which he replied he trusted me with the drafting of the agreement.

Can you comment on whether that language meets the required standard of care?

A. No, it doesn't. And that's the very reason, for example, that Rule 1.8, you know, requires an explanation of the conflict, and a reasonable opportunity for the client to seek independent -- the advice of independent counsel.

Simply saying, I've told him there may be a conflict and he said, that's okay, I trust you, does not meet the requirement and discharge the responsibility, as a fiduciary, to fully explain.

You have to say, okay, I understand that. But here are the things I need to disclose to you.

Q. Does the fact that the client, later, did have an independent attorney look at the documents make any difference on these duties?

A. It doesn't cure the problem of nondisclosure and explanation. That was still required. And as I recall, independent counsel was sought after the fact of the earnest money agreement, or the sales agreement, being signed, which was at a point where independent counsel's advice regarding the transaction was pretty much too late.

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Q. Do you recall reviewing a copy of the letter from Davis Wishney, to Andy Rogers, that has been admitted as Defendant's Exhibit 7-A?

A. I recall reviewing the letter, yes.

Q. Did that letter raise any concerns to you?

A. It would help if I could review the letter.

MS. TAYLOR: Let the record reflect I'm handing 7-A to Mr. Grober.

(Exhibit No. 7-A handed to the witness.)

THE COURT: 7-A?

MS. TAYLOR: 7-A, yes.

MR. CHARNEY: What is that? Oh, Defendant's Exhibit.

THE COURT: Yes. It's the third page of that Exhibit 7.

THE WITNESS: Okay. Would you repeat the question, please?

Q. BY MS. TAYLOR: Did that letter raise any concerns, in your mind, as far as the advice that the Johnsons had been given?

A. Well, yes, it did. And those concerns were in part, significant part, the very concerns that Mr. Wishney expresses in the letter. His concern about

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the agreement has already been entered into, so, you know, to a large -- to a great extent it's too late.
And then his additional concerns about substituting a more standard form deed of trust.
But yes, those were my concerns.
Q. I will represent to you that Mr. Maile received a message, a telephone message, indicating he needed to substitute a standard deed of trust, and that was not done.
Does that raise any issues in your mind?
A. Well, yes. And, again, it's -- it's the same concern, as I've said, that I shared, that was apparently Mr. Wishney's concern.
Q. In reviewing the earnest money agreement, did you note who was named as the trustee on the deed of trust that was attached as an exhibit to that?
A. I did.
Q. Who was that?
A. As I recall, it was Alliance Title.
Q. In reviewing the documents that were signed later, did you see anything that caused you concern?
A. Yes, I did.
Q. What was that?
A. I reviewed -- I recall seeing and reviewing releases and reconveyances of the property, which were

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signed by Steve Shearer as the substitute trustee -- as a substitute trustee, who was substituted in as trustee for Alliance.
And I believe I saw, or through the deposition -- depositions that I reviewed, became aware that Mr. Shearer had, in fact, been substituted in as the trustee.
Q. What, if any, concerns does that raise?
A. My concerns were essentially these. I found nothing, in anything that I reviewed, to suggest that the trustees were made aware of the substitution of the trustee. And, again, it's my opinion that Mr. Maile's fiduciary obligations of, you know, complete candor and disclosure in doing business with his client, would have required him to have informed them of his intention to substitute the trustee.
And then, I found nothing, in anything that I reviewed, to suggest any particular reason for the substitute trustee. And then, the documents themselves, I found -- the releases and reconveyances I found somewhat unusual.
Q. You reviewed those releases and reconveyances?
A. I did.
Q. Those have been admitted as Plaintiff's

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Exhibit No. 126 and 130. I would like to talk, first, about the release and reconveyance that was signed by Mr. Shearer on January 9, 2004.
What concerns do you have relating to that?
MR. CHARNEY: Which exhibit is that?
MS. TAYLOR: That is 126.
THE WITNESS: Could I view the exhibit?
MS. TAYLOR: Yes.

(Exhibit No. 126 handed to the witness.)

Q. BY MS. TAYLOR: The record will reflect I am now handing the witness deposition Exhibits 126 and 130. Not deposition exhibits, I'm sorry, Plaintiff exhibits.
THE COURT: All right. 126 and 130?
MS. TAYLOR: Yes.
THE COURT: Let me give the witness an opportunity to review those. We'll take a 10-minute recess.
MS. TAYLOR: All right.

(Recess taken 10:28 a.m. to 10:45 a.m.)

THE COURT: Please be seated. We are back on the record. And you may continue with your questioning of

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Mr. Grober.
MS. TAYLOR: Thank you, Your Honor.
Q. BY MS. TAYLOR: Mr. Grober, when we recessed, you were looking at the releases and reconveyances. Have you had an opportunity to review those?
A. I have.
Q. What, if any, concerns do they raise in your mind?
A. A number of concerns. First -- the first concern being that I -- in my experience, I find the virtual absolute release language unusual and somewhat troubling, particularly when viewed in light of the provisions in the sales agreement, the attorney fee -- in that attorney fee paragraph that I've talked about.
Secondly, as I stated, I found nothing in my review to suggest any reason for the -- for Mr. Shearer having been substituted in and asked to sign these, and that was certainly not, in anything I reviewed, disclosed to the trustees.
And then, thirdly, I guess it is, the timing issue of these somewhat disturbed me. And I think I need to -- we'll need to explain that a bit.
Q. Okay. Just to back up a little bit, what is your understanding as to whether these releases and reconveyances, Exhibits 126 and 130, had been shown to or

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discussed with Beth Rogers before the time they were signed?
MR. CHARNEY: Objection; foundation and relevance.
THE COURT: Overruled in both cases. The witness may answer the question, if he knows.
THE WITNESS: I'm sorry. Could you repeat the question, please?
Q. BY MS. TAYLOR: In your review of the documents, did you come to an understanding whether Beth Rogers was given an opportunity to review these releases and reconveyances before they were signed?
A. My recollection of the deposition, her deposition testimony, is that she was not made aware of these.
Q. What, about the timing of these, was of concern to you?
A. Okay. As I recall the timing of these, again based upon my review, these were submitted -- and I mean by these, the release and reconveyance documents -- were submitted to Mr. Shearer following Beth Rogers' refusal to sign them, and at a time that she was represented by counsel.
And I recall nothing, in my review, that suggests that Mr. Shearer was made aware of the refusal to sign these.

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Q. In your review, did you see documentation where Mr. Maile had sent a mutual release to Mr. Harwood?
A. Yeah. I recall seeing a -- what I'll call a transmittal letter from Mr. Maile, where the document was sent to Mr. Harwood, and he was asked whether or not his client would sign.
I would need to actually see -- I did review that letter, but I would need to see it to go any further with it.
Q. All right.
MS. TAYLOR: May I approach, Your Honor?
THE COURT: All right.
Q. BY MS. TAYLOR: I will be handing the witness Plaintiff's Exhibit No. 128.

(Exhibit No. 128 handed to the witness.)

Q. BY MS. TAYLOR: Mr. Grober, if it would help, I believe I'm only going to focus on the two paragraphs of the letter and then the release that was attached.
A. Okay. Okay.
Q. Is it correct that the release attached to Exhibit 128 was scheduled -- it had been prepared for Beth Rogers and Andy Rogers to sign?
A. I'm sorry. I didn't hear.

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Q. Well, I just -- looking at the mutual release that was attached to the back of that letter --
A. Yes.
Q. -- can you comment on any concerns you have about that release, as compared to the releases that Mr. Shearer signed?
A. I'm not sure, as I read this, I see any difference. Maybe I don't understand the question.
Q. Well, I'm not sure it was a very good question.
What about the timing of submitting this release, and the executing of the releases by Mr. Shearer, was of concern to you?
A. I think, if we look at the dates of all this, I believe that Mr. Shearer may have already signed one of the releases. And it may have already been recorded at the time this letter was sent, I believe.
Q. And you're holding up No. 126; is that correct?
A. 128, it looks like.
Q. I just want to make sure we have our exhibits straight. Can you tell me the date of signature on the one you're looking at?
A. The date of the one I'm looking at, well, it's sent under cover letter dated February 16th of 2004.

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Q. Okay. And then, the other one was dated January 9, 2004?
A. Yes.
Q. And the -- again, the concern as to timing was what?
A. My concern, at the time, was that Mr. Maile was asking for Beth Rogers, or Beth Rogers and her husband, as co-trustees, to sign a release and reconveyance, when it appeared to me that he already had one signed by Mr. Shearer.
Q. Did you see anything in the record to indicate that Mr. Maile ever disclosed to Beth Rogers' attorney, Mr. Harwood, that he had had Mr. Shearer sign these releases?
A. I saw nothing to indicate that.
Q. In your opinion, does that violate any standards or ethical rules?
A. Well, I -- I believe that it suggests conduct which is dishonest or, perhaps, otherwise deceitful.
Q. Which Rule of Professional Conduct are you citing?
A. 8.1(c), I believe.
Q. Do you have an opinion on whether this conduct would be an extreme deviation from the standard of care?

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MR. CHARNEY: Objection; foundation.
THE COURT: Sustained.
Q. BY MS. TAYLOR: In looking at this transaction, did you form opinions on whether different aspects of it met the required standard of care for attorneys?
A. Yes.
Q. As a result of your work experience, are you familiar with the standard of care for attorneys?
A. In my -- I'm sorry. Would you repeat the question? I'm having trouble hearing you.
Q. In your work experience, are you familiar with the standard of care required for attorneys dealing with this type of transaction within this time frame?
MR. CHARNEY: Objection; relevance.
THE COURT: Overruled.
MR. CHARNEY: Can I make a little argument on that?
THE COURT: Okay. Go ahead.
MR. CHARNEY: The point here is, Your Honor, the standard of care seems to be issues relating to negligence, as opposed to deception.
THE COURT: Professional malpractice, you're saying, as opposed to violations, or alleged violations, of the Rules of Professional Responsibility?

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MR. CHARNEY: Exactly.
THE COURT: I get the distinction, and I understand that the tenor of the question has to do with his opinion regarding whether or not Mr. Maile violated the quote unquote standard of care required of all attorneys at the relevant time.
And when we say standard of care, you might want to rephrase your question or something like that.
I understand that this is not a professional negligence case. The question is not whether or not he breached, or did not breach, the standard of care required of attorneys practicing this type of law, in the relevant community, at the relevant time.
The question is whether or not, in this witness' opinion, Mr. Maile -- Mr. Maile's conduct conformed with the Rules of Professional Responsibility or not. That's where you're going, isn't it?
MS. TAYLOR: That is where I was going.
THE COURT: Okay. And that's the understanding of the Court.
Now, if you have any objection to the witness answering the question as clarified, I'll hear --
MR. CHARNEY: Not as clarified. I just don't want the issues to get confused and this suddenly turn into a negligence action, because negligence would have nothing

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to do with unclean hands.
THE COURT: Right. And have I adequately -- well, negligence could have something to do with unclean hands, in a certain context. I mean, competence is an ethical requirement, as well. But I don't think that's where they're going.
MS. TAYLOR: Actually, Your Honor, it is where we're going.
THE COURT: Oh.
MS. TAYLOR: I am intending to elicit testimony that this was an extreme deviation, which we think implies --
THE COURT: A violation?
MS. TAYLOR: -- brings the ethical rules into play.
THE COURT: Okay. Which violates 1.1. So you're not saying dishonest, you're just saying extremely negligent now?
MS. TAYLOR: Saying both.
THE COURT: Right. Okay. I'll sustain the objection if the question is being asked to elicit evidence about that issue, because I don't think there has been an adequate foundation laid for this witness to testify about the standard of care required for an attorney practicing in Boise, Idaho, at the relevant

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time, with respect to this type of transaction.
So -- because now we've gone from getting away from Mr. Grober's expertise on -- as being an expert on the Rules of Professional Responsibility, and now we're getting into asking him to render an opinion about the professional competency of a real estate lawyer, a trust lawyer, in Boise, during the relevant time.
You can lay some additional foundation, if you like, but I'm not sure if your expert disclosure got into that. Do you see what I mean?
MS. TAYLOR: Well, it did from a negligence standpoint. I will acknowledge that that was the way we were looking at it at that time frame.
THE COURT: Okay.
Mr. Charney?
MR. CHARNEY: I don't believe that there has been an appropriate disclosure that this witness would come to court and testify that he has expertise in this particular area, real estate transactions in this time frame, and that Mr. Maile's conduct was violative of that practice.
I don't think that there has ever been a disclosure along those lines. Mr. Grober has always been called as a witness to testify about the Rules of Professional Responsibility.

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THE COURT: Okay.
MR. CHARNEY: These are very separate.
THE COURT: I understand. And I'm going to -- well, keep in mind, I appreciate and I understand the fact that, to the extent that the Rules of Professional Responsibility also require professional competence, failure to be competent is -- can implicate the Rules of Professional Responsibility.
Now that having been said, I don't believe that this witness has been qualified to testify, as an expert, on the issue of standard of care in these types of transactions. Do you see what I mean?
And Mr. Charney is also saying that he doesn't believe that he was adequately notified that this witness would be called upon to testify about his expertise on these -- on, you know, land sales transactions during this period.
MS. TAYLOR: Your Honor, I think he is right on that count.
THE COURT: Okay.
MS. TAYLOR: I to believe he is right on that count. I did not supplement -- I did do a supplemental disclosure, but I did not get into that. I just sort of, you know, got that direction as part of the questioning.
THE COURT: Okay.

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MS. TAYLOR: So I won't pursue the line of questioning about negligence.
THE COURT: Very good. Thank you.
Q. BY MS. TAYLOR: Mr. Grober, can you elaborate on the statement you made previously about your belief that this conduct, in your opinion, constitutes misconduct or dishonesty?
A. I think, viewing the scenario as a whole, which encompasses virtually everything I have testified to to this point, starting with the provisions in the earnest money agreement, and going forward with no evidence that I've seen that there was the required full and candid disclosure to anyone, the lack of evidence that I've seen for any -- for any legitimate reason, for example, to substitute Mr. Shearer as the trustee, the fact that there was no -- nothing that I've seen to indicate that this was ever disclosed, that -- that entire scenario of events to which I've testified, leads me to believe that it could not have all been an unfortunate series of mistaken events.
And, therefore, leads me to the conclusion that, in order to accomplish what Mr. Maile intended to accomplish, these acts were more motivated by dishonesty.
Q. Does the fact -- well, let me ask you this. In reviewing the documents and preparing for your

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testimony, did you become aware of the fact that Mr. Maile had asserted these releases and reconveyances were a total bar to any action against him?
A. I'm sorry. What was your -- what was your question?
Q. Did you become aware of the fact that Mr. Maile asserted that the Shearer releases and reconveyances were a total bar to any action against him?
A. I did. I think I saw that in -- in the answers that included affirmative defenses.
Q. Does that raise any concern in your mind?
A. Well, yes. And that concern is that, if, as I believe, the obtaining of the releases from Mr. Shearer was, you know, motivated by the intent to deceive and get this transaction completed behind him, to that extent it seems dishonest, to me, to assert those releases as an affirmative defense, if they weren't appropriately obtained.
MS. TAYLOR: I have no further questions, Your Honor.
THE COURT: Thank you.
Mr. Charney, you may cross-examine the witness.
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CROSS EXAMINATION
BY MR. CHARNEY::
Q. Good morning, Mr. Grober. How are you?
A. I'm fine. Thank you.
Q. Can you hear me okay at this level?
A. Yes, I can.
Q. You would agree with me that the Rules of Professional Responsibility that were in place at the time of this transaction did not require written disclosure of a conflict of interest; correct?
A. That's correct.
Q. That Rule has since changed?
A. Yes, it has.
Q. You testified, at your deposition, that you do not have any particular expertise in real estate law; is that fair to say?
A. I do work in real estate, but I wouldn't consider myself a real estate expert, no.
Q. In arriving at the opinion that you have arrived at, have you had a full and fair opportunity to review Mr. Johnson's medical records?
A. No, I have not.
Q. Did you interview family members to discuss with them how Ted's mental faculties were at the time

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that this transaction was entered into?
A. No, I have not.
Q. So you don't know if he signed documents on his deathbed or if he was perfectly alert and capable of making decisions, do you?
A. No. You're correct.
Q. You would agree that somebody who is perfectly alert and capable of making decisions -- that the situation would be different if Mr. Maile had approached Mr. Johnson on his deathbed, when he was in a weary state, and obtained signatures in that manner; correct?
A. I'm not sure I understand your question.
Q. There would be a difference in those two situations, wouldn't there? One would demonstrate he was taking advantage of somebody at a point in time when he might just sign off on anything, and the other demonstrates that he may have thoroughly had the opportunity to review what he signed.
A. Yes. I would agree, by your question, there's a distinction there.
Q. And you took no steps, whatsoever, to check on what Mr. Johnson's mental state was at the time of this transaction, did you?
A. No. I did not.

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Q. You indicated, in your testimony, that some of the clauses contained in the agreements appeared to you to be negligent; is that fair to say?
A. Yes. I think that's fair to say.
Q. You were particularly concerned about the attorneys fees paragraph in Plaintiff's Exhibit -- let me just refer --
MR. CHARNEY: Could he be handed the Defense and Plaintiffs exhibits?
THE COURT: I believe he has them both.
MR. CHARNEY: All right.
Q. BY MR. CHARNEY: Let's look at Defendant's Exhibit No. 1.
THE COURT: Okay. That's the smaller one. Could you give him a hand? That's the -- yeah. That's that packet.

(Bailiff complied.)

THE WITNESS: Okay.
THE COURT: Those are all of the Defense exhibits, Mr. Grober.
Q. BY MR. CHARNEY: And the attorneys fees paragraph that I'm referring to starts at the bottom of page 2, and rolls over on to page 3.

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Do you see that?
A. Yes. Just a moment. Yes, I do.
Q. It is this provision that has caused you some measure of consternation, with respect to whether or not this was fair and reasonable to Mr. Johnson; is that fair to say?
A. Yes. That's one of my concerns.
Q. There is nothing else in this contract that you have ever said was unfair or unreasonable to Mr. Johnson; is that fair to say?
A. I think that's correct.
Q. As we look, then, in paragraph 8 now, since we can isolate that as your target, we see parties waiving a trial by jury and agreeing to submit to the personal jurisdiction and venue in a court in Canyon County, Idaho; correct?
A. That's correct.
Q. The term that I just read to you was binding on both Mr. Maile and Mrs. Maile, and Mr. Johnson; correct?
A. Yes.
Q. So if Mr. Maile wanted to sue for a specific performance in this case, he would have been equally obligated to have a trial by the Court, instead of a trial by jury?

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A. Assuming the provision is, you know, is upheld, yes.
Q. Okay. There is another provision in there that indicates that the prevailing party should reimburse the prevailing party's -- I'm sorry -- that the nonprevailing party would pay the other party's fees, expenses, and costs.
Is that particularly unusual?
A. No.
Q. There is another provision that says that there is a one year limitation on the statute of limitations; correct?
A. Yes.
Q. That term also equally applied to Mr. and Mrs. Maile; correct?
A. That's correct.
Q. So if Mr. Johnson refused to perform on the contract, within one year they would be equally out of luck as Mr. Johnson would be out of luck if he didn't file his action in one year; correct?
A. Assuming the validity of the provision, sure.
Q. And now we have the last sentence, which obviously has some inconsistency, requiring the parties to submit to binding arbitration in lieu of court proceedings; correct?

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A. Yes.
Q. So we clearly have some drafting issues, with respect to whether or not you're going to go to court or go to arbitration; is that fair to say?
A. Sure.
Q. Let's assume that the arbitration clause here is the binding clause. You have opined that that was fair and unreasonable to Mr. Johnson; true?
THE COURT: Can you reinstate your question.
Q. BY MR. CHARNEY: Is it true that you have rendered the opinion, in court today, that the arbitration provision was unfair and unreasonable to Mr. Johnson?
A. It certainly was, to the extent it was not disclosed.
Q. Does page 4 bear Mr. Johnson's signature?
A. Yes, it does.
Q. How can you, then, testify that it was not disclosed if the contract is, in fact, signed?
A. Because signing of a document, under these circumstances, does not relieve Mr. Maile from the obligation to have specifically explained all of the terms in here. And I found no evidence, in anything I have reviewed, to suggest that he did that.
Q. And in everything I have reviewed,

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particularly Rule 1.8, I can find no support for your assertion, in court today, that Mr. Maile had an obligation to fully and thoroughly explain the terms of this contract to Mr. Johnson.
Can you point --
MS. TAYLOR: Objection.
Q. BY MR. CHARNEY: Can you turn to Rule 1.8 and tell us where that language is?
A. No. That specific language is not in the Rule.
Q. Nor is it in any of the comments to the Rule, is it?
A. It stems from his fiduciary duties to his client.
Q. Nor is it in any of the comments following Rule 1.8, is it?
A. That's correct.
Q. This is your interpretation of the Rule that is, in fact, not in the Rule and not in the comments; correct?
A. That's correct.
Q. All right. And when we talk about an arbitration provision, in fact, the public policy is to encourage alternative dispute resolution, is it not?
A. Yes.

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Q. In fact, the Idaho Legislature has adopted a set of statutes that talk about dispute resolution; correct?
A. That's correct.
Q. And the case law that has developed, regarding dispute resolution, clearly indicates that there is a preference in the judicial system for people to resort to alternative dispute resolution, if that can be accomplished; true?
A. That's correct.
Q. So there is, in fact, nothing that is particularly problematic about submitting this to ADR in lieu of court process; correct?
A. No.
Q. In fact ADR might have been cheaper for Mr. Johnson, as opposed to long, drawn out litigation?
A. That's correct.
Q. And that could, in fact, have been advantageous for Mr. Johnson, if he was required to seek some form of dispute resolution?
A. It could have been.
Q. Turning to the addendum, which is following the signature page.
THE COURT: Which exhibit?
MR. CHARNEY: I'm sorry.

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Q. BY MR. CHARNEY: Still in exhibit number -- Defendant's Exhibit 1, which would be the fifth page in.
A. Okay. Give me just a moment.
Q. Sure, take your time.
So that we're sure we're looking at the same page, does the page you're looking at have some handwriting and some initials on it?
A. I don't --
Q. In the middle.
A. I don't see that. Yes.
Q. I'll represent to you that the testimony was that Mr. Johnson, after reviewing the contract, wrote in this term so that his tenant, if you will, the farmer tenant, could get another year of onion seed from this piece of property. All right?
Now, with that in mind, it certainly would appear to you that Mr. Johnson was carefully looking over this contract, in making the appropriate changes; true?
A. It would certainly appear that he did that provision, yes.
Q. And it was signed off by both Mr. Maile and Mr. Johnson; true?
A. Yes, it was.
Q. You indicated that you had reviewed documents from Franz Witte; is that fair to say?

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A. Reviewed a letter, as I recall.
Q. The substance of that letter was that Mr. Witte wanted to purchase this parcel of property for $400,000; correct?
A. Yes.
Q. And, then, the history of the case was that Mr. Johnson brought that offer to Mr. Maile; correct?
A. Yes.
Q. Mr. Maile, then, didn't immediately tell Mr. Johnson to reject the offer, did he?
A. I don't know about immediately.
Q. Well, why don't you turn to Plaintiff's Exhibit 111.
A. I'm sorry. I might have some difficulty finding that. But I will be --
MR. CHARNEY: It should be tabbed.
THE BAILIFF: 111, Plaintiff's 111?
MR. CHARNEY: 111, yes.
Q. BY MR. CHARNEY: Now, 111 is the one from Ms. Hetherington, addressed to ToMr. Maile, on May 24, 2002; is that fair to say?
A. Yes, it is.
Q. And the first line says, as discussed, I have reviewed the tax implications of Mr. Johnson selling his 40 acres of land in Eagle versus holding it indefinitely

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for disposition in his estate; is that fair?
A. Yes.
Q. So, clearly, Mr. Maile had referred the matter to an accountant to see if this would be a good deal for Mr. Johnson; true?
A. It would appear so.
Q. Would this be inconsistent or consistent with his obligation to his client?
A. It would be consistent with his obligation.
Q. And we get into the next sentence, which says, before I get into those specifics, I believe the sales offer for $400,000 is too low. And then she bases that on another sale from another client.
Do you see that?
A. Yes.
Q. Okay. So, then, she goes on to provide Mr. Maile with some scenarios, regarding taxes and things like that, to discuss with Mr. Johnson; is that fair to say?
A. Yes.
Q. So let's turn to Exhibit 112. Have you reviewed 112 before coming to court today?
A. Let me look at it again and make sure. Yes.
Q. I'll paraphrase a little bit, but this is a letter, from Tom, to Ted; correct?

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A. Yes.
Q. And Mr. Maile advises, I have completed the review of the real estate contract. I also discussed your finances with your accountant, Imogen Hetherington, last week. He says he is enclosing a copy of her letter. And then he says, I deem it prudent that you contact our office to discuss the possibility of providing a counteroffer to the potential purchaser to determine the fair market value for the real estate.
Fair to say?
A. Yes.
Q. Would this be consistent or inconsistent with his obligation to his client?
MS. TAYLOR: Your Honor --
THE WITNESS: That would be consistent.
MS. TAYLOR: -- I would like to object to relevance and beyond the scope of direct. We didn't delve into the duties to the client in the Witte offer.
THE COURT: I'll overrule the objection.
Q. BY MR. CHARNEY: And he further advised Mr. Johnson that they needed to do some due relative to the buyer's potential and fiscal responsibility; correct?
A. Yes.
Q. In other words, he didn't want Mr. Johnson to get into a contract with somebody that couldn't, in the

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end, pay; correct?
A. Yes.
Q. So this was consistent with his duties as an attorney; correct?
A. Yes.
Q. So let's move to Exhibit 113. 113 is the letter sent by Mr. Maile, to Mr. Haff, who is Mr. Witte's attorney; true.
A. I'm sorry. I have skipped.
THE COURT: Is this 113? This is Exhibit 113.
THE WITNESS: I've skipped 113.
Q. BY MR. CHARNEY: Have you had a chance to look over 113?
A. I'm doing that right now.
Q. Okay.
A. Yes.
Q. All right. In that letter, Mr. Maile represented that Mr. Johnson would be willing to sell his real property. However, based on comparable values in the area, we feel your offer is extremely low; correct?
A. That's correct.
Q. And that nearly parrots the information that Mr. Maile had received from Mrs. Hetherington -- Ms. Hetherington about a week and a half prior; correct?
A. That's correct.

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Q. Now, I would like you to take a look at Defendant's Exhibit 22, which will be the last, and there's two page, so it would be the second page.
THE COURT: You know, I'm not sure if that form is in that packet.
THE WITNESS: The last one I see here --
THE COURT: Here. I'm going to give you this one.
THE WITNESS: -- is 16.

(Exhibit No. 22 handed to the witness.)

THE COURT: We need to make sure I get that one -- make sure I get 22 back.
Q. BY MR. CHARNEY: Actually, look at the second page of Exhibit 22, please.
A. Okay. The print is somewhat small.
Q. Do you want me to read it, since you're --
A. Would you, please.
Q. I will. This is a letter dated June 7, 2002, which follows the June 4, 2002 letter, 113, from Franz Witte to Mr. Maile.
Thank you for your reply to my offer on the Theodore L. Johnson property. In response to your comments on values, my research shows like properties selling for 10 percent less than this offer.

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I also have concerns over high water tables and City of Eagle issues that make development costs higher. As for my financial strength, I believe that is shown by the $100,000 down payment and the terms of the loan.
I will extend the terms of this offer until June 20th.
A. Yes.
Q. So, by this letter, Mr. Witte was saying that he had actually offered more than he thought the property was worth and was not going to increase his offer; correct?
A. Yes.
Q. You know, from the history of this case, that Mr. Johnson decided not to sell his property to Mr. Witte at that price; correct?
A. Yes.
Q. You also know, from the history of this case, that Mr. Johnson, sometime after this, showed up at Mr. Maile's office, unannounced; correct?
A. I'm not certain that I specifically recall that.
Q. All right.
MR. CHARNEY: Could he be handed Defendant's Exhibit 18?

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THE COURT: All right. Let me have 22 back. 18 is the -- defense Exhibit 18 is the appraisal.
MR. CHARNEY: Correct.
THE COURT: All right.

(Exhibit No. 18 handed to the witness.)

Q. BY MR. CHARNEY: Mr. Grober, you had indicated that you had reviewed Mr. Maile's deposition, and you must know that in Mr. Maile's deposition, he testified that sometime after the Franz Witte transaction died on the vine, that Mr. Johnson showed up at his office one day, unannounced, with an appraisal in mind.
Do recall that now?
A. I believe I do, yes.
Q. Now, looking at the first page of 18 -- and I recognize that the print is small -- but where it -- no, the cover page.
A. Yes.
Q. Where it says client, it doesn't say Thomas Maile, does it?
A. No, it does not.
Q. It says Mr. Theodore Johnson; correct?
A. Yes, it does.
Q. The amount of the appraisal, the appraised

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value of the land, at page 5 of this, was $400,000; correct?
A. I'm sorry. Page 5.
Q. It's the signature page.
A. Yes.
Q. All right. You were aware that Mr. Johnson showed up with the appraisal, and told Tom that he would like to sell the property to him for the appraised price; correct?
A. Yes.
Q. You were also aware that, over the course of their relationship, the years that led up to this, that Mr. Maile and Mr. Johnson had talked about Mr. Johnson selling this property to Mr. Maile at some point in the future; true?
A. I think there's deposition testimony to that effect.
Q. And, in fact, when the Franz Witte offer came along, Tom didn't try to move in and outbid Franz Witte, did he?
A. No. I don't believe he did.
Q. In fact, what he tried to do was, he tried to extract more money from Mr. Witte, to increase the money that would be paid to Mr. Johnson; correct?
A. That's correct.

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Q. And even though he failed at that effort, that wasn't negligence on his part, was it?
A. No. I don't believe so.
Q. So Mr. Johnson came and said, I'd like to sell you this property. Will you pay appraised value? And Mr. Maile says yes, I will. Nothing wrong with that; correct?
A. No.
Q. There's no indication, in this record or anything you have seen, that indicates Mr. Maile tried to get less for the property than the -- tried to get Mr. Johnson to sell the property for less than the appraised value; correct?
A. That's correct.
Q. He said, that looks like a fair appraisal, and I will pay you the appraised price; correct?
A. That's correct.
Q. And you find no problems with that; true?
A. No.
Q. And you were also aware that Mr. Maile had no input, whatsoever, with respect to Exhibit 18? That's the appraisal.
A. Well, I'm not sure I'm aware of that. I mean, I have no reason to think that's not true, I guess.
Q. Now, we have the contract that you have some

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criticisms about paragraph 8. But the bottom line is, the contract said that Mr. Johnson would sell the property to the Mailes for $400,000; true?
A. That's true.
Q. Did the Trust receive the $400,000 that was agreed on?
A. To the best of my knowledge, yes.
Q. Was the $400,000 received in a timely manner?
A. My recollection is that it was.
Q. You have criticized the use of an assignment in this case, which is Plaintiff's Exhibit 117. So please turn to that.
A. Yes. I'm looking at it.
Q. All right. First, the contract itself provided that the term -- that it could be assigned; correct?
A. Yes.
Q. And that was something that was clearly disclosed to Mr. Johnson, after he had an opportunity to review the contract; correct?
A. Assuming he read the contract, yes.
Q. And you have no evidence to dispute that he didn't read it, do you?
A. No.
Q. So the assignment, then, transfers the

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Mailes' interest in the contract to Berkshire Investments; true?
A. Yes.
Q. At the time the assignment was signed, Ted Johnson still owned the property, didn't he?
A. Yes.
Q. So the obligations that you say the Mailes relieved themselves of were -- was the obligation to pay for the property; correct?
A. Yes.
Q. If the Mailes didn't pay, Mr. Johnson would still have the full benefit of his property, because he hadn't yet transferred it; correct?
A. That's correct.
Q. In other words, it wasn't like they paid $400,000 for a car that they had first transferred title to and then were waiting for payment, then an assignment came relieving them of personal liability; correct?
A. Yeah. That's my understanding of the time frame.
Q. In fact, Beth Rogers signed, on behalf of Mr. Johnson, as the power of attorney; true?
A. Yes.
Q. And we also know, by a review of Exhibit 118, if you can take a look at that, looking at the last

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sentence in the first paragraph, it says, the real estate contract indicates we can assign our interest. Consequently, we are requesting your notarized signature on the document and are asking that you return the original to our office.
Do you see that?
A. Yes.
Q. So, Mr. Maile wasn't there, with the document, saying sign, sign, sign, was he?
A. No.
Q. He sent it to them, gave them an opportunity to look it over, and asked them to mail it back?
A. Yes.
Q. Nothing problematic with that, is there?
A. No.
Q. And, in fact, they did just that, didn't they?
A. Yes. I believe so.
Q. Mr. Maile also testified that he advised Ted that he could seek the advice of an independent attorney with respect to this transaction; correct?
A. Yes. He did say that he told him that.
Q. There is no evidence, that you're aware of, that proves anything to the contrary, is there?
A. No.

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Q. So it's clear that Mr. Johnson simply chose not to seek independent counsel prior to signing the contract, and prior to Ms. Rogers signing the assignment; correct?
A. I'm sorry. I misspoke, I believe, on the last question.
Q. Please correct your answer. I don't want anything to be confused.
A. It's my understanding, from reading portions of the deposition, at least of Beth Rogers, that she indicates that nothing was explained.
Q. That's what Ms. Rogers said?
A. Yes.
Q. True. And, once again, if we go back to the Rule, we know that there is no support for your contention that there is an explanation required; correct?
A. I'm sorry?
Q. The Rule does not support your contention that an explanation of the document is required; correct?
A. In the black-and-white language of the Rule, correct.
Q. The black-and-white language of the Rule says that they should be advised of the opportunity to consult with an independent attorney; correct?

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A. That's correct.
Q. And there is no indication here that those people did or did not do just that?
A. I'm sorry?
Q. Let me back -- let me ask that a different way.
A. Okay.
Q. The indication, here, is that these people, knowing that, elected to go ahead and sign the documents without first consulting a lawyer?
A. Yes.
Q. Later on, they went and saw Mr. Wishney, but prior to that, they had not?
A. That's correct.
Q. Mr. Maile didn't have to put a collar on them and drag them to a lawyer's office, did he?
A. No. He did not.
Q. And, additionally, Beth Rogers could have refused to sign the assignment, couldn't she have?
MS. TAYLOR: Objection; calls for speculation.
MR. CHARNEY: I don't think that does.
THE COURT: Overruled.
THE WITNESS: Yes. She could have.
Q. BY MR. CHARNEY: You are not alleging that it was unreasonable for Mr. Maile to pay $400,000 for

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property that appraised at $400,000, are you?
A. No.
Q. You next cast aspersion at the substitution of Mr. Shearer as a trustee in this case?
A. Yes.
Q. You do recognize that under Idaho law, and I can't think of the statute off of the top of my head, but there are a few limited people, or entities, that can be trustees; correct?
A. Yes, I do.
Q. In other words, the marshal, here, couldn't be a trustee, but you and I could because we're lawyers; right?
A. That's correct.
Q. A bank could be a trustee and a title company can be a trustee?
A. That's correct.
Q. But nevertheless, across the board, the statute requires the same obligations of any person who is a trustee, whether they be a bank or a lawyer or a title company; correct?
A. That's correct.
Q. So the substitution of Mr. Shearer as a trustee, versus Alliance Title, didn't change the trustee's statutory obligations pursuant to Idaho law,

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did it?
A. No.
Q. Looking at, then, Exhibits 126 and 130.
THE COURT: And will you hand me back the appraisal? That's number 22, isn't it? Oh, it's 18. I just want to make sure the Court's copies are all in order.
THE WITNESS: What exhibit were you looking for?
Q. BY MR. CHARNEY: 126, to start with. Do you have 126 there?
A. I do.
Q. You're aware that the difference between 126 and 130 is that 126 contained Thomas and Colleen Maile's name, and 130 had the name Berkshire Investments, because there was an oversight; correct?
A. I'm aware of that difference.
Q. Other than that difference, there is no difference between the two documents?
A. There does not appear to be, no.
Q. All right. Now, the release and reconveyance does not operate as a release between the Trust and Mr. and Mrs. Maile or Berkshire Investments, does it?
A. I'm sorry?
Q. The release and reconveyance is not a document that, in any way, operates as a release between

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the Trust and the Mailes; does it?
In fact, Mr. Grober, the release and reconveyance is the trustee obtaining a release from both parties, because the trustee is holding money and property during certain periods, and that's the point of having a trustee; correct?
A. Right.
Q. So when the trustee was paid, and then simultaneously transferred title to the property, the trustee wants, basically, to bail out of the transaction and not be held liable any longer; correct?
A. That's true.
Q. He doesn't want to be sued to either convey title or to be required to pay over money to the party transferring title; right?
A. That's correct?
Q. So the releases that are set forth in 126 and 130 are simply an indication, by the trustee, that he is out of the deal and the property is transferred; fair to say?
A. Yes.
Q. That is entirely different than the mutual release that is appended to Plaintiff's Exhibit 128, isn't it?
A. Let me look at that again, please. Yes, it

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is.
Q. The release that Mr. Maile was seeking to have signed, by way of Exhibit 128, was, there's this lawsuit, and he didn't want to be involved in a lawsuit; correct?
A. That's correct.
Q. So he prepares a release and sends it to Bart Harwood; correct?
A. That's correct.
Q. You know that Bart Harwood is a lawyer; correct?
A. Yes, I do.
Q. He didn't go straight to Beth Rogers and Andy Rogers and ask them to sign the release, did he?
A. I'm not sure I understand the question in -- in the chronology of events.
Q. I'm not asking about chronology of events. Mr. Maile wanted to be released from liability with respect to this transaction?
A. Yes, he did.
Q. There's nothing unreasonable about somebody wanting to be released from liability, is there?
A. No.
Q. It happens all the time; correct?
A. Absolutely.

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Q. And rather than approach the Rogerses directly, he approached Mr. Harwood, the Rogerses' attorney; correct?
A. He did.
Q. And, additionally, he explained in the letter why he wanted the release signed, didn't he?
A. That's correct.
Q. The trustees, through their counsel, did not sign the mutual release, did they?
A. They did not.
Q. There was nothing unethical, at all, about Mr. Maile attempting to be released from a lawsuit, was there?
A. No.
Q. Particularly one that alleged that he paid less than fair market value for the property, when, in fact, you have opined that he did exactly that; correct?
A. Yes.
MR. CHARNEY: No further questions.
THE COURT: You may redirect, Ms. Taylor.

REDIRECT EXAMINATION
BY MS. TAYLOR::
Q. Mr. Grober, is the ethical requirement to disclose conflicts of interest and advice to get

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independent counsel limited to people who don't know what they're doing?
A. No.
Q. Does the fact that Ted Johnson may or may not have had his mental faculties about him change your opinions?
A. Changed them?
Q. Changed the opinions you have stated, as far as Mr. Maile's duties?
A. If he may or may not have had his faculties, yes, that's a concern.
Q. Do you recall reading deposition testimony wherein Beth Rogers disclosed that Mr. Johnson had lung cancer, and was being treated with radiation, at the time of this transaction?
A. Yes. I recall that.
Q. Does the fact that the provisions and agreement are binding on both parties change the inquiry into whether they're fair and reasonable?
A. No. I don't believe it does.
Q. Can you explain the distinction between a fiduciary duty and ethical duties?
A. Yes. Some --
MR. CHARNEY: Objection; scope.
THE COURT: Beyond the scope? Well, I'll overrule

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the objection. I'll go ahead and let you make your point.
THE WITNESS: I'm sorry. Could you repeat the question?
Q. BY MS. TAYLOR: I asked you to explain the distinction between fiduciary duties and ethical duties.
A. Yes. And there is a difference. All -- all fiduciary duties are not delineated, enumerated, spelled out or expressed in the Idaho Rules of Professional Conduct. And, in fact, lawyers can violate a specific Rule of Professional Conduct, and may or may not have -- how do I want to explain that?
Simply saying, I -- I abided by the black-and-white letter of all the Idaho Rules of Professional Conduct does not mean that the attorney has met all their fiduciary duties.
Q. And, in your opinion, did Mr. Maile meet his fiduciary duties?
A. No. He did not.
Q. Which of those categories would the duty to fully explain the provisions of a contract, to which he is a party, fall under?
A. Clearly, he has a fiduciary duty of absolute candor, forthrightness, absolute disclosure of everything. And it's an affirmative -- it's an

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affirmative duty.
Q. Is it enough to just meet the ethical rules?
A. Oftentimes, it's not. The ethical rules and fiduciary duties are, in fact, often two different things.
Q. Did Mr. Maile have an obligation to meet both?
A. Yes, clearly.
Q. Looking at the letter that Mr. Maile wrote to Eric Haff, saying that the $400,000 purchase price was extremely low, does that raise any ethical rules, in your mind?
A. Does Eric Haff's letter?
Q. No. The letter that Mr. Maile wrote to Eric Haff, is there any duty to third parties?
A. There -- yes. If that were Mr. Maile's opinion, he clearly needed to -- to make certain that Mr. Johnson and the trustees were aware of that opinion.
Q. Okay. Is there a duty of honesty to third parties?
A. Well, there's a duty not to affirmatively misrepresent anything to third parties. That's clear.
Q. Which Rule is that under?
A. Might be 4.1, I'm guessing.
THE COURT: Is that important?

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MS. TAYLOR: No. I would represent that that is the Rule he cited in his affidavit, that has been filed with the Court.
Q. BY MS. TAYLOR: Counsel talked to you about the fact that Mr. Johnson agreed to enter into this transaction.
A. Uh-huh.
Q. I would like to turn your attention to the letter that Mr. Maile wrote to me, dated July 10th of 2003, and that is Plaintiff's Exhibit No. 125.
A. 125?
Q. If it's okay, I'll just read a portion of that letter to you.
A. That would be fine with me.
Q. The quote I'm interested in is, Mr. Johnson honored his verbal commitment to me, made years ago, that if he ever decided to sale his land, he would afford me first option to purchase the same.
Does that raise any concerns to you?
A. I'm sorry. What was your question?
Q. Does that statement, as regarding Mr. Johnson honoring a verbal commitment to give a first option to Mr. Maile, raise any concerns to you, as far as ethical standards?
A. Yes, it does.

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Q. What would those be?
A. I think, at that juncture, Mr. Maile was -- was under an obligation to explain to Mr. Johnson, and to the trustees, that a promise to sell -- a verbal promise to sell that land wasn't binding. And, therefore, you know, he was not legally obligated to go ahead with the deal on those terms.
Q. Did you see anything in the record to indicate that he ever advised them of that?
A. No.
MS. TAYLOR: No further questions.
THE COURT: Thank you.
You may redirect.
MR. CHARNEY: Very brief.

RECROSS-EXAMINATION

BY MR. CHARNEY:
Q. What indication is there, in the documents you reviewed, that Tom knew Mr. Johnson was suffering from cancer?
A. I don't recall, specifically.
Q. In fact, the documents that you reviewed indicated that Mr. Johnson was pretty vital and healthy, almost right up to the point of his death; correct?
A. I -- I honestly don't recall, specifically,

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that issue in the documents.
Q. And Beth Rogers even testified that he was a private person and kept those types of things to himself, didn't she?
A. Yeah. I do recall that.
Q. Okay. You then talked about a fiduciary duty to the client. So let's cover this, just in brief.
When the Witte offer came in, the view of the documents in question reveals that Mr. Maile tried to get Mr. Witte to pay more than the $400,000; correct?
A. That's correct.
Q. This would be consistent with his fiduciary duty; correct?
A. That's correct.
Q. And, at that point in time, we did not have the benefit of the appraisal that was Exhibit 18, did we?
A. I don't believe so.
Q. So it was also consistent, with Mr. Maile's fiduciary duty, to pay Mr. Johnson the appraised value for the property, wasn't it?
A. I have to assume something to answer that yes or no.
Q. Assume away.
A. I have to assume the -- the, you know, the validity of the appraisal, that the appraisal was done at

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the highest value, and use value, and those sorts of things. I don't know.
Q. You have no indication to suppose that -- or to come to the conclusion that the appraisal was not a good appraisal, to you?
A. I have never seen the appraisal until today.
Q. You're also aware that banks, when loaning on property, usually only will require one appraisal; correct?
A. Yes.
Q. Okay. You next pointed out -- well, so let's back up then. If, in fact, the appraisal is good, and there's no evidence to the contrary, then he was -- he met his fiduciary duty to his client to pay the appraised value, didn't he?
A. That part of his duty, yes.
Q. He didn't have to pay him more to meet that duty, did he?
A. No.
Q. Would you argue that, if he had tried to negotiate something less with Ted, he would violate that duty?
A. Yeah.
Q. So, in other words, if he said, 400 -- I'll pay you 390, but I won't pay you 400, that would violate

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his fiduciary duty?
A. I believe so.
Q. The letter that was sent to Eric Haff was copied to the clients, wasn't it?
A. To Mr. Haff's client?
Q. No. The letter that Mr. Maile sent to Mr. Haff, had a CC on the bottom that said --
A. Yes, it did.
Q. So his client was fully advised of what he was doing; correct?
A. Assuming he got the letter.
Q. You saw no evidence in this record to indicate that Mr. Johnson said wow, wait a sec. That's not what I want you to do; correct?
A. No.
Q. Even though the letter that Ms. Taylor directed you to indicated that there was a verbal commitment, from Mr. Johnson, to give Mr. Maile the first option to purchase the property, it's clear, from the evidence in this case, that Mr. Maile did not try to enforce that, did he?
A. He purchased the property for that amount. I'm not sure what you mean by didn't try to enforce it.
Q. The Franz Witte offer came in before the appraisal; correct?

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A. Yes.
Q. There is no indication, in the record, that Mr. Maile said, wait Ted, you told me you would sell me this property. So I want to purchase the property, and you shouldn't sell it to Franz Witte?
A. No. I don't recall reading anything like that.
Q. So, in fact, the evidence would tend to support the claim that he did not try to enforce the verbal discussion that they had had; correct?
A. I assume so.
MR. CHARNEY: No further questions.
THE COURT: All right. May the witness be excused?
MS. TAYLOR: Yes, Your Honor.
MR. CHARNEY: Yes, Your Honor.
THE COURT: Thank you, Mr. Grober.
THE WITNESS: Thank you, Judge.

(The witness left the stand at 11:54 a.m.)

THE COURT: Are you ready to call your next witness? We can take a five-minute break, if you like.
MS. TAYLOR: A break would be great.
THE COURT: Okay. Let's take five, and then you

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can call your next witness. Are we still on track to end by 2:00, do you think?
Ms. Taylor?
MS. TAYLOR: Pardon?
THE COURT: Do you think we're still on track to finish by 2:00?
MS. TAYLOR: I believe so, yes.
THE COURT: And, Mr. Charney, do you have a rebuttal witness?
MR. CHARNEY: Currently, yes. We'll discuss it.
THE COURT: Okay.
MR. CHARNEY: Thanks.

(Recess taken 11:54 a.m. to. 12:02 p.m.)

THE COURT: Please be seated.
Ms. Taylor, are you ready to call your next witness?
MS. TAYLOR: We are, Your Honor. We call John Wood.

JOHN WOOD,
called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION
BY MS. TAYLOR::
Q. Would you please state your name.
A. John Wood.
Q. Would you spell your last name.
A. W-O-O-D.
Q. Mr. Wood, where do you reside?
A. At 3390 Flint Drive, Eagle, Idaho.
Q. And how are you employed?
A. I work for a corporation called Park Hampton LLC.
Q. What position do you hold with Park Hampton?
A. Land acquisition and development services, in bringing the projects through the cities.
Q. And what, specifically, are your duties at Park Hampton LLC?
A. Coordinating with the engineers, the surveys, the applications to the City, and also presenting to the City, and getting the properties ready for development, to be sold to the open market.
Q. And does Park Hampton own any properties in the Eagle area?
A. It owns approximately -- about a hundred and -- just shy of 100 acres.

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Q. What stage of development is this land in?
A. All of them are in final plat. Some of them have been sold over the last year, which was Covenant Hill, off of Eagle. It was a joint effort with Hillview Development.
Q. How does the property Park Hampton already owns compare geographically to the Linder Road property?
A. It's all within the -- as the City would call it, is the mile -- the expansion mile property.
We have -- currently we have the property -- 16 acres of commercial, right across from the new Eagle Island State Park, that we've been working with the Parks Department and the State of Idaho, with the Governor's office, for the new entrance for Eagle Island State Park.
This land continues, goes up. There's about 350 homes behind Eagle High School that is -- some has already been through preliminary plat, some is through final plat.
And it's probably about less than a half mile away, this property.
Q. Mr. Wood, has your LLC made an offer to purchase the Linder Road property from the Johnson Trust?
A. We've -- we've asked to -- to put in an offer. But we have not put in an offer, because of the litigation, and where it stands with the lis pendens and

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the timing of the market of this property.
Q. Okay. Had you previously submitted an offer, through Doug Crandall's office?
A. Yes, we have.
Q. What was the amount offered?
A. 1.8 million.
Q. And that offer did not disclose Park Hampton as the purchaser, did it?
A. Normally, none of the properties that we buy will ever disclose Park Hampton from its initial buying.
Q. Why is that?
A. Because of the price of the land. When we bought it -- Flynn Estates, we had to buy ten 5-acre parcels in order to own the CC and Rs. There was 14 pieces of property. And as people know who is buying it, or actively looking at that, a lot of times the price will change. Whether it's a Wal-Mart coming to town -- you'll never know it is a Wal-Mart until the property has already been bought.
Q. So it's not unusual to make the offer through somebody else?
A. A lot of times. It's always done through attorneys, as a client, attorney-client privilege to -- to be able to make the offer.
Q. If you acquire this property, what would your

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plan be to do with it?
MR. CHARNEY: Objection; relevance.
THE COURT: Well, no. I think it is relevant, under this -- under the context. Go ahead. I'll overrule the objection.
Q. BY MS. TAYLOR: You can go ahead and answer.
A. The plans with this property would be to -- first, to go ahead and get it resurveyed, get the -- find out the water rights and the land use. Right now, in the City of Eagle and the county, this property is dedicated to five acres and above. It's on what they call -- north of Beacon Light and East of Linder, which will all be staying 5-acre parcels.
Then, what we would do is, we would go in and redesign the property. We would -- right now, the current plat is long, pinwheel, narrow lots.
Q. Okay. And there's a copy of that in the notebook up there by you, if you would turn to Exhibit No. 122.

(Witness complied.)

Q. BY MS. TAYLOR: Can you explain to the Court what you mean by your reference to pinwheel lots.
A. If you look the way the lots are designed in

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the front, they're very narrow in the front and very wide lots in the rear. And for long-term marketability, and for the properties to hold their resale value with the market, 5-acre pieces normally are a -- have to be a square, long entrance.
When people drive up the driveway, they like the feel -- of the marketing side is, they like to feel that they have a large piece of land, and a -- where their home sits as a focal point of the land, and not a narrow driveway with fences bordering each side.
Q. Is that the reason why you would have the land replatted?
A. I would immediately have it replatted, and I would make a more of a grand entrance on the front. And redesign the road, and put a loop road in there, and -- except a straight road back, for marketability and for long-term value, to hold its value.
Q. So, in making a determination to offer $1.8 million for this property, did you take into consideration the improvements that have been placed on it up to this point?
A. Basically, the improvements that are on the property right now -- anytime that we buy a piece of property, or if we buy something that has already been preplatted, we take an accountability that we more than

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likely will not use any of those improvements, as -- so that we can know how to maximize our dollars and be able to improve the best value for the land.
Q. So does the offer, as it sits, include additional value because of the improvements?
A. No. It does not.
Q. Is this offer any more than you would pay if it were just raw land?
A. No. It would not.
Q. I would like to have you turn to the photographs that are at Plaintiff's Exhibit No. 133.
To lay a foundation, have you been to this property recently?
A. Yes, I have.
Q. Can you just look through those photos and tell me if they're a true and accurate depiction of the condition of the property?
A. Yes, they are.
Q. Specifically, does the barn that's on the property now add any value to it, for your purposes?
A. No. The preliminary look of the barn, there's no value to it, nor would it be the type of subdivision that would allow that type of barn there.
Q. What is the problem with the barn, as you see it?

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A. The way it sits on the property and, also, it's -- as we all can tell, it's been opened and weathered. And it's just in the wrong placement of the property.
Q. So is there any value to the barn at all?
A. No, there's not.
Q. Will you have to pay to have it removed?
A. Almost all -- like on Flynn Estates, on the parcels down there, that we will put a sign out front and a lot of times we can get people to get the stuff moved off. They'll come in and move the stuff off for materials.
Q. And would you have any objection to Mr. Maile removing this barn?
A. No objection.
Q. Okay. I would like to go back to the road. Is it Park Hamilton's intention to leave the road where it is located?
A. No. We were -- had a tentative with Toothman-Orton, have done an initial sketch. It would be a loop road.
Q. This may be obvious, but if you're replatting, will the existing lateral lines for power and gas, telephone, things like that, be left in place?
A. They will be -- try to be, on the new plat.

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We'll try to keep them, if we can. But more than likely, with new lot lines drawn and new roads, that they will have to be moved, maybe 30 feet one way or 30 feet the other way.
Q. Is -- is your pending offer, will it remain open indefinitely?
A. It will. The only thing that I am worried -- and I believe that most people in this Valley, in Park Hampton, or Capital Development, or anybody, is that, especially in Eagle, like Correnta Bello and Covenant Hill, that the buyers are backing out faster than -- you know, the lots were reserved -- a lot of the lots in the new subdivisions that are on line were reserved nine months, a year ago.
Now that these projects are finished, Covenant Hill's only had five close and Brentabello, I believe had about 20 more builders walk away last week. So, the market is changing fast. It wasn't like it was nine months or a year ago, when you had a piece of property and somebody would come in and buy it.
Q. Is there any possibility that this offer will be withdrawn if the litigation isn't concluded so you can buy it?
A. It depends on the length of the litigation and the -- the climate of the market.

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MS. TAYLOR: I have no further questions.
THE COURT: Mr. Charney, you may cross-examine.

CROSS-EXAMINATION

BY MR. CHARNEY:
Q. Good afternoon, sir. How are you?
A. Good afternoon.
Q. How long have you worked for Park Hampton?
A. For two years.
Q. Where were you prior to that?
A. My family owned -- we still do -- we own 17 body shops in California.
Q. So you have only moved to Idaho in the past two years?
A. Three years.
Q. Three years. I'm sorry.
When this property was sold to Mr. Maile, then, you didn't even live in this area, did you?
A. 2003 is when we first moved up, yes.
Q. Since you have moved here, you have become somewhat familiar with the value of property in this particular area; correct?
A. 90 percent of this area; correct.
Q. The property, as it exits now, is split into lots that are slightly larger than five acres each; correct?
A. Correct.
Q. That is consistent with the zoning requirements in this particular area; correct?
A. That's -- yes.
Q. To turn these 40 acres -- it's a little less than 40 acres, but let's call it 40 -- to turn these 40 acres into almost track housing, if you will, would be next to impossible under current zoning laws?
A. It's -- it's totally impossible, yeah.
Q. So the best use that you could make of this parcel, in that area currently, would be 5-acre lots?
A. That -- at this point in time, that's the only thing that is -- and the City of Eagle has been through two comp plan changes, and it's still there.
Q. What steps have you taken to check into the septic requirements that are in this particular area?
A. The septic, I have not checked into.
Q. You have no idea about the septic?
A. I do know that it's 1.8 acres and above, in the City of Eagle.
Q. For a requirement; correct?
A. For a requirement.
Q. You also know that there is not sewer that has been brought out to this particular property yet?

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A. I'm very aware of that.
Q. You don't know anything about the water table problems that currently exist on this 40 acres, do you?
A. The water table that I do have, I have actually -- the water table on State Street, which is down the road from this --
Q. I'm talking about this particular area.
A. Right. This particular area, no.
Q. Okay. You weren't aware of the fact that Mr. Maile actually designed this pinwheel pattern because of the septic requirements and the water table in this area; correct?
A. I -- from my knowledge, I don't believe that there is a water table problem up there.
Q. But you don't know this, do you?
A. No. But a friend of mine owns the property across the street.
Q. So, you are speculating, now, on what some friend of yours told you about the property; correct?
A. Yes.
Q. All right. So, your knowledge --
A. And he's a professional.
Q. So, your knowledge, sir, is you don't know anything about the septic requirements or the water table issues on this particular parcel of property, do you?

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A. No. I do not.
Q. You don't know that Mr. Maile chose the pinwheel design to accommodate the high water table and the septic requirements for this area; correct?
A. No. I do not.
Q. You also don't have any guarantee, from the City, that you, in fact, would be successful in replatting this property to fit the 5-acre lots that you envision would be more saleable?
A. That's false. I've spoken to the City many times on this property.
Q. And they've guaranteed you you could replat it that way?
A. Correct.
Q. Okay. And you've got documentation to back that up?
A. No. But I -- I'm at the City on a biweekly basis.
Q. Okay. Once you replatted this, what would be the value of the lots?
MS. TAYLOR: Objection; relevance, beyond the scope of direct.
MR. CHARNEY: He's talking about he wants to come in and rip this whole thing apart and start from scratch. So, I would like to know why this individual would choose

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to do that as opposed to selling it in its current condition.
THE COURT: I'll overrule the objection.
THE WITNESS: The -- the target market would be about 350 to 450, depending on -- on the lot. The problem, now, anytime that you do a subdivision, say down Beacon Light, now Osprey or any of the others, is your resale.
Q. BY MR. CHARNEY: Okay.
A. Right now, the resale value, the way these are designed, would be very, very tough sales at the current design of it.
Q. But you don't know whether or not somebody would or would not purchase these lots currently, do you?
A. Right now it would be a very tough sale.
Q. You're saying that once you have replatted it, that the lots would be worth anywhere from $350- to $450,000?
A. Correct.
Q. What's the current value of the lots?
A. At the current value, we're probably looking about -- probably the 250, 275. But that is also with improvements which, if you look how long the certain properties are, the fencing and the buffering requirements would eat a ton of that to start out.

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Q. But, nevertheless, you're saying current value of these lots is 250 to 275,000. And if you were successful in replatting, you could sell them for 350 to 450?
A. Correct.
Q. So, roughly about 100,000 more per lot, give or take?
A. Well, the main thing here is -- I think what you're missing is, it's the resale value. You can buy something, but it's to have the people that can build the estate home on the property, so they could get the proper value down the road.
Q. You've made no application, though, to the City, to actually have this replatted; correct?
A. No.
Q. And you don't know where, if you were to replat this into these lots that you envision, the septic would have to be required on each lot; correct?
A. The septic will be required on each lot.
Q. Right. But you don't where, on each lot, the septic would wind up having to go; correct?
A. Well, I've -- I've spent -- I don't want to get exact, but huge amounts of dollars with Toothman-Orton, which is an engineering firm here in town, and all the way up to Floating Feather.

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And just with doing Covenant Hill, next to the middle school up there, we have had no seepage or water issues, anything, from about the high school up north.
Q. Okay. So your view is, you could replat this into squares, as opposed to a pinwheel, and you could get a septic permit for each lot?
A. Unless there was something out there that we did not know.
Q. We'll talk about that later.
MR. CHARNEY: Thank you. No further questions.
THE WITNESS: Thank you.
THE COURT: Now, hang on a second sir.
Do you have any redirect examination?
MS. TAYLOR: I don't.
THE COURT: May the witness be excused?
MS. TAYLOR: He may.
THE COURT: All right, sir. You are excused. Thank you.
THE WITNESS: Thank you very much.
THE COURT: And you can just leave those right there. Thanks.
THE WITNESS: Thank you.

(The witness left the stand at 12:21 p.m.)

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THE COURT: And, Ms. Taylor, you may call your next witness.
MS. TAYLOR: Call Terry Rudd.

TERRY RUDD,
called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MS. TAYLOR:
Q. Would you state your name, please.
A. Terry Rudd, R-U-D-D.
Q. Mr. Rudd, how are you employed?
A. A real estate appraiser.
Q. Can you give the Court the background on your real estate appraisal experience.
A. Well, I started in 1957 for the Forest Service. And, in 1963, I went into business with Mr. Tom Clifton, here in Boise. We had an office here on State Street and one in Lewiston. And we started appraising timberlands, highways, right of ways, power lines.
And, eventually, he retired and I took on

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another partner and worked, in the '70s, on lands throughout the Idaho, Washington, Idaho, Montana area. Obtained an MAI designation. Kept appraising counties all across the United States; Tennessee, Nashville, Mobile, Alabama, Nebraska, Washington, Oregon, and Idaho.
. Then sold that business, in 1988, and went into appraising, with myself and my son, which I've been doing ever since out of my home in Clarkston.
Q. And during the course of that, have you had continuing education?
A. Oh, I've taken 15 to 20 classes. They require -- well, the initial education for the MAI designation was about 200 hours of classroom education, plus demonstration reports and exams. And then, since then, I have been obtaining about 16 to 20 hours per year, as required by all three states, for education.
Q. And what states are you certified in, presently?
A. Idaho, Washington, and Oregon.
Q. Have you also taught continuing education classes?
A. Well, I've taught three different courses; one at the University of Idaho, another for Lewis Clark State College. And the other was a private course that I gave on bell curve appraising.

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Q. Mr. Rudd, are you familiar with the property located on Linder Road that is currently owned by the Johnson Trust?
A. Yes.
Q. How did you first become familiar with that property?
A. Someone from your firm, either yourself or Tom, asked me to appraise the property, which involved a trip to Boise. I went out and inspected the property, with Dallan Taylor. And I contacted realtors, went to the MLS and looked at comparable sales, and then came up with a value determination.
Q. And are -- is the contact with realtors and looking at comparable sales in the MLS the type of information that appraisers normally rely on in forming their opinions?
A. Yes.
Q. Did you prepare an appraisal report as a result of your review of the property?
A. I completed the appraisal. And then I verbally relayed the information to your firm. And then it was requested that I produce a minimal report, which is a restricted use report.
Q. Okay. Do you have that report with you today?

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A. Yes.
THE COURT: Will he be needing the Plaintiff's exhibits that are in the notebook?
MS. TAYLOR: Maybe a couple of them. I'll probably have him look at the plat and the photos.
THE COURT: Okay. As long as they're kept all together, they're fine.
THE WITNESS: Do you want me to work out of the exhibit book or out of my file?
Q. BY MS. TAYLOR: No. I was just asking if you have the report with you.
A. Yes.
Q. Okay. Was this report prepared in the course of your ordinary business dealings?
A. Yes.
Q. Was it prepared near to the time that you actually did the work?
A. Yes.
MS. TAYLOR: Your Honor, I would move for exhibit -- for admission of Plaintiff's Exhibit 135.
THE COURT: Any objection?
MR. CHARNEY: Yes, Your Honor; foundation. The report is actually quite vague, because it doesn't even say anything about the value as to what date, nor have they tied it to any relevance issue in the case at this

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point.
THE COURT: All right. I'll sustain the objection, at this time, and give you leave to lay additional foundation.
MS. TAYLOR: Okay.
Q. BY MS. TAYLOR: Mr. Rudd, what was the effective date of your appraisal?
A. January 10, 2002.
Q. And why was that date selected?
A. I'm sorry?
Q. Do you -- are you aware of why that date was selected?
A. Only in general terms.
Q. And what was your understanding?
A. That it was a date mutually agreed on between the parties involved in this case.
Q. So is this your appraisal of the value of the Linder Road property as of July of 2002?
A. Yes.
Q. Okay.
MS. TAYLOR: Your Honor, I believe the relevance is clear. We're --
THE COURT: Okay. Now, this is July 10, 2002; is that what you said?
MS. TAYLOR: Correct.

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MR. CHARNEY: You said January, I thought.
THE COURT: I wrote down January. I thought that's what he had said, as well. Is it as of July 10th or January 10th, Mr. Rudd?
THE WITNESS: July.
THE COURT: July 10, 2002.
MS. TAYLOR: And that effective date is on the face of the appraisal that they have.
THE COURT: Okay. And it's your contention, Ms. Taylor, that you have -- that this witness -- that the property that we're talking about is the Linder Road 40 acres that we -- that is the subject matter of this litigation?
MS. TAYLOR: Correct. And that we have two other appraisals already admitted relating to it.
THE COURT: All right.
Go ahead. What's your objection, Mr. Charney?
MR. CHARNEY: The objection would be relevance. Unless the Plaintiffs in this case can tie knowledge of the information contained in this appraisal to Mr. Maile, it would not support their doctrine of unclean hands defense to the unjust enrichment claim.
So, I think that there would need to be additional foundation laid, that Mr. Maile was aware that

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this opinion existed, which I don't think it even did at the time, and that he, in violation or knowing violation of what this report says, engaged in conduct to the contrary.
THE COURT: Good argument. However, what I'm going to do is overrule the objection. I'm going to allow it, for what relevance that it has. And if, as Mr. Charney contends, the Court should discount the exhibit because you failed to tie it in, Ms. Taylor, I'll take it into account as well.
But I'm going to overrule the objection and admit, now, Plaintiff's Exhibit 135. It is admitted.
MS. TAYLOR: All right.

(Exhibit No. 135 is admitted.)

MS. TAYLOR: Thank you.
Q. BY MS. TAYLOR: Mr. Rudd, before we get into detail on your appraisal I would like to ask you, have you viewed this property recently?
A. Yes.
Q. And in addition to your appraisal report, are you prepared to testify as to whether there is any value to the improvements on the property?
A. Yes.

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MR. CHARNEY: Well, we'll object to that, because that has never been disclosed.
MS. TAYLOR: Actually, it was.
THE COURT: Go ahead, tell me how.
MS. TAYLOR: Supplemental disclosure of witnesses dated September 22, '06. The Court will recall that they -- they got leave to extend their disclosure.
THE COURT: Right.
MS. TAYLOR: Specifically states, on Terry Rudd, in addition to testimony from prior affidavits and his deposition, Mr. Rudd would be called to rebut the opinions of Joe Corlett, as set forth in Defendants' discovery responses and his -- Corlette's appraisal, and to testify to his expert opinion as to the value or lack thereof of the Defendants' improvements to the Linder Road property.
MR. CHARNEY: That doesn't satisfy 26(b)(4) disclosure. That was practically the same disclosure i read to the Court yesterday about Joe Corlett, and you struck all that testimony. That does not satisfy the 26(B)(4) disclosure, if that's what they're talk -- going to start talking about is the specific dollar value.
THE COURT: Well, your objection was not that it -- that -- your objection was that the question that was asked this witnesses was beyond the scope of the

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disclosure, not that it was too thin.
Do you see what I mean? Not that -- the objection that I hear you making, now, is there's not enough data that was -- you know, that was disclosed.
Is that your objection now?
MR. CHARNEY: Well, it depends on what they actually intend to elicit from the witness. If they're going to try and elicit from the witness that the value of the raw land is X, in today's dollars, and the value of the developed land is X, as it exists today, or that -- then that's exactly what you struck yesterday on nearly an identical disclosure.
So there -- he has provided no data supporting that, he has provided no actual figures for us to come to trial and be prepared to defend against. And maybe they're not intending to go there, but I'll make an appropriate objection when they attempt to cross that bridge.
THE COURT: All right. I think that the disclosure that was made, on the expert witness disclosure, did properly notify Defendant/ Counter-Claimants, the Mailes, that this witness would be testifying about the -- his opinion on the value of the improvements.
Now -- but you're saying the value -- he is

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here to rebut Corlette's testimony. And if Mr. Charney is correct, and I struck all of Corlette's testimony, then what is there to rebut?
MS. TAYLOR: We didn't strike Mr. Corlette's testimony about the value of the improvements.
THE COURT: Right.
MS. TAYLOR: And we were not planning on asking Mr. Rudd any questions on the current value of the property. We'll only question him on his opinion on the value of improvements, to rebut Mr. Corlett, and on his appraisal of the value as of the time that the transaction was entered into, and that is to rebut the appraisals that the Defendant has entered into evidence.
MR. CHARNEY: That's okay with me.
THE COURT: All right. Go ahead.
MS. TAYLOR: Okay.
Q. BY MS. TAYLOR: Mr. Rudd, I would like to start with the improvements that have been made to the property, if that's okay?
A. Okay.
Q. Can you tell the Court when you visited this property.
A. The first time was in the early fall of 2004, September, 2004.
Q. Have you been back since that time?

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A. Yes.
Q. Can you look at the photographs that are in the Plaintiff's Exhibit notebook, up there, under 133, and just flip through those, please.
A. Okay.
Q. Do those appear to be a fair and accurate depiction of the current condition of the property and the improvements?
A. Yes.
Q. Okay. I would like to start with the value of the barn. In your opinion, as the barn sits, what value does it have?
A. It would have two values, depending upon whether we include it with the sale of the property, in that case it would be negligible, or whether we sold the improvements separately.
Q. Okay. I'll represent to you that the prospective purchaser of the property was here just before you and testified that, as far as he is concerned, the barn has to be removed.
A. Well, that would be the case -- in its contribution to sale, that would most likely be the case.
Q. Okay.
A. It's a negligible part of the whole property value. It's not situated as the average person would

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locate it. It is a typical type of barn for that neighborhood, however. I disagree with that design, but it's -- it's somewhat typical. So, in a sale, the contribution would probably be next to nothing.
Q. All right. I will also ask you to assume that the prospective buyer has indicated that he intends to have this property replatted. Are you familiar with the manner in which the property is currently platted?
A. Yes.
Q. I believe that is in your exhibit book under 116.
Oh, wrong number.
MS. TAYLOR: If I can have a moment, Your Honor?
THE COURT: All right.
MS. TAYLOR: 122.
THE WITNESS: I have it.
Q. BY MS. TAYLOR: In your -- can you tell the Court your opinion on this type of platting and the impact it would have on the value of the property.
MR. CHARNEY: Objection; foundation.
THE COURT: If the witness understood the question, he can answer it. I'm going to overrule the objection.
Did you want to be heard?
MR. CHARNEY: Just a little.

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THE COURT: All right.
MR. CHARNEY: If you factor in the governmental requirements and the issue regarding the high water table and the septic, that would have to be part of his opinion.
THE COURT: Well, I'll let him render an opinion. I think there has been sufficient foundation laid for his rendering an opinion, within the scope of Ms. Taylor's question. You certainly have an opportunity, on cross-examination, to attack that opinion.
Go ahead.
THE WITNESS: If I could answer in this way, the market, today, would not accept this layout, because of the configuration of lots. They're narrow, triangular, long fencing, it would be placing the houses too close to each other. But it was an inexpensive way to develop the road system and then, later, to distribute the irrigation water. And in previous years, more back towards the date of the appraisal, it was more accepted than it would be today.
Q. BY MS. TAYLOR: How has the market changed?
A. People are more desirous, they found out because --
MR. CHARNEY: Objection; foundation. He's not talking about this market. He is not tying it to this

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particular market, Your Honor.
THE COURT: Well, I'm going to overrule the objection. As I understand the witness' testimony, he is comparing -- he is talking, specifically, about the market for this type of layout in 2002; is that correct, Ms. Taylor?
MS. TAYLOR: Correct.
THE COURT: Okay. I'm going to overrule the objection.
THE WITNESS: I looked at about 10 or 15 different subdivisions on the west side of Eagle, and that's the basis of my opinions. I drove into them, looked at the places, and I did see some of this vintage, that were laid out similar to this.
But the fencing and the problems that I mentioned have become apparent to the people that have lived there, and the homes have become more valuable. People are building $800 to a million dollar homes on these properties, and they want a little more room away from the road. They want the estate looking -- coming up to their place, and they want some -- some side room to the adjacent homes.
So the patterning has changed in the layout currently. That was what I noticed along Linder and I noticed west of Linder where the newer developments are

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occurring.
Q. So, based on the assumption that this would be sold to someone who would completely replat it, what value would you put on the road as it sits?
A. Very little. It would only be the salvage, and in sale, probably no contribution. But, salvaging it, there would be the electrical pedestals. I don't know that pulling up any of the sewer line, the irrigation system, there may be a pump, there, in the reservoir, you know, that could be salvaged out. But it would be strictly a low value proposition, something no more than 20-, 25,000.
Q. Mr. Corlett expressed the opinion that these improvements are currently worth $220,000. Would you agree with that assessment?
A. He may be viewing that strictly in the cost approach manner. And the cost approach only applies if the market is going in that direction. And I don't think the current market is.
It was, perhaps, a little more so at the time -- the appraisal, back to 2002. But even then, it was an in expensive way to lay out the subdivision, but it wasn't bringing about its highest and best use or price.
Q. And the developer who testified before you

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felt that this layout would have an adverse impact on resale possibilities. Would you agree with that?
A. Well, the market is so hot that anything would sell there. But these lots would definitely sell less, you know, both today and then, as a result of that layout. In fact, I'm not too sure the first lot -- well, I won't say any more. I just think one of those lots might be way reduced in value because of its location.
Q. Well, go ahead and finish that thought.
A. Well, I just thought it was strange that the barn would have been situated on that northern lot, and it was not -- well, I guess not much more than five acres. And that kind of spoils the development for everyone else, when all the other homes that are west of Eagle, like this, have the barns behind the home, and they're better quality, better construction, and a better appearance.
It's just sort of like having the barn in front of your house, the cart before the horse.
Q. Okay. In looking at the condition this barn is in, can you describe it to the Court.
A. It's a low-cost, frame pole construction, with wood siding, asphalt shingle roof. It's a broken Gambrel design, with hay storage above, in part, but not

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all of the interior of the barn.
It looks like the stalls would be constructed. One-third of the concrete floor was in, the other two-thirds had the rebar in and the grade, but they weren't finished. All the siding wasn't finished. The electrical was roughed-in, but not completed.
I didn't see the main doors on. I didn't see any side paddock doors. I didn't see any other finish, or the restrooms, or things that you would expect to find in a building like that. I don't know the status of a septic field, or a well for the water for it.
I did see the road coming into it. We had to drive across the field to get to it. Willing to walk, but I wanted to see how they were getting in there.
Q. There is not a road to the barn, is there?
MR. CHARNEY: Objection, she's testifying.
Q. BY MS. TAYLOR: Is there a road to the barn?
A. I didn't find one. But there must have been one, because there's quite a few materials there. But it wasn't completed; it wasn't graveled. However it's laid out was contrary to the design of the lot.
The roof was in good condition, though. The roof was the best part of it.
Q. Did you notice any deterioration in the building?

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A. The siding was a minimal paneling. And, of course, without insulation, without having the inside finished, and I didn't see Tyvex on it, it's starting to deteriorate. But nothing major, yet.
Q. Okay. In Joe Corlette's appraisal, did you see any indication that he had done any depreciation or accounting for the deterioration?
A. I don't remember seeing it. It may be there, but I didn't see any.
Q. Okay. I would like to move on to your appraisal now. We're looking at Plaintiff's Exhibit No. 135.
Can you describe to the Court --
A. I don't have 135.
Q. Well, that's your appraisal.
A. Oh, okay.
Q. I haven't put it in that book yet.
A. Okay. Well, I've got that, of course.
Q. All right. Can you describe to the Court the steps you went through in determining the value for this property as of July of 2002.
A. I went out, I viewed the property. I drove around the edge of it. Drove down the canal on the north and the east sides. I walked in part of it. And then I met Dallan Taylor, and he showed me the road and the

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interior ponding area. I didn't know the lot layout at that time.
And I took pictures of the surface, looked at what -- how it had been cropped before, the lay of the land, the level general elevations. And then I drove around the immediate neighborhood. I looked at the other properties, what was being developed, what kind of values were being implanted into homes.
Then I stopped and talked to several realtors -- I'd get into more detail on that, as necessary -- asked them about what property values were in 2002. Of course, what they were at the time I looked at it, in 2004.
They gave me comparable sales off the MLS. They gave me some listings, which subsequently sold. Some I included in the appraisal, some I hadn't. I also looked at lots that had sold, what kind of prices, what their sizes were.
And then I drove into the field, looked at all the comparable sales that I had. Drove to each one of them. Later called and talked at least one or two of the owners, the buyers or sellers, picked up fliers on other lots for sale, other homes that had sold, different subdivisions.
And then I came home -- actually, I was doing

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some of -- a lot of this by phone and contact, although I did meet approximately three of the realtors in person -- and verified what the values were, at the time, for various properties, how hard they were to develop, where the water and the sewer was, what they planned to do for roads, how they were going to develop and lay them out, and discussed even the subject property, about what its value was back in 2002, what values were in 2002 in the marketplace.
And then I prepared a graph in which I plotted the sales that I had researched, by acre.
Q. Can you give me a second to catch up?
Is that graph included in your appraisal report?
A. It's the last page, before the curriculum vitae.
Q. Okay. I'm sorry, I interrupted you.
A. No, that's okay.
Q. Can you explain to the Court what this graph is.
A. That page shows all the sales that I obtained and investigated, to various degrees, and located on here by size and price per acre. And then I drew a median line through the sales, and I prepared a sale analysis, which was based on six sales.

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I then abstracted three, that I discussed. No. I discussed all six in the appraisal. And I had adjusted them in a grid, which I don't see a copy of in the appraisal, but that I described, in narrative, in the appraisal, percentage adjustments of those sales back to the subject property.

And the range that I arrived at was from $19,000 to $23,000 per acre for the subject property, as of September of 2002.

Q. Well, the cover page says it's July of 2002; is that --

A. Yes, I'm sorry. Right, July of 2002.

Q. All right. So, in your report, using the value by acreage sale, what value did you reach for this property, as of July of 2002?

A. $20,600 an acre.

Q. And that would be how much for this parcel, how much total?

A. Well, assuming there's 40 acres -- and I know there's a difference of opinion. I did not personally survey or measure it -- I came out with $820,000.

Q. I note that some of the comparables you have used are for either larger or smaller parcels. How to you factor that into your analysis?

A. This graph did all the work. I've made

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hundreds of them, in communities all across the United States.

By plotting the size and the price, then the larger parcels, I usually have them on the right, progress to smaller parcels on the left, and the price just climbs.

This graph doesn't show it, but the one in the appraisal report shows the median line, shows how the prices climb as acreage becomes smaller. And that's quite typical in almost all real estate markets.

Q. Do you also enter an adjustment, depending on the availability of sewer?

A. In general. But in most cases, the buyers were only generally aware of how far the sewer was from the property. And a lot of the properties weren't percing, so the sewer became fairly critical, in some people's minds. In others, septic systems and drain fields were acceptable and didn't really influence the price as much as did the particular zone, the size of the parcels that would be allowed at that location.

The view of Bogus Basin seemed to be the biggest concern, the fact that they were in the Eagle zip code and within its area of impact, even back to 2002, seemed to be the main concern.

Q. You talked about considering the zoning on

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the property. How does that play into valuing it?

A. Most of the people it didn't, to any great degree. Because the City -- and I talked with the mayor yesterday -- they have a particular idea and a plan in mind. And they will change the zoning, because they have, within their area of impact --

MR. CHARNEY: Objection; hearsay.

THE COURT: Sustained.

MS. TAYLOR: Okay.

Q. BY MS. TAYLOR: Let me narrow the question down a little bit.

In looking at comparable sales, is it important to look at ones that are -- that were zoned in the same category as this property?

A. Yes and no. Generally, it's quite important. In this particular case, the location seemed to be as much, or more important, because the two general zones, RR, rural residential, and RUT, urban transitional.

So, although there is a difference in the allowed size, the City's desire to have the properties developed in a certain manner was the most important objective.

MS. TAYLOR: I have no further questions.

THE COURT: All right.

Mr. Charney, you may cross-examine the

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witness.

CROSS-EXAMINATION

BY MR. CHARNEY::

Q. Good afternoon, Mr. Rudd. The report that you prepared was prepared for Ms. Taylor; correct?

A. Yes.

Q. This was not prepared at the request of a bank or anybody who is not a party to litigation trying to convince one side or another about the value of the property; true?

A. True.

Q. You have also done other work for the Taylors in the past; is that fair to say?

A. Yes.

Q. And for this law firm, their law firm, in the past?

A. Yes.

Q. Your primary area of work as an appraiser is not this local area; true?

A. Incorrect.

Q. Your primary work is the Treasure Valley?

A. No.

Q. Your primary --

A. It's part of my primary area.

Q. Right. Your primary area is northern Idaho,

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Washington, and Oregon; correct?
A. Montana.
Q. And Montana?
A. Right.
Q. In fact, you have done only a few appraisals in the Treasure Valley area in the course of your career; true?
A. True. But my son, who opened an office --
Q. Answer my question. Is it true?
A. Partially.
Q. All right. You used -- or you came to an opinion that the value of the property was $820,000 at the time of the sale; correct?
A. I did.
Q. However, when you appraised that property, and you came to that conclusion, that includes the development costs of the property, doesn't it?
A. It includes -- it's as existing that date.
Q. But it included the costs of getting it developed into 5-acre parcels as well?
A. Absolutely not.
Q. All right. So when you testified at your deposition, you were questioned as follows: When you appraised this Linder property -- Linder Road property, does that appraisal include what you perceive the

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development costs would be?
Your answer being, it does, but undefined and undetermined.
Was that the truth then, or is it the truth today, that the development costs are included or not?
MS. TAYLOR: Objection; argumentative.
THE COURT: Overruled.
Did you understand the question?
THE WITNESS: I understood his question. But I -- in the deposition, I didn't fully understand what that attorney was asking me.
THE COURT: All right.
THE WITNESS: So.
THE COURT: Well, I'm going to ask you to restate your question, Mr. Charney.
MR. CHARNEY: All right.
Q. BY MR. CHARNEY: You were asked a question, when you appraised this Linder property -- Linder Road property, does that appraisal include what you perceive the development costs would be? And your answer was, it does, but undefined and undetermined.
Was that the question and was that the answer --
MS. TAYLOR: Counsel --
Q. BY MR. CHARNEY: -- yes or no?

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MS. TAYLOR: Counsel, can you give me a page number and line, please?
MR. CHARNEY: It would be page 47, it would be line 1 to 3.
Q. BY MR. CHARNEY: Was that the question and was that the answer?
A. Well, now you're confusing me. That was my answer.
Q. All right.
A. And I think that was the question.
Q. And later on was the question posed to you: And does your appraisal reflect the value of that additional cost?
And your answer: In theory, through the eyes of the market it does.
And then the question: But you can't put a finite dollar value on it?
And your answer: I could have. I wasn't asked to do that; correct?
A. Correct.
Q. Okay. Your comps that you utilized, you did not look at those comps to find out what their proximity was to the sewer and other types of facilities, did you?
A. Yes.
Q. And that's reflected in your report, then,

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isn't it?
A. I did.
Q. No. Is that reflected in your report?
A. Yes, it is.
Q. All right. And let's take, for example, sale No. 1. 10.5 acres, sold September 5, '02, from Below to Mahaffey, for 283,500. And then you go on to talk about it, but there's no indication in there as to it's proximity to sewer; is there?
A. This was not required in the report.
Q. Okay. So, my question is, nowhere in your report do your comps reflect their proximity to sewer, do they?
A. It's not stated there. But that doesn't mean I didn't do it in the appraisal, which is a separate function.
Q. No, no. It's not even found anywhere in you're report, is it?
MS. TAYLOR: Objection.
THE WITNESS: It doesn't matter. It's in my -- I did it in my appraisal.
Q. BY MR. CHARNEY: Sir, I'm not asking you --
THE COURT: Hang on a second, Mr. Charney.
MR. CHARNEY: Okay.
THE COURT: I have to entertain this objection.

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Go ahead.
MS. TAYLOR: I would like to object. He's mischaracterizing the report. If you look at sale No. 2, sale No. 3, they both talk about being close to sewer.
MR. CHARNEY: No. He doesn't --
THE COURT: They both talk about what?
MS. TAYLOR: They both talk about whether it is -- how close it is to sewer, whether the price has been adjusted, depending on the proximity to sewer. He's mischaracterizing the report.
THE COURT: Well, I don't know if he is or not, but let's do this. I'm just going to ask you to slow down, somewhat, Mr. Charney.
MR. CHARNEY: All right.
THE COURT: And if there is an objection to a question, Ms. Taylor, interpose the objection, and then I will instruct the witness not to answer the question if an objection is interposed, so I can handle that; okay?
So, Mr. Charney, go ahead and take another run at this line of questioning, if you care to.
MR. CHARNEY: I will.
Q. BY MR. CHARNEY: As far as your appraisals go, none of the comps that are reflected in there talk about a specific distance from sewer, do they?

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A. Are you referring to the report or the appraisal?
Q. Whatever this exhibit is, sir, appraisal report.
THE COURT: Exhibit 135?
MR. CHARNEY: Yes.
THE COURT: Okay.
THE WITNESS: Okay. The report doesn't.
Q. BY MR. CHARNEY: All right. The comps that you have utilized are also ones that have already been split and have entitlements; correct?
A. No. Many don't.
Q. Which ones of the 1 through -- you have skipped 4 and 5 in your report. It goes 1, 2, 3 and then 6, 7, 8.
Which of these properties were not entitled?
A. Comp No. 1 was a 10.5-acre transaction.
Q. Yes. Was it or was it not entitled?
A. May be split once.
Q. Do you know that for sure, or are you guessing?
A. No. That's stated right in the MLS report.
Q. That's appended to this report somewhere?
A. No. It's right on the appraisal, right on the MLS report.

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Q. So, if it has been split, it's got its entitlements; right?
A. Well, I don't know. It depends on what you consider entitlements.
Q. A permit to build a house there?
A. Well, maybe there is and maybe there isn't.
Q. So you don't know?
A. I didn't invest -- it's not required to investigate. I don't know.
Q. Sir, I'm not asking you what is or isn't required. I'm asking you, are these properties entitled or not? That's a fair question. So, you're saying you don't know with respect to No. 1.
Let's move to No. 2. Was this property entitled or not?
A. Well, define entitled to me --
Q. Going through the --
A. -- so I know for sure.
Q. Going through the process of obtaining the appropriate permits, platting from government agencies, so that one can actually construct a home or some other structure on the property.
A. Every single property will be able to construct at least one home.
Q. Okay. The question being -- is, which of

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these have been split in a manner that has increased their value, so that you can have higher density?
A. None.
Q. All right. So, in other words, No. 2, the 78 acres, has not been split?
A. No.
Q. It has no entitlements. It's raw land that sold for $20,536 an acre?
A. Absolutely, yes.
Q. And you're convinced of that fact?
A. I know for a fact. I talked to the buyer.
Q. Okay. Now, I noted the absence of an 80-acre parcel, in your report, that was only four miles from the Linder property, that sold at about the same time.
Are you familiar with that property?
A. I have no idea what property you're talking about.
Q. I would be talking about the other 80 acres that were owned by Ted Johnson at his death, that was sold to these -- one of them, these other individuals that were sitting in court.
A. That's the piece that was questioned -- I was questioned about in the deposition.
Q. Yes. The 80-acre parcel that sold for $425,000. Why isn't that factored into your --

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MS. TAYLOR: An 80-acre parcel that sold for what?
MR. CHARNEY: For $425,000.
Q. BY MR. CHARNEY: You didn't include that sale in your report, and I'm curious to know why?
A. I don't know if the parties -- I thought the parties were a family --
Q. And --
A. -- affair. Well, family transactions, in the appraisal world, are considered to be prejudiced and not a fair reflection of the market itself. They may or may not be.
Q. So these individuals, you assumed, did not pay fair market value for 80 acres, and so you didn't include that in your report?
A. At the time --
MS. TAYLOR: Judge, I will object on relevance.
THE COURT: Overruled. I think it's fair enough.
THE WITNESS: I'm not sure, at the time -- Dallan mentioned the sale to me, but he said it was a family sale. So I didn't really investigate the terms or the price.
Q. BY MR. CHARNEY: What is a family sale, in your view?
A. Well, it's a sale from a father to a son, or brother to his sister, or some relation where there's

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often other consideration; love, affection, and some other consideration that goes into the sale, other than the actual price.
Q. All right. So based on your analysis here, that these 40 acres were worth $820,000, and assuming that they paid $425,000 for twice that amount of property, 80 acres, would that have been a fair market value price for that property?
A. I don't know where the property was. It may or may not have been.
Q. 80 undeveloped acres, four miles to the west?
A. Well, four miles is quite a ways.
Q. So this property --
A. I didn't go to it, and I don't know where it's at.
Q. So you can't answer the question, if that was fair market value or not --
A. No, I can't.
Q. -- just four miles away?
A. I can't answer it.
Q. Yet, how far away are these other subject properties?
A. Well, I just -- in other words, I didn't go to the sale property you're referring to.
Q. You never went to the Linder Road property?

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A. I never went to the transaction that you're referring to.
Q. No, no, no. I'm talking about your comps. You seem to be concerned about four miles being a long ways away, so it can't fit in. You seem to be concerned, well, this is four miles away, how could I know?
Comp No. 1 is 5 miles east, isn't it?
A. Well, yes.
Q. Okay.
A. But I obtained --
Q. That's my question.
A. -- the sale.
Q. No. 2, one mile south; correct?
A. The mileage is nothing, the mileage isn't what my concern was.
Q. Sir --
A. I just didn't happen to go by this other property you're talking about, because it was four miles away.
Q. Okay.
A. If it was closer, Dallan probably would have taken me.
Q. Well, let's give you some basic facts about the property. It's four miles to the west, it's twice the size, and it's undeveloped farmland, just like the

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Linder Road property.
Was it worth more than $425,000, or was that a fair price?
A. I could not even offer an opinion, if -- if I wanted to, because I'm required, by USPAT and appraisal law, to view the subject property, determine its condition, it's characteristics, and then, with market data, which I have here, arrive at a value.
I could go out there right now and do it. But I wasn't there, I didn't see it, and I can't do it.
Q. That's for purposes of an appraisal. I'm talking about for purposes of courtroom testimony.
A. Well, that's the same thing.
Q. Knowing that the property is in the same general type of area, that it is twice the size, and that it falls well within the circle of your comps, was $425,000 a fair price for that property or not?
A. Courtroom or not, there is -- my law -- our laws are not absolved in the Courtroom.
MR. CHARNEY: Your Honor, I'm going to ask you to direct the witness to answer the question.
THE COURT: I believe he already has.
MR. CHARNEY: I think he has, too.
THE COURT: He says he could not render an opinion one way or the other.

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Q. BY MR. CHARNEY: Are you familiar with Marshal Valuation?
A. Yes.
Q. Is that an acceptable form of valuing improvements made to properties?
A. No.
Q. Why not?
A. It's a cost approach estimate to valuing properties, to which depreciation needs to be added before a value estimate can be stated.
Q. How do you depreciate the value of, say, a sewer line?
A. Well, you estimate if it's in the right location or not.
Q. How to you estimate the value of electric line?
A. A what line?
Q. Of underground electric?
A. Well, the same answer.
Q. Can you use Marshal Valuation as a basis for doing so?
A. Yes, you can. As a cost estimate.
Q. And is there a multiplier for particular areas and particular times?
A. For cost estimate, yes.

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Q. And have you used Marshal Valuation, in the regular course of your business, for cost valuation analysis?
A. Yes.
Q. And is that an acceptable way to perform cost valuation analysis?
A. Yes.
MR. CHARNEY: No further questions.
THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. TAYLOR::
Q. Mr. Rudd, were the comparables that you looked at within the City impact zone?
A. Yes.
Q. Is that relevant in determining the value of properties?
A. Yes.
Q. Can Marshal's book tell anything about the benefit of improvements?
A. No. And they don't intend that.
Q. Is it fair to say that specific improvements would have a different benefit to different people?
A. That would be in the marketplace, yes.
Q. For example, if you're planning to tear down

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a barn, it has no benefit whatsoever?
A. To that particular individual in the marketplace, although the marketplace may differ from that.
Q. Okay. And if something has no personal benefit, does the cost of it matter in analyzing the benefit?
A. In the market itself?
Q. That was a horrible question. I don't even think I could answer it. I apologize.
If we are trying to determine the benefit of an improvement, does the cost of it make any difference?
A. Yes, it can.
Q. Is that based on a presumption that it will remain in place as it exists?
A. Yes.
Q. Okay.
MS. TAYLOR: No further questions.
THE COURT: Thank you. May the witness be excused?
MR. CHARNEY: One moment, Your Honor. I have no further questions of this witness.
THE COURT: All right. May the witness be excused from the subpoena?
MS. TAYLOR: Yes.

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THE COURT: Very well. Sir, you are excused. Thank you.
THE WITNESS: May I have a second to put my --
THE COURT: Yes, you may. I think the only thing that you had -- I think the only thing we had up there was the binder, wasn't it? Okay. I think everything else is the witness'.
THE WITNESS: It'll just take me a second.
THE COURT: Sure. Yes, I have 135 right here.

(The witness left the stand at 1:13 p.m.)

MR. CHARNEY: Your Honor, previously, I had made an objection that his testimony would not be relevant as to the value of the land at the time of the purchase, because there was no evidence tying it to Mr. Maile and his knowledge of that particular issue.
And I think on an unjust enrichment claim, and on the unclean hands defense, his testimony should be stricken, at least as to the value of the property -- of the $820,000 estimate that he provided for the property as of the date that it was sold, because they haven't indicated that Mr. Maile knew, or should have even known that.
And, therefore, I would ask the Court to

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reconsider my objection and strike that testimony.
THE COURT: Well, it's obvious that as of September 22nd, when the report was prepared and the opinion was arrived at, that it was sort of retrospective.
This witness, as I understand it, was not called to establish that Mr. Maile had actual knowledge that, you know, after the transaction, that he would, you know, that he would know that later on an appraiser would praise the property at $820,000 at the time. That's not the purpose of the testimony.
And you may very well be correct in your -- and I'm not prejudging this particular issue -- but you may be correct, Mr. Maile (sic), that without being able to establish that Mr. Maile was actually aware that another appraiser had an opinion, or may have later had an opinion, that the thing was worth $820,000, that it's irrelevant and the Court shouldn't consider it.
However, I allowed the testimony to come in, for what it's worth. I think that the party calling the witness has a right to present the evidence that she believes is relevant, and can tie it in sufficiently. So that's why I left it in and that's why, at this time at least, I'm not going to strike it.
You will have an opportunity to make that

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argument in your closing argument, though. Do you see what I mean?
MR. CHARNEY: I do.
THE COURT: Now, do you have any additional evidence or testimony, Ms. Taylor.
MS. TAYLOR: We do not. The Plaintiffs rest.
THE COURT: All right.
Does the -- do you have any rebuttal testimony, Mr. Charney?
MR. CHARNEY: Yeah. I think we do, but I need to consult with Mr. Maile about how to trim it down.
THE COURT: Okay. Well, let's take a few minutes. Who would you intend to call.
MR. CHARNEY: Certainly Mr. Maile, and unless -- well, certainly Mr. Maile, Mrs. Maile maybe for a brief question or two, and then I need to discuss with the Mailes whether or not I think we need anything else.
THE COURT: Okay. Fair enough. Now --
MR. CHARNEY: Can we take until 1:30?
THE COURT: Okay. We'll take 10 minutes, and then we'll reconvene with the rebuttal testimony.
MR. CHARNEY: Without any doubt, we'll be done tomorrow.

(Recess taken 1:16 p.m. to 1:28 p.m.)

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THE COURT: You may call your first rebuttal witness.
MR. CHARNEY: We'll have rebuttal. My first rebuttal issue, though, is a request for the Court to, if you will, unstrike that portion of Mr. Corlette's testimony that you struck yesterday. The reason being is, I would like you to treat it now as rebuttal testimony, to rebut Mr. Wood's claim that the current value of the lots, in their current condition, is $250- to $275,000.
Mr. Corlett opined that they were much higher than that, and I would like to offer that as my first piece of rebuttal evidence, without actually having to recall Mr. Corlett for that point.
THE COURT: Interesting.
Ms. Taylor, what's your -- do you have any input on that request?
MS. TAYLOR: Yes, I do, Your Honor. Mr. Wood was not here as an expert witness. He was just talking about facts he is aware of as a developer on this land.
It doesn't -- his testimony doesn't change the fact that Mr. Corlett was not disclosed as an expert witness on the underlying value of the land. That situation has not changed.

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THE COURT: Luckily, I can defer making an decision on that request. Of course, your -- I take it that if I deny that request, then you would want an opportunity to call another witness; right?
MR. CHARNEY: A rebuttal witness, yes.
THE COURT: Okay. And I take it that what you're telling me is, that's the witness you would call?
MR. CHARNEY: He is.
THE COURT: Okay. And how do you respond to Ms. Taylor's contention that he was never -- Mr. Corlett; right?
MR. CHARNEY: That's correct.
THE COURT: -- that Mr. Corlett has never been disclosed as an expert on that issue?
MR. CHARNEY: Well, he certainly was disclosed as an expert with respect to -- that he would opine regarding the value of the property. The question was the recent information that I had received regarding the exact numbers.
Now, I explored, on cross-examination, I will agree, the question as to the value. But it was for the sole point of establishing that this witness might not be credible. In other words, why go in there and rip this whole place up if, in fact, the lots can be sold for a good profit right now, without having to rip the place

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up.
And so, he then offered the opinion that he thinks they're worth, like I said in their current shape, somewhere between 250- and 275,000. And that testimony, left unchecked, would not be appropriate.
Now, the Court is aware that rebuttal evidence doesn't necessarily have to be disclosed, although Mr. Corlett has been previously disclosed and most of his testimony has been. But this, I think, coming in as a rebuttal testimony, would not require the strict compliance with 26(B)(4), that he would be required to -- that we would be required to comply with for our case in chief.
THE COURT: What -- remind me. I had -- and you can tell me this, I suppose, by way of an offer of proof -- if I allowed Corlette's testimony on that subject, Mr. Charney, what would that testimony be, essentially, with respect to the present value of those lots?
MR. CHARNEY: About $66,963 an acre, or $347,700 per lot.
THE COURT: Okay. This last witness was Mr. Woods; right?
MR. CHARNEY: The second-to-the-last witness. The last witness was Mr. Rudd.

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MS. TAYLOR: Rudd, yeah.
THE COURT: I'm going to allow it, for this reason. There was evidence presented during the Plaintiff/Counter-Claimant's case in chief, wherein an expert rendered an opinion as to the present value of each lot, at roughly 250 to 275, I think was the testimony, in its present status.
The testimony that I had previously stricken because it was not disclosed, was sworn testimony nevertheless, taken under oath during this proceeding. And this fellow, Corlett, was subject to cross-examination as I recall; was he not?
MS. TAYLOR: Well, not on that issue, Your Honor, because I moved to strike it and it was stricken. So I didn't cross-examine him.
THE COURT: Well, there you go.
MR. CHARNEY: We can bring him back, so she can cross-examine on that point. He'll be here at 9:00 tomorrow.
THE COURT: Okay. Do it. Bring him back tomorrow morning, and he can be cross-examined on that opinion.
MR. CHARNEY: He will be.
THE COURT: Okay.
MR. CHARNEY: All right. Our next rebuttal witness will be Dallan Taylor.

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THE COURT: Okay. You may call your witness.
DALLAN TAYLOR,
called as a witness by and on behalf of the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. CHARNEY::
Q. Will you please state your name and spell your last for the Court reporter. Be careful. Pull that lid all the way, or it will pour all over your lap. There you go.
A. Dallan Taylor, T-A-Y-L-O-R.
Q. Mr. Taylor, were you related to Ted Johnson in any way?
A. He's my uncle.
Q. Was he your -- was he sister or brother to your -- in other words, describe the relation a little bit more. I'm sorry.
A. He's my mother's brother.
Q. All right. That's what I was looking for. After Mr. Johnson passed away, were you involved in the purchase of the 80-acre parcel, near Star, that Mr. Johnson owned prior to his death?
A. The parcel in Star was 74.6 acres.

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Q. Okay. With that clarification, were you involved in the purchase of that 74.6 acres?
A. Yes.
Q. How were you involved in that purchase, sir?
A. I was a partner with my brother and his sons.
Q. Which brother?
A. Reed Taylor.
Q. And where is Reed?
A. Lewiston, Idaho.
Q. Who did you purchase the property from?
A. The Trust.
Q. Uncle Ted's Trust?
A. Yes.
Q. On that property, was there also a home?
A. Yes.
Q. Describe the home.
A. It's approximately 16-, 1,700 square feet, two level, brick home.
Q. Is that where Uncle Ted lived?
A. Yes.
Q. How much did you pay the Trust for this particular piece of property?
A. We paid them $425,000.
Q. For the full 80 acres.
A. 70-some acres.

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Q. The 76 acres? Is that yes?
A. That's right.
Q. Was this property farmed in a manner similar to the Linder Road property?
A. Yes.
Q. Was it approximately four miles away from the Linder Road property?
A. I think it's a little bit more than four miles.
Q. Not much more, though?
A. It's about five miles.
Q. In addition to the 425,000 that you talked about, was there also a promise that you would make a contribution to the FFA in Uncle Ted's name?
A. That's true.
Q. The promise was you would pay $50,000 to the FFA, in Uncle Ted's name; correct?
A. That's true.
Q. And, in fact, you wound up only paying 10; correct?
A. No. I paid $16,600 and some dollars.
Q. To the FFA?
A. Right.
Q. Okay. Was the contract for the sale of this property negotiated with Beth?

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A. And the sisters.
Q. Which sisters?
A. Other beneficiaries.
Q. Who had the final say, though?
A. The trustees.
Q. Which trustees?
A. Beth and Andy Rogers.
Q. They were the ones that eventually signed the real estate contract?
A. Yes.
Q. Then the $425,000 that you paid went into the Trust and was distributed among the trustees; right?
A. That's right.
Q. Did Beth Rogers obtain court approval to close that contract?
A. I'm not aware of what happened, what they did to -- whether they did approve it or didn't approve it. I'm not aware of that.
MR. CHARNEY: No further questions.
THE COURT: Would you like to cross-examine the witness, Ms. Taylor?
MS. TAYLOR: Very briefly, Your Honor.

CROSS-EXAMINATION
BY MS. TAYLOR::

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Q. Mr. Taylor, can you describe the negotiations leading up to your eventual purchase of this property?
A. Yes. The reason -- originally, the man, Sam Rosti, was trying to buy the property from Ted. He offered $325,000, the original price.
Ted went back to him and says well, I've got to have more than that, because the house is worth 50 or something. So he raised it to $375,000.
I was in Italy at the time my uncle passed away. And my brother was down here at the funeral, and he talked to Beth --
MR. CHARNEY: Objection; hearsay and scope.
THE COURT: Well, I'm going to overrule the objection on -- to the extent that you are objecting as to the scope. I think the negotiation is fine. I think that's just exactly what you were getting after, too, was the -- whether or not this was fair market value or some other consideration, and that's okay.
However, I would just admonish the witness that you're not to say what somebody else told you; okay?
THE WITNESS: Okay.
THE COURT: So don't say what your sister said, or your brother, or anyone else. And I'll sustain the objection on that ground.
You may ask your next question.

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MS. TAYLOR: Okay.
Q. BY MS. TAYLOR: Was the Trust prepared to sell this land for less money than you paid?
A. Yes.
Q. And did you, and your brother, and his children essentially outbid the other buyer?
A. That's true.
MS. TAYLOR: I have no other questions.
THE COURT: Any redirect?
MR. CHARNEY: No redirect.
THE COURT: All right. You may step down. Thank you.
THE WITNESS: Thank you.

(The witness left the stand at 1:41 p.m.)

THE COURT: You may call your next witness, Mr. Charney.
MR. CHARNEY: We'll recall Mr. Maile.
THE COURT: Mr. Maile, I would remind you, you're still under oath.

THOMAS MAILE,
recalled as a witness at the instance of the defense, having been previously duly sworn, was examined and

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further testified as follows:
DIRECT EXAMINATION (Contd)
BY MR. CHARNEY:
Q. Mr. Maile, a couple of brief rebuttal questions. There has been, I guess, criticism cast at the manner in which you designed the lots in question, it being a pinwheel design.
Can you explain to the Court why the pinwheel design was chosen for this 40 acres?
A. All right. As I said yesterday, we did water testing in the calendar year 2003, when the irrigation system was running. And that was required by various State agencies, to determine if septics would work on the 40 acres.
And we determined, through those tests and working with Braun Consulting, which was our water -- retained water expert that worked with the Department of Environmental Quality, that it was touch and go as to the depth -- or to the height of the water, especially in, perhaps, the one -- the southwest one-third of the 40 acres.
It ranged, in a ground water level, of three and a half feet, at its highest, down to four and a half feet. Engineering folks, Joe Canning, who was retained through B and A Engineering, said well, that's

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going to create problems with DEQ for septic. You can't perc. You have to have perc tests for septic systems, when you're not hooked up to the sewer.
So, the only way that we felt we could get it to work was to enlarge the southwest corner lots. And there were two or three that are longer, so that the homes could be built somewhat away from this high water table, closer to the center of the 40 acres, thereby alleviating the problem with berming, for example, that may -- that could have been used as a solution to high water tables. You put your septics up higher and they're more costly.
Also, the road was an issue with ACHD. Because of the water table, ACHD has more -- although it has to be constructed to meet ACHD regulations and requirements, ACHD somewhat goes beyond those requirements, if they're going to accept the road.
So, making it a private road, although it met ACHD requirements, the engineering staff felt that by putting the road away from this high water area, would create less problems than having it accepted and approved by -- excuse me -- approved by ACHD.
And if ACHD didn't have to accept it, to maintain it for perpetuity, a private road would be better there. So we went with a private road, located

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where it's at, because of the water table.
Also critical to the layout was what we considered to be advantageous, that the homes could be located to best take advantage of the view of Bogus Basin. This 40-acre parcel is down in like a little bowl.
And even though there may be surrounding areas, south of us and to the west of us, and even to the east of us, that didn't have water table problems, this -- this 40 acres was in a little bowl, a little dip area. And it also was theorized that there might have been rock obstructions that retained the ground water and made it come back up on to this 40-acre parcel.
So, there were a couple of different theories that everybody -- the professionals felt this was the way that we had to go, in building the road and laying out the lot design.
And that, combined with trying to assess -- take advantage of each lot having a view, the CCRs that were being worked out was even -- we're structuring issues in the CCRs to build homes so that the views weren't obstructed, which was another feature of those longer lots, in addition to the water problems.
So, it was a well thought out design. And we felt that the -- because of the testing that had been

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done on the property, and B and A Engineering staff, who had worked in the area and felt very comfortable they had the expertise to do this, that yes, this was the design that was going to work best, out of necessity. So that's why it was done that way.
I might add, it -- they were very marketable lots back when I -- we still had title, because I was; listing -- I was trying to sell the properties, and they were all very well received, very well received.
Q. What do you mean by that?
A. Well, the public -- I had become an active MLS broker, again, to try to market these lots. And they -- I was getting numbers of calls on people. I think, as we prepared for last year's trial, I had two or three different contracts that I could not close on because of the lis pendens.
So those lots were, even though they were long and designed the way they were, they were still very marketable. It was a very, very good response by the general public. We could have sold them rather quickly, all of them, if we chose to.
Q. There was also criticism of your placement of the barn on the property.
A. Right.
Q. Can you discuss that.

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A. Well, the Court has exhibits that show Classic Cottage. Well, we just had a professional that helped design the layout of where the house was to be.
Q. Okay. And as far as the barn goes, there was some thought that maybe the barn was winding up in front of the house, as opposed to behind it; is that accurate?
A. No, no. Larry Brown, with Classic Cottages, did a -- you know, the site plan that's required for Ada County Developmental Services, to just lay out the conceptual layout of where the house would go and where the barn would go. And, also, we knew from Eagle City, that you couldn't put a barn -- Eagle City had standards that you couldn't put a barn in front of a house.
So, it was designed to have the house out in front, so you would access the house off of Cornerstone Road. The barn was also designed not to interfere with other people's views. And it was also located next to an irrigation canal that really couldn't be used, because it had to be maintained and had to be open for use by the irrigation district.
So all those considerations, Larry and my wife and I considered, in designing the barn and laying out the barn.
Q. Okay.
MR. CHARNEY: No further questions.

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THE COURT: Ms. Taylor, do you have any cross?
MS. TAYLOR: No cross.
THE COURT: All right. Mr. Maile, you may step down. Thank you.

(The witness left the stand at 1:48 p.m.)

THE COURT: Mr. Charney, do you have additional evidence or testimony to put on at this time?
MR. CHARNEY: Can we recess until the morning?
THE COURT: Is it your intention only to put on one additional witness, and that would be mister -- remind me of his name.
MR. CHARNEY: Corlett.
THE COURT: -- Corlett, in order to give Ms. Taylor an opportunity to cross-examine him, given the Court's ruling on the now admissible evidence that the Court had previously stricken; correct?
MR. CHARNEY: I may call Rory Jones on the -- to rebut Dan Grober, but I'm -- personally, myself, I'm leaning away from that.
THE COURT: Okay. But go ahead, Ms. Taylor.
MS. TAYLOR: Your Honor, I have talked with my client. And rather than drag this out any longer, we're willing to waive our right to cross-examine Mr. Corlett.

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We, obviously, will have argument as to how much weight should be put on his testimony.
THE COURT: All right. Well, thank you. I'll note that for the record.
Having that concession, Mr. Charney, are you -- if you want to call Rory Jones -- I saw him in the courtroom today. If you wanted to call him as a rebuttal witness, I will certainly give you an opportunity to do that. But you have also indicated to me, now, that you are leaning against.
MR. CHARNEY: Me personally. I need to talk to Tom about it. For what it's worth, Your Honor, I mean, when somebody gets on the stand and challenges your professional reputation, you want someone to stand up for you.
THE COURT: Right.
MR. CHARNEY: And I don't blame Mr. Maile for that. But I'm wondering -- you know, I guess it's a question of asking you, you know, where is this case going in your head? You know, I guess I'd just -- not asking you for a ruling, but if there's something that you're sitting there saying, this is completely unimportant, I don't want to waste your time with it.
On the other hand --
THE COURT: Well --

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MR. CHARNEY: You see my dilemma.
THE COURT: I do. Maybe I should mention one other thing, too. I see Mr. Grober has come back into the Courtroom. Mr. Grober was called as an expert witness on the issue of the Rules of Professional Responsibility that existed at the time this transaction took place. His testimony is there to assist the finder of fact.
Now, I think, particularly in a case like this, I wonder -- and always, obviously, the Court is not bound by any expert opinion, the finder of fact is never bound by the testimony of an expert, whatever it may be, and whatever subject it may be.
And not to, you know, use a cliche just for the sake of using a cliche, but this is, as they say, not rocket science. And I don't mean that it is, therefore, you know, real, real easy.
But the expertise which Mr. Grober opined about was in an area that the Court and, frankly, anybody who is licensed to practice law, would have some familiarity with. And I think that the parties are probably aware -- and I've kind of struggled with how to approach this -- I have some experience in the area of these professional responsibility issues myself.
When Mr. Grober was Deputy Bar Counsel, I

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was on the Bar Commission. And, you know, the Bar Commissioners are the ones that ultimately -- well, not ultimately, ultimately it's the Supreme Court. But we're the ones who pass on these accusations and allegations of misconduct.

So having said that, I don't know what else to tell you, Mr. Charney. It's up to you whether or not you want to call that rebuttal witness. We certainly have time. What we're faced with, right now, is the possibility that we could save a day, for whatever that is worth, but we don't have to.

MR. CHARNEY: Can we come back here about, maybe, ten after 2:00, five after 2:00? I'll consult with the Mailes and see.

THE COURT: I think that's worth it. Let's give it until five after, and I'll tell you why. Judge McLaughlin is in -- on a long-awaited vacation, and I'm going to cover his mental health court calendar at 3:00. Staffing is at 2:30, and that's a really important part of it. So I'm absolutely -- I have to be doing that at 2:30. Inga's going to cover for Judge Wetherell.

So, let's do this. We'll come back in at five after, and the only question will be whether or not we want to come back tomorrow. Perfectly okay if you want to, but -- and I've given you, I think, about as

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much as I can, Mr. Charney.

MR. CHARNEY: I understand. I just -- you know, I just don't want to belabor the Court with something that's not really important for your consideration. That's my primary concern.

THE COURT: Okay. But that's still your -- it's your call, and I want you to know that, that I'm giving you leave to run your case the way you want to.

Now, we'll come back in at five after. And if we don't have any -- if we don't come back in for additional evidence and testimony tomorrow, what I intend to do is just sort of lay out for you -- because we're going to be out of time for oral closing arguments and so forth, and I would probably be asking the parties to submit written findings of fact and conclusions of law anyway -- I've sort of worked out a schedule that I'll give to you so that I can get everything under advisement in fairly short order, so that I can render a decision in due course.

We'll come back here at five after, by that clock; okay?

MR. CHARNEY: Okay.

(Recess taken 1:55 p.m. to 2:08 p.m.)

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THE COURT: Have you had a full opportunity to consult with your clients about your decision?

MR. CHARNEY: I have. And we're going to rest at this point.

THE COURT: Okay. Now -- thank you.

Ms. Taylor, do you have any surrebuttal?

MS. TAYLOR: Oh, my gosh, no.

THE COURT: Okay.

MS. TAYLOR: No.

THE COURT: Thank you. Okay. Here's what we'll do, then, folks. We have finished, essentially, a day early. But we don't have time, at this point, to listen to closing arguments. So this is, sort of, typically what I do in a, what I consider, pretty complex Court trial.

I'm going to do this. I'm going to set forth a schedule, sort of a briefing schedule. And what I'm going to want from each of the parties is as follows.

I want the Defendant/Counter-Claimants, the Maile parties, to present written closing arguments and proposed findings of fact and conclusions of law. I'm going to give the Plaintiff/Counter-Defendants, the Taylors, the same opportunity to present written closing arguments and proposed findings of fact and conclusions of law.

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Now, ordinarily then, what I would allow, if this was a jury trial or, frankly, if it was a Court trial where I was taking, you know, just oral closing arguments, I would give the Defendant/Counter-Claimants, the Mailes, an opportunity, then, to make a rebuttal closing argument, because, it seem to me, it's their burden of proving the elements and the amounts of damages on the unjust enrichment claim.

But, in this case, I don't see where there would be any harm to do it this way. I'm going to allow the Counter-Defendants, Plaintiff/Counter-Defendants, as well, to present written rebuttal closes, and they'll be simultaneously due.

So, I'm going to give the parties a week, until a week from Friday, at close of business, which would be -- yeah, tomorrow's the 13th -- no later than 5:00 o'clock, October 20th, which is one week from tomorrow, to present, simultaneously, the Defendant/Counter-Claimant's written closing arguments and proposed findings of fact and conclusions of law.

The Plaintiff/Counter-Defendant's written closing arguments and proposed findings of fact and conclusions of law are due at the same time.

One week after that, which will be December 27th -- I'm sorry -- October 27th, at 5:00

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o'clock, each of the parties can give the Court a rebuttal close, just to rebut what the other parties have given us, given the Court, and that's it. I'm going to limit the -- I'm going to put a page limit on the post-trial briefing material.

Do the parties believe that they can get by with just 25 pages each?

MR. CHARNEY: Yes, Your Honor.

THE COURT: And that includes everything. So you can -- if you think you can cover everything in four or five pages, feel free. But if you need more than that, I'm going to give you up to 25 pages apiece.

MS. TAYLOR: In both of our --

THE COURT: Yeah.

MS. TAYLOR: Okay.

THE COURT: Yeah. Just written closing argument and proposed findings of fact and conclusions of law, 25 pages grand total. Then, I'm going to limit each of the parties to no more than 10 pages on your rebuttal close, and those will also be simultaneously made.

That way, I will consider that I'll have this matter fully under advisement end of business October 27th, two weeks from tomorrow. And I will issue a written decision on all matters before the Court in due course. And, of course, I have the 30-day rule. So

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you'll have it sometime in November.

I can't tell you exactly when I'll do it, because I have a big trial starting Wednesday that will, you know, take most of my time through about mid-November. But I'll do the very best I can, and certainly get it out, you know, because I realize this matter is terribly important to all parties.

MR. CHARNEY: Would we concern ourselves with attorneys' fees in this --

THE COURT: Yes, I'd like you to, because that's going to be an issue, as well.

MR. CHARNEY: All the old arguments, or just as relates to this portion of the case?

THE COURT: Well, that's a good questions. I would like to have this matter completely under advisement, so that -- what I've been planning to do is write a decision that covers absolutely everything.

And we're aware of what's happened up to this point, up to the time the Supreme Court rendered its decision, then the subsequent ruling that I made, you know, after their ruling. And I really do want to take up everything, including attorneys' fees and costs issues; okay?

There's also the issue of, I know, the prejudgment interest. That would be an appropriate time

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to tell me what you have to tell me about that.

Are there any other questions about what it is that I'm looking for? I want to have this thing completely done, so that when I -- so that I have no more questions, so that I'm not looking around for any more factual information, not taking any more argument at that point. I'm just basing it on all of the facts, and all of the law of the case, and all of the history of this case and, finally, on the arguments of the parties, and render a final decision which will be, obviously, an appealable decision at that point.

MR. CHARNEY: Okay.

MS. TAYLOR: I have only one concern, Your Honor, on the attorneys' fees issue. Without disclosing any amounts, I think it's safe to say that we have made an offer of judgment. Obviously, your final decision will need to be looked at, and our attorneys' fee issue on the unjust enrichment will be greatly dependant on your final decision.

THE COURT: Okay. And what you can do, then -- are you telling me that you want to -- you don't want to disclose to the Court what the offer of judgment was; right?

MS. TAYLOR: I don't think we're supposed to.

THE COURT: I don't think you should, either. So,

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what you might do then is mention that fact in your closing arguments --

MS. TAYLOR: Okay.

THE COURT: -- in this post-trial material.

MS. TAYLOR: Yeah. And we -- there would be the potential to come back with that?

THE COURT: Which would be okay, as well.

MS. TAYLOR: All right.

THE COURT: I'd be all right with coming back and taking some additional argument and so forth on the issue of costs, and fees, and interest, and everything else, if we need to; okay?

MR. CHARNEY: Are you wanting a memorandum of costs and fees at this point, or we should wait --

THE COURT: Oh, we should wait. We probably should wait. So, I guess what I should tell you is I should -- we really should, I guess, leave costs and attorneys' fees off.

MR. CHARNEY: Okay.

THE COURT: Is that what both parties are sort of suggesting?

MR. CHARNEY: I prefer just to address --

THE COURT: Yeah.

MR. CHARNEY: -- what the amounts on this part would be.

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THE COURT: Which is exactly what you would be doing if I just took oral argument, here, at the end of the case.
MR. CHARNEY: Okay.
THE COURT: Okay. Okay. I think I'm ready to go on this. I think the way I'll approach this is to sort of -- just so that you know, it might be helpful in preparing your proposed findings and conclusions and arguments -- I think what I'll try to do is -- what I do sometimes, in a case like this -- and what I mean by that is a case with a number of complex issues and quite a complicated history -- I will sort of set up an analytical grid that would be consistent with the way I would advise a jury in post-proof jury instructions, if this case were going to be decided by a jury.
I'll try to frame the questions that way and analyze them, you know, in that manner.
MS. TAYLOR: Kind of like a proof chart?
THE COURT: Yeah.
MS. TAYLOR: The elements are --
THE COURT: Something like that. Okay. I think that's it. I want to compliment both sides. I think it was a well-tried case. I'm glad -- I know that all you folks are somewhat relieved by the fact that we finally got this case to trial. This, I understand also, is just

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sort of a pause in the action, probably. But I do want to compliment both sides on being exceptionally well-prepared, on both sides, and in handling this in a very professional way. And I do appreciate the importance, to both sides, of the important decision that's facing the Court.
So if your written material is consistent with the professionalism with which you both presented your cases, and conducted yourselves during the course of this trial, I'll be real well-prepared to make a decision.
Thank you very much. Court will be in recess.

(The proceedings concluded at 2:18 p.m.)

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BOISE, IDAHO
April 2, 2007, 3:09 p.m.

THE COURT: The Court will take up Taylor vs. Maile, Case No. CVOC 040043 D.
This is a hearing on a request for additional records to be included in the appellate file; correct?
MR. MAILE: Yes, Judge. That's part of it.
THE COURT: Okay. And what else? Oh, sanctions?
MR. MAILE: Yes. There is that as well.
THE COURT: What else?
MR. MAILE: Then there's a motion to reconsider the memorandum decision dated November 29, 2006, and a motion to strike and objection to clerk's record.
THE COURT: Okay. Mr. Maile, you have a motion to reconsider that was filed on December 8th, a motion to strike pleadings filed by the respondent on the 14th of February, and the objection to the clerk's record.
MR. MAILE: Yes, Judge.
THE COURT: All right. Okay. I'll hear your argument, Mr. Charney -- I mean Mr. Maile.
MR. MAILE: That's okay.
THE COURT: Mr. Charney was just in here a few minutes ago.
MR. MAILE: Well, he's on this case, as well, so I

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can understand the Court's issue.
Judge, our notice of hearing properly set forth the three items that we're asking this Court to address today, and the Court has just indicated those issues are on the table.
One of the -- the first thing that we need to have the Court address is, back in November 29, 2006, this Court entered its memorandum decision and order. And that was ultimately fought -- a judgment was entered, as a result of that memorandum decision and order, on December 11, '06.
On December 8th of '06, we had filed our motion to amend that memorandum decision and order. And the issue that we're asking the Court -- it looks as though, from our reading of the memorandum decision, the Court did not address the issue of prejudgment interest.
And if -- if the -- I don't have the exhibit numbers with me, but there were two different documents provided at the hearing, the trial, that related to the payments made to the trust, totaling -- $400,000 worth of payments were made.
We made a mistake in calculating the interest, by compounding it on the first day of trial. The second day of trial, we recalculated it and the amount, on simple interest, is $142,021.11.

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That -- both of those exhibits were admitted into evidence. And it just hasn't been -- it wasn't addressed in the memorandum decision. We're asking the Court to either say yeah or nay to that issue and enter the appropriate order on that.

So that -- we think it's rather simple and straightforward. I do have a case, a recent case, cited as Michael "Doc" Holiday vs. Mark Lindsey, and that's a 2006 opinion, No. 57-A, by the Court of Appeals. But it's not a complicated issue.

The Court of Appeals affirmed the Supreme Court's prior decisions that simple interest is due and owing on amounts that are reasonably calculated as liquidated or undisputed. And the record is clear, here, that those payments were received. It's a liquidated amount and we think this Court should allow prejudgment interest.

The second issue that we have before the Court, from our perspective, is that we initially filed an objection to the Respondent's request for additional records, dated February 15, 2007. And upon reading the appellate rules, we felt -- and cited that -- cited the appropriate appellate rules in our motion, which was filed on February 21, 2007 -- that there are time limits imposed on augmenting the record.

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And it's the position of the Respondents -- excuse me, the position of the Appellants in this case, the Respondents did not timely move. Under the Idaho Appellate Rules 21 and 19, they had 14 days to request a motion -- or request to augment the record. They didn't do that. And the rules are directly on point, from our perspective, as to their failure to do the same.

What's the redress for the Appellants -- or the Respondents in this case, really it's not a jurisdictional issue. But the Court, in our opinion, does not have the authority, now, to look at that.

THE COURT: Only the Supreme Court can do that.

MR. MAILE: Only the Supreme Court has that.

THE COURT: I see.

MR. MAILE: So that is our position, based on the rules.

That was filed. It wasn't noticed up for hearing. And then, shortly thereafter, the clerks's record, on March 1st I believe, was created, and we had 28 days to file our objection to the clerk's record. The clerk's record does, now, include those items that weren't timely requested.

So we have filed an objection to the clerk's record, and that was file stamped March 20, 2007, reiterating our position as we stated on February 20th.

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We think that the rules are straightforward. I can appreciate where the Respondent is coming from, based on their response to the objection and request for sanctions. But I think -- if the Court wants me to hear that now, I'll address it. Otherwise, I'll wait for response, whatever the Court wants me to do.

THE COURT: Why don't you go ahead and cover the whole field at this point.

MR. MAILE: Sure. I can't imagine this Court being in a position of saying, you're sanctioned because you followed the Idaho Appellate Rules. It seems rather far-fetched, but I've been wrong before.

And the response submitted by the Appellants in this case, there isn't any authority cited for their proposition that this Court is in a position, or has the jurisdiction or power, to augment the record. So, we think it's simple and straightforward. I don't want to belabor the point. But we think both of our motions are meritorious and should be granted.

Thank you, Your Honor.

THE COURT: Thank you, Counsel, Mr. Maile.

And, Ms. Taylor?

MS. TAYLOR: Your Honor, I'll start with the request to augment the record, if that's okay with the Court.

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Our response does, indeed, cite Idaho Appellate Rule 29. Under that, we have 28 days from the date the clerk's record is received to request additional documents or to object to documents that are included.

What happened in this case is, we received a notice of appeal that gave the impression of citing everything that could possibly be relevant to the issues raised on appeal. There were 98 different records cited. In going through them more closely, we discovered that the Appellate systematically omitted everything that the plaintiff had submitted on the issues that were relevant to the appeal.

I think the issue is whether the Supreme Court will have the appropriate record as exists before it, or if we'll have to do a motion to augment. The Supreme Court will see to it that it has the appropriate record. I think that the Appellant has a duty to submit that, and that it is inappropriate, and unethical, and sanctionable to intentionally omit records that are required for the Court to review -- for the Supreme Court to review this Court's decisions.

It, basically, was an effort to invite error, saying, this is the record, you need to make the decision, knowing that he hadn't included very, very relevant documents.

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But our request was, if anything, early. Under IAR 29, we had 28 days from the date we received the record. It has been submitted. We ask -- and as I read 29, this is the Court that issues the order settling the transcript. That's why this hearing was noticed before you. So you have the authority, under that rule, to say, the transcript, as it has been submitted, is or is not appropriate.

We didn't ask that anything be included that should not have been included in his notice of appeal, and leaving it out was just improper.

THE COURT: What about the other motion, the motion to reconsider on the interest issue?

MS. TAYLOR: Well, Your Honor, our basis for sanctions on noticing that up is that the motion said that oral argument was not requested. We should not have had to fly here and incur all of the expense for a hearing on a motion that they had said they didn't want a hearing on.

All they needed to do was bring it to the Court's intention that they had not requested a hearing and hadn't gotten a decision on it. We briefed this issue six different times, literally, from beginning to end, upside down, every -- every which way. They're not entitled to prejudgment interest because they didn't get

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a judgment.

THE COURT: Do you think that I should, though -- I mean, obviously you don't think that they're entitled to anything. But, procedurally, do you think I still have the jurisdiction to make a ruling on the motion to reconsider the interest issue after the appeal has already been filed?

MS. TAYLOR: Well, Your Honor, they have listed the failure to grant prejudgment interest in the notice of appeal. I would like to see the Court issue an order denying the request for prejudgment interest, just so we don't get into a situation where the Supreme Court finds that it isn't ripe for appeal --

THE COURT: Oh, I see.

MS. TAYLOR: -- because there isn't a decision.

THE COURT: Okay. Fair enough. And it could be. I mean, I suppose that the Court -- the Court has limited jurisdiction after an appeal has been filed. There are certain things the Court still has the jurisdiction to do and certain things that the trial court can't do, obviously.

And it sounds like both parties are saying, that from your reading of the Court's memorandum decision and order that Mr. Maile is referring to, that I could have, at least, been clearer, or that perhaps mister --

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that you agree with Mr. Maile, to the extent that he says it doesn't seem to have been addressed at all.

Is that fair enough?

MS. TAYLOR: I think that's fair enough, Your Honor. In my -- in my opinion, it was -- it was -- a denial of a motion for prejudgment interest was inherent in refusing to grant a judgment.

But if -- I don't want there to be a question. I don't want us to have to go up and come back on just that one issue.

THE COURT: Sure.

MS. TAYLOR: It seems to me like it's kind of a housekeeping measure.

THE COURT: And I think Mr. Maile would agree, probably.

MR. MAILE: Well, I think it's housekeeping. But I do believe that -- I do believe that this Court -- the appeal has been involving the issue of the beneficiaries' claim for summary judgment. And I think this Court still has jurisdiction. Once we filed a motion to amend a memorandum decision and order, this Court has continuing jurisdiction on that narrow issue, until it's either denied or granted or clarified; housekeeping, whatever you want to call it. So I think this Court still has jurisdiction to degree the issue raised.

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Now, granted, it was -- we listed it as a motion that did not need oral argument, but for some reason it never got addressed.

THE COURT: Well, let me just suggest this. Perhaps the best way to handle the interest issue is just simply approach it as a -- I mean, I could say one of two things. I could say, look, this Court intended to address that issue and intended that the court order that I issued previously covered that particular issue. And the fact is, I denied it, in just -- in an abundance of caution.

But it seems to me, if I were to come back and say, you know, I denied it, but on second thought, I'm going to grant it. Then I might not have jurisdiction to do that. That's the way I would look at it.

Do you see a what I mean?

MR. MAILE: I see your -- I see your logic.

THE COURT: So I think what I'll do -- is there anything else that either of the parties want to bring up?

MS. TAYLOR: Your Honor, I just had one brief comment on the merits.

They have only argued for prejudgment interest under 28-22.104. Our briefing cites why those

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sections don't apply in this case.
On the Holiday vs. Lindsey case, that's the only Idaho case in which they address prejudgment interest in an unjust enrichment claim, which is where we are at this point. And in that case, what the -- I can't remember if it was the Supreme Court or the Court of Appeals -- but the Court held that in an unjust enrichment claim, the only way you can get prejudgment interest is if you can show that the money which was obtained wrongfully was invested, and that the defendant in that case had actually received interest on it, if you see what I mean.
You can't get prejudgment interest in an unjust enrichment unless you show that the person who had the money actually received interest themselves.
THE COURT: Oh, I see.
MS. TAYLOR: Yeah. That's what the Holiday case -- and there was no testimony, no evidence of any kind, in this case, that that occurred. So, under that case, they wouldn't be entitled to prejudgment interest.
THE COURT: Let me look at that again. That was Judge Sticklin's case involving a fairly recent appellate decision.
Do you remember -- of course you do, Mr. Maile, if it was Court of Appeals or Supreme Court?

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It must have been Supreme Court.
MR. MAILE: No. It was Court of Appeals.
THE COURT: It was Court of Appeals?
MR. MAILE: Judge Lansing.
THE COURT: Okay. I'll take a look at that one again. Okay. I'll take a look. Let me take this under advisement, and I'll issue a written decision on both of the issues, on the augmentation or objection to the record, and then the jurisdictional issue of -- on the interest, prejudgment interest issue, as well. And I will issue an opinion real quickly.
MR. MAILE: Thank you, Judge.
THE COURT: All right. Thank you, folks. The Court will be in recess.

(The proceedings concluded at 3:24 p.m.)

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants.	Case No. CV-OC-0723232 **SUPPLEMENTAL MEMORANDUM BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS AND IN RESPONSE TO SUPPLEMENTAL AFFIDAVIT OF CONNIE W. TAYLOR IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

The plaintiffs above named, by and through their attorney of record, Thomas Maile IV, and provide this Supplemental Memorandum Brief In Opposition to Defendants' Motion for

Summary Judgement, and provides:

1. The Extend of Pleadings in Case Cv 2004-00473d Has No Bearing in the Present Matter.

The defendant Connie Taylor's affidavit of April 1, 2009, has attached the Idaho Repository printout from case CV 2004-00473D. The attachment serves no purpose for the court's considerations in the pending motions. The plaintiffs can not be held responsible for the defendants' action in committing a fraud upon the court and criminal acts some two years into the prior litigation. It was the action of the defendants which led to the court entering the "**Judgment on Beneficiaries' Claims**" in July 2006. It was this act which gave rise to the damages sustained by the plaintiffs and the claims for relief which ripened upon the entry of the judgment. The record if anything established the breadth of the defendants' misconduct.

2. The Plaintiffs Have Not Alleged a Legal Malpractice Claim Against the Defendant Attorneys.

The defendant attorneys have briefed the point of law that there can be no claim of legal malpractice against Clark & Feeney and their attorneys. The plaintiffs have properly alleged a count of negligence against the professional defendants.

The claim of negligence against all the defendants did not accrual until there were damages which only resulted upon the entry of the Judgment on Beneficiaries' Claim". There was not any objective proof of actual damage until that occurred. See Fairway Development Co. v. Peterson, Moss, Olsen, Meacham & Carr, 124 Idaho 866, 865 P.2d 957 (1993); Chicoine v. Bignall, 122 Idaho 482, 487, 835 P.2d 1293, 1298 (1992). To hold otherwise "would foment future litigation initiated on sheer surmise of potential damages in order to avoid the likely

consequence of seeing actions barred by limitations." City of Mccall V. Buxton (2009-ID-0126.114); Mack Financial Corp. v. Smith, 111 Idaho 8, 12, 720 P.2d 191, 195 (1986).

There is no allegation that the plaintiffs had any attorney-client relationship. To establish a claim for professional negligence, a claimant must show: (1) the existence of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the failure to perform that duty; and (4) the failure to perform the duty must be a proximate cause of the injuries suffered by the client. Estate of Becker v. Callahan, 140 Idaho 522, 526, 96 P.3d 623, 627 (2004) (citing McColm-Traska v. Baker, 139 Idaho 948, 951, 88 P.3d 767, 770 (2004).

In the present matter the plaintiffs claim among other things, the defendants were negligent in misrepresenting to the court their clients' status as beneficiaries under the trust, when in prior sworn pleadings and prior testimony it was established that the individual Taylors' mother was the sole beneficiary of the trust as a result of the Disclaimer Agreement. The attorneys prepared the documentation containing the perjured testimony, had previously prepared documents containing the true facts, filed pleadings asserting facts the attorneys knew were not true, and had participated in court proceedings establishing the true fact that the individual Taylors' mother was the sole beneficiary of the trust.

The allegations of the amended complaint, allege conduct and an agreement between the defendants to accomplish an unlawful objective or to accomplish a lawful objective in an unlawful manner. Such a civil conspiracy is not, by itself, a claim for relief. The essence of a cause of action for civil conspiracy is the civil wrong committed as the objective of the conspiracy, not the conspiracy itself. Mannos v. Moss, 143 Idaho 927, 931, 155 P.3d 1166, 1170

(2007). Such wrongful conduct give rise to a number of civil remedies, to wit: (1) the defendants and their attorneys committed wrongful acts that are prohibited under the Idaho Racketeering Statue (Count Eleven); (2) the defendants committed acts that constitute abuse of process (Count Five); (3) the defendants committed a fraud upon the court (Count One); (4) the defendants committed wrongful conduct in filing a verified pleading which was diametrically opposite to an earlier verified pleading previously submitted by the defendants before another tribunal, requiring an imposition of a constructive trust (Count Two); (5) the defendants committed acts constituting negligence and/or gross negligence (Count Six and Eight); (6) the defendants committed acts which constitute equitable estoppel, quasi estoppel and/or judicial estoppel, (Counts Nine, Ten, and Twelve).

The elements of negligence are well established: (1) duty; (2) breach; (3) causation; and (4) damages. Estate of Becker v. Callahan, 140 Idaho 522, 526, 96 P.3d 623, 627 (2004). As a general rule, an attorney will be held liable for negligence only to his or her client and not to someone with whom the attorney does not have an attorney-client relationship. Harrigfeld v. Hancock, 140 Idaho 134, 90 P.3d 884 (2004), Wick v. Eismann, 122 Idaho 698, 838 P.2d 301 (1992). Our Supreme Court has indicated that a claim can exist between a non-client and an attorney for a claim of negligence. See McPheters v. Maile, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003).

The wrongful conduct on the part of all the defendants is actionable by acting in unison to perpetuate a fraud upon the court and the commission of criminal behavior to accomplish an unlawful objective. Without their active misrepresentation the Honorable Judge Wilper would

not have ordered the property restored to the trust. Judge Wilper's Memorandum Decision and Order, on July 28, 2005 (attached to the Affidavit of Thomas Maile Part 2-Exhibit K), establishes that the trust could not rescind the transaction since the action of the trustee, Beth Rogers demonstrated the trust had waived its right to rescind the sales transaction. In addition, Judge Wilper had previously ruled that Berkshire Investment could pursue its claims for quasi and equitable estoppel and its claim of tortuous interference with contract claim (Judge Wilper's Order Regarding Plaintiffs' Motion for Summary Judgment, on February 13, 2006 (attached to the Amended Affidavit In Support of Motion to Dismiss dated May 14, 2008, Exhibit "B"). The trust could not have had the property restored as it waived that right to restore the real property to the trust. The trust was estopped from rescinding the sale transaction. The unlawful objective was committed by the defendants in having the property restored by misrepresenting their status as beneficiaries before the court in January 2006. By misrepresenting their status as beneficiaries the court restored the property to the trust. The plaintiffs were deprived by such actions of the defendants in putting forth their proof of damages as allowed by Judge Wilper and defending the monetary claims of the trust. As can be been seen from the transcript annexed to the Affidavit of Thomas Maile Part 5 and the testimony contained therein, the plaintiffs had legitimate issues and facts surrounding the claims of quasi estoppel, equitable estoppel, and tortuous interference of contract claims against any claims of the trust. The plaintiffs sustained damages as of July 21, 2006 as a result of the entry of the "**Judgment on Beneficiaries' Claims**".

3. There Has Been No Determination on the Merits of the Defendants' Criminal Activity or the Fraudulent Representations.

The plaintiffs raised the issue of the Taylors' standing in the prior ligation before the

Idaho Supreme Court. The contention was simple, the Taylors and their counsel of record committed multiple criminal acts and committed fraud in representing their status as beneficiaries. When an issue of standing is raised, the focus is not on the merits of the issues raised, but upon the party who is seeking the relief. See Miles v. Idaho Power Co., 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). Scona Inc. v. Green Willow Trust, 133 Idaho 283, 286, 985 P.2d 1145, 1148 (1999). The Supreme Court did not rule on the substantive issues of the fraud and misrepresentation of the Taylors and their counsel before the district court. The Idaho Supreme Court did not have to consider the same on its merits, since as the Supreme Court determined the Taylors had standing in case CV 2004-00473D reserved by an "interest in the litigation" as set forth in the "Disclaimer, Release & Indemnification Agreement" dated July 15, 2004. The material misrepresentations and the criminal behavior committed by the defendants have not been considered on the merits. As stated, there are five factors required for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. Ticor Title Co., 144 Idaho at 124, 157 P.3d at 618. There has been no determination of the issues of fraud and criminal behavior of the defendants. There has been no determination on the merits of the defendants' fraud and criminal behavior. The plaintiffs had no claim for relief until they

sustained damages, (entry of "**Judgment on Beneficiaries' Claims**"). There is no bar to the plaintiffs' claims based upon res judicata or collateral estoppel.

CONCLUSION

The various claims of the plaintiffs must withstand summary judgment including the claims of negligence against the professional defendants. The defendants' motion to dismiss and/or their motions for summary judgment must be denied as to all counts as neither res judicata nor collateral estoppel apply to the present matter.

DATED this 6th day of April, 2009.

THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of April, 2009, I served the foregoing (1) SUPPLEMENTAL MEMORANDUM BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS AND IN RESPONSE TO SUPPLEMENTAL AFFIDAVIT OF CONNIE W. TAYLOR IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, together with (2) AFFIDAVIT OF THOMAS MAILE PART 5 by having a true and complete copy personally delivered, by facsimile and/or by depositing the same in the United States Mail, postage prepaid thereon, and addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV, Pro Se and
Attorney for Berkshire Investments and Colleen Birch Maile

ORIGINAL

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and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 0723232 **AFFIDAVIT OF HELEN TAYLOR**

STATE OF IDAHO)
) ss.
County of Ada)

HELEN TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am over the age of 18 years and make this affidavit from personal knowledge.

2. I make this affidavit to reiterate and clarify my intentions as to the real property on Linder Road, Eagle, Idaho.

3. This property was originally owned by my brother, Theodore Johnson, then transferred into the Johnson Trust before being purchased by Ted Johnson's attorney, Thomas Maile IV, and his wife Colleen. It was my intent and understanding that all actions taken by my sons John, Dallan, and Reed in relation to the lawsuits trying to recover that property were done on behalf of all the beneficiaries, including myself.

When other members of the family decided they did not want to be involved in the lawsuit, all the beneficiaries except my children and I disclaimed their interest in the lawsuit against Maile. All of the Taylor beneficiaries reserved the right to pursue that lawsuit. My children did ask that the trustee's attorney include a provision which would allow my share of the cash in the trust to be distributed to me, as all the other sisters has already been paid.

It has always been and remains my understanding and intention that the terms of my brother's trust will be followed as to the Linder Road property. Under that Trust Agreement, I am entitled to income from that property for my life, and upon my death the property will pass to my six children, in equal shares. This was the understanding at the time of the signing of the Disclaimer Agreement, and has remained my understanding and intent through all proceedings in this matter.

Dated this 15 day of October, 2008.

Helen J. Taylor
Helen Taylor

SUBSCRIBED AND SWORN to before me this 15th day of October, 2008.

JAMES D. BRITTAIN NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho.
Residing at Wells Fargo Bench therein.
My commission expires: 05/31/2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of April, 2009 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☐ ☑	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 939-1001*
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☐ ☐ ☐ ☑	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 385-5384*

Connie W. Taylor
Attorney for Defendants

ORIGINAL

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION

Defendants.

Case No. CV OC 07 23232

SECOND SUPPLEMENTAL AFFIDAVIT OF CONNIE W. TAYLOR IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Nez Perce)

SECOND SUPPLEMENTAL AFFIDAVIT OF CONNIE W. TAYLOR

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law within the state of Idaho and a member of Clark and Feeney, attorneys for the Defendants John Taylor, Dallan Taylor and Theodore Johnson Trust in the above entitled matter. The information contained herein is of my own personal knowledge.

2. I am attaching hereto as Exhibit A, a true and correct copy of the Affidavit of R. John Taylor Re: Defendants' Motion to Compel Payment of Judgment filed in the *Taylor v. Maile* case Ada County Case No. CV OC 04 00473D.

DATED this 7th day of April, 2009.

Connie Taylor

SUBSCRIBED AND SWORN to before me this 7th day of April, 2009.

TAMARA CRANE NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 8/06/2014

CERTIFICATE OF SERVICE

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Connie W. Taylor
Attorney for Defendants

CONNIE W. TAYLOR
CLARK and FEENEY
Attorneys for Plaintiffs
1229 Main Street
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB No. 4837

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants.

Case No. CV OC 0400473D

AFFIDAVIT OF R. JOHN TAYLOR Re: DEFENDANTS' MOTION TO COMPEL PAYMENT OF JUDGMENT

EXHIBIT
A

STATE OF IDAHO)
) ss.
County of Nez Perce)

R. JOHN TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am over the age of 18 years and make this Affidavit from personal knowledge.

2. After this Court's May 15, 2006 order granting summary judgment to the plaintiffs, I contacted a banker and received preliminary approval for a mortgage on the property for $400,000. The Trust also had a pending offer to purchase the property for $1,800,000.00 as soon as the litigation was finished. We would have been able to return the purchase price to him promptly if this matter had not been appealed.

3. On May 18, 2006, Mr. Maile recorded a Lis Pendens against the Linder Road property with the Ada County Recorder's office.

4. After Mr. Maile appealed the order returning the property to the Trust, the prospective purchaser of the property withdrew his $1,800,000.00 offer because he was not willing to wait for the appeal to be resolved.

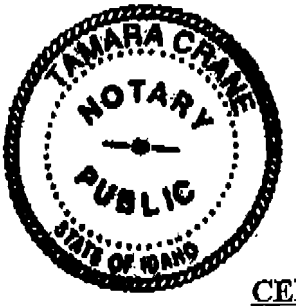
5. On March 25, 2008, Mr. Maile recorded a new Lis Pendens against the Linder Road property after filing a lawsuit against all the Plaintiffs and their attorneys in this matter.

4. After receiving the Supreme Court's opinion affirming that Judgment on January 30, 2009, I again contacted the banker. I was advised that they are not able or willing to lend any money on the property until the Lis Pendens is removed. We have been approached by several parties interested in making an offer on the property, but have not received any firm offers because of the pending litigation.

R. JOHN TAYLOR

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

SUBSCRIBED AND SWORN to before me this 19th day of February, 2009.



Tamara Crane
Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 03/06/2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of February, 2009, I caused to be served a true and correct copy of this document by the method indicated below, and addressed to the following:

Thomas Maile
Attorney at Law
380 W. State
Eagle, ID 83616

- ☒ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX)

Connie W. Taylor
Attorney for Plaintiffs

ORIGINAL

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, et al. Defendants.	Case No. CV OC 0723232 **MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS**

Defendants John Taylor, Dallan Taylor, and the Theodore Johnson Trust, (referred to collectively as "Taylors") by and through their attorney of record, submit this memorandum in opposition to the Plaintiffs' Motion for Summary Judgment on the Defendants' counterclaims.

SUMMARY OF FACTS

This is a second lawsuit relating to attorney Thomas Maile's purchase of 40 acres of land on Linder Road in Eagle, Idaho, from his terminally ill client for $400,000. Mr. Maile filed this action while an appeal was pending in the initial suit, *Taylor v. Maile*, Ada County Case. No. CV OC 04-00473D. Defendants filed a Motion to Dismiss on May 8, 2008, and an amended Motion to Dismiss and/or for Summary Judgment on October 10, 2008. The motions have two bases: first, there is another action pending between these Plaintiffs and the Johnson Trust/Taylors as beneficiaries; and second, that the present case is barred by the doctrine of *res judicata.*

On January 30, 2009 the Idaho Supreme Court issued its opinion in *Taylor v. Maile*. The Supreme Court once again held that the Taylors had standing to pursue the suit against Maile, and affirmed the judgment which quieted title to the Linder Road land in the name of the Johnson Trust. As a result of that ruling, the Taylors and the Johnson Trust filed an Amended Answer and Counterclaim on February 17, 2009, asserting claims for slander of title, abuse of process, intentional interference with a prospective economic advantage, and seeking an award of fees and costs. Mr. Prusynski filed a mirroring Amended Answer and Counterclaim on behalf of the defendants Clark and Feeney, Connie Taylor, and Paul Thomas Clark on March 12, 2009.

Mr. Maile filed his Motion for Summary Judgment regarding the counterclaims on March 17, 2009, asserting that "the claims set forth in all of the defendants' counterclaim [sic] are barred as a matter of law, and there are no material factual issues in dispute."

ARGUMENT

The Defendants' counterclaims are based on the assertion that the Mailes' claims are totally barred by the doctrine of res judicata. Mr. Maile argues that it is entirely appropriate for him to file this second lawsuit attempting to regain title to the Linder Road property, while the Taylors claim that seeking to relitigate these issues is wrongful, has no basis in either law or fact, and is being done for the purposes of harassment and to delay and increase the cost of litigation. Because the counterclaims are (at this juncture) tied inextricably to the res judicata question, it is premature at this point for Maile to seek summary judgment.

2. There are genuine issues of material fact

The overriding issue of material fact in regard to the counterclaims is whether the current action is frivolous because it is barred by the doctrine of res judicata. Now that the Idaho Supreme Court has issued its ruling, the doctrine of law of the case also applies. There is a genuine issue of fact as to whether Maile has a colorable claim to ownership of the Linder Road property, or whether this lawsuit was filed merely out of malice and for purposes of harassment.

A. Slander of title. The Plaintiffs argue that the filing of a lis pendens can not support a slander of title claim, because it is merely notice that a lawsuit is pending. That argument, however, is overly simplistic; a lis pendens may be found to be a slander of title when there has been a determination that the party who recorded it did not have a colorable claim to ownership in the real property. See, for example, the following cases:

(1) *Hewitt v. Rice*, 154 P.3d 408 (Colo. 2007). There are several alternative avenues of relief in the case of a wrongful lis pendens filing, including a claim for abuse of process;

the wrongful filing of a lis pendens can also be remedied through actions claiming slander of title and intentional interference with contractual relationship.

(2) *Brickner v. One Land Development Co.*, 742 N.W.2d 706 (Minn. Ct. App. 2007). Filing a document concerning ownership of real estate known to be inoperative constitutes a false statement for purposes of a slander of title claim.

(3) *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002). The wrongfully recording of an unfounded claim against the property of another generally is actionable as slander of title.

(4) *Ross v. Specialty Risk Consultants, Inc.*, 621 N.W.2d 669 (Wis. App. 2000). There is a cause of action for slander of title if a false, sham, or frivolous lis pendens is filed.

(5) *Ex parte Boykin*, 656 So.2d 821 (Ala. App. 1994). One who places lis pendens notice on property without a colorable claim of right to or interest in the real property subjects themselves to a claim for slander of title.

(6) *Coventry Homes, Inc. v. Scottscom Partnership*, 745 P.2d 962 (Ariz. App. Div.1,1987). Notice of lis pendens was subject to real property statute, which would render the person asserting a groundless interest in real property liable for damages.

(7) *Miceli v. Gilmac Developers, Inc.*, 467 So.2d 404 (Fla. App.2. Dist.,1985). An intentional, wrongful filing of notice of lis pendens will support an action for slander of title.

(8) *Shenefield v. Axtell*, 274 Or. 279, 545 P.2d 876 (1976). Complaint for slander of title stated a cause of action where it alleged the defendant maintained on county records claim of title to land he held in trust for plaintiff. The claim that plaintiffs had buyers ready, willing and able to purchase the property but that they were unable to sell property to them because of defendant's recorded claim was a sufficiently specific allegation of special damages.

There is also a genuine issue of material fact as to whether Mr. Mailes' filing of this lawsuit and the associated lis pendens was malicious. Because he is licensed as both a real estate broker and an attorney, he must be held to understand the impact of placing a cloud on the title, as well as the legal doctrines of res judicata and the law of the case. A number of courts have taken the view that the malice or bad faith necessary to support an action for slander of title based upon wrongful recordation may be implied from the lack of foundation for the claim recorded, in the absence of countervailing evidence affirmatively establishing the defendant's good faith. Malice merely means lack of legal justification and is presumed if the disparagement is false, caused damage, and is not privileged. *Gates v. Utsey*, 177 So. 2d 486 (Fla. Dist. Ct. App. 1st Dist. 1965) See also *Fountain v. Mojo*, 687 P.2d 496 (Colo. Ct. App. 1984) (Property owner's title was slandered by recording of lis pendens, in lawsuit agreement for breach of purchase where malice of purchaser, ***an attorney***, was shown by recording of lis pendens, in action for damages only, purchaser refused to release lis pendens until return of earnest money and deposit of funds in escrow by owner, and where owner's attorney's fees in removing lis pendens constituted special damages); *Contra Costa County Title Co. v. Waloff*, 184 Cal. App. 2d 59, 7 Cal. Rptr. 358 (1st Dist. 1960) (On evidence that documents clouding title were filed in attempt to pressure seller into consenting to modification or rescission

of contract, *where it appeared that buyer was experienced in legal and real-estate matters* and had threatened suit in attempt to coerce seller, malice was properly found.)

There are genuine issues of material fact on the counterclaim for slander of title which preclude summary judgment.

B. Abuse of process

The Defendants have alleged (and the Plaintiffs have denied) that the Plaintiffs have affirmatively used a legal process (this second lawsuit) primarily to accomplish an improper purpose outside of simply gaining an advantage in the underlying litigation for which the process was not designed (i.e. keeping the real property tied up beyond the time of the appeal of his loss in *Taylor v. Maile*). The Affidavit of John Taylor filed in the *Taylor v. Maile* case (attached as an Exhibit to Affidavit of Connie W. Taylor in Opposition to Plaintiffs' Motion for Summary Judgment on Counterclaims) shows that the Taylors have lost an opportunity to sell the property for $1.8 million, and have lost additional opportunities to sell the property because of this litigation. There is a genuine issue as to whether filing this second action was a "misuse of the process," a fact which will be decided when this court rules on the Defendants' pending motions and request for sanctions under Rule 11.

C. Intentional Interference with a prospective economic advantage.

There are also genuine issues of material fact as to the counterclaim for intentional interference with a prospective economic advantage.

The elements of the tort of intentional interference with a prospective economic advantage are as follows: 1) The existence of a valid economic expectancy; 2) knowledge of the expectancy

on the part of the interferer; (3) intentional interference inducing termination of the expectancy; (4) the interference was wrongful by some measure beyond the fact of the interference itself (i.e. that the defendant interfered for an improper purpose or improper means) and (5) resulting damage to the plaintiff whose expectancy has been disrupted. *Idaho First National Bank v. Bliss Valley Foods*, 121 Idaho 266, 284-85, 824 P.2d 841, 859-60 (1991).

The trial court rulings in *Taylor v. Maile*, as affirmed by the Supreme Court, establish the validity of the Taylors' ownership of the land, and it cannot be questioned that Mr. Maile has been painfully aware of these rulings and has intentionally prevented the Taylors from selling the land. The Defendant Clark and Feeney also has an ownership interest in the land by virtue of their contingent fee agreement. The Affidavit of John Taylor referred to in the preceding paragraph shows that the Taylors have been damaged through the lost opportunities to sell the property because of this litigation. The Taylors have alleged that Mr. Maile's interference is for an improper purpose and through improper means - wrongfully filing a second lawsuit in an effort to relitigate issues which he has already raised repeatedly and lost on, repeatedly. As an attorney, he must be held to the highest ethical standards, and required to comply with Rule 11, which requires that pleadings be filed only when they are well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The question of whether there is any merit whatsoever to this lawsuit creates an issue of fact which precludes summary judgment on this counterclaim.

CONCLUSION

For the reasons stated herein, the Defendants John Taylor, Dallan Taylor, and the Theodore Johnson Trust respectfully request that this court deny the Plaintiffs' motion for summary judgment on the Defendants' counterclaims.

DATED this 8th day of April, 2009.

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of April, 2009 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV
380 West State Street
Eagle, ID 83616

- ☐ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
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Mark Prusynski
MOFFATT THOMAS
101 S Capitol Blvd., 10th Floor
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Boise, ID 83701

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_____
Connie W. Taylor
Attorney for Defendants

ORIGINAL

ORIGINAL

NO. _____
A.M _____ FILED P.M. 4:31

APR 08 2009

J. DAVID NAVARRO, Clerk
By DARLENE BOYINK
DEPUTY

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 07 23232 AFFIDAVIT OF CONNIE W. TAYLOR IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS

STATE OF IDAHO)
) ss.
County of Nez Perce)

ARB

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law within the state of Idaho and a member of Clark and Feeney, attorneys for the Defendants John Taylor, Dallan Taylor and Theodore Johnson Trust in the above entitled matter. The information contained herein is of my own personal knowledge.

2. I am attaching hereto as Exhibit A, a true and correct copy of the Affidavit of R. John Taylor Re: Defendants' Motion to Compel Payment of Judgment filed in the *Taylor v. Maile* case Ada County Case No. CV OC 04 00473D.

DATED this 8th day of April, 2009.

Connie Taylor

SUBSCRIBED AND SWORN to before me this 8th day of April, 2009.

TAMARA CRANE NOTARY PUBLIC STATE OF IDAHO

Tamara Crane
Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 03/06/2014

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Connie W. Taylor
Attorney for Defendants

CONNIE W. TAYLOR
CLARK and FEENEY
Attorneys for Plaintiffs
1229 Main Street
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB No. 4837

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants.

Case No. CV OC 0400473D

AFFIDAVIT OF R. JOHN TAYLOR Re: DEFENDANTS' MOTION TO COMPEL PAYMENT OF JUDGMENT

EXHIBIT
tabbies A

STATE OF IDAHO)
) ss.
County of Nez Perce)

R. JOHN TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am over the age of 18 years and make this Affidavit from personal knowledge.

2. After this Court's May 15, 2006 order granting summary judgment to the plaintiffs, I contacted a banker and received preliminary approval for a mortgage on the property for $400,000. The Trust also had a pending offer to purchase the property for $1,800,000.00 as soon as the litigation was finished. We would have been able to return the purchase price to him promptly if this matter had not been appealed.

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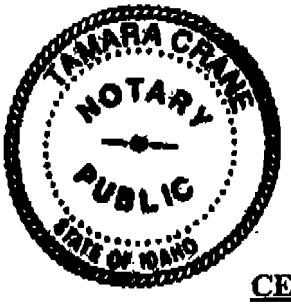
R. JOHN TAYLOR

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

SUBSCRIBED AND SWORN to before me this 19th day of February, 2009.



Tamara Crane
Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 03/06/2014

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380 W. State
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Connie W. Taylor
Attorney for Plaintiffs

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION

Defendants.

Case No. CV OC 07 23232

THIRD SUPPLEMENTAL AFFIDAVIT OF CONNIE W. TAYLOR IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Nez Perce)

THIRD SUPPLEMENTAL AFFIDAVIT OF CONNIE W. TAYLOR 1

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law within the state of Idaho and a member of Clark and Feeney, attorneys for the Defendants John Taylor, Dallan Taylor and Theodore Johnson Trust in the above entitled matter. The information contained herein is of my own personal knowledge.

2. I am attaching hereto as Exhibit A, a true and correct copy of the Motion for Order Compelling Payment of Sums Due and Owing and Interest filed by Mr. Maile in the *Taylor v. Maile* case Ada County Case No. CV OC 04 00473D.

DATED this 8th day of April, 2009.

Connie Taylor

SUBSCRIBED AND SWORN to before me this 8th day of April, 2009.

TAMARA CRANE NOTARY PUBLIC STATE OF IDAHO

Tamara Crane
Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 03/06/2014

CERTIFICATE OF SERVICE

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Connie W. Taylor
Attorney for Defendants

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
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Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs/Counter-Defendants, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants.	Case No. CV OC 04-00473D **MOTION FOR ORDER COMPELLING PAYMENT OF SUMS DUE AND OWING AND INTEREST**
THEODORE L. JOHNSON REVOCABLE TRUST, Plaintiff/Counter-defendant, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC. Defendants/Counter-claimants.	

The Defendants/Counter-Claimants, Thomas Maile, Colleen Maile, and Berkshire Investments, L.L.C., by and through their attorney, Thomas G. Maile, IV, and moves this

MOTION FOR ORDER COMPELLING PAYMENT OF SUMS DUE AND OWING AND INTEREST - Page 1

EXHIBIT
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Honorable Court for the entry of an Order compelling the plaintiffs to pay the sums due and owing pursuant to the terms and conditions imposed by the court, as of July 21, 2006, together with interest thereon until paid in full.

This Motion is made pursuant I.A.R. Rule 13(b)(10) (13), and Idaho Code 28-22-104, together with the Affidavit of Thomas Maile in support of the Motion, the Memorandum Brief in Support of Motion for Order Compelling Payment of Sums Due and Owing and Interest, filed concurrently herewith together with the record and file herein.

ORAL ARGUMENT IS REQUESTED UPON THE MOTION.

DATED this 17 day of February, 2009.

THOMAS G. MAILE, IV., Pro Se,
Attorney for Defendants/Counter-Claimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 17 day of February, 2009, I caused a true and correct copy of the foregoing (1) MOTION FOR ORDER COMPELLING PAYMENT OF SUMS DUE AND OWING AND INTEREST, (2) MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR ORDER COMPELLING PAYMENT OF SUMS DUE AND OWING AND INTEREST, (3) AFFIDAVIT OF THOMAS MAILE IN SUPPORT OF MOTION FOR ORDER COMPELLING PAYMENT OF SUMS DUE AND OWING AND INTEREST and (4) NOTICE OF HEARING, to be delivered, addressed as follows:

Connie W. Taylor
CLARK and FEENEY
P.O. Drawer 785
Lewiston, Idaho 83501
Facsimile: (208) 746-9160

( ) U. S. Mail
(X) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

THOMAS G. MAILE, IV., Pro Se,
Attorney for Defendants/Counter-Claimants

NO. _____
A.M. _____ FILED P.M. 5

APR 0 8 2009

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

ORIGINAL

Mark S. Prusynski, ISB No. 2349
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
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17136.0306

Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, fka CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION,

Defendants.

Case No. CV-OC-0723232

JOINDER

ath

COMES NOW the Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark, and join in the Memorandum in Opposition to Plaintiffs' Motion For Summary Judgment on Counterclaims filed by Defendants John Taylor, Dallan Taylor and the Theodore Johnson Trust, on the grounds stated in said defendants' motion, memorandum of law and affidavits.

DATED this 8th day of April, 2009.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Larry C. Hunter – Of the Firm
Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April, 2009, I caused a true and correct copy of the foregoing **JOINDER** to be served by the method indicated below, and addressed to the following:

Thomas G. Maile IV
LAW OFFICES OF THOMAS G MAILE IV, P.A.
380 W. State St.
Eagle, ID 83616-4902
Facsimile (208) 939-1001

( ) U.S. Mail, Postage Prepaid
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Connie W. Taylor
CLARK & FEENEY
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Facsimile (208) 386-5055

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( ) Hand Delivered
( ) Overnight Mail
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Jason E. Murray
Harry C. Hunter

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants John Taylor
Dallan Taylor and the Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, et al. Defendants.	Case No. CV OC 0723232 **REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

Defendants John Taylor, Dallan Taylor, and the Theodore Johnson Trust, by and through their attorney of record, submit this responsive memorandum in support of their motion asking that this Court enter an order dismissing this action in its entirety and seeking an Order for Rule 11 Sanctions for the filing of this frivolous lawsuit.

I. UPDATE OF RELEVANT FACTS

Since the Defendants filed their Memorandum in support of Motion to Dismiss and/or Motion for Summary Judgment in October 2008, the following events have occurred in *Taylor v.*

Maile, Ada County Case CV OC 04-00473D, which is the action that has been pending since 2004 between these Plaintiffs and the Johnson Trust and its beneficiaries:

1. On January 30, 2009, the Idaho Supreme Court issued its opinion in the latest appeal of *Taylor v. Maile* (2009-ID-0202.167). For the sake of clarity, that opinion will be referred to as *Taylor II.* In that opinion, the Supreme Court ruled, again, that the Taylors had standing to bring an action against Mr. Maile and his LLC. The Court ruled that the Disclaimer, Release and Indemnity Agreement had specifically reserved the Taylors' ownership interest in the lawsuit against the Mailes, and that summary judgment against the Mailes was proper.[1] I have attached a copy of the Disclaimer, Release & Indemnity Agreement hereto as Exhibit A for convenience of the court.

2. On February 17, 2009, Mr. Maile filed a Motion for Entry of Order Compelling Payment of Sums Due and Owing and Interest in *Taylor v. Maile* - i.e., seeking to enforce the very judgment that he claims in the present action should be set aside.[2] That Motion was argued on April 6, 2009. Judge Wilper denied the motion, ruling from the bench that the Taylors have no duty to return the purchase price to Mailes as long as there are lis pendens which make the property unmarketable. Judge Wilper will be issuing a written opinion which we will forward to this court as soon as we receive it.

II. ARGUMENT

The Plaintiffs' filings in response to this motion give this Court a small taste of the last five years of litigation in *Taylor v. Maile.*[3] Fortunately, it is not necessary for this Court to determine

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[1] A copy of that opinion was attached to the Affidavit of Connie W. Taylor dated February 5, 2009.

[2] A copy of that motion is filed as Exhibit A to the Third Supplemental Affidavit of Connie W. Taylor dated April 8, 2009.

[3] See Idaho Repository attached to Supplemental Affidavit of Counsel dated April 1, 2009.

whether there is any merit to the multitude of claims filed by the Plaintiffs. Mr. Mailes' own filings abundantly illustrate that every fact raised in this current action either was or could have been raised in *Taylor v. Maile.*

A. There is no factual basis for the claims of misrepresentation or fraud on the court in *Taylor v. Maile*

The Mailes' lawsuit seeks an order setting aside the judgments entered by the trial court and affirmed by the Supreme Court in Taylor II. The lawsuit is based on two allegations:

- The Taylors (through their attorneys) misrepresented their status as beneficiaries when they filed their Amended Complaint in *Taylor v. Maile* on March 2, 2006. and
- The Taylors (through their attorneys) wrongfully filed an action on behalf of the Trust before they had been formally appointed as trustees. [4]

1. Amended Complaint. In support of the assertion that the Taylors misrepresented their status as beneficiaries when they filed their Amended Complaint, Maile points to a single line in a single document - a Petition for Appointment of Trustees in the Johnson Trust filed on November 15, 2004 in Ada County Case No. SP OT 0400874M. A copy of that petition (without the attachments referred to therein) was attached to the Mailes' Amended Complaint filed in this case on March 25, 2008. That petition contained a typographical error; it stated that Helen Taylor was "the sole remaining beneficiary of the Theodore Johnson Trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement," when it should have stated that she was the sole remaining *direct* beneficiary. As the Supreme Court ruled in *Taylor II*, under the language of the Disclaimer

[4] As a result of the order granting the motion for summary judgment in the beneficiaries' lawsuit, no judgment was ever entered in the lawsuit filed by the Johnson Trust. Any claims relating to that complaint are therefore moot, but will be addressed nonetheless for the sake of providing a thorough response to the Plaintiffs' claims.

Agreement, all of the Taylors had reserved the right to pursue the lawsuit against the Mailes and their LLC.

What Mr. Maile has consistently failed to address is the fact that the typographical error was corrected in an Amended Petition filed with the probate court on April 19, 2005.[5] That document clarified the fact that Helen Taylor's children were beneficiaries of the Johnson Trust. The Amended Complaint filed nearly eleven months later in *Taylor v. Maile* correctly stated that the Taylors were beneficiaries of the Trust, a fact which has been affirmed by the Supreme Court. There was no misrepresentation, no fraud on the court, no crime, no conspiracy, no theft, and no negligence.

2. Johnson Trust Complaint. There was no misrepresentation or fraud on the court relating to that Complaint. In the Disclaimer Agreement, all of the beneficiaries agreed that the successor trustees would resign and the Taylors would take over as Trustees of the Johnson Trust. When Mr. Maile pointed out the need for court approval, the Taylors sought formal appointment and it was granted over Mr. Maile's objection.[6]

B. Mailes unsuccessfully raised these same issues in *Taylor v. Maile*

In his appeal of the trial court's order granting summary judgment , Mr. Maile has already unsuccessfully argued these same issues.[7]

He argued that the initial petition filed in the probate court constituted a judicial admission

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[5] A copy of the Amended Petition is included as part of Exhibit T to the Affidavit of Thomas Maile Part Three dated December 31, 2008.

[6] Defendants ask that this Court take judicial notice of the court file in Ada County Case. No. SP OT 0400874M

[7] See Appellants' briefing attached as Exhibits X and Y to the Affidavit of Thomas Maile Part Four.

that Helen Taylor was the sole beneficiary of the Johnson Trust and that the Taylors had misrepresented their status to the lower court.[8] A copy of the initial Petition was attached as an exhibit to that brief, which was dated November 14, 2007. In the appeal, just as in the present action, Mr. Maile did not acknowledge or discuss the fact that the petition had been amended long before the Taylor beneficiaries filed the Amended Complaint which he claims was a misrepresentation and fraud on the court. In his reply brief in *Taylor v. Maile II*, Mr. Maile argued that the filing of the Amended Complaint constituted a violation of the Idaho Rules of Professional Conduct, specifically stating "The Taylors, and Mrs. Taylor as their attorney, verified statements of fact under oath that were misleading to the court and to this tribunal."[9]

Maile also argued unsuccessfully on appeal that the trial court had erred when it allowed the Taylors to amend the Trust's complaint after their formal appointment as trustees, and ruled that the amendment related back to the time of the initial complaint. [10]

C. This action is barred by the doctrine of claim preclusion

The undisputed facts set forth above show that not only is there another action pending between the same parties, that action arises from the same set of operative facts and has already addressed the issues which the Plaintiffs claim support this lawsuit.

As noted in our prior memorandum, the elements of claim preclusion are: (1) same parties; (2) same claim; and (3) final judgment. *Ticor Title Co. v. Stanion,* 144 Idaho 119, 124, 157 P.3d

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[8] See pages 7 - 10 of Appellants' Reply brief (Exhibit Y to Affidavit of Thomas Maile Part Four).

[9] See Exhibit Y, Appellants' Reply Brief, pages 34-36.

[10] See pages 35-36 of Appellants' Opening Brief (Exhibit X to Affidavit of Thomas Maile Part Four)

613, 618 (2007).

Same parties. Claim preclusion bars the presentation of the claim in a subsequent lawsuit between the same parties or their privies. *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir and Canal Co.*, 123 Idaho 634, 637, 851 P.2d 348, 351 (1993). This suit involves the same parties as *Taylor v. Maile*, with the exception of Mr. Maile's addition of the Taylors' attorneys and their law firm. The law firm defendants appear by virtue of their activities as representatives of the Taylors, which has been held to create privity.

The application of claim preclusion to attorneys for a party was addressed in *Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612 (N.D. 2005). The Simpsons had sought a new trial of their products liability claim. After the North Dakota Supreme Court affirmed the denial of that motion, they brought a second action against the tool maker, and also named the tool maker's attorneys as parties under the premise that the defendants had failed to produce all of the surveillance tapes that Simpson was entitled to receive via discovery. The trial court granted defendants summary judgment and awarded sanctions against Simpsons. The North Dakota Supreme Court affirmed both the summary judgment and the sanctions, specifically finding as follows:

> The only difference between this case and *Simpson* is the addition of Chicago Pneumatic's attorneys as defendants and the alternative theories pled to justify recovery. ... Here, the alleged wrongful conduct of the defendants involves the attorneys' response on behalf of their client to discovery requests and orders. Under these circumstances, privity exists between Chicago Pneumatic and its attorneys in the underlying action for purposes of res judicata and collateral estoppel. *See, e.g., Geringer v. Union Elec. Co.*, 731 S.W.2d 859, 866 (Mo.App.1987) (law firm which represented client in underlying action was in privity with client in the prior adjudication and could assert collateral estoppel as bar to relitigation of issue resolved in previous lawsuit); *Merchants State Bank v. Light,* 458 N.W.2d 792, 794 (S.D.1990) (lawyer who prosecuted and directed prior litigation was in privity with

client for purposes of res judicata); 47 Am.Jur.2d *Judgments* § 691 (1995), and cases collected therein.

Simpson, 693 N.W.2d at 617. A similar result was reached in the following cases:

1. *Jayel Corp. v. Cochran*, 234 S.W.3d 278, 283 (Ark. 2006) (holding that attorney-client relationship is sufficient to establish privity for purposes of res judicata analysis)

2. *Chaara v. Lander*, 132 N.M. 175, 45 P.3d 895 (Ct.App.2002) (holding that wife's divorce attorney was in privity with wife, thus *res judicata* barred husband's subsequent suit against attorney).

3. *In re El San Juan Hotel Corp.,* 841 F.2d 6 (1st Cir.1988) (holding that trustee's attorney was in privity with trustee, thus *res judicata* barred a subsequent action against attorney accused of facilitating a wrongdoing);

4. *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235 n. 6 (7th Cir.1986) (holding that res judicata barred suit against bank's attorneys for alleged misconduct in prior lawsuit)

Same claim. As discussed in paragraph II.B above, all of the Plaintiffs' claims in this case stem from the allegation that the Taylors and their attorneys misrepresented the Taylors' status as beneficiaries and Trustees of the Johnson Trust. Those issues were raised unsuccessfully in *Taylor II*, and claim preclusion bars the Plaintiffs from using those same allegations as a springboard for their claims in this case. Other than the legal negligence allegations, the present claims are largely identical to their counterclaims in *Taylor v. Maile*.

A. In this case, Mailes have alleged the following causes of action:

1. Quiet title, seeking return of the title to the Linder Road property to Berkshire Investments
2. Constructive Trust
3. Tortiuous [sic] Interference with Contract
4. Tortiuous [sic] Interference of Prospective Economic Advantage

5. Abuse of Process

6. Legal negligence of Connie Taylor and Tom Clark

7. Legal negligence per se of attorneys Connie Taylor and Tom Clark

8. Gross Negligence of attorneys Connie Taylor and Tom Clark

9. Equitable estoppel

10. Quasi estoppel

11. Civil Racketeering action based on allegations of a conspiracy between Clark and Feeney and the Taylors/Johnson trust to commit theft, perjury, and obtaining property by false pretense

12. Judicial Estoppel

B. In Taylor v. Maile, the Answer to Amended Complaint and Counterclaims dated March 17, 2005[11] contained the following:

1. Affirmative defenses:

a. Failure to state a cause of action upon which relief may be granted

b. Venue proper in Canyon County (based on the Ernest [sic] Money agreement which was attached as an exhibit)

c. Plaintiffs not real parties in interest

d. Mandatory binding arbitration under the Earnest Money Agreement

e. No jury trial available under terms of Earnest Money Agreement

f. Lack of Consideration

g. Lack of contractual privity

h. "Latches" [sic]

i. Equitable estoppel and/or Quasi-estoppel

j. Failure to mitigate

k. Unclean Hands

[11] Exhibit A to Amended Affidavit in Support of Motion to Dismiss dated May 14, 2008

l. Release and Reconveyance

m. Accord and Satisfaction

2. Counterclaims as follows:

a. Tortious interference with contract

b. Tortious interference with prospective economic advantage

c. Slander of title

d. Wrongful cloud on title

e. Civil conspiracy

f. Breach of contract

g. Equitable estoppel

h. Quasi estoppel

i. Breach of good faith and fair dealing

C. On September 7, 2005, the Appellants filed an Amended Answer[12] which added the following counterclaims:

1. Fraudulent conveyance

2. Unjust enrichment (based on work the Mailes had done on the real property)

3. "Indemnification agreement" (Referring to the Disclaimer, Release and Indemnity Agreement between the Trustees and all beneficiaries).

4. Breach of peace and quiet enjoyment of deeded property

5. Breach of warranty deed, and

6. "Continuing tort"

On February 13, 2006, the district court entered an order[13] dismissing the Appellants' counterclaims for tortious interference with the purchase contract, tortious interference with

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[12] Exhibit A to Amended Affidavit in Support of Motion to Dismiss dated May 14, 2008

[13] Exhibit B to May 14, 2008 Amended Affidavit in Support of Motion to Dismiss.

prospective economic advantage, slander of title, wrongful cloud of title, civil conspiracy, breach of contract, good faith and fair dealing, indemnification agreement, breach of peace and quiet enjoyment, breach of warranty deed, failure to join indispensable parties, and accord and satisfaction. In that order, the court repeatedly stated that the Mailes had failed to present even a scintilla of evidence to support the counterclaims.

On March 15, 2006, the Appellants filed an Answer and Counterclaim to the Beneficiaries' Amended Complaint incorporating by reference all of the "affirmative defenses, requests for attorney fees, prayer for relief and counterclaims contained in all of Defendants/Counter-Claimants' previous answers to the various complaints and amended complaints filed in the matter of Taylor v. Maile, et al, and in the matter of the Theodore L. Johnson Revocable Trust v. Thomas Maile, et al." The Answer added the following affirmative defenses:

1. Failure to join indispensable parties
2. Plaintiffs' claims barred by the release of the successor trustee from liability [based on the Disclaimer, Release and Indemnity Agreement]
3. Defendants were bona fide purchasers
4. Majority of beneficiaries consented to the sale of the Linder Road Property.

After granting summary judgment to the Taylors[14], the court on June 27, 2006 entered a judgment which quieted title to the Linder Road property to the Johnson Trust and dismissed all of the Appellants' remaining counterclaims and affirmative defenses other than unjust enrichment.

[14] Exhibit C to May 14, 2008 Amended Affidavit in Support of Motion to Dismiss

After a bench trial, Judge Wilper entered a Memorandum Decision[15] on November 29, 2006 which denied Maile's claim for unjust enrichment, specifically ruling:

1. The Trust was not unjustly enriched by Maile's expenditures after the purchase;

2. Maile's expenditures conferred no benefit upon the Johnson Trust, the trustees, nor the beneficiaries.

3. Even if the Trust had received a benefit, it "certainly did not do so under circumstances that would make it inequitable for it to retain the benefit without paying Mr. Maile."

4. The fair market value of the property as of November 29, 2006, was $1,800,000, which is the same fair market value of the property with or without any expenditures or improvements made by Mr. Maile.

5. In spite of Mr. Maile's testimony at trial that he had advised Mr. Johnson to seek independent advice about selling him the land for $400,000, "the Court is not persuaded that Mr. Maile so advised Mr. Johnson."

6. There was ample evidence in the record to support the contention that Mr. Maile engaged in "sharp practices" in drafting the documents connected to the transaction.

Mr. Maile filed a Notice of Appeal[16] which listed 16 separate issues, including the following:

> (e) Was the Court correct in denying Appellants' Motion to Dismiss/Motion for Summary Judgment relating to the role of the successor trustees not obtaining judicial appointment prior to filing suit on behalf of the trust?
>
> (f) Was the Court correct in determining that the Respondents as beneficiaries of the trust had standing to pursue the claims which were ultimately granted by the Beneficiaries' Motion for Summary Judgment?
>
> (k) Did the Court err in failing to consider the effect of the Disclaimer and Indemnification Agreement executed by the Respondents and the successor trustees and the other beneficiaries of the trust relating [to] the claims against the Appellants?

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[15] Exhibit D to May 14, 2008 Amended Affidavit in Support of Motion to Dismiss

[16] Exhibit BB to Affidavit of Thomas Maile Part Four.

(n) Did the Court err in not allowing the counterclaims of the Appellants to proceed to trial?

(o) Did the Court err in determining that the Theodore L. Johnson Trust was entitled to amend their complaint and relate back the complaint to the date of filing, when the successor trustees had not been properly appointed by Court Order as required pursuant to I.C. 68-101 or 68-107?

The briefs which the Mailes filed in *Taylor II* argued each of these issues in some detail. The fact that they were not all addressed individually in the Supreme Court's opinion does not change the fact that the issues were litigated in the trial court and may not be raised again.

The prior adjudication "extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose. *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990). A cause of action can be barred by a prior adjudication even though the theory of liability and supporting evidence differ from the cause of action actually litigated in the prior lawsuit. *Magic Valley Radiology, P.A. v. Kolouch,* 123 Idaho 434, 437-39, 849 P.2d 107, 110-112 (1993). The new theories under which the Plaintiffs claim the Johnson Trust property should be returned to them are barred by the doctrine of claim preclusion.

Final Judgment. The trial court's judgments have now been affirmed by the Idaho Supreme Court, definitively meeting the "final judgment" requirement.

D. Judicial estoppel. Just one week ago, the Plaintiff in this action asked Judge Wilper to enter an order compelling the Taylors to pay the judgment in *Taylor v. Maile*, which ordered the return of the Linder Road property to the Johnson Trust and the return of the $400,000

purchase money to Mailes.[17] This position is diametrically opposed to the position taken in the present action, which is that the judgment should be set aside.

Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *Heinze v. Bauer,* 145 Idaho 232, 178 P.3d 597 (2008). The policies underlying judicial estoppel are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (quoting *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir.1996)). Judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts. *Id.*

Under the doctrine of judicial estoppel, these Plaintiffs are precluded from seeking to enforce a judgment in one action while simultaneously insisting that the very same judgment be set aside in this proceeding.

CONCLUSION

For the reasons stated herein, the Defendants John Taylor, Dallan Taylor, and the Theodore Johnson Trust respectfully request that this court enter an order dismissing this cause of action with prejudice and enter an Order finding this action to be a violation of Rule 11 and imposing costs and attorney fees as a sanction.

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[17] Motion is attached to Third Supplemental Affidavit of Connie Taylor in Support of Motion for Summary Judgment

DATED this 10 day of April, 2009.

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of April, 2009 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV
380 West State Street
Eagle, ID 83616

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX) ***(208) 939-1001***

Mark Prusynski
MOFFATT THOMAS
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PO Box 829
Boise, ID 83701

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX) ***(208) 385-5384***

Connie W. Taylor
Attorney for Defendants

DISCLAIMER, RELEASE & INDEMNITY AGREEMENT

1. Disclaimers.

1.1 Disclaimer of Claims by Certain Beneficiaries. Except for those individuals identified in the last sentence of this Section 1.1, each of the beneficiaries of the Theodore L. Johnson Trust, UTD November 4, 1997 (hereafter referred to as the "Trust"), hereby disclaims, in favor of the Trust, any ownership interest he/she may now or in the future have in any claims or causes of action by the Trust or the trustees of the Trust against attorney Thomas G. Maile, or his successors or affiliates, including, without limitation, Thomas Maile, IV, Colleen Maile, Thomas Maile Real Estate Company and Berkshire Investments, LLC, in connection with the purchase of real property from the Trust ("Claims"); and by this Disclaimer, the same individuals confirm in the Trust complete ownership and control of any such Claims. No warranty or representation is made as to the existence or efficacy of such Claims. The following beneficiaries do not join in this disclaimer: Helen Taylor, Reed J. Taylor, Dallan J. Taylor, Mark J. Taylor, Gloria Rydalch, Virginia Porter and R. John Taylor.

1.2 Disclaimer of All Other Interests.

1.2.1 Fisher. Gordon E. Fisher, Garth J. Fisher and Judith F. Crawford, comprising all of the children of Hazel Fisher, hereby disclaim all interests whatsoever in the Trust, not previously disclaimed in Section 1.1 above, in favor of their mother, Hazel Fisher, and hereby approve immediate distribution to Hazel Fisher.

1.2.2 Seely. J. David Seely, Karl J. Seely, Dorothy S. Dayton, Janet S. Denison and Nathan L. Seely, comprising all of the children of Joyce Seely, hereby disclaim all interests whatsoever in the Trust, not previously disclaimed in Section 1.1 above, in favor of their mother, Joyce Seely, and hereby approve immediate distribution to Joyce Seely.

1.2.3 Taylor. Reed J. Taylor, Dallan J. Taylor, Mark J. Taylor, Gloria Rydalch, Virginia Porter and R. John Taylor, comprising all of the children of Helen Taylor, hereby disclaim all interests whatsoever in the Trust, in favor of their mother, Helen Taylor, and hereby approve immediate distribution to Helen Taylor. All of the individuals identified in this Section 1.2.3 are sometimes hereafter referred to as "Taylors".

2. Receipt in Full – Income Tax. The undersigned acknowledge receipt in full of all property, money and benefits which he/she is entitled to receive from Andrew T. Rogers and Beth J. Rogers, in their capacity as trustees of the Trust. This includes a full share of the final payment received in 2004 from the sale to Thomas G. Maile/Berkshire Investments, LLC, in 2002, of the real estate located in Ada County. (Except for the Taylors, to the extent they are retaining a beneficial interest in the Claims), the undersigned have no further expectation of receiving anything from the Trust. The undersigned further understand that the trustees have not paid income tax on the final payment received in 2004 and that he/she will receive an IRS form K-1 indicating his/her share of such tax, which is to be included on the beneficiary's own federal and state income tax returns for 2004.

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3. Release of Trustees – Estimated Expenses. The undersigned hereby release and discharge Andrew T. Rogers and Beth J. Rogers from all claims or causes of action, whether known or unknown, he/she may have against them (i) in their capacity as trustees of the Trust, or (ii) arising in any way out of their service as trustees of the Trust. The undersigned further acknowledge that the trustees have distributed, and he/she has received, all of the property, money and benefits to which he/she is entitled under the terms of the Trust, except an amount which shall not exceed Five Thousand Dollars ($5,000), which has been retained for the sole purpose of paying accounting, legal and other expenses associated with the Trust. Any surplus in such retainage will be distributed to the beneficiaries proportionately. The undersigned acknowledge the financial information he/she has received will constitute a final accounting; and he/she waives any right to a court-approved formal final accounting.

4. Resignation of Trustees. The undersigned understand Andrew T. Rogers and Beth J. Rogers intend to resign as trustees of the Trust, leaving in the Trust the Claims described in Section 1.1 above; and the undersigned approve of such resignation. The undersigned further understand and agree that the successor trustee, Garth Fisher, will decline to serve as trustee, and that Reed J. Taylor, Dallan J. Taylor and R. John Taylor will be nominated and appointed to serve as successor co-trustees of the Trust.

5. Indemnification. Taylors, jointly and severally, agree to defend, indemnify and hold harmless (i) Andrew T. Rogers and Beth J. Rogers, and (ii) all of the other beneficiaries of the Trust against all suits, claims, expenses, costs, attorney's fees, losses or monies that they may incur or be required to pay as a result of any lawsuit by Taylors, or any of them, or their successors, based upon the Claims, including, without limitation, any third-party claim or counterclaim advanced by the defendants.

6. Enumeration of Beneficiaries. This will certify the twenty-five (25) individuals identified below as signators constitute all of the beneficiaries of the Trust. ***Exhibit A*** attached is a graphical depiction of the relationship of the signators and grantor Theodore L. Johnson. Blair Johnson predeceased the Grantor, Theodore Johnson, leaving no issue; and the beneficial interest of Blair Johnson therefore lapsed.

7. Binding Effect. This instrument shall be effective as of the latest signature by all, and not less than all, of the signators indicated below; and this instrument shall be binding upon the heirs and successors of the parties.

8. Attorney's Fees. If any party commences legal proceedings for any relief against the other party(ies) arising out of this agreement, the prevailing party(ies) shall be entitled to an award of his/her/their legal costs and expenses, including, but not limited to, reasonable attorney's fees as determined by the court. The prevailing party(ies) shall be that party receiving substantially the relief sought in the proceeding, whether brought to final judgment or not.

9. Counterparts and Facsimile. This instrument may be executed in several counterparts and all so executed shall constitute one instrument, binding on all the parties hereto, even though all the parties are not signatories to the original or the same counterpart. A signed document transmitted by fax shall be the equivalent of execution and delivery of an original signed document.

10. Entire Agreement. This agreement, together with all exhibits attached hereto and other agreements and written materials and documents expressly referred to herein, constitutes the entire agreement between the parties with respect to the matters set forth herein. All prior or contemporaneous agreements, understandings, representations, warranties and statements, oral or written, are superseded.

11. Further Assurances. The parties agree to perform such further acts and to execute and deliver such additional documents and instruments as may be reasonably required in order to carry out the provisions of this instrument and the intention of the parties. Each of the signators warrants and represents that in executing this instrument he/she is dealing with his/her sole and separate property.

12. Governing Law. This agreement shall be governed, construed and enforced in accordance with the laws of the State of Idaho.

13. Modification/Waiver. No modification, waiver, amendment or discharge of this instrument shall be valid unless the same is in writing and signed by all parties.

HAZEL FISHER Dated

GORDON E FISHER Dated

GARTH J. FISHER Dated

JUDITH F CRAWFORD Dated

JOYCE SEELY Dated

DOROTHY S DAYTON Dated

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

REED J. TAYLOR Dated

HELEN TAYLOR Dated

DALLAN J. TAYLOR Dated

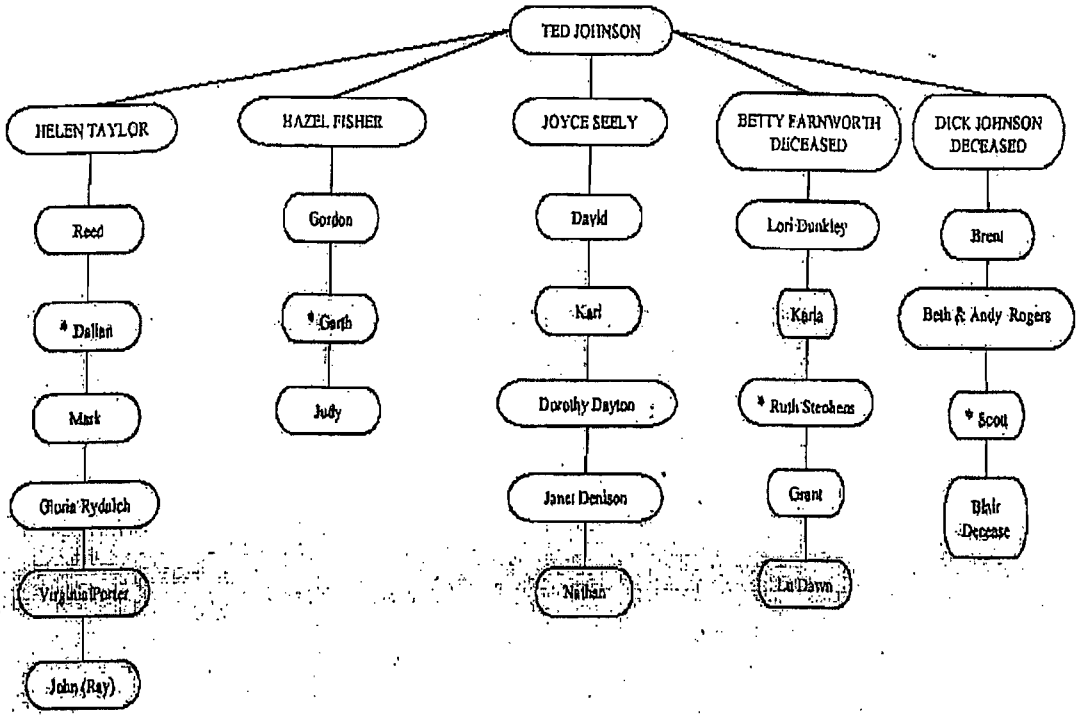
GLORIA RYDALCH Dated

MARK J. TAYLOR Dated

VIRGINIA PORTER Dated

R. JOHN TAYLOR Dated

EXHIBIT A



* Family contact

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

REED J. TAYLOR Dated

Helen Taylor 6/11/04
HELEN TAYLOR Dated

DALLAN J. TAYLOR Dated

GLORIA RYDALCH Dated

MARK J. TAYLOR Dated

VIRGINIA PORTER Dated

R. JOHN TAYLOR Dated

HELEN TAYLOR Dated

DALLAN J. TAYLOR 6-14-04 Dated

GLORIA RYDALCH Dated

MARK J. TAYLOR Dated

VIRGINIA PORTER Dated

R. JOHN TAYLOR Dated

HELEN TAYLOR Dated

DALLAN J. TAYLOR Dated

Gloria Rydalch 6/14/04

GLORIA RYDALCH Dated

MARK J. TAYLOR Dated

VIRGINIA PORTER Dated

R. JOHN TAYLOR Dated

HELEN TAYLOR Dated

DALLAN J. TAYLOR Dated

GLORIA RYDALCH Dated

Mark Taylor 15 Jan '04
MARK J. TAYLOR Dated

VIRGINIA PORTER Dated

R. JOHN TAYLOR Dated

HELEN TAYLOR Dated

DALLAN J. TAYLOR Dated

GLORIA RYDALCH Dated

MARK J. TAYLOR Dated

10 June 04
VIRGINIA PORTER Dated

R. JOHN TAYLOR Dated

9. Counterparts and Facsimile. This instrument may be executed in several counterparts and all so executed shall constitute one instrument, binding on all the parties hereto, even though all the parties are not signatories to the original or the same counterpart. A signed document transmitted by fax shall be the equivalent of execution and delivery of an original signed document.

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Hazel Fisher 5-24-04
HAZEL FISHER Dated

Gordon E. Fisher 5-26-04
GORDON E FISHER Dated

GARTH J. FISHER Dated 5-24-04

Judith F Crawford 5/29/04
JUDITH F CRAWFORD Dated

JOYCE SEELY Dated

DOROTHY S DAYTON Dated

9. Counterparts and Facsimile. This instrument may be executed in several counterparts and all so executed shall constitute one instrument, binding on all the parties hereto, even though all the parties are not signatories to the original or the same counterpart. A signed document transmitted by fax shall be the equivalent of execution and delivery of an original signed document.

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12. Governing Law. This agreement shall be governed, construed and enforced in accordance with the laws of the State of Idaho.

13. Modification/Waiver. No modification, waiver, amendment or discharge of this instrument shall be valid unless the same is in writing and signed by all parties.

_____
HAZEL FISHER Dated

_____
GORDON E FISHER Dated

_____
GARTH J. FISHER Dated

_____
JUDITH F CRAWFORD Dated

Joyce Seely
JOYCE SEELY Dated 5-27-04

DOROTHY S DAYTON Dated 5-26-04

J David Seely 27 May 04
J DAVID SEELY Dated

KARL J SEELY Dated MAY 27, 2004

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

J DAVID SEELY Dated

KARL J SEELY Dated

6 JUNE 04
NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

P.02

Jun-07-04 09:30A

5

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

Janet S Denison
JANET S DENISON Dated May 27, 2004

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated 5-30-2004

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSONDated

Beth Rogers 06/04/04
BETH J ROGERS Dated

SCOTT B JOHNSONDated

D GRANT FARNWORTH Dated

LU 5/28/04
LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

Scott B Johnson 3 June 2004
SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D Grant Farnworth 6/2/04
D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

Laurie Dunkley

LAURIE DUNKLEY Dated 6/01/04

KARLA FARNWORTH Dated

RUTH F STEPHENS Dated

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

Karla J. Farnworth
KARLA FARNWORTH Dated 5-29-04

RUTH F STEPHENS Dated

J DAVID SEELY Dated

KARL J SEELY Dated

NATHAN L SEELY Dated

JANET S DENISON Dated

BRENT B JOHNSON Dated

BETH J ROGERS Dated

SCOTT B JOHNSON Dated

D GRANT FARNWORTH Dated

LU DAWN FARNWORTH Dated

LAURIE DUNKLEY Dated

KARLA FARNWORTH Dated

Ruth F. Stephens 5-25-04

RUTH F STEPHENS Dated

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants.	Case No. CV-OC-0723232 **REPLY MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RELATING TO THE DEFENDANTS' COUNTER-CLAIM & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The Plaintiffs submit their Reply Memorandum Brief in Support of their Motion for Summary Judgment and provide the following.

REPLY MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: COUNTER-CLAIM & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - Pg 1 C:\handybackback1\server1files\a\ADBERKSHIR.INV\clarkfeeney\summjudgmnt.plaintiffreplymemorandumbrief6j1.wpd

LEGAL ARGUMENT

1 **The Memorandum Submitted by the Plaintiffs and the Affidavit of R. John Taylor Contain Hearsay Evidence, Conclusory Statements, and Assertions That Have No Proper Foundation Before the Court and must Be Stricken from the Record.**

The Affidavit of R. John Taylor is before the court through the Affidavit of Connie Taylor dated April 8, 2009. The defendants' Memorandum Brief makes reference to the Affidavit of R. John Taylor (p.7) as supporting the proposition that the Taylors have sustained damages. The Affidavit of R. John Taylor, contain impermissible hearsay and conclusory statements, conjuncture or have references to facts which are not part of the record and must be stricken.

Rule 12(F) of the Idaho Rules of Civil Procedure provides:

> Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty (20) days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Rule 56 of the Idaho Rules of Civil Procedure requires that the evidence submitted in opposition must be admissible evidence. There is no record before this court of any alleged ascertainable damages allegedly sustained by the Taylors and/or Clark & Feeney. The Affidavit of R. John Taylor, contains hearsay testimony including statements allegedly made by a banker and/or an pending offer. The case of Homes Corp. v. R. Herr, 142 Id. 87, 123 P.3d 720 142 (C.A. 2005), provides:

> In order to be considered on a summary judgment motion, affidavits must be based on personal knowledge, set forth facts that would be admissible in evidence

at trial, and show that the affiant is competent to testify on the stated matters. I.R.C.P. 56(e). In determining the admissibility of evidence, trial courts are given broad discretion and will be reversed on appeal only when there has been a clear abuse of discretion. State, Dep't of Health and Welfare v. Altman, 122 Idaho 1004, 1007, 842 P.2d 683, 686 (1992); Baker v. Shavers, Inc., 117 Idaho 696, 698, 791 P.2d 1275, 1277 (1990).

Idaho courts exercise free review of the standards of the admissibility of evidence on summary judgment motions, and will not be overturned unless there is a clear abuse of discretion. An examination of the Affidavit of R. John Taylor reveals a lack of foundation relating to the alleged feasibility of a loan and/or a pending offer. Supporting and opposing affidavits must 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. Tri-State Nat. Bank v. Western Gateway Storage Co., 92 Idaho 543, 447 P.2d 409 (1968). There is no supporting foundation for such assertions and any such reference should be stricken from the record as hearsay and lack foundation under the Rule of Evidence, Rules 801, 802, 901, 902. Likewise the Affidavit of R. John Taylor contains statements from alleged potential buyers but this in and of itself does not establish a basis of damages, which constitute hearsay and must be stricken.

2 **The Defendants Have Failed to Rebut Unconverted Facts in the Record and There Is Nothing in the Record to Establish a Genuine Issue of Material Fact in Dispute.**

The defendants have offered no evidence by way of deposition testimony, affidavits, etc., which demonstrate a dispute of material fact. I.R.C.P. 56(e), demonstrate that when faced with a motion for summary judgment the party against whom it is sought may not merely rest on allegations contained in his pleadings. Rather, he must come forward and produce evidence by way

of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact. Dulaney v. St. Alphonsus Regional Medical Center, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002). A trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the court's attention. Coeur d'Alene Mining Co. v. First Nat'l Bank of North Idaho, 118 Idaho 812, 800 P.2d 1026 (1990)Esser Elec. v. Lost River Ballistics Techs., Inc., 145 Idaho 912, 917, 188 P.3d 854, 859 (2008). There is nothing in the record to establish any genuine issue of material fact in dispute that would prevent the entry of summary judgment for the plaintiffs.

3 **The Affidavit of Helen Taylor Must Be Stricken from the Record as it Fails to Demonstrate Material Issues of Fact in Dispute and is Not Relevant.**

The Affidavit of Helen Taylor dated October 15, 2008 has been filed with the court, however, it is silent as to whether it is being used by the defendants' in their motions for summary judgement or whether it is being offered in opposition to the plaintiff's motion for summary judgment. I.R.C.P. Rule 56 requires that all supporting affidavits be filed 28 days prior to the hearing on the motion for summary judgment. Obviously, the filing of April 8, 2009 does not comply with the Rules and should be stricken. In addition, the testimony of Helen Taylor has no relevance as to the determination of the defendants' misrepresentations to the court which ultimately resulted in the "Judgment on Beneficiaries' Claims". A trial court has the discretion to decide whether an affidavit offered in support of or opposition to a motion for summary judgment is admissible under Rule 56(e), even if that issue is not raised by one of the parties. Rhodehouse v. Stutts, 125 Id. 208, 868 P.2d 1224 (1994). There must be an objection for the court to determine

the admissibility of the affidavit. If there is no timely objection, the trial court can grant summary judgment based upon an affidavit that does not comply with Rule 56(e). State, Dept. of Agric. v. Curry Bean Co. Inc., 139 Idaho 789, 86 P.3d 503 (2004). The plaintiffs request that such affidavit be stricken from the record as not relevance to the ultimate determination of the criminal activity and the misrepresentations of the defendants in obtaining the **"Judgment on Beneficiaries' Claims"**.

4 **The Defendants Have Failed to Rebut the Verified Pleadings, and Other Evidence in the Record, consequently the Plaintiffs' Motion for Summary Judgment must Be Granted.**

The defendants have taken the position, that since the issue of res judicata has not been addressed, the plaintiff's motion for summary judgment cannot be entertained. We know from established case law in Idaho, that res judicata is not a bar to a claim for relief, premised upon an independent action to set aside a judgment based upon fraud. Compton v. Compton, 101 Id. 328, 334, 612 P.2d 1175, 1181 (1980). Rule 60(b) of the Idaho Rules of Civil Procedure recognizes that courts have the inherent power "to set aside a judgment for fraud upon the court". Rae v. Bunce, (S.C. 2008 Docket No. 33996).

The defendants have failed to rebut their own judicial admissions before the probate court contained in the verified petition filed November 14th 2004. There is no dispute that Connie Taylor, notarized her husband's signature on November 14th 2004, wherein her then husband stated under oath in the verified petition before the probate court, at page two "the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of this trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement". Immediately above the signature the

verification provides, ""R. John Taylor, being sworn, says that the facts set forth in the foregoing petition are true, accurate, and complete to the best of applicant's knowledge and belief".

Nor have they rebutted the sworn testimony before the probate court in May 2005 (Annexed hereto as Exhibit "A" is a true and correct copy of the reporter's transcript from the hearing dated May 25, 2005 before the Honorable Christopher Bieter, Judge of the Probate Court.

Relevant portions of the testimony and statements before the probate court provides commencing at page 14, ln 4:

> Q. Will you explain to the court just briefly why it is that you want to serve? 6
> A. "Well, primarily, to pursue the claim for the trust. We have always thought it was a valid claim because I think that, for the benefit -- my mother is the beneficiary of the trust, and we expect that we will eventually win on this claim."
>
> page 17, ln 12: MR. CLARK: "Yes. Just briefly, Judge. It seems to me that, based upon, first, the agreement of the beneficiaries -- they have all indicated that the Taylors should serve as co-trustees. The Taylors, pursuant to that same agreement, have a guarantee in the disclaimer. So they have some interest in the proceeding. Their mother stands to gain and, thereby, they have an interest in the proceeding." (Affidavit of Thomas Maile Part One transcript of probate court hearing Exhibit "A").

Nor have they rebutted the fact that defendant Connie Taylor, acting for the benefit of the Taylors in negotiating the terms of the Disclaimer, Release & Indemnification Agreement, drafted a letter to Bart Harwood on April 14, 2004 which stated, "The Taylors are not willing to give up their rights as beneficiaries of the trust unless Beth will affirm her prior factual statements in the form of an affidavit and agree to cooperate in the action against Mr. Maile... (Affidavit of Thomas Maile Part One deposition of Beth Rogers Exhibit "B" referencing

deposition exhibit 39).

The understanding of Helen Taylor as set forth in her October 15, 2008 affidavit has no bearing on the defendants' sworn testimony before the probate court. The defendants have failed to provide any relevant evidence by way of their own affidavits, or other sworn statements which would rebut their established judicial admissions which are the cornerstone of their subsequent perjured testimony.

Idaho Code section 18-5410 states:

> SUBORNATION OF PERJURY. Every person who wilfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured.

CONCLUSION

The defendants have failed to provide competent, relevant evidence in the form of affidavits, testimony, etc., to deny the plaintiffs' motion for summary judgment. The filing of the lis pendens to protect the plaintiffs rights both as to the remedies pled and for the repayment of the monies that are still outstanding which are lawfully due and owing to Berkshire Investments is proper. The Counter-defendants are entitled to Partial Summary Judgment as to all counter-claims raised by the defendants.

DATED this 14th day of April, 2009.

THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of April, 2009, I served the foregoing (1) REPLY MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: COUNTER-CLAIM & IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, by having a true and complete copy personally delivered, by facsimile and/or by depositing the same in the United States Mail, postage prepaid thereon, and addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV..

ORIGINAL

Mark S. Prusynski, ISB No. 2349
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
msp@moffatt.com
17136.0306

Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, fka CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION,

Defendants.

Case No. CV-OC-0723232

REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Despite several supplemental memoranda and affidavits in multiple parts, plaintiffs still have not shown that the claims raised in this lawsuit were not raised in the earlier litigation between the same parties or why they could not have been raised in that litigation. Rather than contribute to the repetition contained in the briefing in this extensive litigation, these defendants defer to the briefing filed by co-defendants, who are much more knowledgeable concerning the facts and issues in both cases.

These defendants filed their motion for summary judgment on October 9, 2008. Although the case was stayed, the Supreme Court issued its decision, the stay was lifted, and many pounds of paper have been filed since October 9, none of this refutes the arguments raised in these defendants' memorandum in support of motion for summary judgment. All of plaintiffs' verbiage can be condensed into three incorrect arguments: (1) plaintiffs confuse collateral estoppel with *res judicata*; (2) plaintiffs confuse their opportunity to raise an issue in the first litigation with the fact that they raised the issue and lost; and (3) plaintiffs' claims are not "independent actions for fraud" that escape *res judicata*.

II. ARGUMENT

A. *Res Judicata* Bars All Claims that Might or Should have been Litigated in the First Suit.

Plaintiffs repeatedly cite the standard for collateral estoppel or issue preclusion. The standard is clearly different for *res judicata* and bars re-litigation "not only on the matters offered and received to defeat the claim, but also as to 'every matter which might and should have been litigated in the first suit.'" *Ticor Title Co. v. Stanion,* 144 Idaho 119, 126, 157 P.3d 613, 620 (2007). Plaintiffs apparently understand the distinction, because they seem to argue

that they were unable to raise the existing claims in the earlier suit. Their own briefing, however, shows that plaintiffs raise the issues, but those claims were rejected by the courts. Therefore, they not only had the opportunity to raise the issues, they raised the issues and lost. *Res judicata* precludes a second opportunity.

B. Plaintiffs' Fraud Claims Accrued During the Course of the Earlier Litigation.

Plaintiffs make obtuse arguments concerning the accrual of a cause of action and whether they exercised due diligence in discovering fraud. Assuming these arguments were intended to explain why the fraud claim could not have been raised in the earlier litigation, they simply do not apply to the facts of the case. In addition, plaintiffs' argument that the cause of action for fraud did not occur until they were damaged by the entry of the judgment is directly contrary to Idaho law.

Plaintiffs' fraud claim is based upon the alleged misrepresentation by defendants that Helen Taylor was the sole beneficiary. Although plaintiffs struggle to explain how an allegation in a pleading that was later amended rises to the level of extrinsic fraud that would preclude the application of *res judicata*, it is clear from plaintiffs' pleadings that the misrepresentation was known to them and argued by them in the earlier case. On Page 6 of plaintiffs' "Supplemental Memorandum Brief in Response to Supreme Court Opinion Filed February 4, 2009," plaintiffs state:

> The Plaintiffs brought the facts surrounding the misrepresentation to the Idaho Supreme Court in their briefing as they alleged that the Taylors had insufficient standing as beneficiaries to rescind the transaction as the Taylors acknowledged under oath that they were no longer beneficiaries and that their mother was the sole beneficiary. Plaintiffs had a right to have that determined as an issue of standing. Standing is an issue that can be raised at any time at either the District Court level or at the appellate level. The

> Plaintiffs legitimately raised that issue and the Idaho Supreme Court chose not to address that issue and that issue remains unresolved at this date.

The above quoted argument by plaintiffs shows that the issue not only could have been raised, but was raised by the plaintiffs in the earlier decision. The fact that the Idaho Supreme Court chose not to address the issue does not preclude the application of *res judicata*.

Plaintiffs argue that the misrepresentation related to standing in the earlier case, but claim that it was a fraud issue in this case. This does not allow for re-litigation of the "misrepresentation" issue. The application of *res judicata* does not require that "the precise point or question in the present action be finally resolved in the prior proceeding." *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 70, 878 P.2d 762, 769 (1994). The issue of who was the appropriate beneficiary was litigated extensively in the first lawsuit and was the sole subject of the first Idaho Supreme Court opinion. Characterizing the same issue as a fraud claim, does not avoid the application of *res judicata*.

In spite of the fact that they raised the misrepresentation issue in the prior litigation, plaintiffs now claim they did not have the opportunity to raise the misrepresentation claim because it has not yet accrued. They argue both that the claim did not accrue until they were damaged by the judgment entered by Judge Wilpur, and that the claim was somehow suspended by the application of the discovery exception for fraud. The "some damage" rule does not, as contended by plaintiffs, extend the running of the statute of limitations until a judgment is entered. Some damage accrues once the plaintiff expends attorney fees in an attempt to correct the error. The Idaho Supreme Court has specifically rejected the plaintiffs' argument that there is no damage until an adverse judgment is entered. *B & K Fabricators, Inc. v. Sutton*, 126 Idaho 934, 894 P.2d 167 (1995). There is no question that plaintiffs in this case incurred substantial

attorney fees in attempting to correct the "misrepresentation" concerning the status of the beneficiaries. Therefore, their claim accrued, if at all, when they first began litigating the standing issue that was the subject of the "misrepresentation."

Plaintiffs argue they exercised due diligence in discovering the fraud, but do not explain how their diligence or lack of diligence has anything to do with whether the fraud allegation could have been resolved in the first lawsuit. Mr. Maile drafted the trust agreement and should have understood immediately who the beneficiaries were. He should have known immediately whether the allegation that Helen Taylor was the sole beneficiary was accurate. In fact, he argued against it. The discovery exception for a fraud claim has nothing to do with whether plaintiffs had the opportunity to raise the fraud claim in the earlier litigation. They discovered all of the facts upon which they based their fraud claim as soon as the relevant pleadings were filed.

III. PLAINTIFFS HAVE NO BASIS FOR AN INDEPENDENT ACTION FOR FRAUD.

Plaintiffs' argument that the claim of extrinsic fraud is not barred by *res judicata* is a complete red herring. Plaintiffs cite *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980), in support of their argument that *res judicata* does not apply to judgments obtained by fraud. Plaintiffs ignore several relevant holdings of the *Compton* case, however. The court stated, "The term 'fraud upon the court' contemplates more than interparty misconduct, and, in Idaho, has been held to require more than perjury or misrepresentation by a party or witness, even where the misrepresentation was made to establish the court's jurisdiction." *Id.* 101 Idaho at 334, 612 P.2d at 1181. Here, plaintiffs claim that the misrepresentation was made to establish

standing. *Compton* seems to say that such a misrepresentation does not rise to the level of a fraud upon the court. The *Compton* court also stated:

> Among the non-conclusory points we can make are that the independent action in equity is a most unusual remedy, available only rarely and under the most exceptional circumstances. It is most certainly not its function to relitigate issues determined in another action between the same parties, or to remedy the inadvertence or oversight of one of the parties to the original action. It will lie only in the presence of an extreme degree of fraud.

Id., 101 Idaho at 335, 612 P.2d at 1182.

The plaintiffs here are attempting to do precisely what the court in *Compton* prohibited, relitigating issues determined in another action between the same parties. Finally, plaintiffs fail to note that the *Compton* court refused to find that the claims of fraud allowed an independent action for relief from the judgment. Similarly, plaintiffs' claims here do not show anything more than an allegation that was later remedied by an amendment. There was certainly no fraud, nor was there any evidence of egregious conduct that would allow an independent action to set aside an otherwise valid judgment.

IV. CONCLUSION

Plaintiffs have failed to make any cogent arguments against the application of *res judicata*. Summary judgment should be granted in favor of all defendants.

DATED this 15th day of April, 2009.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Mark S. Prusynski – Of the Firm
Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2009, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Thomas G. Maile IV
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Facsimile (208) 939-1001

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17136.0306

Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, fka CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION,

Defendants.

Case No. CV-OC-0723232

RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

On April 6, plaintiffs sent a notice of hearing for their motion to compel. Plaintiffs are requesting a hearing on April 22, at 3:30 p.m., the same time as the hearings scheduled for defendants' motions for summary judgment that were noticed on February 24, 2009, and March 2, 2009. On March 17, 2009, plaintiffs also scheduled their motion for summary judgment regarding defendants' counterclaims for the same time. Defendants ask that the Court defer hearing on the motion to compel until after a decision is made concerning the pending motions for summary judgment.

Plaintiffs' motion to compel was filed on October 20, 2008. It was originally scheduled for hearing on November 6, 2008, and was accompanied by an affidavit and a motion to continue the summary judgment hearings that had been scheduled for November 6, 2008. The parties eventually agreed to vacate the November 6 hearings and stay the case until after the Idaho Supreme Court decided the companion case.

Because this Court's decision on the motions for summary judgment may resolve some or all of the issues in the case, thus making all of the discovery irrelevant or limiting the scope of permissible discovery, defendants believe that the Court's and counsels' resources would be saved if the Court would defer argument on the motion to compel until after a decision on the motions for summary judgment.

DATED this 20th day of April, 2009.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Mark S. Prusynski – Of the Firm
Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April, 2009, I caused a true and correct copy of the foregoing **RESPONSE TO PLAINTIFFS' MOTION TO COMPEL** to be served by the method indicated below, and addressed to the following:

Thomas G. Maile IV
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Mark S. Prusynski

ORIGINAL

NO. _____ FILED 4:15
A.M. _____ P.M.

APR 20 2009

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

Mark S. Prusynski, ISB No. 2349
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Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, fka CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION,

Defendants.

Case No. CV-OC-0723232

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Because this Court's decision on the motions for summary judgment may resolve some or all of the issues in the case, thus making all of the discovery irrelevant or limiting the scope of permissible discovery, defendants believe that the Court's and counsels' resources would be saved if the Court would defer argument on the motion to compel until after a decision on the motions for summary judgment.

DATED this 20th day of April, 2009.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Mark S. Prusynski – Of the Firm
Attorneys for Defendants Connie Wright Taylor fka Connie Taylor, Clark and Feeney, and Paul T. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April, 2009, I caused a true and correct copy of the foregoing **RESPONSE TO PLAINTIFFS' MOTION TO COMPEL** to be served by the method indicated below, and addressed to the following:

Thomas G. Maile IV LAW OFFICES OF THOMAS G MAILE IV, P.A. 380 W. State St. Eagle, ID 83616-4902 Facsimile (208) 939-1001	(x) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (✓) Facsimile
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Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

PLAINTIFFS' REQUEST TO TAKE JUDICIAL NOTICE OF PLEADINGS

COMES NOW, Berkshire Investments, LLC and Colleen Birch-Maile and, Thomas G. Maile, IV, pro se and attorney of record for co-plaintiffs herein, and pursuant to the Idaho Rules

of Evidence, Rule 201, requests that this Honorable Court take judicial notice of the following pleadings from the records, and court file from the Ada County the consolidated case captioned Taylor v. Maile, et. al, case No. CV OC 04-00473D, to wit:

1. Verified Amended Answer and Counter-Claim and Demand for Jury Trial filed September 7, 2005 (attached to Amended Affidavit in Support of Motion to Dismiss dated May 14, 2008 and filed in this proceeding).
2. Order Regarding Plaintiffs' Motion for Summary Judgment filed February 13, 2006 (attached to Amended Affidavit in Support of Motion to Dismiss dated May 14, 2008 and filed in this proceedings).
3. Judgment on Beneficiaries' Claim (filed June 7, 2006 and attached hereto).
4. Memorandum Decision and Order (filed July 21, 2006 and attached hereto).
5. First Amended Judgment on Beneficiaries' Claim (filed July 21, 2006 and attached hereto).

In addition the plaintiffs requests that this Court take judicial notice of the Registry of Actions relating to the probate proceeding captioned, In the Matter of the Registration of the Revocable Trust of Theodore L. Johnson, case number CV-TR-2004-22118 (copy attached).

This Motion is based upon the upon the file and record in this matter and further pursuant to I.R.E. Rule 201. Oral argument is requested.

DATED this 1st day of May, 2009.

THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

COPY

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

JUN 07 2006

J. DAVID NAVARRO, Clerk
By INGA JOHNSON
DEPUTY

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs, vs. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Defendants.	Case No. CV OC 0400473D JUDGMENT ON BENEFICIARIES' CLAIMS
THEODORE L. JOHNSON REVOCABLE TRUST, Plaintiff, vs. THOMAS MAILE IV, and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC., Defendants.	

This cause came on before the Honorable Ronald J. Wilper for hearing on a Motion for Summary Judgment on the Beneficiaries' Claim. Based upon the findings of fact and conclusions of law contained within this Court's May 15, 2006 Order Granting Plaintiffs' Motion for Summary Judgment on Beneficiaries' Claim,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The July 22, 2002 Earnest Money Agreement between The Theodore L. Johnson Revocable Trust and defendants Thomas Maile IV and Colleen Maile for the purchase of the Linder Road property which is more fully described in paragraph 3 of this Judgment, and all subsequent documents relating to that transaction, are void as a matter of law.

2. The title to the property commonly referred to as "the Linder Road property" and more particularly described in Paragraph 3 of this Judgment shall be quieted to the Theodore L. Johnson Revocable Trust, in fee simple.

3. The Linder Road property is more particularly described as follows:

The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho

4. The Defendants' remaining counterclaims and affirmative defenses, all of which were based on either equitable claims or the assertion that the Plaintiffs were wrongfully interfering with the Defendants' right to possess the Linder Road Property, are hereby dismissed. Specifically, those claims are as follows:

A. Counterclaim I (tortious interference with contract between Defendants and their lending institution)

B. Counterclaims VII and VIII (equitable estoppel and Quasi-Estoppel)

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

C. Counterclaim X (fraudulent transfer)

D. Counterclaim XI (unjust enrichment)

E. Affirmative defenses of Laches, Failure to Mitigate, and Unclean Hands.

5. The Plaintiff Beneficiaries are the prevailing parties in this matter.

DATED this 6 day of June, 2006.

RONALD J. WILPER

The Honorable Ronald J. Wilper

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7 day of June, 2006, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas Maile, IV Attorney at Law 380 West State Street Eagle, ID 83616	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Connie W. Taylor Clark and Feeney PO Box 285 Lewiston, ID 83501	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Jack S. Gjording Gjording & Fouster P.O. Box 2837 Boise, ID 83702	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Dennis M. Charney Attorney at Law 951 E. Plaza Drive, Suite 140 Eagle, ID 83616	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

SEAL

INGA JOHNSON
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/ Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/ Counter-Claimants.

THEODORE L. JOHNSON RECOVABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENT, LLC,

Defendants.

Case No. CVOC0400473D

MEMORANDUM DECISION AND ORDER

This matter came before the Court on A) Defendants' Motion to Amend Counterclaims; B) Defendants' Motion for Rule 54(f) Certification; and C) Defendants' Objections to Plaintiffs' Proposed Amended Judgment on Beneficiaries' Claim. The Court heard oral arguments on the motions on July 17, 2006 and took the matter fully under advisement at that time.

I. BACKGROUND

On May 15, 2006, the Court entered its Order Granting Plaintiffs' Motion for Summary Judgment on Beneficiaries' Claim. On June 7, 2006, the Court entered its corresponding Judgment. On June 20, 2006, the Court entered an order denying the Defendants' motion to reconsider and clarifying its findings as set forth in the June 7 Judgment. Plaintiffs have submitted a proposed amended judgment incorporating the Court's June 20 findings.

II. DEFENDANTS' MOTION TO AMEND COUNTERCLAIMS

The Court finds that the Defendants' counterclaim for unjust enrichment, as it currently stands on the record, sufficiently preserves the Defendants' ability to adjudicate their claim that the Plaintiffs have been unjustly enriched by improvements made by the Defendants on the Linder Road property. As a result, Defendants' motion to amend their counterclaims is hereby denied.

III. MOTION FOR RULE 54(b) CERTIFICATION

Idaho Rule of Civil Procedure 54(b) permits some partial judgments to be appealed earlier than they otherwise could have been appealed. *Callaghan v. Callaghan*, 142 Idaho 185, 189, 125 P.3d 1061, 1065 (2005). "Rule 54(b) was adopted to overcome the 'single judicial unit theory' which seriously inconvenienced persons involved in multi-party or multiple claim actions by forcing them to await the adjudication of 'the whole case and every matter in controversy in it' before being allowed to appeal." *Merchants, Inc. v. Intermountain Indus., Inc.*, 97 Idaho 890, 892, 556 P.2d 366, 368 (1976). The decision of whether to issue a Rule 54(b) certification is within the discretion of the trial court. *Willis v. Larsen*, 110 Idaho 818, 822, 718 P.2d 1256, 1260 (Ct. App. 1986).

The Court finds that a certification of final judgment at this time would not serve the interests contemplated by Idaho Rule of Civil Procedure 54(b). Defendants' Motion for Rule 54(b) Certification is hereby denied.

IV. OBJECTIONS TO PLAINTIFFS' PROPOSED AMENDED JUDGMENT

A. Effect of the Court's Finding that the Sale Violated I.C. § 68-108(b)

The Court finds that the trustees' failure to obtain judicial approval in this case pursuant to Idaho Code section 68-108(b) rendered both the closing of the sale and the sales contract as a whole void, rather than voidable, as a matter of law.

B. Rightful Holder of Title in the Linder Road Property

The Court finds that the effect of the Court's imposition of a constructive trust on the Linder Road property is the reconveyance of the property to the Trust and the quieting of the title in favor of the Trust. *See Klein v. Shaw*, 109 Idaho 237, 240, 706 P.2d 1348, 1351 (Ct. App. 1985) (holding that a party upon who a constructive trust is imposed "is treated as if he or she had been an express trustee from the date of the wrongful holding and is required to reconvey the property to the plaintiff"); *see also* I.C. § 6-410 (describing an action to quiet title as that "brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim").

C. Unjust Enrichment Claim

The Defendants' argument that the Plaintiffs' proposed amended judgment wrongfully disallows Defendants' claim of unjust enrichment is well taken. Defendants' Counterclaim XI for unjust enrichment shall not be dismissed.

V. CONCLUSION

Defendants' Motion to Amend Counterclaims is hereby denied.

Defendants' Motion for Rule 54(b) Certification is hereby denied.

The Court will issue in due course an amended judgment in conformity with both its findings set forth in its June 20 order as well as its findings set forth above.

IT IS SO ORDERED.

Dated this 21st day of July 2006.

Ronald J. Wilper
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/ Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/ Counter-Claimants.

THEODORE L. JOHNSON RECOVABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENT, LLC,

Defendants.

Case No. CVOC0400473D

FIRST AMENDED JUDGMENT ON BENEFICIARIES' CLAIM

This cause came before the Honorable Ronald J. Wilper for hearing on Plaintiffs' Motion for Summary Judgment on the Beneficiaries' Claim. Based upon the findings of fact and conclusions of law contained within the Court's May 15, 2006 Order Granting Plaintiffs' Motion for Summary Judgment on Beneficiaries' Claim,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The trustees' failure to obtain judicial approval in this case pursuant to Idaho Code section 68-108(b) rendered both the closing of the sale and the sales contract as a whole void, rather than voidable, as a matter of law.
2. The property commonly referred to as "the Linder Road property" is more particularly described as follows:

   The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho.

3. The Linder Road property is currently being held in constructive trust by the current title holders for the benefit of the Theodore L. Johnson Trust.
4. In relation to the interests asserted by the Defendants therein, the title to the Linder Road property shall be quieted in favor of the Theodore L. Johnson Trust.
5. Defendant Berkshire Investments shall be entitled to repayment of the $400,000 purchase price paid for the Linder Road property, less any amount proven to be entitled to the Defendants pursuant to their counterclaim for unjust enrichment.
6. With the exception of Counterclaim XI Unjust Enrichment, all of the Defendants' remaining counterclaims and affirmative defenses are hereby dismissed.
7. The sole issue remaining to be adjudicated in this case is Defendants' Counterclaim XI Unjust Enrichment.

IT IS SO ORDERED.

Dated this 21st day of July 2006.

Ronald J. Wilper
District Judge

Case Number Result Page

Ada

1 Cases Found.

In The Matter Of The Registration Of Trust Of Theodore L Johnson Revokable Trust

Case: **CV-TR-2004-22118** **Old Case: SP-OT-04-00874*M** **Magistrate** Filed: **11/15/2004** Subtype: **Trust Registration** Judge: **Christopher Bieter** Status: **Closed 05/02/2005**

Subjects: **Theodore L Johnson Revokable Trust**

Other Parties: **Birkshire Investme, Nts Llc Maile, Coleen Taylor, Dallan Taylor, R John Taylor, Reed J**

Register Date of actions:

11/15/2004	New Case Filed
11/15/2004	Petn For Appmt Of Trustees,initial Petition, Except Registration
11/15/2004	Order For Appmt Of Trustees
11/15/2004	Judgment
11/17/2004	Demand For Notice & Verified Objection To Petition For Appointment Of Trustees(maile
11/17/2004	(for Colleen Maile & Berkshire Investments
11/17/2004	Reopen (case Previously Closed)
11/22/2004	Motn To Set Aside Ordr Motn To Re-consider
11/22/2004	Affidavit In Support Of Motion
11/26/2004	Calendaring Order (sched Conf 1/7/05 @11 Am)
01/10/2005	Scheduling Order (3/2/05 @ 9am)
02/03/2005	Supplmtl Affd Of T.mail In Support Of Motn
02/14/2005	Affidavit Of Elaine H Lee
02/23/2005	Motion To Vacate Hearing
02/23/2005	Affidavit In Support
02/23/2005	Motion Shortening Time
02/23/2005	Affidavit Of Counsel
02/23/2005	Trustee's Response To Objection To Appt
02/25/2005	Order To Shorten Time & Notice
02/28/2005	Demnd Notice & Verif Objtn To Petn For Apptmt
02/28/2005	Amend Motn To Set Aside Order And Reconsider
03/01/2005	Order Vacating Hearing (tel Sc 3/16/05 10 Am)
03/16/2005	Order
03/28/2005	Hearing Scheduled - Ogjtns To Appmt (04/13/2005) Christopher Bieter
03/29/2005	Notc Of Assoc Of Counsel (gjording W/ Maile)
03/29/2005	Second Affiadvit Of Elaine H Lee
03/29/2005	Lodged-reply Memo In Support Of Motion
04/06/2005	Affidavit In Support Of Memo In Opposition
04/06/2005	Petitioners Memo In Opposition To Set Aside
04/13/2005	Hearing Held - Ogjtns To Appmt
04/13/2005	Notc Of Additional Relevant Case Law
04/18/2005	Order Setting Aside Appointment Of Trustee
04/18/2005	Notice To Appt Trustees
04/18/2005	Affidavit Of Mailing
04/19/2005	Amended Petition To Appoint Trustees

04/19/2005	Notice If Intent To Cross-exam & Evidence
04/21/2005	Affidavit Of Mailing
04/25/2005	Affd Of John Taylor In Support Of Appmt
04/25/2005	Affd Of Reed Taylor In Support
04/25/2005	Affd Of Dallan Taylor In Support
04/25/2005	**thomas Mails Memo In Oppstn To Taylors Appt
04/25/2005	Affd Of Counsel In Support Of Mails Memo
04/25/2005	Affd Of Brent Johnson
04/26/2005	Petitioners Supplemental Memo In Support
04/28/2005	Objection To Affd
04/29/2005	Rsps To Taylors Supplmtl Memo Re:retro Issue
05/02/2005	(2)acceptance Of Appointment
05/02/2005	Order Apptmt As Co-successor Trustees
05/02/2005	Letters Of Co-successor Trusteeship
05/09/2005	Affidavit Of Mailing
07/07/2008	Transcript Of Audiotaped Proceedings Hearing Re Appt Of Trustees

Connection: Public

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants.	Case No. CV-OC-0723232 MEMORANDUM DECISION AND ORDER

I. Facts

The plaintiffs Berkshire Investments, LLC, Thomas G. Maile, IV and Colleen Birch-Maile filed this lawsuit after receiving an adverse judgment in two other consolidated cases.[1] Thomas G. Maile, IV and Colleen Birch-Maile (collectively the Mailes) are husband and wife.

[1] Ada County District Court cases CV-OC-0400473D and CV-OC-0405656D.

JK

Berkshire Investments, LLC (Berkshire) is owned by the Mailes. Dallan Taylor and R. John Taylor are Trustees of the Theodore L. Johnson Revocable Trust. These three defendants were parties to one or the other of the previous cases that were consolidated. For convenience, these defendants will sometimes be collectively referred to as the "Trust defendants." The other named defendants, Connie Wright Taylor, Paul T. Clark, and Clark and Feeney partnership represented the other current defendants as the lawyers in the previous cases. For convenience, these defendants will sometimes be collectively referred to as the "Lawyer defendants." The original cases involved a real estate transaction between the current plaintiffs and the Theodore L. Johnson Revocable Trust ("the Trust").

Thomas Maile was Theodore L. Johnson's (Johnson's) attorney. Mr. Maile's representation included drafting the trust agreement for the Trust and overseeing its administration. After Johnson's death, Mr. Maile represented Johnson's estate.

The underlying transaction that spawned this case and the earlier cases is a land sale between Johnson, then trustee and settler of the Trust, and the Mailes. Johnson, acting on behalf of the Trust, and the Mailes entered into an earnest money agreement for the purchase by the Mailes of 40 acres in Eagle, Idaho owned by the Trust. The purchasers' interest in the contract was later assigned to Berkshire. Mr. Maile acted as both the attorney and realtor for the transaction. Johnson died before the sale closed. The deal was consummated by the successor trustees, who were also beneficiaries of the Trust.

When the other beneficiaries discovered the purchase price, they filed a lawsuit to set aside the sale. On January 23, 2004, three of the beneficiaries, Reed Taylor, Dallan Taylor, and R. John Taylor (collectively the Taylors), filed the first lawsuit, alleging three causes of

action seeking damages or rescission of the sale. On April 23, 2004, the district court, Judge Wilper presiding, dismissed the claims based upon lack of standing. The Taylors appealed. The Idaho Supreme Court ultimately reversed and remanded.

While the first case went up on appeal, the original trustees purportedly transferred their status as trustees to the Taylors. The rest of the beneficiaries disclaimed interest in the property and Trust, save one group of beneficiaries who retained an interest in the claims against the current plaintiffs. On July 22, 2004, the group of beneficiaries executed a Disclaimer, Release, and Indemnity agreement and filed a new suit in the name of the Trust against Berkshire and the Mailes. Judge Wilper consolidated the two cases on September 29, 2004.

In November of 2004, Magistrate Judge Bieter entered an order in the pending Johnson probate appointing the Taylors as co-successor Trustees. He later set aside the order on April 13, 2005. After a hearing, in May 2005, he again appointed the Taylors as Trustees. He did so over Mr. Maile's objection, but declined to make the appointment retroactive as requested by petitioners. The circumstances surrounding the petition for appointment as trustees filed in Judge Beiter's court plays a central role in Berkshire's claims made in this current case.

On December 30, 2005, the Idaho Supreme Court decided the first appeal. *Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (Idaho 2005). The Idaho Supreme Court remanded the case back to the district court for trial. The district court allowed the Trust and the Taylors to amend their consolidated complaint to conform to the Idaho Supreme Court's opinion.

On May 15, 2006, Judge Wilper granted both the Trust and the Taylors' motions for summary judgment that, combined with an earlier ruling granting partial summary judgment, gave plaintiffs in the consolidated case judgment on all of the counterclaims and affirmative defenses, except the counterclaim for unjust enrichment. The ruling also invalidated the sale of the property as a matter of law.

A court trial in October of 2006 determined that the Mailes and Berkshire were not entitled to any relief on the only remaining counter-claim, unjust enrichment. Judge Wilper's final judgment ordered the Trust to repay the purchase price and Berkshire convey title back to the Trust. This case was also appealed. The judgment was affirmed. *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (Idaho 2009).

In the wake of the previous lawsuit, Berkshire and the Mailes[2] filed the current action on December 31, 2007 asserting numerous claims against the Trust and the Taylors on a number of legal theories: quiet title, constructive trust, tortious interference with contract, tortious interference with a prospective business advantage, abuse of process, negligence, negligence per se, gross negligence, equitable estoppel, quasi estoppel, violation of the title 18, chapter 78 of Idaho Code (RICO), and finally, judicial estoppel. In addition, Berkshire added several new parties to this action, Connie Wright Taylor, the law firm Clark and Feeney, Paul T. Clark, and any John Doe claiming any right to possession of the disputed property. In this case, Berkshire requests the Court to convey title to the property back to Berkshire, impose a constructive trust, or money damages. All defendants have

[2] For convenience, the Mailes and Berkshire will be referred to collectively as "Berkshire" for the balance of this opinion.

counterclaimed for slander of title to the real estate at issue and for abuse of process. The Taylor defendants have also counterclaimed for intentional interference with a prospective economic advantage. There has been no attempt to name or serve any of the John Doe defendants.

All of the current defendants moved for summary judgment on Berkshire's current claims because the causes of action are bared by the operation of *res judicata* or I.R.C.P. 12(b)(8) (another action pending). In addition to making a motion for summary judgment, the current defendants asked the Court to impose Rule 11 sanctions against the Mailes and Berkshire. Finally, Berkshire moved for summary judgment on each of the defendants' counter claims.

II. Standard of Review

The Trust defendants originally styled their motion as a motion to dismiss. It was supported by an affidavit. Plaintiffs objected to this procedure and moved to strike and filed an amended "Motion to Dismiss and/or Motion for Summary Judgment." An amended affidavit was filed in support of this motion. All parties have filed extensive briefing. Berkshire has filed several hundred pages of affidavits in support of its motions and in opposition to the defendants' pending motions.

If a trial court considers factual allegations outside the pleading on a Rule 12(b)(6) motion, it errs if it fails to convert the motion to one for summary judgment. *Fonte v. Board of Managers of Continental Towers Condominium,* 848 F.2d 24 (2nd Cir.1988); *Rose v. Bartle.* 871 F.2d 331 (3d Cir.1989). Furthermore, if a court considers matters outside pleadings on a Rule 12(b)(6) motion to dismiss, such motion must be treated as a motion for

summary judgment *and* the proceedings thereafter must comport with the hearing and notice requirements of Rule 56. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Id. Ct. App.1990). Since it was necessary to consider materials outside of the pleadings, the Court will treat this as a motion for summary judgment.

All parties have treated the amended motion as a motion for summary judgment. All parties have had a full and fair opportunity to present their version of the case through the affidavits and briefing. The Court will decide the case as submitted on cross motions for summary judgment.

> "Summary judgment is proper '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.' " *Samuel v. Hepworth, Nungester & Lezamiz,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

The fact that both sides moved for summary judgment does not in itself establish that there is no genuine issue of fact. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 600 P.2d 1387 (1979). The Court must analyze the case from the perspective of each motion, granting the opposing party the benefit of any inferences that may be drawn in its favor. If there is a genuine issue of material fact, the motion must be denied.

III. Privity

A threshold question that must be addressed is whether the Lawyer defendants can raise the defenses they have put forth. Both *res judicata* and I.R.C.P. 12(b)(8) require that the party raising it have been a party to a previous action with the plaintiff or in privity with a party to the previous action. For *res judicata* purposes privity exists between a party and its attorneys where the defendant attorneys are named as a result of their prior representation in

the transaction that gives rise to the litigation. *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235 n. 6 (7th Cir.1986). *See also*, *Plotner v. AT & T Corp.*, 224 F.3d 1161 (10 Cir. 2000). For purposes of this case, the Lawyer defendants are in privity with their clients, the Trust defendants. The following analysis applies to all defendants.

IV. Analysis -- Defendants' Motions for Summary Judgment

A. Rule 12(b)(8)

All defendants suggest that Rule 12(b)(8) bars the present action. At the time this case was filed, the final judgment entered by Judge Wilper in the consolidated cases was pending on appeal. The appeal has since been remanded with Judge Wilper's decision being affirmed. The determination of whether to proceed with a case, when a similar case is pending elsewhere and has not gone to judgment, is discretionary. *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 684 P.2d 307 (Ct. App. 1984), overruled on other grounds, *NBC Leasing Co. v. R & T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987). Once the other action has gone to judgment, the case should be evaluated on *res judicata* grounds. *Klaue v. Hern*, 133 Idaho 437, 988 P.2d 211 (1999); *Roberts v. Hollandsworth*, 101 Idaho 522, 616 P.2d 1058 (1980). Since the cases before Judge Wilper went to judgment, this case will be analyzed under *res judicata* principles. Defendants' Rule 12(b)(8) motions are denied.

B. *Res Judicata*

The defendants also move to dismiss this lawsuit based on the doctrine of r*es judicata*. There are three fundamental purposes served by *res judicata*:

> First, it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results. Second, it serves the public interest in

> protecting the court against the burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh v Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (*citing Aldape v Akins*, 105 Idaho 254, 256, 668 P.2d 130,132 (Ct. App. 1983)).

Res judicata is shorthand for two distinct legal concepts – issue preclusion (collateral estoppel) and claim preclusion (prohibition against splitting a cause of action). Compare *Stoddard v. Hagadone,* 2009 WL 982693 (2009) with *Ticor Title Co. v. Stanion*, 144 Idaho 119, 157 P.3d 613 (2007).

Both doctrines are implicated here.

a. Issue Preclusion

The doctrine of issue preclusion exists to prevent the re-litigation of an issue previously determined when:

> (1) the party against who the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case;
> (2) the issue decided in the prior litigation was identical to the issue presented in the present action;
> (3) the issue sought to be precluded was actually decided in the prior litigation;
> (4) there was a final judgment on the merits in the prior litigation, and
> (5) the party against who the issue is asserted was a party or in privity with a party to the litigation.

Stoddard v. Hagadone Corp., 2009 WL 982693 (2009), (*citing Rodriguez v. Dept. of Correction*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001)).

Examination of Berkshire's answer and counterclaims in the consolidated cases eliminates many of the claims in this case. These are the claims Berkshire brought in this action that were counterclaims in the previous case, i.e. the claims for quiet title, tortuous interference with a contract, tortuous interference with a prospective business advantage, equitable estoppel, and quasi estoppel. Berkshire had a full and fair opportunity to present

those claims before Judge Wilper. Each claim here is identical to the one pleaded in prior litigation. Judge Wilper decided the claims to be without merit in granting summary judgment. A final judgment on the merits was entered and sustained on appeal. The parties in this case are identical to, or in privity with, the parties in the previous lawsuit. Plaintiffs' claims for quiet title, tortious interference with a contract, tortious interference with a prospective business advantage, equitable estoppel, and quasi estoppel are dismissed.

b. Claim Preclusion

Claim Preclusion, "bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action." *Stoddard v. Hagadone Corp.*, 2009 WL 982693 (2009); (*citing Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007)). A claim is barred if it *could* have been brought, regardless of whether it *was* brought. For claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) final judgment. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 157 P.3d 613 (2007) (citing *Hindmarsh v. Mock*, 138 Idaho 92, 57 P.3d 803 (2002); *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994)).

In this case, the remaining claims must be dismissed based on claim preclusion. In the current action, the parties are identical to, or are in privity with, the parties in the prior case. The first element is present.

In determining whether the claim is the same, it is not the legal theory espoused by the plaintiff that controls. The issue is whether the new complaint arises out of the same transaction or series of transactions out of which the cause of action arose. *Ticor Title Co. v.*

Stanion, supra. *See also*, Restatement (Second) of Judgments § 24 (1982) and the commentary thereto.

Berkshire strenuously argues the new claims are not barred because the damage caused by the alleged fraud did not occur until the earlier cases were lost. For this proposition plaintiffs cite *Fuller v. Wolters,* 119 Idaho 415, 807 P.2d 633 (1991). *Fuller* is inapposite as it concerns collateral estoppel, not claim preclusion. The question presented in *Fuller* was whether certain damages had been determined in a prior case. The Court held they had not. In so holding, the opinion does not discuss claim preclusion.

Plaintiffs' remaining claims are abuse of process, negligence, negligence per se, gross negligence, and violation of the title 78, chapter 18 of Idaho Code. A comparison of the facts alleged in the present case to the facts alleged in the prior consolidated cases leaves no doubt that these claims relate to the same transaction that gave rise to the first cases. Berkshire makes much of the supposed fraud perpetrated by defendants. The core fact upon which Berkshire's case is built is an alleged misrepresentation made to Judge Beiter in the application to appoint new Trustees. The Taylors filed a verified petition for appointment as Trustees. The petition contained a statement to the effect that "Helen Taylor is the sole remaining beneficiary of the Trust." The petition was later amended to reflect that she was not the sole beneficiary. In Berkshire's view, the first allegation was true and the second false. Consequently, when the Taylors later caused the Trust to file suit against Berkshire alleging they were beneficiaries of the Trust, this was a false statement under oath. Likewise, the amended complaint filed in the consolidated cases after the first appeal contained this same false statement. Not only could any issues arising from this alleged fraud have been

raised in the earlier case, the opinion of the Supreme Court in *Maile II* reflects this issue was argued in the most recent appeal and rejected. Dressing the claim in the language of RICO and other new legal labels does not change the fact that this claim, the extent it was not, *should have* been presented to Judge Wilper. The second element is present.

Finally, the earlier suit resulted in a final judgment adverse to plaintiffs here. The third element of claim preclusion is present. The balance of plaintiffs' claims must be dismissed.

c. Plaintiffs Other Arguments

Although the argument is not always easy to follow, Berkshire's claims presented here all hinge on the assertion that the Taylors and their counsel committed a fraud on Judge Beiter by filing a petition for appointment as Trustees that contained a false statement. This statement somehow led Judge Beiter to appoint the Taylors as Trustees, giving them standing to bring the suit which ultimately led to Judge Wilper's determination that the underlying real estate transaction was void. This led to the loss of the property. The loss of the property, in turn is what caused the damages in this case. Since those damages only arose after Judge Wilper's final judgment, this action could not have been brought earlier. Therefore, it is not barred by *res judicata*. In other words, the loss of the prior suit gives rise to the cause of action in this case.

Berkshire does not attack the correctness of Judge Wilper's decision. The argument seems to be that, but for the alleged fraud on Judge Beiter and the alleged false statements in the complaint filed by the Trust, the case before Judge Wilper would have been dismissed on standing grounds. But, Berkshire asks this Court to do what the Supreme Court declined to do

– set aside the judgment entered in the prior case. That decision held that Berkshire was not entitled to the property in the first place. If this were grounds for liability, every losing defendant would then have a cause of action against the successful plaintiff and the winning plaintiff's counsel.

Fundamentally, Berkshire misses the point. The underlying series of transactions in this case is the original real estate transaction between the Berkshire parties and the Trust. It is not whatever representations may or may not have been true in the previous litigation. It is all of the claims that could have been brought arising from *that* transaction that are precluded.

Berkshire straightforwardly asks this Court to set aside the judgment in the prior consolidated cases based upon fraud on the Court. In doing so, they rely on *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980). *Compton* reiterates the statement in Rule 60(b) that a court has the inherent power to entertain an independent action in equity to set aside a judgment. Assuming for purposes of this motion that the allegations in the complaint are true and the actions of the Taylors and their lawyers, as pled in the verified complaint, constituted a fraud on the Court, the conduct is not, in this case, sufficient to justify this Court setting aside the Judgment of Judge Wilper.

> "[T]the independent action in equity is a most unusual remedy, available only rarely and under the most exceptional circumstances. It is most certainly not its function to relitigate issues determined in another action between the same parties, or to remedy the inadvertence or oversight of one of the parties to the original action. It will lie only in the presence of an extreme degree of fraud. *Compton v. Compton*, 101 Idaho 328,335, 612 P.2d 1175,1182 (1980).

In this case, it is undisputed that the conduct of which Berkshire complains was known to Berkshire long before the judgment was entered in Judge Wilper's Court. Berkshire should

have brought the alleged fraud to Judge Wilper's attention under IRCP 60(b), rather than requesting this Court to second guess Judge Wilper and the Idaho Supreme Court.

V. Plaintiffs' Motion for Summary Judgment on Defendants' Counterclaims

In the answer, the defendants filed several counterclaims against Berkshire including slander of title, abuse of process, and intentional interference with a prospective economic advantage. Plaintiffs have moved for summary judgment on all these claims. Just as plaintiffs are entitled to have all reasonable inferences from the undisputed facts drawn in their favor when opposing summary judgment, so to are defendants. Plaintiffs have moved to strike the affidavits of Helen Taylor and Connie Wright Taylor. The affidavit of Helen Taylor is not germane to this Court's decision on these motions. It appears to be directed to interpretation of the Disclaimer Agreement. That is not an issue here. Her affidavit is not hearsay, but will not be considered because the Court does not perceive it to be relevant to the counterclaims. The Connie Wright Taylor affidavit incorporating the affidavit of R. John Taylor is hearsay. It will not be considered in ruling on the counterclaims.

A. Slander of Title

It is undisputed that a lis pendens has been filed in this case. Depending on the circumstances, the mere filing of the lis pendens may constitute slander of title. There appear to be other genuine issues of fact regarding this cause of action. It is simply not possible on the current record to find the claim without merit. Summary judgment on this issue is denied.

B. Abuse of Process

Given the Court's ruling on defendants' motions for summary judgment, this claim cannot be dismissed on this record. The Court has reviewed the pleadings and Judge Wilper's

several decisions in the prior consolidated cases. Taken together with the pleadings, briefs, and affidavits filed by Berkshire in this case, it cannot be said that this claim is without merit. There remain factual issues to be determined before this claim can be determined on its merits. Summary judgment on this issue is denied.

C. Intentional Interference with Prospective Advantage

Again, when the information set forth in Judge Wilper's decisions is taken together with the information found in plaintiffs' voluminous filings in this case, there are simply too many factual issues needing determination before the Court can determine the merit, or lack of the same. Summary judgment on this issue is denied.

VI. Rule 11 Sanctions and Attorney Fees

Given that this case had not been concluded, but remains to be tried on the counterclaims, the Court will reserve ruling on attorney fees, whether under Rule 11 or otherwise. Rule 11, in particular, is intended to grant courts the power to impose sanctions for discrete pleading abuses or other types of litigative misconduct. *Kent v. Pence,* 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct.App.1989). It is also this Court's opinion that Rule 11 sanction motions should be free standing and not combined with other motions as has been done in the instant case. Such practice inevitably leads, in a hotly contested case, to every motion containing a Rule 11 request, diverting the energy of the parties and the Court from the real issues in need of determination. Where the corrective power of Rule 11 is needed, a separate motion and hearing that clearly delineates the facts and issues is more useful. In some respects, the issues in a Rule 11 request are duplicative of the abuse of process claims that remain to be litigated in this case.

Just so there is no misunderstanding, the Court is not precluding an award of attorney fees in this case in the future, including fees under Rule 11 based on pleadings filed up to this point. The Court is simply preserving the issue for another day.

VII. Summary.

Defendants' motions for summary judgment are granted. Plaintiffs' complaint is dismissed for the reasons set forth above. Defendants' motion for summary judgment is denied. The Court reserves ruling on the request for attorney fees under Rule 11.

Counsel for the Trust defendants is requested to provide a form of Order for entry by the Court. The discovery motions pending at the time of the hearing on the motions decided here may be re-noticed for hearing by any party choosing to do so.

IT IS SO ORDERED.

Dated this 2 day of July 2009.

Richard D. Greenwood
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 7 day of July 2009, I mailed a true and correct copy of the within instrument to:

THOMAS G MAILE IV
ATTORNEY AT LAW
380 WEST STATE STREET
EAGLE IDAHO 83616

MARK STEPHEN PRUSYNSKI
POST OFFICE BOX 829
BOISE IDAHO 83701

CONNIE W TAYLOR
CLARK AND FEENEY
POST OFFICE DRAWER 785
LEWISTON IDAHO 83501

J. DAVID NAVARRO
Clerk of the District Court

By: _____
Deputy Court Clerk

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12

COMES NOW, Berkshire Investments, LLC and Colleen Birch-Maile and, Thomas G. Maile, IV, pro se and attorney of record for co-plaintiffs herein, and pursuant to I.R.C.P. Rule

AH

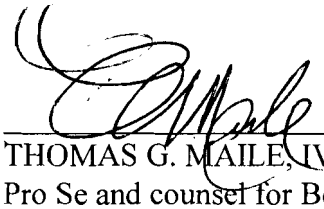
54(b), request that the Court enter its Judgment on the Memorandum Decision and Order filed July 2, 2009, containing the language, as provided, to wit:

> With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules

That in addition, and in the alternative the plaintiffs herein request that this court enter an order pursuant to I.R.C.P. Rule 83(x) and I.A.R. Rule 12, granting the plaintiffs a permissive appeal of said Order. This Motion is on the grounds set fort above and the record and file herein, and the Affidavit of Thomas Maile and the accompanying Memorandum Brief filed concurrently herewith.

ORAL ARGUMENT IS REQUESTED ON THIS MOTION.

DATED this 13th day of July, 2009.



THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 13 day of July, 2009, I caused a true and correct copy of the foregoing, (1) MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12, (2) AFFIDAVIT OF THOMAS MAILE IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12, together with (3) PLAINTIFFS' MEMORANDUM

BRIEF IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12 to be delivered, addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	(X) ( ) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV., Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

THOMAS G. MAILE, IV
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Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12

COMES NOW, Berkshire Investments, LLC and Colleen Birch-Maile and, Thomas G.

a.h

Maile, IV, pro se and attorney of record for co-plaintiffs herein, and pursuant to I.R.C.P. Rule 54(b), request that the Court enter its Judgment on the Memorandum Decision and Order filed July 2, 2009, and in the alternative to allow a permissive appeal pursuant to the Idaho Appellate Rule 12.

1. A Central issue for appellate review consists of the application of Res Judicata in light of the wrongful conduct of the defendants.

The case of Robinson v. Robinson, 70 Idaho 122, 128, 212 P.2d 1031, 1034 (1949)). Commencing at page 128 of 70 Id. Reports, the Supreme Court declared:

> One of the oldest and most universally accepted juridical principles is that embraced in the doctrine of res judicata. In the ***absence of fraud*** or collusion a judgment is conclusive as between the parties and their privies on all issues which were (or should have been) litigated in the action....
>
> Generally speaking, the fraud which will invalidate a judgment must be extrinsic or collateral to the issues tried, by which the aggrieved party has been prejudiced, or prevented from having a fair trial. It is not sufficient to charge only intrinsic fraud, or that which is involved in the issues tried, such as the presentation of perjured testimony. Hirsch v. Hirsch, 74 Cal.App.2d 391, 168 P.2d 770; Metzger v. Vestal, 2 Cal.2d 517, 42 P.2d 67; Kasparian v. Kasparian, 132 Cal.App. 773, 23 P.2d 802; Stout v. Derr, 171 Okl. 132, 42 P.2d 136; Zounich v. Anderson, 35 Idaho 792, 208 P. 402; Donovan v. Miller, 12 Idaho 600, 88 Pac. 82, 9 L.R.A., N.S., 524, 10 Ann.Cas. 444; Scanlon v. McDevitt, 50 Idaho 449, 296 P. 1016; Harkness v. Village of McCammon, 50 Idaho 569, 298 P. 676; Boise Payette Lumber Co. v. Idaho Gold Dredging Corp., 56 Idaho 660, 58 P.2d 786; Moyes v. Moyes, 60 Idaho 601, 94 P.2d 782; Keane v. Allen, 69 Idaho 53, 202 P.2d 411; 49 C.J.S., Judgements, §§ 269, 270, pp. 486-490; 31 Am. Jur. 228-243; L.R.A.1917B (note) 409-512.

Our Supreme Court has confirmed that the principle that a party committing fraud will not be afforded the protection of Res Judicata. Sund v. Gambrel, 127 Idaho 3, 896 P.2d 329 (1995), Stoddard V. the Hagadone Corporation (2009-ID-0416.158 Docket No. 34335). There is

ample evidence in the record, that the defendants committed perjury in their verification surrounding the amended complaint filed in 2006. 47 Am. Jur. 2d Judgments § 537, Fraud or Collusion provides:

> Fraud by a party will not undermine the conclusiveness of a judgment unless the fraud was extrinsic, that is, it deprived the opposing party of the opportunity to appear and present his or her case. With respect to extrinsic fraud, the doctrine of res judicata will not shield a blameworthy defendant from the consequences of his or her own misconduct. Accordingly, the principles of res judicata may not be invoked to sustain fraud, and a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of res judicata.

The defendants' misrepresentation under oath purportedly gave them a basis to contest the lack of court approval of the real estate closing pursuant to I.C. 68-106, which resulted in the real estate sale be voided. But for their perjury there would not have been a voided real estate transaction. Once again the Honorable Judge Wilper had ruled that the trust itself could not rescind the transaction.

50 C.J.S. Judgments § 532, provides:

§ 532. Fraud, collusion, or perjury

> A judgment may be collaterally attacked on the ground of fraud where the fraud goes to the jurisdiction of the court. Where the fraud alleged was inherent in the cause of action, or in the character or procurement of the instrument sued on, it does not furnish a legitimate ground for impeaching the judgment in a collateral proceeding; and, as a broad general rule, where the court has jurisdiction, it is not permissible for a party or privy to attack a judgment in a collateral proceeding because of fraud, such a judgment being voidable only, and not void.
> A judgment obtained by fraud may, however, be void under some circumstances, and subject to collateral attack, as where such fraud appears on the face of the record or goes to the method of acquiring jurisdiction. Likewise, the judgment may be attacked collaterally where fraud has been practiced in the very act of obtaining the judgment, or on the party against whom the judgment was rendered,

> so as to prevent him from having a fair opportunity to present his case. Judgments obtained by extrinsic, rather than intrinsic, fraud may be attacked collaterally. The extrinsic fraud which is required as a basis for collateral attacks on judgments is defined as fraud which is collateral to the issues tried in the case where the judgment is rendered.

There are substantial controlling legal issues involved in this litigation. A certification of the Court's Memorandum Decision and Order filed July 2, 2009 and any subsequent orders relating to the same would promote judicial economy.

2. Our Supreme Court has not determined the effects of allegations of perjury, aiding and abetting perjury, and obtaining money by false pretenses in the application of Res Judicata.

There have been no reported Idaho cases involving the issues of criminal conduct and the application of Res Judicata relating to the Idaho Racketeering Statutes. The case of State v. Wolfrum; 175 P.3d 206 (C.A. 2007) provides relevant standards involving a criminal case of perjury. Commencing at p. 210 of 175 P.3d Reports, the Idaho Court of Appeals provides:

> The test for materiality is whether the testimony probably would or could influence a tribunal or jury on the issue before it. The false statement relied upon need not bear directly upon the ultimate issue of fact. A statement is material if it is material to any proper point of inquiry, and if it is calculated and intended to bolster the witness' testimony on some material point or to support or attack his credibility. The degree of materiality is not important. Instruction No. 22, which quoted I.C. § 18-5406, stated: It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and ***might have been used to affect such proceeding*** (emphasis added).

The Taylors actively participated in the global disclaimer agreement between the beneficiaries of the trust and the successor trustees. The Taylors obtained control of the trust and

were no longer beneficiaries of the trust. Our Supreme Court in Taylor v. Maile (2) so indicated "In addition, the Taylors disclaimed their interest in all other Trust property in favor of their mother..." (Page 3 of opinion). As a matter of law as determined by our Supreme Court the Taylors were not beneficiaries in 2006 as they verified under oath in their amended complaint.

In addition the record establishes that defendant Connie Taylor drafted a letter to Bart Harwood on April 14, 2004 which stated, "The Taylors are not willing to give up theft rights as beneficiaries of the trust unless Beth will affirm her prior factual statements in the form of an affidavit and agree to cooperate in the action against Mr. Maile. If we aren't able to reach an agreement on that, they will seek a full accounting of the trust and a copy of the trust and estate tax returns". (Affidavit of Thomas Maile Part One deposition of Beth Rogers Exhibit "B" referencing deposition exhibit 39).

Finally, the testimony of R. John Taylor before the probate court provided verification of their state of mind, " my mother is the beneficiary of the trust, and we expect that we will eventually win on this claim." During that same hearing Mr. Clark provided in his closing argument before Judge Beiter on June 5, 2005 provided: page 17, ln 12: MR. CLARK: "Yes. Just briefly, Judge. It seems to me that, based upon, first, the agreement of the beneficiaries -- they have all indicated that the Taylors should serve as co-trustees. The Taylors, pursuant to that same agreement, have a guarantee in the disclaimer. So they have some interest in the proceeding. Their mother stands to gain and, thereby, they have an interest in the proceeding." (Affidavit of Thomas Maile Part One transcript of probate court hearing Exhibit "A").

The record is ample for an immediate appellate review under I.R.C.P. Rule 54(b). This court has ruled that Res Judicata applies, which consequently defeat the claims of the plaintiffs and results in a potential trial based upon the defendants' counter-claims, which is driven by application of Res Judicata to the plaintiffs' claims. There could be no trial on the counter-claims if Idaho Law precludes a party committing fraud and/or criminal activity in obtaining the prior judgment. A certification pursuant to Rule 54(b) would aid in the affective administrative of justice.

The plaintiffs have now offered to the defendants to release their lis pendens. In addition the Honorable Judge Ronald Wilper had previously ruled that the filing of the lis pendens in the prior proceeding was warranted during the appeal. (Affidavit of Thomas Maile in Support of Motion for Certification/Motion for Permissive Appeal). There can be no prejudice to the defendants in allowing an immediate appellate review as the defendants can do what they so desire relative to the real property that has been the subject of these proceedings.

As stated in the case of Callaghan v. Callaghan, 142 Id. 185, 125 P.3d 1061 (2005):

> The purpose of Rule 54(b) was to liberalize the appeals process by permitting some partial judgments to be appealed earlier than they otherwise could have been appealed. Merchants, Inc. v. Intermountain Indus., Inc., 97 Idaho 890, 556 P.2d 366 (1976). "Rule 54(b) was adopted to overcome the `single judicial unit theory' which seriously inconvenienced persons involved in multi-party or multiple claim actions by forcing them to await the adjudication of `the whole case and every matter in controversy in it' before being allowed to appeal." Id. at 892, 556 P.2d at 368.

The legal issues presented by the plaintiffs involve substantial issues involving the integrity of our judicial system. The certification under Rule 54(b) will produce an efficient,

orderly determination of justice for all parties.

3. In the Alternative the Plaintiffs Request That the Court Enter its Order Allowing a Permissive Appeal Pursuant to I.A.R. Rule 12.

The plaintiffs believe that a certification pursuant to I.R.C.P. 54(B) is a sensible approach to the litigation. The plaintiffs in the alternative request an order allowing a permissive appeal pursuant to I.A.R. Rule 12.

I.A.R. Rule 12 provides:

> Permission may be granted by the Supreme Court to appeal from an interlocutory order or decree of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

The parties would be best served by having the appellate court consider the issue which is central to this litigation, to wit: the affects of the doctrine of Res Judicata. This one legal issue controls the remaining claims contained in the counter-claims of the defendants. Idaho Law has not specifically ruled on the affects of criminal behavior under the Idaho Racketeering Statute in light of Res Judicata. Our appellate courts have not examined facts similar to the allegations raised by the plaintiffs relating to the defendants' misrepresentations to the court as to whether such facts are a "fraud upon the court". Our Supreme Court can provide guidance as to whether the plaintiffs' allegations of perjury, obtaining money by false pretenses, and aiding and abetting perjury constitute such facts amounting to "tampering with the administration of justice' as to suggest `a wrong against the institutions set up to protect and safeguard the public.'" Compton v.

Compton, 101 Idaho 328, 334, 612 P.2d 1175, 1181 (1980). The facts of this case warrant an examination by our Supreme Court to determine the integrity of our judicial system.

CONCLUSION

The plaintiffs have offered to release any and all lis pendens filed which may affect the subject real property. The defendants are free to deal with the subject real property in any manner they choose. The Honorable Judge Wilper had previously ruled that the filing of the Lis Pendens in the prior case was warranted during the appeal process in the prior proceedings. There remains a controlling issue of Law, to wit: the affect of Res Judicata in light of the defendants' alleged wrongful behavior, that can be addressed by the Supreme Court. Our Supreme Court should provide their guidance as to whether the conduct of the defendants constitutes a "wrong against the institutions set up to protect and safeguard the public." Our Supreme Court should determine whether Res Judicata is a bar in light of the allegations of the criminal behavior of the defendants.

DATED this 13th day of July, 2009.

THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
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Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

AFFIDAVIT IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12

STATE OF IDAHO)
) ss:

AFFIDAVIT IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12 - Pg 1

County of Ada)

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is the counsel of record for Berkshire Investments, LLC and Colleen Birch-Maile and in addition is a named plaintiff herein. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. That the following pleadings were filed in the captioned matter known as *Theodore L. Johnson Revocable Trust vs Thomas Maile, IV and Colleen Maile and Berkshire Investments, LLC*, Ada County Case Number CV OC 04-05656D, and *Taylor vs Maile*, Ada County Case Number CV OC 04-00473D, to wit: Exhibit "A" is a true and correct copy of the Motion for Appeal Bond or Order Removing Lis Pendens; Exhibit "B" is a true and correct copy of the Memorandum Brief in Opposition to the Plaintiffs/Counter-Claimants' Motion for Appeal Bond or Order Removing Lis Pendens; Exhibit "C" is a true and correct copy of the Order entered March 1, 2007 relating to the Motion for Appeal Bond or Order Removing Lis Pendens, all of which are made a part hereof as if set forth in full herein.

3. Annexed hereto as Exhibit "D" is a true and correct copy of a letter to Connie Wright Taylor dated July 9, 2009, together with the enclosures referenced therein and the same is made a part hereof as if set forth in full herein.

DATED this 13 day of July, 2009.

THOMAS G. MAILE, IV, pro se and
Attorney for Berkshire Investments and Colleen Birch Maile

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 13 day of July, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

PAUL THOMAS CLARK
CONNIE WRIGHT TAYLOR
CLARK and FEENEY
Attorneys for Plaintiffs
The Train Station, Suite 201
13th and Main Streets
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB# 1329

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs/Counter-Defendants, vs. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants.	Case No. CV OC 0400473D **MOTION FOR APPEAL BOND or ORDER REMOVING LIS PENDENS**
THEODORE L. JOHNSON REVOCABLE TRUST, Plaintiff, vs. THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC, Defendants.	

COME NOW Plaintiffs Reed, Dallan, and John Taylor (hereafter referred to as "the Beneficiary Plaintiffs"), by and through their attorney of record, Connie Wright Taylor of the firm

EXHIBIT "A"

of Clark & Feeney and, pursuant to I.A.R. 13(b)(14) and 13 (b)(15), move this Court for an order requiring the Defendants to either deposit with the court $1.8 million in cash or post a supersedeas bond in the amount of $2.448,000 as a condition of pursuing their appeal.

This motion is made on the grounds and for the reasons that the Defendants have recorded a lis pendens (a true and correct copy of which is attached to this motion). This lis pendens was not filed with the Court, nor was a copy of it sent to opposing counsel. The lis pendens is the equivalent of a unilateral stay of this Court's order dated July 21, 2006 returning title of the real property at issue to the Plaintiffs. Under the Idaho Appellate Rules, such a stay may be obtained only upon the posting of security.

In the alternative, Plaintiffs move for an order removing the lis pendens from the Ada County Records and precluding the Defendants from filing any subsequent lis pendens relating to the real property at issue in this matter without posting security.

Oral argument is requested.

DATED this 5th day of January, 2007.

Connie Wright Taylor,
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of January, 2007, I caused to be served a true and correct copy of this document by the method indicated below, and addressed to the following:

Thomas Maile Attorney at Law 380 W. State Eagle, ID 83616	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Jack S. Gjording Gjording & Fouster P.O. Box 2837 Boise, ID 83702	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Dennis Charney Attorney at Law 951 E. Plaza Dr. Ste. 140 Eagle, ID 83616	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)

Connie Wright Taylor
Attorney for Plaintiffs

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT 9.00 3
BOISE IDAHO 05/18/06 04:10 PM
DEPUTY Bonnie Oberbillig
RECORDED - REQUEST OF
Thomas Maile


106078472

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Colleen Maile and Berkshire Investments, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REED TAYLOR, DALLAN TAYLOR and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY and BERKSHIRE INVESTMENTS, LLC.,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-Defendants,

vs.

Case No. CV OC 04-00473D

NOTICE OF LIS PENDENS

THOMAS MAILE IV. and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.,

Defendants/Counter-Claimants.

TO: ALL INTERESTED PARTIES

RE: LITIGATION AFFECTING THE RIGHTS AND INTERESTS BETWEEN AND AMONGST THE ABOVE-REFERENCED PARTIES

The nature of the action supporting the above-named Defendants/Counter-Claimants' claim to the legal and equitable rights in the real property hereinafter described is a quiet title action, declaratory judgment, estoppel, filed in the above captioned matter in Ada County, State of Idaho, including a claim for damages, determination of title and interests to the real property, costs and attorneys fees.

The above Defendants/Counter-Claimants' claims an interest in said real property or properties described as follows:

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho.

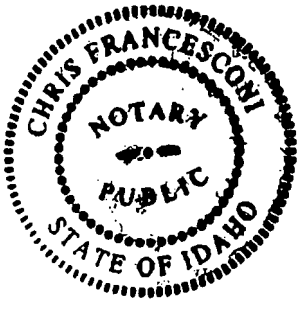
DATED this 16 day of May, 2006.

THOMAS G. MAILE, IV., individually, and as Managing member of Berkshire Investments L.L.C.

STATE OF IDAHO)
) ss.
County of Ada)

On this 18th day of May, 2006, before me, the undersigned, a Notary Public in and for said state, personally appeared THOMAS G. MAILE, IV., known to be the managing member of Berkshire Investments L.L.C., and the individual, and further known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same for Berkshire Investments L.L.C., and for himself individually.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last above written.



Notary Public for Idaho
Residing at Eagle, Idaho
Commission Expires: 9/19/09

DENNIS M. CHARNEY, ISB #4610
JACOB D. DEATON, ISB #7470
CHARNEY AND ASSOCIATES
951 East Plaza Drive, Suite 140
Eagle, Idaho 83616
Telephone: (208) 938-9500
Facsimile: (208) 938-9504

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs/Counter-Defendants, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants.	Case No. CV OC 04-00473D **DEFENDANTS/COUNTER-CLAIMANTS' MEMORANDUM BRIEF IN OPPOSITION TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR APPEAL BOND OR ORDER REMOVING LIS PENDENS**
THEODORE L. JOHNSON REVOCABLE TRUST, Plaintiff/Counter-Defendant, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants.	

DEFENDANTS/COUNTER-CLAIMANTS' MEMORANDUM BRIEF IN OPPOSITION TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR APPEAL BOND OR ORDER REMOVING LIS PENDENS - 1

EXHIBIT "B"

The Defendants/Counter-Claimants, by and through their attorney of record, Dennis M. Charney, provide their Memorandum Brief in Opposition to Plaintiffs/Counter-Defendants' Motion for Appeal Bond or Order Removing Lis Pendens.

STATEMENT OF ISSUES

The Plaintiffs/Counter-Defendants have filed their motion for an appeal bond and/or an order striking the Lis Pendens which was filed with the Ada County Recorder's Office on May 18, 2006. The Defendants/Counter-Claimants filed their Notice of Appeal on December 23, 2006. The appellate court has retained jurisdiction of the above-captioned matter with the exception of certain post-judgment matters which are set forth in Idaho Appellate Rule 13.

POINTS AND AUTHORITIES

A. The Defendants/Counter-Claimants Are Entitled to the Continuation of the Lis Pendens Filed With the Ada County Recorder's Office, Without Any Requirement of a Bond

The relevant portion of Idaho Code Section 5-505, provides:

> 5-505. LIS PENDENS. In an action ***affecting the title or the right of possession*** of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. **From the time of filing such notice for record** only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

Id. (emphasis added).

The present matter before the court requires this Court to construe the plain meaning and intention of Idaho Code Section 5-505. The interpretation of a statute is an issue of law over

which this Court exercises free review. *Idaho Fair Share v. Idaho Public Utilities Comm'n*, 113 Idaho 959, 751 P.2d 107, 109-10 (1988). When interpreting a statute, the primary function of the court is to determine and give effect to the legislative intent. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 797 P.2d 1385 (1990). Such intent should be derived from a reading of the whole act at issue. *Id.* at 539, 797 P.2d at 1387-88. If the statutory language is unambiguous, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 976 P.2d 477, 483 (1999). The plain meaning of a statute, therefore, will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990); *Driver v. SI Corp.*, 139 Idaho 423, 429, 80 P.3d 1024, 1030 (2003).

The Idaho statute relating to the right to file a lis pendens is straightforward. There is no additional language contained in the statute that would defeat the Defendants/Counter-Claimants' rights to rely upon their properly recorded notice to the world that litigation is pending which may affect the rights of the parties to real property involved in the litigation. There is nothing in the statute that supports any of the contentions of the Plaintiffs/Counter-Defendants in their present motion before the court that the lis pendens should be stricken or that a bond needs to be filed.

As stated in the case of *DeRousse v. Higginson*, 95 Idaho 173, 176, 505 P.2d 321, 324 (1973):

> In making such a statutory interpretation or construction, it is a "... universal rule of statutory construction that a statute must be

> construed in the light of its intent and purpose." Jorstad v. City of Lewiston, 93 Idaho 122, 125, 456 P.2d 766, 769 (1969).
>
> The primary function of the appellate court in construing a statute is to ascertain the legislative intent and give effect thereto. Knight v. Employment Security Agency, 88 Idaho 262, 398 P.2d 643 (1965); Messenger v. Burns, 86 Idaho 26, 382 P.2d 913 (1963); Lebrecht v. Union Indemnity Co., 53 Idaho 228, 22 P.2d 1066, 89 A.L.R. 640 (1933)." Idaho Public Utilities Commission v. VI Oil Co., 90 Idaho 415, 420, 412 P.2d 581, 583 (1966).
>
> Furthermore, if possible, it is incumbent upon a court to give a statute an interpretation which will not in effect nullify it. Filer Mutual Telephone Co. v. Idaho State Tax Commission, 76 Idaho 256, 261, 281 P.2d 478 (1955)."
>
> "We adhere to the cardinal rules of construction which require that courts should not nullify a statute or deprive a law of potency and force unless such course is absolutely necessary; meaning and effect should be given to every section of a code in all its parts, if possible to do so." Sampson v. Layton, 86 Idaho 453, 457, 387 P.2d 883 (1963).

Id. at 176-77, 505 P.2d at 324-25.

The above authority clearly establishes that our Idaho legislators chose the wording of Idaho Code Section 5-505 to include the right to maintain a lis pendens throughout the judicial process. Idaho Code Section 5-505 demonstrates the legislative intent and clearly establishes the right to the continued protection of a filed lis pendens during the entire judicial proceeding.

The case of *Joseph C.L.U. Ins. Assoc., Inc. v. Vaught*, 117 Idaho 555, 789 P.2d 1146 (Ct.App. 1990), provides:

> A lis pendens is a notice to the world of the existence of a claim affecting certain real property. *See* I.C. § 5-505; *Suitts v. First Security Bank of Idaho, N.A.*, 100 Idaho 555, 559, 602 P.2d 53, 57 (1979). The lis pendens does not purport, by itself, to establish or to change anyone's legal rights. Of course, the filing of a lis pendens may highlight a possible legal problem affecting the property, thereby inducing an extra measure of caution by

> potential purchasers or lenders until the litigation is concluded. But this does not mean that any underlying legal rights have been altered.

Id. at 557-58, 789 P.2d at 1148-49.

The *Joseph* case authority establishes that the filing of a lis pendens does not "change the legal rights" of the litigants. It is simply a recorded document giving notice to the world that litigation has been instituted which may affect the underlying property.

In short, Idaho Code Section 5-505 permits a plaintiff or defendant to file a lis pendens with the county recorder as notice of the pendency of the action. A lis pendens remains in effect for the duration of an action including any appeal. *See Suitts v. First Sec. Bank of Idaho*, 100 Idaho 555, 602 P.2d 53 (1979). In fact, the Idaho Supreme Court noted that absent a statutory stay, a defendant could protect himself against the "transfer of the property in question to a bona fide purchaser during the pendency of the appeal by filing a lis pendens." *Id.* at 559. This is so because "[t]he effect of filing a lis pendens is that a person who purchases or acquires rights in the subject matter of the litigation during the pendency of the action (which encompasses appeal) takes subject to the final disposition of the case." *Id.*; *see also Radermacher v. Daniels*, 64 Idaho 376, 133 P.2d 713, 715 (1943); *Timm v. Dewsnup*, 921 P.2d 1381, 1389-90 (Utah 1996) (holding lis pendens was proper during appeal, as outcome of case would be determined after appeal).

Other jurisdictions are in accord. S*ee generally Blake v. Gilbert*, 702 P.2d 631 (Alaska 1985) (lis pendens remains in effect where appeal is taken, so that posting supersedeas bond or moving to continue lis pendens pending appeal is not necessary); *Kennedy v. Dawson*, 296 Mont. 430, 989 P.2d 390 (1999) (notice of appeal and lis pendens effectively preserves the status quo pending appeal); *Gardner v. Perry City*, 994 P.2d 811 (Utah App. 2000) (ordering reinstatement

of the lis pendens because the appellant's interest in the subject property depended upon the outcome of the case on remand); *Timm v. Dewsnup*, 921 P.2d 1381, 1389-90 (Utah 1996) (holding lis pendens was proper during appeal as outcome of case would be determined after appeal).

Here, Plaintiffs/Counter-Defendants argue that the lis pendens should be removed because it is "the equivalent of a unilateral stay of the Court's order" and that such a stay "may be obtained only upon the posting of security." Both assertions are wrong. Nothing about the lis pendens prevents the voiding the contract between the parties or prevents the title from being quieted to the Plaintiffs/Counter-Defendants. The lis pendens merely provides notice of the pending litigation. As such, the lis pendens should be left in effect until the Defendants/Counter-Claimants' appeal has ended.

Further, as the court noted in *Suitts*, a lis pendens is available absent a statutory stay. The Plaintiffs/Counter-Defendants have not provided any other authority or basis for their claim that such an effect can only be obtained through a statutory stay. An examination of the relevant authorities supports the opposite conclusion. Further, there is no statutory authority requiring the lis pendens to be stricken during the appellate process. Idaho law authorizes the continuation of the lis pendens on appeal without the necessity of any bond.

B. Idaho Appellate Rules 13(b)(14) and (15) Require the Posting of an Appeal Bond *Only* if a Party Seeks a Stay of Execution

During the pendency of an appeal, a district court's authority is limited to the extent set out in Idaho Appellate Rule 13(b). *See Desfosses v. Desfosses*, 120 Idaho 27, 813 P.2d 366 (Ct.App. 1991). Rules 13(b)(14) and (15) grant a district court the authority to stay execution or enforcement of any judgment "upon the posting" of an appeal bond. However, a district court

has the authority to require the posting of a bond *only* if a party seeks a stay of execution. *See Bernard v. Roby*, 112 Idaho 583, 589, 733 P.2d 804, 810 (Ct.App. 1987). In *Bernard*, the court noted that the posting of an appeal bond is not a requirement for appeal and that a failure to post an appeal bond merely exposes an appellant to execution of the previous judgment. *Id.* at 589.

Here, Defendants/Counter-Claimants are not seeking a stay of execution from this Court. The present motion is being brought by the Plaintiffs/Counter-Defendants, the prevailing party on their own motion for summary judgment. If, on one hand, the Plaintiffs/Counter-Defendants are requesting this Court enter a stay against their own judgment in an effort to require the Defendants/Counter-Claimants to post an appeal bond, such a request would be nonsensical. If, on the other hand, the Plaintiffs/Counter-Defendants' request is not a request to stay the previously entered judgment, but rather a unilateral request for an appeal bond, such a request should be denied because an appeal bond is not a requirement for taking an appeal. It appears that Plaintiffs/Counter-Defendants' request to require a multi-million dollar appeal bond is, in reality, an attempt to prevent Defendants/Counter-Claimants from taking their rightful appeal. This Court should reject Plaintiffs/Counter-Defendants' request. The posting of an appeal bond should only be required when a stay is requested by the appealing party. Since that is not the case in the motion before the Court, Defendants/Counter-Claimants need not post an appeal bond.

C. Idaho Appellate Rule 13(b)(15) Is Inapplicable Because the Judgment in the Present Case Is Not a Money Judgment

Idaho Appellate Rule 13(b)(15) grants a district court jurisdiction to hear a request to "[s]tay execution or enforcement of *a money judgment*." I.A.R. 13(b)(15). Black's Law Dictionary defines a money judgment as "[o]ne which adjudges the payment of a sum of money,

as distinguished from one directing an act to be done or *property to be restored or transferred.*" BLACK'S LAW DICTIONARY, 5th ed. p. 757 (emphasis added). Further, Idaho courts have noted that judgments affecting the right to property are not money judgments. *See, e.g., Barnes v. Buffalo Pitts Co.*, 6 Idaho 519, 57 P. 267 (1899); *Suchan v. Suchan*, 113 Idaho 102, 138, 74 P.2d 1289, 1326 (1986) (Bistline, J., dissenting) (citing with approval Black's Law Dictionary's definition of money judgment).

Here, the judgment entered by this Court from which Defendants/Counter-Claimants' appeal is taken voided the contract between the parties. No award of money was granted. Thus the judgment was not a money judgment. As such, Idaho Appellate Rule 13(b)(15) does not apply to the present motion. Even if the Court determines that the previous judgment is in fact a money judgment, the analysis found in Section B precludes this Court from granting Plaintiffs/Counter-Defendants' request.

CONCLUSION

Thus, Plaintiffs/Counter-Defendants' request that an appeal bond be required or that the lis pendens be removed should be rejected for three reasons: (1) Idaho law authorizes an appellant to maintain a lis pendens in effect for the duration of the appeal; (2) an appeal bond is not a requirement for the taking of an appeal and the Defendants/Counter-Claimants have not requested a stay of execution from the Court; and (3) the judgment previously entered by this Court is not a money judgment. As such, Plaintiffs/Counter-Defendants' attempt to prevent Defendants/Counter-Claimants' rightful appeal by requiring the posting of a multi-million dollar appeal bond should be rejected.

Further, without a statutory basis or a rule that allows this Court to exercise jurisdiction as requested by the Plaintiffs/Counter-Defendants, no basis exists to grant the relief sought by the Plaintiffs/Counter-Defendants.

DATED this 14th day of February, 2007.

DENNIS M. CHARNEY
Attorney for Defendants/Counter-Claimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Connie W. Taylor
Paul Thomas Clark
Clark and Feeney
1229 Main Street
P.O. Drawer 285
Lewiston, Idaho 83501
Fax: **(208) 746-9160**

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Jack S. Gjording
Gjording and Fouser
509 West Hays Street
Post Office Box 2837
Boise, Idaho 83701
Fax: **336-9177**

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Thomas G. Maile, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Fax: **939-1001**

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Dennis M. Charney

DENNIS M. CHARNEY, ISB #4610
JACOB D. DEATON, ISB #7470
CHARNEY AND ASSOCIATES
951 East Plaza Drive, Suite 140
Eagle, Idaho 83616
Telephone: (208) 938-9500
Facsimile: (208) 938-9504

Attorneys for Defendants/Counter-Claimants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-Defendant,

v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

Case No. CV OC 04-00473D

ORDER

The Court, having considered the Plaintiffs/Counter-Defendants' motion to release lis pendens, or, alternatively, motion to require the Defendants/Counter-Claimants to post an appeal bond hereby denies both motions.

SO ORDERED this 27th day of Feb., 2007.

Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1 day of March 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Connie W. Taylor
Paul Thomas Clark
Clark and Feeney
1229 Main Street
P.O. Drawer 285
Lewiston, ID 83501
Fax: **(208) 746-9160**

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Thomas G. Maile, IV
Attorney at Law
380 West State Street
Eagle, ID 83616
Fax: **939-1001**

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Dennis M. Charney
CHARNEY AND ASSOCIATES
951 East Plaza Drive, Suite 140
Eagle, Idaho 83616
Fax: **938-9504**

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

J. DAVID NAVARRO
INGA JOHNSON
~~Dennis M. Charney~~

LAW OFFICE OF
THOMAS G. MAILE, IV, P.A.
380 WEST STATE STREET, EAGLE, IDAHO 83616
(208) 939-1000 / Fax (208) 939-1001

July 9, 2009

BY FACSIMILE TRANSMISSION
TO (208) 746-9160

Clark and Feeney
Attn: Connie Taylor
1229 Main Street
Post Office Drawer 285
Lewiston, Idaho 83501

Re: Johnson Trust, Taylor v. Thomas & Colleen Maile, et.al
Consolidated Ada County Case No. CV OC 04-00473D
Our File No. M04-5109.0

Dear Ms. Taylor:

Please find enclosed a proposed Satisfaction of Judgment related to the costs outstanding on the above captioned matter, together with a propose Release of Lis Pendens. Berkshire Investments, my wife and I will execute the Release of Lis Pendens on all current Lis Pendens upon receiving a certified check for the balance owing from the $400,000.00 minus costs and interest awarded which is referenced in the enclosed Satisfaction of Judgment. If you would calculate the interest on the judgment and the appellate costs, please provide my office with your calculations. I see no reason why the exchange of monies and the appropriate release cannot be handle as a typical real estate closing transaction, to wit: simultaneously.

Please make the appropriate arrangements to obtain the certified funds payable to Berkshire Investments, LLC along with the executed Satisfaction of Judgment. We will file, contemporaneously with the exchange of the same, our proposed Release of Lis Pendens.

Sincerely,

Thomas G. Maile

TGM/mp
N:\server\files\a LO\MAILE\TAYLOR\connietaylor fax.wpd
Enclosures
cc: Mark S. Prusynki via fax (385-5384)

EXHIBIT "D"

RELEASE OF NOTICE OF LIS PENDENS

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, THOMAS G. MAILE, IV., on behalf of and as attorney for BERKSHIRE INVESTMENTS, LLC, THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, whose address is 380 W. State Street, Eagle, Idaho, do hereby release that certain Notice of Lis Pendens dated and recorded on May 18, 2006, as Instrument Number 106078472 at the offices of the Ada County Recorder, State of Idaho, as well as that certain Notice of Lis Pendens dated and recorded March 25, 2008, as Instrument Number 108033598 at the office of the Ada County Recorder, State of Idaho, in and for that certain parcel of real property described as The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho.

DATED This _____ day of July, 2009.

THOMAS G. MAILE, IV., Individually and as attorney for BERKSHIRE INVESTMENTS, LLC and COLLEEN BIRCH-MAILE

STATE OF IDAHO)
) ss:
County of Ada)

On this _____ day of July, 2009, before me, the undersigned, a Notary Public for said State, personally appeared THOMAS G. MAILE, IV., known or acknowledged to me to be the attorney for BERKSHIRE INVESTMENTS, LLC and COLLEEN BIRCH-MAILE, and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed said document on behalf of said limited liability company.

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

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs/Counter-Defendants, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants.	Case No. CV OC 04-00473D **SATISFACTION OF JUDGMENT**
THEODORE L. JOHNSON REVOCABLE TRUST, Plaintiff/Counter-defendant, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC. Defendants/Counter-claimants.	

KNOW ALL THESE PRESENTS, that the Plaintiffs/Counter-Defendants above-named do hereby certify that the costs awarded in the Order entered on April 6, 2007 by the Fourth Judicial District Court in the amount of $12, 424.04, together with the appellate costs in the

amount of $514.00, together with interest thereon against the above-named Defendants/Counter-Claimants and in favor of the above-named Plaintiffs in the said District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, is fully paid, satisfied and discharged.

Plaintiffs/Counter-Defendants, Taylors and Theodore L. Johnson Trust, release and forever discharge the Defendants/Counter-Claimants from any and all liability associated to any and all Judgments and Orders entered awarding costs together with interest thereon, relating to the above captioned matters.

DATED this _____ day of July, 2009.

_____
CONNIE WRIGHT-TAYLOR
Attorney for Plaintiffs/Counter-Defendants

STATE OF IDAHO)
) ss:
County of _____)

On this _____ day of July, 2009, before me, the undersigned, a Notary Public in and for said State, personally appeared CONNIE WRIGHT-TAYLOR, known or acknowledged to me to be the person(s) whose name(s) is/are subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

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

_____
Notary Public for Idaho
Residing at _____
My Commission Expires: _____

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION

Defendants.

Case No. CV OC 0723232

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This cause came on before the Honorable Richard D. Greenwood for hearing on the Plaintiffs' Motion for Summary Judgment on the Defendants' counterclaims.

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

Based upon the findings of fact and conclusions of law contained within this Court's July 2, 2009 Memorandum Decision and Order,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiffs' Motion for Summary Judgment is denied.

2. The Defendants' request for attorney fees and costs, as well as sanctions under Rule 11, is reserved.

DATED this 16 day of July, 2009.

The Honorable Richard Greenwood

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of July, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas Maile, IV Attorney at Law 380 West State Street Eagle, ID 83616	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 939-1001*
Connie W. Taylor Clark and Feeney PO Box 285 Lewiston, ID 83501	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) (208) 385-5384

CLERK OF THE DISTRICT COURT

Deputy Clerk

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 0723232 **JUDGMENT DISMISSING PLAINTIFFS' CLAIMS**

This cause came on before the Honorable Richard D. Greenwood for hearing on the Defendants' Motions for Summary Judgment. Based upon the findings of fact and conclusions of law contained within this Court's July 2, 2009 Memorandum Decision and Order,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendants' Motion for Summary Judgment is granted.

2. The Plaintiffs' Complaint and Amended Complaint are dismissed with prejudice.

RDG ~~3. The Defendants are the prevailing parties in this matter.~~

DATED this 16 day of July, 2009.

The Honorable Richard Greenwood

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of July, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas Maile, IV Attorney at Law 380 West State Street Eagle, ID 83616	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Connie W. Taylor Clark and Feeney PO Box 285 Lewiston, ID 83501	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☑ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) (208) 385-5384

CLERK OF THE DISTRICT COURT

Deputy Clerk

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12

STATE OF IDAHO)
) ss:

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12 -

County of Ada)

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is the counsel of record for Berkshire Investments, LLC and Colleen Birch-Maile and in addition is a named plaintiff herein. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. That attached hereto as "Exhibit A" is a true and correct copy of the recorded Lis Pendens, recorded July 13, 2009, the same incorporated herewith by reference herein as if set forth in full herein.

DATED this 4 day of July, 2009.

THOMAS G. MAILE, IV, pro se and
Attorney for Berkshire Investments and Colleen Birch Maile

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 21 day of July, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

CERTIFICATE OF SERVICE

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12 - Pg 2 C:\handyhackback1\server1\files\a\ADUBERKSHIR.INV\clerk\corney\supp affidavitofl gm.wpd

I HEREBY CERTIFY That on the 24 day of July, 2009, I caused a true and correct copy of the foregoing, (1) SUPPLEMENTAL AFFIDAVIT OF THOMAS MAILE IN SUPPORT OF MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: MEMORANDUM DECISION AND ORDER/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12, to be delivered, addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV., Pro Se and counsel for
Berkshire Investments and Colleen Birch-Maile

RELEASE OF
NOTICE OF LIS PENDENS

KNOW ALL PERSON BY THESE PRESENTS:

That the undersigned, THOMAS G. MAILE, IV, on behalf of and as attorney for BERKSHIRE INVESTMENTS, LLC, COLLEEN BIRCH-MAILE and Pro se, whose address is 380 W. State Street, Eagle, Idaho, does hereby release and forever discharge that certain Notice of Lis Pendens, dated March 25, 2008 and recorded on March 25, 2008, as Instrument Number 108033598 at the offices of the Ada County Recorder, State of Idaho, in and for that certain parcel of real property known described as follows:

The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho.

DATED This 13 day of July, 2009.

THOMAS G. MAILE, IV., Attorney for
BERKSHIRE INVESTMENTS, LLC, COLLEEN
BIRCH-MAILE and Pro se

STATE OF IDAHO)
) ss:
County of Ada)

On this 13 day of July, 2009, before me, the undersigned, a Notary Public for said State, personally appeared THOMAS G. MAILE, IV, known or acknowledged to me to be the attorney for BERKSHIRE INVESTMENTS, LLC, COLLEEN BIRCH-MAILE and Pro se and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed said document.

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

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT 3.00 1
BOISE IDAHO 07/13/09 11:48 AM
DEPUTY Bonnie Oberbillig
RECORDED-REQUEST OF

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

AMENDED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT DISMISSING PLAINTIFFS' CLAIMS/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12

COMES NOW, Berkshire Investments, LLC and Colleen Birch-Maile and, Thomas G. Maile, IV, pro se and attorney of record for co-plaintiffs herein, and pursuant to I.R.C.P. Rule

54(b), request certification from the Judgment Dismissing Plaintiffs' Claims entered July 20, 2009, or in the alternative a request for a permissive appeal pursuant to I.A.R. Rule 12, and incorporate by reference herein as if set forth in full herein the Motion, Affidavit and Brief filed on the 13th day of July, 2009 as if set forth in .

ORAL ARGUMENT IS REQUESTED ON THIS MOTION.

DATED this 3rd day of August, 2009.

THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 3rd day of August, 2009, I caused a true and correct copy of the foregoing, (1) AMENDED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT DISMISSING PLAINTIFFS' CLAIMS/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12, together with the (2) AMENDED NOTICE OF HEARING to be delivered, addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

SECOND SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF AMENDED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT DISMISSING PLAINTIFFS' CLAIMS/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12

STATE OF IDAHO)
) ss:

SECOND SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF AMENDED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT DISMISSING PLAINTIFFS' CLAIMS/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12 - Pg 1 C:\hardybeckback1\server1\files\a\D\BERKSHIR.INV\clarkfeeney\2ndsupaffidavitofigm.wpd

County of Ada)

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is the counsel of record for Berkshire Investments, LLC and Colleen Birch-Maile and in addition is a named plaintiff herein. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. That attached hereto as Exhibit "A" is a true and correct copy of the recorded Release of Lis Pendens filed August 3, 2009 bearing Instrument No. 109090496 and the same is incorporated herein by reference herein as if set forth in full herein.

3. That attached hereto as "B" is a true and correct copy of the recorded Notice of Vendee's Lien filed August 3, 2009 bearing Instrument No. 109090497 and the same is incorporated herein by reference herein as if set forth in full herein.

DATED this 12 day of August, 2009.

THOMAS G. MAILE, IV, pro se and
Attorney for Berkshire Investments and Colleen Birch Maile

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 12 day of August, 2009.

Notary Public for Idaho
Residing at Boise, Idaho

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

My Commission Expires July 30, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 12 ~~day~~ of August, 2009, I caused a true and correct copy of the foregoing, (1) SUPPLEMENTAL AFFIDAVIT OF THOMAS MAILE IN SUPPORT OF **AMENDED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT DISMISSING PLAINTIFFS' CLAIMS/MOTION FOR PERMISSIVE APPEAL PURSUANT TO THE I.A.R. RULE 12**, to be delivered, addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV., Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

RELEASE OF NOTICE OF LIS PENDENS

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, THOMAS G. MAILE, IV., individually, and on behalf of and as attorney for BERKSHIRE INVESTMENTS, LLC, THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, whose address is 380 W. State Street, Eagle, Idaho, do hereby release that certain Notice of Lis Pendens dated and recorded on May 18, 2006, as Instrument Number 106078472 at the offices of the Ada County Recorder, State of Idaho, in and for that certain parcel of real property described as The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho.

DATED This 3rd day of August, 2009.

THOMAS G. MAILE, IV., Individually and as attorney for BERKSHIRE INVESTMENTS, LLC and COLLEEN BIRCH-MAILE

STATE OF IDAHO)
) ss:
County of Ada)

On this 3rd day of August, 2009, before me, the undersigned, a Notary Public for said State, personally appeared THOMAS G. MAILE, IV., known or acknowledged to me to be the attorney for BERKSHIRE INVESTMENTS, LLC and COLLEEN BIRCH-MAILE, and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed said document on behalf of said limited liability company, Colleen Birch-Maile and by himself.

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

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT 3.00 1
BOISE IDAHO 08/03/09 10:51 AM 109090496
DEPUTY Vicki Allen
RECORDED-REQUEST OF
Berkshire Investments

EXHIBIT "A"

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs/Counter-Defendants, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants. THEODORE L. JOHNSON REVOCABLE TRUST, Plaintiff/Counter-defendant, v. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC. Defendants/Counter-claimants.	Case No. CV OC 04-00473D **NOTICE OF VENDEE'S LIEN**

TO: ALL INTERESTED PARTIES
RE: Berkshire Investments L.L.C., Notice of Vendee's Lien

The nature of the vendee's lien is made pursuant to I.C. 45-804, for the re-payment of the purchase price paid by Berkshire Investments L.L.C., to the Theodore L. Johnson Revocable

EXHIBIT "B"

Trust. That the principal sum paid was $400,000.00 which is due and owing minus any costs and interest thereon awarded in the above captioned matter.

Berkshire Investments L.L.C, claims its vendee's lien in said real property or properties described as follows:

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho.

DATED this 3rd day of August, 2009.

THOMAS G. MAILE, IV., attorney for
Berkshire Investments L.L.C.

STATE OF IDAHO)
) ss.
County of Ada)

On this 3rd day of August, 2009, before me, the undersigned, a Notary Public in and for said state, personally appeared THOMAS G. MAILE, IV., known to be the attorney for Berkshire Investments L.L.C., and further known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same for Berkshire Investments L.L.C.

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

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

ORIGINAL

NO. _____
A.M. 8 FILED P.M. _____

AUG 21 2009

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

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION

Defendants.

Case No. CV OC 0723232

NOTICE OF NON-OPPOSITION TO MOTION FOR RULE 54(B) CERTIFICATION

THE DEFENDANTS Theodore L. Johnson Revocable Trust, John Taylor and Dallan Taylor, by and through their attorney of record, hereby notify the court and counsel that they do not oppose entry of a certificate of final judgment on this Court's order dismissing the claims of the Plaintiff.

Defendants' position is based upon the following considerations:

1. The Plaintiff has stated unequivocally that he will appeal the order dismissing his claims, and we believe it is in the best interest of all parties to have that appeal concluded as soon as possible. Because this is the third appeal relating to these issues, we believe there is a good chance that the appeal will proceed quickly.

2. The existence of this litigation on the ownership of the property must be disclosed to potential lenders, which prevents the Johnson Trust from borrowing the funds necessary to return the original purchase price to these Plaintiffs pursuant to Judge Wilper's judgments.

3. The Plaintiffs' Fourth Affirmative Defense to the Defendants' counterclaims (see Reply dated March 17, 2009) alleges a failure to mitigate their damages. Defendants are concerned that this Plaintiff will allege that any failure to cooperate in efforts to expedite the Plaintiffs' appeal is a breach of that duty.

4. We are going into the eighth year of litigation involving the Plaintiffs' attempt to purchase the Linder Road property. If the appeal of the Plaintiffs' claim to quiet title to the property is delayed until after the November 2010 trial of the counterclaims, it will likely be 2012 or later before the title to the property is cleared.

For the reasons stated above, the Johnson Trust, John Taylor, and Dallan Taylor respectfully request that this Court grant the Plaintiffs' motion for certification under I.R.C.P. 54(b).

DATED this 20th day of August, 2009.

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Johnson Trust, John Taylor, and Dallan Taylor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August, 2009 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail ☒ Telecopy (FAX) *(208) 939-1001*
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☐ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail ☒ Telecopy (FAX) *(208) 385-5384*

_____
Connie W. Taylor
Attorney for Defendants

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

ORDER RE: MOTION FOR CERTIFICATION/MOTION FOR PERMISSIVE APPEAL

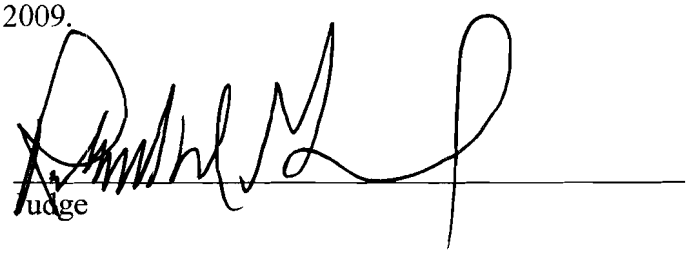
THIS MATTER having come before the Court pursuant to Plaintiffs' Motion for Certification/Motion for Permissive Appeal with Thomas G. Maile, IV appearing on behalf of the Plaintiffs and Connie Taylor appearing on behalf of Dallan Taylor, R. John Taylor and the

Theodore L. Johnson Revocable Trust and Mark S. Prusynski appearing on behalf of Clark and Feeney and Connie Wright Taylor and the Court having considered the matter herein and none of the Defendants having opposed the motion, with defendants Dallan Taylor, R. John Taylor and the Theodore L. Johnson Revocable Trust specifically filing their Notice of Non-Opposition to the plaintiffs' motions, and the court having considered the record and argument of counsel;

IT IS HEREBY ORDER AND THIS DOES ORDER that permission is hereby granted for an interlocutory appeal of the Judgment entered on July 20, 2009 and the appeal is hereby authorized and ordered. That an interlocutory appeal of the issues contained in the court's Memorandum Decision and Order dated July 2, 2009 which resulted in the above referenced Judgment would resolve controlling questions of law as to which there are substantial grounds for difference of opinion and in which an immediate appeal from the order and Judgment would materially advance the orderly resolution of the litigation pursuant to I.A.R. Rule 12(a). ;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the current scheduling order and trial date set on the Counter-Claim is vacated pending further order of this Court.

DATED this 28 day of September, 2009.



Judge

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009

COMES NOW, Berkshire Investments, LLC and Colleen Birch-Maile and, Thomas G. Maile, IV, pro se and attorney of record for co-plaintiffs herein, and pursuant to I.R.C.P. Rule 54(b), request that the Court enter its Judgment on the Memorandum Decision and Order filed

July 2, 2009 and the resulting Judgment Dismissing Plaintiffs' Claims entered July 20, 2009, containing the language, as provided, to wit:

> With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules

This Motion is on the grounds set fort above and the record and file herein, and the Supplemental Affidavit of Thomas Maile and the accompanying Memorandum Brief filed concurrently herewith.

ORAL ARGUMENT IS REQUESTED ON THIS MOTION.

DATED this 3 day of December, 2009.

THOMAS G. MAILE, IV
Pro Se and counsel for Berkshire Investments, LLC
and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 3 day of December, 2009, I caused a true and correct copy of the foregoing, (1) RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009, (2) AFFIDAVIT OF THOMAS MAILE IN SUPPORT OF RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009 and (3) NOTICE OF HEARING RE: RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009 to be delivered, addressed as follows:

Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Fax: (208) 385-5384	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

THOMAS G. MAILE, IV., Pro Se and counsel for
Berkshire Investments and Colleen Birch-Maile

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Pro Se and counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants.

Case No. CV-OC-0723232

AFFIDAVIT IN SUPPORT OF RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009

STATE OF IDAHO)
) ss:
County of Ada)

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is the counsel of record for Berkshire Investments, LLC and Colleen Birch-Maile and in addition is a named plaintiff herein. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. That the following pleadings were filed in the captioned matter known as *Theodore L. Johnson Revocable Trust vs Thomas Maile, IV and Colleen Maile and Berkshire Investments, LLC*, Ada County Case Number CV OC 04-05656D, and *Taylor vs Maile*, Ada County Case Number CV OC 04-00473D, to wit: Exhibit "A" is a true and correct copy of the Order Denying Motion for Order Releasing Vendee's Lien by Judge Wilper on October 14, 2009, and the same is made a part hereof as if set forth in full herein.

3. That attached hereto as Exhibit "B" is a true and correct copy of the Verified Motion for Foreclosure of Vendee's Lien filed November 5, 2009 and the same is made a part hereof as if set froth in full herein.

DATED this 3 day of December, 2009.

THOMAS G. MAILE, IV, pro se and
Attorney for Berkshire Investments and Colleen Birch Maile

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 3 day of December, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants.

Case No. CVOC 0400473D

ORDER DENYING MOTION FOR ORDER RELEASING VENDEE'S LIEN

This matter came before the Court on the Plaintiffs' Motion for Order Releasing Vendee's Lien. The Court heard oral argument on Monday, October 5, 2009. Connie Taylor appeared

EXHIBIT A

telephonically for the Plaintiffs and Thomas Maile appeared in person for the Defendants. At that time, the Court considered the matter fully under advisement.

Thomas Maile was Theodore L. Johnson's attorney. Maile's representation included drafting the trust agreement for the Theodore L. Johnson Revocable Trust, overseeing the administration of the trust, and representing the estate after Johnson's death. The underlying transaction in this case is a land sale between Johnson, then trustee and settlor of the trust, and Maile. Maile and Johnson entered into an earnest money agreement for the purchase of forty acres in Eagle, ID, which Maile had previously advised Johnson not to convey to a third party. The purchase price was $400,000 and the property was conveyed by the successor trustee after Johnson passed away. Beneficiaries of the trust brought suit.

Maile filed a *lis pendens* against the property on May 18, 2006. On July 21, 2006, the Court held that the land sale was void pursuant to Idaho law and ordered the land be returned to Plaintiffs and the purchase money be returned to Defendants, less any amounts the Defendants may be able to prove in an unjust enrichment counterclaim. On December 11, 2006, the Court entered a judgment in favor of the Plaintiffs on the counterclaim. The Idaho Supreme Court upheld this Court's judgment on January 30, 2009.

On December 31, 2007, Maile filed a new complaint against the beneficiaries and their attorneys, once again contesting ownership of the property. Maile filed a second *lis pendens* on May 25, 2008. On July 2, 2009, the Honorable Judge Richard Greenwood dismissed all of Maile's claims under the doctrines of issue and claim preclusion. In that litigation, the beneficiaries' counterclaims remain to be resolved. Maile and his related entities have informed this Court of their intention to appeal Judge Greenwood's ruling.

On May 7, 2009, the Court entered an Order Denying Motion to Compel Payment of Judgment and Interest, holding that it was the intention of this Court in its July 21, 2006 order to void the underlying transaction returning all parties to the position they had been in prior to the transaction and that because the property had not been returned free of encumbrance, it was not the time to order a return of the purchase money. On August 3, 2009, Defendants filed a release of the May 2006 *lis pendens*. On that same day Defendants filed a notice of vendee's lien on the subject property.

Plaintiffs seeks an order releasing the vendee's lien, contending that the lien is inappropriate in light of this Court's ruling that the transaction was void as a matter of law. Defendants counter that Plaintiffs are in possession of the purchase money and that Idaho Code § 45-804 authorizes a vendee's lien to secure the return of that money.

Idaho Code § 45-804 states:

> One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration.

Although there has not been a failure of consideration in this transaction, the Court has found the transaction to be void and ordered a return of the property and a return of the purchase money to return each party as nearly as possible to the position they would have been in had the transaction not occurred. As a matter of equity, Defendants are entitled to maintain a lien against the property to secure the return of the purchase price, less costs which have been previously awarded by the Court. Plaintiffs' Motion for Order Releasing Vendee's Lien is DENIED.

The Court finds that the vendee's lien filed August 3, 2009 is sufficient to secure the return of the purchase price. Therefore the Court orders that no new *lis pendens* are to be filed against the subject property in this litigation.

IT IS SO ORDERED.

Dated this 12th day of October, 2009.

Ronald J. Wilper
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 14 day of October, 2009, I caused a true and correct copy of the foregoing ORDER DENYING MOTION FOR ORDER RELEASING VENDEE'S LIEN to be served by the method indicated below, and addressed to the following:

Connie Taylor
P.O. Drawer 285
Lewiston, ID 83501

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Thomas G. Maile
380 W. State
Eagle, ID 83616

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By _____
Deputy Clerk

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Berkshire Investments LLC

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,
Plaintiffs/Counter-Defendants,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-defendant,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.

Defendants/Counter-claimants.

Case No. CV OC 04-00473D

VERIFIED MOTION FOR FORECLOSURE OF VENDEE'S LIEN

COMES NOW, the Defendants/Counter-Claimant, BERKSHIRE INVESTMENTS, LLC, by and through its attorney, Thomas G. Maile, IV., and hereby moves this Court for the following relief as follows:

EXHIBIT "B"

COPY

001445

The above captioned Court has determined the real estate closing by and between the parties was declared void and a return of the purchase price was ordered minus court costs incurred by the Plaintiff. That this Court as of October 14, 2009 denied the Plaintiff's Motion For Order Releasing Vendee's Lien. That based upon the same the following is alleged:

COUNT ONE
FORECLOSURE
I.

During all times herein mentioned, Berkshire Investments, LLC, is and was a limited liability company authorized to transact business in the State of Idaho.

II.

During all times herein mentioned, plaintiff, the Theodore L. Johnson Revocable Trust, was a duly registered trust under the law of the State of Idaho and currently holds the legal title to the real property subject to the vendee's lien hereinafter referenced. That consistent with the prior Orders, Berkshire Investment has not been paid any portion of the monies due and owing from the plaintiff "Theodore L. Johnson Revocable Trust". That although repeatedly requested to do so the plaintiff "Theodore L. Johnson Revocable Trust" has not paid the $400,000.00 due and owing and/or paid any sums minus the costs awarded to Berkshire Investments above referenced.

That attached hereto as Exhibit "A" is a true and correct copy of the Vendee's Lien in the litigation above captioned which was recorded with the Ada County Recorder's Office on August 3, 2009 bearing Instrument No. 109090497, which is incorporated by reference herein as if set forth in full herein.

III.

That the Vendee's Lien filed and is perfected against the real property in the County of Ada, State of Idaho. The real property is described as Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho..

IV.

The "Theodore L. Johnson Revocable Trust" is the owner or reputed owners of the certain real property above describe in the County of Ada, State of Idaho.

V.

That pursuant to the Judgments of record and the subsequent orders entered herein there a fix liquidated and ascertainable sum due and owing Berkshire Investments LLC from the "Theodore L. Johnson Revocable Trust". That the sum of $400,000.00, (minus awarded costs and interest thereon) is the outstanding balance due to Berkshire Investments after deducting all just credits, payments and offsets, together with interest legal at the rate of twelve (12) percent per annum from October 14, 2009, until paid in full is due from the "Theodore L. Johnson Revocable Trust".

VI.

Berkshire Investments LLC claims an interest in and to the subject property pursuant to that Vendee's Lien, and any right, title, claim or interest of the "Theodore L. Johnson Revocable Trust" and/or the named plaintiffs (or any other interested party or person in and to the subject property, if such right, title, claim or interest exists) is junior and subservient to the interest of Berkshire Investments LLC in the subject property. That Berkshire Investments LLC is entitled

to a Decree allowing the foreclosure of its interest against the real property above described and a determination of the rights of the parties herein and any others who claim an interest therein.

VII.

That annexed hereto as Exhibit "B" is one of the letters transmitted to the counsel for the plaintiffs dated October 21, 2009 requesting payment of the sums due and owing to Berkshire Investments LLC. There has been no reply from any party or counsel for any party. That Berkshire Investments LLC, has no plain, speedy or adequate remedy at law.

IX.

That Berkshire Investments LLC has been required to retain the services of Thomas G. Mails, IV, to pursue this matter. Pursuant to Idaho Code, Section 12-120, 12-121, 12-123, Berkshire Investments LLC is entitled to reasonable attorneys fees in the amount of $2,500.00 if this matter is uncontested and a further amount as may be awarded by the Court if this matter is contested, together with such costs as may be awarded by the Court pursuant to Rule 54(e) of the Idaho Rules of Civil Procedure.

PRAYER

WHEREFORE, Berkshire Investments, LLC prays for judgment against the plaintiff "Theodore L. Johnson Revocable Trust" and/or any other parties or third parties claiming an interest in the real property as follows:

1 That Berkshire Investments, LLC be granted Judgment against "Theodore L. Johnson Revocable Trust" and/or any other parties or third parties in the principal sum of $400,000.00, together with interest thereon at the rate of twelve (12) percent per annum from and after October 14, 2009, minus costs and interests

due and owing "Theodore L. Johnson Revocable Trust" and/or any other parties, to and including the date of Judgment and thereafter at the highest legal rate until paid in full.

2 For Berkshire Investments, LLC's attorneys fees incurred herein in the sum of $2,500.00 if this matter is uncontested and a further amount as may be awarded by the Court if this matter is contested.

3 For Berkshire Investments, LLC's costs and disbursements incurred herein.

4 That the "Theodore L. Johnson Revocable Trust" be required to set forth herein by proper pleading the nature of their claims in and to said premises or any part thereof.

5 That Berkshire Investments, LLC's interest in and to the subject property be declared senior and superior and that any other claim, right, title, or interest of the"Theodore L. Johnson Revocable Trust" and/or any of the party (or any other interested party or person in and to the subject property, if such right, title, claim or interest exists) be declared junior and subservient to the interest of Berkshire Investments, LLC in the subject property to wit: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho.

6 That a Decree be entered adjudging and decreeing that Berkshire Investments, LLC is the owner and is entitled to possession of the subject property, and further

ordering that the "Theodore L. Johnson Revocable Trust", has no right, title or interest or claim in and to the subject real property or any part thereof and that each of them, and further, that any person claiming under them and all persons having any lien, claim, judgment or decree on or against said real property or any part, parcel or portion thereof (either as purchaser, encumbrancer, or otherwise) be barred and foreclosed from all equity of redemption in and to the said real property and in and to every part, parcel and portion thereof.

7 That this Court order the sale of the subject real property according to law and the practice of this Court, and that the proceeds of said sale be applied in payment of amounts found due and owing to Berkshire Investments, LLC as aforesaid, and for Berkshire Investments, LLC's costs and expenses of this action.

8 That in the event the proceeds from the sale of said real property be insufficient to satisfy the amounts due to Berkshire Investments, LLC herein (together with the costs of sale and other proper charges), that Berkshire Investments, LLC have Judgment against the "Theodore L. Johnson Revocable Trust" for such deficiency, together with interest thereon at the highest legal rate until paid in full.

9 For such other and further relief in law or equity that the Court may deem proper in the premises.

DATED This 3 day of November, 2009.

THOMAS G. MAILE, IV
Attorney for Berkshire Investments, LLC

VERIFICATION

STATE OF IDAHO)
) ss:
County of Ada)

THOMAS G. MAILE, IV., being first duly sworn upon oath, deposes and states as follows:

He is the attorney for the above named petitioner, Berkshire Investments LLC, in the above-entitled action, he has read the foregoing VERIFIED MOTION FOR FORECLOSURE ON VENDEE'S LIEN, knows the contents thereof, and believes the same to be true and correct to the best of his knowledge and belief and executes the same as attorney for the above named Berkshire Investments, LLC.

DATED This 3 day of November, 2009.

THOMAS G. MAILE, IV., Attorney for
Berkshire Investments, LLC

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for said State, this 3 day of November, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Eagle, Idaho
My Commission Expires January 21, 2009

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,
Plaintiffs/Counter-Defendants,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-defendant,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.

Defendants/Counter-claimants.

Case No. CV OC 04-00473D

NOTICE OF VENDEE'S LIEN

TO: ALL INTERESTED PARTIES
RE: Berkshire Investments L.L.C., Notice of Vendee's Lien

The nature of the vendee's lien is made pursuant to I.C. 45-804, for the re-payment of the purchase price paid by Berkshire Investments L.L.C., to the Theodore L. Johnson Revocable

Exhibit "A"

Trust. That the principal sum paid was $400,000.00 which is due and owing minus any costs and interest thereon awarded in the above captioned matter.

Berkshire Investments L.L.C, claims its vendee's lien in said real property or properties described as follows:

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho.

DATED this 3rd day of August, 2009.

THOMAS G. MAILE, IV., attorney for
Berkshire Investments L.L.C.

STATE OF IDAHO)
) ss.
County of Ada)

On this 3rd day of August, 2009, before me, the undersigned, a Notary Public in and for said state, personally appeared THOMAS G. MAILE, IV., known to be the attorney for Berkshire Investments L.L.C., and further known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same for Berkshire Investments L.L.C.

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

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

LAW OFFICE OF
THOMAS G. MAILE, IV, P.A.
380 WEST STATE STREET, EAGLE, IDAHO 83616
(208) 939-1000 / Fax (208) 939-1001

October 21, 2009

BY FACSIMILE TRANSMISSION
TO (208) 746-9160

Clark and Feeney
Attn: Connie Taylor
1229 Main Street
Post Office Drawer 285
Lewiston, Idaho 83501

Re: Johnson Trust & Taylor v. Thomas & Colleen Maile, et.al
Consolidated Ada County Case No. CV OC 04-00473D
Our File No. M04-5109.0

Dear Ms. Taylor:

Pursuant to the Court's Order of October 14, 2009, we once again request payment of the amounts due and owing Berkshire Investments, LLC.

Your prompt reply and payment is appreciated.

Sincerely,

Dictated and Forwarded Without
Signature to Avoid Delay

Thomas G. Maile

TGM/mp

Exhibit "B"

CONNIE W. TAYLOR
CLARK and FEENEY
1229 Main Street
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB No. 4837

Attorneys for Defendants John Taylor
Dallan Taylor and the Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, et al. Defendants.	Case No. CV OC 0723232 OBJECTION TO RENEWED MOTION FOR RULE 54(B) CERTIFICATION

John Taylor, Dallan Taylor, and the Johnson Trust object to the Plaintiffs' renewed motion for certification of the dismissal of their claims for the following reasons:

1. This Court has already considered that motion and denied it on the grounds that the judgment on the Plaintiffs' claim will not be final until the issue of costs and attorneys fees has been addressed.

KB

2. As shown by the documents attached to the Affidavit of Counsel, Mr. Maile is seeking to enforce the Judgment entered by Judge Wilper which he claims, in this case, is void and should be set aside. This Court's dismissal of Plaintiffs' claims will likely be upheld under the doctrine of judicial estoppel, and it is a waste of judicial resources to interpose an interlocutory appeal which will only delay the final resolution of this action.

3. Defendants submit that the filing of this renewed motion is frivolous and request that it be denied.

DATED this 18th day of December, 2009.

CLARK and FEENEY

By _____
For Connie W. Taylor, a member of the firm.
Attorneys for Defendants John Taylor
Dallan Taylor and the Johnson Trust

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of November, 2009, I caused to be served a true and correct copy of the above document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☒ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 385-5384***
Mr. Christ Troupis Attorney at Law PO Box 2408 Eagle, ID 83616	☒ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 938-5482***

Connie W. Taylor

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 07 23232 AFFIDAVIT OF CONNIE W. TAYLOR IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR CERTIFICATION

STATE OF IDAHO)
) ss.
County of Nez Perce)

KB

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law within the state of Idaho and a member of Clark and Feeney, attorneys for the Defendants John Taylor, Dallan Taylor and Theodore Johnson Trust in the above entitled matter. The information contained herein is of my own personal knowledge.

2. I am attaching hereto as Exhibit A, a true and correct copy of the Verified Motion for Foreclosure of Vendee's Lien filed in the *Taylor v. Maile* case Ada County Case No. CV OC 04 00473D.

3. I am attaching hereto as Exhibit B, a true and correct copy of the Affidavit of Thomas G. Maile, IV, in Support of Verified Motion for Foreclosure of Vendee's Lien filed in the *Taylor v. Maile* case Ada County Case No. CV OC 04 00473D.

DATED this 18th day of December, 2009.

Connie Taylor

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

TAMARA CRANE NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 03/06/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of December, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☒ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mark Prusynski MOFFATT THOMAS 101 S Capitol Blvd., 10th Floor PO Box 829 Boise, ID 83701	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 385-5384***
Mr. Christ Troupis Attorney at Law PO Box 2408 Eagle, ID 83616	☒ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 938-5482***

Connie W. Taylor

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Berkshire Investments LLC

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,
Plaintiffs/Counter-Defendants,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-defendant,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.

Defendants/Counter-claimants.

Case No. CV OC 04-00473D

VERIFIED MOTION FOR FORECLOSURE OF VENDEE'S LIEN

COMES NOW, the Defendants/Counter-Claimant, BERKSHIRE INVESTMENTS, LLC, by and through its attorney, Thomas G. Maile, IV., and hereby moves this Court for the following relief as follows:

EXHIBIT
A
001461

The above captioned Court has determined the real estate closing by and between the parties was declared void and a return of the purchase price was ordered minus court costs incurred by the Plaintiff. That this Court as of October 14, 2009 denied the Plaintiff's Motion For Order Releasing Vendee's Lien. That based upon the same the following is alleged:

COUNT ONE
FORECLOSURE
I.

During all times herein mentioned, Berkshire Investments, LLC, is and was a limited liability company authorized to transact business in the State of Idaho.

II.

During all times herein mentioned, plaintiff, the Theodore L. Johnson Revocable Trust, was a duly registered trust under the law of the State of Idaho and currently holds the legal title to the real property subject to the vendee's lien hereinafter referenced. That consistent with the prior Orders, Berkshire Investment has not been paid any portion of the monies due and owing from the plaintiff "Theodore L. Johnson Revocable Trust". That although repeatedly requested to do so the plaintiff "Theodore L. Johnson Revocable Trust" has not paid the $400,000.00 due and owing and/or paid any sums minus the costs awarded to Berkshire Investments above referenced.

That attached hereto as Exhibit "A" is a true and correct copy of the Vendee's Lien in the litigation above captioned which was recorded with the Ada County Recorder's Office on August 3, 2009 bearing Instrument No. 109090497, which is incorporated by reference herein as if set forth in full herein.

III.

That the Vendee's Lien filed and is perfected against the real property in the County of Ada, State of Idaho. The real property is described as Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho..

IV.

The "Theodore L. Johnson Revocable Trust" is the owner or reputed owners of the certain real property above describe in the County of Ada, State of Idaho.

V.

That pursuant to the Judgments of record and the subsequent orders entered herein there a fix liquidated and ascertainable sum due and owing Berkshire Investments LLC from the "Theodore L. Johnson Revocable Trust". That the sum of $400,000.00, (minus awarded costs and interest thereon) is the outstanding balance due to Berkshire Investments after deducting all just credits, payments and offsets, together with interest legal at the rate of twelve (12) percent per annum from October 14, 2009, until paid in full is due from the "Theodore L. Johnson Revocable Trust".

VI.

Berkshire Investments LLC claims an interest in and to the subject property pursuant to that Vendee's Lien, and any right, title, claim or interest of the "Theodore L. Johnson Revocable Trust" and/or the named plaintiffs (or any other interested party or person in and to the subject property, if such right, title, claim or interest exists) is junior and subservient to the interest of Berkshire Investments LLC in the subject property. That Berkshire Investments LLC is entitled

to a Decree allowing the foreclosure of its interest against the real property above described and a determination of the rights of the parties herein and any others who claim an interest therein.

VII.

That annexed hereto as Exhibit "B" is one of the letters transmitted to the counsel for the plaintiffs dated October 21, 2009 requesting payment of the sums due and owing to Berkshire Investments LLC. There has been no reply from any party or counsel for any party. That Berkshire Investments LLC, has no plain, speedy or adequate remedy at law.

IX.

That Berkshire Investments LLC has been required to retain the services of Thomas G. Mails, IV, to pursue this matter. Pursuant to Idaho Code, Section 12-120, 12-121, 12-123, Berkshire Investments LLC is entitled to reasonable attorneys fees in the amount of $2,500.00 if this matter is uncontested and a further amount as may be awarded by the Court if this matter is contested, together with such costs as may be awarded by the Court pursuant to Rule 54(e) of the Idaho Rules of Civil Procedure.

PRAYER

WHEREFORE, Berkshire Investments, LLC prays for judgment against the plaintiff "Theodore L. Johnson Revocable Trust" and/or any other parties or third parties claiming an interest in the real property as follows:

1 That Berkshire Investments, LLC be granted Judgment against "Theodore L. Johnson Revocable Trust" and/or any other parties or third parties in the principal sum of $400,000.00, together with interest thereon at the rate of twelve (12) percent per annum from and after October 14, 2009, minus costs and interests

due and owing "Theodore L. Johnson Revocable Trust" and/or any other parties, to and including the date of Judgment and thereafter at the highest legal rate until paid in full.

2 For Berkshire Investments, LLC's attorneys fees incurred herein in the sum of $2,500.00 if this matter is uncontested and a further amount as may be awarded by the Court if this matter is contested.

3 For Berkshire Investments, LLC's costs and disbursements incurred herein.

4 That the "Theodore L. Johnson Revocable Trust" be required to set forth herein by proper pleading the nature of their claims in and to said premises or any part thereof.

5 That Berkshire Investments, LLC's interest in and to the subject property be declared senior and superior and that any other claim, right, title, or interest of the"Theodore L. Johnson Revocable Trust" and/or any of the party (or any other interested party or person in and to the subject property, if such right, title, claim or interest exists) be declared junior and subservient to the interest of Berkshire Investments, LLC in the subject property to wit: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho.

6 That a Decree be entered adjudging and decreeing that Berkshire Investments, LLC is the owner and is entitled to possession of the subject property, and further

ordering that the "Theodore L. Johnson Revocable Trust", has no right, title or interest or claim in and to the subject real property or any part thereof and that each of them, and further, that any person claiming under them and all persons having any lien, claim, judgment or decree on or against said real property or any part, parcel or portion thereof (either as purchaser, encumbrancer, or otherwise) be barred and foreclosed from all equity of redemption in and to the said real property and in and to every part, parcel and portion thereof.

7 That this Court order the sale of the subject real property according to law and the practice of this Court, and that the proceeds of said sale be applied in payment of amounts found due and owing to Berkshire Investments, LLC as aforesaid, and for Berkshire Investments, LLC's costs and expenses of this action.

8 That in the event the proceeds from the sale of said real property be insufficient to satisfy the amounts due to Berkshire Investments, LLC herein (together with the costs of sale and other proper charges), that Berkshire Investments, LLC have Judgment against the "Theodore L. Johnson Revocable Trust" for such deficiency, together with interest thereon at the highest legal rate until paid in full.

9 For such other and further relief in law or equity that the Court may deem proper in the premises.

DATED This 3 day of November, 2009.

THOMAS G. MAILE, IV
Attorney for Berkshire Investments, LLC

VERIFICATION

STATE OF IDAHO)
) ss:
County of Ada)

THOMAS G. MAILE, IV., being first duly sworn upon oath, deposes and states as follows:

He is the attorney for the above named petitioner, Berkshire Investments LLC, in the above-entitled action, he has read the foregoing VERIFIED MOTION FOR FORECLOSURE ON VENDEE'S LIEN, knows the contents thereof, and believes the same to be true and correct to the best of his knowledge and belief and executes the same as attorney for the above named Berkshire Investments, LLC.

DATED This 3 day of November, 2009.

THOMAS G. MAILE, IV., Attorney for
Berkshire Investments, LLC

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for said State, this 3 day of November, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Eagle, Idaho
My Commission Expires January 21, 2009

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,
Plaintiffs/Counter-Defendants,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-defendant,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.

Defendants/Counter-claimants.

Case No. CV OC 04-00473D

NOTICE OF VENDEE'S LIEN

TO: ALL INTERESTED PARTIES
RE: Berkshire Investments L.L.C., Notice of Vendee's Lien

The nature of the vendee's lien is made pursuant to I.C. 45-804, for the re-payment of the purchase price paid by Berkshire Investments L.L.C., to the Theodore L. Johnson Revocable

Exhibit "A"

Trust. That the principal sum paid was $400,000.00 which is due and owing minus any costs and interest thereon awarded in the above captioned matter.

Berkshire Investments L.L.C, claims its vendee's lien in said real property or properties described as follows:

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, Block 1 of Fairfield Estates Subdivision, Ada County, Idaho, recorded in Book 90 of Plats, at pages 10457 and 10458 of Ada County Recorder's Office, also known as, the Northwest 1/4 of the Southwest 1/4, Section 36, Township 5 North, Range 1 West, Boise, Meridian, Ada County, Idaho.

DATED this 3rd day of August, 2009.

THOMAS G. MAILE, IV., attorney for
Berkshire Investments L.L.C.

STATE OF IDAHO)
) ss.
County of Ada)

On this 3rd day of August, 2009, before me, the undersigned, a Notary Public in and for said state, personally appeared THOMAS G. MAILE, IV., known to be the attorney for Berkshire Investments L.L.C., and further known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same for Berkshire Investments L.L.C.

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

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

LAW OFFICE OF
THOMAS G. MAILE, IV, P.A.
380 WEST STATE STREET, EAGLE, IDAHO 83616
(208) 939-1000 / Fax (208) 939-1001

October 21, 2009

BY FACSIMILE TRANSMISSION
TO (208) 746-9160

Clark and Feeney
Attn: Connie Taylor
1229 Main Street
Post Office Drawer 285
Lewiston, Idaho 83501

Re: Johnson Trust & Taylor v. Thomas & Colleen Maile, et.al
Consolidated Ada County Case No. CV OC 04-00473D
Our File No. M04-5109.0

Dear Ms. Taylor:

Pursuant to the Court's Order of October 14, 2009, we once again request payment of the amounts due and owing Berkshire Investments, LLC.

Your prompt reply and payment is appreciated.

Sincerely,

Dictated and Forwarded Without
Signature to Avoid Delay

Thomas G. Maile

TGM/mp

Exhibit "B"

TRANSMISSION VERIFICATION REPORT

TIME : 10/21/2009 14:53
NAME : THOMAS MAILE
FAX : 12089391001
TEL : 12089391000
SER.# : 000H5J484204

DATE,TIME	10/21 14:52
FAX NO./NAME	12087469160
DURATION	00:00:19
PAGE(S)	01
RESULT	OK
MODE	STANDARD

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,
Plaintiffs/Counter-Defendants,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-defendant,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.

Defendants/Counter-claimants.

Case No. CV OC 04-00473D

AFFIDAVIT OF THOMAS G. MAILE, IV., IN SUPPORT OF VERIFIED MOTION FOR FORECLOSURE OF VENDEE'S LIEN

STATE OF IDAHO)
) ss.
County of Ada)

EXHIBIT
B
001472

THOMAS G. MAILE, IV, being first duly sworn upon oath, deposes and says:

1. Your Affiant is the attorney for the above-named Defendants/Counter-Claimants and further appears Pro Se, and provides this Affidavit in support of the Verified Motion for Foreclosure of Vendee's Lien. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. Attached hereto as Exhibit "A" is a true and correct copy of a July 10, 2009 letter from Connie Taylor to your Affiant and the same is incorporated by reference herein as if set forth in full herein.

3. There are three (3) different Orders/Judgment for costs and attorney fees in this matter which all are awarded interest at different rates. The first Judgment in the amount of $12,424.04 was entered on April 6, 2007 and bears interest at a rate of 10.125% with a per diem of $3.45. A second Judgment in the amount of $504.80 was entered on January 17, 2006 and bears interest at a rate of 8.375% with a per diem of $.12. The third Judgment in the amount of $514.00 and bears interest at a rate of 7.625% with a per diem of $.11.

4. The total amount owing on all three Judgments as of August 3, 2009, the date the Vendee's Lien in this matter was filed, is $16,537.76. The total amount owing as of December 15, 2009, the hearing on this matter, is $17,030.80.

DATED this 25 day of November, 2009.

THOMAS G. MAILE, IV.,
Attorney for Defendants/Counter-Claimants

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 25 day of November, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires July 30, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 25 day of November, 2009, I caused a true and correct copy of the foregoing (1) AFFIDAVIT OF THOMAS MAILE IN SUPPORT OF VERIFIED MOTION FOR FORECLOSURE OF VENDEE'S LIEN, to be delivered, addressed as follows:

Connie W. Taylor
CLARK and FEENEY
P.O. Drawer 785
Lewiston, Idaho 83501
Facsimile: (208) 746-9160

( ) U. S. Mail
(X) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

THOMAS G. MAILE, IV., Pro Se,
Attorney for Defendants/Counter-Claimants

RON T. BLEWETT
WILLIAM JEREMY CARR
PAUL THOMAS CLARK
THOMAS W. FEENEY
SCOTT D. GALLINA **
JONATHAN D. HALLY
RUBE G. JONES *
TINA L. KERNAN **
JOHN C. MITCHELL
DOUGLAS L. MUSHLITZ
CHARLES M. STROSCHEIN **
CONNIE TAYLOR **

* LICENSED IN WASHINGTON & OREGON ONLY
** LICENSED IN IDAHO & WASHINGTON

LAW OFFICES OF
CLARK AND FEENEY
THE TRAIN STATION, SUITE 106
1329 MAIN STREET
P.O. DRAWER 296
LEWISTON, IDAHO 83501

TELEPHONE
(208) 743-9516
(800) 885-9516
FAX
(208) 746-9160
oflaw@lewiston.com

July 10, 2009

Sent Via Facsimile To: (208) 939-1001

Total Pages: 5

Mr. Thomas Maile
380 West State Street
Eagle, ID 83616

Re: Berkshire Investments, LLC v. Taylor et. al.

Dear Mr. Maile:

I have received your letter of July 9, 2009, with its enclosed proposed Satisfaction of Judgment, which relates solely to the costs in the *Taylor v. Maile* case. I am attaching printouts which show that the current amount owing on the three cost awards is $16,449.44, which brings the balance on the purchase price down to $383,550.56.

In regard to your request that my clients make arrangements to obtain a certified check, I'm afraid that in the current banking market, a bank would not be willing to even begin the process of loaning money on this property unless all lis pendens have been released. Once that occurs, it would likely take a number of months to get the loan completed.

The Taylors are willing to discuss a full settlement of all pending matters, including their counterclaims which are not mentioned in your letter. Because property values have plummeted while these lawsuits have been pending, they believe they will be able to establish losses which far exceed the $383,550.56. In addition, the Taylors have incurred costs and fees of $16,305.86 in the pending lawsuit, which does not include the fees and costs incurred by Mr. Prusynski's office.

As a counteroffer, the Taylors are willing to dismiss their counterclaims and any claims for costs and attorney fees in the second lawsuit in exchange for the release of all lis pendens and your waiver of any further payment.

EXHIBIT "A"

I look forward to hearing from you and hopefully getting this matter finally resolved.

Sincerely,

CLARK and FEENEY

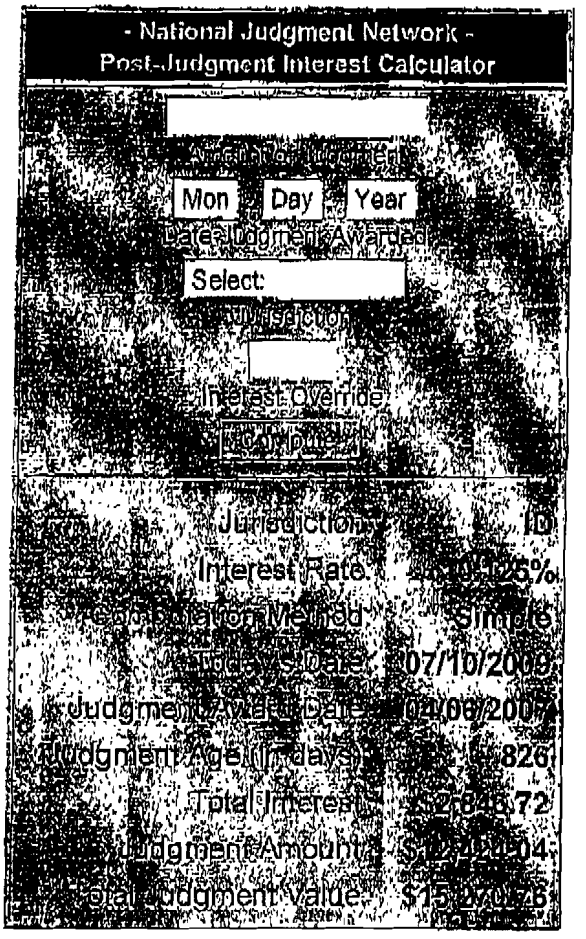
Dictated by Ms. Taylor and sent without signature to avoid delay

By: Connie W. Taylor

CWT:tc
Enclosures

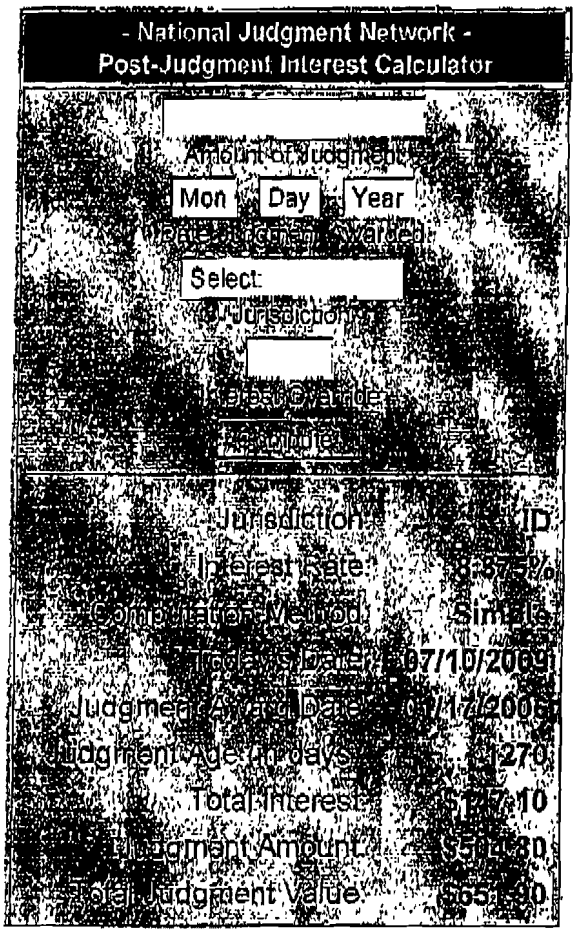
cc: John Taylor w/encs. - ***Via US Mail***
Dallan Taylor w/encs. - ***Via US Mail***
Mark Prusynski w/encs. ***Sent Via Facsimile ONLY To: (208) 385-5384 Total Pages:*** 5

unjust enr.



The correct interest rate and method of calculation will be selected by the program based on the amount of judgment, award date and jurisdiction. You may override the selected interest rate by entering a different rate in the "interest override" field. Rates are believed accurate for judgments awarded from 01/01/1969 to the current date, however, National Judgment Network assumes no responsibility for inaccuracies. In order to use this calculator you must agree that you are using it at your own risk. If an obvious error is encountered, please report it to **National Judgment Network.**

1st appeal



The correct interest rate and method of calculation will be selected by the program based on the amount of judgment, award date and jurisdiction. You may override the selected interest rate by entering a different rate in the "interest override" field. Rates are believed accurate for judgments awarded from 01/01/1989 to the current date, however, National Judgment Network assumes no responsibility for inaccuracies. In order to use this calculator you must agree that you are using it at your own risk. If an obvious error is encountered, please report it to **National Judgment Network**.

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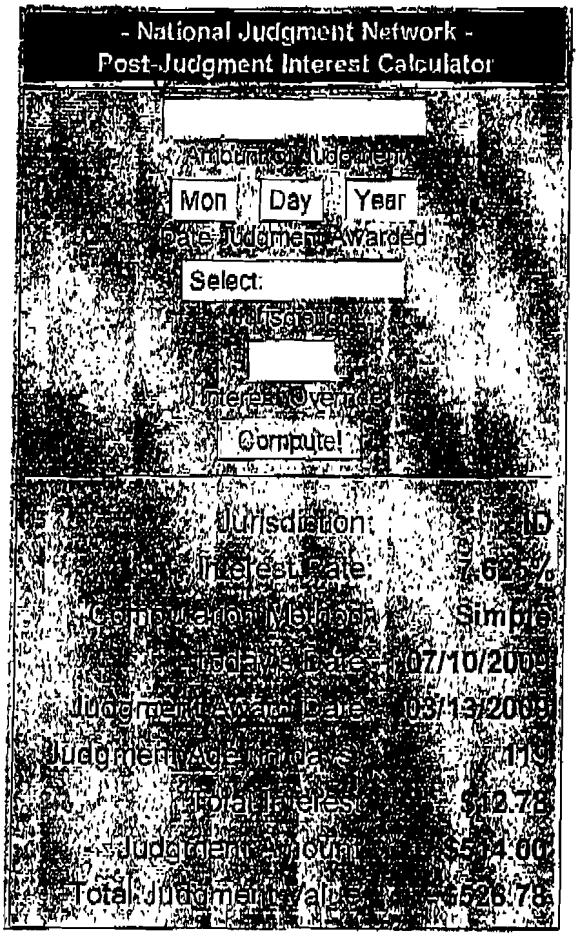
Join **National Judgment Network**!

2nd appeal



The correct interest rate and method of calculation will be selected by the program based on the amount of judgment, award date and jurisdiction. You may override the selected interest rate by entering a different rate in the "interest override" field. Rates are believed accurate for judgments awarded from 01/01/1989 to the current date, however, National Judgment Network assumes no responsibility for inaccuracies. In order to use this calculator you must agree that you are using it at your own risk. If an obvious error is encountered, please report it to **National Judgment Network.**

CHRIST TROUPIS
Address: PO Box 2408
Eagle, ID 83616
(208) 938-5584
FAX: (208) 938-5482
Attorney at Law
Idaho State Bar No. 4549

Pro Se and Counsel for Berkshire Investments and Colleen Birch-Maile

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs/Counter-Defendants,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I - JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants/Counter-Claimants.

Case No. CV-OC-0723232

MEMORANDUM BRIEF IN SUPPORT OF RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009

Berkshire Investments, LLC and Colleen Birch-Maile and, Thomas G. Maile, IV, by and through their attorneys of record, Christ Troupis and Thomas Maile, and pursuant to I.R.C.P.

Rule 54(b), request that the Court enter its Judgment on the Memorandum Decision and Order filed July 2, 2009 and the subsequent Judgment Dismissing Plaintiff's Claims entered on July 20, 2009.

1. The Plaintiffs Request That the Court Enter its Certification of the Judgment entered July 20, 2009.

The court is aware that the Plaintiffs' filed their Motion for Permissive Appeal, which was denied on November 6, 2009. The plaintiffs believe that a certification pursuant to I.R.C.P. 54(B) is a sensible approach to the litigation. The defendants have filed their objection to the request for certification, which indicated in part that the court would be requested to entertain the issues of costs and attorneys fees. Judicial economy would be promoted by allowing the claims for costs and attorney fees to be advanced before this court, to allow an appellate decision on the issues raised in the plaintiffs' Complaint and Demand for Jury Trial. Significant issues have developed since the Court entered its Memorandum Decision and Order filed July 2, 2009.

The Honorable Judge Ronald Wilper in the case *Theodore L. Johnson Revocable Trust vs Thomas Maile, IV and Colleen Maile and Berkshire Investments, LLC*, Ada County Case Number CV OC 04-05656D entered his Order October 14, 2009, affirming that the plaintiffs have a continued right to assert a Vendee's Lien for the return of the purchase price pursuant to I.C. 45-804 (attachment to the Affidavit in Support of Renewed Motion for Certification Pursuant to I.R.C.P. Rule 54(b) Re: Judgment Entered July 20, 2009 filed December 3, 2009). In addition, the plaintiffs have filed on November 5, 2009, their Verified Motion for Foreclosure of Vendee's Lien. Judge Wilper has continued the matter for the submission of additional factual issues surrounding the vendee's foreclosure of the lien.

The court in addition has been provided with additional facts which were not submitted as part of the record in the Court's order denying the plaintiffs' motion for summary judgment.

The Taylors, before Judge Wilper in 2007, requested that the court strike the Lis Pendens filed in May 2006 and/or requested that a bond be posted during the appeal. Judge Wilper entered his Order on March 1, 2007 denying the motion and pursuant to that order the Lis Pendens was authorized to remain of record through the appeal (February 2009) (Affidavit in Support of Motion for Certification Pursuant to I.R.C.P. Rule 54(b) Re: Memorandum Decision and Order/motion for Permissive Appeal Pursuant to the I.A.R. Rule 12, filed July 13, 2009).

The plaintiffs filed their release of Lis Pendens before this court on July 13, 2009 and released the lis pendens involved with Judge Wilper's case on August 3, 2009 and simultaneously filed their vendee's lien. The real property is not encumbered by any Lis Pendens. The pending claim is for lien enforcement of theVendee's Lien to be determined by Judge Wilper.

The Relevant portion of Idaho Code section 5-505, provides:

> 5-505. LIS PENDENS. In an action ***affecting the title or the right of possession*** of real property,, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. **From the time of filing such notice for record** only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. (emphasis added).

The present matter before the court requires this court to construe the plain meaning and

intention of I. C. 5-505. The interpretation of a statute is an issue of law over which this Court exercises free review. The Idaho statute relating to the right to file a Lis Pendens is straightforward. The purchase price has not been returned and the plaintiff's have statutory rights to a vendee's lien affecting the title of property, as with any other lien and/or foreclosure action.

The case of Joseph C.L.U. Ins. Assoc., Inc. v. Vaught, 117 Id. 555, 557, 789 P.2d 1146, 1148 (Ct.App.1990), provides:.

> A lis pendens is a notice to the world of the existence of a claim affecting certain real property. See I.C. § 5-505; Suitts v. First Security Bank of Idaho, N.A., 100 Idaho 555, 559, 602 P.2d 53, 57 (1979). The lis pendens does not purport, by itself, to establish or to change anyone's legal rights. Of course, the filing of a lis pendens may highlight a possible legal problem affecting the property, thereby inducing an extra measure of caution by potential purchasers or lenders until the litigation is concluded. But this does not mean that any underlying legal rights have been altered.

The *Joseph*, supra, case authority, establishes that the filing of a lis pendens does not "change the legal rights" of the litigants. It is simply a recorded document giving notice to the world that litigation has been instituted which may affect the underlying property.

The defendants have not provided any appropriate authority or basis for the advancement in support of their proposition that the filing of the lis pendens under these facts can give rise to a valid claim for relief. The importance of such legal issues relate directly to the counter-claims advanced by the counter-defendants which technically is the only claim before this court. Under these facts, did the filing of the Lis Pendens and the ultimate release of the Lis Pendens by the plaintiffs give rise to any actionable torts?

> **45-1302 DETERMINATION OF ALL RIGHTS UPON FORECLOSURE PROCEEDINGS.**

> In any suit brought to foreclose a mortgage ***or lien upon real property*** or a lien on or security interest in personal property, the plaintiff, cross-complainant or plaintiff in intervention may make as party defendant in the same cause of action, any person, including parties mentioned in section 5-325, having, claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title.

The plaintiffs are lawfully pursuing their rights to foreclose the vendee's lien. The plaintiffs have consistently asserted that the right to pursue the vendee's lien and the foreclosure of the same, was part and parcel of the Lis Pendens which were previously filed of record.

The plaintiffs have released their lis pendens. On July 13, 2009 after receipt of the Court's Memorandum, the plaintiffs released the lis pendens relating to the current matter. Although, technically, the plaintiffs could have maintained the lis pendens through any appeal in the current case (as allowed by Judge Wilper during the appeal in Taylor v. Maile), the plaintiffs voluntarily removed the same.

The case of Suitts v. First Sec. Bank of Idaho, N.A., 100 Id. 555, 602 P.2d 53 (1979) provides further support of the appellants' right to maintain the lis pendens during the appeal without the necessity of any bond. The *Suitts* court stated:

> It seems clear that under the statutory law existing at the time of the original action the lis pendens would continue to have effect until the final determination of the action on appeal. See Petty v. Hall, 257 Ala. 145, 57 So.2d 620 (1952); Maedel v. Wies, 15 N.W.2d 692 (Mich.1944); 54 C.J.S. Lis Pendens Â§ 36. The effect of filing a lis pendens is that a person who purchases or acquires rights in the subject matter of the litigation during the pendency of the action (which encompasses appeal) takes subject to the final disposition of the case.
>
> Other jurisdictions are in accord, see generally, Blake v. Gilbert, 702 P.2d 631 (Alaska

1985), lis pendens remains in effect where appeal is taken, so that posting supersedeas bond or moving to continue lis pendens pending appeal is not necessary; Kennedy v. Dawson, 989 P.2d 390,296 Mont. 430,(1999), notice of appeal and lis pendens, effectively preserves the status quo pending appeal; Gardner v. Perry City , 994 P.2d 811, 2000 UT 1, (2000), ordering reinstatement of the lis pendens because the appellant's interest in the subject property depended upon the outcome of the case on remand; Timm v. Dewsnup, 921 P.2d 1381, 1389-90 (Utah 1996), holding lis pendens was proper during appeal, as outcome of case would be determined after appeal. The plaintiffs could have continued their lis pendens in the current case pending any appeal. However, they have chosen to release the same.

The Honorable Judge Ronald Wilper had previously ruled that the filing of the lis penden in the prior proceeding was warranted during the appeal. (Affidavit of Thomas Maile in Support of Motion for Certification/Motion for Permissive Appeal). There can be no prejudice to the defendants in allowing an immediate appellate review as the defendants can do what they so desire relative to the real property that has been the subject of these proceedings.

As stated in the case of Callaghan v. Callaghan, 142 Id. 185, 125 P.3d 1061 (2005):

> The purpose of Rule 54(b) was to liberalize the appeals process by permitting some partial judgments to be appealed earlier than they otherwise could have been appealed. Merchants, Inc. v. Intermountain Indus., Inc., 97 Idaho 890, 556 P.2d 366 (1976). "Rule 54(b) was adopted to overcome the `single judicial unit theory' which seriously inconvenienced persons involved in multi-party or multiple claim actions by forcing them to await the adjudication of `the whole case and every matter in controversy in it' before being allowed to appeal." Id. at 892, 556 P.2d at 368.

The legal issues presented by the plaintiffs involve substantial issues involving the integrity of our judicial system. The certification under Rule 54(b) will produce an efficient,

orderly determination of rights of the parties which primarily centers on the doctrine of res judicata, and the exceptions thereto as raised by the plaintiffs. The parties would be best served by having the appellate court consider the issue which is central to this litigation, to wit: the affects of the doctrine of Res Judicata. This one legal issue controls the remaining claims contained in the counter-claims of the defendants. Our appellate court has not examined facts similar to the allegations raised by the plaintiffs relating to the defendants' misrepresentations to the court as to whether such facts are a "fraud upon the court". Our Supreme Court can provide guidance as to whether the plaintiffs' allegations of perjury, obtaining money by false pretenses, and aiding and abetting perjury constitute such facts amounting to "tampering with the administration of justice' as to suggest `a wrong against the institutions set up to protect and safeguard the public.'" Campbell v. Kildew, 141 Id. 640, 115 P.3d 731, (2005), Compton v. Compton, 101 Id. 328, 334, 612 P.2d 1175, 1181 (1980). The facts of this case warrant an examination by our Supreme Court to determine the integrity of our judicial system.

CONCLUSION

The plaintiffs have released any and all lis pendens filed which may affect the subject real property. The defendants are free to deal with the subject real property in any manner they choose. The Honorable Judge Wilper had previously ruled that the filing of the Lis Pendens in the prior case was warranted during the appeal process in the prior proceedings. Judge Wilper has determined that the plaintiffs have a right to a vendee's lien and there is currently set before his court a verified motion for the foreclosure of that lien. There remains a controlling issue of Law, to wit: the affect of Res Judicata in light of the defendants' alleged wrongful behavior, that can be addressed by the Supreme Court.

DATED this 7th day of January, 2010.

CHRIST TROUPIS, attorney for Berkshire Investments, LLC and Colleen Birch-Maile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 7th day of January, 2010, I caused a true and correct copy of the foregoing, **(1) MEMORANDUM BRIEF IN SUPPORT OF RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009, (2) SUPPLEMENTAL AFFIDAVIT OF THOMAS MAILE IN SUPPORT OF RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009** to be delivered, addressed as follows:

Mark Stephen Prusynski	( )	U. S. Mail
PO Box 829	(X)	Facsimile Transmission
Boise, ID 83701	( )	Hand Delivery
Phone: (208) 345-2000	( )	Overnight Delivery
Fax: (208) 385-5384		
Connie W. Taylor	( )	U. S. Mail
CLARK and FEENEY	(X)	Facsimile Transmission
P.O. Drawer 785	( )	Hand Delivery
Lewiston, Idaho 83501	( )	Overnight Delivery
Facsimile: (208) 746-9160		
Thomas Maile	( )	U. S. Mail
380 W. State Street	(X)	Facsimile Transmission
Eagle, Idaho	( )	Hand Delivery
Facsimile: (208-939-1001)	( )	Overnight Delivery

CHRIST TROUPIS, attorney for Berkshire Investments, LLC and Colleen Birch-Maile

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Idaho State Bar No. 2378

Co-counsel for Berkshire Investments and Colleen Birch-Maile

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs-Counter-Defendants,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants-Counter-Claimants.

Case No. CV-OC-0723232

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF RENEWED MOTION FOR CERTIFICATION PURSUANT TO I.R.C.P. RULE 54(B) RE: JUDGMENT ENTERED JULY 20, 2009

STATE OF IDAHO)
) ss:
County of Ada)

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is the co-counsel of record for Berkshire Investments, LLC and Colleen Birch-Maile and in addition is a named plaintiff herein. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. That annexed hereto as Exhibit "A" is a true and correct copy of the recorded Release of Lis Pendens filed with the Ada County Recorder's Office on July 13, 2009, relating to the above captioned matter.

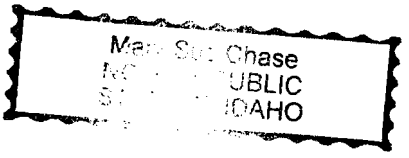
3. That Berkshire Investments has pursued its Verified Motion for Foreclosure of Vendee's Lien which was filed November 5, 2009 in the consolidated case *Theodore L. Johnson Revocable Trust vs Thomas Maile, IV and Colleen Maile and Berkshire Investments, LLC*, Ada County Case Number CV OC 04-05656D, and *Taylor vs Maile*, Ada County Case Number CV OC 04-00473D. That your affiant is the managing member of Berkshire Investments LLC, and in such capacity has pursued the return of the purchase price as ordered by Judge Wilper, on behalf of Berkshire Investments LLC. There has been no unconditional tender of the monies due and owing although requests have been repeatedly made. That opposing counsel has filed pleadings indicating judicial estoppel should apply because of Berkshire Investments' demand for the return of the monies ordered by Judge Wilper. Berkshire Investments has requested the return of monies, and if at any point in time any court orders the parties to be returned to the status quo prior to the defendant's obtaining the Judgment on Beneficiaries' Claims, the monies will be

returned and deposited into the appropriate court or trust account.

DATED this 22 day of December, 2009.

THOMAS G. MAILE, ~~IV~~, pro se and
Attorney for Berkshire Investments and Colleen Birch Maile

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 22 day of December, 2009.



Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

RELEASE OF
NOTICE OF LIS PENDENS

KNOW ALL PERSON BY THESE PRESENTS:

That the undersigned, THOMAS G. MAILE, IV, on behalf of and as attorney for BERKSHIRE INVESTMENTS, LLC, COLLEEN BIRCH-MAILE and Pro se, whose address is 380 W. State Street, Eagle, Idaho, does hereby release and forever discharge that certain Notice of Lis Pendens, dated March 25, 2008 and recorded on March 25, 2008, as Instrument Number 108033598 at the offices of the Ada County Recorder, State of Idaho, in and for that certain parcel of real property known described as follows:

The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho.

DATED This 13 day of July, 2009.

THOMAS G. MAILE, IV., Attorney for BERKSHIRE INVESTMENTS, LLC, COLLEEN BIRCH-MAILE and Pro se

STATE OF IDAHO)
) ss:
County of Ada)

On this 13 day of July, 2009, before me, the undersigned, a Notary Public for said State, personally appeared THOMAS G. MAILE, IV, known or acknowledged to me to be the attorney for BERKSHIRE INVESTMENTS, LLC, COLLEEN BIRCH-MAILE and Pro se and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed said document.

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

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT 3.00 1
BOISE IDAHO 07/13/09 11:48 AM
DEPUTY Bonnie Oberbillig
RECORDED – REQUEST OF

Christ T. Troupis, ISB # 4549
TROUPIS LAW OFFICE
1299 E. Iron Eagle, Ste 130
PO Box 2408
Eagle, Idaho 83616
Telephone: 208/938-5584
Facsimile: 208/938-5482
Email: ctroupis@troupislaw.com

Co-Counsel for Plaintiffs/Counter-Defendants

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, husband and wife, **Plaintiffs/Counter-Defendants,** **v.** **CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I - JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.** **Defendants/Counter-claimants.**	**Case No. CV-OC-0723232** **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS**

PLAINTIFFS/COUNTERDEFENDANTS BERKSHIRE INVESTMENTS, LLC, an Idaho Limited Liability Company, and THOMAS G. MAILE, IV, and COLLEEN BIRTH-MAILE, by and through their counsel of record, hereby move for Summary Judgment against Defendants/Counterclaimants with respect to all of the Counterclaims, pursuant to Rule 56 of the

Idaho Rules of Civil Procedure. This motion is made on the grounds that there are no genuine issues of material fact in dispute and Plaintiffs/Counterdefendants are entitled to judgment as a matter of law with respect to all of the Defendants' Counterclaims.

This motion is based upon the pleadings, files and record herein, the Affidavit of Thomas G. Maile IV filed in support of this Motion, the Statement of Material Facts filed on October 8, 2008 as supplemented in the Memorandum filed in support of this Motion, and the Memorandum in Support of Plaintiff's Motion for Summary Judgment submitted herewith.

Oral Argument is requested.

Dated: March 2, 2010.

Christ T. Troupis
Attorneys for Plaintiffs/Counterdefendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 2nd day of March, 2010, I caused a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS to be delivered, addressed as follows:

Connie W. Taylor
CLARK and FEENEY
P.O. Drawer 785
Lewiston, Idaho 83501
Facsimile: (208) 746-9160

(X) U. S. Mail
( ) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

CHRIST T. TROUPIS,
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, husband and wife, **Plaintiffs/Counter-Defendants,** **v.** **CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I - JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.** **Defendants/Counter-claimants.**	**Case No. CV-OC-0723232** **MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The plaintiffs' have filed their Motion for Summary Judgment against all of the defendants' counterclaims. The defendants assert claims of slander of title, intentional

interference with a prospective business advantage, and abuse of process.

STATEMENT OF UNCONTESTED FACTS

The Plaintiffs have previously filed a Statement of Uncontested Facts on October 8, 2008 and the same is incorporated herein as if set forth in full herein. Since the Statement of Uncontested Facts was filed, additional facts have developed that warrant this motion for summary judgment. Those facts are as follows:

Honorable Judge Ronald Wilper in the case *Theodore L. Johnson Revocable Trust vs Thomas Maile, IV and Colleen Maile and Berkshire Investments, LLC*, Ada County Case Number CV OC 04-05656D entered his Order October 14, 2009, affirming that the plaintiffs have a continued right to assert a vendee's lien for the return of the purchase price pursuant to I.C. 45-804. In addition, the plaintiffs filed on November 5, 2009, their Verified Motion for Foreclosure of Vendee's Lien (attachments to the Affidavit in Support of Renewed Motion for Certification filed December 3, 2009). The foreclosure motion with respect to the real property titled in the name of the Theodore L. Johnson Revocable Trust is currently pending before Judge Wilper.

In the litigation before Judge Wilper in 2007, the Taylors requested that the court strike the Lis Pendens filed in May 2006 and/or requested that a bond be posted during the appeal. On March 1, 2007, Judge Wilper entered his Order denying the Taylors' motion. Pursuant to that order, the lis pendens was authorized to remain of record, (attachments to Affidavit in Support of Motion for Certification filed July 13, 2009).

In an effort to obtain reimbursement of the purchase price of $400,000.00 which Judge

Wilper ordered returned to the Plaintiffs, the Plaintiffs filed a Release of Lis Pendens in this litigation on July 13, 2009. On August 3, 2009, the Plaintiffs filed their Vendee's lien, which his the subject of the pending action before Judge Wilper. The real property is not encumbered other than lien enforcement to be determined vendee's lien foreclosure before Judge Wilper.

STANDARD OF REVIEW: SUMMARY JUDGMENT

In ruling on a summary judgment motion pursuant to I.R.C.P. 56©, all facts are to be liberally construed in favor of the party opposing the motion for summary judgment, IBM Corp. v. Lawhorn, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984). The non-moving party is also given the benefit of all reasonable inferences arising from the evidence in the record. Thomas v. Campbell, 107 Idaho 398, 690 P.2d 333 (1984).

LEGAL ARGUMENT

1. *The Plaintiffs properly filed two (2) Lis Pendens relating to litigation.*

Taylors' counterclaims allege that the filing of the Lis Pendens slandered their title to the real property. However, the Idaho Supreme Court rejected a slander of title claim based upon the recording of a notice of lis pendens coupled with failure to reconvey a deed of trust in *Vanderford Co., Inc. v. Knudson, 144 Idaho 547, 552, 165 P.3d 261, 266 (2007).* The Court noted that "...the publication of the notice of *lis pendens* is not defamatory. It merely informs the public that the property is involved in litigation."

The counter-claimants' slander of title claim is based entirely on the filing of the notice of *lis pendens,* and therefore fails as a matter of law to state a viable cause of action. The mere filing of a notice of lis pendens cannot give rise to any actionable claim against the Plaintiffs.

Moreover, the lis pendens filing was lawful and proper in this case. The relevant portion of Idaho Code §5-505, provides:

> 5-505. LIS PENDENS. In an action ***affecting the title or the right of possession*** of real property, the plaintiff at the time of filing the complaint,... may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. **From the time of filing such notice for record** only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. (emphasis added).

The application of this statute to the current litigation is clear. The original litigation directly concerned the title to the real property. The Court ordered the return of title to the real property to Taylors, but also ordered that the purchase price be returned to Berkshire, in order to rescind the transaction. A party seeking to rescind a contract ordinarily must return any consideration or the benefit received by the rescinding party before the rescission is valid. *Robinson v. State Farm Mut. Auto. Ins. Co.,* 137 Idaho 173,181, 45 P.3d 829, 837 (2002).

The Supreme Court made note of the order for repayment of the purchase price to Berkshire in *Taylor v. Maile,* 145 Idaho 705, 201 P.3d 1282, 1286 (2009):

> "On June 7, 2006, the court entered judgment on that claim, quieting title to the Linder Road property in the Trust and dismissing the Mailes' counterclaims and defenses. On July 21, 2006, the court amended the judgment to clarify that the property is in a constructive trust, **that Berkshire is entitled to repayment of the purchase price**, and that the Mailes' counterclaim for unjust enrichment was the only remaining issue."

Notwithstanding this order, and although title to the real property has been quieted in the Taylors, they have not returned any portion of the purchase price. On these facts, the Plaintiffs have established rights to a vendee's lien to secure repayment of the purchase price. Those rights

have been confirmed by Judge Wilper's order of October 14, 2009.

Prior to entry of the order rescinding the property sale, a *lis pendens* was proper because the litigation concerned the disputed title to the real property. Following entry of the order rescinding the property sale, a *lis pendens* was proper because rescission was not fully effected until the consideration was repaid to Berkshire by Taylors, and by operation of law, Berkshire retained a vendee's lien interest in the real property to secure the return of the consideration.

The *lis pendens* was properly filed and did not slander the Taylors' title to the real property. In addition, the filing of a lis pendens did not alter any underlying legal rights to the real property. *Joseph C.L.U. Ins. Assoc., Inc. v. Vaught*, 117 Id. 555, 557, 789 P.2d 1146, 1148 (Ct. App.1990) states:

> A lis pendens is a notice to the world of the existence of a claim affecting certain real property. See I.C. § 5-505; Suitts v. First Security Bank of Idaho, N.A., 100 Idaho 555, 559, 602 P.2d 53, 57 (1979). The lis pendens does not purport, by itself, to establish or to change anyone's legal rights."

Since the *lis pendens* simply gives notice to the world that litigation has been instituted that may affect the underlying property, its filing cannot give rise to a cause of action for slander of title, or any other tort claim unless it was filed without legal authority and for an ulterior purpose.

As noted above, the plaintiffs had legal authority to file a notice of lis pendens, as well as pursue foreclosure of their vendee's lien. The foreclosure of vendee's lien as with any lien foreclosure is addressed in I.C. § 45-1302, which provides:

> Determination of All Rights upon Foreclosure Proceedings.
> In any suit brought to foreclose a mortgage ***or lien upon real property***... the plaintiff..., plaintiff in intervention may make as party defendant in the same

> cause of action, any person, including parties mentioned in section 5-325, having, claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title.

Since July 21, 2006, the Plaintiffs had a statutory right to a vendee's lien securing the return of the purchase price as ordered by Judge Wilper. The entry of the Order by Judge Wilper on March 1, 2007 confirmed the Plaintiffs right to foreclose their vendee's lien to recover the purchase price.

A vendee's lien is afforded the same right as any other lien foreclosure referenced in I.C. § 45-1302 and treated as a quiet title action. The specific language of the statute provides, "determine the title, estate, or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title". Determination of a vendee's lien is, according to the statute, equivalent to a quiet title action.

There can be no dispute that the Plaintiffs lawfully were entitled to record a lis pendens on their claim for return of the purchase price, as provided in I.C. § 45-1302. The Defendants have admitted that they have not returned the purchase price, and would not return the purchase price unless the plaintiffs agreed to dismiss their potential right to an appeal (Affidavit of Connie Taylor dated December 18, 2009 filed 12/21/09; Exhibit "A" to Affidavit of Thomas G. Maile, IV., In Support of Plaintiffs' Motion for Summary Judgment Re: Defendants' Counterclaim, filed concurrently herewith). The July 21, 2006 order cited in *Taylor v. Maile,supra, at 1286* stating that **"Berkshire is entitled to repayment of the purchase price"** does not include any condition that the Plaintiffs agree to waive or dismiss their appeal rights.

A plain reading of I.C. § 45-1302 supports the plaintiffs' position that filing of a lis pendens was proper until the vendee's lien has been foreclosed. The plaintiffs have consistently asserted that the right to pursue the foreclosure of their vendee's lien was part and parcel of the Lis Pendens that was previously filed of record. On July 13, 2009, after receipt of the Court's Memorandum Decision, the plaintiffs released the lis pendens relating to the current matter. Until the purchase price was returned, pursuant to I.C. § 45-1302, the plaintiffs were entitled to maintain their lis pendens. Although the plaintiffs could have maintained the lis pendens through an appeal in the current case (as allowed by Judge Wilper during the appeal in Taylor v. Maile), the plaintiffs voluntarily removed the same.

2. *The Counter-Claimants' Slander of Title claim has no basis in law or fact.*

A notice of lis pendens may be filed by an interested party in any action "affecting the title to real property." See generally, *Bengoechea v. Bengoechea*, 106 Idaho 188, 677 P.2d 501 (Ct. App.1984), wherein a claim for constructive trust relating to real property allegedly obtained by fraud allowed the filing of lis pendens. A constructive trust can be imposed where property was obtained either fraudulently or through violation of a fiduciary duty. *Hettinga v. Sybrandy*, 126 Idaho 467, 469, 886 P.2d 772, 774 (1994); *Witt v. Jones*, 111 Idaho 165, 722 P.2d 474 (1986).

A slander of title claim requires proof of four elements:

> "(1) publication of a slanderous statement; (2) its falsity; (3) malice; and (4) resulting special damages...." *Chavez v. Barrus*, 146 Id. 212, 192 P.3d 1036 (2008)

In the present case, the recording of a lis pendens is not actionable as a slander of title

because there was no slanderous statement, no falsity, no malice, and no resulting special damages. The counterclaimants have not suffered any special damages because they have not paid back the purchase price and as a result are not entitled to the removal of the vendee's lien from the property.

The other required elements for slander of title are also missing. Idaho courts have defined malice as a reckless disregard for the truth or falsity of a statement. *Weaver v. Stafford*, 134 Idaho 691, 701, 8 P.3d 1234, 1244 (2000). The 'statement' made by filing a lis pendens is that the filer is an interested party in an action relating to the title of the real property. As noted above, that 'statement' was and is true. However, even a false statement does not support a slander of title claim, if the statement was made in good faith with probable cause for believing it. *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006). Given the facts in this case, the Plaintiffs certainly had probable cause to believe they had the right to file a notice of lis pendens.

Moreover, as the Court declared in *Clark v. Clark*, 56 Idaho 6, 47 P.2d 914 (1935), malice cannot be imputed to a lawful act done pursuant to a statutory right.

> "It is quite generally held that what a person may lawfully do may be done with or without malice. (Authorities cited.) In other words, there can be no legal malice in contemplation of law where the thing done is lawful and the means employed are lawful. Courts must judge the intent a man has in doing an act by the means he employs and the thing to be accomplished, and if they all be lawful, courts cannot impute malicious or unlawful motives to the actor."

In addition, the filing of a *lis pendens* is absolutely privileged as a filing in a judicial proceeding. In *Overman v. Klein,* 103 Idaho 795, 800, 654 P.2d 888 (1982), the Idaho Supreme Court discussed the breadth of immunity accorded statements in judicial proceedings, and with

approval cited a California case according immunity to the filing of a notice of lis pendens.

> "The cases cited usually involved verbal testimony, but the immunity or privilege attaches to affidavits, as well as pleadings. Sacks v. Stecker, supra; *Young v. Young,* 18 F.2d 807 (D.C.Cir.1927); *McGehee v. Insurance Co. of North America,* 112 F. 853 (5th Cir.1902). The immunity has been held to apply as to virtually any statement in documents which have been filed in a judicial proceeding. Richeson v. Kessler, supra, (attorney's letter); *DiBlasio v. Kolodner,* 233 Md. 512, 197 A.2d 245 (1964) (declaration in prior suit); *Bartlett v. Christhilf,* 69 Md. 219, 14 A. 518 (1889) (petition); *Kerpelman v. Bricker,* 23 Md.App. 628, 329 A.2d 423 (1974) (letter of complaint); *Gilpin v. Tack,* 256 F.Supp. 562 (W.D.Ark.1966) (interrogatories); *O'Barr v. Feist,* 292 Ala. 440, 296 So.2d 152 (1974) (physician's letter); *Todd v. Cox,* 20 Ariz.App. 347, 512 P.2d 1234 (1973) (affidavit); *Albertson v. Raboff,* 295 P.2d 405, 46 Cal.2d 375 (1956) (notice of lis pendens); *McDonald v. Lakewood Country Club,* 170 Colo. 355, 461 P.2d 437 (1969) (criminal information); *Jarman v. Offutt,* 239 N.C. 468, 80 S.E.2d 248 (1954) (affidavit); *Resciniti v. Padilla,* 420 N.Y.S.2d 759, 72 A.D.2d 557 (1979) (affidavit); *Adams v. Peck,* 288 Md. 1, 415 A.2d 292 (1980) (psychiatric report, not filed in proceeding)"

.

Other states are in accord with the principle that a notice of lis pendens is subject to a judicial privilege. *See Powell v. Stevens*, 449 Mass. 1109, 873 N.E.2d 247 (2007); *Zamarello v. Yale*, 514 P.2d 228, 230-232 (Alaska, 1973); *Procacci v. Zacco*, 402 So. 2d 425, 426-428 (Fla. Dist. Ct. App. 1981); *Woodcourt II Ltd. v. McDonald Co.*, 119 Cal. App. 3d 245, 249-251 (1981); *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112, 117-118 (Miss. 1987); *Hauptman v. Edwards, Inc.* 170 Mont. 310, 317 (1976); *Lone v. Brown*, 199 N.J. Super. 420, 427-429 (1985); *Superior Constr., Inc. v. Linnerooth,* 103 N.M. 716, 719-720 (1986) (majority opinion); *Brough v. Foley*, 572 A.2d 63, 66-68 (R.I. 1990); *Kropp v. Prather*, 526 S.W.2d 283, 286-287 (Tex. Civ. App. (1975); *Hansen v. Kohler*, 550 P.2d 186, 190 (Utah 1976).

None of the essential elements of a slander of title claim are present here.

Therefore, summary judgment is proper.

3. *There is no valid claim of Abuse of Process.*

"The essential elements of abuse of process are: (1) an ulterior, improper purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Bird v. Rothman,* [128 Ariz. 599] 627 P.2d 1097 (Ariz.App.1981) and *Bull v. McCuskey,* [96 Nev. 706] 615 P.2d 957 (Nev.1980)."

Badell v. Beeks, 115 Idaho 101, 104, 765 P.2d 126(1988)

The Court in *Badell, supra,* upheld the District Court's grant of summary judgment to the defendant on the abuse of process claim, noting:

"...this court has concluded that the defendant attorney had probable cause for the filing of the malpractice complaint against Dr. Badell. Even assuming, arguendo, that a factual issue exists with regard to an ulterior, improper purpose, **there is no evidence of subsequent misuse of process after it was lawfully issued**....This court, therefore, concludes that the defendant attorney is also entitled to summary judgment on the abuse of process claim." (emphasis added)

As in *Badell,* the 'process' in our case (the lis pendens) was properly filed in the regular conduct of the proceeding, instituted with probable cause and there is no evidence of subsequent misuse of process after it was lawfully issued. Therefore, the counterclaim for abuse of process cannot be sustained.

The absence of a 'subsequent misuse of process' is fatal to the claim for abuse of process. This was illustrated in a New York case, *Wilderhomes v Zautner*, 009-NY-0422.225 (2009 NY Slip Op 50718), which dealt with the filing of a complaint and lis pendens. That Court noted:

"Here, defendants' claim the "process" plaintiff's allegedly abused consisted of instituting this action and in filing a lis pendens. The institution of this action, with its summons and complaint, does not form the basis for an abuse of process claim, as a matter of law... Similarly, "even if it is assumed that the filing of a lis pendens can provide a basis for an abuse of process claim, the critical fact remains that defendants do not assert that the lis pendens was improperly used after its issuance, but only that plaintiff acted maliciously in bringing the action." (Brown v. Bethlehem Terrace Associates, 136 AD2d 222, 225 [3d Dept.1988]). An allegation of maliciousness alone is insufficient to state an abuse of process claim. Accordingly, defendants' abuse of process claim is dismissed."

Where it is alleged that the process "abused" is the very filing of a lawsuit, it is incumbent upon the party asserting that claim to show that the other party's claim is "devoid of factual support or if supportable in fact, has no cognizable basis in law". *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo.App. 2005).

Here, the Plaintiff's claims had factual support and a cognizable basis in law. Counterclaimants made written admissions regarding their disclaimer to the trust as beneficiaries (Connie Taylor letter to Bart Harwood on April 14, 2004 which stated, "The Taylors are not willing to give up their rights as beneficiaries of the trust unless Beth will affirm her prior factual statements in the form of an affidavit and agree to cooperate in the action against Mr. Maile. If we aren't able to reach an agreement on that, they will seek a full accounting of the trust and a copy of the trust and estate tax returns". (Affidavit of Thomas Maile Part One deposition of Beth Rogers Exhibit "B" referencing deposition exhibit 39). There was also a sworn statement under oath verifying the Taylors had disclaimed their interest in the trust as beneficiaries ("my mother is the beneficiary of the trust...Their mother stands to gain and, thereby, they have an interest in the proceeding." (Affidavit of Thomas Maile Part One transcript of probate court hearing Exhibit "A"). Testimony under oath verified that the Taylors were longer beneficiaries under the trust (Verified Petition in the probate court on November 12, 2004... which stated under oath, "***the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of this trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement.***" (Affidavit of Thomas Maile Part Two Exhibit "I").

On March 9, 2006, a Verified Amended Complaint was filed by the Taylors, and prepared

by the co-defendant attorneys. Page 1 of the Verified Amended Complaint stated under oath, "Reed and R. John Taylor are residents of Nez Perce County, Idaho; Dallan Taylor is a resident of Ada County Idaho. **All of the plaintiffs are residual beneficiaries** of the Theodore L. Johnson Trust." (The verified Amended Complaint is annexed to Amended Complaint and Demand for Jury Trial as Exhibit "B") (emphasis added) .

In addition, and most importantly, the Idaho Supreme Court has established "law of the case" that the Taylors had disclaimed their interest in the trust (Taylor v. Maile 2).

On all of these facts, the Plaintiffs had a factual and legal basis to bring their claims. Filing of a lis pendens was authorized because the claims affected the real property and included a specific request for a constructive trust based upon fraud. Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title. . . . If one party obtains the legal title to property, not only by fraud... *Bengoechea*, supra. An action to impress a constructive trust on realty affects title to that property, so that a notice of lis pendens may be filed. *Ross v. Specialty Risk Consultants, Inc.*, 240 Wis.2d 23, 621 N.W.2d 669, 677 (Ct. App.2000).

Plaintiffs sought to set aside the judgment quieting title in the Taylors based upon a fraud upon a court. The application of that legal theory was upheld in *Campbell v. Kildew,* 141 Idaho 640, 115 P.3d 731 (2005), in which the Court stated:

> "Kildew and Campbell argue that a motion to set aside a judgment is governed by equitable principles.... In seeking equitable relief, the Daltosos were required to enter the court with clean hands. Daltoso previously entered into arbitration with Campbell which resulted in the subdivision of property confirmed by a court

decree. According to Campbell, the Daltosos may not now argue against application of the very court exception they formerly relied on to their benefit.

The Daltosos are not estopped based on either the doctrine of unclean hands or quasi-estoppel. The doctrine of unclean hands allows "a court to deny equitable relief to a litigant on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." Sword v. Sweet, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004). Motions to set aside a judgment are governed by equitable principles. See Compton, 101 Idaho at 334, 612 P.2d at 1181."

Since it was based on facts evidencing fraud in obtaining title to real property, there was no abuse of process in filing a complaint and lis pendens in order to set aside a judgment affecting that property. Nor was it an abuse of process to record a lis pendens since the plaintiffs had a legitimate statutory right to pursue their vendee's lien for the return of their purchase price. All of the elements of a claim for abuse of process are missing and summary judgment is proper.

3. *There is no valid claim of Intentional Interference with Prospective Business Advantage.*

To establish a claim for intentional interference with a prospective economic advantage, Taylors must show (1) the existence of a valid economic expectancy, (2) knowledge of the expectancy on the part of the interferer, (3) intentional interference inducing termination of the expectancy, (4) the interference was wrongful by some measure beyond the fact of the interference itself, and (5) resulting damage to the plaintiff whose expectancy has been disrupted. *Highland Enter., Inc. v. Barker,* 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999).

This tort also requires a showing that the interference was wrongful beyond the fact of interference itself. *Lexington Heights Dev., LLC v. Crandlemire,* 140 Idaho 276, 286, 92 P.3d 526, 536 (2004).

A claim of tortious interference is subject to a motion dismiss where the complaint shows

the interference was justified or privileged. *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 220, 367 S.E.2d 647, 650 (1988). Interference of the contract must be without justification. The interference is "without justification" if the defendants' motives . . . were "not reasonably related to the protection of a legitimate business interest' of the defendant." A complaint must admit of no motive for interference other than malice. *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 601, 646 S.E.2d 826, 830 (2007).

The undisputed facts show that the filing of the complaint and the lis pendens were not wrongful. Judge Wilper ruled that the lis pendens could be maintained during the appeal. Following the appeal, continuation of the lis pendens was clearly authorized since the Taylors refused to repay the purchase price to Berkshire in accordance with the court order, but instead imposed additional conditions on that payment. The Plaintiffs' right to maintain its vendee's lien has likewise been established. I.C. § 45-1302 authorizes the foreclosure of a lien to the same status as a quiet title action.

The counterdefendants have not exceeded their legal rights. They are entitled to the protection of the vendee's lien and have a right to foreclosure on the real property to enforce their right to reimbursement of the purchase price.

Statutory protection is a defense to any alleged wrongful recording of a notice of claim. See generally, *Hewson v. Asker's Thrift Shop*, 120 Idaho 164, 167, 814 P.2d 424, 427 (1991). Generally a right which stems from statutory protection is a defense to certain actions. See, generally, *Rincover v. State*, 128 Idaho 653, 656, 917 P.2d 1293, 1296 (1996).

There has been no conduct on the part of the counter-defendants other than filing the lis

pendens. For the reasons above outlined, the lis pendens were valid and/or arguably valid based upon fact and law. The counter-claimants have not alleged wrongful conduct beyond their allegations relating to the lis pendens. The essential elements of a claim for intentional interference with prospective business advantage are missing and summary judgment is proper

CONCLUSION

Berkshire has a right to maintain a vendee's lien foreclosure action against the real property. A vendee's lien is afforded the same analysis as a quiet title action affecting real property. The counter-claimants had a right to maintain their lis pendens in the current matter even through an appeal. The continuation of the lis pendens through August 2009 was proper because Taylors failed to reimburse Berkshire the purchase price after receiving back the property. The necessary elements relating to all three (3) counts of the counterclaim are missing. Counterdefendants are therefore entitled to Summary Judgment as to all counterclaims raised by the defendants in this matter.

DATED this 2 day of March, 2010.

CHRIST T. TROUPIS, co-counsel for
Plaintiffs/Counter-defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 2nd day of March, 2010, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS to be delivered, addressed as follows:

Connie W. Taylor	(X)	U. S. Mail
CLARK and FEENEY	( )	Facsimile Transmission
P.O. Drawer 785	( )	Hand Delivery
Lewiston, Idaho 83501	( )	Overnight Delivery
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Co-Counsel for Plaintiffs/Counter-Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs/Counter-Defendants,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Defendants/Counter-claimants.

Case No. CV-OC-0723232

AFFIDAVIT OF THOMAS G. MAILE, IV. IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: DEFENDANTS' COUNTERCLAIM

STATE OF IDAHO)
) ss:
County of Ada)

THOMAS G. MAILE, IV, being duly sworn upon oath, deposes and says:

1. Your Affiant is co-counsel of record in this matter and the Ada County Case No. CV OC 04-00473D. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. Attached hereto as Exhibit "A" is a true and correct copy of a letter which was received via facsimile from Connie Taylor dated July 28, 2009 and the same is made part hereof as if set forth in full herein. Your affiant provided his reply to this letter which is contained as a part of Exhibit "B" described below

3. Attached hereto as Exhibit "B" is a true and correct copy of the Affidavit of Thomas Maile filed in *Ada County Case No. CV OC 04-00473D, Taylor vs Maile* filed September 23, 2009 and the same is made part hereof as if set forth in full herein.

DATED this 26 day of February, 2010.

THOMAS G. MAILE, IV.

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 26 day of February, 2010.

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 12/08/2010

NOTARY PUBLIC STATE OF IDAHO

AFFIDAVIT OF THOMAS G. MAILE, IV. IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT - Pg 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2010, I caused a true and correct copy of the foregoing Affidavit of Thomas G. Maile, IV. In Support of Plaintiff's Motion for Summary Judgment Re: Defendants' Counterclaim to be delivered, addressed as follows:

Connie W. Taylor
CLARK and FEENEY
P.O. Drawer 785
Lewiston, Idaho 83501
Facsimile: (208) 746-9160

(X) U. S. Mail
( ) Facsimile Transmission
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(208) 746-9160
clfaw@lewiston.com

RON T. BLEWETT
WILLIAM JEREMY CARR
PAUL THOMAS CLARK
THOMAS W. FEENEY
SCOTT D. GALLINA **
JONATHAN D. HALLY
RUBE G. JONES *
TINA L. KERNAN **
JOHN C. MITCHELL
DOUGLAS L. MUSHLITZ
CHARLES M. STROSCHEIN **
CONNIE TAYLOR

* LICENSED IN WASHINGTON & OREGON ONLY
** LICENSED IN IDAHO & WASHINGTON

July 28, 2009

Sent Via Facsimile To: (208) 939-1001 *Total Pages:* 2

Mr. Thomas Maile
380 West State Street
Eagle, ID 83616

Re: Berkshire Investments, LLC v. Taylor et. al.

Dear Mr. Maile:

The fact that you have recently recorded a release of lis pendens in this matter does not change the fact that you have filed a quiet title action against the property. As long as there is any possibility of an appeal of your claim to the Linder Road property, it will remain unmarketable. Because you have filed a motion for permissive appeal, which will not even be heard until September 9th, your demand for payment of the purchase price within 21 days is ludicrous and flies in the face of Judge Wilper's most recent ruling.

As a realtor, you undoubtedly understand that the reduction in value of the Linder Road property over the years you have pursued your baseless claims far exceeds the amount of the purchase price. As the market continues to decline, the damages incurred by the Taylors will increase. In addition, Judge Greenwood sent a very clear message that he is quite likely to order you to pay costs and attorney fees in the present action.

You state that you are unable to settle this matter in full because there are motions pending. The only motion pending is your request for a permissive appeal, and I am certain you understand that the likelihood of the Supreme Court reversing the dismissal of your claims is extremely remote.

You are the only one who has the ability to put an end to this insanity. The Taylors' offer to resolve this matter completely as set forth in my letter to you of July 15, 2009 will remain open only until August 15, 2009.

Sincerely,

CLARK and FEENEY

Dictated by Ms. Taylor and sent without signature to avoid delay

By: Connie W. Taylor

CWT:tc

cc: John Taylor w/encs. - ***Via US Mail***
Dallan Taylor w/encs. - ***Via US Mail***
Mark Prusynski w/encs. ***Sent Via Facsimile ONLY To: (208) 385-5384 Total Pages:*** 2

THOMAS G. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000
Facsimile: (208) 939-1001
Idaho State Bar No. 2378

Attorney for Defendants/Counter-Claimants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,
Plaintiffs/Counter-Defendants,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff/Counter-defendant,
v.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC.

Defendants/Counter-claimants.

Case No. CV OC 04-00473D

AFFIDAVIT OF THOMAS G. MAILE, IV. IN OPPOSITION TO MOTION FOR ORDER RELEASING VENDEE'S LIEN

STATE OF IDAHO)
) ss.
County of Ada)

AFFIDAVIT OF THOMAS G. MAILE, IV. IN OPPOSITION TO MOTION FOR ORDER RELEASING VENDEE'S LIEN - Page 1 C:\handybackback1\server1files\a\M\MAILE 2 TAYLOR\aff.oppmtnreleasevendeeslien.wpd

THOMAS G. MAILE, IV, being first duly sworn upon oath, deposes and says:

1. Your Affiant is the attorney for the above-named Defendants/Counter-Claimants and further appears Pro Se, and provides this Affidavit in opposition to the Motion for Order Releasing Vendee's Lien. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Release of Notice of Lis Pendens in the above captioned matter.

3. That your affiant caused to be filed Exhibit "A" with the Ada County Recorder's Office on behalf of Berkshire Investments, LLC. There still remains as outstanding the purchase price which was fully paid in January 2004.

4. Attached hereto as Exhibit "B" is a true and correct copy of an August 3, 2009 letter from your affiant to counsel for the Plaintiffs/Counter-Defendants in the above referenced matter.

DATED this 21 day of September, 2009.

THOMAS G. MAILE, IV.,
Attorney for Defendants/Counter-Claimants

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said State, this 21 day of September, 2009.

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires July 30, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 21 day of September, 2009, I caused a true and correct copy of the foregoing AFFIDAVIT OF THOMAS G. MAILE, IV., IN OPPOSITION TO MOTION FOR ORDER RELEASING VENDEE'S LIEN, to be delivered, addressed as follows:

Connie W. Taylor
CLARK and FEENEY
P.O. Drawer 785
Lewiston, Idaho 83501
Facsimile: (208) 746-9160

( ) U. S. Mail
(X) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

THOMAS G. MAILE, IV., Pro Se,
Attorney for Defendants/Counter-Claimants

EXHIBIT "A"

RELEASE OF NOTICE OF LIS PENDENS

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, THOMAS G. MAILE, IV., individually, and on behalf of and as attorney for BERKSHIRE INVESTMENTS, LLC, THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, whose address is 380 W. State Street, Eagle, Idaho, do hereby release that certain Notice of Lis Pendens dated and recorded on May 18, 2006, as Instrument Number 106078472 at the offices of the Ada County Recorder, State of Idaho, in and for that certain parcel of real property described as The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho.

DATED This 3rd day of August, 2009.

THOMAS G. MAILE, IV., Individually and as attorney for BERKSHIRE INVESTMENTS, LLC and COLLEEN BIRCH-MAILE

STATE OF IDAHO)
) ss:
County of Ada)

On this 3rd day of August, 2009, before me, the undersigned, a Notary Public for said State, personally appeared THOMAS G. MAILE, IV., known or acknowledged to me to be the attorney for BERKSHIRE INVESTMENTS, LLC and COLLEEN BIRCH-MAILE, and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed said document on behalf of said limited liability company, Colleen Birch-Maile and by himself.

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

Mary Sue Chase
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires July 30, 2014

EXHIBIT "B"

LAW OFFICE OF
THOMAS G. MAILE, IV, P.A.
380 WEST STATE STREET, EAGLE, IDAHO 83616
(208) 939-1000 / Fax (208) 939-1001

August 3, 2009

BY FACSIMILE TRANSMISSION
TO (208) 746-9160

Clark and Feeney
Attn: Connie Taylor
1229 Main Street
Post Office Drawer 285
Lewiston, Idaho 83501

Re: Johnson Trust, Taylor v. Thomas & Colleen Maile, et.al
Consolidated Ada County Case No. CV OC 04-00473D
Our File No. M04-5109.0

Dear Ms. Taylor:

In response to your most recent letter, the following should outline Berkshire Investment's position relative to the pending litigation. As a preliminary issue, there is no Realtor involved in this matter. The designation Realtor is a trade name for the National Association of Realtors, which none of the parties are members.

First, in the claim regarding Berkshire Investment v Connie Taylor et. al., we have filed a Release of Lis Pendens with the County Recorder's Office which negates any issues regarding marketability of the real property. As you know, we have continued to assert that Berkshire Investments has a Vendee's Lien on the subject real property and until the sums are paid that are due and owing pursuant to the Order entered by Judge Wilper, it is Berkshire Investment's position that the Vendee's Lien is covered by the Lis Pendens earlier filed. However, please note an executed Release of Lis Pendens and an executed Vendee's Lien which have been recorded today. Berkshire Investments continues to maintain it is entitled to the repayment of the purchase price minus any costs. The payment is once again requested in a timely manner. An appropriate Release of the Vendee's Lien can be exchanged simultaneously with the payment by certified funds.

Regarding the pending motion for an appeal, the claim for quiet title is not germane once Berkshire Investment has filed the Release of Lis Pendens with the County Recorder's Office. When the appeal is initiated and when an appellate court reverses the district court's decision regarding the Berkshire Investments' claims, it is quite conceivable the only remedy available, at that point in time, will be a suit for damages for the claims asserted by Berkshire Investment. By releasing the Lis Pendens, Berkshire Investments no longer claims any interest in the real property pursuant to counts set fort in the amended complaint. By the very nature of the recorded Releases of Lis Pendens any claims pursued will be for damages. The Vendee Lien remains unsatisfied and

Berkshire Investments continues to request payment as outlined in this letter.

The twenty-one (21) days requested should be more than sufficient for your client to obtain funds to pay off what is due and owing Berkshire Investments. As in any real estate transaction and as previously stated, an appropriate executed release of the vendee's lien will be recorded at such time a certified check is issued from a closing company, mortgage company and/or from your client.

Finally, the Judgment that was entered awarding costs in the favor of Thomas Maile Real Estate Company L.L.C., was for the amount of $932.75. The Judgment was entered October 3, 2005. Consequently, this amount, including interest should be used as an offset to any costs outstanding and/or can be paid directly. I would appreciate your reply indicating when payment can be received.

Sincerely,

Thomas G. Maile

TGM/mp
enclosures
cc: Mark S. Prusynki/enclosures via fax (385-5384)

TRANSMISSION VERIFICATION REPORT

TIME : 08/03/2009 14:31
NAME : THOMAS MAILE
FAX : 12089391001
TEL : 12089391000
SER.# : 000H5J484204

DATE,TIME	08/03 14:29
FAX NO./NAME	12087469160
DURATION	00:01:35
PAGE(S)	05
RESULT	OK
MODE	STANDARD

TRANSMISSION VERIFICATION REPORT

TIME : 08/03/2009 14:33
NAME : THOMAS MAILE
FAX : 12089391001
TEL : 12089391000
SER.# : 000H5J484204

DATE,TIME	08/03 14:32
FAX NO./NAME	3855384
DURATION	00:01:27
PAGE(S)	05
RESULT	OK
MODE	STANDARD ECM

TRANSMISSION VERIFICATION REPORT

TIME : 09/21/2009 08:51
NAME : THOMAS MAILE
FAX : 12089391001
TEL : 12089391000
SER.# : 000H5J484204

DATE,TIME	09/21 08:49
FAX NO./NAME	12087469160
DURATION	00:02:15
PAGE(S)	10
RESULT	OK
MODE	STANDARD

ORIGINAL

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants
John Taylor, Dallan Taylor
and the Theodore Johnson Trust

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 07 23232 AFFIDAVIT OF MARK PRUSYNSKI IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT ON THE DEFENDANTS' COUNTERCLAIMS

STATE OF IDAHO)
) ss.
County of Ada)

MARK PRUSYNSKI, being first duly sworn upon oath, deposes and says:

1. I was attorney for Defendants, Connie Taylor, Paul Thomas Clark, and Clark and Feeney.

2. I am attaching hereto as Exhibit "A" a true and correct copy of Moffatt Thomas' billing statement for services provided to these Defendants in defense of this matter.

DATED this 27th day of April, 2010.

Mark Prusynski

SUBSCRIBED AND SWORN to before me this 27th day of April, 2010.

Notary Public in and for the State of Idaho.
Residing at Boise Id therein.
My commission expires: 3/11/16

RAGAN ELLIOTT NOTARY PUBLIC STATE OF IDAHO

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
4/25/2008	MSP	0.20	33.00	Telephone conference with G. Schmidt regarding answer to complaint;
4/25/2008	MSP	0.10	16.50	Correspondence from insured regarding notice of appearance;
4/25/2008	MSP	0.20	33.00	Receive and review complaint;
4/25/2008	MSP	0.10	16.50	Correspondence to insured regarding appearance;
4/28/2008	MSP	0.10	16.50	Receive and review correspondence from insured regarding substitution of attorney;
4/29/2008	MSP	0.30	49.50	Telephone conference with Christine Miller regarding defense strategy;
4/29/2008	MSP	1.50	247.50	Analyze amended complaint;
4/29/2008	MSP	1.20	198.00	Research regarding previous case against same parties;
4/29/2008	MSP	0.90	148.50	Telephone conference with Connie Taylor regarding facts;
4/29/2008	MSP	0.50	82.50	Receive and review brief from insured;
4/29/2008	MSP	0.10	16.50	Prepare Notice of Appearance;
4/30/2008	MSP	1.50	247.50	Receive and review amended complaint with exhibits;
4/30/2008	MSP	0.20	33.00	Receive and review retention letter;
4/30/2008	MSP	0.10	16.50	Receive and review letter from client regarding disqualification;
4/30/2008	MSP	0.20	33.00	Correspondence to client regarding disqualification;
4/30/2008	MSP	0.40	66.00	Begin preparation of answer to complaint;
4/30/2008	MSP	0.80	132.00	Research regarding corporate status of Berkshire;
5/2/2008	MSP	0.30	49.50	Prepare notice of substitution of counsel;

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
5/2/2008	MSP	0.20	33.00	Letters to clients regarding notice of substitution of counsel;
5/2/2008	MSP	0.20	33.00	Receive and review response to correspondence regarding notice of substitution of counsel;
5/2/2008	MSP	1.40	231.00	Analyze appeal brief to determine basis for possible motion to dismiss;
5/2/2008	MSP	0.10	16.50	Correspondence to co-counsel regarding substitution;
5/6/2008	MSP	1.20	198.00	Research waiver of defenses of other action pending;
5/6/2008	MSP	0.50	82.50	Draft affirmative defenses;
5/6/2008	MSP	0.80	132.00	Continue analysis of complaint and comparison to pending case;
5/6/2008	MSP	0.50	82.50	Research racketeering statutes cited in complaint;
5/7/2008	MSP	1.00	165.00	Receive and review Supreme Court brief;
5/7/2008	MSP	0.20	33.00	Correspondence to client regarding Supreme Court brief and possible motion to dismiss;
5/7/2008	MSP	0.10	16.50	Receive and review notice of substitution;
5/7/2008	MSP	0.40	66.00	Telephone conference with insured regarding motion to dismiss;
5/8/2008	MSP	0.60	99.00	Initial conference with claims handling regarding case management;
5/8/2008	MSP	0.10	16.50	Receive and review notice of intent to take default;
5/8/2008	MSP	0.30	49.50	Telephone conference with insured regarding notice of intent to take default and response to motion to dismiss;
5/8/2008	MSP	0.30	49.50	Correspondence to insured regarding substitution of counsel;

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
5/8/2008	MSP	1.80	297.00	Draft answer;
5/8/2008	MSP	0.20	33.00	Finalize substitution of counsel;
5/9/2008	MSP	0.20	33.00	Finalize answer;
5/9/2008	MSP	0.20	33.00	Correspondence to client regarding filing answer;
5/9/2008	MSP	0.10	16.50	Receive and review correspondence from client regarding notice of substitution and answer;
5/13/2008	MSP	0.40	66.00	Receive and review co-defendant's motion to dismiss, affidavit and exhibits;
5/13/2008	MSP	0.10	16.50	Correspondence to client regarding co-defendant's motion to dismiss;
5/13/2008	MSP	1.50	247.50	Research regarding dismissal of parties if identical action;
5/13/2008	MSP	0.40	66.00	Prepare motion to dismiss;
5/13/2008	MSP	0.70	115.50	List claims decided by summary judgment to compare to complaint;
5/14/2008	MSP	0.20	33.00	Receive and review plaintiff's motion to strike;
5/14/2008	MSP	0.10	16.50	Receive and review correspondence from client regarding possible recusal of judge;
5/14/2008	MSP	0.20	33.00	Correspondence to client regarding possible recusal of judge and motion to dismiss;
5/21/2008	MSP	0.30	49.50	Receive and review amended affidavit and exhibits;
5/29/2008	MSP	0.10	16.50	Telephone conference with Zurich regarding case management plan;
6/12/2008	MSP	0.30	49.50	Prepare case management plan;
6/24/2008	MSP	0.30	49.50	Conference with client regarding strategy for status conference;

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
6/24/2008	MSP	0.30	49.50	Attend Court's status conference;
6/24/2008	MSP	0.40	66.00	Analyze pleadings to prepare for status conference;
6/25/2008	MSP	0.20	33.00	Telephone conference with client regarding case management plan;
6/25/2008	MSP	2.80	462.00	Prepare case management plan;
6/25/2008	MSP	0.30	49.50	Prepare budget;
6/26/2008	MSP	0.30	49.50	Finalize case management plan and budget;
7/24/2008	MSP	1.20	198.00	Receive and review discovery request from plaintiff;
7/24/2008	MSP	1.00	165.00	Receive and review earlier deposition transcript of Helen Taylor;
7/25/2008	MSP	0.30	49.50	Correspondence to insured regarding preparing discovery responses;
7/28/2008	MSP	0.60	99.00	Prepare responses to requests for admissions;
7/28/2008	MSP	1.50	247.50	Analyze pleadings from prior case to prepare responses to requests for admissions;
7/29/2008	MSP	0.30	49.50	Continue preparation of responses to Requests for Admissions;
7/29/2008	MSP	0.30	49.50	Correspondence from insured regarding deposition of Helen Taylor;
7/29/2008	MSP	0.10	16.50	Receive and review correspondence from insured regarding deposition (duplicate?);
7/29/2008	MSP	0.10	16.50	Correspondence to insured regarding deposition of Helen Taylor;
7/30/2008	MSP	0.10	16.50	Receive and review correspondence from client regarding depositions;
7/30/2008	MSP	0.10	16.50	Correspondence to client regarding depositions;
7/31/2008	MSP	0.20	33.00	Correspondence from client regarding responses

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
				to requests for admissions;
7/31/2008	MSP	1.00	165.00	Continue analysis of pleadings from prior case to determine grounds for dismissal;
8/4/2008	MSP	0.10	16.50	Receive and review correspondence from client regarding deposition;
8/4/2008	MSP	0.30	49.50	Correspondence to client regarding deadlines for requests for admissions and documents from first case;
8/4/2008	MSP	0.10	16.50	Correspondence to client regarding deposition;
8/4/2008	MSP	0.10	16.50	Correspondence from client regarding documents;
8/4/2008	MSP	0.20	33.00	Receive and review pleading index from first case;
8/4/2008	MSP	0.10	16.50	Correspondence from client regarding discovery from plaintiff;
8/4/2008	MSP	0.30	49.50	Correspondence to clients regarding discovery from plaintiff's counsel;
8/5/2008	MSP	0.20	33.00	Correspondence to client regarding pleading index and key documents;
8/5/2008	MSP	0.60	99.00	Receive and review deposition transcript of Doug Crandall;
8/6/2008	MSP	0.80	132.00	Receive and review Tom Maile's deposition transcript;
8/6/2008	MSP	0.10	16.50	Receive and review correspondence from client regarding additional depositions;
8/6/2008	MSP	0.10	16.50	Correspondence to client regarding additional depositions to be taken;
8/7/2008	MSP	0.70	115.50	Receive and review deposition transcript of B. Hardwood;
8/7/2008	MSP	2.20	363.00	Receive and review deposition transcript of B. Rogers;

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
8/7/2008	MSP	1.50	247.50	Receive and review deposition transcript of B. Knipe;
8/7/2008	MSP	0.80	132.00	Receive and review deposition transcript of S. Sherer;
8/7/2008	MSP	0.30	49.50	Receive and review volume 2 of deposition transcript of T. Maile;
8/8/2008	MSP	0.20	33.00	Receive and review deposition transcript of D. Wishney;
8/8/2008	MSP	0.50	82.50	Receive and review deposition of S. Johnson;
8/8/2008	MSP	0.70	115.50	Receive and review deposition transcript of I. Hetherington;
8/11/2008	MSP	0.30	49.50	Continue preparation of responses to requests for admissions;
8/12/2008	MSP	2.50	412.50	Continue analysis of two volumes of deposition transcripts of T. Maile;
8/12/2008	MSP	0.40	66.00	Receive and review deposition transcript of H. Fisher;
8/14/2008	MSP	1.50	247.50	Prepare responses to requests for admissions and answers to interrogatories;
8/14/2008	MSP	0.20	33.00	Correspondence to client regarding responses to requests for admissions and answers to interrogatories;
8/21/2008	MSP	1.40	231.00	Continue preparation of discovery responses;
8/21/2008	MSP	0.60	99.00	Telephone conference with C. Taylor regarding discovery responses;
8/21/2008	MSP	0.50	82.50	Receive and review draft responses;
8/22/2008	MSP	0.50	82.50	Finalize discovery responses;
8/22/2008	MSP	0.30	49.50	Letters to client regarding approving and signing discovery responses;
8/25/2008	MSP	0.20	33.00	Correspondence to plaintiff's counsel regarding

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
				Helen Taylor's deposition;
8/26/2008	MSP	0.20	33.00	Correspondence to client regarding rescheduling deposition of Helen Taylor;
8/27/2008	MSP	0.30	49.50	Letters to client regarding Helen Taylor's deposition;
8/27/2008	MSP	0.20	33.00	Correspondence to plaintiff's counsel regarding deposition of Helen Taylor;
8/29/2008	MSP	0.10	16.50	Receive and review correspondence from client regarding deposition of Helen Taylor;
8/29/2008	MSP	0.10	16.50	Correspondence to client regarding deposition of Helen Taylor;
9/2/2008	MSP	0.10	16.50	Receive and review amended notice and subpoena for Helen Taylor;
9/2/2008	MSP	0.20	33.00	Correspondence to client regarding amended notice and subpoena for Helen Taylor;
9/2/2008	MSP	0.10	16.50	Receive and review responses from client regarding amended notice and subpoena for Helen Taylor;
9/8/2008	MSP	0.10	16.50	Receive and review correspondence from client regarding deposition of Helen Taylor;
9/16/2008	MSP	0.50	82.50	Receive and review correspondence from plaintiff's counsel regarding objections to discovery and motion to compel;
9/17/2008	MSP	0.20	33.00	Correspondence to client regarding plaintiff's threat of motion to compel;
9/17/2008	MSP	2.50	412.50	Research regarding exceptions to attorney-client privilege to defend objections to discovery;
9/18/2008	AJS	0.30	39.00	Conference to discuss research assignment regarding attorney as attesting witness and possible waiver of attorney-client privilege;
9/18/2008	MSP	1.50	247.50	Continue research regarding plaintiff's claims

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
				of an exception to attorney-client privilege;
9/22/2008	MSP	0.10	16.50	Receive and review correspondence from client regarding discovery responses;
9/22/2008	MSP	0.20	33.00	Telephone conference with plaintiff regarding discovery responses;
9/22/2008	MSP	0.20	33.00	Telephone conference with client regarding discovery responses;
9/22/2008	MSP	0.10	16.50	Receive and review letter from client regarding res judicata;
9/22/2008	MSP	0.40	66.00	Research regarding res judicata;
9/22/2008	MSP	0.10	16.50	Correspondence to client regarding res judicata;
9/22/2008	AJS	0.20	26.00	Research the rules of evidence with regard to the attorney-as-witness exception to the attorney-client privilege;
9/22/2008	AJS	0.20	26.00	Review letter correspondence from opposing counsel asserting attorney-as-witness as waiver of the attorney-client privilege;
9/23/2008	AJS	2.20	286.00	Continue to research state law from multiple jurisdictions regarding scope and application of attorney as attesting witness exception to the attorney-client privilege;
9/23/2008	MSP	0.30	49.50	Research regarding attorney-client privilege;
9/24/2008	MSP	0.40	66.00	Telephone conference with client regarding plaintiff's threat of motion to compel;
9/24/2008	MSP	0.20	33.00	Receive and review brief in support of motion for summary judgment;
9/26/2008	MSP	0.30	49.50	Correspondence to plaintiff's counsel regarding motion to compel;
9/26/2008	MSP	0.40	66.00	Continue analysis of co-defendant's brief on res judicata;

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
9/26/2008	MSP	0.50	82.50	Research regarding res judicata;
9/26/2008	AJS	1.90	247.00	Continue to research state and federal law regarding scope and application of attorney as attesting witness exception to the attorney-client privilege;
9/29/2008	AJS	1.10	143.00	Research state and federal law regarding fraud as exception to attorney-client privilege in preparation for drafting motion for summary judgment;
9/29/2008	MSP	0.10	16.50	Receive and review letter from client regarding deposition;
9/30/2008	MSP	0.20	33.00	Correspondence to client regarding deposition and motion for protective order;
9/30/2008	AJS	1.80	234.00	Research state and federal law regarding issue of res judicata, particularly with regard to privies of party to prior suit, in preparation for drafting motion for summary judgment;
9/30/2008	AJS	0.40	52.00	Review complaints as necessary to direct research regarding issue of res judicata;
9/30/2008	AJS	0.30	39.00	Continue to research state and federal case law regarding crime-fraud exception to attorney-client privilege;
10/1/2008	AJS	0.50	65.00	Continue to research Idaho and Ninth Circuit law regarding crime-fraud exception to the attorney-client privilege;
10/1/2008	AJS	1.30	169.00	Continue research regarding application of res judicata, specifically with regard to parties and their privies;
10/1/2008	AJS	0.20	26.00	Review co-defendants' summary judgment memorandum in preparation for drafting own summary judgment motion and memorandum;
10/1/2008	MSP	2.00	330.00	Analyze first Helen Taylor deposition to prepare for second deposition;
10/1/2008	MSP	0.40	66.00	Review letters from client regarding deposition

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Date	Initials	Hours	Amount	Description
				of Helen Taylor and possible conflict;
10/1/2008	MSP	1.20	198.00	Receive and review motion for summary judgment, affidavit and brief from co-defendants;
10/1/2008	MSP	0.80	132.00	Research regarding res judicata issues for summary judgment;
10/2/2008	MSP	0.40	66.00	Continue preparation of brief in support of motion for summary judgment;
10/2/2008	MSP	0.60	99.00	Analyze complaint and decisions in prior case to prepare motion for summary judgment;
10/2/2008	MSP	0.40	66.00	Telephone conference with client regarding deposition of Helen Taylor;
10/2/2008	MSP	2.20	363.00	Continue analysis of prior deposition to prepare for deposition of Helen Taylor;
10/2/2008	AJS	1.40	182.00	Continue to review plaintiff's complaint in preparation for drafting memorandum in support of motion for summary judgment;
10/2/2008	AJS	0.40	52.00	Review Idaho Supreme Court case Taylor v. Maile to further develop case understanding and strategy in preparation for drafting memorandum in support of summary judgment;
10/2/2008	AJS	1.40	182.00	Review pleadings regarding prior summary judgment proceedings in this matter;
10/2/2008	AJS	0.80	104.00	Continue research of case law regarding attorney as in privity with client for purposes of res judicata;
10/3/2008	AJS	0.80	104.00	Outline memorandum in support of motion for summary judgment;
10/3/2008	AJS	0.30	39.00	Review case law research and case file as necessary to complete memorandum in support of motion for summary judgment;
10/3/2008	AJS	0.30	39.00	Review case law research and case file as necessary to complete outline memorandum in support of motion for summary judgment;

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Date	Initials	Hours	Amount	Description
10/3/2008	AJS	2.10	273.00	Draft memorandum in support of motion for summary judgment;
10/3/2008	MSP	0.40	66.00	Conference with client regarding Helen Taylor deposition;
10/3/2008	MSP	0.20	33.00	Conference with Helen and Dallan Taylor regarding deposition;
10/3/2008	MSP	2.60	429.00	Attend deposition of Helen Taylor;
10/3/2008	MSP	0.30	49.50	Conference with client regarding motion for summary judgment and analysis of plaintiff's strategy;
10/5/2008	AJS	2.50	325.00	Continue to draft memorandum in support of motion for summary judgment in preparation for review by supervising attorney;
10/6/2008	AJS	2.60	338.00	Revise and edit memorandum in support of motion for summary judgment;
10/6/2008	AJS	0.30	39.00	Review complaint for additional facts relating to plaintiffs' claims as necessary to complete revisions to memorandum in support of summary judgment;
10/6/2008	MSP	0.50	82.50	Revise brief in support of motion for summary judgment;
10/6/2008	MSP	0.30	49.50	Receive and review amended motion for appointment of trustees;
10/7/2008	MSP	0.90	148.50	Receive and review redraft of brief in support of motion for summary judgment;
10/7/2008	AJS	0.50	65.00	Continue to review plaintiffs' complaint as necessary to complete revisions to memorandum in support of motion for summary judgment;
10/7/2008	AJS	2.90	377.00	Continue to revise and edit memorandum in support of motion for summary judgment to include additional references to plaintiffs' complaint and revise and edit generally;

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Date	Initials	Hours	Amount	Description
10/8/2008	MSP	3.30	544.50	Revise motion for summary judgment;
10/8/2008	MSP	0.70	115.50	Analyze brief filed by co-defendants;
10/8/2008	MSP	0.60	99.00	Research regarding dismissal while other action is on appeal for brief;
10/8/2008	MSP	0.40	66.00	Analyze claims made in complaint for brief;
10/9/2008	MSP	1.20	198.00	Finalize brief and motion for summary judgment;
10/9/2008	MSP	1.50	247.50	Receive and review plaintiff's response to motion to dismiss with affidavits and exhibits;
10/9/2008	MSP	0.20	33.00	Correspondence to client regarding briefing in previous case;
10/10/2008	MSP	3.30	544.50	Receive and review reply brief in opposition to motion for summary judgment, supplemental memo regarding motion for summary judgment and brief in support of motion to reconsider;
10/10/2008	AJS	1.40	182.00	Research and review case law from state and federal jurisdictions and secondary sources regarding dismissal of fraud-based claims by doctrine of res judicata in preparation for drafting reply brief in support of motion for summary judgment;
10/14/2008	AJS	0.30	39.00	Continue to research and review case law discussing application of res judicata to fraud based claims derived from prior litigation in preparation for drafting reply brief in support of motion for summary judgment;
10/20/2008	AJS	0.90	117.00	Research Idaho and other jurisdiction case law regarding application of res judicata to independent actions based on fraud in preparation for drafting reply memorandum in support of summary judgment;
10/20/2008	MSP	1.00	165.00	Receive and review motion to compel, brief and affidavit;
10/20/2008	MSP	0.20	33.00	Letters to clients regarding motion to compel, brief and affidavit;

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Date	Initials	Hours	Amount	Description
10/20/2008	MSP	0.20	33.00	Receive and review motion to continue motion for summary judgment;
10/22/2008	MSP	1.20	198.00	Analyze plaintiff's brief in support of motion to compel;
10/22/2008	MSP	0.40	66.00	Conference with client regarding plaintiff's brief in support of motion to compel;
10/22/2008	MSP	2.40	396.00	Research regarding attorney-client privilege and exceptions for fraud claim;
10/23/2008	MSP	3.50	577.50	Research regarding elements of fraud for motion for summary judgment and motion to compel;
10/23/2008	MSP	0.20	33.00	Correspondence to client regarding plaintiff's arguments on motion to compel;
10/23/2008	MSP	0.50	82.50	Outline issues for objection to motion to compel;
10/23/2008	MSP	1.30	214.50	Review plaintiff's brief regarding motion for summary judgment;
10/23/2008	AJS	0.20	26.00	Research Idaho Rules of Civil Procedure to determine when response to motion to compel and/or motion for continuance due;
10/23/2008	AJS	1.10	143.00	Research Idaho and Ninth Circuit case law regarding crime/fraud exception to attorney-client privilege in preparation for responding to opposing counsel's motion to compel and/or in support of our motion for summary judgment;
10/23/2008	AJS	0.40	52.00	Review plaintiffs' summary judgment and motion to compel briefing in preparation for responding to same;
10/23/2008	AJS	0.30	39.00	Review secondary sources regarding crime-fraud exception to attorney-client privilege;
10/24/2008	AJS	1.70	221.00	Continue to research state and federal case law on issue of whether allegation regarding status as beneficiary is a legal conclusion and not a

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Date	Initials	Hours	Amount	Description
				material fact for purposes of evaluating plaintiffs' fraud claim;
10/24/2008	AJS	0.20	26.00	Review correspondence from client regarding prior probate proceedings and statements made regarding the status of beneficiaries;
10/24/2008	AJS	0.60	78.00	Research state and federal case law regarding the reliance element of fraud with respect to an attorney's potential reliance on statements made by opposing counsel;
10/24/2008	MSP	0.20	33.00	Review correspondence from client regarding amended pleadings;
10/24/2008	MSP	0.20	33.00	Review amended petition for appointment of beneficiary;
10/24/2008	MSP	1.50	247.50	Outline issues for response to plaintiff's motion to compel and reply brief regarding motion for summary judgment;
10/27/2008	MSP	0.30	49.50	Correspondence to plaintiff's attorney regarding vacating hearings;
10/27/2008	MSP	0.20	33.00	Correspondence to client regarding vacating hearings;
10/27/2008	MSP	0.10	16.50	Review correspondence from client regarding vacating hearings;
10/27/2008	MSP	0.20	33.00	Correspondence to client regarding motion to compel and vacating hearing regarding motions for summary judgment;
10/27/2008	MSP	0.40	66.00	Outline brief regarding motion to compel;
10/27/2008	AJS	0.20	26.00	Analyze issues regarding content of plaintiffs' motion to compel briefing response brief;
10/27/2008	AJS	0.70	91.00	Review plaintiffs' motion to compel briefing in preparation for drafting response brief;
10/28/2008	MSP	0.10	16.50	Review correspondence from plaintiff's attorney regarding postponing hearings;

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Date	Initials	Hours	Amount	Description
10/29/2008	MSP	0.10	16.50	Receive and review notices of vacating motion for summary judgment hearing;
10/29/2008	MSP	0.10	16.50	Prepare notice to vacate our motion for summary judgment hearing;
10/29/2008	MSP	0.10	16.50	Receive and review notice of vacating motion to compel hearing;
11/6/2008	MSP	0.40	66.00	Receive and review research regarding response to motion to compel;
11/18/2008	MSP	0.30	49.50	Conference with client regarding postponement of hearing on motion for summary judgment;
11/18/2008	MSP	0.30	49.50	Analyze pleadings regarding correction to case management plan;
11/21/2008	MSP	0.80	132.00	Conference with client regarding outcome of Idaho Supreme Court argument;
12/1/2008	MSP	0.20	33.00	Receive and review correspondence from client regarding motion for summary judgment;
12/1/2008	MSP	0.20	33.00	Correspondence to client regarding motion for summary judgment;
12/1/2008	MSP	2.80	462.00	Research cases on res judicata for motion for summary judgment;
12/2/2008	MSP	2.30	379.50	Continue research regarding fraud exception to attorney-client privilege and elements of fraud claim;
12/2/2008	MSP	0.60	99.00	Continue research regarding res judicata;
12/3/2008	MSP	0.30	49.50	Correspondence to client regarding motion for summary judgment and motion to compel;
12/4/2008	MSP	1.80	297.00	Analyze plaintiff's brief in opposition to motion for summary judgment;
12/5/2008	MSP	1.60	264.00	Continue analysis of briefs on motion to compel and motion for summary judgment;
12/8/2008	MSP	0.80	132.00	Continue research regarding motion for summary

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Date	Initials	Hours	Amount	Description
				judgment;
12/15/2008	MSP	0.20	33.00	Telephone conference with client regarding motion for summary judgment;
12/24/2008	MSP	1.00	165.00	Receive and review recent decision on standing to sue lawyers;
12/24/2008	MSP	0.50	82.50	Research regarding recent decision on standing to sue lawyers;
12/24/2008	MSP	0.60	99.00	Letters to client regarding results of research regarding standing to sue lawyers;
1/2/2009	MSP	0.90	148.50	Research regarding allegations of fraud on court as defense to res judicata claim;
1/8/2009	MSP	2.20	363.00	Receive and review plaintiff's motion for stay, affidavit, exhibits and supplemental memorandum;
1/8/2009	MSP	0.30	49.50	Correspondence to client regarding response to motion for stay;
1/8/2009	MSP	0.10	16.50	Receive and review response regarding motion to stay;
1/12/2009	MSP	0.10	16.50	Correspondence from client regarding motion to stay;
1/12/2009	MSP	0.10	16.50	Correspondence to plaintiff's counsel regarding motion to stay;
1/14/2009	MSP	0.10	16.50	Receive and review notice of non-opposition to motion to stay;
1/19/2009	MSP	0.10	16.50	Receive and review correspondence from plaintiff's counsel regarding motion to stay;
1/19/2009	MSP	0.30	49.50	Prepare notice of non-opposition to motion for stay;
2/2/2009	MSP	0.20	33.00	Receive and review Supreme Court opinion in Taylor v. Maile;
2/3/2009	MSP	0.40	66.00	Continue analysis of Supreme Court decision;

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Date	Initials	Hours	Amount	Description
2/3/2009	MSP	0.20	33.00	Telephone conference with client regarding Supreme Court decision;
2/3/2009	MSP	0.20	33.00	Correspondence to client regarding summary judgment strategy;
2/3/2009	MSP	0.10	16.50	Receive and review response from client regarding summary judgment strategy;
2/5/2009	MSP	2.20	363.00	Analyze prior motion for summary judgment briefing and pleadings regarding motion to lift stay and obtain hearing on motion for summary judgment;
2/5/2009	MSP	0.40	66.00	Correspondence to client regarding strategy for summary judgment motion;
2/5/2009	MSP	0.20	33.00	Receive and review response from client regarding strategy for summary judgment motion;
2/6/2009	MSP	0.20	33.00	Receive and review affidavit of C. Taylor regarding recent case in support of summary judgment motion;
2/10/2009	MSP	0.20	33.00	Receive and review letters from client regarding possible dismissal;
2/10/2009	MSP	0.30	49.50	Correspondence to client regarding possible dismissal;
2/13/2009	MSP	0.90	148.50	Receive and review supplemental memorandum regarding Supreme Court Opinion;
2/13/2009	MSP	2.70	445.50	Receive and review affidavit in support of supplemental memo and attachments to motion for summary judgment;
2/17/2009	MSP	0.20	33.00	Receive and review correspondence from client regarding hearing on motion for summary judgment and counterclaim;
2/18/2009	MSP	0.20	33.00	Receive and review answers and counterclaim;
2/18/2009	MSP	0.30	49.50	Correspondence to Zurich regarding counterclaim;

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Date	Initials	Hours	Amount	Description
2/23/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding hearing on motion for summary judgment;
2/23/2009	MSP	0.10	16.50	Correspondence to client regarding hearing on motion for summary judgment;
3/2/2009	MSP	0.10	16.50	Telephone conference with client regarding counterclaim;
3/3/2009	MSP	0.20	33.00	Correspondence to insured regarding counterclaim and answer to complaint;
3/3/2009	MSP	0.10	16.50	Correspondence from insured regarding counterclaim and amending answer;
3/5/2009	MSP	0.10	16.50	Correspondence to insured regarding answer to complaint;
3/5/2009	MSP	0.20	33.00	Receive and review plaintiff's reply to amended answer and counterclaim;
3/6/2009	MSP	0.20	33.00	Receive and review counterclaim;
3/11/2009	MSP	0.10	16.50	Finalize amended complaint;
3/18/2009	MSP	1.80	297.00	Receive and review plaintiff's motion for summary judgment, brief and affidavit;
3/18/2009	MSP	0.10	16.50	Correspondence to client regarding response to motion for partial summary judgment;
3/18/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding hearing on summary judgment motions;
3/18/2009	MSP	0.10	16.50	Correspondence to client regarding hearings on summary judgment motions;
4/2/2009	MSP	0.10	16.50	Correspondence to client regarding response brief;
4/8/2009	LCH	0.60	99.00	Review pleadings regarding joinder to objection to summary judgment;
4/13/2009	MSP	0.20	33.00	Receive and review correspondence from client

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Date	Initials	Hours	Amount	Description
				regarding reply briefs;
4/13/2009	MSP	0.50	82.50	Receive and review defendants' reply brief;
4/13/2009	MSP	0.30	49.50	Receive and review plaintiffs' reply brief regarding counterclaim;
4/14/2009	MSP	0.70	115.50	Receive and review plaintiffs' supplemental reply brief regarding summary judgment motion;
4/14/2009	MSP	0.50	82.50	Receive and review plaintiffs' reply brief regarding counterclaim;
4/14/2009	MSP	1.40	231.00	Review plaintiffs' two other supplemental briefs, five affidavits and brief in opposition to summary judgment motion to prepare our reply brief;
4/14/2009	MSP	1.00	165.00	Research regarding res judicata for our reply brief;
4/14/2009	MSP	1.80	297.00	Draft reply brief in support of summary judgment motion;
4/15/2009	MSP	1.40	231.00	Revise and finalize reply brief in support of summary judgment motion;
4/15/2009	MSP	0.50	82.50	Receive and review plaintiff's reply brief and motion to strike regarding counterclaim;
4/15/2009	MSP	0.30	49.50	Correspondence to insured regarding strategy for handling and argument on summary judgment motion;
4/16/2009	MSP	0.20	33.00	Receive and review correspondence from insured regarding strategy for hearing;
4/17/2009	MSP	1.60	264.00	Prepare argument for summary judgment motion hearing;
4/20/2009	MSP	1.50	247.50	Analyze pleadings from prior case to locate statements to be used as res judicata for summary judgment motion;
4/20/2009	MSP	2.80	462.00	Analyze plaintiffs' motion to compel and brief;

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Date	Initials	Hours	Amount	Description
4/20/2009	MSP	1.20	198.00	Draft response brief to motion to compel;
4/21/2009	MSP	5.20	858.00	Analyze trial transcript filed by plaintiffs and Supreme Court brief to identify issues previously litigated;
4/21/2009	MSP	0.10	16.50	Correspondence to client regarding strategy for hearing;
4/22/2009	MSP	3.20	528.00	Analyze Supreme Court briefs to obtain proof of claims barred by res judicata;
4/22/2009	MSP	1.50	247.50	Continue preparation for argument of three motions for summary judgment;
4/22/2009	MSP	2.30	379.50	Attend hearing on motions for summary judgment and motion to compel;
4/22/2009	MSP	0.20	33.00	Conference with client regarding hearing on motions for summary judgment;
4/29/2009	MSP	0.20	33.00	Correspondence to client regarding hearings on motions for summary judgment;
4/29/2009	MSP	1.50	247.50	Research cases cited by plaintiffs at the hearings on motions for summary judgment;
5/1/2009	MSP	2.30	379.50	Attend hearing on plaintiff's motion to dismiss counterclaim;
5/19/2009	MSP	0.20	33.00	Receive and review Judge Wilper's order denying payment of judgment and interest;
6/1/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding decision on motion for summary judgment;
6/1/2009	MSP	0.10	16.50	Correspondence to client regarding decision on motion for summary judgment;
6/1/2009	MSP	0.50	82.50	Research regarding case alleging fraud on the court;
7/7/2009	MSP	0.80	132.00	Receive and review memorandum decision on summary judgment;

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Date	Initials	Hours	Amount	Description
7/7/2009	MSP	0.30	49.50	Letters to clients regarding memorandum decision received regarding summary judgment;
7/7/2009	MSP	0.70	115.50	Analyze issues regarding certifying decision as final and dismissal of counterclaim;
7/8/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding the Court's memorandum decision on our motion for summary judgment;
7/9/2009	MSP	0.30	49.50	Receive and review settlement offer and proposed satisfaction of judgment;
7/13/2009	MSP	0.10	16.50	Receive and review correspondence from insured regarding settlement;
7/13/2009	MSP	0.20	33.00	Correspondence to insured regarding settlement amount;
7/13/2009	MSP	0.10	16.50	Receive and review correspondence from insured regarding settlement and Bar complaint against Maile.
7/14/2009	MSP	1.20	198.00	Receive and review plaintiff's motion to certify order as final and for permissive appeal, affidavit and brief in support of motion;
7/14/2009	MSP	0.20	33.00	Correspondence to insured regarding plaintiffs' motion for permissive appeal and certified order as final;
7/14/2009	MSP	0.10	16.50	Receive and review correspondence from insured regarding settlement;
7/14/2009	MSP	0.10	16.50	Receive and review correspondence from insured to plaintiff regarding settlement;
7/15/2009	MSP	0.10	16.50	Receive and review proposed judgment and order;
7/15/2009	MSP	0.90	148.50	Telephone conference with insured regarding costs and fees, permissive appeal and strategy for response to motion for permissive appeal;
7/15/2009	MSP	0.20	33.00	Receive and review notice of scheduling conference;

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Date	Initials	Hours	Amount	Description
7/15/2009	MSP	0.20	33.00	Correspondence to insured regarding strategy for response to motion for permissive appeal;
7/16/2009	MSP	0.10	16.50	Receive and review notice of hearing on motion for permissive appeal;
7/16/2009	MSP	1.20	198.00	Research regarding which costs should be requested after partial summary judgment;
7/16/2009	MSP	0.20	33.00	Correspondence to insured regarding request for costs;
7/16/2009	MSP	0.10	16.50	Receive and review correspondence from insured regarding settlement offer;
7/21/2009	MSP	0.10	16.50	Receive and review correspondence from plaintiff's counsel regarding settlement;
7/21/2009	MSP	0.10	16.50	Receive and review supplemental affidavit regarding certification for appeal;
7/22/2009	MSP	0.40	66.00	Receive and review plaintiff's first and second set of discovery to Connie Taylor;
7/24/2009	MSP	0.10	16.50	Correspondence to client regarding discovery responses;
7/27/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding discovery responses;
7/28/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding settlement;
8/3/2009	MSP	0.10	16.50	Receive and review correspondence from co-counsel to plaintiff's counsel regarding proposed litigation plan;
8/3/2009	MSP	0.10	16.50	Receive and review amended motion for certification for appeal;
8/3/2009	MSP	0.20	33.00	Receive and review correspondence from plaintiff's counsel regarding lis pendens;
8/3/2009	MSP	0.10	16.50	Receive and review notice of lien;

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Date	Initials	Hours	Amount	Description
8/5/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding litigation strategy;
8/5/2009	MSP	0.20	33.00	Correspondence to client regarding certification for appeal and withdrawal from case;
8/5/2009	MSP	0.10	16.50	Correspondence from client regarding certification for appeal and withdrawal from case;
8/5/2009	MSP	0.10	16.50	Correspondence to client responding to client's response regarding certification for appeal;
8/12/2009	MSP	0.20	33.00	Receive and review second supplemental affidavit regarding permissive appeal;
8/14/2009	MSP	0.30	49.50	Attend status conference with Judge, plaintiff's counsel and counsel for co-defendant;
8/17/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding permissive appeal;
8/17/2009	MSP	0.30	49.50	Correspondence to client regarding permissive appeal;
8/21/2009	MSP	0.10	16.50	Receive and review notice of non-opposition to certificate for appeal;
8/21/2009	MSP	0.10	16.50	Receive and review order governing proceedings;
8/28/2009	MSP	0.20	33.00	Receive and review discovery responses to plaintiff;
8/31/2009	MSP	0.30	49.50	Receive and review responses to plaintiff's discovery regarding counterclaim;
9/4/2009	MSP	0.10	16.50	Receive and review correspondence from plaintiff regarding non-opposition to motion to certify;
9/4/2009	MSP	0.10	16.50	Correspondence to plaintiff regarding our position concerning his motion to certify;
9/9/2009	MSP	0.60	99.00	Analyze pleadings regarding motion to certify

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Date	Initials	Hours	Amount	Description
				appeal;
9/9/2009	MSP	1.30	214.50	Attend hearing on motion to certify appeal;
9/9/2009	MSP	0.30	49.50	Correspondence to client regarding appeal;
9/15/2009	MSP	0.10	16.50	Receive and review proposed order certifying appeal;
9/16/2009	MSP	0.20	33.00	Conference with client regarding proposed order granting motion to appeal;
10/1/2009	MSP	0.30	49.50	Receive and review signed order authorizing appeal;
10/1/2009	MSP	0.10	16.50	Correspondence to client regarding authorizing appeal;
10/2/2009	MSP	0.30	49.50	Research regarding new Idaho Supreme Court decision on res judicata;
10/2/2009	MSP	0.10	16.50	Correspondence to client regarding new Idaho Supreme Court decision on res judicata;
10/5/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding interlocutory appeal;
10/5/2009	MSP	0.20	33.00	Correspondence to client regarding interlocutory appeal;
10/6/2009	MSP	1.20	198.00	receive and review plaintiff's motion for permissive appeal with brief and affidavit attaching relevant pleadings;
10/6/2009	MSP	0.50	82.50	Research regarding applicable appellate rules;
10/6/2009	MSP	0.20	33.00	Correspondence to insured regarding plaintiff's brief regarding permissive appeal and applicable rules;
10/9/2009	MSP	0.10	16.50	Receive and review notice of non-opposition to appeal;
10/9/2009	MSP	0.10	16.50	Receive and review notice from court regarding handling of permissive appeal;

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Date	Initials	Hours	Amount	Description
11/10/2009	MSP	0.10	16.50	Receive and review order denying permissive appeal;
11/10/2009	MSP	0.30	49.50	Correspondence to client regarding order denying permissive appeal;
11/11/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding withdrawing;
11/11/2009	MSP	0.20	33.00	Correspondence to client regarding probable date of final judgment;
11/16/2009	MSP	0.10	16.50	Receive and review offer of judgment;
11/17/2009	MSP	0.10	16.50	Receive and review scheduling order;
11/17/2009	MSP	0.30	49.50	Correspondence to client regarding stipulation to withdraw or substitute counsel;
11/17/2009	MSP	0.10	16.50	Receive and review response from client regarding stipulation to withdraw or substitute counsel;
11/17/2009	MSP	0.20	33.00	Draft notice of substitution of counsel;
12/3/2009	MSP	0.20	33.00	Receive and review motion to reconsider;
12/3/2009	MSP	0.40	66.00	Letters to insured regarding renewed motion to reconsider;
12/17/2009	MSP	0.10	16.50	Receive and review notice of appearance of counsel;
12/17/2009	MSP	0.30	49.50	Correspondence to Zurich regarding request for reconsideration, scheduling conference and withdrawal;
12/17/2009	MSP	0.10	16.50	Receive and review notice of scheduling conference;
12/17/2009	MSP	0.10	16.50	Receive and review correspondence from plaintiffs' counsel regarding new attorney;
12/21/2009	MSP	0.40	66.00	Receive and review objection to renewed motion to certify with affidavit;

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
12/22/2009	MSP	0.10	16.50	Receive and review correspondence from insured regarding court's scheduling conference;
12/22/2009	MSP	0.20	33.00	Analyze court's scheduling order;
12/22/2009	MSP	0.10	16.50	Correspondence to co-defendant regarding court's scheduling order;
12/22/2009	MSP	0.30	49.50	Receive and review proposed stipulation regarding scheduling order;
12/22/2009	MSP	0.20	33.00	Receive and review letters from insured regarding proposed stipulation regarding scheduling order;
12/23/2009	MSP	0.10	16.50	Receive and review correspondence from insured regarding scheduling stipulation;
12/28/2009	MSP	0.10	16.50	Receive and review correspondence from client regarding revised stipulation;
12/29/2009	MSP	0.10	16.50	Correspondence to insured regarding stipulation for trial;
12/29/2009	MSP	0.20	33.00	Receive and review revised stipulation for trial;
12/30/2009	MSP	0.20	33.00	Receive and review revised stipulation for scheduling and correspondence from other counsel regarding vacating scheduling conference;
1/5/2010	MSP	0.20	33.00	Correspondence to client regarding status conference and hearing on second motion to certify for appeal;
1/6/2010	MSP	0.30	49.50	Receive and review court's scheduling order;
1/6/2010	MSP	0.20	33.00	Correspondence to client regarding court's scheduling order;
1/7/2010	MSP	0.30	49.50	Receive and review brief in support of renewed motion to certify for appeal;
1/7/2010	MSP	0.20	33.00	Receive and review supplemental affidavit regarding renewed motion to certify for appeal;

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
1/12/2010	MSP	0.10	16.50	Receive and review correspondence from client regarding response to renewed motion to certify for appeal;
1/12/2010	MSP	0.20	33.00	Correspondence to client regarding renewed motion to certify for appeal;
1/12/2010	MSP	1.00	165.00	Analyze prior pleadings and orders to prepare for hearing on renewed motion to certify for appeal;
1/12/2010	MSP	0.10	16.50	Receive and review motion to disqualify judge;
1/25/2010	MSP	0.10	16.50	Receive and review correspondence from counsel for co-defendant regarding attending hearing by telephone;
1/27/2010	MSP	0.50	82.50	Review pleadings on renewed motion to certify case for appeal;
1/27/2010	MSP	0.30	49.50	Telephone conference with client regarding hearing on motion to certify case for appeal;
1/27/2010	MSP	1.00	165.00	Attend hearing on motion to certify case for appeal;
1/27/2010	MSP	0.50	82.50	Letters to clients regarding status following hearing on motion to certify case for appeal;
1/27/2010	MSP	0.20	33.00	Correspondence to Zurich regarding denial of motion, substitution of counsel and settlement;
2/12/2010	MSP	0.10	16.50	Correspondence to client regarding substitution of counsel;
2/12/2010	MSP	0.10	16.50	Receive and review response from client regarding substitution of counsel;
2/12/2010	MSP	0.10	16.50	Receive and review notice of substitution;
2/17/2010	MSP	0.10	16.50	Receive and review order of disqualification;
2/25/2010	MSP	0.10	16.50	Receive and review correspondence from client regarding substitution of counsel;

17136.0306 - Berkshire Investments, LLC v. Clark & Feeney, et al

Date	Initials	Hours	Amount	Description
2/25/2010	MSP	0.10	16.50	Correspondence to client regarding substitution of counsel;
2/26/2010	MSP	0.20	33.00	Correspondence to co-counsel regarding substitution of counsel and mediation;
2/26/2010	MSP	0.10	16.50	Correspondence to client regarding substitution of counsel and mediation;
		228.70	36,521.00	TOTAL

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, et al. Defendants.	Case No. CV OC 0723232 ***SUPPLEMENTAL* MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS**

The Defendants submit this *supplemental* memorandum in opposition to the Plaintiffs' Second Motion for Summary Judgment on the Defendants' counterclaims.

1. Presumptions and inferences of intentional interference

The Idaho Supreme Court has ruled that intent, as an element of intentional interference with prospective economic advantage, can be shown even if the interference is incidental to the actor's intended purpose and desire, if the interference is known to him to be a necessary consequence of his action.

In *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999), the Court stated as follows:

> In proving the element of intent, the plaintiff may show that the interference "with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." RESTATEMENT (SECOND) OF TORTS § 766B (1977). Intent can be shown even if the interference is incidental to the actor's intended purpose and desire "but known to him to be a necessary consequence of his action." *Id.* at § 766.

Highland Enterprises, Inc. v. Barker, 133 Idaho at 340.

The Supreme Court went on to approve of the trial court's notation that "[w]hat motivates a person to act seldom is susceptible of direct proof." *Kalgaard v. Lindo Mar Adventure Club, Ltd.*, 147 Or.App. 61, 934 P.2d 637, 640 (1997) (addressing whether the lower court should have granted summary judgment for a claim of tortious interference with a potential business relationship).

The *Highland* court also cited with approval a California case addressing the intentional tort of interference with contract (and noting that intentional interference with contract and intentional interference with economic advantage do not differ with regard to intent). That case held that "[i]ntent, of course, may be established by inference as well as by direct proof." *Highland, supra, citing Savage v. Pacific Gas & Electric Co.*, 21 Cal.App.4th 434, 26 Cal.Rptr.2d 305, 314 (1993) (quoting *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 206 Cal.Rptr. 354, 686 P.2d 1158, 1165 (1984)). Accordingly, the jury may infer culpable intent from conduct substantially certain to interfere with the prospective economic relationship. *Id.*

In the present matter, there is a genuine issue of fact as to whether Mr. Maile's interference with the Johnson Trust's right to sell the Linder Road property was intentional. There is evidence

that Thomas Maile is licensed both as an attorney and a realtor, and is it more than reasonable to infer that he was aware that interference with the Trust's ability to sell the Linder Road property was certain or substantially certain to occur as a result of his filing a lawsuit which was barred by res judicata and recording a lis pendens. The inference that his interference with the Trust's prospective economic advantage was intentional, taken together with the other issues raised in the Defendants' initial briefing, precludes summary judgment on that issue.

DATED this 29th day of April, 2010.

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of April, 2010 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 939-1001*
Mr. Christ Troupis Attorney at Law PO Box 2408 1299 East Iron Eagle Drive, Ste. 130 Eagle, ID 83616	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) *(208) 938-5482*

_____
Connie W. Taylor
Attorney for Defendants

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
Attorneys for Defendants
ISBA No. 4837

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 07 23232 AFFIDAVIT OF R. JOHN TAYLOR IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT ON THE DEFENDANTS' COUNTERCLAIMS

STATE OF IDAHO)
) ss.
County of Nez Perce)

R. JOHN TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am one of the Defendants, and the information contained herein is of my own personal knowledge.

2. I am attaching as ***Exhibit A*** a true and correct copy of a Real Estate Purchase and Sale Agreement offering to purchase the Johnson Trust property for $1.8 million in September 2005. The Trust was unable to accept this offer because of the lis pendens which had been filed by Mr. Maile against the property, and the offer was ultimately withdrawn when the real estate market plummeted.

3. Before Thomas Maile acquired possession of my uncle Ted's property on Linder Road, it was taxed as farm land at a very low rate. As a result of Maile's subdividing the property, the taxes increased to the amounts set forth in the chart attached as ***Exhibit B*** to this affidavit. Since the property was returned to the Trust in 2006, the Johnson Trust has incurred taxes, interest and late fees in the amount of $99,279.76. The litigation has prevented the Trust from either selling the property or borrowing the money to pay these taxes and the $400,000 purchase price.

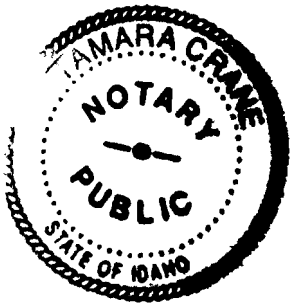
4. From the filing of this Complaint to the date this Court denied the Plaintiffs' Renewed Motion for Certification Pursuant to IRCP 54(b) on January 27, 2010, the Johnson Trust incurred attorney fees and costs in defending the Plaintiffs' claims in the approximate amount of $22,937.36, as demonstrated by the billing statement of Clark and Feeney attached as ***Exhibit C*** to this affidavit.

5. As one of the trustees of the Johnson Trust, I requested that the Idaho State Bar investigate Mr. Maile's purchase of the Linder Road property. A true and correct copy of the Complaint which the Bar has filed is attached as ***Exhibit D***.

DATED this 23rd day of April, 2010.

R. John Taylor

SUBSCRIBED AND SWORN to before me this 23rd day of April, 2010.



Tamara Crane
Notary Public in and for the State of Idaho.
Residing at Lewiston therein.
My commission expires: 3/06/2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of April, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mr. Christ Troupis Attorney at Law PO Box 2408 Eagle, ID 83616	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 938-5482***

Connie W. Taylor
Attorney for Defendants

REAL ESTATE PURCHASE AND SALE AGREEMENT

This Agreement is made effective as of September ___, 2005, between Crandall Law Office ("Buyer"), and the Theodore L. Johnson Revocable Trust, and John, Reed and Dallan Taylor, as co-trustees of the estate ("Sellers").

The parties agree as follows:

1. PURCHASE AND SALE OF PROPERTY.

1.1 Property. Subject to the terms and conditions of this Agreement, the Sellers shall sell to Buyer and Buyer shall purchase the following real property and other assets (the "Property"): The Northwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 1 West, Boise Meridian, Ada County, Idaho known as 3900 Linder Road. The size of the property is approximately plus or minus 40 acres.

1.2 Purchase Price Amount. The purchase price for the Property is One Million Eight Hundred Thousand Dollars ($1,800,000.00) (the "Purchase Price").

1.3 Purchase Price Payment. The Purchase Price shall be paid as follows: Earnest Money Deposit. Upon the execution of this Agreement by the Buyer and the Sellers, the Buyer shall deposit in escrow at Title One Title Insurance Company, Eagle, Idaho ("Closing Agent"), earnest money in the amount of Ten Thousand Dollars ($10,000.00) to be held for the benefit of the Buyer and the Sellers. Such deposit shall be returned by the Closing Agent to the Buyer if this Agreement does not close because of (i) the failure of a condition precedent, or (ii) any reason not the fault of the Buyer. If this Agreement does not close because of any reason not specified in the preceding sentence, all earnest money shall be paid by the Closing Agent to the Sellers as the agreed liquidated damages which shall be the sole and exclusive remedy of the Sellers. The balance of the purchase price shall be paid in immediately available funds delivered at Closing to Closing Agent.

1.4 Conveyance of Title. Title to the Real Property shall be conveyed by a General Warranty Deed. Title to the Property shall be marketable and insurable and shall be free and clear of all liens, encumbrances, and restrictions, exclusive of (i) real property taxes for the current year which are not due and payable on or before Closing, and (ii) liens, encumbrances, and conditions accepted in writing by the Buyer on or before Closing.

1.5 Title Insurance. Upon the acceptance of this Agreement by the Sellers, the Buyer, for the account of the Sellers, shall order a Commitment for Title Insurance ("Commitment") issued by Title One ("Title Company"), covering the Property. If any exceptions shown on the Commitment are not approved in writing by the Buyer prior to Closing and cannot be removed by the Sellers by Closing, then the Buyer shall have the right to terminate this Agreement, in which event all earnest money deposited shall be refunded to the Buyer and each party shall be fully released and discharged from any further obligations under this Agreement.

At Closing, the Sellers shall purchase and deliver to the Buyer an ALTA Owner's Policy title insurance policy ("Policy") satisfying the following specifications: The

EXHIBIT A

Policy shall name the Buyer as the insured in the amount of the Purchase Price. The Policy shall insure the Buyer as the owner of the Property, subject only to the following special exceptions: (i) real property taxes for the current year which are not due and payable on or before Closing, and (ii) liens, encumbrances, and conditions accepted in writing by the Buyer on or before Closing. The Policy shall include the following endorsements: (I) an endorsement deleting the general exceptions to the Policy, (ii) an endorsement insuring that each street adjacent to the Real Property is a public street and there is direct and unencumbered pedestrian and vehicular access to such street from the Property, and (iii) an endorsement insuring that there are no encroachments by or onto the Property with respect to property, easement, or setback lines.

1.6 Possession. Sellers shall deliver actual possession of the Property to Buyer at Closing.

1.7 Risk of Loss. Until Closing, the Sellers shall assume all risk of loss or damage with respect to the Property. In the event of any loss or damage to all or any part of the Property, the, Buyer shall have the right to (i) terminate this Agreement, in which event all earnest money deposited shall be refunded to the Buyer and each party shall be fully released and discharged from any further obligations under this Agreement, (ii) close the purchase of the Property and reduce the Purchase Price by an equitable amount equal to the loss or damage, such reduction to be applied first to the cash payment at Closing to be delivered at Closing, or (iii) close the purchase of the Property and elect to receive all insurance proceeds paid or payable by reason of the loss or damage.

1.8 Prorated Items. The following items shall be prorated as of Closing: (i) taxes and water assessments using the last assessments available prior to Closing; (ii) rents; and (iii) utilities.

1.9 Time for Acceptance. This Agreement shall be null and void and of no force or effect unless a fully executed original of this Agreement is delivered to and received by the Buyer on or before September ___, 2005.

2. REPRESENTATIONS, WARRANTIES, AND COVENANTS OF THE SELLER.

The Sellers represent and warrant to, and covenants with, the Buyer as follows:

2.1 Authority of the Sellers. The execution, delivery, and consummation of this Agreement by the Sellers has been duly approved in accordance with applicable law and any documents or instruments governing the Sellers. The execution, delivery, and consummation of this Agreement by the Sellers will not cause the Sellers to be in violation or breach of any law, regulation, contract, agreement, or other restriction to or by which the Sellers or the Property is subject or bound. If the Sellers are a corporation, the Sellers, at Closing, shall provide to the Buyer (i) a certificate from the State of Idaho dated not more than 45 days prior to Closing indicating that the Sellers are in good standing and qualified to do business in Idaho, and (ii) resolutions of the board of directors of the Sellers authorizing and approving this Agreement and the transactions contemplated hereby. If the Sellers are a partnership, the Sellers, at Closing, shall provide to the Buyer resolutions of the partners of the Sellers authorizing and approving this Agreement and the transactions contemplated hereby.

2.2 Property Ownership. The Sellers own and possess all right, title, and interest in and to the Property free and clear of all covenants, conditions, easements, liens, and encumbrances.

2.3 Condition of Property. All of the Property, including, but not limited to, parking areas, landscape areas, sprinkler system(s), structural components, electrical, plumbing, heating and air conditioning systems, is in good operating condition and repair, subject only to routine maintenance.

2.4 Material Misstatement or Omissions. No representation or warranty made by the Sellers in this Agreement or in any document or agreement furnished in connection with this Agreement contains or will contain any untrue statement of material fact, or omits or will omit to state a material fact necessary to make the statements not misleading.

2.5 No Default. The Sellers are not in default under the terms of any contract, agreement, lease, license or other understanding, and no condition or event has occurred which, after notice, the passage of time, or otherwise, would constitute a default under or breach of any such terms. The Sellers are not aware of any condition that will result in a default under any such terms.

2.6 Broker Fees. Except as disclosed in writing to the Buyer prior to Closing, the Sellers are not obligated to pay any fee or commission to any broker, finder, or intermediary for or on account of the transaction contemplated by this Agreement.

2.7 Information to be Provided. Within ten (10) business days after the date this Agreement is accepted by the Sellers, the Sellers shall deliver to the Buyer the following: All contracts of any kind or nature which shall survive the Closing and which relate to the Property; A copy of all leases relating to the Property, together with any amendments to such leases; A copy of any and all licenses, certificates, permits, approvals, conditions or similar items, in the Sellers' possession relating to all or any portion of the Property.

2.8 Conduct Pending Closing. From the effective date of this Agreement to Closing, the Sellers shall (i) maintain the Property in good repair and in a broom clean condition, (ii) continue to operate the Property in the manner previously operated by the Sellers, (iii) not enter into any contracts or purchase orders relating to the Property, and (iv) perform all acts necessary to insure that the representations, warranties, and covenants of the Sellers shall be true, complete, and accurate in all respects on and as of the date of closing to the same force and effect as if made at Closing.

2.9 Access to Property. After the Sellers' acceptance of this Agreement, the Buyer and the Buyer's authorized representatives shall have reasonable access to the Property for inspection.

3. HAZARDOUS SUBSTANCES. The terms "hazardous substance," "release," and "removal" shall have the definition and meaning as set forth in Title 42 U.S. C. 9601 (or corresponding provision of any future law); provided, however that the term "hazardous substance" shall include "hazardous waste" as defined in Title 42 U.S.C. 6903 (or corresponding

provision of any future law) and "petroleum" as defined in Title 42 U.S.C. 6991 (or corresponding provision of any future law). The Sellers represent and warrant to, and covenants with, the Buyer that: the Property is not contaminated with any hazardous substance, the Sellers have not caused and will not cause the release of any hazardous substances on the Property, there is no asbestos on the Property, and there is no underground storage tank on the Property.

4. CONDITIONS PRECEDENT TO CLOSING. The obligations of the Buyer under this Agreement are, at Buyer's option, subject to the satisfaction of the following conditions:

4.1 The representations and warranties of the Sellers are true, complete, and accurate as of the date of this Agreement and as of the date of Closing as if made as of such date.

4.2 The Sellers have performed all obligations, covenants and agreements to be performed prior to Closing as set forth in this Agreement.

4.3 The Title Company is prepared to issue a policy in accordance with this agreement. The Sellers shall have executed and delivered to the Closing Agent the Warranty Deed and same is recorded.

4.4 The Buyer has obtained financing (effective to the date of Closing) from a bank or other financial institution, for a loan of $1,500,000.00, bearing interest at a fixed rate of not more than six and one-half percent (6 ½ %) per annum, with a maximum of one (1) point payable at funding. The loan shall be repayable in monthly installments of principal and interest amortized over a thirty (30) year term.

4.5 The Buyer has obtained an appraisal of the Property indicating that the fair market value of the Property is not less than the Purchase Price. The Buyer has obtained, at the Buyer's sole cost, an inspection of the Property, including, without limitation, parking areas, landscape areas, sprinkler systems, structural components, electrical, plumbing, heating and air conditioning systems and roofs and has approved the condition of the Property, in Buyer's sole discretion.

4.6 That the Theodore L. Johnson Revocable Trust has been awarded through successful negotiation, settlement or litigation, clear and unencumbered title to the property set forth in paragraph 1.1 of this Agreement.

4.7 The Sellers deliver to the Buyer an affidavit executed by the Sellers under penalty of perjury that provides the Sellers' United States taxpayer identification number, and states that the Sellers are not foreign persons.

5. CLOSING. The Closing Agent for this Agreement shall be Title One Title Insurance Company. ("Closing Agent"). Buyer and the Sellers shall each pay one-half of the Closing Agent's Closing Fees at Closing. Closing shall be at the offices of the Closing Agent on Explorer Drive in Eagle, Idaho on November 3, 2005, or at such other time, date, and place as may be mutually agreed between Sellers and Buyer. Buyer and Sellers shall execute and deliver to the Closing Agent instructions on the form generally provided by the Closing Agent with such modifications as are reasonably made by the Buyer.

6. GENERAL PROVISIONS.

6.1 All notices, claims, requests and other communications ("Notices") under this Agreement (i) shall be in writing, and (ii) shall be addressed or delivered to the relevant address set forth in Section 7 below or at such other address as shall be given in writing by a party to the other. Notices complying with the provisions of this Section shall be deemed to have been delivered (I) upon the date of delivery if delivered in person, or (ii) on the date of the postmark on the return receipt if deposited in the United States Mail, with postage prepaid for certified or registered mail, return receipt requested.

6.2 The Parties agree that if a party is in default under this Agreement, then such party shall pay to the other party (a) reasonable attorney fees and other costs and expenses incurred by the other party after default and referral to an attorney, (b) reasonable attorney fees and other costs and expenses incurred by the other party in any settlement negotiations, and © reasonable attorney fees and other costs and expenses incurred by the other party in preparing for and prosecuting any suit or action. This Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction and agree that Ada County is the proper venue. Time is of the essence with respect to the obligations to be performed under this Agreement. Except as expressly provided in this Agreement, and to the extent permitted by law, any remedies described in this Agreement are cumulative and not alternative to any other remedies available at law or in equity. The failure or neglect of a party to enforce any remedy available by reason of the failure of the other party to observe or perform a term or condition set forth in this Agreement shall not constitute a waiver of such term or condition. A waiver by a party (I) shall not affect any term or condition other than the one specified in such waiver, and (ii) shall waive a specified term or condition only for the time and in a manner specifically stated in the waiver.

6.3 This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, assigns, heirs, and personal representatives. This Agreement, together with the Exhibits, constitutes the entire agreement among the parties and supersedes all prior correspondence, conversations and negotiations. The invalidity of any portion of this Agreement, as determined by a court of competent jurisdiction, shall not affect the validity of any other portion of this Agreement. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instruments. All representations, warranties, and covenants of the Sellers set forth in this Agreement shall survive the Closing and shall survive the recording of the Warranty Deed.

7. **SIGNATURES.**

BUYER

Dated: September 2, 2005

(Signature)

Douglas Crandall

(Print or Type Name)

202 N. Ninth

(Street # and Name)

Boise Idaho 83702

(City, State and Zip)

SELLER ACCEPTANCE

Dated: _____, 2005

(Signature)

(Print or Type Name)

(Street # and Name)

(City, State and Zip)

Dated: _____, 2005

(Signature)

(Print or Type Name)

(Street # and Name)

(City, State and Zip)

Dated: _____, 2005

_____
(Signature)

_____
(Print or Type Name)

_____
(Street # and Name)

_____
(City, State and Zip)

Dated: _____, 2005

_____
(Signature)

_____
(Print or Type Name)

_____
(Street # and Name)

_____
(City, State and Zip)

EXHIBIT B
001570

PROPERTY TAXES ON THE THEODORE JOHNSON TRUST PROPERTY

	Lot 1	Lot 2	Lot 3	Lot 4	Lot 5	Lot 6	Lot 7	Grand Totals
2006 taxes	$ 2,252.56	$ 2,252.56	$ 2,252.56	$ 2,252.56	$ 2,252.56	$ 2,252.56	$ 2,252.56	$ 15,767.92
Late Fees	$ 45.02	$ 45.02	$ 45.02	$ 45.02	$ 45.02	$ 45.02	$ 45.02	$ 315.14
Interest	$ 737.34	$ 737.34	$ 737.34	$ 737.34	$ 737.34	$ 737.34	$ 737.34	$ 5,161.38
Total 2006	$ 3,034.92	$ 3,034.92	$ 3,034.92	$ 3,034.92	$ 3,034.92	$ 3,034.92	$ 3,034.92	$ 21,244.44
2007 taxes	$ 3,285.82	$ 3,285.82	$ 3,285.82	$ 3,285.82	$ 3,285.82	$ 3,285.82	$ 3,285.82	$ 23,000.74
Late Fees	$ 65.68	$ 65.68	$ 65.68	$ 65.68	$ 65.68	$ 65.68	$ 65.68	$ 459.76
Interest	$ 709.18	$ 709.18	$ 709.18	$ 709.18	$ 709.18	$ 709.18	$ 937.12	$ 5,192.20
Total 2007	$ 4,060.68	$ 4,060.68	$ 4,060.68	$ 4,060.68	$ 4,060.68	$ 4,060.68	$ 4,288.62	$ 28,652.70
2008 taxes	$ 3,393.26	$ 3,393.26	$ 3,393.26	$ 3,393.26	$ 3,393.26	$ 3,393.26	$ 3,393.26	$ 23,752.82
Late fees	$ 67.82	$ 67.82	$ 67.82	$ 67.82	$ 67.82	$ 67.82	$ 67.82	$ 474.74
Interest	$ 551.56	$ 551.56	$ 551.56	$ 551.56	$ 551.56	$ 551.56	$ 551.56	$ 3,860.92
Total 2008	$ 4,012.64	$ 4,012.64	$ 4,012.64	$ 4,012.64	$ 4,012.64	$ 4,012.64	$ 4,012.64	$ 28,088.48
2009 taxes	$ 2,953.14	$ 2,953.14	$ 2,953.14	$ 2,953.14	$ 2,953.14	$ 2,953.14	$ 2,953.14	$ 20,671.98
Late Fees	$ 29.51	$ 29.51	$ 29.51	$ 29.51	$ 29.51	$ 29.51	$ 29.51	$ 206.57
Interest	$ 59.37	$ 59.37	$ 59.37	$ 59.37	$ 59.37	$ 59.37	$ 59.37	$ 415.59
Total 2009	$ 3,042.02	$ 3,042.02	$ 3,042.02	$ 3,042.02	$ 3,042.02	$ 3,042.02	$ 3,042.02	$ 21,294.14
Grand Totals	$ 14,150.26	$ 14,150.26	$ 14,150.26	$ 14,150.26	$ 14,150.26	$ 14,150.26	$ 14,378.20	$ 99,279.76

Interest on unpaid taxes increases daily. Unpaid taxes for these properties include Lot 7 for year 2007 and all parcels for 2008 and 2009. These interest amounts are up-to-date as of 04/01/10.

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Fees									
11195.000	02/06/2008	20	P	1	190.00	0.50	95.00	Telephone conference with our insurance adjuster at Zurich. Theodore Johnson Trust Thomas Maile v.	1
11195.000	02/06/2008	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Blake. Theodore Johnson Trust Thomas Maile v.	2
11195.000	04/08/2008	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Blake. Theodore Johnson Trust Thomas Maile v.	3
11195.000	04/16/2008	20	P	1	190.00	0.20	38.00	Telephone conference with Christine Young Zurich. Theodore Johnson Trust Thomas Maile v.	4
11195.000	04/22/2008	20	P	10	190.00	0.30	57.00	Preparation of Notice of Appearance. Theodore Johnson Trust Thomas Maile v.	5
11195.000	04/22/2008	20	P	10	190.00	0.60	114.00	Preparation of correspondence to the Clerk of the Court and to Dallan Taylor. Theodore Johnson Trust Thomas Maile v.	6
11195.000	04/27/2008	20	P	10	190.00	0.60	114.00	Preparation of Notice of Appearance for John Taylor and correspondence to the Clerk. Theodore Johnson Trust Thomas Maile v.	7
11195.000	04/29/2008	20	P	19	190.00	2.00	380.00	Detailed review of Complaint and Drafting Answer. Theodore Johnson Trust Thomas Maile v.	8
11195.000	05/07/2008	20	P	10	190.00	0.60	114.00	Preparation of Motion to Dismiss and correspondence to the Clerk of the Court. Theodore Johnson Trust Thomas Maile v.	9
11195.000	05/07/2008	20	P	10	190.00	0.30	57.00	Preparation of Affidavit in Support of Motion to Dismiss. Theodore Johnson Trust Thomas Maile v.	10
11195.000	05/07/2008	20	P	19	190.00	0.30	57.00	Preparation of Notice of Hearing. Theodore Johnson Trust Thomas Maile v.	11
11195.000	05/08/2008	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the clerk of the court. Theodore Johnson Trust Thomas Maile v.	12
11195.000	05/08/2008	20	P	19	190.00	0.40	76.00	Review of Three Day Notice of Intent to Take Default and correspondence to the clients enclosing the same. Theodore Johnson Trust Thomas Maile v.	13
11195.000	05/13/2008	20	P	19	190.00	0.50	95.00	Review of Motion to Strike Defendant Taylors' Motion to Dismiss and/or Consider the Same a Motion for Summary Judgment. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	14
11195.000	05/13/2008	30	P	1	80.00	0.20	16.00	Telephone conference with the Judge's Clerk. Theodore Johnson Trust Thomas Maile v.	16
11195.000	05/14/2008	20	P	10	190.00		0.00	No Charge. Preparation of Amended Affidavit and correspondence to the clerk of the Court. Theodore Johnson Trust Thomas Maile v.	15
11195.000	05/14/2008	20	P	19	190.00	0.50	95.00	Review of Recusal and Notice of Reassignment. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	17
11195.000	05/19/2008	20	P	19	190.00	0.20	38.00	Review of Notice of Status Conference. Theodore Johnson Trust Thomas Maile v.	18
11195.000	05/19/2008	30	P	1	80.00	0.20	16.00	Telephone conference with the Judge's Clerk. Theodore Johnson Trust Thomas Maile v.	19
11195.000	07/23/2008	20	P	19	190.00	0.60	114.00	Review of Subpoena Duces Tecum for Helen Taylor and Notice of Taking Deposition Duces Tecum of Helen Taylor. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	20
11195.000	07/30/2008	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile re. Helen's deposition. Theodore Johnson Trust Thomas Maile v.	21
11195.000	08/29/2008	20	P	19	190.00	0.10	19.00	Review of correspondence from Mr. Prusynski to Mr. Maile dated August 27, 2008. Theodore Johnson Trust Thomas Maile v.	25
11195.000	09/03/2008	20	P	10	190.00	0.70	133.00	Review of Amended Subpoena Duces Tecum for Helen Taylor and Amended Notice of Taking Deposition Duces Tecum of Helen Taylor. Preparation of correspondence to Mr. Maile with a copy of the same. Theodore Johnson Trust Thomas Maile v.	24
11195.000	09/16/2008	20	P	10	190.00	0.40	76.00	Review of Notice of Association of Counsel and Substitution of Counsel and preparation of	26

EXHIBIT C

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Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Fees								correspondence to the clients enclosing the same. Theodore Johnson Trust Thomas Maile v.	
11195.000	09/22/2008	20	P	10	190.00	5.50	1,045.00	Research for and preparation of Memorandum in Support of Amended Motion to Dismiss and/or Motion for Summary Judgment. Theodore Johnson Trust Thomas Maile v.	27
11195.000	09/24/2008	20	P	19	190.00	2.50	475.00	Review and revise Memorandum in Support of Motion for Summary Judgment. Theodore Johnson Trust Thomas Maile v.	28
11195.000	09/26/2008	20	P	10	190.00	0.60	114.00	Preparation of Second Affidavit in Support of Motion to Dismiss and correspondence to the clerk of the court. Theodore Johnson Trust Thomas Maile v.	29
11195.000	10/02/2008	20	P	19	190.00	1.00	190.00	Deposition preparation. Theodore Johnson Trust Thomas Maile v.	31
11195.000	10/03/2008	20	P	19	190.00	5.50	1,045.00	Travel from Boise after Helen's deposition. Theodore Johnson Trust Thomas Maile v.	30
11195.000	10/03/2008	20	P	19	190.00	0.25	47.50	Attendance at deposition. Theodore Johnson Trust Thomas Maile v.	32
11195.000	10/08/2008	20	P	19	190.00	0.40	76.00	Review of Amended Notice of Substitution of Counsel for Appellants/Cross-Respondents. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	33
11195.000	10/23/2008	20	P	10	190.00	0.60	114.00	Review of Motion to Continue Summary Judgment/Motion to Dismiss Hearing Set for November 6, 2008, Affidavit of Thomas G. Maile, IV, and Notice of Hearing. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	34
11195.000	10/24/2008	20	P	10	190.00	0.30	57.00	Preparation of Notice Vacating Hearing. Theodore Johnson Trust Thomas Maile v.	36
11195.000	10/24/2008	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the Clerk of the Court. Theodore Johnson Trust Thomas Maile v.	37
11195.000	10/28/2008	20	P	19	190.00		0.00	Review of Certificate of Mailing , Statement of Facts in Opposition to Motion for Summary Judgment and Motion for Rule 11 Sanctions, Memorandum Brief in Opposition to Motion to Dismiss/Summary Judgment and Motion for Rule 11 Sanctions, Affidavit of Thomas Maile Part One and Affidavit of Thomas Maile Part Two. Theodore Johnson Trust Thomas Maile v.	35
11195.000	01/09/2009	20	P	19	190.00	1.30	247.00	Review of Motion for Stay and or Set for Jury Trial, Affidavit in Support, Notice of Hearing, Certificate of Mailing and Supplemental Memorandum in Opposition to Dispositive Motions. Preparation of corresondence to client enclosing the same. Theodore Johnson Trust Thomas Maile v.	38
11195.000	01/13/2009	20	P	10	190.00	0.60	114.00	Preparation of Notice of Non-Opposition to Motion for Stay and correspondence to the Clerk of the Court. Theodore Johnson Trust Thomas Maile v.	40
11195.000	01/14/2009	20	P	19	190.00	0.40	76.00	Review of Notice of Reassignment filed by the court. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	39
11195.000	01/20/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the client with a copy of the proposed Order. Theodore Johnson Trust Thomas Maile v.	42
11195.000	01/21/2009	20	P	19	190.00	0.20	38.00	Review of correspondence and proposed order from Mr. Maile. Theodore Johnson Trust Thomas Maile v.	41
11195.000	01/26/2009	20	P	19	190.00	0.10	19.00	Review of Order for stay entered by the court. Theodore Johnson Trust Thomas Maile v.	43
11195.000	01/26/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	44
11195.000	02/04/2009	20	P	10	190.00	0.30	57.00	Preparation of Affidavit of Connie Taylor. Theodore Johnson Trust Thomas Maile v.	45
11195.000	02/05/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the clerk of the court. Theodore Johnson Trust Thomas Maile v.	46

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Fees									
11195.000	02/13/2009	20	P	10	190.00	0.60	114.00	Preparation of Motion for Order Removing Lis Pendens and correspondence to the court. Theodore Johnson Trust Thomas Maile v.	47
11195.000	02/13/2009	20	P	19	190.00	0.10	19.00	Reviewed Mr. Maile's objection to our costs. Theodore Johnson Trust Thomas Maile v.	50
11195.000	02/17/2009	20	P	10	190.00	0.60	114.00	Preparation of Amended Answer of John Taylor, Dallan Taylor, and Johnson Trust and Counterclaim. Preparation of correspondence to the Court. Theodore Johnson Trust Thomas Maile v.	48
11195.000	02/17/2009	20	P	19	190.00	1.50	285.00	Review of Supplemental Memorandum Brief and Affidavit. Theodore Johnson Trust Thomas Maile v.	51
11195.000	02/18/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the Ada County Recorder. Theodore Johnson Trust Thomas Maile v.	52
11195.000	02/23/2009	20	P	10	190.00	0.60	114.00	Preparation of Notice of Hearing and correspondence to the clerk of the court. Theodore Johnson Trust Thomas Maile v.	53
11195.000	03/03/2009	20	P	19	190.00	0.70	133.00	Reviewed and responded to e-mail from Mark Prusynski. Theodore Johnson Trust Thomas Maile v.	54
11195.000	03/05/2009	20	P	10	190.00	0.50	95.00	Review of Reply to Amended Answer of John Taylor, Dallan Taylor, and Johnson Trust and Counterclaim. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	55
11195.000	03/11/2009	20	P	19	190.00	0.10	19.00	Review of correspondence from Mr. Maile regarding the Amended Motion to Dismiss. Theodore Johnson Trust Thomas Maile v.	56
11195.000	03/19/2009	20	P	10	190.00	0.80	152.00	Review of Affidavit of Thomas G. Maile, IV. in Support of Plaintiffs' Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment; Plaintiffs' Motion for Summary Judgment Re: Defendants' Counterclaim; Memorandum Brief in Support of Motion for Partial Summary Judgment Relating to the Defendants' Counter-Claim & and in Opposition to Defendants' Motion for Summary Judgment and Notice of Hearing. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	57
11195.000	04/01/2009	20	P	10	190.00	0.30	57.00	Preparation of Supplemental Affidavit of Connie W. Taylor in support of Motion for Summary Judgment. Theodore Johnson Trust Thomas Maile v.	58
11195.000	04/01/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the clerk of the court. Theodore Johnson Trust Thomas Maile v.	59
11195.000	04/07/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the Clerk of the Court. Theodore Johnson Trust Thomas Maile v.	60
11195.000	04/07/2009	20	P	10	190.00	0.60	114.00	Preparation of correspondence to the Clerk of the Court. Preparation of Affidavit of Connie Taylor. Theodore Johnson Trust Thomas Maile v.	61
11195.000	04/07/2009	20	P	10	190.00	8.00	1,520.00	Review of Maile's Motion for Summary Judgment. Research and preparation of Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment on Counterclaims. Theodore Johnson Trust Thomas Maile v.	62
11195.000	04/08/2009	20	P	10	190.00	0.60	114.00	Preparation of Third Supplemental Affidavit in Support of Motion for Summary Judgment, and Affidavit of Connie Taylor in Opposition to Plaintiffs' Motion for Summary Judgment on the Counterclaims. Theodore Johnson Trust Thomas Maile v.	63
11195.000	04/08/2009	20	P	19	190.00	11.50	2,185.00	Reviewing the submissions by Mr. Maile, research and working on Reply Memorandum. Theodore Johnson Trust Thomas Maile v.	65
11195.000	04/09/2009	20	P	19	190.00	7.50	1,425.00	Revising the Reply to Plaintiffs Opposition to Motion for Summary Judgment. Theodore Johnson Trust Thomas Maile v.	66
11195.000	04/10/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the clerk. Theodore Johnson Trust Thomas Maile v.	64
11195.000	04/14/2009	20	P	10	190.00	0.50	95.00	Review of Reply Memorandum Brief in Support of Motion for Partial Summary Judgment Relating to	67

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Fees								the Defendants' Counter-Claim & in Opposition to Defendants' Motion for Summary Judgment. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	
11195.000	04/22/2009	20	P	19	190.00	4.00	760.00	Travel time to and from Boise for hearings. Theodore Johnson Trust Thomas Maile v.	68
11195.000	04/22/2009	20	P	19	190.00	5.00	950.00	Preparation for and attendance at hearing. Theodore Johnson Trust Thomas Maile v.	69
11195.000	05/04/2009	20	P	10	190.00	0.70	133.00	Review of Plaintiff's Request to Take Judicial Notice of Pleadings and Certificate of Mailing. Preparation of correspondence to John and Dallan enclosing the same. Theodore Johnson Trust Thomas Maile v.	70
11195.000	05/12/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Jennifer Kennedy, Judge Greenwood's Clerk. Theodore Johnson Trust Thomas Maile v.	71
11195.000	07/08/2009	20	P	10	190.00	1.30	247.00	Review of Memorandum Decision and Order, Civil Case Order for Scheduling Conference and Order Re. Motion Practice, and Civil Case Stipulation for Scheduling and Planning. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	72
11195.000	07/09/2009	20	P	19	190.00	0.70	133.00	Sending of emails to the clients re. the correspondence, proposed Release, and Satisfaction received in the Taylor/Maile case. Telephone conference with John Taylor. Theodore Johnson Trust Thomas Maile v.	76
11195.000	07/09/2009	20	P	4	190.00	1.00	190.00	Office conference with John. Theodore Johnson Trust Thomas Maile v.	77
11195.000	07/10/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	73
11195.000	07/10/2009	20	P	10	190.00	0.90	171.00	Preparation of Order Denying Plaintiffs' Motion for Summary Judgment, Judgment Dismissing Plaintiffs' Claims, and correspondence to the Clerk. Theodore Johnson Trust Thomas Maile v.	74
11195.000	07/13/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	75
11195.000	07/15/2009	20	P	10	190.00	1.80	342.00	Review of Motion for Certification Pursuant to IRCP Rule 54(B) re: Memorandum Decision and Order/Motion for Permissive Appeal Pursuant to the IAR Rule 12, Affidavit in Support of Preparation of Motion for Certification Pursuant to IRCP Rule 54(B) re: Memorandum Decision and Order/Motion for Permissive Appeal Pursuant to the IAR Rule 12, and Memorandum Brief in Support of Motion for Certification Pursuant to IRCP Rule 54(B) re: Memorandum Decision and Order/Motion for Permissive Appeal Pursuant to the IAR Rule 12.. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	78
11195.000	07/15/2009	20	P	19	190.00	0.10	19.00	Review of Notice of Hearing Re: Scheduling Conference. Theodore Johnson Trust Thomas Maile v.	79
11195.000	07/15/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	80
11195.000	07/15/2009	20	P	19	190.00	0.30	57.00	Exchanged e-mails with Mark Prusynski. Theodore Johnson Trust Thomas Maile v.	82
11195.000	07/15/2009	20	P	1	190.00	0.20	38.00	Telephone conference with John Taylor. Theodore Johnson Trust Thomas Maile v.	83
11195.000	07/15/2009	20	P	1	190.00	0.70	133.00	Telephone conference with Mark Prusynski. Theodore Johnson Trust Thomas Maile v.	84
11195.000	07/16/2009	20	P	10	190.00	0.40	76.00	Review of Notice of Hearing re. Motion for Certification and Preparation of correspondence to the client. Theodore Johnson Trust Thomas Maile v.	81
11195.000	07/27/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	87
11195.000	07/28/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	86
11195.000	07/29/2009	20	P	19	190.00	0.10	19.00	Review of correspondence from Mr. Maile regarding access numbers for the telephonic hearing 08/14.	88

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Fees									
								Theodore Johnson Trust Thomas Maile v.	
11195.000	07/30/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	89
11195.000	08/04/2009	32	P	10	175.00	0.30	52.50	Preparation of correspondence to the client. Theodore Johnson Trust Thomas Maile v.	91
11195.000	08/14/2009	20	P	19	190.00	0.30	57.00	Review of Amended Motion for Certification and correspondence from mr. Maile re. access code for telephonic hearing. Theodore Johnson Trust Thomas Maile v.	90
11195.000	08/14/2009	20	P	10	190.00	0.40	76.00	Review of Second Supplemental Affidavit in Support of Amended Motion for Certification and preparation of correspondence to the clients enclosing the same. Theodore Johnson Trust Thomas Maile v.	92
11195.000	08/20/2009	20	P	10	190.00	0.90	171.00	Preparation of Notice of Non-Opposition, correspondence to the Clerk and correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	93
11195.000	08/24/2009	20	P	19	190.00	5.50	1,045.00	Review of pleading filed by Mr. Maile. Communication with clients and co-counsel regarding Motion for Rule 54(b) certification. Research into Vendees lien statute. Review of Affirmative Defenses to counsel claims. Theodore Johnson Trust Thomas Maile v.	94
11195.000	08/26/2009	20	P	10	190.00	0.50	95.00	Preparation of Answers to Interrogatories and Requests for Production. Theodore Johnson Trust Thomas Maile v.	95
11195.000	08/27/2009	20	P	10	190.00	0.30	57.00	Preparation of Notice of Service. Theodore Johnson Trust Thomas Maile v.	96
11195.000	08/27/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	97
11195.000	08/27/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the Clerk of the court. Theodore Johnson Trust Thomas Maile v.	98
11195.000	09/27/2009	20	P	19	190.00	0.80	152.00	Research into recent case law on attorney's fees on appeal. Theodore Johnson Trust Thomas Maile v.	99
11195.000	09/30/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	100
11195.000	10/07/2009	20	P	19	190.00		0.00	Review of the Motion for Permissive Appeal Pursuant to the I.A.R. Rule 12, Memorandum Brief in Support of Motion for Permissive Appeal Pursuant to the I.A.R. Rule 12., and Affidavit of Thomas Maile in Support of Motion for Permissive Appeal Pursuant to The I.A.R. Rule 12 directed to the Supreme Court. Theodore Johnson Trust Thomas Maile v.	101
11195.000	10/07/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the clients enclosing the Motion for Permissive Appeal Pursuant to the I.A.R. Rule 12, Memorandum Brief in Support of Motion for Permissive Appeal Pursuant to the I.A.R. Rule 12., and Affidavit of Thomas Maile in Support of Motion for Permissive Appeal Pursuant to The I.A.R. Rule 12 directed to the Supreme Court. Theodore Johnson Trust Thomas Maile v.	102
11195.000	10/07/2009	20	P	10	190.00	0.30	57.00	Preparation of Notice of Non-Opposition. Theodore Johnson Trust Thomas Maile v.	103
11195.000	10/07/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the Supreme Court. Theodore Johnson Trust Thomas Maile v.	104
11195.000	11/12/2009	20	P	10	190.00	0.40	76.00	Review of Order Denying Motion for Permissive Appeal and preparation of correspondence to the clients. Theodore Johnson Trust Thomas Maile v.	105
11195.000	11/13/2009	20	P	10	190.00	0.30	57.00	Preparation of Request for Scheduling Conference and Trial Setting. Theodore Johnson Trust Thomas Maile v.	106
11195.000	11/13/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the clerk. Theodore Johnson Trust Thomas Maile v.	107
11195.000	11/30/2009	20	P	10	190.00	0.30	57.00	Preparation of Affidavit in Opposition to Motion to Foreclose. Theodore Johnson Trust Thomas Maile v.	108
11195.000	12/03/2009	20	P	10	190.00	0.80	152.00	Review of Renewed Motion for Certification Pursuant to IRCP Rule 54(b) re: Judgment Entered July 20, 2009, Notice of Hearing, and	109

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Fees									
								Affidavit in Support of Renewed Motion for Certification. Preparation of correspondence to the client. Theodore Johnson Trust Thomas Maile v.	
11195.000	12/17/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Troupis. Theodore Johnson Trust Thomas Maile v.	110
11195.000	12/17/2009	20	P	10	190.00	0.50	95.00	Review of Notice of Association and correspondence from Mr. Maile to Mr. Prusynski dated December 17, 2009. Preparation of correspondence to the clients enclosing the same. Theodore Johnson Trust Thomas Maile v.	111
11195.000	12/18/2009	20	P	10	190.00	0.90	171.00	Preparation of Objection to Renewed Motion for Rule 54(B) Certification, Affidavit in Opposition to Renewed Motion for Certification and correspondence to the Clerk of the Court. Theodore Johnson Trust Thomas Maile v.	112
11195.000	12/22/2009	20	P	10	190.00	0.50	95.00	Review of correspondence and proposed stipulation received from Mr. Maile. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	113
11195.000	12/22/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Troupis. Theodore Johnson Trust Thomas Maile v.	114
11195.000	12/22/2009	20	P	10	190.00	0.20	38.00	Review of additional correspondence from Mr. Maile and his second proposed Stipulation Theodore Johnson Trust Thomas Maile v.	115
11195.000	12/28/2009	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile. Theodore Johnson Trust Thomas Maile v.	116
11195.000	12/28/2009	20	P	1	190.00	0.20	38.00	Telephone conference with Jennifer Kennedy of Judge Greenwood's office. Theodore Johnson Trust Thomas Maile v.	117
11195.000	01/04/2010	20	P	10	190.00	0.50	95.00	Review of correspondence from Mr. Mail with a copy of the final Civil Case Stipulation for Scheduling and Planning. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	118
11195.000	01/07/2010	20	P	10	190.00	0.80	152.00	Review of Memorandum Brief in Support of Renewed Motion for Certification Pursuant to IRCP Rule 54(b) Re: Judgment Entered July 20, 2009 and Supplemental Affidavit in Support of the same. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	123
11195.000	01/11/2010	20	P	10	190.00	0.60	114.00	Preparation of Motion to Disqualify Alternate Judge and Order to Deny Alternate Judge. Theodore Johnson Trust Thomas Maile v.	124
11195.000	01/12/2010	20	P	10	190.00	0.30	57.00	Preparation of correspondence to the court. Theodore Johnson Trust Thomas Maile v.	125
11195.000	01/12/2010	20	P	10	190.00	0.40	76.00	Review of Order Governing Proceedings and Setting Trial. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	126
11195.000	01/25/2010	20	P	10	190.00	0.30	57.00	Preparation of correspondence to Mr. Maile and Mr. Troupis. Theodore Johnson Trust Thomas Maile v.	127
11195.000	01/25/2010	20	P	10	190.00	0.40	76.00	Review of Order Disqualifying Alternate Judge. Preparation of correspondence to the client enclosing the same. Theodore Johnson Trust Thomas Maile v.	128
11195.000	01/27/2010	20	P	19	190.00	1.50	285.00	Review file, prepare for, and attend hearing on Renewed Motion for 54(b) Certificate. Theodore Johnson Trust Thomas Maile v.	129
Total for Fees					Billable	107.05	20,291.00		
Expenses									
11195.000	07/25/2008	20	P	37			1.00	Fax Transmission - June/July Theodore Johnson Trust Thomas Maile v.	1
11195.000	08/25/2008	20	P	37			15.00	Fax Transmission - July/August Theodore Johnson Trust Thomas Maile v.	2
11195.000	09/25/2008	20	P	37			6.00	Fax Transmission - August/September Theodore Johnson Trust Thomas Maile v.	3
11195.000	10/25/2008	20	P	29	0.250		4.25	Photocopies - September/October Theodore Johnson Trust Thomas Maile v.	6

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Expenses									
11195.000	11/18/2008	20	P	44			0.76	Postage Theodore Johnson Trust Thomas Maile v.	7
11195.000	11/25/2008	20	P	29	0.250		4.00	Photocopies - October/November Theodore Johnson Trust Thomas Maile v.	8
11195.000	02/18/2009	20	P	44			2.70	Postage Theodore Johnson Trust Thomas Maile v.	10
11195.000	02/25/2009	20	P	37			124.00	Fax Transmission - January/February Theodore Johnson Trust Thomas Maile v.	11
11195.000	02/25/2009	20	P	29	0.250		19.75	Photocopies - January/February Theodore Johnson Trust Thomas Maile v.	12
11195.000	03/06/2009	20	P	44			1.18	Postage Theodore Johnson Trust Thomas Maile v.	15
11195.000	03/25/2009	20	P	37			25.00	Fax Transmission - February/March Theodore Johnson Trust Thomas Maile v.	16
11195.000	03/25/2009	20	P	29	0.250		4.00	Photocopies - February/March Theodore Johnson Trust Thomas Maile v.	17
11195.000	04/10/2009	20	P	44			21.85	Postage Theodore Johnson Trust Thomas Maile v.	18
11195.000	04/25/2009	20	P	29	0.250		112.50	Photocopies - March/April Theodore Johnson Trust Thomas Maile v.	19
11195.000	04/25/2009	20	P	43			5.00	Color Copies - March/April Theodore Johnson Trust Thomas Maile v.	20
11195.000	04/25/2009	20	P	37			42.00	Fax Transmission - March/April Theodore Johnson Trust Thomas Maile v.	21
11195.000	05/13/2009	20	P	44			1.22	Postage Theodore Johnson Trust Thomas Maile v.	22
11195.000	05/25/2009	20	P	29	0.250		3.00	Photocopies - April/May Theodore Johnson Trust Thomas Maile v.	23
11195.000	06/25/2009	20	P	45			175.00	Westlaw Charges - April 2009 Theodore Johnson Trust Thomas Maile v.	26
11195.000	06/25/2009	20	P	29	0.250		3.00	Photocopies - May/June Theodore Johnson Trust Thomas Maile v.	27
11195.000	07/20/2009	20	P	44			9.39	Postage Theodore Johnson Trust Thomas Maile v.	30
11195.000	07/23/2009	20	P	45			33.33	Westlaw Charges - June, 2009 Theodore Johnson Trust Thomas Maile v.	29
11195.000	07/25/2009	20	P	37			2.00	Fax Transmission - June/July Theodore Johnson Trust Thomas Maile v.	31
11195.000	07/25/2009	20	P	29	0.250		26.50	Photocopies - June/July Theodore Johnson Trust Thomas Maile v.	32
11195.000	08/17/2009	20	P	44			2.44	Postage Theodore Johnson Trust Thomas Maile v.	33
11195.000	08/25/2009	20	P	29	0.250		8.00	Photocopies - July/August Theodore Johnson Trust Thomas Maile v.	34
11195.000	09/23/2009	20	P	44			0.61	Postage Theodore Johnson Trust Thomas Maile v.	35
11195.000	09/25/2009	20	P	29	0.250		77.50	Photocopies - August/September Theodore Johnson Trust Thomas Maile v.	36
11195.000	10/08/2009	20	P	44			9.26	Postage Theodore Johnson Trust Thomas Maile v.	37
11195.000	10/19/2009	20	P	44			1.83	Postage Theodore Johnson Trust Thomas Maile v.	38
11195.000	10/25/2009	20	P	43			434.00	Color Copies - September/October Theodore Johnson Trust Thomas Maile v.	39
11195.000	10/25/2009	20	P	29	0.250		14.25	Photocopies - September/October Theodore Johnson Trust Thomas Maile v.	40
11195.000	11/25/2009	20	P	29	0.250		3.75	Photocopies - October/November Theodore Johnson Trust Thomas Maile v.	41
11195.000	11/25/2009	20	P	37			6.00	Fax Transmission - October/November Theodore Johnson Trust Thomas Maile v.	42
11195.000	12/22/2009	20	P	44			22.49	Postage Theodore Johnson Trust Thomas Maile v.	43
11195.000	12/25/2009	20	P	29	0.250		7.25	Photocopies - November/December Theodore Johnson Trust Thomas Maile v.	44
11195.000	12/25/2009	20	P	37			52.00	Fax Transmission - November/December	45

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Stmt # Rate	Hours to Bill	Amount		Ref #
Expenses								Theodore Johnson Trust Thomas Maile v.	
Total for Expenses					Billable	0.00	1,281.81		
Advances									
11195.000	04/22/2008	20	P	21			69.60	Filing Fee (Notice of Appearance) - #45332 Clerk of Ada County Theodore Johnson Trust Thomas Maile v.	14
11195.000	04/28/2008	20	P	21			69.60	Filing Fee (Notice of Appearance) - #45380 Clerk of Ada County Theodore Johnson Trust Thomas Maile v.	13
11195.000	10/06/2008	20	P	27			163.62	Mileage (Boise on 9/2-3/08) - #47240 Connie Taylor Theodore Johnson Trust Thomas Maile v.	4
11195.000	10/15/2008	20	P	26			82.33	Deposition (Helen Taylor) - #47185 Burnham, Habel & Associates, Inc. Theodore Johnson Trust Thomas Maile v.	5
11195.000	02/18/2009	20	P	20			2.40	#48429 Ada County Recorder - Copy of Lis Pendens Theodore Johnson Trust Thomas Maile v.	9
11195.000	05/25/2009	20	P	20			533.60	Global Travel - Airfare for Connie Taylor on 4-22-09 Theodore Johnson Trust Thomas Maile v.	24
11195.000	06/15/2009	20	P	20			9.00	Connie Taylor - Reimbursement for Parking at Civic Plaza Court House on 04/22/09 Theodore Johnson Trust Thomas Maile v.	25
11195.000	07/22/2009	20	P	20			434.40	Global Travel - Airfare for Connie Taylor on 4/21/09 to Boise Theodore Johnson Trust Thomas Maile v.	28
Total for Advances					Billable	0.00	1,364.55		
					GRAND TOTALS				
					Billable	107.05	22,937.36		

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ISB No. 2576

BEFORE THE PROFESSIONAL CONDUCT BOARD
OF THE IDAHO STATE BAR

IDAHO STATE BAR,	ISB File No. FC 09-04
Plaintiff,	**COMPLAINT**
v.	
THOMAS G. MAILE IV,	
Respondent.	

The Idaho State Bar ("ISB") by and through its counsel, Bradley G. Andrews, hereby charges Thomas G. Maile IV, an attorney at law admitted to practice before the courts of Idaho, with professional misconduct as follows:

COMMON ALLEGATIONS

1. Thomas G. Maile IV (hereinafter referred to as "Respondent") was admitted to the practice of law in the State of Idaho in 1979, at which time he took the oath required for admission, wherein he agreed to abide by the rules of professional conduct adopted by the Idaho Supreme Court. At all times mentioned herein, Respondent has continuously been under the jurisdiction of the Idaho Supreme Court as a member of the ISB on active status.

EXHIBIT D
001579

2. The Idaho Supreme Court has adopted the Idaho Rules of Professional Conduct ("I.R.P.C."), governing the ethical conduct of attorneys licensed to practice in the State of Idaho, which Rules were in effect at all times relevant herein.

3. Pursuant to Rule 511(a)(1) of the Idaho Bar Commission Rules ("IBCR"), the Board of Commissioners has approved the filing of these charges against the Respondent.

4. Quotations throughout this Complaint are from deposition testimony or from the documents being referred to.

5. Respondent represented Theodore L. Johnson ("Ted") in various legal matters between 1992 and Ted's death in September 2002. In November 1997, Ted executed a Revocable Trust Agreement that created the Theodore L. Johnson Revocable Trust ("Trust"). Respondent prepared the document, which designated Ted as trustee, and Ted's niece, Beth Rogers ("Beth) and her husband, Andrew, as co-successor trustees. Ted's nephews, Reed, Dallan and John Taylor ("Taylors"), were residual beneficiaries of the Trust. The Trust owned approximately forty acres of undeveloped property on Linder Road in Ada County, Idaho ("Linder property").

6. On or around May 19, 2002, Ted received an unsolicited offer from Franz Witte, Jr., to purchase the Linder property for $400,000 ("Witte offer"). On May 22, 2002, Ted met with Respondent to review the terms of the Witte offer. Ted informed Respondent during their meeting that the Witte offer was for the same property that Respondent had previously indicated he was interested in purchasing, and asked Respondent if he was still interested. Respondent confirmed that he was still interested in the Linder property, and asked Ted whether that interest caused Ted "any difficulty" in having him review the Witte offer. Ted replied "no," and

indicated that he was not aware of the property's fair market value. Respondent and Ted then discussed "the necessity of trying to determine what the [Linder] property was worth."

7. Respondent advised Ted that there were a "variety of ways" to determine the Linder property's fair market value, including obtaining "some appraisals" and asking "some real estate agents to provide their opinions." Respondent advised Ted that the best approach was to get an average from "three opinions from real estate agents" and, if possible, "extra opinions from appraisers." Respondent also informed Ted that the "best approach" was to retain a licensed appraiser to establish the fair market value, and indicated that such an approach was preferable to working with a realtor because the appraiser did not work for commissions. Respondent advised Ted not to inform any real estate agent or appraiser about the Witte offer, because a prospective purchase price could influence the appraiser's report. Ted did not comment further about the possible value of the property and they then discussed the tax consequences of selling the property.

8. Thereafter, Respondent contacted Ted's accountant, Imajean Hetherington, to discuss the tax implications of the Witte offer. On May 24, 2002, Ms. Hetherington sent Respondent a letter, in which she indicated that the $400,000 offer might be too low and referenced another of her client's sale of forty acres of undeveloped land in the area for $850,000 in 1996. Ms. Hetherington stated that if the properties were comparable, the Linder property could be worth up to $1,000,000 to a developer. She recommended that Ted determine the current fair market value based on the "highest and best use and on recent sales," and stated that Ted could make a counteroffer once the market value was determined. Ms. Hetherington added that if Ted carried a note on the sale, she recommended obtaining financial information from Mr. Witte in order to review his "financial strength." Ms. Hetherington sent Ted a copy of her letter.

9. On May 29, 2002, Respondent sent Ted a letter stating that he had completed his review of the Witte offer and also discussed Ted's finances with Ms. Hetherington. Respondent told Ted it would be "prudent" for Ted to contact him to discuss the possibility of a counteroffer to Mr. Witte, to help determine the fair market value of the Linder property. He told him that, as recommended by Ms. Hetherington, they needed to "do some due diligence relative to the buyers[']] potential and fiscal responsibility," and asked Ted to schedule an appointment so Respondent could "pursue this matter more diligently on [Ted's] behalf."

10. On May 31, 2002, Respondent met with Ted to discuss the Witte offer and a possible counteroffer. The only other property they discussed during that meeting was the property referenced by Ms. Hetherington in her May 24, 2002 letter.

11. On June 4, 2002, Respondent faxed Mr. Witte's attorney, Eric Haff, a letter advising that he represented the Trust and Ted, individually, regarding the Witte offer. Respondent stated that although Ted was willing to sell the Linder property, "based upon comparable values in the area, we feel your offer is extremely low." He added that because the Witte offer would require Ted to carry a short-term mortgage on the property, he would need to review Mr. Witte's "current financial statement, year-to-date profit and loss statements, and his federal and state income tax returns for the last three (3) years."

12. Respondent has acknowledged that his statement to Mr. Haff that the Witte offer was extremely low based on comparable values in the area was "slightly inaccurate." He explained that "we" referred to himself, Ted and Ms. Hetherington, and that he referenced "comparable values" because he was aware of only "one comparable" and "did not think it would be to Ted's advantage to reference a singular comparable." Respondent also

acknowledged that he had no information about the property referenced by Ms. Hetherington, and did not know whether that property was, in fact, comparable.

13. On June 7, 2002, Mr. Witte responded to Respondent's May 29, 2002 letter. With respect to Respondent's statements about the property value, Mr. Witte stated that his research showed that similar properties in the area had sold for 10% less than his offer, and added that he had "concerns over high water tables and City of Eagle issues that make development costs higher." With respect to his financial strength, Mr. Witte referenced his $100,000 down payment offer and the terms of the proposed loan. He concluded by extending the terms of his offer to June 20, 2002.

14. Sometime in June 2002, Beth contacted Knipe Janoush Knipe ("Knipe"), to appraise the Linder property on behalf of the Trust. Beth sought the appraisal at Ted's request, independent of any advice from Respondent, and believed that the Witte offer had expired at the time she sought the appraisal. According to Beth, she obtained the appraisal because "Ted was curious what the [property] was worth." On June 13, 2002, Knipe sent Ted a letter confirming its agreement to perform the appraisal.

15. On June 17, 2002, Respondent sent Ted a copy of Mr. Witte's letter. Ted did not accept the Witte offer, or propose a counteroffer, before the June 20, 2002 deadline.

16. On July 15, 2002, Knipe sent Ted a report appraising the Linder property at $400,000.

17. On or around July 19, 2002, Ted met with Respondent at his office. Ted informed Respondent about the Knipe appraisal and asked if he was still interested in purchasing the Linder property. Respondent told Ted that he had "always been interested" in purchasing the property and asked Ted about the sale price. Ted responded that he "want[ed] the appraised

value." When Respondent then asked about the possible terms of the purchase, Ted informed Respondent that he "would like to have $100,000 down and the thing to be paid off in five years." Respondent then advised Ted as follows:

> 'Because I have represented you in the past there may be a question of a conflict of interest. So if you want, and it's your choice, if you want another attorney to draw up the real estate agreement, you have the right to seek independent counsel to do so, if you want to.' Ted replied, 'No, I trust you.'

After Respondent informed Ted about the potential conflict of interest and Ted indicated that he still wanted Respondent to draft the purchase agreement, Respondent told Ted:

> 'You should, and it is your choice, seek independent counsel either to review the contract or create the contract. Write the contract.' Ted replied, 'No, I trust you.'

Respondent and Ted then discussed Respondent's development plans for the property "in great detail." There was also some discussion about how Ted obtained the appraisal, and Respondent asked Ted whether he had contacted other appraisers. Ted informed Respondent that he did not want to "pay for any more opinions" and "felt comfortable with this appraisal." Respondent told Ted that he would have the purchase contract ready in a few days.

18. On July 22, 2002, Respondent and his wife, Colleen, signed an Earnest Money Agreement ("EMA") to purchase the Linder property for $400,000. In a section entitled "Attorney Fees and Costs," the EMA included the following provisions: waiver of the right to a jury trial, venue in Canyon County, and binding arbitration in lieu of court proceedings. The EMA also reduced the statute of limitation period to one year, instead of the five-year limitation generally applicable to written contracts. The last paragraph of the EMA stated:

> The parties acknowledge that Thomas Maile d/b/a/ Thomas Maile Real Estate Company, is a licensed Real Estate Broker and is representing himself and Colleen Birch Maile, husband and wife, and/or their assigns in this transaction, (hereinafter referred to collectively as Buyer).

19. An Addendum to EMA ("Addendum"), also signed by Respondent and Colleen on July 22, 2002, provided payment terms and stated that they would secure the payments for the balance of the purchase price by executing a standard deed of trust, to be placed in escrow at Alliance Title ("Alliance"). A copy of a Deed of Trust naming Alliance as Trustee ("First Deed") was attached as Exhibit A-2 to the Addendum and incorporated by reference. Under the Addendum, the Trust agreed to the assignment of the Mailes' interests in the Linder property before or after closing, which was scheduled on or before September 15, 2002. The Addendum also stated that the parties acknowledged that "Thomas Maile d/b/a/ Thomas Maile Real Estate is a licensed Real Estate Broker and is representing himself and his wife," and provided that the purchase offer "shall expire if not accepted by 5:00 o'clock p.m. on July 25, 2002."

20. Although Respondent had advised Ted to obtain the market value of the property by taking the average of three appraisals or real estate brokers' estimations, Respondent determined that $400,000 was an acceptable fair market value for the Linder property based on the single Knipe appraisal. Respondent believed that the language providing that the parties acknowledged that he was a licensed real estate broker and was representing only himself and Colleen, "spell[ed] out" that he did not represent the Trust or Ted in the transaction.

21. On July 25, 2002, the date the offer expired, Respondent met with Ted and Beth at Ted's house. Ted signed the EMA and Addendum on behalf of the Trust. The First Deed did not include a signature line for Ted. According to Respondent, he "didn't read the contract" with Ted, but instead "tried to explain to [Ted] the general provisions of the contract" and Addendum. He stated that he also "generally explained" the Attorney Fees and Costs provision to Ted, and discussed his intention to create a limited liability company and assign his interests in the

property to it. Respondent stated that when he informed Ted about "being able to see an independent attorney, if he wanted to," Ted indicated that he did not want to consult another attorney. When deposed, Beth testified that Respondent simply asked her and Ted to read the documents and asked if there were any questions. Ted requested a change to the Addendum to provide for a current lessee's onion seed crop and then executed the documents. Respondent did not have any further contact with Ted.

22. On August 1, 2002, Respondent and Colleen formed Berkshire Investments, LLC ("Berkshire"), for the purpose of acquiring the Linder property from the Trust and developing the property in a joint venture with Respondent's development company, Thomas Maile Real Estate Company. On or around August 2, 2002, Respondent was informed that Ted suffered another heart attack and had been placed in a nursing home.

23. On August 15, 2002, pursuant to an Assignment of Earnest Money Agreement ("Assignment") prepared by Respondent and executed on that date, Respondent and Colleen assigned their rights under the EMA and Addendum to Berkshire. In return, Berkshire agreed to pay the unpaid balance of the purchase price and released Respondent "from all future liability." The Assignment was executed by Respondent and Colleen as assignors, Respondent as assignee (manager of Berkshire), and Beth as Ted's attorney-in-fact.

24. When the Assignment was executed, Berkshire had no assets other than "$100,000 either through a line of credit or in cash." Although Respondent had recommended that Ted conduct "due diligence" regarding Mr. Witte's financial strength, because the Witte offer provided for the assignment of Mr. Witte's rights to a limited liability company and a liability release, Respondent did not provide any financial information (including financial

statements and tax returns) about himself, Colleen or Berkshire and Ted did not request that information.

25. Respondent did not inform Beth about any conflict of interest or explain that the Assignment would release him and Colleen from all future liability regarding the transaction. Respondent also did not inform Beth that she should seek independent counsel regarding the transaction on behalf of Ted and/or the Trust.

26. Sometime thereafter, Beth and Andrew contacted attorney David Wishney to review the terms of the transaction. Beth testified that she sought Mr. Wishney's counsel based on Andrew's suggestion, because Ted was in a nursing home at the time and she and Andrew were "not familiar with legal reading." According to Beth, she simply wanted Mr. Wishney to "make sure the paperwork was correct."

27. On September 5, 2002, Mr. Wishney sent Andrew a letter stating that he had reviewed the EMA, Addendum, First Deed and Assignment. Mr. Wishney stated that because the documents had already been executed, it was "really too late for [him] to provide any substantive input." He added, however, that if Respondent was "willing," Andrew should substitute a "standard form deed of trust" for the First Deed attached to the EMA. Mr. Wishney noted that the First Deed did not include standard language protecting the Trust's interests, including a requirement that taxes be paid before they become delinquent. Later that day, Beth left a message at Respondent's office, asking him to use the standard form deed of trust recommended by Mr. Wishney. Beth also sent Respondent a copy of Mr. Wishney's letter.

28. Respondent did not make the requested changes to the deed of trusts. Respondent also failed to include Mr. Wishney's suggested modification to the deed of trust that taxes be paid before they became delinquent. According to Respondent, Mr. Wishney contacted him by

telephone in August 2002, but Beth never informed him about the concerns regarding the First Deed and he did not receive a copy of Mr. Wishney's letter prior to closing.

29. On September 14, 2002, Ted passed away, and Beth and Andrew became successor co-trustees. Respondent did not have any conversation with Beth or Andrew about any potential or actual conflict of interest after they became successor co-trustees.

30. On September 16, 2002, Respondent closed the sale on the Linder property. Under the terms of the sale, the Trust took a deed of trust on the property to secure payment of the remainder of the $400,000 purchase price. Beth and Andrew signed a standard form Request for Full Reconveyance ("Reconveyance") to Alliance. On the day of the closing, however, Respondent substituted a different Deed of Trust ("Second Deed") which named his friend, attorney Stephen Sherer, as the Trustee. Mr. Sherer had served as a trustee in several of Respondent's prior real estate transactions. Respondent did not disclose to Beth or Andrew that he changed the trustee from Alliance to Mr. Sherer. Beth never saw the Second Deed, which was recorded on September 26, 2002.

31. Thereafter, the Taylors' attorney, Connie Taylor, sent Respondent a letter requesting information about the Trust's assets and indicated that the Taylors would challenge the sale of the Linder property.

32. On May 7, 2003, Beth sent Respondent a letter immediately terminating his employment "in any capacity as attorney" for the Trust or Ted's estate because she did not want the Trust involved in a lawsuit. Beth testified that until May 2003, she considered Respondent to be the attorney for Ted and/or the Trust.

33. Sometime thereafter, Respondent contacted Beth to ask if he could begin developing the Linder property, before paying it off, if he gave the Trust an extra payment.

Consistent with the EMA and Addendum, Beth told Respondent not to develop the property until it was paid off.

34. On May 19, 2003, Respondent sent Beth a check for $32,357, for Berkshire's first annual payment under the EMA. The Taylors instructed Beth not to cash the check because they questioned the propriety of the transaction, intended to proceed with a lawsuit against Respondent, and were concerned about his development of the property. Beth cashed the check because she and Andrew "were not in favor of any lawsuit."

35. On July 7, 2003, Ms. Taylor sent Respondent a letter stating that she represented Beth, as successor trustee, and the Taylors, as Trust beneficiaries, with respect to Respondent's purchase of the Linder property. Ms. Taylor asserted that Respondent had purchased the Linder property for "far less than the fair market value," and indicated that she would file a civil complaint by July 22, 2003, unless she received Respondent's written waiver of the one-year statute of limitation provision. Beth did not consider Ms. Taylor to be her or the Trust's attorney at that time. Sometime thereafter, Beth retained attorney Bart Harwood to represent the Trust.

36. On July 10, 2003, Respondent sent Ms. Taylor a letter, in which he agreed to waive the one-year statute of limitation. Respondent asserted that the "purchase price and terms were fully explored" by Ted and Beth, an appraisal was conducted, and the purchase price represented the appraised value. He stated that the appraisal was conducted at Ted's request and with no involvement from his office. According to Respondent, Ted "honored his verbal commitment to me made years ago that if he ever decided to sale [sic] his land he would afford me first option to purchase the same." He added that "your client sought independent legal counsel prior to the closing, and your client chose to close the transaction even after consulting an attorney."

37. On July 22, 2003, Beth and Andrew sent Ms. Taylor a letter stating that, as co-trustees, they wanted to "withdraw from all proceedings" against Respondent and Berkshire. They wanted to "let the purchase of the Linder property proceed as in the current contract with [Respondent]/Berkshire Development until said property is paid off in full." Beth sent a copy of her letter to Respondent, together with a note that indicated that she and Andrew "refused to sign the paperwork" provided by Ms. Taylor.

38. On September 5, 2003, Mr. Harwood sent Ms. Taylor a letter advising that he had been retained by Beth and Andrew to represent the Trust. He stated that the Trust was not interested in pursuing a claim against Respondent.

39. On or around November 7, 2003, Idaho Independent Bank retained an independent appraiser, Timothy Williams, to appraise the Linder property in connection with a potential commercial loan to Respondent and/or Berkshire for development of a subdivision on the property. On December 10, 2003, Mr. Williams completed his report, which valued the property at $410,000.

40. On or around December 10, 2003, at Respondent's request, Mr. Sherer contacted Beth and asked her to consult her accountant about his calculation of the final payoff amount for the property. Beth testified that she did not have any prior contact with Mr. Sherer and was under the impression that he was simply handling the final payment of the property for Respondent.

41. On January 8, 2004, Respondent finalized a commercial loan for the development of the subdivision. Also on that date, Mr. Sherer hand-delivered a cashier's check to Beth in the amount of $293,848.03, representing Berkshire's final payment on the Linder property. Beth testified that Mr. Sherer explained to her that if she accepted the check, each party would be

forever discharged from any further obligations or responsibilities. Beth testified that she understood that upon delivery and acceptance of the final payment, the Trust and Berkshire would "go their separate ways" and release each other from any liability for alleged wrongdoing.

42. On January 9, 2004, Mr. Sherer, as trustee of the Second Deed, signed a Release and Reconveyance ("First Release") prepared by Respondent. The First Release provided that Mr. Sherer agreed to "remise, release and forever discharge" Respondent and the Trust from all liability or causes of action relating to the Linder property. Beth was not consulted about, and was not aware of, the First Release. Respondent was aware of possible litigation when he prepared the First Release, but admitted that he did not provide a copy of the First Release to Beth or Mr. Harwood and did not know if Mr. Sherer or anyone else suggested that Beth or Mr. Harwood review the First Release. Mr. Sherer testified that he did not have any "stated authority" or good reason to execute the First Release and acknowledged that his duty as trustee of the Second Deed was to "protect" the Trust and beneficiaries. He explained that Respondent intended the First Release to bar any claim the Trust and/or beneficiaries may have against Respondent personally and stated that he considered the First Release to be "surplusage" because the transaction for the sale of the property had already been completed.

43. On January 22, 2004, the Taylors filed a lis pendens against the Linder property. On January 23, 2004, as residual beneficiaries of the Trust, they filed a civil complaint ("Complaint") against Respondent, Colleen and Berkshire, alleging breach of fiduciary duties and negligence. The Taylors alleged that Respondent breached his fiduciary duties as an attorney and real estate broker by acquiring the Linder property for less than fair market value, failing to disclose his conflict of interest, and failing to advise Ted and/or the Trust to seek independent legal counsel regarding the transaction. The Taylors sought at least $600,000 in

compensatory damages, disgorgement of profits, rescission of the transaction, imposition of a constructive trust on the Linder property, and an order quieting title of the Linder property to the Trust.

44. On February 16, 2004, Respondent faxed Mr. Harwood a letter attaching copies of the lis pendens and Complaint. Respondent also attached a proposed mutual release regarding the litigation for Mr. Harwood's consideration, based on Beth's statement that "the trust wanted no involvement with [the Taylors'] lawsuit."

45. On February 18, 2004, Respondent prepared, and Mr. Sherer signed, a second Release and Reconveyance ("Second Release"). The Second Release removed Respondent's name from the Linder property transaction and substituted Berkshire in its place. It also provided that Mr. Sherer, as Trustee, agreed to "remise, release and forever discharge" Berkshire from all liability or causes of action relating to the Linder property.

46. Beth and Mr. Harwood were not consulted about, and were not aware of, the Second Release. Respondent also failed to inform Ms. Sherer that, at the time the Second Release was executed, the Trust was represented by other counsel, a lawsuit against Respondent had been filed, Beth was not aware of either release, and Respondent had attempted, but failed, to obtain a mutual release from the Trust. According to Mr. Sherer, he considered the Second Release to be simply a "ministerial correction," and therefore did not discuss the change with Beth.

47. On February 23, 2004, Respondent filed a Verified Answer and Counterclaim, asserting the following affirmative defenses: (1) failure to state a cause of action; (2) proper venue was Canyon County based on the EMA and Addendum; (3) Plaintiffs lacked standing; (4) the EMA required the parties to submit the controversy to binding arbitration; (5) the Taylors'

demand for jury trial should be dismissed consistent with the EMA waiver; (6) lack of consideration; (7) lack of contractual privity; (8) doctrine of laches because the lis pendens and Complaint were not filed until after the purchase price was paid; (9) doctrines of equitable estoppel and/or quasi-estoppel; (10) failure to mitigate alleged damages; (11) doctrine of unclean hands; (12) the Release(s) were binding upon the Taylors; and (13) accord and satisfaction. Respondent also asserted the following counterclaims: (1) tortious interference with contract; (2) tortious interference with prospective economic advantage and/or opportunity; (3) slander of title; (4) wrongful cloud on title; (5) civil conspiracy; (6) breach of contract; (7) equitable estoppel; (8) quasi-estoppel; and (9) breach of good faith and fair dealing. Respondent also filed a Motion for Change of Venue, Motion to Dismiss, Motion to Compel Arbitration Order and Motion to Strike Plaintiffs' Demand for Jury Trial.

48. On February 24, 2004, Respondent faxed Mr. Harwood a letter asking him to coordinate a meeting with Mr. Harwood, himself, and Beth and Andrew, as co-trustees, to discuss the Taylors' lawsuit and the proposed mutual release. Mr. Harwood informed Respondent that the mutual release would not be signed, that the Trust would attempt to distribute all of the assets, and that Beth and Andrew planned to resign as co-trustees.

49. On March 15, 2004, Respondent filed a Motion to Dismiss the Taylors' action based on lack of standing. On April 12, 2004, the district court advised the Taylors that their case would be dismissed unless they joined the co-trustees in the lawsuit by April 19, 2004. The co-trustees were not joined by the deadline, and the district court dismissed the case in its entirety. The court's Order of Dismissal was subsequently amended to retain Respondent's counterclaims against the Taylors. On June 4, 2004, the Taylors appealed the Order of Dismissal to the Idaho Supreme Court.

50. On June 10, 2004, Beth and Andrew resigned as trustees, effective immediately, and nominated the Taylors as co-successor trustees.

51. On July 21, 2004, the Taylors, as trustees on behalf of the Trust, filed a new action against Respondent, Berkshire, and Respondent's real estate company for breach of fiduciary duties and negligence. On August 3, 2004, Respondent faxed Ms. Taylor and Mr. Harwood a Subpoena Duces Tecum for Beth, and a notice setting her deposition on August 11, 2004. Ms. Taylor's firm requested that Respondent vacate and reschedule the depositions of Beth and other trust beneficiaries because Ms. Taylor was unavailable until September 2, 2004. Mr. Harwood informed Respondent that Beth would attend her scheduled deposition. After Respondent refused to reschedule the depositions, Ms. Taylor's firm filed a Motion for Protective Order and sent Respondent a letter contending that the depositions should be rescheduled until after the August 16, 2004 hearing on the Motion for Protective Order.

52. On August 11, 2004, Respondent deposed Beth on behalf of Berkshire and Colleen. Attorney Phillip Collaer appeared for Respondent in his capacity as a realtor/broker, and attorney Jack Gjording appeared for Respondent in his capacity as attorney. Beth was not represented by counsel at the deposition because, consistent with Beth's instruction, Mr. Harwood agreed not to attend. During the deposition, Respondent asked Beth about a number of issues regarding the Linder property transaction and the ensuing lawsuit, including:

(1) Questions about Beth's discussions with Mr. Wishney regarding the Linder property sale. Respondent advised Beth that "all the detail" she could remember about her discussions with Mr. Wishney "would be helpful for us on the record." Respondent specifically asked Beth whether there was any discussion with Mr. Wishney about a

breach of fiduciary duty or "any areas of unprofessionalism by the law offices of [Respondent]";

(2) Whether Beth believed that Respondent had breached any fiduciary duty owed to the Trust or Ted during the time that Beth acted as co-trustee in August and September 2002;

(3) Whether Ms. Taylor indicated to Beth during their conversations what areas of malpractice or professional negligence Ms. Taylor believed were committed in the Linder property transaction;

(4) Beth's "understanding of how this lawsuit is going to be divided up" in the event any wrongdoing was established; and

(5) Whether Beth was aware of Respondent's counterclaim and whether there was "ever any discussion between the beneficiaries" about that counterclaim. Respondent specifically asked Beth whether the Taylors had made any statements about the "merits" and "appropriateness" of his counterclaim.

53. On August 12, 2004, Respondent filed a Motion to Consolidate the two cases.

54. After the August 16, 2004 hearing on the Motion for Protective Order, the district court vacated the remaining August depositions and ordered that Respondent coordinate with Ms. Taylor to reschedule the depositions in September 2004.

55. On or around September 6, 2004, Respondent filed an Amended Answer and Counterclaim, asserting that the Taylors' action was barred by the Release and/or the Second Release.

56. On September 29, 2004, the district court entered an Order consolidating the two cases against Respondent.

57. On October 20, 2004, Respondent filed a Motion to Dismiss/Motion for Summary Judgment and a supporting Memorandum and Affidavit. Respondent asserted that the Trust was barred from pursuing the action because the Trust Agreement prohibited the assignment and/or appointment of successor trustees and the co-trustees failed to follow the prescribed statutory requirements for their appointments. Alternatively, Respondent asserted that he was entitled to summary judgment on the negligence and breach of fiduciary duties claims because no duty was owed and no breach of any standards of care could be established. According to Respondent, he advised Ted to seek independent counsel, the Trust received independent legal counsel prior to closing, and Respondent did not act as attorney for Ted and/or the Trust at any time after May 31, 2002. Respondent also sought summary judgment on the equitable claims of rescission and constructive trust because the Trust accepted final payment for the Linder property and the releases executed by Mr. Sherer "settled the rights and obligations of each party."

58. On November 15, 2004, the Taylors filed a Petition for Appointment of Trustees in Ada County, based on Beth and Andrew's June 10, 2004 resignation. On November 17, 2004, Magistrate Judge Bieter entered an Order appointing the Taylors as co-successor trustees for the Trust, effective retroactively to June 10, 2004. Also on November 17, 2004, Respondent filed a Demand for Notice & Verified Objection to Petition for Appointment of Trustees. On November 22, 2004, Respondent filed a Motion to Set Aside Order Dated November 17, 2004 and/or Motion to Re-Consider [sic] based on the Taylors' failure to provide notice of their Petition for Appointment.

59. On February 28, 2005, Respondent filed a second Demand for Notice & Verified Objection to Petition for Appointment of Trustees.

60. On April 18, 2005, Judge Bieter entered an Order Setting Aside Order for Appointment of Trustees. Also on that date, the Taylors filed an Amended Petition for Appointment of Trustees. On May 2, 2005, Judge Bieter entered an Order appointing the Taylors as co-successor trustees, but denied their request to be appointed retroactively.

61. On May 13, 2005, the Taylors filed a Motion for Summary Judgment. In a supporting memorandum, they stated that Respondent had substituted the Reconveyance signed by Beth and Andrew at closing with the Second Deed naming Mr. Sherer as trustee. The Taylors noted that Beth was not aware of and had not been consulted about the Second Deed, which was "drastically different" from the Reconveyance because it purported to release "all claims whatsoever relating to the purchase." They stated that Beth was also not aware of nor consulted about the Release or Second Release, which were executed without the Trust's knowledge or permission and therefore could not be pled as an affirmative defense by Respondent.

62. On June 6, 2005, Respondent filed a Reply Brief to the Motion for Summary Judgment. He asserted that there was no attorney-client relationship between the Trust and him after June 2002, and that any "irregularities" in the real estate documents were cured by Beth and Andrew's acceptance of the full payment of the purchase price in January 2004.

63. On July 28, 2005, the district court entered a Memorandum Decision and Order dismissing the Taylors' rescission claim and their claims against Maile as a real estate broker. The constructive trust claim and the Taylors' claims against Respondent as an attorney survived. The court noted that the Taylors alleged that Respondent had a conflict of interest because, as a lawyer, he was "supposed to help the Trust get the best price for its land." However, as a purchaser, Respondent "wanted to get the land for the lowest possible price." With respect to Respondent's claim that no attorney-client relationship existed between him and the Trust at the

time of the purchase, the Court stated that Respondent "never did formally terminate the relationship" and therefore there was a material issue of fact about the existence of an attorney-client relationship. The court also found there was a material issue of fact regarding whether Respondent properly advised Ted and/or the Trust to seek independent legal counsel and breached the necessary standard of care.

64. On September 7, 2005, Respondent filed a Verified Amended Answer and Counter-Claim and Demand for Jury Trial asserting the following affirmative defenses: (1) the Taylors' claims were based on the EMA; (2) failure to join indispensable parties; (3) doctrine of laches; (4) equitable estoppel and/or quasi-estoppel; (5) failure to mitigate; (6) doctrine of unclean hands; (7) the binding releases barred the claims; (8) accord and satisfaction; and (9) lack of standing. Respondent also asserted the following counterclaims: (1) tortious interference with contract; (2) tortious interference of prospective economic advantage and/or opportunity; (3) slander of title; (4) wrongful cloud of title; (5) civil conspiracy; (6) breach of contract; (7) equitable estoppel; (8) quasi-estoppel; (9) breach of good faith and fair dealing; (10) fraudulent conveyance; (11) unjust enrichment; (12) indemnification agreement among trustees; (13) breach of peace and quiet enjoyment; (14) breach of warranty deed; and (15) continuing tort.

65. On September 28, 2005, the Taylors filed an Amended Complaint, asserting negligence and breach of fiduciary duties and seeking the following relief: (1) judgment against Respondent for compensatory damages for the difference between the $400,000 purchase price and the fair market value of the Linder property; (2) disgorgement of profits; (3) rescission of sale and return of the Linder property to the Trust beneficiaries; (4) imposition of a constructive trust pending resolution of the litigation; (5) an order quieting title to the Linder property in the Trust; (6) pre- and post- judgment interest; and (7) costs and attorney fees.

66. On October 3, 2005, the Taylors filed an Amended Motion for Summary Judgment. On October 7, 2005, Respondent filed a Renewed Motion for Summary Judgment, seeking an order dismissing the professional malpractice claim.

67. On November 7, 2005, the district court entered a Judgment granting summary judgment in favor of Respondent on all claims brought against him in his capacity as a real estate broker.

68. On November 14, 2005, Respondent filed a Memorandum in support of his Motion in Limine to exclude certain expert witness testimony regarding the terms of the EMA and Addendum. He noted that he had waived the one-year statute of limitation and the case was set for jury trial in Ada County. He added that he was "no longer asserting the defense of Release and Reconveyance" and explained in a footnote that it was his position that the affirmative defense of accord and satisfaction "achieves the same result anyway."

69. On December 23, 2005, the Idaho Supreme Court reversed in part, and affirmed in part, the district court's decision ("Taylor I"). In its Opinion, the Court stated that I.R.C.P. 17(a) did not require dismissal, since the rule did not expressly prohibit trust beneficiaries from bringing a cause of action against a third party, particularly where the trustee declined to protect the beneficiaries' interests. The Court stated that the professional malpractice claim was correctly dismissed, "because no attorney-client or broker-client relationship existed between the Taylors and [Respondent]." The Court determined that the Complaint alleged sufficient support to find standing "to pursue a claim against [Respondent] for acquisition of trust property with knowledge of a potential breach of trust by, or conflict of interest on the part of, the trustees." The Court noted that Respondent purchased the Linder property for $400,000, despite Respondent's advice to the Trust and Ted, as trustee, to reject the Witte offer for the same

amount two months earlier. The Court stated that it was "reasonable to infer" that Ted was aware that the Linder property was valued at over $400,000, and that Beth and Andrew were aware of the Taylors' objections to the sale. The Court stated that as trustee, Ted had a fiduciary duty to the Trust beneficiaries, and that his agreement to transfer the Linder property "for substantially less than its fair market value" would violate that duty. The Court noted that there was "no indication in the record" that Beth and Andrew "carefully examined the sale transaction" to determine whether $400,000 was the property's fair market value, or that they acted with "due regard to their obligations as fiduciaries in proceeding with and consummating the sale." The Court further noted that there was no indication in the record that Beth and Andrew obtained the necessary court approval for the transaction, and added that "one could reasonably infer that they did not, since the sale occurred just one week after Mr. Johnson's death." The Court held that because the Taylors alleged that Respondent was aware of "all of the facts because of Respondent's position as attorney and realtor for both parties and purchaser of the property," Respondent and his wife were not "bona fide purchasers for value." The Court also held that the Taylors "sufficiently alleged a claim against Respondent for relief, including imposition of a constructive trust, for aiding the trustees in disposing of trust property in violation of their fiduciary responsibilities and receiving the property with knowledge of the same."

70. On February 13, 2006, the Taylors filed a Motion for Summary Judgment on Beneficiaries' Claim, seeking summary judgment on the constructive trust claim and an order quieting title in the Linder property. In a supporting memorandum, the Taylors asserted that there was an "undisputed conflict of interest" between the Trust's residual beneficiaries and Beth, since she was one of only a few beneficiaries entitled to receive her share of the Trust

corpus immediately. The Taylors stated that because Respondent drafted the initial Trust agreement, he was aware that Beth was both a successor trustee and a beneficiary who would benefit from the immediate sale of the Linder property.

71. Also on February 13, 2006, the district court entered an Order regarding the Taylors' Motion for Summary Judgment on Respondent's counterclaims and affirmative defenses. The court granted summary judgment on the following counterclaims: (1) tortious interference with contract; (2) tortious interference with prospective economic advantage; (3) slander of title; (4) wrongful cloud of title; (5) civil conspiracy; (6) breach of contract; (7) good faith and fair dealing; (8) breach of peace and quiet enjoyment; (9) breach of warranty deed; and (10) continuing tort. The court denied summary judgment on the following counterclaims: (1) equitable estoppel and quasi-estoppel; (2) fraudulent transfer of Trust corpus; and (3) unjust enrichment. The court denied the Taylors' motion to strike the following affirmative defenses: (1) laches; (2) failure to mitigate; and (3) unclean hands. With respect to Respondent's assertion that the Release and/or Second Release barred any tort claims brought on behalf of the Trust, the court stated that the terms of the purchase agreement did not bar the Taylors' claim that Respondent breached his fiduciary duty.

72. On March 9, 2006, the district court granted the Taylors' motion to amend their Complaint in accordance with the Idaho Supreme Court's decision. The Amended Complaint contained a single cause of action alleging that Respondent aided the trustees in disposing of the Linder property in violation of his fiduciary duties, and received the Linder property with knowledge of such violation, including knowledge that the sale had not been court-approved as required by I.C. § 18-108(b). According to the Taylors, Beth's decision as co-trustee to close the sale of the Linder property involved a conflict of interest which required court approval of the

transaction, because Beth (an income beneficiary) would benefit from the sale of the Trust corpus (the Linder property), to the detriment of the Taylors (residual beneficiaries).

73. On May 15, 2006, the district court entered an Order Granting Plaintiff's Motion for Summary Judgment on Beneficiaries' Claim. The court found that Beth's "dual role as trustee and beneficiary created a conflict of interest as a matter of law." The court further found that the scope of Beth's power subject to judicial oversight included not only her power to enter into a contract for the sale of the Linder property, "but also the power to close a sale of real property." According to the court, Beth's conflict of interest "necessitated prior court approval of the closing of the sale," and that, without such approval, the transaction was void as a matter of law. The court found that Respondent had "actual knowledge that [Beth and Andrew] were exceeding or improperly exercising their powers as a matter of law," and noted that Respondent had prepared the trust agreement which created the conflict of interest. Accordingly, the court granted the Taylors' motion for summary judgment, and ordered that the Linder property be held in constructive trust for the benefit of the Trust. The ruling did not decide Respondent's counterclaim for unjust enrichment.

74. On May 30, 2006, Respondent filed a Motion to Reconsider, on the ground that the Taylors never raised the issue of whether the transaction was void and therefore the evidentiary record was incomplete.

75. On June 7, 2006, the district court entered its Judgment on Beneficiaries' Claims ("Judgment"), which provided the following: (1) the EMA and all subsequent documents relating to the Linder property transaction were "void as a matter of law"; (2) title to the Linder property was quieted to the Trust in fee simple; and (3) Respondent's remaining counterclaims and affirmative defenses, all of which were based on equitable claims or assertions that the

Taylors wrongfully interfered with Respondent's right to possess the Linder property, were dismissed.

76. Thereafter, Respondent filed a Motion to Amend Judgment and/or Motion to Reconsider and objections to the Judgment. On June 20, 2006, the district court denied that motion. The court noted, however, that Respondent's objections to the Judgment were "well taken," and found that the issue as to what offset, if any, Respondent was entitled to claim against the $400,000 purchase price remained to be litigated. Specifically, Respondent had counterclaimed on the ground of unjust enrichment based upon his development of the Linder property into seven lots during the litigation, which he estimated was now valued at approximately $633,900 (determined by subtracting the current raw value from the current developed value).

77. On July 21, 2006, the district court entered a Memorandum Decision and Order clarifying that Respondent's unjust enrichment claim was not dismissed and that the constructive trust returned the Linder property to the Trust, quieted title of the property in favor of the Trust, and required the Trust beneficiaries to return the $400,000 purchase money less any amounts Respondent may prove in his counterclaim for unjust enrichment.

78. On November 29, 2006, the district court entered a Memorandum Decision and Order, denying Respondent's claim for damages based on the theory of unjust enrichment. The court stated that it had previously ruled that the Linder property transaction was void:

> [B]ased on the fact that [Respondent] himself had drafted the documents effectuating the sale of the property to himself, and he had drafted the Trust documents that created the conflict of interest between Beth Rogers as co-trustee and beneficiary. [Respondent] was not a good faith purchaser without notice of the Trustees' violation of her fiduciary duties to the Trust.

The court continued by stating:

> [There was] evidence in the record to support [Respondent's] claim that the property really was worth only $400,000 at the time he purchased it from the Trust including the unsolicited offer to purchase the property for exactly that amount and an independent appraisal obtained by Mr. Johnson which also said the property was worth $400,000. On the other hand, [Respondent] also knew that the property might be worth considerably more than $400,000 at the time he offered to purchase it for this amount. In any event, [Respondent] apparently thought it would be a good buy at $400,000. In hindsight, [Respondent's] professional judgment, which he had a duty to exercise for the benefit of his client, may have been obscured by his personal desire to take advantage of what he believed to be an attractive business transaction. [Respondent] should have advised Mr. Johnson to seek independent advice about selling him the land for $400,000. Indeed, [Respondent] testified at trial that he did exactly that. The Court is not persuaded that [Respondent] so advised Mr. Johnson.

The court further stated:

> [There was] also ample evidence in the record to support the contention that [Respondent] engaged in sharp practices in drafting the documents connected to the transaction. For example, [Respondent] included a clause in the contract that would have barred any cause of action against himself after only one year. This is an unusual deviation from the statutory limitation on causes of action in this type. [Respondent] claimed that this was a scrivener's error; however, this claim is belied by the fact that he pled it as an affirmative defense in this lawsuit. This is the type of self-dealing that has led to the claim that [Respondent] has unclean hands and should not be granted any equitable relief.

The court stated, however, that Respondent's counterclaim could be decided on its merits, "without proclaiming that [Respondent] is barred from seeking equitable relief based on the doctrine of unclean hands." The court found that the Trust was not unjustly enriched by Respondent's expenditures after the transaction, since those expenditures did not increase the value of the property or confer any benefit upon the Trust, the trustees or the beneficiaries. The court found that the property's fair market value was the same regardless of the expenditures, and again ordered the Trust to pay Respondent the $400,000 purchase price.

79. On December 11, 2006, the district court entered a Judgment denying Respondent's counterclaim for unjust enrichment. Also on that date, Respondent filed a Motion to Amend and/or Reconsider the November 29, 2006 Order because it did not address the issue of approximately $80,000 in pre-judgment interest from September 2002 through October 2006.

80. On December 21, 2006, Respondent appealed from the district court's judgments.

81. On April 6, 2007, the district court entered an Order denying Respondent's request for pre-judgment interest. Also on that date, the court granted the Taylors' request for approximately $12,500 in costs. On May 7, 2007, the July 1, 2006 Order was amended to reduce the purchase price by the assessed costs.

82. On May 10, 2007, the district court entered a Second Amended Judgment on Beneficiaries' Claims as follows: (1) the closing of the sale and the Linder property sale contract as a whole were void as a matter of law; (2) the Linder property was currently being held in a constructive trust for the benefit of the Trust; (3) title to the Linder property was quieted in favor of the Trust; (4) Berkshire was entitled to repayment of the $400,000 purchase price less assessed costs; and (5) Respondent's unjust enrichment counterclaim was denied.

83. On December 31, 2007, Respondent and Berkshire filed a civil action against the Trust, the Taylors, Connie Taylor and her law firm (hereinafter referred to as "the Berkshire case") on the following grounds: quiet title, constructive trust, tortious interference with contract, tortious interference with prospective business advantage, abuse of process, negligence, negligence per se, gross negligence, equitable estoppel, quasi estoppel, criminal racketeering, and judicial estoppel.

84. Thereafter, the Taylors and Connie Taylor's firm individually filed motions for summary judgment in the Berkshire case based on res judicata and collateral estoppel. They also

counterclaimed for slander of title, abuse of process, and intentional interference with a prospective economic advantage.

85. On January 30, 2009, the Idaho Supreme Court issued its Opinion in Taylor II, which affirmed the district court's grant of summary judgment to the Taylors on the claim of professional negligence against Respondent. The Idaho Supreme Court held that since Beth had a conflict of interest because she was both a trustee and a beneficiary, the district court was correct that the trustee's power to close a land sale was subject to judicial oversight pursuant to Idaho Code §68-108(b) and Taylor I. The Idaho Supreme Court also held that it was uncontroverted that Respondent had knowledge of that conflict of interest since Respondent, acting as Ted's attorney, drafted the Trust that created the various classes of beneficiaries and named Beth as a successor trustee.

86. On July 2, 2009, the district court entered a Memorandum Decision and Order in the Berkshire case. The court determined that Respondent's claims were identical to those pleaded in the prior litigation and that Berkshire had "a full and fair opportunity to present" those claims earlier. Accordingly, Respondent's claims for quiet title, tortious interference with a contract, tortious interference with a prospective business advantage, equitable estoppel and quasi estoppel were dismissed. Respondent's remaining claims were dismissed based on claim preclusion, and his motion for summary judgment on the Taylors' counterclaims was denied. A Judgment consistent with the Memorandum Decision and Order was entered on July 20, 2009.

87. References to the Idaho Rules of Professional Conduct ("I.R.P.C.") below are to the rules of conduct effective on the date of the complained conduct.

COUNT ONE
(Lack of Diligence)

88. Paragraphs 1 through 87 above are hereby realleged and incorporated as if fully set forth herein.

89. The conduct described in paragraphs 1 through 88 above, including, but not limited to, the EMA errors, the First and Second Deeds, the First and Second Releases, and closing the sale of the Linder property without judicial approval, constitutes violations of Idaho Rule of Professional Conduct 1.3 [Lack of diligence].

COUNT TWO
(Conflict of Interest, Failure to Exercise Independent Professional Judgment and Render Candid Advice)

90. Paragraphs 1 through 89 above are hereby realleged and incorporated as if fully set forth herein.

91. The conduct described in paragraphs 1 through 90, including, but not limited to, the Assignment of the EMA from Respondent to Berkshire and the First and Second Deeds, constitutes violations of Idaho Rules of Professional Conduct 1.7(a) [Conflict of interest] and 2.1 [Failure to exercise independent professional judgment and render candid advice].

COUNT THREE
(Conflict of Interest, Failure to Exercise Independent Professional Judgment and Render Candid Advice)

92. Paragraphs 1 through 91 above are hereby realleged and incorporated as if fully set forth herein.

93. The conduct described in paragraphs 1 through 92, including, but not limited to, the EMA between Respondent and Ted, Assignment of the EMA to Berkshire, and closing the sale of the Linder property with Beth, constitutes violations of Idaho Rules of Professional Conduct 1.7(b) [Conflict of interest] and 2.1 [Failure to exercise independent professional judgment and render candid advice].

COUNT FOUR
(Prohibited Transactions)

94. Paragraphs 1 through 93 above are hereby realleged and incorporated as if fully set forth herein.

95. The conduct described in paragraphs 1 through 94, including, but not limited to, the First and Second Releases, constitutes violations of Idaho Rule of Professional Conduct 1.8(h) [A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice under certain conditions are satisfied].

COUNT FIVE
(Conflict of Interest – Former Client)

96. Paragraphs 1 through 95 above are hereby realleged and incorporated as if fully set forth herein.

97. The conduct described in paragraphs 1 through 96, including, but not limited to, the First and Second Releases, Respondent's representation of Colleen and Berkshire in the Taylor litigation, and Respondent's deposition of Beth constitutes violations of Idaho Rules of Professional Conduct 1.9 [Conflict of interest relating to former clients].

WHEREFORE based on the matters alleged above, Plaintiff prays for judgment against Respondent as follows:

That Respondent be suspended from the practice of law; placed upon an appropriate probation; be ordered to pay the costs and expenses incurred in investigating and prosecuting this matter; and such other relief as is deemed necessary and proper.

DATED this 16th day of Dec, 2009.

Bradley G. Andrews
Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of Dec, 2009, I served a true and correct copy of the foregoing **COMPLAINT** upon the following by U.S. certified mail, return receipt requested, to the Respondent's last known address as filed with the Idaho State Bar:

Thomas G. Maile IV
Law Offices of Thomas G. Maile IV, PA
380 W. State Street
Eagle, ID 83616

Bradley G. Andrews
Bar Counsel

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife,

Plaintiffs,

vs.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION

Defendants.

Case No. CV OC 07 23232

AFFIDAVIT OF COUNSEL IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

STATE OF IDAHO)
) ss.
County of Nez Perce)

CONNIE TAYLOR, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law within the state of Idaho and a member of Clark and Feeney, attorneys for all Defendants in the above entitled matter. The information contained herein is of my own personal knowledge.

2. I am attaching hereto true and correct copies of the following documents:

a. ***Exhibit A*** is the *Order Denying Defendants' Motion for Foreclosure of Vendee's Lien and Denying Plaintiffs' Motion for Sanctions* entered by the trial court on March 15, 2010 in *Taylor v. Maile,* Ada County Case No. CV OC 04 00473D, as well as the Affidavit of Greg Charlton and the letter from Virgil Garland to which the Court referred in its order.

b. ***Exhibit B*** is a true and correct copy of the testimony of John Woods at the October 11, 2006 trial of Mailes' unjust enrichment claim in *Taylor v. Maile.*

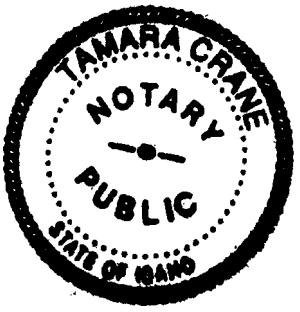
c. ***Exhibit C*** is a true and correct copy of the Memorandum Decision & Order dated July 28, 2005 filed in the *Taylor v. Maile,* Ada County Case No. CV OC 04 00473D.

d. ***Exhibit D*** is a true and correct copy of the April 14, 2004 correspondence from me to Bart W. Harwood.

DATED this 28th day of April, 2010.

Connie Taylor

SUBSCRIBED AND SWORN to before me this 28th day of April, 2010.



Tamara Crane
Notary Public in and for the State of Idaho.
Residing at Grangeville therein.
My commission expires: 03/06/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of April, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mr. Christ Troupis Attorney at Law PO Box 2408 Eagle, ID 83616	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 938-5482***

Connie W. Taylor
Attorney for Defendants

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs/Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/Counter-Claimants.

THEODORE L. JOHNSON REVOCABLE TRUST,

Plaintiff,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC,

Defendants.

Case No. CVOC 0400473D

ORDER DENYING DEFENDANTS' MOTION FOR FORECLOSURE OF VENDEE'S LIEN AND DENYING PLAINTIFFS' MOTION FOR SANCTIONS

This matter came before the Court on the Defendants' Motion for Foreclosure of Vendee's Lien and on Plaintiffs' Motion for Sanctions. The Court heard oral argument on December 14, 2009. Connie Taylor appeared for the Plaintiffs and Christ Troupis appeared for the Defendants. At

EXHIBIT A
001614

the hearing, the Court expressed approval that Defendants had obtained outside counsel and provided time for Mr. Troupis to familiarize himself with this litigation. The Court allowed Plaintiffs thirty days to supply evidence in support of the argument that they are unable to secure a loan against the Property and allowed Defendants thirty days to respond to such evidence. Finally, the Court encouraged the parties to work together toward a resolution of this matter and ordered the parties to meet and confer by February 19, 2010. The Court considered the matter fully under advisement on February 19, 2010.

Thomas Maile was Theodore L. Johnson's attorney. Maile's representation included drafting the trust agreement for the Theodore L. Johnson Revocable Trust, overseeing the administration of the trust, and representing the estate after Johnson's death. The underlying transaction in this case is a land sale between Johnson, then trustee and settlor of the trust, and Maile. Maile and Johnson entered into an earnest money agreement for the purchase of forty acres in Eagle, ID, which Maile had previously advised Johnson not to convey to a third party. The purchase price was $400,000 and the Property was conveyed by the successor trustee after Johnson passed away. Beneficiaries of the trust brought suit.

On July 21, 2006, the Court held that the land sale was void pursuant to Idaho law and ordered the land be returned to Plaintiffs and the purchase money be returned to Defendants. The Idaho Supreme Court upheld this Court's judgment on January 30, 2009. On December 31, 2007, Maile filed a new complaint against the beneficiaries and their attorneys, once again contesting ownership of the Property. Maile filed a second *lis pendens* on May 25, 2008. On July 2, 2009, the Honorable Judge Richard Greenwood dismissed all of Maile's claims under the doctrines of issue and claim preclusion. On November 6, 2009, the Idaho Supreme Court entered its Order Denying

Motion for Permissive Appeal. In that litigation, the beneficiaries' counterclaims remain to be resolved. Defendants have indicated an intention to appeal Judge Greenwood's ruling dismissing Maile's claims at the conclusion of that litigation.

On May 7, 2009, the Court entered an Order Denying Motion to Compel Payment of Judgment and Interest, holding that it was the intention of this Court in its July 21, 2006 order to void the underlying transaction returning all parties to the position they had been in prior to the transaction and that because the Property had not been returned free of encumbrance, it was not the time to order a return of the purchase money. On August 3, 2009, Defendants filed a release of the May 2006 *lis pendens* and filed a notice of vendee's lien on the Property. Subsequently, Plaintiffs sought an order releasing Defendants' vendee's lien. On October 14, 2009, the Court denied Plaintiffs' motion for an order releasing Defendants' vendee's lien, holding that as a matter of equity, Defendants are entitled to maintain a lien against the Property to secure the return of the purchase price.

At this time, Defendants seek an order foreclosing the vendee's lien, contending that judgment has been entered in favor of Defendants but that Plaintiffs have made no effort to satisfy that judgment. Plaintiffs counter that continuing litigation constitutes a cloud on the title which prevents Plaintiffs from obtaining a loan secured by the Property to satisfy the judgment.

Plaintiffs have provided evidence which indicates that Plaintiffs have contacted at least two financial institutions with the intention of obtaining a $400,000 loan secured by the Property and that Plaintiffs have been denied such a loan as a result of the pending motion to foreclose vendee's lien and the pending suit before Judge Greenwood. The Court finds that it is Defendants' actions which prevent Plaintiffs from satisfying the judgment at this time. Defendants' attempt to enforce

this Court's judgment, while simultaneously attempting in a collateral proceeding to challenge that judgment, is disingenuous. The Court has previously held that Defendants are entitled to a return of the purchase price. Further, the Court finds that the continued existence of the vendee's lien filed August 3, 2009 is sufficient to secure the return of the purchase price. The Court will not enter an order foreclosing the vendee's lien while there is pending litigation between these parties challenging the title of the Property. Defendants' Motion for Order Foreclosing Vendee's Lien is DENIED.

Plaintiffs request that the Court sanction Defendants for bringing this motion to foreclose, arguing that the motion is frivolous. Idaho Rule of Civil Procedure 11(a)(1) states in pertinent part:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The standard of review for an appellate court reviewing a trial court's decision whether to impose sanctions is one of abuse of discretion. *Gubler v. Brydon,* 125 Idaho 112, 113-14, 867 P.2d 986, 987-88 (1994). "The power to impose sanctions under this rule is exercised narrowly, focusing on discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit." *Kent v. Pence*, 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct. App. 1989). "'Reasonableness under the circumstances' is the appropriate standard to apply under I.R.C.P. Rule 11." *Riggins v. Smith*, 126 Idaho 1017, 1021, 895 P.2d 1210, 1214 (1995). "When determining whether Rule 11

sanctions should be imposed, the trial court must only consider the attorney's conduct in the filing of pleadings, motions or other papers." *Id.*

Defendants paid $400,000 for the Property in January 2004. The Court has voided the land sale and ordered repayment of the purchase price. Defendants have made repeated requests for satisfaction of judgment. Prior to this motion, there is no evidence in the record to support a finding that Plaintiffs were unable to satisfy the judgment. Plaintiffs' efforts to determine the value of the Property and to obtain a loan against the Property appear to have resulted from this motion. Therefore, the Court finds that Defendants' motion to foreclose the vendee's lien is not without a basis in law or fact and was reasonable under the circumstances. Plaintiffs' motion for sanctions is DENIED.

IT IS SO ORDERED.

Dated this 9th day of March, 2010.

Ronald J. Wilper
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 11 day of March, 2010, I caused a true and correct copy of the foregoing ORDER DENYING DEFENDANTS' MOTION FOR FORECLOSURE OF VENDEE'S LIEN AND DENYING PLAINTIFFS' MOTION FOR SANCTIONS to be served by the method indicated below, and addressed to the following:

Connie Taylor
1229 Main Street
P.O. Drawer 285
Lewiston, ID 83501

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Christ Troupis
1299 E. Iron Eagle, Ste. 130
P.O. Box 2408
Eagle, ID 83616

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk

CONNIE W. TAYLOR
CLARK and FEENEY
Attorneys for Plaintiffs
1229 Main Street
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516
ISB No. 4837

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR, Plaintiffs/Counter-Defendants, vs. THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC, Defendants/Counter-Claimants.	Case No. CV OC 0400473D AFFIDAVIT OF GREG CHARLTON
THEODORE L. JOHNSON REVOCABLE TRUST, Plaintiff, vs. THOMAS MAILE, IV and COLLEEN, MAILE, husband and wife, and BERKSHIRE INVESTMENTS, LLC, Defendants.	

STATE OF IDAHO)
) ss.
County of Ada)

Greg Charlton, being first duly sworn upon oath, deposes and says:

1. I am a Senior Vice President of Idaho Independent Bank, and have held that position for _10____ years. I have been engaged in the banking profession for _40____ years, and have many years of experience in the processing of commercial and real property loans.

2. Idaho Independent Bank has received an inquiry from John Taylor about the possibility of extending a loan for approximately $400,000. In conjunction with that inquiry, I was informed of the following:

A. That the loan would be secured by 40 acres of unimproved real property near Eagle, Idaho which is owned by the Johnson Trust.

B. That the property is encumbered by a vendee's lien in the amount of $400,000 less any costs and interest awarded, and that there is a pending motion to foreclose on that lien.

C. That there is a second lawsuit pending relating to the ownership of the property.

3. Based upon the facts as represented, Idaho Independent Bank would not consider making a loan on this property.

DATED this _12____ day of January, 2010.

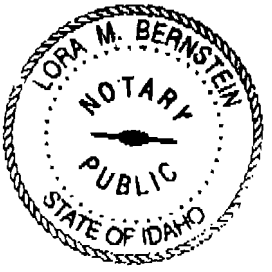
Greg Charlton

Greg Charlton

SUBSCRIBED AND SWORN to before me this 12 day of January, 2010.

Lora M Bernstein

Notary Public in and for the State of Idaho.
Residing at Boise Idaho therein.
My commission expires: 4/24/2010



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2010, I caused to be served a true and correct copy of the above document by the method indicated below, and addressed to the following:

Thomas G. Maile Attorney at Law 380 W. State Eagle, ID 83616	Christ Troupis Attorney at Law PO Box 2408 Eagle, ID 83616	U.S. Mail Hand Delivered Overnight Mail XX Telecopy (FAX)

Connie W. Taylor
Attorney for Plaintiff

perfect fit bank.

January 12th, 2010

Mr. John Taylor
P.O.Box 538
Lewiston, Idaho 83501

Dear John,

Thank you for your inquiry regarding acquisition and real estate development loans with Sterling Savings Bank.

It is with regret that I inform you that, at the present time Sterling Savings Bank has a moratorium on making real estate development loans (commercial or residential real estate), as well as bare land loans, or non-owner occupied commercial real estate loans, given our portfolio mix and current economic conditions.

It is my understanding that the property discussed has been in litigation for a number of years. That fact would cause additional concerns which would be an impediment to obtaining financing.

Sincerely,

Virgil R. Garland
V.Pres./Commercial Banker

STERLING SAVINGS BANK

sterlingsavingsbank.com

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A. Yes.
Q. There is no indication, in the record, that Mr. Maile said, wait Ted, you told me you would sell me this property. So I want to purchase the property, and you shouldn't sell it to Franz Witte?
A. No. I don't recall reading anything like that.
Q. So, in fact, the evidence would tend to support the claim that he did not try to enforce the verbal discussion that they had had; correct?
A. I assume so.
MR. CHARNEY: No further questions.
THE COURT: All right. May the witness be excused?
MS. TAYLOR: Yes, Your Honor.
MR. CHARNEY: Yes, Your Honor.
THE COURT: Thank you, Mr. Grober.
THE WITNESS: Thank you, Judge.

(The witness left the stand at 11:54 a.m.)

THE COURT: Are you ready to call your next witness? We can take a five-minute break, if you like.
MS. TAYLOR: A break would be great.
THE COURT: Okay. Let's take five, and then you

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can call your next witness. Are we still on track to end by 2:00, do you think?
Ms. Taylor?
MS. TAYLOR: Pardon?
THE COURT: Do you think we're still on track to finish by 2:00?
MS. TAYLOR: I believe so, yes.
THE COURT: And, Mr. Charney, do you have a rebuttal witness?
MR. CHARNEY: Currently, yes. We'll discuss it.
THE COURT: Okay.
MR. CHARNEY: Thanks.

(Recess taken 11:54 a.m. to. 12:02 p.m.)

THE COURT: Please be seated.
Ms. Taylor, are you ready to call your next witness?
MS. TAYLOR: We are, Your Honor. We call John Wood.

JOHN WOOD,

called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

BY MS. TAYLOR::
Q. Would you please state your name.
A. John Wood.
Q. Would you spell your last name.
A. W-O-O-D.
Q. Mr. Wood, where do you reside?
A. At 3390 Flint Drive, Eagle, Idaho.
Q. And how are you employed?
A. I work for a corporation called Park Hampton LLC.
Q. What position do you hold with Park Hampton?
A. Land acquisition and development services, in bringing the projects through the cities.
Q. And what, specifically, are your duties at Park Hampton LLC?
A. Coordinating with the engineers, the surveys, the applications to the City, and also presenting to the City, and getting the properties ready for development, to be sold to the open market.
Q. And does Park Hampton own any properties in the Eagle area?
A. It owns approximately -- about a hundred and -- just shy of 100 acres.

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Q. What stage of development is this land in?
A. All of them are in final plat. Some of them have been sold over the last year, which was Covenant Hill, off of Eagle. It was a joint effort with Hillview Development.
Q. How does the property Park Hampton already owns compare geographically to the Linder Road property?
A. It's all within the -- as the City would call it, is the mile -- the expansion mile property.
We have -- currently we have the property -- 16 acres of commercial, right across from the new Eagle Island State Park, that we've been working with the Parks Department and the State of Idaho, with the Governor's office, for the new entrance for Eagle Island State Park.
This land continues, goes up. There's about 350 homes behind Eagle High School that is -- some has already been through preliminary plat, some is through final plat.
And it's probably about less than a half mile away, this property.
Q. Mr. Wood, has your LLC made an offer to purchase the Linder Road property from the Johnson Trust?
A. We've -- we've asked to -- to put in an offer. But we have not put in an offer, because of the litigation, and where it stands with the lis pendens and

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the timing of the market of this property.
Q. Okay. Had you previously submitted an offer, through Doug Crandall's office?
A. Yes, we have.
Q. What was the amount offered?
A. 1.8 million.
Q. And that offer did not disclose Park Hampton as the purchaser, did it?
A. Normally, none of the properties that we buy will ever disclose Park Hampton from its initial buying.
Q. Why is that?
A. Because of the price of the land. When we bought it -- Flynn Estates, we had to buy ten 5-acre parcels in order to own the CC and Rs. There was 14 pieces of property. And as people know who is buying it, or actively looking at that, a lot of times the price will change. Whether it's a Wal-Mart coming to town -- you'll never know it is a Wal-Mart until the property has already been bought.
Q. So it's not unusual to make the offer through somebody else?
A. A lot of times. It's always done through attorneys, as a client, attorney-client privilege to -- to be able to make the offer.
Q. If you acquire this property, what would your

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plan be to do with it?
MR. CHARNEY: Objection; relevance.
THE COURT: Well, no. I think it is relevant, under this -- under the context. Go ahead. I'll overrule the objection.
Q. BY MS. TAYLOR: You can go ahead and answer.
A. The plans with this property would be to -- first, to go ahead and get it resurveyed, get the -- find out the water rights and the land use. Right now, in the City of Eagle and the county, this property is dedicated to five acres and above. It's on what they call -- north of Beacon Light and East of Linder, which will all be staying 5-acre parcels.
Then, what we would do is, we would go in and redesign the property. We would -- right now, the current plat is long, pinwheel, narrow lots.
Q. Okay. And there's a copy of that in the notebook up there by you, if you would turn to Exhibit No. 122.

(Witness complied.)

Q. BY MS. TAYLOR: Can you explain to the Court what you mean by your reference to pinwheel lots.
A. If you look the way the lots are designed in

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the front, they're very narrow in the front and very wide lots in the rear. And for long-term marketability, and for the properties to hold their resale value with the market, 5-acre pieces normally are a -- have to be a square, long entrance.
When people drive up the driveway, they like the feel -- of the marketing side is, they like to feel that they have a large piece of land, and a -- where their home sits as a focal point of the land, and not a narrow driveway with fences bordering each side.
Q. Is that the reason why you would have the land replatted?
A. I would immediately have it replatted, and I would make a more of a grand entrance on the front. And redesign the road, and put a loop road in there, and -- except a straight road back, for marketability and for long-term value, to hold its value.
Q. So, in making a determination to offer $1.8 million for this property, did you take into consideration the improvements that have been placed on it up to this point?
A. Basically, the improvements that are on the property right now -- anytime that we buy a piece of property, or if we buy something that has already been preplatted, we take an accountability that we more than

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likely will not use any of those improvements, as -- so that we can know how to maximize our dollars and be able to improve the best value for the land.
Q. So does the offer, as it sits, include additional value because of the improvements?
A. No. It does not.
Q. Is this offer any more than you would pay if it were just raw land?
A. No. It would not.
Q. I would like to have you turn to the photographs that are at Plaintiff's Exhibit No. 133.
To lay a foundation, have you been to this property recently?
A. Yes, I have.
Q. Can you just look through those photos and tell me if they're a true and accurate depiction of the condition of the property?
A. Yes, they are.
Q. Specifically, does the barn that's on the property now add any value to it, for your purposes?
A. No. The preliminary look of the barn, there's no value to it, nor would it be the type of subdivision that would allow that type of barn there.
Q. What is the problem with the barn, as you see it?

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A. The way it sits on the property and, also, it's -- as we all can tell, it's been opened and weathered. And it's just in the wrong placement of the property.
Q. So is there any value to the barn at all?
A. No, there's not.
Q. Will you have to pay to have it removed?
A. Almost all -- like on Flynn Estates, on the parcels down there, that we will put a sign out front and a lot of times we can get people to get the stuff moved off. They'll come in and move the stuff off for materials.
Q. And would you have any objection to Mr. Maile removing this barn?
A. No objection.
Q. Okay. I would like to go back to the road. Is it Park Hamilton's intention to leave the road where it is located?
A. No. We were -- had a tentative with Toothman-Orton, have done an initial sketch. It would be a loop road.
Q. This may be obvious; but if you're replatting, will the existing lateral lines for power and gas, telephone, things like that, be left in place?
A. They will be -- try to be, on the new plat.

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We'll try to keep them, if we can. But more than likely, with new lot lines drawn and new roads, that they will have to be moved, maybe 30 feet one way or 30 feet the other way.
Q. Is -- is your pending offer, will it remain open indefinitely?
A. It will. The only thing that I am worried -- and I believe that most people in this Valley, in Park Hampton, or Capital Development, or anybody, is that, especially in Eagle, like Correnta Bello and Covenant Hill, that the buyers are backing out faster than -- you know, the lots were reserved -- a lot of the lots in the new subdivisions that are on line were reserved nine months, a year ago.
Now that these projects are finished, Covenant Hill's only had five close and Brentabello, I believe had about 20 more builders walk away last week. So, the market is changing fast. It wasn't like it was nine months or a year ago, when you had a piece of property and somebody would come in and buy it.
Q. Is there any possibility that this offer will be withdrawn if the litigation isn't concluded so you can buy it?
A. It depends on the length of the litigation and the -- the climate of the market.

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MS. TAYLOR: I have no further questions.
THE COURT: Mr. Charney, you may cross-examine.

CROSS-EXAMINATION

BY MR. CHARNEY:
Q. Good afternoon, sir. How are you?
A. Good afternoon.
Q. How long have you worked for Park Hampton?
A. For two years.
Q. Where were you prior to that?
A. My family owned -- we still do -- we own 17 body shops in California.
Q. So you have only moved to Idaho in the past two years?
A. Three years.
Q. Three years. I'm sorry.
When this property was sold to Mr. Maile, then, you didn't even live in this area, did you?
A. 2003 is when we first moved up, yes.
Q. Since you have moved here, you have become somewhat familiar with the value of property in this particular area; correct?
A. 90 percent of this area; correct.
Q. The property, as it exits now, is split into lots that are slightly larger than five acres each;

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correct?
A. Correct.
Q. That is consistent with the zoning requirements in this particular area; correct?
A. That's -- yes.
Q. To turn these 40 acres -- it's a little less than 40 acres, but let's call it 40 -- to turn these 40 acres into almost track housing, if you will, would be next to impossible under current zoning laws?
A. It's -- it's totally impossible, yeah.
Q. So the best use that you could make of this parcel, in that area currently, would be 5-acre lots?
A. That -- at this point in time, that's the only thing that is -- and the City of Eagle has been through two comp plan changes, and it's still there.
Q. What steps have you taken to check into the septic requirements that are in this particular area?
A. The septic, I have not checked into.
Q. You have no idea about the septic?
A. I do know that it's 1.8 acres and above, in the City of Eagle.
Q. For a requirement; correct?
A. For a requirement.
Q. You also know that there is not sewer that has been brought out to this particular property yet?

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A. I'm very aware of that.
Q. You don't know anything about the water table problems that currently exist on this 40 acres, do you?
A. The water table that I do have, I have actually -- the water table on State Street, which is down the road from this --
Q. I'm talking about this particular area.
A. Right. This particular area, no.
Q. Okay. You weren't aware of the fact that Mr. Maile actually designed this pinwheel pattern because of the septic requirements and the water table in this area; correct?
A. I -- from my knowledge, I don't believe that there is a water table problem up there.
Q. But you don't know this, do you?
A. No. But a friend of mine owns the property across the street.
Q. So, you are speculating, now, on what some friend of yours told you about the property; correct?
A. Yes.
Q. All right. So, your knowledge --
A. And he's a professional.
Q. So, your knowledge, sir, is you don't know anything about the septic requirements or the water table issues on this particular parcel of property, do you?

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A. No. I do not.
Q. You don't know that Mr. Maile chose the pinwheel design to accommodate the high water table and the septic requirements for this area; correct?
A. No. I do not.
Q. You also don't have any guarantee, from the City, that you, in fact, would be successful in replatting this property to fit the 5-acre lots that you envision would be more saleable?
A. That's false. I've spoken to the City many times on this property.
Q. And they've guaranteed you you could replat it that way?
A. Correct.
Q. Okay. And you've got documentation to back that up?
A. No. But I -- I'm at the City on a biweekly basis.
Q. Okay. Once you replatted this, what would be the value of the lots?
MS. TAYLOR: Objection; relevance, beyond the scope of direct.
MR. CHARNEY: He's talking about he wants to come in and rip this whole thing apart and start from scratch. So, I would like to know why this individual would choose

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to do that as opposed to selling it in its current condition.
THE COURT: I'll overrule the objection.
THE WITNESS: The -- the target market would be about 350 to 450, depending on -- on the lot. The problem, now, anytime that you do a subdivision, say down Beacon Light, now Osprey or any of the others, is your resale.
Q. BY MR. CHARNEY: Okay.
A. Right now, the resale value, the way these are designed, would be very, very tough sales at the current design of it.
Q. But you don't know whether or not somebody would or would not purchase these lots currently, do you?
A. Right now it would be a very tough sale.
Q. You're saying that once you have replatted it, that the lots would be worth anywhere from $350- to $450,000?
A. Correct.
Q. What's the current value of the lots?
A. At the current value, we're probably looking about -- probably the 250, 275. But that is also with improvements which, if you look how long the certain properties are, the fencing and the buffering requirements would eat a ton of that to start out.

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Q. But, nevertheless, you're saying current value of these lots is 250 to 275,000. And if you were successful in replatting, you could sell them for 350 to 450?
A. Correct.
Q. So, roughly about 100,000 more per lot, give or take?
A. Well, the main thing here is -- I think what you're missing is, it's the resale value. You can buy something, but it's to have the people that can build the estate home on the property, so they could get the proper value down the road.
Q. You've made no application, though, to the City, to actually have this replatted; correct?
A. No.
Q. And you don't know where, if you were to replat this into these lots that you envision, the septic would have to be required on each lot; correct?
A. The septic will be required on each lot.
Q. Right. But you don't where, on each lot, the septic would wind up having to go; correct?
A. Well, I've -- I've spent -- I don't want to get exact, but huge amounts of dollars with Toothman-Orton, which is an engineering firm here in town, and all the way up to Floating Feather.

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And just with doing Covenant Hill, next to the middle school up there, we have had no seepage or water issues, anything, from about the high school up north.

Q. Okay. So your view is, you could replat this into squares, as opposed to a pinwheel, and you could get a septic permit for each lot?

A. Unless there was something out there that we did not know.

Q. We'll talk about that later.

MR. CHARNEY: Thank you. No further questions.

THE WITNESS: Thank you.

THE COURT: Now, hang on a second sir. Do you have any redirect examination?

MS. TAYLOR: I don't.

THE COURT: May the witness be excused?

MS. TAYLOR: He may.

THE COURT: All right, sir. You are excused. Thank you.

THE WITNESS: Thank you very much.

THE COURT: And you can just leave those right there. Thanks.

THE WITNESS: Thank you.

(The witness left the stand at 12:21 p.m.)

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THE COURT: And, Ms. Taylor, you may call your next witness.

MS. TAYLOR: Call Terry Rudd.

TERRY RUDD,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TAYLOR:

Q. Would you state your name, please.

A. Terry Rudd, R-U-D-D.

Q. Mr. Rudd, how are you employed?

A. A real estate appraiser.

Q. Can you give the Court the background on your real estate appraisal experience.

A. Well, I started in 1957 for the Forest Service. And, in 1963, I went into business with Mr. Tom Clifton, here in Boise. We had an office here on State Street and one in Lewiston. And we started appraising timberlands, highways, right of ways, power lines.

And, eventually, he retired and I took on another partner and worked, in the '70s, on lands throughout the Idaho, Washington, Idaho, Montana area. Obtained an MAI designation. Kept appraising counties all across the United States; Tennessee, Nashville, Mobile, Alabama, Nebraska, Washington, Oregon, and Idaho.

Then sold that business, in 1988, and went into appraising, with myself and my son, which I've been doing ever since out of my home in Clarkston.

Q. And during the course of that, have you had continuing education?

A. Oh, I've taken 15 to 20 classes. They require -- well, the initial education for the MAI designation was about 200 hours of classroom education, plus demonstration reports and exams. And then, since then, I have been obtaining about 16 to 20 hours per year, as required by all three states, for education.

Q. And what states are you certified in, presently?

A. Idaho, Washington, and Oregon.

Q. Have you also taught continuing education classes?

A. Well, I've taught three different courses; one at the University of Idaho, another for Lewis Clark State College. And the other was a private course that I gave on bell curve appraising.

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Q. Mr. Rudd, are you familiar with the property located on Linder Road that is currently owned by the Johnson Trust?

A. Yes.

Q. How did you first become familiar with that property?

A. Someone from your firm, either yourself or Tom, asked me to appraise the property, which involved a trip to Boise. I went out and inspected the property, with Dallan Taylor. And I contacted realtors, went to the MLS and looked at comparable sales, and then came up with a value determination.

Q. And are -- is the contact with realtors and looking at comparable sales in the MLS the type of information that appraisers normally rely on in forming their opinions?

A. Yes.

Q. Did you prepare an appraisal report as a result of your review of the property?

A. I completed the appraisal. And then I verbally relayed the information to your firm. And then it was requested that I produce a minimal report, which is a restricted use report.

Q. Okay. Do you have that report with you today?

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

REED TAYLOR, DALLAN TAYLOR, and R. JOHN TAYLOR,

Plaintiffs,/ Counter-Defendants,

vs.

THOMAS MAILE, IV and COLLEEN MAILE, husband and wife, THOMAS MAILE REAL ESTATE COMPANY, and BERKSHIRE INVESTMENTS, LLC,

Defendants/ Counter-Claimants.

Case No. CVOC0400473D

MEMORANDUM DECISION & ORDER

This matter came before the Court on the Defendants' Motion to Dismiss/Motion for Summary Judgment, the Defendants' Motions for Partial Summary Judgment, Plaintiffs' Motion to Amend, Defendants' Motions to Strike, and Plaintiffs' Motion to Strike. On June 13, 2005, the Court heard oral arguments regarding the motions. After considering the briefs and arguments of the parties, the Court hereby GRANTS Plaintiffs' Motion to Amend, DENIES Defendants' Motion to Dismiss, GRANTS in part and DENIES in part Defendants' Motions for Partial Summary Judgment, DENIES Plaintiffs' Motion to Strike, and refuses to consider Defendants' Motions to Strike.

I. BACKGROUND

Thomas Maile, IV was Theodore L. Johnson's attorney. Maile's representation included drafting the trust agreement for the Theodore L. Johnson Revocable Trust and overseeing the administration of the trust. After Johnson's death, Maile represented Johnson's estate.

The underlying transaction in this case is a land sale between Johnson, then trustee and settlor

EXHIBIT C
001630

of the Theodore L. Johnson Revocable Trust, and Maile. Maile and Johnson entered into an earnest money agreement for the purchase of 40 acres in Eagle, ID. The purchase price was $400,000. Maile later assigned his interest in the purchase money agreement to Berkshire Investments, LLC. The assignment was approved by Beth Rogers acting for Theodore Johnson through a power of attorney. Johnson died of cancer before title was conveyed. After Johnson's death, co-trustees Beth Rogers and Andrew Rogers conveyed title to Berkshire Investments and executed a warranty deed on behalf of the trust as seller. The title was subject to a deed of trust, which was paid in full on January 04, 2004.

On January 22, 2004, Plaintiffs, certain residual beneficiaries of the Theodore L. Johnson Trust, filed a lis pendens against the 40 acres in Eagle. On January 23, 2004, Plaintiffs filed a lawsuit, alleging three causes of action and seeking damages and/or rescission of the sale. Plaintiffs claimed the property at the time Maile entered into the earnest money agreement with Johnson was worth at least $1.2 million. Plaintiffs asserted a breach of fiduciary duty claim against Maile, arguing Maile owed Theodore Johnson a fiduciary duty by virtue of their attorney client relationship and that Maile breached this duty by not dealing fairly with Johnson, not advising Johnson to consult independent counsel, paying less than fair market value for the property, and offering to purchase the property on terms unfavorable to Johnson. Plaintiffs also asserted a breach of fiduciary duty claim against Maile in his capacity as a realtor/broker, alleging he breached his fiduciary duty by failing to deal honestly with Johnson and by purchasing the property for less than fair market value. Finally, Plaintiffs asserted professional negligence claims against Maile in his capacity as attorney and as real estate broker.

Maile answered the complaint and then moved to dismiss the complaint, arguing the residual beneficiaries lacked standing to bring every asserted cause of action. On April 23, 2004, the Court dismissed the claims of the Plaintiffs based upon a lack of standing. The Court found that the Plaintiffs were beneficiaries of the trust and only the trustee could bring a claim. The Plaintiffs have appealed the ruling to the Supreme Court. However, a Counterclaim filed by Defendants is still ongoing on that case.

On July 22, 2004, Plaintiffs filed a new action against Defendants. Plaintiffs were believed to be the new co-trustees of the trust. The original trustees supposedly transferred their status as trustees to the Plaintiffs.

On September 29, 2004 the Court ordered that the two cases be consolidated.

On November 17, 2004, the Honorable Christopher Bieter entered an order appointing the Plaintiffs as co-successor trustees of the Trust. On April 13, 2005, Judge Bieter set aside the November 17, 2004 order. On May 2, 2005, Judge Bieter allowed the Plaintiffs to be appointed as successor trustees, but denied their request to be appointed retroactively.

II. PLAINTIFFS' MOTION TO AMEND

Plaintiffs seek to amend their complaint to clarify their status as trustees. They want the amendments to relate back to the time of the filing of the complaint. Basically, Plaintiffs seeks to have their status as trustees applied retroactively to the time of the filing of the complaint.

The trial court has the discretion to determine whether to grant or deny a motion to amend. Trimble v. Engelking, 134 Idaho 195, 196 (2000). Motions to amend a pleading under IRCP Rule 15(a) should be liberally granted by the court. Hayward v. Valley Vista Care Corp., 136 Idaho 342, 345 (2001). Rule 15(a) states that motions to amend at this stage in a case should be "freely given

when justice so requires." IRCP Rule 15(a). The Court must consider the potential prejudice to the opposing party when deciding on a motion to amend. Jordan v. Cnty of Los Angeles, 669 F.2d 1311 (9th Cir. 1982).

Plaintiffs argue that IRCP 15(c) and 17(a) allow for the amendment to relate back to the time of the filing of the complaint. IRCP 15(c) allows amendments to relate back to the time of the filing of the complaint if they arose out of the same conduct set forth in the complaint. IRCP 17(a) provides that all actions shall be prosecuted in the name of the real party in interest.

In Hayward, the Idaho Supreme Court allowed the plaintiff to change the representative capacity in which he brought the suit. The plaintiff had sued as a personal representative of a decedent's estate and he wanted to sue as an heir of the estate. The court allowed him to make this change.

The Hayward court noted that "the good faith of the plaintiff and prejudice experienced by the defendant are factors to consider . . . . Rule 17(a) is not intended to validate claims filed without any real basis but with the hope that a proper party will eventually materialize in order to benefit from suspended statutes of limitation. However, this principle has no application to cases in which substitution of the real party in interest is necessary to avoid injustice." Id. at 348 (citing Conda Partnership, Inc. v. M.D. Constr. Co., Inc., 115 Idaho 902, 922 (Ct. App. 1989) (citations omitted).

The Hayward court also noted "that courts from other jurisdictions have applied a more lenient standard to the relation back of a motion to amend that primarily centers around the capacity in which the plaintiff brings the action." Id.

Defendants argue that the suit was not filed in good faith, but they do not claim any prejudice. Because Title 68 of the Idaho Code specifically provides that a trustee may not delegate his office and

mandates that a court must a appoint a trustee, Defendants argue that Plaintiffs should have known that they were not legal trustees when they filed suit on June 21, 2004.

The Court finds no evidence of bad faith on the part of the Plaintiff. It appears that they were not aware of their error until receiving Defendants' Motion to Dismiss in October. Plaintiffs then applied to the court to be appointed as trustees. Therefore, the Court hereby GRANTS Plaintiffs' Motion to Amend. The Court finds that the amendments relate back to the time of the filing of the complaint.

III. DEFENDANTS' MOTION TO DISMISS

Defendants' Motion to Dismiss is based on the failure of the Plaintiffs to file suit as trustees. Defendants argue that because Plaintiffs were not properly appointed trustees when they filed suit, the case should be dismissed. However, due to the Court's granting of Plaintiffs' Motion to Amend, this argument fails. Accordingly, Defendants' Motion to Dismiss is hereby DENIED.

IV. DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Defendants have also filed motions for partial summary judgment seeking the dismissal of (1) Plaintiffs' claims against Maile as a real estate broker; (2) Plaintiffs' claims against Maile as an attorney; and (3) Plaintiffs' claims for equitable relief.

A. MAILE AS A REAL ESTATE BROKER

Maile argues that there was no relationship between himself as a broker and Plaintiffs. Idaho Code §54-2084 provides:

> (1) A buyer or seller is not represented by a brokerage in a regulated real estate transaction unless the buyer or seller and the brokerage agree, in a separate written document, to such representation. No type of agency representation may be assumed by a brokerage, buyer or seller or created orally or by implication.

IC 54-2084.

There was no written representation agreement in this case. As a result, The Court finds that there was no broker-client relationship, and thus no claims against Maile in his capacity as a broker can survive.

Plaintiffs also argue that Maile violated Idaho law by acting as a realtor and failing to obtain a written representation agreement in violation of Idaho Code §54-2085. However, the Court finds that while Maile could be subject to discipline for violating Idaho Code §54-2085, the disciplinary sections provided for in this section do not allow for clients suing the broker. The Idaho Real Estate Commission handles disciplinary matters in this area.

Plaintiffs further argue that because Maile did not disclose to the Trust that the appraisal conducted was defective and the property was worth more, he violated his Idaho Code §54-2086 duties as a customer. However, as Maile points out, a customer owes "no duty to independently verify the accuracy or completeness of any statement or representation made by the seller or any source reasonably believed by the licensee to be reliable." IC §54-2086(2). Maile also argues that the appraisal was an opinion, not a material fact that required disclosure. The Court agrees with Maile's arguments and consequently finds that no issue of material fact exists with respect to this claim.

B. MAILE AS AN ATTORNEY

> To establish a claim for attorney malpractice arising out of a civil action, the plaintiff must show: (1) the creation of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty or the standard of care by the lawyer; and (4) that the failure to perform the duty was a proximate cause of the damages suffered by the plaintiff.

Jordan v. Beeks, 135 Idaho 586, 590 (2001).

Plaintiffs have provided the affidavit of Richard Mollerup, their legal expert, who claims that Maile violated his fiduciary duties, violated his ethical duties and was negligent, all of which were the proximate cause of damages to the Plaintiffs.

Plaintiffs claim that Maile had a conflict of interest. On one hand, as a lawyer, he was supposed to help the Trust get the best price for its land, on the other hand, as a purchaser, he wanted get the land for the lowest possible price.

1. Attorney-Client Relationship

Defendants argue that no attorney-client relationship existed between Maile and the Trust at the time Maile purchased the property. Maile had represented Johnson in various matters in the ten years prior to the land purchase. Maile represented Johnson with respect to an offer (the Witte offer) that was made in May 2002 on the same property that Maile later bought. Maile claims his representation ended after his work dealing with this offer because he performed no further work for the Trust. Beth Rogers wrote Maile a letter in May 2003 declining further representation by him. Maile never did formally terminate the relationship. The Court finds that Rogers did terminate the relationship in May 2003. The Comment to Idaho Rule of Professional Conduct 1.3 states:

> If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

IRPC 1.3 cmt.

Maile had served the Trust in various matters for the past ten years. The Court finds that there is a material issue of fact about the existence of an attorney-client relationship.

2. Breach of the Standard of Care

Defendants argue that Plaintiffs cannot show that Maile breached the standard of care for an attorney. Plaintiffs' legal expert, Richard Mollerup, states that he felt that Maile breached his

fiduciary obligations to the Trust because the terms of the transaction under which Maile purchased the subject property from the trust were not fair and reasonable.

Mollerup notes that several provisions in the Purchase Agreement and Deed of Trust were irregular and favorable to Maile. Defendants contend that these irregularities are irrelevant to the issue of whether the deal was fair. However, Mollerup also states that the purchase price itself was unfair, considering it was identical to an offer previously rejected by Maile.

Additionally, Defendants argue that Maile complied with Rules 1.8 and 1.9 of the Idaho Rules of Professional Conduct because Maile told Johnson of his right of seek independent counsel at least twice. Plaintiffs claim that Maile made no such representations. Based on the above, the Court finds that a material issue of fact exists as to whether the representations were made and as to whether a breach of the standard of care occurred.

3. Damages

Defendants argue that Plaintiffs cannot prove any damages because Maile paid the market value for the property. However, Plaintiffs have submitted appraisals and affidavits stating that the $400,000 price was far too low and that others were ready, willing and able to pay for the property. Also, Maile himself had previously stated that the $400,000 price was too low. Based on these assertions, the Court finds that the Plaintiffs' have adequately demonstrated damages.

Based on the above, the Court hereby DENIES Defendants' Motion for Partial Summary Judgment on Plaintiffs' claims against Maile as an attorney.

C. EQUITABLE RELIEF

1. Rescission

> Rescission is an equitable remedy that totally abrogates the contract and seeks to restore the parties to their original positions. It is normally granted only in those circumstances in which one of the parties has committed a breach so material that it destroys or vitiates the entire purpose for entering into the contract.

Blinzler v. Andrews, 94 Idaho 215, 485 P.2d 957 (1971).

The Rogers, as trustees, were informed by the Taylors that the purchase price was unfair before the deal was done. The Rogers chose to ignore the Taylors and to accept the payment for the property. Maile argues that the Plaintiffs are bound by the decision made by the trustees. On July 22, 2003, Beth Rogers told Maile that no legal action would be pursued by the Trust. "Under the common law, it is well established that the party seeking rescission must act promptly once the grounds for rescission arise. Once a party treats a contract as valid after the appearance of facts giving rise to a right of rescission, the right of rescission is waived." White v. Mock, 140 Idaho 882, 888 (2004).

Maile argues that he relied on the Rogers' assurances in obtaining financing to develop the subject property. Plaintiffs argue that Maile was on notice in July 2003 that they were upset about the sale and that legal action was imminent. Maile argues that he did not worry about the Plaintiffs at that time because they were not trustees and had no standing to sue. Their first lawsuit was dismissed due to a lack of standing. Maile relied on the assertions of the trustees, at that time, Beth and Andy Rogers.

The Court finds that the Plaintiffs, now with standing as trustees, did not act promptly to pursue rescission once the grounds for it arose. Therefore, the Court hereby GRANTS Defendants' motion with respect to this claim.

2. Constructive Trust

> Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title. . . . If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.

Hanger v. Hess, 49 Idaho 325, 328, 288 P. 160, 161 (1930).

In this case, it is alleged that Maile obtained the property by violating his fiduciary obligations. The Court finds that there is an issue of fact about that claim. Therefore, the Court DENIES Defendants' motion with respect to the Plaintiffs' constructive trust claim.

3. Estoppel

Maile asserts the equitable defenses of equitable estoppel and quasi estoppel against the Plaintiffs. He argues that he relied on the trustees' July 2003 assertions that litigation would not be pursued when he obtained financing for the development of the property. He argues that the trustees cannot now change their position. The Plaintiffs argue that Maile has unclean hands because of his alleged misconduct and thus cannot assert equitable remedies.

Because the Court finds that there is an issue of fact about Maile's unclean hands, it will not consider estoppel as a defense at this time.

V. DEFENDANTS' MOTIONS TO STRIKE

Defendants seek to strike Richard White's affidavit and portions of Richard Mollerup's affidavit. Richard White is Plaintiffs' expert real estate broker. Mollerup is Plaintiffs' expert on legal malpractice.

Plaintiffs have objected to even hearing Defendants' motions to strike at the June 13, 2005 hearing because Defendants did not comply with IRCP 7(b)(3) in filing the motions. IRCP 7(b)(3) requires that motions be filed at least 14 days before the hearing. In this case, the motions to strike were filed on June 6, 2005 for a June 13, 2005 hearing. No motions to shorten time were filed. Plaintiffs claimed that they did not have enough time to respond to the motions. At the hearing both parties rested on the record regarding the motions to strike and no arguments were presented.

Because IRCP 7(b)(3) was not complied with, the Court will not entertain Defendants' Motions to Strike.

VI. PLAINTIFFS' MOTION TO STRIKE

Plaintiffs seek to strike the testimony of Maile as it relates to any unwritten communication or agreement with the decedent, Ted Johnson, relating to the property which forms the subject matter of this litigation because they argue that it be inadmissible hearsay. Plaintiffs do not articulate exactly what they wish to exclude.

Defendants argue that as a trustee of the Trust which is now suing Maile, Johnson's statements are admissions of a party-opponent pursuant to Idaho Rule of Evidence 801(d)(2). The Coourt finds that Johnson's statements are admissions of a party-opponent and thus DENIES Plaintiffs' Motion to Strike

VII. CONCLUSION

Based on the foregoing, the Court hereby GRANTS Plaintiffs' Motion to Amend, DENIES Defendants' Motion to Dismiss, GRANTS in part and DENIES in part Defendants' Motions for Partial Summary Judgment, DENIES Plaintiffs' Motion to Strike, and refuses to consider Defendants' Motions to Strike.

IT IS SO ORDERED.

Dated this 28th day of July 2005.

Ronald J. Wilper
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 29 day of July, 2005, I caused a true and correct copy of the foregoing MEMORANDUM DECISION & ORDER to be served by the method indicated below, and addressed to the following:

Paul Thomas Clark
CLARK & FEENEY
P.O. Drawer 285
Lewiston, ID 83501

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail

Phillip J. Collaer
ANDERSON, JULIAN & HULL LLP
P.O. Box 7426
Boise, ID 83707-7426

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail

Thomas G. Maile
ATTORNEY AT LAW
380 W. State Street
Eagle, ID 83616

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail

Jack S. Gjording
GJORDING & FOUSER
PO Box 2837
Boise, ID 83702

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By _____
Deputy Clerk

April 14, 2004

SENT VIA FACSIMILE TO: 208-395-8585

Bart W. Harwood
Hall Farley Oberrecht & Blanton, P.A.
702 W. Idaho Street, Suite 700
P.O. Box 1271
Boise, ID 83701

Re: Taylor v. Maile

Dear Mr. Harwood:

My clients have reviewed the documents you e-mailed to me, and have a number of concerns.

First, Helen's Taylor's share of the trust should be distributed to her at this time. They realize they could make that distribution as soon as the current trustees have resigned, but they would like to avoid the incorrect impression that the funds are going to Helen's children rather than to her.

Second, they are quite concerned with the demand that all of the Taylors release the trustees from any potential claims and waive their right to an accounting of the trust as a precondition to them being allowed to pursue the suit against Mr. Maile on behalf of the trust. It is extremely irregular for a trustee to refuse to provide any accounting, but none has been provided in this case.

Third, they need assurances that both Beth and Andy will be supportive of this lawsuit, as there is no getting around the fact that at least Beth will be an essential witness. This suit was filed based on Beth's totally unequivocal representations that Mr. Maile had never informed Ted Johnson that it was a conflict of interest for him to enter into a business transaction with a client, had never informed Mr. Johnson that he should seek independent counsel, had never advised he obtain an appraisal of the property at development value, and had never informed her or Andy of any of those facts. In fact, she reported that she felt Mr. Maile had treated her quite unfairly, putting pressure on her and demanding that the real estate transaction be closed right when she was planning a funeral for Ted, who had been like a father to her. She made these unequivocal statements at a meeting attended by a number of family members on July 5, 2003, and acknowledged that it was the trustees' fiduciary duty to bring an action against Mr. Maile. She repeated these statements to Reed Taylor

EXHIBIT D

EXHIBIT NO. 39
B. Rogers
DATE 8-11-04
BURNHAM, HABEL & ASSOCIATES, INC.

and his son Jud when they met with her in Boise on several occasions. The events which are concerning to us are as follows:

1. On July 22, 2003, I received a letter informing me that the Rogers had decided the suit "has not the merit to benefit the trust." We have never received an explanation of the basis for this conclusion, which was entirely contrary to Beth's previous statements. The letter did, however, follow a request for an accounting made by Dallan Taylor. When I talked to Beth about the letter, she made overt threats against Dallan if he didn't "back off."

2. On February 23, 2004, we received Mr. Maile's Answer and Counterclaim, which attached the July 22, 2003 letter to me as an Exhibit. We most certainly did not provide him with a copy of that letter, and must assume he received it from Beth.

3. Beth attended the hearing on Monday with Mr. Maile and his attorneys. She appeared to be on very good terms with all of them, and made comments in the hallway which have caused grave concerns about where her loyalties lie.

4. After the hearing, Beth told me unequivocally that it will not be possible to obtain all of the signatures of the beneficiaries by the Monday deadline the court has given us. Because nearly all of the beneficiaries have already assigned their rights as beneficiaries under the Maile lawsuit to Reed Taylor and any other beneficiaries who wish to pursue it, there is no valid basis for her insistence on obtaining all the signatures before she and Andy resign.

My clients recognize Beth and the sisters' concerns that this action must not in any way put Ted Johnson's reputation or physical state at the time of the Maile transaction in an unfavorable light. They absolutely share that view and have agreed to prosecute this case in a manner which will focus on Mr. Maile's conduct only. Beth has agreed to this strategy, but now attempts to frustrate.

The Taylors are not willing to give up their rights as beneficiaries of the trust unless Beth will affirm her prior factual statements in the form of an affidavit and agree to cooperate in the action against Mr. Maile. If we aren't able to reach an agreement on that, they will seek a full accounting of the trust and a copy of the trust and estate tax returns. They will also require an accounting of all distributions from the estate and nontestamentary transfers, including copies of all records relating to the annuities which Mr. Johnson had established for the benefit of his sisters. No explanation has

ever been given on where that money has gone. We will need records establishing whether the beneficiaries on the annuities were changed, when, by whom, and who received the funds. We also need a copy of the power of attorney given to Beth and a summary of the actions taken pursuant to that power of attorney.

My clients will waive their right to these records only if Beth executes an affidavit and expedites the signing of the documents so they may proceed with the suit against Mr. Maile.

Judge Wilpur has given us only until close of business on Monday, April 19th, to either join or substitute the trust as a plaintiff in the pending lawsuit. We would of course be able to refile, but deem it extremely unwise to provide Mr. Maile with a window of opportunity to dispose of the real property, which may well be our only potential source of collecting on a judgment.

Time is very critical. Dallan Taylor is in Boise and is willing to meet with you and Beth to review and copy the changes to the documents described above.

Sincerely,

CLARK and FEENEY

By: Connie W. Taylor

CWT:st
cc: John Taylor
Dallan Taylor
Reed Taylor

CONNIE W. TAYLOR
CLARK and FEENEY
P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, et al. Defendants.	Case No. CV OC 0723232 **MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS**

The Defendants submit this memorandum in opposition to the Plaintiffs' Second Motion for Summary Judgment on the Defendants' counterclaims.

Because the Plaintiffs in this case were the Defendants in *Taylor v. Maile*, the use of the designations "Plaintiff" and "Defendant" becomes very confusing. For the sake of clarity, we will refer to the parties by name, with the Plaintiffs collectively identified as "Mailes" and the Defendants collectively identified as "Taylors."

SUMMARY OF RELEVANT FACTS

The Mailes filed a Motion for Partial Summary Judgment relating to the Taylors' counterclaims on March 17, 2009. This Court denied that motion in its Memorandum Decision and Order dated July 7, 2009, holding that there are factual issues to be determined which preclude summary judgment on the Taylors' claims of slander of title, abuse of process, and interference with prospective economic advantage.

The Mailes filed another Motion for Summary Judgment on the counterclaims on March 2, 2010. The brief in support of this second motion for summary judgment on the counterclaims contains a "Statement of Uncontested Facts" which relate ***solely*** to filings and decisions in the initial lawsuit relating to the Linder Road property, *Taylor v. Maile.* The present motion appears to be premised primarily on the Mailes' filing of a vendee's lien and efforts to foreclose on that lien. *See* Motion for foreclosure of Vendee's Lien which is attached as Exhibit B to Thomas Maile's December 3, 2009 Affidavit in Support of Renewed Motion for Certification.

While titled as a motion to foreclose, rather than simply seeking repayment of the purchase price, that motion in actuality sought an order returning title to the Linder Road property to Mailes' LLC.[1] On March 15, 2010, Judge Wilper entered an Order Denying Defendants' Motion for Foreclosure of Vendee's Lien.[2] In the most recent order, Judge Wilper noted that on May 7, 2009,

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[1] Verified Motion for Foreclosure of Vendee's Lien, Exhibit B to December 3, 2009 Affidavit in Support of Renewed Motion for Certification Pursuant to IRCP Rule 54(b). Prayer, paragraph 6, page 5, asks "that a decree be entered adjudging and decreeing the Berkshire Investments LLC is the owner and is entitled to possession of the subject property, and further ordering that the "Theodore L. Johnson Revocable Trust" has no right, title or interest or claim in and to the subject real property..."

[2] A copy of that order and the bankers' statements upon which it was based are attached as Exhibit A to the April 28, 2009 Affidavit of Counsel.

he had entered an Order Denying Mailes' Motion to Compel Payment of Judgment and Interest, holding that it was the intention of the court in its July 21, 2006 order "to void the underlying transaction returning all parties to the position they had been in prior to the transaction and that because the Property had not been returned free of encumbrance, it was not the time to order a return of the purchase money."

On the Motion to Foreclose the Vendee's lien, Judge Wilper ruled:

> The Court finds that it is Defendants'[Mailes'] actions which prevent Plaintiffs [Taylors] from satisfying the judgment at this time. Defendants' attempt to enforce this Court's judgment, while simultaneously attempting in a collateral proceeding to challenge that judgment, is disingenuous. The Court has previously held that Defendants are entitled to a return of the purchase price. Further, the Court finds that the continued existence of the vendee's lien filed August 3, 2009 is sufficient to secure the return of the purchase price. The Court will not enter an order foreclosing the vendee's lien while there is pending litigation between these parties challenging the title of the Property. Defendants' Motion for Order Foreclosing Vendee's Lien is DENIED.

At the trial of Mailes' unjust enrichment claim in October of 2006, local developer John Wood testified that Park Hampton, LLC (though Boise attorney Doug Crandall) had offered to purchase the Linder Road property (which consists of seven lots of five acres or more) for $1,800,000,[3] but that the offer could be withdrawn, depending on "the length of the litigation and the – the climate of the market."[4] The offer was ultimately withdrawn.[5] Connie Shannahan of Coldwell Banker prepared a market evaluation which indicates that in the 2005-2006 time frame,

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[3] A copy of the written Purchase and Sale Agreement is Exhibit A to the Affidavit of R. John Taylor dated April 23, 2010.

[4] Pages 334, 339 of trial transcript, Exhibit B to Affidavit of Counsel dated April 28, 2010.

[5] April 23, 2010 Affidavit of R. John Taylor

comparable five acre lots were selling for between $325,000 and $699,000; in contrast, between January 2009 and 2010 a single comparable five acre lot sold for only $149,900. She suggested that the five-acre lots on Linder Road be listed for between $125,000 and $150,000.[6] During the time this property has been in litigation following Judge Wilper's order voiding the Mailes' purchase, the Johnson Trust has incurred real property taxes, interest and late fees in the amount of $99,279.76. The litigation has prevented the Trust from either selling the property or borrowing the money to pay these taxes and the $400,000 purchase price.[7] The Defendants incurred $59,458.36 in attorneys fees for defending Mailes' claims against them in this case.[8]

The Idaho Supreme Court affirmed the lower court ruling which returned the Linder Road property to the Johnson Trust on January 30, 2009. Maile waited over six months before he released the lis pendens he had filed in the *Taylor v. Maile* case on August 3, 2009. That was the date he recorded the Notice of Vendee's Lien. On December 16, 2009, the Idaho State Bar counsel filed a five count Complaint against Thomas Maile based upon his conduct relating to the purchase of the property and during the litigation.[9]

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[6] Affidavit of Connie Shannahan dated April 22, 2010.

[7] Paragraph 3, Affidavit of R. John Taylor dated April 23, 2010.

[8] Affidavit of Mark Prusynski; Exhibit C to Affidavit of R. John Taylor dated April 23, 2010.

[9] Exhibit D to Affidavit of R. John Taylor dated April 23, 2010.

ARGUMENT

1. SLANDER OF TITLE

In *Weaver v. Stafford*, 134 Idaho 691, 701, 8 P.3d 1234, 1244 (2000), the Idaho Supreme Court ruled that an assertion in a pleading claiming an interest in real property satisfies the publication element of slander of title. This holding supported the Taylors' counterclaim for slander of title, for two reasons: (1) the Complaint and Amended Complaint filed in this action claimed an interest in the Linder Road property and asked that title be quieted to the Mailes; and (2) the Mailes maintained a lis pendens against the real property in *Taylor v. Maile* for over six months after the Supreme Court affirmed Judge Wilper's judgment returning title to the property to the Johnson Trust.

However, on April 2, 2010 the Idaho Supreme Court in *Weitz v. Green*, 040210 IDSCCI, 33696, overruled *Weaver*, finding that defamatory statements as to the title to property published in a judicial proceeding are absolutely privileged. In light of this reversal, the Taylors have filed a Motion for Leave to Amend their Counterclaims to eliminate the slander of title claim. Because the conduct within both lawsuits is still relevant to the abuse of process and intentional interference claims, the Amended Counterclaim also clarifies that those claims are based on Mailes' conduct in both this case and the underlying case.

2. SUMMARY JUDGMENT STANDARD

The burden of proving the absence of a material fact rests at all times upon the moving party. *Harris v. State Dept. of Health*, 123 Idaho 295, 298, 847 P.2d 1156 (1992). This burden is onerous because even circumstantial evidence can create a genuine issue of material fact. *Harris*, supra,

citing *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). This Court is required to liberally construe facts in the existing record in favor of the Defendants on this motion, and to draw all reasonable inferences from the record in their favor . *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 326, 48 P.3d 651, 655 (2002).

3. THERE ARE GENUINE ISSUES OF FACT ON THE ABUSE OF PROCESS CLAIM

When this issue was last briefed, the Defendants argued that there was a genuine issue of fact as to whether Maile had a colorable claim to ownership of the Linder Road property. That question has been answered, twice: once by this Court's dismissal of the Plaintiffs' claims, and again by Judge Wilper's order denying the Mailes' request that they be allowed to foreclose on the lien which secures the repayment of the $400,000 purchase price.

On the abuse of process claims, there remain a genuine issues of material fact as to whether the Plaintiffs have engaged in willful acts in the use of process for an ulterior or improper purposes, which precludes summary judgment.

A. Law of the Case.

The majority of the Memorandum Brief in Support of Plaintiffs' Motion for Summary Judgment simply repeats Mailes' unsuccessful arguments that the Taylor beneficiaries did not have standing to object to his purchase of the Linder Road property from his client, Ted Johnson. There is no legal basis for this argument, as it has been decided repeatedly.

The law of the case doctrine provides that when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent

progress, both in the district court and upon subsequent appeal." *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000) (internal quotations and citations omitted).

The Idaho Supreme Court has ruled, twice, that the Taylor beneficiaries have standing to challenge Mailes' purchase of this property. *Taylor v. Maile I*, 142 Idaho 253, 261, 127 P.3d 156, 164 (2005) ; *Taylor v. Maile II*, 146 Idaho 705, 708, 201 P.3d 1282, 1285 (2009). The law of the case doctrine precludes Mailes' attempts to revisit that issue at this point, and his attempt to use them raises an inference that he is improperly attempting to mislead this court for an improper purpose; i.e. to avoid responsibility for his actions and deprive the Taylors of their right to seek redress for his conduct.

B. Wrongful conduct in addition to the recording of the lis pendens

The Mailes' briefing incorrectly presumes that the sole basis for the abuse of process claim was their filing of the lis pendens. This view is simplistic and inaccurate.

The Taylors assert that the Plaintiffs, by their conduct in *Taylor v. Maile* and in the present lawsuit, have affirmatively used the legal process primarily to accomplish an improper purpose outside of simply gaining an advantage in the underlying litigation for which the process was not designed. The specific acts of the Plaintiffs which support this claim include, but are not necessarily limited to, the following:

a. Filing the second lawsuit in spite of the fact that the claims contained therein were totally barred by the doctrine of res judicata

b. Filing the second lawsuit even though the Plaintiffs' claims were devoid of factual support or if supportable in fact, had no cognizable basis in law

c. During the litigation of both cases, repeatedly asserting claims which have been rejected by the Idaho Supreme Court and misrepresenting the decisions of the Supreme Court in pleadings

d. Presenting false and misleading affidavits and pleadings to the district court in tihs action

e. Asserting claims (both in the Complaint and in the briefing which has been submitted since) which were not well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law

f. Asserting claims (both in the Complaint and in the briefing which has been submitted since) which were interposed for a improper purpose, such as to harass, to cause unnecessary delay, and/or to needlessly increase in the cost of litigation

g. Asserting baseless claims for the purpose of delay, in an attempt to forestall disciplinary proceedings by the Idaho State Bar.

h. Failing to release the lis pendens filed in *Taylor v. Maile* for six months after the Supreme Court decision affirming the district court order quieting title in the Linder Road property to the Johnson Trust

i. Attempting to regain title to the Linder Road property through improper means, by seeking to foreclose on a vendee's lien while concurrently seeking to set aside the judgment upon which that lien was based

j. Repeatedly filing duplicate motions and/or seeking reconsideration of rulings.

The Taylors allege that the Plaintiffs' actions were taken for ulterior, improper purposes including but not limited to the following: to delay, stall, and subverting the Johnson Trust's right to the Linder Road property; to needlessly increase the cost of litigation, to gain collateral advantage in the proceeding not authorized by law; to delay the resolution of these matters for the purpose of keeping the real property tied up beyond the time of the appeal of the initial lawsuit in which the property was ordered returned to the Johnson Trust; and to attempt to forestall disciplinary proceedings by the Idaho State Bar.

An abuse of process claim can be based on the entire range of procedures incident to the litigation process. See, e.g., *General Refractories Co. v. Fireman's Fund. Ins. Co.*, 337 F.3d 297 (3rd Cir. 2003) (use of discovery proceedings, making misrepresentations to opposing counsel and the court and filing motions); *Hopper v. Drysdale*, 524 F.Supp. 1039 (D.Mont. 1981) (filing notice of deposition can be the basis for an abuse of process claim); *Crackel v. Allstate Ins. Co.*, 92 P.3d 882 (Ariz. Ct. App. 2004) (a litigant may commit abuse of process while merely defending an underlying action through conduct such as serving an unreasonable offer in bad faith, asserting bogus defenses, exercising procedural rights, engaging in misconduct at mandatory settlement conferences); *Nienstedt v. Wetzel*, 651 P.2d 876 (Ariz. Ct. App. 1982) (the entire range of court procedures incident to litigation, including the noticing of depositions, entry of defaults and the utilizations of various motions, could be the basis for an abuse of process claim); *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 567 S.E.2d 251, 253 (S.C. Ct. App. 2002) (process embraces full range of activities and procedures attendant to litigation including taking discovery and filing motions).

C. Misrepresentations and bogus defenses

Mailes entire lawsuit, and his attempt to justify the filing of the lawsuit to avoid liability for abuse of process and intentional interference with prospective advantage, are based on repeated misrepresentations. Those include the following:

1. Taylors' standing to seek the return of the property.

In their Memorandum in support of Motion for Summary Judgment, at page 4, Mailes state "In addition, and most importantly, the Idaho Supreme Court has established "law of the case" that the Taylors had disclaimed their interest in the trust *(Taylor v. Maile 2)*."[10] This statement is a blatant misrepresentation. In actuality, the Supreme Court in *Taylor v. Maile II* acknowledged that the Taylor beneficiaries had retained their right to pursue the lawsuit against Mailes:

> While the first appeal to this Court was pending, the beneficiaries of the Trust executed the Disclaimer, Release, and Indemnity Agreement (Disclaimer) in June 2004. In the Disclaimer, the beneficiaries, ***other than the Taylors***, disclaimed any interest in the lawsuit against the Mailes. In addition, the Taylors disclaimed their interest in all ***other*** Trust property in favor of their mother, the beneficiaries agreed to an immediate distribution to beneficiaries, the Rogers resigned as trustees, the named successor trustee declined to serve as trustee, and the beneficiaries nominated and appointed the Taylors as trustees.

Taylor v. Maile II, 146 Idaho 705, 708, 201 P.3d 1282, 1285 (2009) (emphasis added).

Misstatements of this type have occurred with alarming frequency during the litigation over the Linder Road property, and are relevant to the abuse of process counterclaim. As the person who drafted the Theodore Johnson trust documents, Mr. Maile knows that under the terms of the trust Helen Taylor had the right to receive interest only, with the entire principal being distributed to her

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[10] Page 12, March 2, 2010 Memorandum Brief in Support of Plaintiffs' Motion for Summary Judgment.

children upon her death. He received a copy of the Disclaimer agreement referred to in the Supreme Court opinion, and therefore knew that the Taylor beneficiaries had retained their interest in the lawsuit against him. There is no scenario which will justify this misrepresentation as to the facts, and those misrepresentations are sufficient to create the inference that his continued attempts to relitigate that issue are improper acts for an ulterior or improper purpose.

2. Rescission of the Maile / Johnson Trust purchase contract

In this Motion, the Mailes put a great deal of weight on their argument that they retained an colorable interest in the property because there was a rescission of their purchase contract which will not be effective until the purchase price is returned. This is a total misrepresentation of the proceedings in *Taylor v. Maile*. They state "The original litigation directly concerned the title to the real property. The Court ordered the return of title to the real property to Taylors, but also ordered that the purchase price be returned to Berkshire, *in order to rescind the transaction.*"[11] On the following page, they assert:

> Prior to entry of the *order rescinding the property sale*, a *lis pendens* was proper because the litigation concerned the disputed title to the real property. Following entry of the *order rescinding the property sale*, a lis pendens was proper because rescission was not fully effected until the consideraiton was repaid to erkshire by Taylors..."[12]

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[11] Page 4 of Mailes' March 2, 2010 Memorandum in Support of Motion for Summary Judgment on Counterclaims

[12] Page 5 of Mailes' March 2, 2010 Memorandum in Support of Motion for Summary Judgment on Counterclaims

This is a misrepresentation of Judge Wilper's ruling. The purchase was found to be void, not rescinded. As noted in the Supreme Court decision in *Taylor II*, the trial court ruled that the initial contract for Mailes' purchase of the property was void. Judge Wilper's May 7, 2009 order reiterated the fact that it was the intention of the court in its July 21, 2006 order "to void the underlying transaction returning all parties to the position they had been in prior to the transaction..."

This no simple error. It was obvious that the *Taylor v. Maile* trial court did not order a rescission of the contract; in fact, Maile had obtained an order granting summary judgment on the Taylors' claim for rescission.[13] For him to now misrepresent that fact to this court in an attempt to avoid liability is further evidence of improper acts for an ulterior or improper purpose.

3. Misrepresentation as to negotiations on the Disclaimer

Another example of misrepresenting facts in order to try to create the appearance that there was a factual basis for the now-dismissed claim is Maile's repeated references to a letter between Connie Taylor and Bart Harwood on April 14, 2004.[14] Maile points to this letter to support his argument that the Taylor beneficiaries lacked standing, ignoring the fact that the Idaho Supreme Court has ruled twice that they do. Maile points to a single sentence and takes it out of context. When the letter is read in full, it is clear that the "rights as beneficiaries" which the Taylors did not want to give up was the right to require an accounting from the prior trustee and a copy of the trust and estate tax records.

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[13] Memorandum Decision and Order, pages 8-9, Exhibit C to April 27, 2010 Affidavit of Counsel.

[14] Affidavit of Thomas Maile Part One; for each of reference, an additional copy is attached as Exhibit D to the Affidavit of Counsel dated April 28, 2010.

Maile knows that the Taylors all retained the right to pursue the lawsuit against him, and filing documents with the court which misrepresent those facts support an inference that he had an ulterior, improper purpose and engaged in willful acts not proper in the regular conduct of the proceeding. There can be no argument that to misrepresent facts and attempt to mislead the court is "regular conduct of the proceeding."

4. Misleading statements as to Taylors' duty to repay the purchase money

Mailes argue (p. 4) that notwithstanding Judge Wilper's order for return of the purchase price, the Taylors "have not returned any portion of the purchase price." This statement is misleading, as it fails to acknowledge that Judge Wilper has repeatedly ruled that as long as the Mailes pursue litigation over title to the property, they are not entitled to repayment of the purchase price and their attempts to force payment are "disingenuous."

5. Asserting that the vendee's lien creates an interest in real property

The Mailes' argument is difficult to follow, but they appear to claim that there is no distinction between a vendee's lien, an action to foreclose a vendee's lien, and a quiet title action. They argue this leads to the conclusion that a lis pendens was appropriate from the time of Judge Wilper's July 21, 2006 order returning the property to the Trust and ordering the return of the purchase money.

There are a number of problems with this argument. First, it ignores the fact that the Mailes did not file a vendee's lien in the underlying suit until August 3, 2009, which was over three years after the District Court's order returning the property, over a year and a half after they filed the

Complaint in this matter, six months after the Supreme Court affirmed the district court's decision returning the property, and a full month *after* this court had dismissed their claims in this case. They cannot use the August 2009 vendee's lien to legitimize their conduct prior to that time.

Second, this argument is now baseless because Judge Wilper has denied their motion to foreclose on the vendee's lien, noting that Mailes' "attempt to enforce this Court's judgment, while simultaneously attempting in a collateral proceeding to challenge that judgment, is disingenuous." This is not a new development; Judge Wilper has ruled repeatedly that Mailes are not entitled to the return of the purchase price as long as they are continuing to litigate the ownership of the Linder Road property.

Most importantly, the argument that the vendee's lien supports a lis pendens has no legal merit. The Idaho Supreme Court has ruled that a lien creates a personal property right, not an interest in real property. Under Idaho law, a lien is a charge upon property to secure payment of a debt and transfers no title to the property subject to the lien. I.C. § 45-109; I.C. § 45-101. *Chavez v. Barrus*, 146 Idaho 212, 221, 192 P.3d 1036, 1045 (2008), citing *Middlekauff v. Lake Cascade, Inc.*, 103 Idaho 832, 834, 654 P.2d 1385, 1387 (1982); 51 Am.Jur.2d Liens § 2 (stating that a lien confers no ownership interest).

Thomas Maile often represented himself in the underlying litigation, and even when he hired other counsel, he was present at all hearings. He cannot claim to be unaware of the fact that he had raised the issue of whether the Taylor beneficiaries had standing repeatedly and lost on that issue every time, including two trips to the Supreme Court. It is reasonable to infer that, as a licensed attorney, he was well aware of the doctrine of res judicata and the fact that it would act as a

complete bar to these efforts to relitigate the claims to the Linder Road property. A thirty second research session on Casemaker reveals that res judicata has been addressed by the Idaho appellate courts 494 times, beginning with *People ex rel. Attorney General v. Alturas County*, 6 Idaho 418, 55 P. 1067 (1899) and ending with *Ridgley* v. *State of Idaho*, ISCCR No. 35823, March 17, 2010.

4. INTENTIONAL INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE.

There are also genuine issues of material fact as to the counterclaim for intentional interference with a prospective economic advantage.

The elements of the tort of intentional interference with a prospective economic advantage are as follows: 1) The existence of a valid economic expectancy; 2) knowledge of the expectancy on the part of the interferer; (3) intentional interference inducing termination of the expectancy; (4) the interference was wrongful by some measure beyond the fact of the interference itself (i.e. that the defendant interfered for an improper purpose or improper means) and (5) resulting damage to the plaintiff whose expectancy has been disrupted. *Idaho First National Bank v. Bliss Valley Foods,* 121 Idaho 266, 284-85, 824 P.2d 841, 859-60 (1991).

Mailes' do not dispute the first three elements; their sole argument on this claim is that the interference was "justified or privileged" and that the Taylors were not damaged. They cite to a North Carolina case which states that "a complaint must admit of no motive for interference other than malice," but malice is not a required element under Idaho law. Their argument is based entirely on their position that the complaint in this case and lis pendens weren't wrongful, ignoring the fact that they maintained the lis pendens in *Taylor v. Maile* for six months following the decision of the

appeal. They also rely heavily on the fact that the Taylors have not repaid the purchase money, ignoring Judge Wilpers' orders stating that they are not entitled to repayment as long as they continue to litigate the ownership of the property. In support of a nebulous argument about "statutory protection," they cite two Idaho cases which have no relevance whatsoever to the facts of this case. *Hewson v. Asker's Thrift Shop*[15] deals with the question of whether an injured employee may tape record an evaluation by a workers' compensation panel, and *Rincover v. State*[16] addresses state officials' qualified immunity for discretionary functions.

The July 21, 2006 trial court ruling in *Taylor v. Maile*, as affirmed by the Supreme Court, establish the validity of the Taylors' ownership of the land, and the offer from Park Hampton LLC establishes their economic expectancy to sell the land. Mr. Maile has been aware of these rulings, was present during testimony about the pending offer to purchase, and has intentionally and successfully prevented the Taylors from selling the land.

On a claim for tortious interference with contract, the improper conduct may be shown through evidence of (among other things) fraud, misrepresentation, or abusive civil suits. *Fortson v. Brown*, 690 S.E.2d 239 (Ga.App. 2010); *Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hosp. Center*, 873 N.Y.S.2d 679 (N.Y.App.Div.2.Dept.,2009). Unfounded litigation may form the basis for a tortious interference with business relationship. *Overstock.com, Inc. v. SmartBargains, Inc.*, 192 P.3d 858 (Utah, 2008).

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[15] 120 Idaho 164, 167, 814 P.2d 424, 427 (1991)

[16] 128 Idaho 653, 656, 917 P.2d 1293, 1296 (1996)

The misrepresentations which have been and continue to be made were addressed in the preceding section. This court's dismissal of the Plaintiffs' claims on summary judgment raises the inference that there was no legal merit to the second lawsuit. Judge Wilper's denial of their "disingenuous" attempt to regain possession of the property by foreclosing on a vendee's lien raises the same inference as to their continued attempts to force the Taylors to pay them $400,000 while they continue to allege that the property should be returned to them.

These rulings establish an inference that the filing of this suit and the foreclosure motion were the use of "wrongful means" or "wrongful conduct" to interfere with the Johnson Trust's right to sell the real property. This inference, when taken in the light most favorable to the Taylors, creates an issue of fact which precludes summary judgment on this counterclaim.

As an alternative to establishing an improper purpose, the plaintiff alleging intentional interference with prospective contractual relations may prove that the defendant's method of interference was improper under the circumstances. *Santoro v. Schulthess*, 681 S.E.2d 897 (S.C.App.,2009). The Taylors have alleged that Mr. Maile's interference is for an improper purpose and through improper means, which included but is not limited to wrongfully filing a second lawsuit in an effort to relitigate issues which he has already raised repeatedly and lost on, repeatedly. As an attorney, he must be held to the highest ethical standards, and required to comply with Rule 11, which requires that pleadings be filed only when they are well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Wrongful motive may be inferred from Mailes' continued attempts to get title to the property back, by any means, whether it be duplicative lawsuits, continued appeals of issues repeatedly argued unsuccessfully, or "disingenuous" attempts to foreclose on the vendee's lien while also challenging the very judgment upon which the lien is based.

DAMAGES. The Plaintiffs argue that there has been no damage to the Defendants because they have not returned the $400,000 purchase price. This argument ignores the following facts:

a. Judge Wilper has ruled that Mailes' continued litigation over the title to the property is the reason the Taylors have not been able to borrow money to return the purchase price to him;

b. Had the Taylors been able to accept the offer from Park Hampton, they could have paid the $400,000 and still had $1,400,000;

c. Because of the precipitous decline in the real estate market since 2006, the property is now valued at no more than $1,050,000, for a loss of at least $750,000.

d. Because of its inability to either sell the property or borrow against it, the Johnson Trust has incurred incurred real property taxes, interest and late fees in the amount of $99,279.76.

e. The Defendants have incurred $59,458.36 in attorneys fees for defending Mailes' claims against them.

There are many issues of fact which remain to be decided by the jury in this case, making summary judgment improper at this time.

CONCLUSION

For the reasons stated herein, the Defendants request that this court deny the Plaintiffs' motion for summary judgment on the Defendants' counterclaims.

DATED this 28th day of April, 2010.

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of April, 2010 I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mr. Christ Troupis Attorney at Law PO Box 2408 1299 East Iron Eagle Drive, Ste. 130 Eagle, ID 83616	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 938-5482***

_____
Connie W. Taylor
Attorney for Defendants

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Co-Counsel for Plaintiffs/Counter-Defendants

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs/Counter-Defendants, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants/Counter-claimants.	Case No. CV-OC-0723232 **MOTION TO STRIKE**

The Plaintiffs/Counter-Defendants, by and through co-counsel of record, Christ Troupis, hereby moves this Court to strike certain attachments to Affidavit of Counsel and Affidavit of R. John Taylor relating to Plainitffs' Motion for Summary Judgment filed herein, and moves this

Court to enter it's Order striking the attachments described in the Affidavit of Christ Troupis, filed contemporaneously herewith, as the same have no relevancy in this matter.

This motion is based on the records, papers, pleadings, and files of this action, and I.R.C.P. Rules 12(F) & 56(c), of the Idaho Rules of Civil Procedure. This motion is further made and based upon the record and files in this action. Plaintiffs/Counter-Defendants request timely oral argument on the matters contained herein.

ORAL ARGUMENT WILL BE REQUESTED.

DATED this 3rd day of May, 2010.

CHRIST T. TROUPIS, Co-counsel for
Plaintiffs/Counter-defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 3rd day of May, 2010, I caused a true and correct copy of the foregoing MOTION TO STRIKE to be delivered, addressed as follows:

Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) U. S. Mail (X) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery
Thomas G. Maile, IV. 380 W. State Street Eagle, Idaho 83616 Facsimile: (208) 939-1001	( ) U. S. Mail (X) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery

CHRIST T. TROUPIS, Co-counsel for
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Co-Counsel for Plaintiffs/Counter-Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs/Counter-Defendants, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants/Counter-claimants.	Case No. CV-OC-0723232 **AFFIDAVIT OF CHRIST TROUPIS IN SUPPORT OF MOTION TO STRIKE**

STATE OF IDAHO)
) ss:
County of Ada)

CHRIST TROUPIS, being first duly sworn upon oath, deposes and states as follows:

1. Your Affiant is co-counsel for the above-named Plaintiffs/Counter-Defendants, and as such, is well familiar with the facts contained in the record herein and provides this affidavit in support of Plaintiffs/Counter-Defendant's Motion to Strike portions of the attachments to the Affidavit of Counsel and the Affidavit of R. John Taylor filed in opposition to Plaintiffs' Motion for Summary Judgment filed herein. That the information and facts set forth herein are based upon your affiant's personal knowledge and/or observations and can testify as to the truth of the matters asserted herein if called upon as a witness at the trial of this matter.

2. That your affiant received the affidavits referenced above and the affidavits contain improper, immaterial, impertinent, or scandalous matter, to wit: any and all billings relating to this litigation and the copy of the Idaho State Bar Complaint filed on December 16, 2009. That such material has no relevance to the motion for summary judgment.

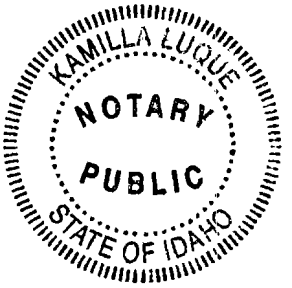
3. That said attachments to the affidavit are inadmissible as the same are not relevant for consideration by the court.

Wherefore, your affiant prays that the court enter its order striking from the record, those allegations and/or documents which lack any foundation the court's consideration relating to the pending motion for summary judgment.

DATED this 3rd day of May, 2010.

CHRIST T. TROUPIS, Co-counsel for
Plaintiffs/Counter-defendants

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for said State, this 3rd day of May, 2010.



Notary Public for Idaho
Residing at Boise, ID 83703
My Commission Expires March 10, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 3rd day of May, 2010, I caused a true and correct copy of the foregoing AFFIDAVIT OF CHRIST TROUPIS IN SUPPORT OF MOTION TO STRIKE to be delivered, addressed as follows:

Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) U. S. Mail (X) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery
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Co-Counsel for Plaintiffs/Counter-Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV., and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs/Counter-Defendants, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants/Counter-claimants.	Case No. CV-OC-0723232 **REPLY MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO COUNTER-CLAIMANTS MOTION TO AMEND THE COUNTER-CLAIM**

The plaintiffs provide the following Reply Memorandum Brief in support of their Motion

for Summary Judgment against all of the defendants' counterclaims.

LEGAL ARGUMENT

1. *The Counter-claimants have failed to adequately Reply with Evidence and/or Briefing to rebut the Plaintiffs' Contentions on Summary Judgment.*

There are significant developments established in the record, which the Counter-Claimants have failed to address in opposition to the Plaintiffs' motion. The Honorable Judge Ronald Wilper in the case *Theodore L. Johnson Revocable Trust vs Thomas Maile, IV and Colleen Maile and Berkshire Investments, LLC*, Ada County Case Number CV OC 04-05656D entered his Order October 14, 2009, affirming that the plaintiffs have a continued right to assert a vendee's lien for the return of the purchase price pursuant to I.C. 45-804. The decision of March 11, 2010, only suspends the foreclosure until there is a resolution in the current proceedings.

A plain reading of I.C. § 45-1302 supports the plaintiffs' position that a lis pendens was proper until the vendee's lien is foreclosed upon. The plaintiffs have consistently asserted that the right to pursue the vendee's lien and the foreclosure of the same, was part and parcel of the Lis Pendens which were previously filed of record. Judge Wilper has validated the counter-defendants' right to file the vendee's lien. I.C. § 45-1302 authorizes the foreclosure of a lien to the same status as a quiet title action. Although Taylors argue that the vendee's lien does not create an interest in the real property, they admit that "Under Idaho law, a lien is a charge upon property to secure payment of a debt..." Def. Memo, pg. 14. Moreover, the Taylors' claim that the contract was declared void, but not rescinded, is merely semantic, since the July 21, 2006 order mandated "returning all parties to the position they had been in prior to the transaction..."

which is the substantive effect of the rescission remedy. See Def. Memo, p. 12.

The Counter-claimants have failed to argue any position relating to the interplay between I.C. § 45-1302 & I.C. 45-804. As stated in the opening brief, a foreclosure of a vendee's lien is treated as an action to quiet title. An action to quiet title affects the legal and equitable claims affecting real property. A filing of Lis Pendens is proper to give notice of the competing claims in any quiet-title action.

In addition the counter-claimants failed to address the plaintiffs' good faith equitable claims asserted by the plaintiffs for quieting title based upon a "fraud upon the court". The counter-claimants failed to argue against the clear basis for equitable relief afforded under the case of Campbell v. Kildew, 141 Idaho 640, 115 P.3d 731 (2005), which provided that actions to set aside a judgment are governed by equitable principles. This court ruled that the doctrine of Res Judicata applied to bar the plaintiffs' requested relief. The plaintiffs respectively disagree with the court's ruling, for a number of reasons. Most importantly, the defendants filed verified pleadings asserting they were beneficiaries when in truth and established fact they were not. The plaintiffs are supported in their proposition by the Idaho Supreme Court which has established "law of the case" that the Taylors had disclaimed their interest in the trust. Consequently the Taylors were not beneficiaries as they submitted in their verified pleading in January 2006 which gave rise to the "Judgment on Beneficiaries' Claim (Taylor v. Maile 2). The plaintiffs have alleged there was a "fraud upon the court" which was sought to be corrected by seeking equitable relief, consistent with the Campbell case. In any case alleging an independent basis for equitable relief based upon fraud upon the court, there will always be a previous judicial proceeding that

gave rise to the judgment sought to be set aside. That in and of itself does not make the filing for equitable relief wrongful conduct that will give rise to a civil remedy.

Nor have the counter-claimants argued against the established law relating to a constructive trust remedy. The plaintiffs alleged fraud upon the court as one of the bases to set aside the Judgment and quiet title to the real property in Berkshire Investments. Any action "affecting the title to real property" clearly allows the filing of a lis pendens by an interested party in order to protect their interest in the property subject to the litigation. Such actions include actions attempting to set aside a fraudulent conveyance of real property; actions to establish a constructive trust over real estate which may have been obtained by fraud. See generally, Bengoechea v. Bengoechea, 106 Idaho 188, 677 P.2d 501 (Ct. App.1984), wherein a claim for constructive trust relating to real property allegedly obtained by fraud allowed the filing of lis pendens. A constructive trust can be imposed where property was obtained either fraudulently or through violation of a fiduciary duty. Hettinga v. Sybrandy, 126 Idaho 467, 469, 886 P.2d 772, 774 (1994), Witt v. Jones, 111 Idaho 165, 722 P.2d 474 (1986). The counter-claimants have failed to argue or provide any law in opposition to these basic principles of law.

The burden of proving the absence of material facts is upon the moving party. Levinger v. Mercy Medical Center, Nampa, 139 Idaho 192, 195, 75 P.3d 1202, 1205 (2003); I.R.C.P. 56(c). Once the moving party establishes the absence of a genuine issue by sufficiently raising the issue as to an element of the prima facie case, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. Id. The party opposing summary judgment, therefore, "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." I.R.C.P. 56(e). This rule facilitates the dismissal of factually unsupported claims prior to trial. Venters v. Sorrento Delaware, Inc., 141 Idaho 245, 108 P.3d 392 (2005).

Idaho appellate courts will not consider any issue when a party fails to support it with argument or authority. Lamprecht v. Jordan, LLC, 139 Idaho 182, 187, 75 P.3d 743, 748 (2003), United Investors Life Ins. Co. v. Severson, 143 Idaho 628, 151 P.3d 824 (2007). Assignments of error are deemed waived and should not be considered by an appellate court. State v. Creech, 132 Idaho 1, 966 P.2d 1 (1998). Appellate courts need not address an issue when an appellant has made only conclusory assertions and has failed to cite any legal authority. Such conduct amounts to a waiver by an appellant of issues to be reviewed. Suitts V. Nix 141 Id. 706, 117 P.3d 120 (2005), Eagle Water Co., Inc. v. Roundy Pole Fence Co., Inc., 134 Id. 626, 7 P.3d 1103 (2000).

The granting of Summary Judgment against all of the claims set forth in the counterclaims is proper in the current case.

2. *The Supreme Court has provided recent authority to support the Plaintiffs' Right to a Summary Judgment on all claims raised in the Counter-Claim.*

The Idaho Supreme Court on April 2, 2010, issued a decision in the case of Weitz v. Green, 33696 (IDSCCI) which provided:

> "Slander of title requires proof of four elements: (1) publication of a slanderous statement; (2) its falsity; (3) malice; and (4) resulting special damages."" Porter v. Bassett, 146 Idaho 399, 405, 195 P.3d 1212, 1218 (2008) (quoting McPheters v. Maile, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003)). Slander is "[a] defamatory assertion expressed in a transitory form." Black"s Law

Dictionary 660 (3rd pocket ed. 2006). A "defamatory" statement is one "tending to harm a person"s reputation, [usually] by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person"s business." Id. at 188. "„Malice has been generally defined by Idaho courts as a reckless disregard for the truth or falsity of a statement. An action will not lie where a statement in slander of title, although false, was made in good faith with probable cause for believing it."" Hogg v. Wolske, 142 Idaho 549, 557, 130 P.3d 1087, 1095 (2006) (internal citation omitted) (quoting Weaver v. Stafford, 134 Idaho 691, 701, 8 P.3d 1234, 1244 (2000)). Attorney fees and legal expenses incurred in removing a cloud from title constitute special damages for purposes of a slander of title claim. Rayl v. Shull Enters., Inc., 108 Idaho 524, 530, 700 P.2d 567, 573 (1984).

The district court concluded that Appellants made assertions in their Amended Complaint that satisfied the first two elements of publication of a slanderous and false statement. The Amended Complaint contains allegations that Appellants, and not Respondents, are the title-holders of the property, and that Respondents trespassed on Appellants" land and caused damages. The district court found that the Amended Complaint constituted the publication of a defamatory and false statement. As to malice, the district court made the factual finding that Appellants had recklessly made numerous false statements in their Amended Complaint, including a statement that a hogwire fence on the eastern portion of the disputed property extended to intersect with another fence, when they knew that it did not.

The district court"s finding as to the publication element was erroneous as a matter of law. As this Court noted in Richeson v. Kessler, "[w]ith certain exceptions, unimportant here, defamatory matter published in the due course of a judicial proceeding, having some reasonable relation to the cause, is absolutely privileged and will not support a civil action for defamation although made maliciously and with knowledge of its falsity." 73 Idaho 548, 551-52, 255 P.2d 707, 709 (1953). If the defamatory statement was made in the course of a proceeding and had a reasonable relation to the cause of action of that proceeding, that statement may not be used as the basis for a civil action for defamation. Carpenter v. Grimes Pass Placer Mining Co., 19 Idaho 384, 393-94, 114 P. 42, 45 (1911). A cause of action for defamation in Idaho has very similar elements to a cause of action for slander of title; a plaintiff suing for defamation must show that the defendant: "(1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication." Clark v. Spokesman-Review, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007). The public policy behind granting immunity from civil defamation actions holds also for actions alleging slander of title, as has been

recognized by several other jurisdictions. See Conservative Club of Washington v. Finkelstein, 738 F.Supp. 6, 13-14 (D. D.C. 1990); Wilton v. Mountain Wood Homeowners Ass'n, 22 Cal.Rptr.2d 471, 473 (Cal.Ct.App. 1993).

Respondents cite to our decision in Weaver v. Stafford, in support of their argument that the publication requirement may be satisfied through statements made in a pleading. 134 Idaho 691, 701, 8 P.3d 1234, 1244 (2000) (stating "[h]ere, Stafford"s pleadings assert an interest in Lot 16 and thus satisfy the publication element of slander of title."). We find no compelling reason why the public policy granting civil immunity for statements made in judicial proceedings as applied to defamation actions should not also apply to slander of title actions. Therefore, to the extent Weaver conflicts with the general rule articulated in Richeson, 73 Idaho at 551-52, 255 P.2d at 709, and quoted above, we overrule it.

As the finding of slander of title in this case was premised upon a statement made in the complaint, a necessary first step in litigation, where such statement was related to the underlying claim against Respondents, that statement is deemed immune. Therefore, this Court reverses the district court"s determination that Appellants committed slander of title against Respondents. Accordingly, the award of $40,000 in attorney fees as special damages under the slander of title claim was improperly granted and is reversed.

The Weitz, supra, case has important implications relating to established Idaho Law to the present proceedings. All of the counter-claimants' contentions relate to an alleged improper filing of Lis Pendens and the alleged misuse of judicial process relating to allegations contained in the amended complaint filed by the plaintiff. As the Weitz case holds such statements whether set forth in a lis pendens filed of record or contained in allegations of a complaint are judicially immune from liability if they "had a reasonable relation to the cause of action of that proceeding". In both cases whether protected under a vendee's lien or a claim for a constructive trust, the pleadings and the Lis Pendens were reasonably related to the claims for relief in both cases.

Such judicial statements may not be used as the basis for a civil action for defamation,

whether it be a slander of title, abuse of process, or a claim for intentional interference with a prospective economic advantage. The plaintiffs alleged the Taylors committed a "fraud upon the court" and prayed for equitable relief to set aside the judgment and quiet title in Berkshire Investments. The plaintiffs are supported in their proposition by the Idaho Supreme Court which has established "law of the case" that the Taylors had disclaimed their interest in the trust. Every claim advanced by the counter-claimants is premised upon a general principle that such statements were defamatory or false. Such can not be the case under Weitz, supra, as these allegations and Lis Pendens had a reasonably relation to the cause of actions. Summary Judgment for the plaintiffs is proper on all counts. of the defendants' counterclaims.

3. *The March 9th 2010 Order Affirms That the Plaintiffs Have Not Improperly Pursued Litigation Surrounding Any Filings to Secure Their Vendee's Lien on the Real Property.*

The Honorable Judge Wilper has currently denied the plaintiffs' right to seek enforcement of their vendee's lien, in essence ruling that while this litigation is pending it would be inappropriate to foreclosure the vendee's lien. The Court however, denied sanctions against the plaintiffs. The denial of the sanctions provides the basis for this court to determine that there are legitimate factual and legal issues surrounding the plaintiffs' right to seek the enforcement of a vendee's lien. The Decision and Order relating to the defendants' request for sanctions provides additional basis for summary judgment. First, if the district court failed to assess sanctions it is a finding that establishes that there are meritorious issues raised by the plaintiffs. The case of Cunningham, et al. v. Jensen, et al., 31332 (IDSCCI), illustrates the available remedies in civil litigation relating to alleged wrongful conduct.

> There are troubling concerns in adopting a broader definition for the tort of abuse of process. There is clearly the potential for litigants to abuse this cause of action, filing lawsuits outside the main litigation to obtain undue advantage in the underlying suit, or burdening the courts with claims of improper litigation tactics for every perceived slight by their opponents. Further, there are remedies within the litigation itself, such as court-ordered sanctions, which can compensate litigants for abusive tactics by the opposing party. Allowing recovery of damages in an abuse of process action that could be recoverable and addressed by the court in the underlying litigation would be inefficient and could create the possibility that a disappointed litigant would seek a "second opinion" if the litigant didn't feel the sanctions were sufficient in the first case. As one court has noted: Attorneys have a relatively swift mechanism for redressing careless, slick, underhanded, or tacky conduct: court-imposed sanctions. Once imposed, sanctions may be reviewed by an appellate court. They may not, however, be tried de novo under the guise... of a tort action. [Such would] represent[] an intolerable attempt to end-run and abuse the judicial system and could lead to a geometric proliferation of litigation. Pollack v. Superior Court, 279 Cal.Rptr. 634, 636 (Cal. Ct. App. 1991).

The fact that the Honorable Judge Wilper did not find a basis for an award of sanctions relating to the filing and/or attempt to enforce the vendee's lien, establishes that the plaintiffs did not commit wrongful conduct. If they had arguably Judge Wilper would have so found. The counterclaim cannot advance as Judge Wilper has ruled that there were meritorious issues and facts which are to be resolved.

Second, the determination by Judge Wilper serves as Res Judicata and Collateral Estoppel relating to the current counter-claim. There are five factors required for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the

party against whom the issue is asserted was a party or in privity with a party to the litigation. Ticor Title Co., 144 Idaho at 124, 157 P.3d at 618. The determination made by Judge Wilper satisfies all the elements under Ticor case. The plaintiffs unless they committed fraud, cannot be held accountable under the counter-claim for alleged wrongful conduct. The plaintiffs have properly asserted that they have a valid vendee's lien as the same has been litigated and resolved in the plaintiffs' favor.

5. The plaintiffs in good faith advanced their colorable claim for a constructive trust.

The plaintiffs filed suit seeking equitable relief. Relative hereto 49 C.J.S. Judgments § 310 provides:

> .... In order for a party to obtain relief under such a rule, the party seeking relief must prove the most egregious conduct involving corruption of the judicial process itself by establishing to the satisfaction of the trial judge that there was perjured testimony which influenced the judgment of the court. ...
> In any event, some courts hold that a judgment may be vacated for perjury under certain conditions, as where a party obtains a judgment by that party's own willful perjury, or by the use of false testimony, which the party knows at the time to be false.

The district court entered its "Judgment on Beneficiaries' Claim", solely upon the direct material misrepresentations of the Taylors and their counsel of record. A colorable claim was advanced by the plaintiffs in the present matter. All the allegations against the plaintiffs stem from a "reasonable relation" to the allegations surrounding the "fraud upon the court".

The case of Robinson v. Robinson, 70 Idaho 122, 128, 212 P.2d 1031, 1034 (1949) provides the initial standards of application of Res Judicata. Commencing at page 128 of 70 Id. Reports, the Supreme Court declared:

> One of the oldest and most universally accepted juridical principles is that embraced in the doctrine of res judicata. In the ***absence of fraud*** or collusion a judgment is conclusive as between the parties and their privies on all issues which were (or should have been) litigated in the action....
>
> Generally speaking, the fraud which will invalidate a judgment must be extrinsic or collateral to the issues tried, by which the aggrieved party has been prejudiced, or prevented from having a fair trial. It is not sufficient to charge only intrinsic fraud, or that which is involved in the issues tried, such as the presentation of perjured testimony. (citation omitted).

Our Supreme Court has confirmed the principle that a party committing fraud will not be afforded the protection of res judicata. Sund v. Gambrel, 127 Idaho 3, 896 P.2d 329 (1995), Stoddard V. the Hagadone Corporation (2009-ID-0416.158 Docket No. 34335). The plaintiffs have legitimately and properly advanced sound legal and factual argument relating to the defendants' alleged misconduct in obtaining their "Judgment on Beneficiaries' Claims". Summary Judgment is proper.

4. *Certain Attachment to John R. Taylor's should be stricken and not considered relevant to the Summary Judgement.*

The attachment relating to the Idaho State Bar Complaint filed on December 16, 2009 is improper. R. John Taylor has provided the attachment to the record which is improper and serves no purpose to the present proceeding and must be stricken for lack of foundation.

> Rule 12(F) of the Idaho Rules of Civil Procedure provides:
> Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty (20) days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Rule 56 of the Idaho Rules of Civil Procedure requires that the evidence submitted in

opposition must be admissible evidence. The complaint serves no purpose to the court in its determination of the legal issues involved in the motion for summary judgment. The recent case of Homes Corp. v. R. Herr, 2005 Idaho 30667, provides:

> In order to be considered on a summary judgment motion, affidavits must be based on personal knowledge, set forth facts that would be admissible in evidence at trial, and show that the affiant is competent to testify on the stated matters. I.R.C.P. 56(e). In determining the admissibility of evidence, trial courts are given broad discretion and will be reversed on appeal only when there has been a clear abuse of discretion. State, Dep't of Health and Welfare v. Altman, 122 Idaho 1004, 1007, 842 P.2d 683, 686 (1992); Baker v. Shavers, Inc., 117 Idaho 696, 698, 791 P.2d 1275, 1277 (1990).

The court exercises free review of the standards of the admissibility of evidence on summary judgment motions, and will not be overturned unless there is a clear abuse of discretion. The complaint must be stricken from the record and should not be considered as legitimate fact in support of the motion for summary judgment.

6. *The Court should deny the Counter-claimants motion to amend its counter-claim.*

Idaho Rule of Civil Procedure 15(a) provides that, once a responsive pleading has been filed, a pleading may only be amended by "leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ." An abuse-of-discretion standard is employed in reviewing a district court"s denial of a motion to amend a complaint to add an additional cause of action. Farmers Ins. Exch. v. Tucker, 142 Idaho 191, 193, 125 P.3d 1067, 1069 (2005). If the amended pleading does not set out a valid claim, or if the opposing party would be prejudiced by the delay in adding the new claim . . . it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint." Black Canyon

Racquetball Club, Inc. v. Idaho First Nat'l Bank, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

The motion to amend the counter-claim does not alter the underlying facts established in the record to create any additional basis for any claims. The proposed amendment does not alter the underlying facts that the allegations contained in the plaintiffs' amended complaint and the filing of the Lis Pendens were not reasonably related to the cause of actions involving the real property subject the plaintiffs' claims for a constructive trust and/or the judicially authorized and established claim for the foreclosure of a vendee's lien.

CONCLUSION

There are ample undisputed facts supporting the continued right to maintain a vendee's lien foreclosure action against the real property. A vendee's lien is afforded the same analysis as a quiet title action affecting real property. The counter-claimants had a legitimate right to maintain their lis pendens in the current matter even through an appeal. The continuation of the lis pendens through August 2009 were proper. The Counter-defendants are entitled to Summary Judgment as to all counter-claims raised in this matter.

DATED this 3rd day of May, 2010.

CHRIST T. TROUPIS, co-counsel for
Plaintiffs/Counter-defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 3rd day of May, 2010, I caused a true and correct copy of the foregoing (1) REPLY MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO COUNTER-CLAIMANTS MOTION TO AMEND THE COUNTER-CLAIM to be delivered, addressed as follows:

Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) U. S. Mail ( ) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery
Thomas G. Maile, IV. 380 W. State Street Eagle, Idaho 83616 Facsimile: (208) 939-1001	( ) U. S. Mail ( ) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery

CHRIST T. TROUPIS, co-counsel for Plaintiffs/Counter-defendants

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, et al. Defendants.	Case No. CV OC 0723232 **ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT ON THE DEFENDANTS' COUNTERCLAIMS**

This cause came on before the Honorable Richard D. Greenwood for hearing on the Plaintiffs' Motion for Summary Judgment on the Defendants' counterclaims.

Based upon and for the reasons stated on the record, the court finds there are genuine issues of material fact that prevent it from granting a Motion for Summary Judgement at this time.

The Plaintiffs' Motion for Summary Judgment on the Defendants' Counterclaim is therefore DENIED.

DATED this 22 day of June, 2010.

By Judge Greenwood

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of June, 2010, I caused to be served a true and correct copy of the foregoing documents by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☐ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mr. Christ Troupis Attorney at Law PO Box 2408 Eagle, ID 83616	☐ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 938-5482***
Connie Taylor Clark and Feeney PO Box 285 1229 Main Street, Ste 201 Lewiston, ID 83501	☐ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 746-9160***

_____
Clerk

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, et al. Defendants.	Case No. CV OC 0723232 **ORDER GRANTING MOTION FOR LEAVE TO AMEND COUNTERCLAIMS**

This cause came on before the Honorable Richard D. Greenwood for hearing on the Defendants' Motion to Amend Counterclaims. Following Defendants' counsel's agreement to redact references made in the proposed Amended Counterclaim to disciplinary proceedings by the Idaho State Bar against Mr. Maile, the Plaintiffs had no further objection thereto.

The Defendants' Motion to Amend Counterclaims is hereby GRANTED.

DATED this 22 day of June, 2010.

Hon. D. Carey, Sr. Dist Judge

for By_____
Judge Greenwood

LAW OFFICES OF
CLARK AND FEENEY
LEWISTON, IDAHO 83501

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of June, 2010, I caused to be served a true and correct copy of the foregoing documents by the method indicated below, and addressed to the following:

Thomas G. Maile, IV 380 West State Street Eagle, ID 83616	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 939-1001***
Mr. Christ Troupis Attorney at Law PO Box 2408 Eagle, ID 83616	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 938-5482***
Connie Taylor Clark and Feeney PO Box 285 1229 Main Street, Ste 201 Lewiston, ID 83501	☒ ☐ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) ***(208) 746-9160***

Clerk

CONNIE W. TAYLOR
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P.O. Drawer 285
Lewiston, Idaho 83501
Telephone (208) 743-9516
ISBA No. 4837
Attorneys for Defendants

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE husband and wife, Plaintiffs, vs. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; and R. JOHN TAYLOR, an individual, CLARK and FEENEY, a partnership; PAUL T. CLARK an individual; THEODORE L. JOHNSON REVOCABLE TRUST, n Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSON IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION Defendants.	Case No. CV OC 0723232 **AMENDED COUNTERCLAIM**

As an amended counterclaim against the Plaintiffs, the Defendants allege as follows:

1. The allegations as to residency and jurisdiction admitted in the Answer are incorporated herein by reference.

2. **Abuse of Process**. Plaintiffs, by their conduct in *Taylor v. Maile* and in the present lawsuit, have affirmatively engaged in willful acts in the use of the legal process primarily to accomplish an improper purpose outside of simply gaining an advantage in the underlying litigation for which the process was not designed. The specific acts of the Plaintiffs which support this claim include, but are not necessarily limited to, the following:

a. Filing the instant lawsuit in spite of the fact that the claims contained therein were totally barred by the doctrine of res judicata

b. Filing the instant lawsuit even though the Plaintiffs' claims were devoid of factual support or if supportable in fact, had no cognizable basis in law

c. Asserting claims which had previously been rejected by the Idaho Supreme Court and misrepresenting the decisions of the Supreme Court in pleadings

d. Presenting false and misleading affidavits and pleadings to the district court

e. Asserting claims which were not well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law

f. Asserting claims which were interposed for a improper purpose, such as to harass, to cause unnecessary delay, to needlessly increase in the cost of litigation

g. Asserting baseless claims for the purpose of delay.

h. Failing to release the lis pendens filed in *Taylor v. Maile* for six months after the Supreme Court decision affirming the district court order quieting title in the Linder Road property to the Johnson Trust

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LEWISTON, IDAHO 83501

i. Attempting to regain title to the Linder Road property through improper means, by seeking to foreclose on a vendee's lien while concurrently seeking to set aside the judgment upon which that lien was based

j. Repeatedly filing duplicate motions and/or seeking reconsideration of rulings.

Plaintiffs' actions were taken for ulterior, improper purposes including but not limited to: to delay, stall, and subverting the Johnson Trust's right to the Linder Road property; to needlessly increase the cost of litigation, to gain collateral advantages in the proceeding not authorized by law; to delay the resolution of these matters for the purpose of keeping the real property tied up beyond the time of the appeal of the initial lawsuit in which the property was ordered returned to the Johnson trust.

As a result of these acts by the Plaintiffs, they have prevented and significantly delayed the Defendants from selling the Linder Road property, which has precipitously declined in value since the filing of this action, damaging the Defendants by misuse of the process external to the litigation that cannot be compensated in the underlying proceeding.

3. **Intentional interference with a prospective economic advantage.** By wrongfully continuing to assert an ownership interest in the Linder Road property, the Plaintiffs have committed the tort of intentional interference with a prospective economic advantage. Defendants have lost opportunities to sell the property because of the Plaintiffs' ongoing litigation over the title to the property, including but not limited to the loss of an offer to purchase the property for $1.8 million dollars of which the Plaintiffs had knowledge. The Plaintiffs' interference was for an improper purpose, and has caused resulting damage to the Johnson Trust.

4. **Attorney fees:** As a result of the actions of Plaintiffs in this matter, Defendants have been required to retain the legal counsel from the law offices of Clark and Feeney, and are entitled to recover their attorneys fees incurred in this matter pursuant to IRCP 11 and Idaho Code sections 12-121 and 12-123.

WHEREFORE, Defendants pray that the Court enter an order granting the following relief:

1. That judgment be entered against the Plaintiffs in an amount to be determined at trial for abuse of process.

2. That judgment be entered against the Plaintiffs in an amount to be determined at trial for intentional interference with prospective economic advantage.

3. That the Defendants be awarded reasonable attorney fees and costs incurred in bringing their counterclaim pursuant to I.C. 12-121, 12-123 and I.R.C.P 11.

DATED this 28th day of May, 2010.

CLARK and FEENEY

By _____
Connie W. Taylor, a member of the firm.
Attorneys for Defendants.

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LEWISTON, IDAHO 83501

STATE OF IDAHO)
)ss.
County of Ada)

R. John Taylor, being first duly sworn on oath, deposes and says:

That I am the one of the trustees for the Theodore L. Johnson Revocable Trust, the Plaintiff in the above-entitled action; that I have read the foregoing Amended Counterclaim and know the contents thereof and believe the same to be true.

R. John Taylor

SUBSCRIBED AND SWORN to before me this 1st day of June, 2010.

TAMARA CRANE NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at Grangeville therein.
My Commission expires: 03/06/2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of June, 2010, I caused to be served a true and correct copy of the above document by the method indicated below, and addressed to the following:

Thomas G. Maile	☐	U.S. Mail
Attorney at Law	☐	Hand Delivered
380 W. State St.	☐	Overnight Mail
Eagle, ID 83616	☒	Telecopy (FAX) ***(208) 939-1001***
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Attorneys for Defendants

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Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs/Counter-Defendants, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants/Counter-Claimants.	Case No. CV-OC-0723232 REPLY TO AMENDED COUNTERCLAIM

The above named Plaintiffs/Counter-Defendants, by and through attorney, Christ Troupis Maile hereby provide their Reply to Defendants/Counter-claimants' Amended Counterclaim and in reply to the same allege as follows:

1. Plaintiffs' deny each and every allegation of Defendant's Amended Counterclaim which is not specifically admitted herein.

2. Plaintiffs admit the allegations set forth in paragraph 1 of the Counter-Claim.

3. Plaintiffs specifically deny paragraphs 2, 3, & 4 of the Counter-Claim.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs affirmatively allege that the defendants have been required to return the purchase price of $400,000.00 by previous court proceedings. The same remains unpaid, including interest thereon and the plaintiffs are entitled to a "vendee's lien" on the subject real property pursuant to the previous court proceedings and further pursuant to Idaho Code section 45-804. That in addition, the plaintiffs herein have previously filed their Lis Pendens in the prior proceedings which remained of record with the Ada County Recorder's Office, as further protection of the vendee's lien. That such liens are superior to the Lis Pendens herein and as such the Lis Pendens filed herein has not impaired the title to the subject real property and as such the claims set forth in the counter-claim are barred in the present action. That the court in the prior proceeding captioned Taylor v. Maile, allowed the filing of the notice of lis pendens and as such the claims are barred.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have alleged allegations of wrongful conduct in violation of Chapter 18 Title 78 of the Idaho Code. That plaintiffs are availed of certain remedies set forth below including but not limited to:

> 18-7804 PROHIBITED ACTIVITIES -- PENALTIES.
> (a) It is unlawful for any person who has received any proceeds derived directly or indirectly from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or

the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property. Whoever violates this subsection is guilty of a felony.

18-7805 RACKETEERING -- CIVIL REMEDIES.

(a) A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three (3) times the actual damages proved and the cost of the suit, including reasonable attorney's fees.

(c) The district court has jurisdiction to prevent, restrain and remedy racketeering after making provisions for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. Prior to a determination of liability, such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.

(d) Following a determination of liability, such orders may include, but are not limited to:

(1) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

That such potential remedy, including the request for a constructive trust, authorizes the filing a Lis Pendens herein and as such the claims set forth in the counter-claim are barred in the present action.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs allege the affirmative defense of equitable estoppel and quasi estoppel by the action above referenced.

FOURTH AFFIRMATIVE DEFENSE

Defendants failed to take reasonable steps to mitigate the claimed or alleged damages.

FIFTH AFFIRMATIVE DEFENSE

Defendants are not entitled to all or part of the relief they seek by way of their Counter-Claim for the reason that the damages alleged in their claim reasonably could have been avoided by the counter-claimants.

SIXTH AFFIRMATIVE DEFENSE

Defendants/Counter-claimants were alleged to commit a fraud upon the court giving rising to a colorable claim for the relief sought by the plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

Pursuant to Rule 11 of the IDAHO RULES OF CIVIL PROCEDURE, all possible affirmative defenses may not have been alleged and set forth herein because sufficient facts are not available at this time to form an adequate factual basis for the defenses, after counter-defendants have made reasonable inquiry to obtain such facts. Therefore, counter-defendants reserves the right to raise additional affirmative defenses as fact-gathering and discovery in this matter progresses.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial upon all facts triable by a jury.

REQUEST FOR ATTORNEYS FEES AND COSTS

Plaintiffs have engaged the services of Thomas G. Maile, IV., and Christ Troupis to defend this action and reasonable attorney fees plus costs should be ordered against the Defendants and Idaho Code 12-120; 12-121; 12-123.

PRAYER

WHEREFORE, Plaintiffs pray for Judgment as follows:

1 That Defendants' Counterclaim be dismissed against the Plaintiffs.

2 For Plaintiffs' reasonable attorney fees, plus costs.

3 For such other and further relief as the Court deems just and equitable in the premises.

DATED this 31 day of July, 2010.

CHRIST T. TROUPIS,
Attorney for counter-defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 3rd day of August, 2010, I caused a true and correct copy of the foregoing REPLY TO AMENDED COUNTERCLAIM to be delivered, addressed as follows:

Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery
Thomas G. Maile, IV. 380 W. State Street Eagle, Idaho 83616 Facsimile: (208) 939-1001	( ) (X) ( ) ( )	U. S. Mail Facsimile Transmission Hand Delivery Overnight Delivery

CHRIST T. TROUPIS,
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Email: ctroupis@troupislaw.com

Co-Counsel for Plaintiffs/Counter-defendants

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

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife, Plaintiffs/Counter-Defendants, v. CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION. Defendants/Counter-Claimants.	Case No. CV-OC-0723232 **PLAINTIFFS/COUNTER-DEFENDANTS' MOTION TO RECONSIDER**

COMES NOW the Plaintiffs/Counter-defendant by and through their undersigned counsel of record, Christ T. Troupis, and moves this Honorable Court for its reconsideration of the following, to wit: (1) Memorandum Decision & Order entered July 2, 2009, (2) Order

Denying Plaintiff's Summary Judgment entered July 20, 2009, (3) the Judgment Dismissing Plaintiff's Claims entered 07/20/2009, together with (4) the Order Denying Plaintiffs' Motion for Summary Judgment on the Defendants' Counterclaims entered on 06/23/2009.

The motion is brought pursuant to I.R.C.P. Rule 11 (a)(2)(B), on the grounds that the decision of the Idaho Supreme Court in *Taylor v. McNichols*, 36130, 36131 (IDSCCI), decided on September 3, 2010, significantly alters the legal positions of the parties to this action with respect to the Plaintiffs' dismissed claims.

This Motion is further made based upon the record and file contained herein, Affidavit in Support of the Motion to Reconsider/Motion to Amend, and the Memorandum Brief in Support of the Motion, filed concurrently herewith.

WHEREFORE, Plaintiffs/Counter-defendants requests this Honorable Court to amend said Orders, Memorandum Decision, and Judgments above referenced.

ORAL ARGUMENT is requested upon the motion.

DATED this 28th day of September, 2010.

CHRIST T. TROUPIS,
Co-Counsel for Plaintiffs/Counter-Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 28th day of September, I caused a true and correct copy of the foregoing (1) PLAINTIFFS/COUNTER-DEFENDANTS' MOTION TO RECONSIDER, (2) AFFIDAVIT OF CHRIST TROUPIS IN SUPPORT PLAINTIFFS/COUNTER-DEFENDANTS' MOTION TO RECONSIDER, together with (3) MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS/COUNTER-DEFENDANTS' MOTION TO RECONSIDER, to be delivered, addressed as follows:

Connie W. Taylor CLARK and FEENEY P.O. Drawer 785 Lewiston, Idaho 83501 Facsimile: (208) 746-9160	(X) U. S. Mail ( ) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery
Thomas G. Maile, IV. 380 W. State Street Eagle, Idaho 83616 Facsimile: (208) 939-1001	( ) U. S. Mail ( ) Facsimile Transmission (X) Hand Delivery ( ) Overnight Delivery

CHRIST T. TROUPIS,
Co-Counsel for Plaintiffs/Counter-Defendants