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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

ABC AGRA, LLC, an Idaho limited liability company,

Plaintiff/Appellant,

v.

CRITICAL ACCESS GROUP, INC., a Minnesota non-profit corporation,

Defendant/Respondent.

Supreme Court Docket No. ~~40753-2012~~ 40543

Jerome County Case No. CV-2012-513

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Jerome,

Honorable Robert J. Elgee, Presiding

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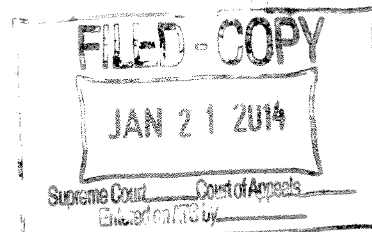

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Statement of the Case

This is Respondent Critical Access Group, Inc's ("CAG") response brief. It responds to *Appellant's Brief* filed by Appellant ABC Agra, LLC ("ABC").

I. Nature of the case

The question in this case is whether the district court should be compelled to decide, and CAG forced to defend, a lawsuit that is not ripe. ABC sued CAG, a Minnesota non-profit corporation, seeking a declaration regarding the enforceability of a real property use restriction despite the fact that there are no existing or proposed uses that implicate the restriction. The district court (Judge Elgee presiding) correctly determined that ABC's claim against CAG was not ripe and granted CAG's motion to dismiss. The district court awarded CAG costs and attorney fees in the total amount of $11.058.00. ABC appealed.

II. Course of proceedings

On May 11, 2012, ABC sued CAG seeking a judgment from the district court "declaring that the Subject Property may only be used for the construction of 'healthcare facilities' defined as being a facility constructed for the 'private practice of medicine for the care and treatment of human beings.'" R., p. 7. The potential use restriction that is the basis for ABC's claim is contained in an Option Agreement executed by ABC and CAG's predecessor in interest. R., pp. 4-5, 18-24.

Upon being served with the Complaint, CAG immediately filed a motion to dismiss under I.R.C.P. Rule 12(b)(6) on the ground that the case was not ripe because there was no present need for court action. R., p. 61. In support of that motion, CAG pointed out that the Complaint lacked any allegation that CAG breached any part of the Option Agreement, that CAG has commenced any construction on the property, or that CAG has taken any action at all toward development of the property. Supp. R., p. 10.

Following briefing and oral argument, on September 7, 2012, the district court entered its *Memorandum Decision on Motion to Dismiss* ("Memorandum Decision"), in which it concluded that ABC's claim was not ripe and granted CAG's *Motion to Dismiss.* R., p. 109. The district court, Judge Elgee presiding, stated:

> Unquestionably, this case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all. Whether any controversy ever arises turns to a large degree, if not entirely, on what sort of a facility is proposed for development. As pointed out by CAG, there is no current threat, evidence or allegation that the property will not be developed in accordance with the specified definition of a healthcare facility, and thus it is as likely as not that a *possible defense* to the terms of the Option Agreement may never have to be raised or litigated.

R., p. 104 (emphasis in original).

The court entered judgment against ABC on October 3, 2012 (R., pp. 111-12). The court awarded costs and attorney fees to CAG as the prevailing party and then entered an *Amended Judgment* on January 18, 2013 against ABC in the total amount of $11,058.00 (Supp. R., pp. 23-24).

III. STATEMENT OF THE FACTS

The only facts in the record are those alleged in ABC's Complaint. CAG accepted all of the facts set forth in the Complaint as true solely for purposes of its *Motion to Dismiss* and continues to do so for this appeal.

The Complaint contains the following description of the real estate transaction that is the subject of this case.

- ABC granted an option in favor of St. Benedicts (CAG's predecessor in interest) to purchase Lot 6 in ABC's "Crossroads Point Business Center PUD." Complaint, ¶ 6; R., p. 4.

- St. Benedicts, prior to the Option Agreement, represented (according to the Complaint) that it would build a new hospital on the property. Complaint, ¶ 7; R., p. 4.

- The purchase price for Lot 6 was $1,678,000. Complaint, Exh. D, ¶ 1(c); R., 19.

- ABC agreed to gift two lots to St. Benedicts (Lots 7 and 8) if St. Benedicts exercised its option to purchase Lot 6. *See* Complaint, ¶ 8; R., p. 4. *See also* Option Agreement (Exh. D to the Complaint), ¶¶ 1(a) and 2; R., pp. 18 and 20.

- The Option Agreement stated that the optionee (then St. Benedicts and Saint Alphonsus) covenanted with ABC that they would use the purchased lot and the two gift lots for the construction of healthcare facilities. Conversely, ABC agreed that optionee (St. Benedicts and Saint Alphonsus) "shall be the exclusive provider of health care services within the development currently known as Crossroads Point" and agreed to restrictions on development of adjacent properties. Option Agreement at ¶¶ 4 and 9(i); R., pp. 20 and 22.

- Paragraph 7 of the Option Agreement stated that if St. Benedicts did not commence construction of healthcare facilities on the property within three years of the date of the exercise of its option, then ABC had the right to buy back all three parcels (the purchased parcel and the two gift parcels) for $1,678,000, which is the exact same price that St. Benedicts paid for Lot 6. The buy-back right "shall be in effect for a two (2) year period which shall commence at the end of the third year following Optionee's exercise of the option on the Real Property."

- St. Benedicts exercised its option on May 14, 2007 and purchased Lot 6. Complaint, ¶ 10; R., p. 5.

- ABC executed a Gift Deed conveying Lots 7 and 8 to St. Benedicts. Complaint, Exh. G; R., pp. 36-39.

The Complaint is devoid of any allegation that CAG is seeking to use Lots 6, 7 or 8 for any purpose other than the construction of healthcare facilities.

Additional Issues Presented on Appeal

The CAG identifies one issue in addition to those identified in the *Appellant's Brief*:

> Should attorney fees and costs be awarded to CAG on appeal pursuant to Idaho Code Section 12-120(3), paragraph 11 of the Option Agreement, and I.A.R. Rules 40 and 41?

ARGUMENT

Idaho law on ripeness is well established with clearly defined standards. The district court properly applied those standards in its well reasoned Memorandum Decision. The district court focused on the fact that ABC's claim against CAG was based upon hypothetical events that may never occur and therefore the matter may never need be submitted to the court for resolution. R., p. 109. While ABC cites to the proper authorities, it misapplies the ripeness analysis. In addition, ABC inappropriately attempts to use matters outside of the allegations in its Complaint to establish ripeness. Based upon the district court's correct decision that ABC's claim against CAG was not ripe, it properly awarded costs and attorney fees to CAG. In addition, if CAG prevails before this Court, then it is entitled to recover its costs and attorney fees on appeal, and ABC's request for attorney fees and costs on appeal must be denied.

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE MATTER WAS NOT RIPE.

A. Standard of review.

"This Court reviews de novo a district court's dismissal of a complaint under Idaho Rule of Civil Procedure 12(b)(6)." *Brooksby v. Geico General Ins. Co.*, 153 Idaho 546, 547, 286 P.3d 182, 183 (2012) (citing *Hoffer v. City of Boise*, 151 Idaho 400, 402, 257 P.3d 1226, 1228 (2011). This Court must determine whether ABC has alleged sufficient facts in the Complaint, which if true, would entitle it to relief. "A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

> When this Court reviews an order dismissing an action pursuant to I.R.C.P. 12(b)(6), we apply the same standard of review we apply to a motion for summary judgment. After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the

claims.

Losser v. Bradstreet 145 Idaho 670, 672–73, 183 P.3d 758, 760–61 (2008) (internal citations and quotations omitted).

B. Standards for determining ripeness: Is there a need for adjudication at the present time?

The only question presented by this appeal is whether, based upon the facts alleged in the Complaint, ABC's claim against CAG is ripe. "Ripeness asks whether there is any need for court action at the present time." *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996). Said another way: "The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh v. Cenarrusa,* 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002).

This Court recently vacated a declaratory judgment on the ground that the record reflected that the case was not ripe. In *Paddison Scenic Properties, Family Trust, L.C. v. Idaho County*, 153 Idaho 1, 278 P.3d 403 (2012), the plaintiff sued the county and the county highway district seeking a declaratory judgment that Coolwater Ridge Road in Idaho County was not a public road but had instead been dedicated as a right of way as part of a federal project. The district court ruled that, regardless of whatever federal rights of way existed, the road was a public road because the elements of a common law dedication were met. *Id.* at 2, 278 P.3d at 404. On appeal, this Court observed that the road was maintained by the U.S. Forest Service as part of the National Forest Road System, and that there was no present dispute between the federal government and either the county or highway district concerning the management of the road. "There is no contention that the Highway District or County seek to manage the road, let

alone inconsistently with the United States' present management." *Id.* As a result, the case was not ripe.

> **There is no present need for adjudication in this case.** The parties agree that the public enjoys access over the road because the United States owns and maintains it as part of the National Forest Road System. Neither the County nor the Highway District—the only defendants in this action—has taken an interest in managing the road. Nor is there any controversy among or between Paddison, the United States, the County, and the Highway District regarding the road's management.

Id. at 4, 278 P.3d at 406 (emphasis added).

In *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006), this Court considered a declaratory judgment action brought by the City of Sun Valley concerning the legality of a proposed ordinance. The *Davidson* court, drawing on its own precedent, analyzed the question as follows:

> This Court has described a justiciable controversy as one that is
>
> > distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot . . . . The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.
>
> *Weldon* [*v. Bonner County Tax Coalition*], 124 Idaho [31] at 36, 855 P.2d [868] at 873 (1993) (quoting *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). Idaho has adopted the constitutionally based federal justiciability standard. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). Idaho courts are authorized under I.C. § 10–1201 to render declaratory judgments under certain circumstances, but even actions filed pursuant to that statute must present an actual or justiciable controversy in order to satisfy federal constitutional justiciability requirements. *Noh*, 137 Idaho at 801, 53 P.3d at 1220.

Davidson, 143 Idaho at 620, 151 P.3d at 816.

The *Davidson* court held that the case was not ripe because the proposed ordinance had not been passed by the voters. "The substance of Davidson's proposed initiative will not be ripe for judicial review unless or until passage by the voters brings up the problem of enforcing a potentially invalid law. Until then, any judgment on the merits of this case would be an academic discussion on a hypothetical set of facts. Federal justiciability standards do not permit the courts to rule on such questions." *Id.* at 621, 151 P.3d at 817 (citations omitted).

Idaho's Declaratory Judgment Act (I.C. §§ 10-1201 *et. seq.*) does not change this analysis. Referencing the inability of Congress to override the federal justiciability standard, this Court held that Idaho Code Section 34-1809 (which permits any qualified elector to bring an action to determine the constitutionality of an initiative) did not create a justiciable controversy. This Court then specifically cited the Declaratory Judgment Act as an example of a statute that could confer standing but not justiciability.

> Analogous to the present case, the Idaho Legislature passed the Declaratory Judgment Act, but this Court held that "as a general rule, a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." *Harris* at 516, 681 P.2d 988. While I.C. § 34-1809 may be a vehicle to determine proper parties to a suit, it cannot create a justiciable controversy.

Noh v. Cenarrusa, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002).

C. The District Court correctly found that ABC's claim against CAG was not ripe because it is based on hypothetical facts.

The district court cited and quoted from these same authorities in the Memorandum Decision. R., pp. 103-04. In particular, the court focused on the portion of the ripeness test that requires the record to show a definite and concrete controversy rather than a hypothetical set of facts that would result in an advisory opinion. In addition to the Idaho cases discussed above, the district court also quoted from the Ninth Circuit Court of Appeals decision in *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122-23 (9th Cir. 2010) as follows:

> '[T]he question of ripeness turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)(internal quotation marks omitted) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). 'The 'central concern [of the ripeness inquiry] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'' *Richardson v. City and County of Honolulu,* 124 F.3d 1150, 1160 (9th Cir. 1997) (quoting 13B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, Joan E. Steinman, Catherine T. Struve, Vikram David Amar, *Federal Practice and Procedure* § 3532, at 112 (2d ed.1984)).

R., p. 104.

In *Chandler*, the Ninth Circuit affirmed the decision granting the defendant's motion to dismiss on the grounds that the record showed that plaintiffs lacked standing and the case was not ripe because they involved uncertain and speculative future events – specifically, whether plaintiffs would be able to recover from third party tortfeasors before turning to the defendant insurer for payment. 598 F.3d at 1123.

Judge Elgee concluded that this was exactly the same type of case because ABC's claim is based on "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." R., p. 109.

ABC attempts to sidestep the prohibition on advisory opinions based on hypothetical facts by claiming that "there is no hypothetical set of facts" in the present case, stating: "Either the covenant contained in the Option Agreement is valid or it isn't." *Appellant's Brief*, p. 17. This misses the point. The question is not whether the use restriction is valid. The question presented here is whether this issue needs to be decided now. The only facts that ABC wants this Court to consider are the existence of the Option Agreement and the communications

between the parties.[1] But those facts alone do not create any controversy at all. At most those facts show the potential for a dispute to arise in the future. Judge Elgee addressed this as follows:

> There are some points to consider. First, in essence, ABC's complaint seeks to flush out and resolve any pending or potential defenses CAG might have under a "what if" scenario. (What if CAG decides to challenge the use restriction contained in the Supplemental Declaration?) If parties are able to bring contractual claims before the Court any time a proposed or possible defense is identified, then all contracts are subject to declaratory judgment actions at all times. Second, even if such a practice was useful or utilized, new and unanticipated factual situations or contract dilemmas could always arise, rendering prior determinations valueless. . . . Fifth, this is not a contract with an identified ambiguity that is causing difficulties between the parties, or which will most certainly cause a problem within an identifiable or specified period of time. Rather, this case presents an existing contract with an identifiable *possible* contract defense that may never be raised, or never have to be raised.

R., pp. 105-06 (emphasis in original).

As observed by the district court, the only way that the use restriction in the Option Agreement would have to be litigated is if the owner of the property (CAG or its successor) attempts to build something other than a healthcare facility on the property, which would potentially implicate the use restriction in the Option Agreement. There are a multitude of hypothetical facts that would result in ABC's proposed declaration being moot. The owner of

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[1] For reasons that are not clear, ABC repeatedly claims in its brief that CAG's refusal to give unqualified agreement to ABC's legal position on the use restriction is somehow made worse by the fact that CAG's attorneys, when they were representing St. Benedicts in the underlying transaction, "authored the healthcare language of the restrictive covenant . . . ." *Appellant's Brief*, p. 24; *see also* pp. 1, 4-5, 9-10, 11, 13 and 19. However, the input from St. Benedicts' lawyer regarding the definition of health care services had to do with the Supplemental Declaration, which does not contain any use restriction applicable to any of CAG's property. The only use restriction that potentially applies to CAG's property is the one in the Option Agreement, which was drafted and executed several months prior to the Supplemental Declaration. Just like the question of validity, whether the definition of "health care services" in the Supplemental Declaration applies in any way to the covenant in the Option Agreement is an issue that does not need to be litigated at this time.

the property could build a healthcare facility. ABC could repurchase the property and eliminate the use restriction altogether. ABC and the owner of the property could come to an agreement that would remove or modify the restriction to permit a different use. A third party could purchase ABC's property and its interest under the Option Agreement and subsequently remove or modify the restriction. A third party could buy the property owned by both CAG and ABC. We could go on. The district court properly applied Idaho law in finding that the hypothetical nature of ABC's claim rendered it unripe.

A. ABC's analysis of the law of ripeness is flawed.

ABC analyzes Idaho and federal cases in search of support for its position that its claim against CAG is ripe. However, the case law relied upon by ABC reinforces the district court's decision.

ABC first discusses *Miles v. Idaho Power Company*, 116 Idaho 635, 778 P.2d 757 (1989), which ABC calls "one of the seminal cases in Idaho jurisprudence regarding ripeness." *Appellant's Brief*, p. 13. We could not agree more. In *Miles*, this Court plainly stated that "a declaratory judgment action must raise issues that are definite and concrete, and must involve a real and substantial controversy as opposed to an advisory opinion based upon hypothetical facts." *Id.* at 642, 778 P.2d at 764. Importantly, the *Miles* Court concluded that the claim was ripe because it was clear from the record that the issue would be brought before the court "either now or in the future." No such claim exists in this case.

The claim in *Miles* was an attack upon an agreement and implementing legislation that limited the Idaho Public Utilities Commission's ability to change rates charged to Idaho Power. The trial court dismissed the plaintiff's declaratory judgment action on the ground that he had not yet been deprived of any constitutionally protected property interest. This Court observed that the challenged agreement and statute were already in place and that all Miles would have to

do to bring the issue before the court would be to request a rate reduction, which the commission would have to deny based on the agreement. Thus, forcing Miles to jump through administrative hoops would add nothing to the resolution of the legal issues. *Id.* at 643, 778 P.2d at 765.

In this case there is no such inevitability in the record. As previously discussed, there are many potential outcomes concerning the disposition and use of the Property that would moot ABC's claim against CAG and make litigating the merits a waste of time and money. The Complaint does not include any allegations that support a finding of a present need for a decision regarding the use restriction. Simply put, there is no reason to force CAG to litigate when there is no "real and substantial" controversy.

ABC next quotes from *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996) and *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006) – two cases that this Court determined were ripe for adjudication. But ABC fails to appreciate that in both of those cases this Court reiterated that declaratory judgment actions must be based on more than hypothetical facts, and that the existing facts in both of those cases showed a need for court action **at that time**. Conversely, the record in this case shows no need for any decision now – and possibly never.

Boundary Backpackers involved a challenge to a county ordinance that required state and federal agencies to comply with the County's land use plan. Following an adverse verdict, the County argued on appeal that the case was not ripe because the County board members testified that they did not intend to enforce the ordinance. This Court made short work of that argument.

> The ordinance is in place. It contains several edicts concerning the compliance of federal and state agencies with the plan and announces that "[n]o wilderness areas shall be designated in Boundary County." The ordinance proclaims: "Boundary County shall enforce compliance with [the plan]...." The affidavit of the board members who enacted the ordinance stating that they

> "deemed that it would not be proper to seek enforcement of the ordinance by fines or penalties" does not override the terms of the ordinance requiring enforcement. We will not speculate whether the board members will choose another form of enforcement or whether a new board will choose to enforce the ordinance by fines or penalties. The ordinance requires the plan to be enforced.

128 Idaho at 376, 913 P.2d at 1146. This stands in stark contrast to the instant case. There was nothing hypothetical about the facts in the record in *Boundary Backpackers* – the ordinance was enacted and it explicitly called for enforcement. Here, there is nothing in the record about any existing plan to develop the Property or any other fact that creates a need for judicial action with regard to the use restriction at this time.

Similarly, in *Schneider*, on appeal from an adverse ruling confirming the existence of an easement, the defendant claimed that the matter was not ripe because the plaintiff had not filed an application with the county to develop the property subject to the alleged easement. However, again in contrast to the case at bar, the plaintiff in *Schneider* alleged that he intended to subdivide the property and that the easement afforded the only access. He also alleged existing harm based upon the defendant's refusal to allow him to use the easement. 142 Idaho at 773, 133 P.3d at 1238. Thus, the record in *Schneider,* including the plaintiff's testimony concerning his plans for the property, demonstrated a dispute that needed to be resolved at that time. That is simply not true in this case where ABC's claim is based on "uncertain or contingent events that may not occur as anticipated, or indeed may not occur at all." *Richardson v. City and County of Honolulu,* 124 F.3d 1150, 1160 (9th Cir.1997). The record is devoid of any evidence that the applicability of the use restriction needs to be decided now. There is simply no need at this time to require CAG to litigate an issue that may never need to be put before a court.

ABC also cites to two federal court decisions in support of its position – *Schugg v. Gila River Indian Community*, No. 2-05-AP-003-84 (U.S.D.C., D. AZ, May 25, 2012) and *Stormans,*

Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009). As with the Idaho cases discussed by ABC, these two federal cases actually support the district court's conclusion that ABC's claim was not ripe.

ABC's own description of the first case plainly reveals how it is distinguishable. "The *Schugg* case involved the plaintiffs' plan to pave certain easements, but they were told by the defendant that they did not have a legal right to pave the easements, or to use them for their planned development." *Appellant's Brief*, p. 22. Of course that case was ripe. The record showed that the plaintiffs had an existing plan to pave the easements, and that the defendant had advised them that it would not allow the easements to be paved. It would be ridiculous to require the plaintiffs to commence excavating as a prerequisite to hearing the case. There was nothing hypothetical about the facts in the record in *Schugg* that gave rise to the dispute. CAG acknowledges that if the record in this case reflected a plan to develop the Property in a manner that potentially violated the use restriction then ABC's claim would be ripe. But the record before the Court in this case demonstrates no such controversy that needs court action at this time.

The *Selecky* case provides an even more compelling example. That case involved a challenge by certain pharmacies and pharmacists to state rules that required pharmacies to dispense legally prescribed medications including the "Plan B" oral contraceptive, regardless of personal, moral, or religious objections. 585 F.3d at 1116-17. The issue of ripeness there had to do with the claims of two of the individual pharmacists. The defendants argued that the pharmacists lacked standing because the state had not taken any enforcement action against them. The Ninth Circuit rejected that argument. The *Selecky* court determined that the pharmacists' claims were ripe because the record reflected that one of them had been forced to leave her job and the other was threatened with termination based upon their refusals to dispense

Plan B. *Id.* at 1123-24. Again, as with *Schugg*, the record contained existing facts that established the need for court action at that time.

ABC argues that *Schugg* and *Selecky* support its position based upon the fact that ripeness in those cases was based on verbal statements rather than something in writing. "If a simple oral statement made in [*Selecky*] can give rise to a determination of ripeness, it is clear that CAG's letter, coupled with the legal assertions contained in its Reply Brief, should lead this Court to a conclusion that this case is ripe for review." *Appellant's Brief* at 23. Whether the statement that creates a justiciable controversy is spoken or written makes no difference – it is the content of the statement that determines whether there is a need for court action at that time. In both *Schugg* and *Selecky*, the statements of the parties established the existence of a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Selecky*, 586 F.3d at 1124 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)). The statements in those cases reflected definite plans by the parties to take actions that were at odds with each other. In *Schugg*, the plaintiff planned to pave the easements despite the defendant's admonition. In *Selecky*, the pharmacists planned to refuse to dispense Plan B despite their employers' stated intent to terminate them if they did. The controversies in those cases were "real" and "immediate." Here, the record does not contain evidence of a real – as opposed to hypothetical – conflict that needs to be resolved right now.

Interestingly, in *Selecky*, while the court found the pharmacists' claims against the state defendants (that had promulgated the rules) to be ripe, it also found that the pharmacists' claims against the agency charged with enforcement of the state law prohibiting discrimination were not ripe because the record showed that there was no enforcement action taken, imminent, or even

threatened by that agency. The pharmacists alleged that their claims against the agency were ripe based upon a letter sent by the agency to the pharmacy board stating that a refusal to dispense the drugs would be a violation of the anti-discrimination statute. 586 F.3d at 1124-25. In other words, in *Selecky*, the Ninth Circuit concluded that a letter expressing a legal opinion contrary to the opinion of the plaintiffs was insufficient to create a justiciable claim. That is actually more than what we have here – a letter that provides notice of a potential disagreement with ABC's opinion.

The very cases promoted by ABC in support of its appeal of the district court's decision demonstrate that ABC's claim was not ripe. The courts in those cases focused on whether the particular facts in each case established a need for court action at that time, or if the claim was based on hypothetical facts. That is the same analysis performed by the district court in this case, which properly found that ABC's claim was contingent on a particular event that may or may not occur in the future – the development of the Property in a manner that would violate the use restriction – and therefore there was no reason to burden the court and parties to litigate it at the present time.

B. ABC cannot rely on matters outside of the Complaint to establish ripeness.

Before the district court, ABC argued that its claim was ripe based not only on the letter from CAG but also because of certain arguments made by CAG in its *Reply Memorandum in Support of Motion to Dismiss* ["CAG Reply Brief"] and because ABC was harmed by CAG's failure to agree with ABC's position on the use restriction.

> In this case, the requisite uncertainty was initially created by the letter from CAG's attorney, and has been subsequently bolstered by the legal issues raised in CAG's Reply Brief. There is clearly a direct and immediate uncertainty that has befallen ABC as a consequence, given its inability to make the specific warranties and representations to future buyers that had been expressly demanded

by CAG's predecessor when it acquired its property.

Plaintiff's Second Memorandum in Opposition to Motion to Dismiss Complaint, p. 5; R., p. 87. ABC repeats that argument on appeal. *Appellant's Brief*, pp. 11, 12, 18, 19, 24 and 25.

However, even if such matters supported a finding of ripeness (which they don't), it is inappropriate on a motion brought pursuant to I.R.C.P. Rule 12(b)(6) to consider any facts beyond those alleged in the pleadings.

> "A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). In *Hellickson v. Jenkins*, the Idaho Court of Appeals discussed judicial notice in the context of a 12(b)(6) motion to dismiss, stating that:
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> > [t]he only facts which a court may *properly* consider on a motion to dismiss for failure to state a claim are those appearing in the complaint, supplemented by such facts as the court may properly judicially notice. *Cohen v. United States*, 129 F.2d 733 (8th Cir.1942). However, a trial court, in considering a Rule 12(b)(6) motion to dismiss, has no right to hear evidence; and since judicial notice is merely a substitute for the conventional method of taking evidence to establish facts, the court has no right to take judicial notice of anything, with the possible exception of *facts of common knowledge* which controvert averments of the complaint. *See Grand Opera Co. v. Twentieth Century–Fox Film Corp.*, 235 F.2d 303 (7th Cir.1956); *Sears, Roebuck & Co. v. [Metro.] Engravers, Ltd.*, 245 F.2d 67 (9th Cir.1956); *Schwartz v. Commonwealth Land Title [Ins.] Co.*, 374 F.Supp. 564 (E.D.Pa.1974), supp. op. (E.D.Pa.) 384 F.Supp. 302.
>
> 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct.App.1990) (emphasis in the original). *See also Fleming v. Lind–Waldock & Co.*, 922 F.2d 20, 23 (1st Cir.1990) (comparing a 12(b)(6) motion to a Rule 56 motion the Court and finding, "[o]ne fundamental difference between the two motions lies in the scope of the court's consideration. The grounds for a Rule 12(b)(6) dismissal comprise *only the pleadings and no more* ") (emphasis added).

Taylor v. McNichols, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010).

Judge Elgee recognized this general rule of law but then proceeded to consider facts outside the pleadings. "While no specific authority has been found on this point, the Court is assuming, without deciding, that it may look to facts not contained or alleged in the pleadings when examining the issue of ripeness." R., p. 106. The Court observed that ABC's claim of hardship arose outside of the pleadings. *Id.* The district court could have, and should have, stopped there. ABC's contention that the uncertainty created by CAG's letter and the arguments in the CAG Reply Brief harm ABC because ABC is now unable to make certain representations and warranties to prospective buyers is conspicuously absent from the Complaint. As a result, those matters cannot be considered in determining whether ABC's claim is ripe.

ABC's attempt to fashion ripeness out of the arguments in the CAG Reply Brief is particularly inappropriate as it not only pertains to matters outside of the Complaint but it also ignores the context in which CAG raised potential defenses to ABC's position on the merits. CAG raised the doctrine of merger as one potential defense to ABC's declaratory judgment action only to demonstrate the waste of time and money that would occur if the parties were forced to litigate the matter. CAG stated: "The point here is not to argue the merits of the merger question, but to point out that litigating complicated legal matters that may never need to be addressed is a waste of time, money, and judicial resources." R., p. 77. CAG specifically noted that its discussion of merger was "[f]or example, but not by way of limitation . . . ." Not only is CAG's reference to merger as a potential defense outside of the allegations in the Complaint, but it was only brought up in the first place to emphasize the potential consequence to the parties of litigating issues based on hypothetical facts. A lawyer's statement in a memorandum discussing potential legal issues hardly seems like the basis for a finding of ripeness.

In any event, neither CAG's reference to the doctrine of merger nor ABC's unsupported statements regarding its inability to make warranties and representations concerning the Property serve to make ABC's claim ripe, even if such matters could properly be considered. As the district court observed, if a party to a contract were allowed to file a declaratory judgment action anytime it wished to flush out or test the other party's defenses, "then all contracts are subject to declaratory judgment actions at all times." R., p. 105. In addition, the district court found it significant that, to the extent ABC has been put into an uncertain legal position by CAG's letter or the arguments made in this action, ABC put itself there.

> However, it cannot be overstated that *CAG did not, as asserted by ABC, raise claims or defenses in pursuit of a plan or scheme to put ABC in some difficult legal position, in order to lower the value of the property or affect its marketability, or even enhance its legal position vis a vis ABC. Rather, CAG only responded to ABC's initial inquiry or request for contract assurances by stating that its awareness of ABC's previous position "should not be interpreted as a statement that CAG agrees with such positions."* Period. If ABC was concerned with being able to make representations as a seller, it could have left matters there. Instead, ABC filed suit requesting a declaratory judgment: when pressed for a legal position as to why litigation was not a good idea, CAG responded. It does not escape the Court that if ABC has been placed in an untenable legal position regarding its ability to give assurances to a future potential buyer, it put itself there. There is an old equitable maxim that a party should not be able to gain out of its own wrong. While neither party here has anything to "gain" if the Motion to Dismiss is denied except the possibility of expensive litigation, [ABC[2]] stands to gain by its actions if it is able to make a case ripe for judicial determination by pressing for a legal resolution of a matter which the other side not only did not seek, but has steadfastly sought to avoid, and which, after all, may not be necessary.

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[2] The Memorandum Decision says "CAG" here but it appears to be a typographical error based upon the context.

R., p. 108 (emphasis in original).[3] As the final nail, the district court accurately stated: "Even if hardship exists to some degree to ABC, it does not outweigh the relative merits of the ripeness doctrine." R., p. 109.[4] Part of the "relative merits" is not forcing the parties into litigation, which necessarily consumes both judicial resources and private resources, when there is no real and immediate need for it. That is the case here.

II. CAG IS ENTITLED TO ATTORNEY FEES; ABC IS NOT.

The district court found CAG to be the prevailing party and awarded costs and attorney fees pursuant to paragraph 11 of the Option Agreement, Idaho Code Section 12-120(3), and I.R.C.P. Rule 54. The only basis upon which ABC appeals the award of costs and fees is based upon the outcome of the ripeness question. *Appellant's Brief*, pp. 24-25. As discussed above, the district court properly found that ABC's claim against CAG was not ripe. Therefore, this Court should affirm the district court's decision, which means that CAG remains the prevailing party below and confirms its right to recover its costs and fees as reflected in the *Amended Judgment*.

The same reasoning applies on appeal. The parties appear to agree that the prevailing party on appeal in this matter is entitled to an award of its costs and attorney fees incurred on

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[3] Judge Elgee stated that his use of the maxim that no party should be able to gain from its own wrong was not intended to imply that ABC committed any wrongful act but instead was in recognition of the fact that ABC started the "snowball effect" by writing to CAG. R., p. 108-09, fn 2. "CAG was a sleeping dog. It only raised the possibility of a defense after ABC's counsel sought acquiescence or acknowledgements CAG was unwilling to give, and was not required to give." R., p. 105.

[4] While CAG believes that such matters should not be considered at all, CAG feels compelled to observe that ABC's claim that it has been harmed by any uncertainty created by CAG is a red herring. ABC's contention that CAG's statements trigger any duty on the part of ABC to disclose such issues to a prospective buyer is patently wrong. Even if we assume (without any factual basis or allegation) that a prospective buyer would demand warranties such as those contained in the Option Agreement, none of CAG's statements constitutes a basis for a "claim, action, suit, arbitration, proceeding or investigation." The Option Agreement and Supplemental Declaration are matters of public record that would be identified on a title report. Any prospective purchaser can read those documents and evaluate the legal import of those documents the same as any other recorded restrictive covenant.

appeal pursuant to I.A.R. Rules 40 and 41, Idaho Code Section 12-120(3) and paragraph 11 of the Option Agreement. Thus, assuming this Court agrees with the decision of the trial court, CAG should be awarded its costs and fees on appeal and ABC's request for costs and fees on appeal should be denied.

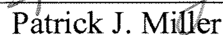
CONCLUSION

Parties are not forced to litigate, and courts are not forced to decide, issues as to which there is no current need for adjudication and for which there may never be such a need. The record in this case, which consists only of the factual allegations in the Complaint, reflects that there is no need at this time for any sort of decision regarding the applicability, enforceability, or interpretation of the use restriction in the Option Agreement. If the owner of the property does not pursue a use that implicates the covenant, then any litigation regarding that covenant will have been a waste of time, money, and judicial resources. The Complaint contains no allegations whatsoever concerning any proposed use of the property. As a result, there is no real and immediate controversy that requires adjudication at this time. ABC's claim against CAG is not ripe.

For all the reasons set forth above, CAG respectfully submits that this Court should affirm the district court's dismissal of ABC's Complaint and the award of costs and fees below, award CAG its costs and attorney fees incurred on appeal, and deny ABC's request for costs and fees on appeal.

Respectfully submitted this 21st day of January, 2014.

GIVENS PURSLEY LLP

By 
Patrick J. Miller

By
Martin C. Hendrickson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of January, 2014, the foregoing was served as follows:

Gary D. Slette
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☒ U. S. Mail
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Patrick J. Miller