

1-2-2014

Golub v. Kirk-Scott, LTD Clerk's Record Dckt. 41505

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ALAN GOLUB and MARILYN GOLUB, husband)
and wife,)

Plaintiffs-Respondents,)

v.)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company; KIRK-)
HUGHES & ASSOCIATES, INC., a Nevada)
corporation; GERALDINE KIRK-HUGHES and)
PETER SAMPSON, husband and wife,)

Defendants-Appellants,)

and)

KIRK-SCOTT, LTD., a Texas corporation;)
INTERNAL REVENUE SERVICE;)
TOMLINSON NORTH IDAHO, INC., an Idaho)
corporation; KELLY POLATIS, an individual;)
DELANO D. and LENORE J. PETERSON,)
husband and wife,)

Defendants.)

ALAN GOLUB and MARILYN GOLUB, husband)
and wife,)

Plaintiffs-Respondents,)

v.)

KIRK-SCOTT, LTD., a Texas corporation,)

Defendant-Appellant,)

and)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company; INTERNAL)
REVENUE SERVICE; TOMLINSON NORTH)
IDAHO, INC., an Idaho corporation;)
GERALDINE KIRK-)
HUGHES and PETER SAMPSON, husband and)
wife; KIRK-HUGHES & ASSOCIATES, INC., a)

Supreme Court Docket No. 41501-2013
Kootenai County No. 2007-8038

Supreme Court Docket No. 41505-2013
Kootenai County No. 2007-8038

Nevada corporation; KELLY POLATIS, an)
individual; DELANO D. and LENORE J.)
PETERSON, husband and wife,)
)
Defendants.)

CLERK'S RECORD ON APPEAL

MICHAEL S. BISSELL
820 W 7TH Avenue
Spokane, WA 99204

MATTHEW Z. CROTTY
421 W Riverside Ave Ste 1005
Spokane, WA 99201

ATTORNEY FOR APPELLANT

ATTORNEY FOR RESPONDENT

Reminder Date	Case	Reminder For	Reminder Text
12/24/2013	CR-2011-0000403 State of Idaho vs. Haley Lynn Hendrickson	WATKINS	see if PA has objection to Withheld judgment, stip sent to them on 1216/13
12/24/2013	CR-2011-0011489 State of Idaho vs. Philip Sean Griner	ZOOK	MAKE SURE THIS PROCESS' CORRECTLY / SHOULD SHOW ON COLLECTIONS REPORT 12/24/13
12/24/2013	CR-2011-0015677 State of Idaho vs. Alexander Allen Welstad	ROHRBACH	check response from pros
12/24/2013	CR-2012-0022115 State of Idaho vs. Ronald Ray Hanson	MCCANDLESS	ntwd
12/24/2013	CR-2013-0002623 State of Idaho vs. Danyell Janean Sheets	BOOTH	sentencing 1/3
12/24/2013	CR-2013-0003263 State of Idaho vs. Timothy James Freund	ZOOK	CHECK TO SEE IF THEY LESSEND THE SENTENCE
12/24/2013	CR-2013-0004168 State of Idaho vs. Tahnee K Miller	STHOMAS	Check to see if OTHER was met
12/24/2013	CR-2013-0007689 State of Idaho vs. Shane Eric Phillipy	HAMILTON	Set Arn
12/24/2013	CR-2013-0008169 State of Idaho vs. Kelly Shawn Brannam	STHOMAS	Ask Amanda About Other and Self-Help. Change Date?
12/24/2013	CR-2013-0013964 State of Idaho vs. Nickelus David Hite	HAMILTON	Set Arn
12/24/2013	CR-2013-0020095 State of Idaho vs. James Dean Hubbard Jr	HAMILTON	Set Arn
12/24/2013	CR-2013-0021797 State of Idaho vs. David Edward Lupo	SVERDSTEN	Set Arn
12/24/2013	CR-2013-0022552 State of Idaho vs. Kevin L McKuin	BOOTH	Set Arn
12/24/2013	CR-2013-0022632 State of Idaho vs. Brandon Warren Ferrara	SVERDSTEN	Set Arn
12/24/2013	CR-2013-0022775 State of Idaho vs. James Dean Hubbard Jr	HAMILTON	Set Arn
12/24/2013	CR-2013-0023448 State of Idaho vs. Nicholas David King	SVERDSTEN	Set Arn
12/24/2013	CR-2013-0023618 State of Idaho vs. Timothy Paul Alexander	SVERDSTEN	Set Arn
12/24/2013	CR-2013-0023790 State of Idaho vs. Heidi Alice Myers	HAMILTON	Set Arn
12/24/2013	CV-2007-0008038 Alan Jay Golub, etal. vs. Geraldine Kirk-Hughes, etal.	CLEVELAND	Reminder for clerk's record due to Attorneys by the 27th
12/24/2013	CV-2012-0003689	ROHRBACH	review, set delinq hearing??

Date	Code	User	Judge
10/30/2007	NCOC	MCCORD	New Case Filed - Other Claims Lansing L. Haynes
		MCCORD	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Winston & Cashatt Receipt number: 0768243 Dated: 10/30/2007 Amount: \$88.00 (Check) For: [NONE] Lansing L. Haynes
	SUMI	BOWLES	Summons Issued Lansing L. Haynes
11/14/2007		VICTORIN	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Holmes Law Receipt number: 0770333 Dated: 11/14/2007 Amount: \$58.00 (Check) For: [NONE] Lansing L. Haynes
	NOAP	VICTORIN	Notice Of Appearance/Edwin Holmes Lansing L. Haynes
11/16/2007	NOTC	GBROWN	Notice of Discovery Lansing L. Haynes
	NOTC	GBROWN	Notice of Discovery Lansing L. Haynes
	NOTC	GBROWN	Notice of Discovery Lansing L. Haynes
11/29/2007	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 02/12/2008 03:30 PM) E. Holmes 1 hr Lansing L. Haynes
11/30/2007	NOTC	LSMITH	Notice of discovery Lansing L. Haynes
	AFSV	LSMITH	Affidavit Of Service-Alfred Braun 11/26/2007 Lansing L. Haynes
12/3/2007		ROBINSON	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Patrick Miller Receipt number: 0772648 Dated: 12/3/2007 Amount: \$58.00 (Check) For: [NONE] Lansing L. Haynes
	MOTN	ROBINSON	Motion To Enlarge Time To Answer Complaint Lansing L. Haynes
	AFSV	GBROWN	Affidavit Of Service/Amended for Michael T Howard and Kenneth B Howard via facsimile on 12-3-07 Lansing L. Haynes
	NTSV	GBROWN	Notice Of Service of Defendants/First Set of Interrogatories to Plaintiffs Lansing L. Haynes
12/4/2007	MOTN	PARKER	Plaintiffs' Motion for Order of Default Against Defendant Kelly Polatis Lansing L. Haynes
	MEMO	PARKER	Plaintiffs' Memorandum of Law in Support of Motion for Default Order Against Defendant Kelly Polatis Lansing L. Haynes
	AFFD	PARKER	Affidavit of Michael T Howard in Support of Plaintiffs' Motion for Order of Default Lansing L. Haynes
	AFSV	SHEDLOCK	Affidavit Of Service on Lenore J. Peterson 11/8/07 Lansing L. Haynes
	AFSV	SHEDLOCK	Affidavit Of Service on Delano D. Peterson 11/8/07 Lansing L. Haynes
	AFSV	SHEDLOCK	Affidavit Of Service on Kirk-Hughes Development, LLC to Scott LaScala of The Corporation Trust Company, Registered Agent 11/6/07 Lansing L. Haynes

Date	Code	User		Judge
12/4/2007	AFSV	SHEDLOCK	Affidavit Of Service on Kirk-Hughes & Associates to Ollie Kirk, Resident Agent 11/25/07	Lansing L. Haynes
	AFSV	SHEDLOCK	Affidavit Of Service on Geraldin Kirk-Hughes 11/25/07	Lansing L. Haynes
	AFSV	SHEDLOCK	Affidavit Of Service on Peter Sampton 11/25/07	Lansing L. Haynes
	RTSV	SHEDLOCK	Return Of Service on Kelly Polatis 11/6/07	Lansing L. Haynes
12/5/2007	NOTC	BAXLEY	Amended Notice of Discovery	Lansing L. Haynes
12/7/2007	NOTC	BAXLEY	Amended Notice of Discovery	Lansing L. Haynes
12/13/2007	NTSD	BAXLEY	Plaintiffs' Notice Of Service Of Discovery	Lansing L. Haynes
	NTSD	BAXLEY	Notice Of Service Of Discovery	Lansing L. Haynes
12/18/2007	LETR	MCCOY	Letter to Court	Lansing L. Haynes
1/8/2008	ORDF	MCCORD	Order For Entry Of Default Against Def Kelly Polatis	Lansing L. Haynes
1/15/2008	AFFD	MCCOY	Affidavit of Delano D. Peterson in Support of Delano D. Peterson and Lenore J. Petersons' Motion for Partial Summary Judgment	Lansing L. Haynes
	AFFD	MCCOY	Affidavit of Edwin B. Holmes in Support of Delano D. Peterson and Lenore J. Petersons' Motion for Partial Summary Judgment	Lansing L. Haynes
	AFFD	MCCOY	Affidavit of Lenore J. Peterson in Support of Delano D. Peterson and Lenore J. Petersons' Motion for Partial Summary Judgment	Lansing L. Haynes
	BRIE	MCCOY	Brief in Support of Delano D. Peterson and Lenore J. Petersons' Motion for Partial Summary Judgment	Lansing L. Haynes
	NTSD	MCCOY	Notice Of Service Of Discovery	Lansing L. Haynes
	MNSJ	MCCOY	Defendants Delano D. Peterson and Lenore J. Petersons' Motion For Partial Summary Judgment	Lansing L. Haynes
	NOHG	MCCOY	Notice Of Hearing on Defendants Delano D. and Lenore J. Petersons' Motion for Partial Summary Judgment	Lansing L. Haynes
1/16/2008	NOTC	MCCORD	Notice of change of address	Lansing L. Haynes
	MISC	LUNNEN	Plaintiff's Motion For Order Of Default Against Defendants Geraldine Kirk-Hughes; Peter Sampson; Kirk-Hughes Development, LLC; And Kirk-Hughes & Associates, INC.	Lansing L. Haynes
	MEMO	SHEDLOCK	Plaintiff's Memorandum Of Law	Lansing L. Haynes
	AFFD	SHEDLOCK	Affidavit Of Michael T. Howard	Lansing L. Haynes
1/18/2008	NTSV	LUNNEN	Notice Of Service Of Defendants Geraldine Kirk-Hughes' And Peter Sampson's Answers And Responses To Plaintiffs First Set Of Interrogatories And Requests For Production Of Documents	Lansing L. Haynes

Date	Code	User		Judge
1/23/2008	HRSC	TAYLOR	Hearing Scheduled (Motion to Continue 02/05/2008 03:30 PM) Motion to Continue 2/12/08 MSJ Hearing Howard	Lansing L. Haynes
	NOTH	MCCORD	Notice Of Hearing	Lansing L. Haynes
	AFIS	MCCORD	Affidavit in Support of Motion to Continue	Lansing L. Haynes
	MNCN	MCCORD	plaintiff's Motion To Continue	Lansing L. Haynes
1/29/2008	HRVC	TAYLOR	Hearing result for Motion to Continue held on 02/05/2008 03:30 PM: Hearing Vacated Motion to Continue 2/12/08 MSJ Hearing Howard	Lansing L. Haynes
1/31/2008	NOTC	MCCORD	Notice of Postponement of Hearing on def's Delano & Peterson's motion for partial summary judgment	Lansing L. Haynes
	HRVC	TAYLOR	Hearing result for Motion for Summary Judgment held on 02/12/2008 03:30 PM: Hearing Vacated E. Holmes 1 hr	Lansing L. Haynes
	FILE	MCCOY	New File Created *****FILE #2*****	Lansing L. Haynes
2/7/2008	NOTC	LUNNEN	Notice Of Discovery	Lansing L. Haynes
	ANSW	MCCOY	Answer - Patrick Miller OBO Geraldine Kirk Hughes & Peter Sampson & Kirk-Hughes Development LLC & Kirk-Hughes & Associates Inc	Lansing L. Haynes
2/8/2008	HRSC	TAYLOR	Hearing Scheduled (Status Conference 03/24/2008 03:30 PM)	Lansing L. Haynes
		TAYLOR	Notice of Hearing	Lansing L. Haynes
3/20/2008	RSCN	MCCORD	Response to Status Conference Notice - Michael Howard	Lansing L. Haynes
	RSCN	MCCORD	Response to Status Conference Notice - Edwin Holmes	Lansing L. Haynes
3/21/2008	RSCN	LSMITH	Response to Status Conference Notice-Patrick Miller	Lansing L. Haynes
3/24/2008		MCCOY	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Kelly Polatis Receipt number: 0788018 Dated: 3/24/2008 Amount: \$58.00 (Check) For: [NONE]	Lansing L. Haynes
	ANSW	MCCOY	Answer - Kelly Polatis	Lansing L. Haynes
	HRSC	TAYLOR	Hearing Scheduled (Jury Trial Scheduled 01/20/2009 09:00 AM) 4 day	Lansing L. Haynes
		TAYLOR	Notice of Trial	Lansing L. Haynes

Date	Code	User	Judge
3/24/2008	DCHH	TAYLOR	Hearing result for Status Conference held on 03/24/2008 03:30 PM: District Court Hearing Held Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated: LESS THAN 100
4/17/2008	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 06/17/2008 03:30 PM) Holmes, 1 hr
4/25/2008	NOTH	PARKER	Notice of Rescheduled Hearing on Defendants Delano D and Lenore J Petersons' Motion for Partial Summary Judgment
6/3/2008	AFFD	RABROWN	Affidavit of Alan J Golub in Support of Plaintiffs' Memorandum in Opposition To Defendants' Delano D and Lenore J Peterson's Motion for Partial Summary Judgment
	MEMO	RABROWN	Plaintiffs' Memorandum in Opposition To Defendants' Delano D and Lenore J Peterson's Motion For Partial Summary Judgment
	AFFD	RABROWN	Affidavit of Michael T howard in Support of Plaintiffs' Memorandum in Opposition To Defendants' Dalano D and Lenore J Peterson's Motion for Partial Summary Judgment
6/4/2008	HRSC	TAYLOR	Hearing Scheduled (Motion 06/17/2008 03:30 PM) Mtn for Default Jdmt Howard
	FILE	MCCORD	New File Created *****FILE 3*****
6/9/2008	OBJT	MCCORD	Objection & Reply Brief in Support of Motion of Partial Summary Judgment
6/10/2008	MOTN	SHEDLOCK	Plaintiffs' Motion To Continue June 17, 2008 Hearing On Motion For Summary Judgment
	AFFD	SHEDLOCK	Affidavit Of Michael T. Howard In Support Of Motion To Continue Hearing On Summary Judgment
6/11/2008	HRSC	JOKELA	Hearing Scheduled (Motion to Continue 06/17/2008 03:30 PM) Howard
	NOHG	LSMITH	Notice Of Hearing
	MODF	LSMITH	Motion For Entry Of Default Judgment against Defendant Kelly Polatis
	AFFD	LSMITH	Affidavit of Michael T. howard in Support of Plaintiff's Motion for Default Judgment against Kelly Polatis
	AFFD	LSMITH	Affidavit of Alan Golub In Support of Motion for default Judgment Against Kelly Polatis
	AFFD	LSMITH	Supplemental Affidavit of Michael T. Howard In support of Plaintiffs' Response to Defendant Peterson's Motion for Summary Judgment

Date	Code	User	Judge
6/11/2008	MEMO	LSMITH	Plaintiffs' Memorandum in Opposition to Defendant Petersons' Objection to Evidence
	MOTN	LSMITH	Plaintiffs' Motion to shorten Time
	NOHG	TAYLOR	Notice Of Hearing
6/12/2008	NOTH	MCCORD	Notice Of Hearing
	AFFD	CANTU	Supplemental Affidavit of Michael T. Howard In Support of Plaintiff's Response to Defendant Peterson's Motion for Summary Judgment
6/13/2008		LSMITH	Filing: 11A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: R Bruce Owens Receipt number: 0799752 Dated: 6/13/2008 Amount: \$58.00 (Cash) For: [NONE]
	OBJT	CANTU	Objection to Motion to Continue and Renewed Attempt to Introduce Hearsay Evidence
	AFFD	CANTU	Affidavit of Edwin B. Holmes
	AFFD	VICTORIN	Declaration of Kelly Polatis
	AFFD	VICTORIN	Affidavit of Counsel
	MNCN	VICTORIN	Motion To Continue Hearing on Motion for Default
	NOAP	VICTORIN	Notice Of Appearance/Regina McCrea
6/17/2008	HRHD	TAYLOR	Hearing result for Motion held on 06/17/2008 03:30 PM: Hearing Held Mtn for Default Jdmt Howard
	HRVC	TAYLOR	Hearing result for Motion to Continue held on 06/17/2008 03:30 PM: Hearing Vacated Howard
	HRHD	TAYLOR	Hearing result for Motion for Summary Judgment held on 06/17/2008 03:30 PM: Hearing Held Holmes, 1 hr TAKEN UNDER ADVISEMENT
	ORDR	TAYLOR	Order (shorten time)
6/26/2008	HRSC	TAYLOR	Hearing Scheduled (Motion 07/25/2008 10:00 AM) Mtn to Set Aside Default, McCrea
6/27/2008	NOHG	MCCOY	Notice Of Hearing Re: Motion to Vacate Order of Default
	AFFD	MCCOY	Affidavit of Kelly Polatis
	MOTN	MCCOY	Motion to Vacate Order of Default
	MEMO	BAXLEY	Memorandum In Support of Motion to Vacate Order of Default
7/11/2008	AFFD	BAXLEY	Affidavit of Michael Howard In Support of Plaintiffs' Response to Defendant Polatis' Motion to Vacate Default Order
	MISC	BAXLEY	Plaintiff's Response To Defendant Polatis' Motion To Set Aside Default Order
7/22/2008	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 10/21/2008 03:30 PM) Holmes, 1 hr

Date	Code	User	Judge
7/24/2008	MEMS	MCCORD	Reply Memorandum In Support Of Motion to Vate Order of Default
	AFFD	BAXLEY	Second Affidavit of Kelly Polatis
7/25/2008	HRHD	TAYLOR	Hearing result for Motion held on 07/25/2008 10:00 AM: Hearing Held Mtn to Set Aside Default, McCrea TAKEN UNDER ADVISEMENT
8/11/2008	MEMO	TAYLOR	Memorandum Opinion and Order in Re: Def's Motion for Partial Summary Judgment
8/12/2008	HRSC	TAYLOR	Hearing Scheduled (Motion 08/13/2008 03:00 PM) Mtn pursuant to IAR 12, Holmes, 15 min.
	NOHG	LSMITH	Notice Of Hearing
	MOTN	LSMITH	Peterson's Motion for Shortening of time and Notice of Hearing
	MOTN	LSMITH	Delano D. Peterson & Lenore J Petersons' Motion for Permission to Appeal From an Interlocutory Order of the Trial Court
8/13/2008	HRHD	TAYLOR	Hearing result for Motion held on 08/13/2008 03:00 PM: Hearing Held Mtn pursuant to IAR 12, Holmes, 15 min. TAKEN UNDER ADVISEMENT
	MISC	BAXLEY	Plaintiffs' Opposition To Defendants' Motion For Permission To Appeal From An Interlocutory Order Of The Trial Court
8/18/2008	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 09/30/2008 03:30 PM) Miller, 30 min
	NTSV	BAXLEY	Notice Of Service of Defendants Geraldine Kirk-Hughes' First Set of Requests for Admissions to Plaintiffs
	NTSV	BAXLEY	Notice Of Service of Defendants Geraldine Kirk-Hughes and Peter Sampson's; Kirk-Hughes Development, LLC's and Kirk-Hughes & Associates Inc.'s First Set of Interrogatories to Plaintiffs
8/19/2008	PTCO	BAXLEY	Delano D Peterson and Lenore J Petersons' Pretrial Compliance (Expert Witness Disclosure In Conformity With IRCP 26(b)(4))
8/20/2008	NTSV	BAXLEY	SUPPLEMENTAL Notice Of Service of Defendants Geraldine Kirk-Hughes' First Set of Requests for Admissions To Plaintiffs
	NTSV	BAXLEY	SUPPLEMENTAL Notice Of Service of Defendants Geraldine Kirk-Hughes' and Peter Sampson's; Kirk-Hughes Development LLC's and Kirk-Hughes & Associates Inc.'s Second Set of Interrogatories and First Set of Requests for Production of Documents To Plaintiffs
8/21/2008	FILE	MCCORD	New File Created *****FILE

Date	Code	User		Judge
8/25/2008	NTSV	MCCORD	pet's Notice Of Service of Discovery	Lansing L. Haynes
	NTSV	MCCORD	pet's Notice Of Service of Discovery	Lansing L. Haynes
8/26/2008	AFFD	MCCOY	Affidavit of Patrick E. Miller in Support of Defendant Kirk-Hughes' Motion for Partial Summary Judgment	Lansing L. Haynes
	MEMS	MCCOY	Defendants Kirk-Hughes's Memorandum In Support Of Motion for Partial Summary Judgment	Lansing L. Haynes
	MOTN	MCCOY	Defendants Kirk-Hughes's Motion for Partial Summary Judgment	Lansing L. Haynes
	NOHG	MCCOY	Notice Of Hearing	Lansing L. Haynes
	NTSD	BAXLEY	Plaintiffs' Notice Of Service Of Discovery	Lansing L. Haynes
8/27/2008	OPIN	TAYLOR	Memorandum Opinion and Order in re: Defendant's Motion to Set Aside Entry of Default	Lansing L. Haynes
	ORDR	TAYLOR	Order Disapproving Defendants' Permissive Appeal	Lansing L. Haynes
9/3/2008	MOTN	BAXLEY	Plaintiffs' Motion and Memorandum For Clarification of Order Re Default Judgment	Lansing L. Haynes
9/4/2008	HRSC	TAYLOR	Hearing Scheduled (Motion 09/30/2008 03:30 PM) Motion for Clarification of Order Re: Polatis, Howard	Lansing L. Haynes
	NOTH	MCCORD	Notice Of Hearing	Lansing L. Haynes
9/8/2008	NOTC	CRUMPACKER	notice of service of defs 3rd set of interrogatories	Lansing L. Haynes
9/17/2008	MNAM	VICTORIN	Motion To Amend Complaint	Lansing L. Haynes
	MEMO	VICTORIN	Plaintiffs' Memorandum in Opposition to Defendant Kirk-Hughes' Motion for Partial Summary Judgment	Lansing L. Haynes
	NOHG	VICTORIN	Notice Of Hearing	Lansing L. Haynes
9/19/2008	NTSV	CRUMPACKER	Notice Of Service of Defendants 2nd set of Requests for Admissions to Plaintiffs	Lansing L. Haynes
9/22/2008	NTSD	BAXLEY	Notice Of Service Of Discovery Responses	Lansing L. Haynes
9/23/2008	MISC	VICTORIN	Defendants Kirk-Hughes's Objection to Plaintiffs' Motion to Amend the Complaint	Lansing L. Haynes
	MOTN	LSMITH	Defendants Delano d. Peterson & Lenore J. Petersons' Renewed Motion for Partial Summary Judgment	Lansing L. Haynes
	NOHG	LSMITH	Notice Of Hearing on Defendants Delano D. & Lenore J. Petersons' Renewed Motion for Partial Summary Judgment	Lansing L. Haynes
	BRIE	LSMITH	Brief in Support of Delano D. Peterson & Lenore J. Petersons' Renewed Motion for Partial Summary Judgment	Lansing L. Haynes
9/24/2008	MISC	BAXLEY	Defendant Polatis's Response To Plaintiffs' Motion For Clarification Of Memorandum Opinion and Order	Lansing L. Haynes

Date	Code	User		Judge
9/24/2008	NTSD	BAXLEY	Notice Of Discovery	Lansing L. Haynes
9/25/2008	DRSB	CRUMPACKER	Defendant's Response Brief in support of Motion for Partial Summary Judgment	Lansing L. Haynes
9/30/2008	HRHD	TAYLOR	Hearing result for Motion held on 09/30/2008 03:30 PM: Hearing Held Motion for Clarification of Order Re: Polatis, Howard	Lansing L. Haynes
	HRHD	TAYLOR	Hearing result for Motion for Summary Judgment held on 09/30/2008 03:30 PM: Hearing Held Miller, 30 min TAKEN UNDER ADVISEMENT	Lansing L. Haynes
10/2/2008	MEMO	TAYLOR	Memorandum Opinion and Order Clarifying Order Re: Default	Lansing L. Haynes
	HRSC	TAYLOR	Hearing Scheduled (Decision 10/21/2008 03:30 PM)	Lansing L. Haynes
		TAYLOR	Notice of Hearing	Lansing L. Haynes
	NOTC	ROBINSON	Seven Day Notice of intent to serve Subpoena For Inspection Of Doc Upon A third Party	Lansing L. Haynes
10/3/2008	NTSV	CRUMPACKER	Notice Of Service of Defendants Answers	Lansing L. Haynes
10/7/2008	MEMO	CRUMPACKER	Plaintiffs Memorandum in Opposition to Petersons Renewed Motion	Lansing L. Haynes
	AFFD	CRUMPACKER	Affidavit of Michael Howard	Lansing L. Haynes
	AFFD	CRUMPACKER	Affidavit of Cheryl Reed	Lansing L. Haynes
	AFFD	CRUMPACKER	Affidavit of Alice Sackman	Lansing L. Haynes
	FILE	SREED	New File Created *****FILE #5*****	Lansing L. Haynes
10/10/2008	NOTC	PARKER	Notice of Unavailability	Lansing L. Haynes
10/14/2008	HRVC	TAYLOR	Hearing result for Motion for Summary Judgment held on 10/21/2008 03:30 PM: Hearing Vacated Holmes, 1 hr	Lansing L. Haynes
	NOTD	CRUMPACKER	Notice Of Deposition	Lansing L. Haynes
	NOTD	CRUMPACKER	Notice Of Deposition of Norman Gissell	Lansing L. Haynes
	OBJT	SREED	Objection, Withdrawal of Motion and Vacation of Hearing	Lansing L. Haynes
10/15/2008	NOTR	BAXLEY	Notice Of Transcript Delivery - Deponent Dusty Obermayer	Lansing L. Haynes
10/16/2008	NTSD	CRUMPACKER	Notice Of Service Of Discovery Responses	Lansing L. Haynes
	NTSD	CRUMPACKER	Notice Of Service Of Discovery Responses	Lansing L. Haynes
	MOTN	JCUMMINGS	Plaintiffs' Motion and Memorandum to Amend Scheduling Order and for Expedited Hearing	Lansing L. Haynes
10/21/2008	HRSC	TAYLOR	Hearing Scheduled (Motion 11/21/2008 10:00 AM) Motion to Strike, Motion to Amend, Pat Miller	Lansing L. Haynes
	HRHD	TAYLOR	Hearing result for Decision held on 10/21/2008 03:30 PM: Hearing Held	Lansing L. Haynes

Date	Code	User	Judge
10/21/2008	OBJT	JCUMMINGS	Defendants Kirk-Hughes' Objection to Plaintiff's Motion to Amend Scheduling Order
	OBJT	JCUMMINGS	Defendants Kirk-Hughes' Objection to Plaintiff's Motion to Amend Scheduling Order
10/22/2008	AFFD	SREED	Affidavit of Patrick E. Miller in Support of Defendant Kirk-Hughes' Motion to Amend
	AFFD	SREED	Affidavit of Patrick E. Miller in Support of Defendant Kirk-Hughes' Motion to Strike
	MEMS	SREED	Defendants Kirk-Hughes' Memorandum In Support Of Motion to Amend Answer
	MOTN	SREED	Defendants Kirk-Hughes' Motion and Memorandum to Strike Plaintiffs' Responses to Defendant's Request for Admission
	NOHG	SREED	Notice Of Hearing
	AFSV	JCUMMINGS	Affidavit Of Service on 10/14 served Dr. Steven Liss
	AFSV	JCUMMINGS	Affidavit Of Service on 10/14 served Norman Gissel
	NTSD	JCUMMINGS	Notice Of Service Of Discovery
10/27/2008	NOTD	BAXLEY	Notice Of Deposition Duces Tecum of Marilyn Golub
	NOTD	BAXLEY	Notice Of Deposition Duces Tecum of Alan Golub
10/29/2008	HRSC	TAYLOR	Hearing Scheduled (Motion to Reconsider 11/21/2008 10:00 AM) Holmes
	NTSV	CRUMPACKER	Notice Of Service of Defendants
10/30/2008	MOTN	PARKER	Defendants Delano D Peterson and Lenore J Petersons' Motion for Reconsideration of the Court's Decision on Partial Summary Judgment (In Re: Peterson's Motion to Dismiss Conspiracy to Defraud)
	BRIE	PARKER	Brief in Support of Delano D Peterson and Lenore J Petersons' Motion for Reconseration of the Court's Decision on Partial Summary Judgment (In Re: Peterson's Motion to Dismiss Conspiracy to Defraud)
	NOTH	PARKER	Notice Of Hearing on Defendants Delano D and Lenore J Petersons' Renewed Motion for Reconsideration of the Court's Decision on Partial Summary Judgment (In Re: Peterson's Motion to Dismiss Conspiracy to Defraud)
10/31/2008	ORDR	TAYLOR	Order (re: Summary Jdmt)
11/3/2008	NOTR	ROBINSON	Notice Of Transcript Lodged
11/12/2008	MISC	HUFFMAN	Joint Stipulation to Continue Trial Date
11/13/2008	HRVC	TAYLOR	Hearing result for Motion to Reconsider held on 11/21/2008 10:00 AM: Hearing Vacated Holmes

Date	Code	User	Judge
11/13/2008	HRSC	TAYLOR	Hearing Scheduled (Motion to Reconsider 12/05/2008 10:00 AM) Holmes
	HRSC	TAYLOR	Hearing Scheduled (Motion to Reconsider 12/23/2008 10:00 AM) Holmes (if not heard on 12/5)
	HRSC	TAYLOR	Hearing Scheduled (Motion 12/05/2008 10:00 AM) Motion to Strike, Motion to Amend Pat Miller
	HRVC	TAYLOR	Hearing result for Motion held on 11/21/2008 10:00 AM: Hearing Vacated Motion to Strike, Motion to Amend, Pat Miller
	NOTD	SREED	AMENDED Notice Of Deposition Duces Tecum - Alan Golub
	NOTD	SREED	AMENDED Notice Of Deposition Duces Tecum - Marilyn Golub
	NOHG	SREED	AMENDED Notice Of Hearing on Defendants Delano D. and Lenore J. Petersons' Renewed Motion for Reconsideration of the Court's Decision of Partial Summary Judgment (In Re: Peterson's Motion to Dismiss Conspiracy to Defraud)
	NOHG	SREED	2nd AMENDED Notice Of Hearing on Defendants Delano D. and Lenore J. Petersons' Renewed Motion for Reconsideration of the Court's Decision of Partial Summary Judgment (In Re: Peterson's Motion to Dismiss Conspiracy to Defraud)
11/17/2008	NOHG	HUFFMAN	Amended Notice Of Hearing-12/5/2008 10:00am
11/20/2008	ORDR	TAYLOR	Order (IN RE: JOINT STIPULATION TO CONTINUE TRIAL DATE)
	HRVC	TAYLOR	Hearing result for Jury Trial Scheduled held on 01/20/2009 09:00 AM: Hearing Vacated 4 day
	HRSC	TAYLOR	Hearing Scheduled (Jury Trial Scheduled 08/17/2009 09:00 AM) 4 day
		TAYLOR	AMENDED Notice of Trial
11/25/2008	HRSC	TAYLOR	Hearing Scheduled (Motion to Withdraw 12/05/2008 10:00 AM) McCrea
	NLTR	MCCORD	Notice of Lodging Transcript
	MNWD	VICTORIN	Motion For Leave To Withdraw As Attorney
	NOHG	VICTORIN	Notice Of Hearing
11/26/2008	MEMO	CRUMPACKER	Plaintiffs Memorandum in Opposition to Defendant Petersons Motion for Reconsideration
	MEMO	CRUMPACKER	Plaintiffs Memorandum in Opposition to Defendant Kirk Hughes Motion to Strike Responses to Requests for Admission

Date	Code	User	Judge
11/26/2008	MEMO	CRUMPACKER	Plaintiffs Memorandum in Opposition to Defendant Kirk Hughes Motion to Amend Answer to Add Affirmative Defense
	MISC	HUFFMAN	Amended Motion for Withdrawal
12/1/2008	NOHG	JOKELA	AMENDED Notice Of Hearing
	NOHG	JOKELA	AMENDED Notice Of Hearing
12/2/2008	BRIE	BAXLEY	Reply Brief In Support Of Delano D Peterson and Lenore J Petersons' Motion For Reconsideration of The Court's Decision On Partial Summary Judgment (In RE: Peterson's Motion to Dismiss Conspiracy to Defraud)
	FILE	PARKER	New File Created --File 6--
12/3/2008	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 02/03/2009 03:30 PM) Howard, 1 hr
	MOTN	CRUMPACKER	Defendants Kirk-Hughes Reply in Support of Motion To Amend Answer
	MOTN	CRUMPACKER	Defendants Kirk-Hughes Reply in Support of Motion to Strike Plaintiffs Responses to Requests for Admission
12/4/2008	MOTN	PARKER	Plaintiffs' Motion in Support of Summary Judgment Re: Legal Description
	NOTH	PARKER	Note for Hearing
12/5/2008	HRHD	STONE	Hearing result for Motion to Withdraw held on 12/05/2008 10:00 AM: Hearing Held McCrea--GRANTED
	HRHD	STONE	Hearing result for Motion held on 12/05/2008 10:00 AM: Hearing Held Motion to Strike--DENIED, Motion to Amend Pat Miller--GRANTED
	HRHD	STONE	Hearing result for Motion to Reconsider held on 12/05/2008 10:00 AM: Hearing Held Holmes--GRANTED
	HRVC	STONE	Hearing result for Motion to Reconsider held on 12/23/2008 10:00 AM: Hearing Vacated Holmes (if not heard on 12/5)
	NOTC	SREED	Notice of Postponement of Deposition Duces Tecum
	NOTC	SREED	Notice of Postponement of Deposition Duces Tecum
	ORDR	ROBINSON	Order Allowing Withdrawal Of Attorney
12/8/2008	NTSV	WELLS	Notice Of Service -- Kelly Polatis -- served 12/08/2008
12/18/2008	ORDR	PARKER	Order (In Re: Delano D Peterson and Lenore J Petersons' Motion for Reconsideration of the Court's Decision on Partial Summary Judgment to Dismiss the Plaintiffs' 5th Cause of Action, Conspiracy to Defraud)

Date	Code	User	Judge
12/18/2008	ORDR	PARKER	Order Granting Defendants Kirk-Hughes' Motion to Amend Answer
	ORDR	PARKER	Order Denying Defendants Kirk-Hughes' Motion to Strike
12/22/2008	ANSW	SREED	Defendants Kirk-Hughes' AMENDED Answer
1/13/2009	MNWD	MCCORD	Motion For Leave To Withdraw As Attorney - Patrick Miller
1/20/2009	AFFD	BAXLEY	SECOND Affidavit of Delano D Peterson
	AFFD	VICTORIN	Affidavit of Patrick Miller in Support of Motion to Withdraw as Attorneys for Geraldine Kirk-Hughes, Peter Sampson, Kirk-Hughes Development, LLC and Kirk-Hughes & Associates, Inc Pursuant to Rule 11(b)(2), IRCP
	NOHG	VICTORIN	Notice Of Hearing
	MISC	VICTORIN	Answering Brief in of Delano Peterson and Lenore Peterson in Opposition to Plaintiffs' Motion for Partial Summary Judgment
	AFFD	VICTORIN	Second Affidavit of Delano Peterson
1/27/2009	BRIE	BAXLEY	Plaintiffs' Reply Brief Re: Motion for Summary Judgment on Sufficiency of Legal Description
2/3/2009	HRHD	TAYLOR	Hearing result for Motion for Summary Judgment held on 02/03/2009 03:30 PM: Hearing Held Howard, 1 hr - TAKEN UNDER ADVISEMENT
2/4/2009	ORDR	ROBINSON	Order Granting Permission To Withdraw Atty Patrick Miller
2/6/2009	AFFM	CRUMPACKER	Affidavit Of Mailing
2/13/2009	MEMO	ROSENBUSCH	Plaintiff's Supplemental Memorandum Re: Legal Description
	BRIE	LEU	Supplemental Brief Of Delano D. Peterson And Lenore J. Petersons (In Re: Enforceability Of Legal Description)
2/18/2009	MISC	ROSENBUSCH	Plaintiff's Disclosure of Expert Witnesses
2/23/2009	ORDR	JOKELA	Order RE: Plaintiffs' Motion for Summary Judgment RE: Legal Discription
2/26/2009	MOTN	ROSENBUSCH	Plaintiffs' Motion and Memorandum for Default Judgment Re: Defendants Polatis and Kirk-Hughes et. al.
	AFFD	TAYLOR	Affidavit of Michael T. Howard
	FILE	SREED	New File Created *****FILE #7*****
3/3/2009	ORDR	TAYLOR	Order for Default Against Defs Kelly Polatis; Geraldine Kirk-Hughes; Peter Sampson; Kirk-Hughes Development, LLC; and Kirk-Hughes & Associates, Inc.
3/4/2009	MOTN	HUFFMAN	Motion for Final Judgment & Certificate Under I.R.C.P. 54(b)

Date	Code	User		Judge
3/11/2009	SUBC	ROBINSON	Substitution Of Counsel	Lansing L. Haynes
	NOTE	ROBINSON	Atty Substitution For Geraldine Kirk-Hughes Atty L. Sanders Joiner Inactive With Bar List	Lansing L. Haynes
	MISC	LEU	Defendants', Except For Petersons, Motion To Set Aside Default Ant Opposition To Plaintiffs' Motion And Memorandum For Default Judgment And for Final Judgment & Certificate Under I.R.C.P.54(b)	Lansing L. Haynes
	MISC	LEU	Affidavit Of L. Sanders, Joiner In Support Of Motion To Set Aside Default And the Opposition Of Plaintiffs' Motion And Memorandum For Default Judgment And For Final Judgment & Certification Under I.R.C.P. 54(b)	Lansing L. Haynes
3/12/2009	JDMT	SREED	Judgment	Lansing L. Haynes
3/16/2009	MOTN	BAXLEY	Defendants', Except For Petersons, Motion To Set Aside Default and Opposition To Plaintiffs' Motion and Memorandum For Default Judgment and For Final Judgment & Certificate Under IRCP 54(b)	Lansing L. Haynes
	AFFD	BAXLEY	Affidavit Of L Sanders Joiner In Support Of Motion To Set Aside Default and The Opposition Of Plaintiffs' Motion and Memorandum For Default Judgment and For Final Judgment & Certificate Under IRCP 54(b)	Lansing L. Haynes
3/26/2009	AFFD	CRUMPACKER	Affidavit of Judith H Braeklein in Support of Motion to Set Aside Default Judgment or for Reconsideration of Defendants Opposition to Plaintiffs Motion for Default Judgment & 54(b) Certification	Lansing L. Haynes
	AFFD	CRUMPACKER	Affidavit of Geraldine Kirk-Hughes in Support of Motion to Set Aside Default Judgment or for Reconsideration of Defendants opposition to Plaintiffs Motion for Default Judgment & 54(b) Certification	Lansing L. Haynes
	AFFD	CRUMPACKER	Affidavit of Peter Sampson Jr In Support of Motion to Set Aside Default Judgment or for Reconsideration of Defendants Opposition to Plaintiffs Motion for Default Judgment & 54(b) Certification	Lansing L. Haynes
	MOTN	CRUMPACKER	Defendants Except for Petersons Motion to Set Aside Default Judgment or for Reconsideration of Defendants Opposition to Plaintiffs Motion for Default Judgment & 54(b) Certification	Lansing L. Haynes
4/8/2009	BANK	SREED	Bankruptcy Filed - Kirk Hughes Development	Lansing L. Haynes
	STAT	SREED	Case status changed: Inactive	Lansing L. Haynes
4/9/2009	HRSC	TAYLOR	Hearing Scheduled (Status Conference 05/18/2009 03:30 PM)	Lansing L. Haynes
	STAT	TAYLOR	Case status changed: Reopened	Lansing L. Haynes

Date	Code	User		Judge
4/9/2009		TAYLOR	Notice of Hearing	Lansing L. Haynes
	STAT	TAYLOR	Case status changed: inactive BANKRUPTCY KIRK-HUGHES DEVELOPMENT	Lansing L. Haynes
5/18/2009	INHD	JOKELA	Hearing result for Status Conference held on 05/18/2009 03:30 PM: Interim Hearing Held HEARING REQUESTED BY MR HOLMES DUE TO BANKRUPTCY FILED	Lansing L. Haynes
	DCHH	JOKELA	District Court Hearing Held Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated: LESS THAN 100 PAGES	Lansing L. Haynes
5/19/2009	NTSD	CRUMPACKER	Notice Of Discovery	Lansing L. Haynes
6/17/2009	NOTD	BAXLEY	Notice Of Deposition Duces Tecum of Marilyn Golub on 07/10/09 at 9:00 AM	Lansing L. Haynes
	MISC	HUFFMAN	Amended Notice of Deposition Duces Tecum - Deponent: Alan Golub - 7/14/09 10:30 AM	Lansing L. Haynes
	MISC	HUFFMAN	Amended Notice of Deposition Duces Tecum - Deponent: Marilyn Golub - 7/14/09 9:00 AM	Lansing L. Haynes
	NOTC	HUFFMAN	Notice of Deposition Duces Tecum - Deponent: Alan Golub 7/10/09 10:30 AM	Lansing L. Haynes
7/9/2009	NOTD	CRUMPACKER	Notice Of Cancellation of Deposition Duces Tecum of Marilyn Golub	Lansing L. Haynes
	NOTD	CRUMPACKER	Notice Of Cancellation of Deposition Duces Tecum of Alan Golub	Lansing L. Haynes
7/15/2009	HRSC	TAYLOR	Hearing Scheduled (Motion 08/07/2009 09:00 AM) Re: Default Judgments, Howard	Lansing L. Haynes
7/22/2009	MISC	COCHRAN	Acknowledgment Pursuant to Rul 16(k)(7) IRCP Regarding Case Status/Mediation	Lansing L. Haynes
7/23/2009	MOTN	PARKER	Plaintiffs' Motion to Strike All Pleadings, Motion and Other Papers Signed of Filed by L Sanders Joiner	Lansing L. Haynes
	MOTN	PARKER	Plaintiffs' Motion for Dismissal of All Claims Against Defendant Peterson	Lansing L. Haynes
	MOTN	PARKER	Motion for Final Judgment and Certificate	Lansing L. Haynes
	AFFD	PARKER	Affidavit of Michael T Howard	Lansing L. Haynes
	MEMO	PARKER	Plaintiffs' Memorandum in Support of Motion to: 1) Dismiss Claims Against Peterson; 2) Strike all Pleadings, Motions, and Papers Filed by L Sanders Joiner; and 3) Issue a Rule 54(b) Certificate of Final Judgment	Lansing L. Haynes
	NOTH	PARKER	Note for Hearing	Lansing L. Haynes
7/29/2009	AFFD	LEU	Affidavit Of Edwin B. Holmes In Re: Plaintiffs' Motion To Dismiss, ET Seq.	Lansing L. Haynes
	MISC	LEU	No Objection In Re: Plaintiffs' Motion To Dismiss, ET Seq.41501-2013 and 41505-2013	Lansing L. Haynes

Date	Code	User		Judge
7/31/2009	MISC	BAXLEY	Defendants', Except For Petersons, Opposition To Plaintiff's Motion To Strike All Pleadings, Motions and Other Papers Filed By L Sanders Joiner	Lansing L. Haynes
	ANSW	COCHRAN	Defendant Kirk-Hughes Development, Cda, LLC's Answer to Plaintiff's Complaint	Lansing L. Haynes
	FILE	SREED	New File Created *****FILE #8*****	Lansing L. Haynes
8/3/2009	PLWL	BAXLEY	Plaintiffs' Witness List	Lansing L. Haynes
8/4/2009	DFWL	COCHRAN	Defendant's Witness List	Lansing L. Haynes
	MOTN	CRUMPACKER	Plaintiffs Reply Re: Motion to Strike	Lansing L. Haynes
8/6/2009	MISC	EARLE	Defendants', Except for Petersons, Supplement Exhibit to Opposition to Plaintiff's Motion To Strike All Pleadings, Motions, and Other Papers Filed By L. Sanders Joiner	Lansing L. Haynes
8/7/2009	HRVC	TAYLOR	Hearing result for Jury Trial Scheduled held on 08/17/2009 09:00 AM: Hearing Vacated 4 day	Lansing L. Haynes
	DCHH	TAYLOR	Hearing result for Motion held on 08/07/2009 09:00 AM: District Court Hearing Held GRANTED Court Reporter: BYRL CINNAMON Number of Transcript Pages for this hearing estimated: Re: Default Judgments, Howard	Lansing L. Haynes
8/10/2009	CVDI	HUFFMAN	Civil Disposition entered for: Golub, Alan, Plaintiff; Golub, Marilyn, Plaintiff; Peterson, Delano D, Defendant; Peterson, Lenore J, Defendant. Filing date: 8/10/2009	Lansing L. Haynes
	FJDE	HUFFMAN	Final Judgement, Order Of Dismissal - Delano D Peterson & Lenore Peterson	Lansing L. Haynes
	STAT	HUFFMAN	Case status changed: Closed	Lansing L. Haynes
	CVDI	HUFFMAN	Civil Disposition entered for: Kirk Hughes & Associates Inc, Defendant; Kirk-Hughes, Geraldine, Defendant; Peterson, Delano D, Defendant; Peterson, Lenore J, Defendant; Polatis, Kelly, Defendant; Sampson, Peter, Defendant; Golub, Alan, Plaintiff; Golub, Marilyn, Plaintiff. Filing date: 8/10/2009	Lansing L. Haynes
	FJDE	HUFFMAN	Final Judgement, Order Of Final Judgement - Except Kirk-Hughes Development	Lansing L. Haynes
8/19/2009		LEU	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: David-Lanz Mtg Receipt number: 0862397 Dated: 8/19/2009 Amount: \$1.00 (E-payment)	Lansing L. Haynes
8/25/2009		VICTORIN	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Winston/Cashatt Receipt number: 0863444 Dated: 8/25/2009 Amount: \$.50 (Check)	Lansing L. Haynes

Date	Code	User	Judge
8/25/2009		VICTORIN	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Winston/Cashatt Receipt number: 0863444 Dated: 8/25/2009 Amount: \$2.00 (Check)
8/31/2009		HUFFMAN	Miscellaneous Payment: Writs Of Execution Paid by: Michael Howard Receipt number: 0864213 Dated: 8/31/2009 Amount: \$2.00 (Cash)
	APPL	HUFFMAN	Application for Writ of Execution
	AFFD	HUFFMAN	Affidavit in Support of Execution
	WRIT	HUFFMAN	Writ Issued \$941,000
9/3/2009		LEU	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Kirk-Hughes, Geraldine (defendant) Receipt number: 0865100 Dated: 9/3/2009 Amount: \$101.00 (E-payment) For: Kirk-Hughes, Geraldine (defendant)
	BNDL	LEU	Bond Posted - Cash (Receipt 865105 Dated 9/3/2009 for 100.00)
	STAT	LEU	Case status changed: Closed pending clerk action
	APSC	SREED	Appealed To The Supreme Court
	NOTC	SREED	Notice of Appeal
9/4/2009	STAT	SREED	Case status changed: Reopened
9/9/2009	MISC	SREED	Clerks Certificate of Appeal - Mailed to Supreme Court Certified Mail *****7008 1830 0003 7217 5550*****
9/14/2009	RTCT	HUFFMAN	Return Certificate 7008 1830 0003 7217 5550-9/11/09
9/21/2009	ORDR	RICKARD	Order Suspending Appeal
9/30/2009	NOTC	SREED	Notice of Appeal - L Sanders Joiner
		RICKARD	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: L Sanders Joiner Receipt number: 0869094 Dated: 10/1/2009 Amount: \$4.00 (E-payment)
10/6/2009	BNDL	RICKARD	Bond Posted - Cash (Receipt 869573 Dated 10/6/2009 for 300.00)
10/29/2009	BNDV	VICTORIN	Bond Converted (Transaction number 9503066 dated 10/29/2009 amount 52.25)
	NLTR	VICTORIN	Notice of Lodging Transcript/Laurie Johnson
	NLTR	VICTORIN	Notice of Lodging Transcript/Byrl Cinnamon
11/10/2009	BNDV	VICTORIN	Bond Converted (Transaction number 9503168 dated 11/10/2009 amount 58.75)
	BNDV	VICTORIN	Bond Converted (Transaction number 9503169 dated 11/10/2009 amount 189.00)
	BNDV	VICTORIN	Bond Converted (Transaction number 9503170 dated 11/10/2009 amount 100.00)

Date	Code	User		Judge
11/13/2009	LETR	VICTORIN	Letter to Attorney Joiner for payment for Appeal	Lansing L. Haynes
11/16/2009	NOTE	VICTORIN	Called Attorneys Howard and Holmes to Pick up Appeal	Lansing L. Haynes
11/18/2009	RECR	BAXLEY	Receipt Of Clerk's Record & Reporter's Trans. hand delivered to Michael T Howard	Lansing L. Haynes
11/20/2009	RECR	VICTORIN	Receipt Of Clerk's Record & Reporter's Trans. hand delivered to Ed Holmes	Lansing L. Haynes
12/16/2009	ORDR	VICTORIN	Order Conditionally Dismissing Appeal	Lansing L. Haynes
12/21/2009	HRSC	SVERDSTEN	Hearing Scheduled (Motion 02/05/2010 10:00 AM) Mtn for Charging Order, Howard, 30 min.	Lansing L. Haynes
	NTSD	CRUMPACKER	Notice Of Service Of Discovery	Lansing L. Haynes
	AFFD	CRUMPACKER	Affidavit of Michael T Howard	Lansing L. Haynes
	NOHG	CRUMPACKER	Notice Of Hearing	Lansing L. Haynes
	NTSD	CRUMPACKER	Notice Of Service Of Discovery	Lansing L. Haynes
	NTSD	CRUMPACKER	Notice Of Service Of Discovery	Lansing L. Haynes
	NTSD	SHEDLOCK	Notice Of Service Of Discovery	Lansing L. Haynes
1/20/2010	AFFD	SREED	Affidavit of Michael T. Howard	Lansing L. Haynes
	MNCL	SREED	Plaintiffs' Motion To Compel Discovery	Lansing L. Haynes
	NOHG	SREED	Notice Of Hearing	Lansing L. Haynes
1/29/2010	BANK	SREED	Bankruptcy Filed - Geraldine Kirk-Hughes	Lansing L. Haynes
	INAC	MEYER	Inactive - Bankruptcy filed	Lansing L. Haynes
	STAT	MEYER	Case status changed: Inactive	Lansing L. Haynes
2/3/2010	ORDR	PARKER	Supreme Court Order Dismissing Appeal	Lansing L. Haynes
2/5/2010	GRNT	JOKELA	Hearing result for Motion held on 02/05/2010 10:00 AM: Motion Granted Mtn for Charging Order and Motion to Compel, Howard	Lansing L. Haynes
	DCHH	JOKELA	District Court Hearing Held Court Reporter: LAURIE JOHNSONSYC Number of Transcript Pages for this hearing estimated:	Lansing L. Haynes
2/8/2010	ORDR	VICTORIN	Charging Order RE: Peter Sampson and Kelly Polatis	Lansing L. Haynes
2/12/2010	ORDR	VICTORIN	Order to Compel Post-Judgment Discovery	Lansing L. Haynes
2/19/2010	REMT	RICKARD	Remittitur	Lansing L. Haynes
3/8/2010	AFFD	CRUMPACKER	Affidavit of Michael T Howard re: Motion for Order to Show Cause	Lansing L. Haynes
	MOSC	CRUMPACKER	Motion For Order To Show Cause	Lansing L. Haynes
3/23/2010	HRSC	SVERDSTEN	Hearing Scheduled (Order to Show Cause 05/06/2010 03:30 PM) Howard	Lansing L. Haynes
3/24/2010	ORDR	LEU	Order To Show Cause	Lansing L. Haynes

Date	Code	User	Judge
5/6/2010	DCHH	SVERDSTEN	Hearing result for Order to Show Cause held on 05/06/2010 03:30 PM: District Court Hearing Held Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated: Howard
	STAT	MEYER	Case status changed: closed
7/15/2010	MISC	CRUMPACKER	Full Satisfaction of Mediated Settlement Agreement
1/11/2011	NOTE	MEYER	File sent to judge's office to advise on status - per Suzi, case still ongoing
7/11/2011	REVR	MEYER	Reviewed And Retained
6/15/2012	HRSC	SVERDSTEN	Hearing Scheduled (Status Conference 07/17/2012 04:00 PM)
	STAT	SVERDSTEN	Case status changed: Closed pending clerk action
		SVERDSTEN	Notice of Hearing
7/12/2012	HRVC	SVERDSTEN	Hearing result for Status Conference scheduled on 07/17/2012 04:00 PM: Hearing Vacated
	HRSC	SVERDSTEN	Hearing Scheduled (Status Conference 07/19/2012 09:30 AM)
		SVERDSTEN	AMENDED Notice of Hearing
7/19/2012	DCHH	SVERDSTEN	Hearing result for Status Conference scheduled on 07/19/2012 09:30 AM: District Court Hearing Held Court Reporter: DEBRA BURNHAM Number of Transcript Pages for this hearing estimated:
	STAT	SVERDSTEN	Case status changed: closed
5/1/2013	HRSC	SVERDSTEN	Hearing Scheduled (Motion for Summary Judgment 06/04/2013 03:30 PM) Howard
	STAT	SVERDSTEN	Case status changed: Closed pending clerk action
5/3/2013	NOHG	CRUMPACKER	Notice Of Hearing
5/8/2013	HRSC	SVERDSTEN	Hearing Scheduled (Motion for Summary Judgment 06/27/2013 03:30 PM) Howard
	HRVC	SVERDSTEN	Hearing result for Motion for Summary Judgment scheduled on 06/04/2013 03:30 PM: Hearing Vacated Howard
5/9/2013	HRSC	SVERDSTEN	Hearing Scheduled (Motion for Summary Judgment 07/09/2013 03:30 PM) Howard
	HRHD	SVERDSTEN	Hearing result for Motion for Summary Judgment scheduled on 06/27/2013 03:30 PM: Hearing Held Howard
	ANHR	BAXLEY	Amended Notice Of Hearing (07/09/13 at 3:30 pm)

Date	Code	User	Judge
5/9/2013	MNSJ	BAXLEY	Plaintiffs' Motion For Summary Judgment Declaring Interest And Priority In Property
	MEMO	BAXLEY	Memorandum RE Motion For Summary Judgment Declaring Interest And Priority In Property
	AFFD	BAXLEY	Affidavit Of Alan J Golub
	FILE	BAXLEY	*****New File #9 Created*****
	AFFD	BAXLEY	Affidavit Of Michael T Howard
5/14/2013	MISC	BAXLEY	Plaintiffs' Response RE Kirk Scott's Motion to Dismiss
5/16/2013	HRSC	SVERDSTEN	Hearing Scheduled (Motion to Dismiss 07/09/2013 03:30 PM) Crotty
5/17/2013	ANHR	MCKEON	Amended Note Of Hearing Re Kirk-Scott, LTD'S Motion To Dismiss
5/20/2013	ORDR	LEU	Order To Consolidate
6/24/2013	NOHG	BAXLEY	Notice Of Hearing (07/09/13 at 3:30 pm)
	MNVA	BAXLEY	Defendant Kirk-Scott LTD's Motion To Vacate Default Judgment
	MISC	BAXLEY	Defendant Kirk-Scott LTD's Combined Statement Of Facts
	BRIE	BAXLEY	Defendant Kirk-Scott LTD's Brief RE Motion To Vacate Plaintiffs' March 11, 2009 Default Judgment
	AFFD	BAXLEY	Affidavit Of Matthew Z Crotty In Response To Plaintiffs' Motion For Summary Judgment And In Support Of Kirk-Scott LTD's Motion To Vacate Plaintiffs' Default Judgment
	FILE	BAXLEY	*****New File #10 Created*****
	BRIE	BAXLEY	Defendant Kirk-Scott LTD's Brief In Response To Plaintiffs' Motion For Summary Judgment
	BRIE	BAXLEY	Defendant Kirk-Scott LTD's Motion To Dismiss Reply Brief
	AFFD	BAXLEY	Affidavit Of Balinda Antoine
6/25/2013	AFFD	LEGARD	Affidavit Of Richard D Campbell
	AFFD	LEGARD	Affidavit Of Darlene Moore In Opposition To Plaintiff's Motion For Summary Judgment
	AFFD	LEGARD	Affidavit Of Geraldine Kirk-Hughes In Opposition To Plaintiff's Motion For Summary Judgment
	AFFD	LEGARD	Affidavit Of Melody Jones In Opposition To Plaintiff's Motion For Summary Judgment
	MISC	LEGARD	Kirk-Hughes Development, LLC's Response In Opposition To Plaintiff's Motion For Summary Judgment

Date	Code	User	Judge
6/25/2013	NOTC	LEGARD	Notice Of Joinder By Defendant Kirk-Hughes Development, LLC In Defendant Kirk-Scott, LTD.'s Motion To Vacate And Memorandum In Support Thereof
7/2/2013	AFFD	LEU	Affidavit Of Michael T. Howard
	AFFD	LEU	Affidavit Of Michael T. Howard
	ANSW	LEU	Golub's Response Re: Kirk-Scott And Kirk-Hughes Development's Motion To Set Aside Judgment
	ANSW	LEU	Gloub'e Reply Re: Motion For Summary Judgment Declaring Interests And Priority
7/3/2013	MNVA	LEGARD	Defendant Kirk-Scott LTD's Motion To Vacate Reply Brief
	NOTC	LEGARD	Notice Of Joinder By Defendant's Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, And Peter Sampson In Defendant Kirk-Scott, LTD's Motion To Vacate And Brief In Support Thereof, And Kirk-Hughes Development, LLC's Memorandum In Support Of The Same
	NOAP	LEGARD	Notice Of Appearance On Behalf Of Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, And Peter Sampson
7/9/2013	AFSV	LEGARD	Affidavit Of Service -BJA 02/22/13
	DCHH	SVERDSTEN	Hearing result for Motion to Dismiss scheduled on 07/09/2013 03:30 PM: District Court Hearing Held Court Reporter: Val Nunemacher Number of Transcript Pages for this hearing estimated: and Motion to Vacate Default Judgment, Crotty
	DCHH	SVERDSTEN	Hearing result for Motion for Summary Judgment scheduled on 07/09/2013 03:30 PM: District Court Hearing Held Court Reporter: Val Nunemacher Number of Transcript Pages for this hearing estimated: Howard
	AFFD	DIXON	Affidavit Of Michael T Howard
7/18/2013	FILE	HUFFMAN	New File ***** 10 ***** Created
7/19/2013	MNSJ	CRUMPACKER	Defendant Kirk-Scott Lt6s'd Joinder re Kirk=Hughes Development LLC et als Motion For Summary Judgment
7/22/2013	HRSC	SVERDSTEN	Hearing Scheduled (Motion for Summary Judgment 09/18/2013 03:30 PM) Bissell
	NOHG	CRUMPACKER	Notice Of Hearing
7/25/2013	HRSC	SVERDSTEN	Hearing Scheduled (Motion to Compel 09/18/2013 03:30 PM) Crotty

Date	Code	User	Judge
7/25/2013	AFFD	HUFFMAN	Affidavit Of Matthew Z Crotty Re Motion To Compel
	MOTN	HUFFMAN	Defendant Kirk-Scott, LTD's Motion To Compel
	MEMO	HUFFMAN	Defendant Kirk-Scott, LTD's Memorandum In Support Of Motion To Compel
	NOHG	HUFFMAN	Notice Of Hearing Re: Motion To Compel
7/26/2013	NOTC	BAXLEY	Notice Of Joinder By Defendant Kirk-Hughes Development LLC, Kirk-Hughes & Associates Inc, Geraldine Kirk-Hughes And Peter Sampson In Defendant Kirk-Scott LTD's Motion To Compel
8/8/2013	HRVC	SVERDSTEN	Hearing result for Motion to Compel scheduled on 09/18/2013 03:30 PM: Hearing Vacated Crotty
	HRVC	SVERDSTEN	Hearing result for Motion for Summary Judgment scheduled on 09/18/2013 03:30 PM: Hearing Vacated Bissell
8/9/2013	CVDI	MCCOY	Civil Disposition entered for: Internal Revenues Service, Defendant; Kirk Hughes & Associates Inc, Defendant; Kirk Hughes Development LLC, Defendant; Kirk-Hughes, Geraldine, Defendant; Kirk-Scott Ltd, Defendant; Peterson, Delano D, Defendant; Peterson, Lenore J, Defendant; Polatis, Kelly, Defendant; Sampson, Peter, Defendant; Tomlinson North Idaho Inc, Defendant; Golub, Alan, Plaintiff; Golub, Marilyn, Plaintiff. Filing date: 8/9/2013
	FJDE	MCCOY	Memorandum Decision and Order Re: (1) Defendant Kirk-Scott, Ltd's Motion to Vacate Judgment, (2) Defendant Kirk-Scott, Ltd's Motion to Dismiss, and (3) Plaintiff's Motion for Summary Judgment
	STAT	MCCOY	Case status changed: Closed
8/15/2013		MCCOY	Miscellaneous Payment: Writs Of Execution Paid by: Michael Howard Receipt number: 0034318 Dated: 8/15/2013 Amount: \$2.00 (Cash)
	AFFD	SVERDSTEN	Affidavit in Support of Execution
	APPL	SVERDSTEN	Application for Writ of Execution
	WRIT	SVERDSTEN	Writ Issued: Writ of Execution: Real Property \$1,598,652.48
8/20/2013	HRSC	SVERDSTEN	Hearing Scheduled (Motion 09/27/2013 09:00 AM) Motion to Amend/Alter Under Rule 59, Matt Crotty
	STAT	SVERDSTEN	Case status changed: Closed pending clerk action
8/21/2013	ORDR	HUFFMAN	Judgment Re: Interest And Priority In Property
	NOHG	BAXLEY	Note For Hearing RE Motion To Amend/Alter (09/27/13 at 9:00 am)

Date	Code	User	Judge
8/21/2013	MNAM	BAXLEY	Defendant Kirk-Scott Ltd's Motion To Amend/Alter Judgment
	MEMS	BAXLEY	Defendant Kirk-Scott Ltd's Memorandum In Support Of Motion To Amend Judgment
	AFFD	BAXLEY	Affidavit Of Matthew Z Crotty RE Motion To Amend/Alter Judgment
	AFFD	BAXLEY	Second Affidavit of Balinda Antoine
8/23/2013	NOTC	CRUMPACKER	Notice of Joinder by Defendants Kirk-Hughes Development LLC Kirk-Hughes & Associates Inc Geraldine Kirk-Hughes & Peter Sampson in Defendant Kirk-Scott LTD's Motion to Amend/Alter Judgment
8/27/2013	HRSC	SVERDSTEN	Hearing Scheduled (Motion 09/13/2013 09:00 AM) Motion to Stay Execution of Writ, Bissell
	NOHG	HUFFMAN	Notice Of Hearing Without Oral Argument
	MOTN	HUFFMAN	Defendants Kirk-Hughes Development LLC, Kirk-Hughes and Associates Inc, Geraldine Kirk-Hughes, and Peter Sampson's Motion to Stay Execution Of Writ
9/5/2013	MISC	BAXLEY	Golub's Response RE Motion For Stay Of Execution
	AFFD	BAXLEY	Affidavit Of Michael T Howard
9/9/2013	AFFD	CRUMPACKER	Affidavit of Michael S Bissell
	MISC	CRUMPACKER	Defendants Kirk-Hughes Development LLC Kirk-Hughes & Associates Inc Geraldine Kirk-Hughes & Peter Sampsons Reply in Support of Motion to Stay Execution of Writ
9/13/2013	DCHH	SVERDSTEN	Hearing result for Motion scheduled on 09/13/2013 09:00 AM: District Court Hearing Held DENIED Court Reporter: Val Nunemacher Number of Transcript Pages for this hearing estimated: Motion to Stay Execution of Writ, Bissell
	ORDR	SVERDSTEN	Order RE: Kirk-Hughes Development, LLC, et al's Moton to Stay Execution of Writ
9/19/2013	AFFD	VICTORIN	Affidavit of Michael T Howard
	MISC	VICTORIN	Golub's Response RE: Motion to Amend Judgment
9/20/2013	LISP	CRUMPACKER	Lis Pendens
9/23/2013	AFFD	BAXLEY	Second Affidavit Of Matthew Z Crotty RE Motion To Amend/Alter Judgment
	MNAM	BAXLEY	Defendant Kirk-Scott Ltd's Motion To Amend/Alter Reply Brief

Date	Code	User	Judge
9/23/2013	NOTC	MCCOY	Notice of Joinder by Defendants Kirk-Hughes Development LLC, Kirk-Hughes & Associates, Inc, Geraldine Kirk-Hughes, and Peter Sampson in Defendant Kirk-Scott, Ltds Reply in Support of its Motion to Amend/Alter Judgment
9/24/2013	LISP	CRUMPACKER	Lis Pendens
9/26/2013	AFFD	BAXLEY	Affidavit Of Matthew Z Crotty RE Credit Bid
9/27/2013	DCHH	SVERDSTEN	Hearing result for Motion scheduled on 09/27/2013 09:00 AM: District Court Hearing Held Court Reporter: Val Nunemacher Number of Transcript Pages for this hearing estimated: Motion to Amend/Alter Under Rule 59, Matt Crotty MIKE BISSELL TELEPHONIC 509-455-7100
	WRNS	CRUMPACKER	Writ Returned/Not Satisfied Final Return
9/30/2013		DEGLMAN	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Campbell, & Bissell Receipt number: 0040588 Dated: 9/30/2013 Amount: \$109.00 (Check) For: Kirk-Scott Ltd (defendant)
		DEGLMAN	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Campbell & Bissell Receipt number: 0040590 Dated: 9/30/2013 Amount: \$109.00 (Check) For: Kirk Hughes & Associates Inc (defendant)
	BNDC	DEGLMAN	Bond Posted - Cash (Receipt 40604 Dated 9/30/2013 for 100.00)
	BNDC	DEGLMAN	Bond Posted - Cash (Receipt 40605 Dated 9/30/2013 for 100.00)
	NORA	CLEVELAND	Notice of Appeal - Matthew Z. Crotty (Attorney) for Appellant Kirk-Scott, Ltd. (Kirk-Scott)
	NORA	CLEVELAND	Notice of Appeal - Michael S. Bissell (Attorney) for Appellants Kirk-Hughes Development LLC, Kirk-Hughes & Associates, Inc, Geraldine Kirk-Hughes and Peter Sampson
10/2/2013	ORDR	SVERDSTEN	Order RE Kirk-Scott's Motion to Amend/Alter Judgment
10/10/2013	CERT	CLEVELAND	Certificate Of Certified Mailing - 7012 1010 0001 2166 2215 - to ISC (Clerk's Certificate of Appeal Attorney Crotty)
	CERT	CLEVELAND	Certificate Of Certified Mailing - 7012-1010 0001 2166 2208 - ISC (Clerk's Certificate of Appeal Attorney Bissell)
	MISC	VICTORIN	Request for Additional Transcript
11/21/2013	ORDR	SVERDSTEN	Decision and Order Re: IRCP 11(a)(1) Sanctions
11/25/2013	ORDR	CLEVELAND	Order Consolidating Appeals - 41501-2013 (2007-8038) and 41505-2013 (2007-8038)

Date	Code	User		Judge
11/26/2013	MEMO	MITCHELL	Defendant Kirk-Scott, LTD's Memorandum In Opposition to Plaintiff's Fee Petition	Lansing L. Haynes
	AFFD	MITCHELL	Affidavit of Michael T Howard	Lansing L. Haynes
	MEMO	MITCHELL	Plaintiff's Memorandum of Costs and Fees Re: Order for Sanctions	Lansing L. Haynes
	MISC	MITCHELL	Defendants Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, INC., Geraldine Kirk-Hughes, and Peter Sampson's REsponse in Opposition to Plaintiff's Memorandum of Costs & Fees Re: Sanctions	Lansing L. Haynes
12/4/2013	NLTR	CLEVELAND	Notice of Transcript Lodged - Valerie Nunemacher, CSR,CCR,RPR	Lansing L. Haynes
	ORDR	CLEVELAND	Order RE: Sanctions	Lansing L. Haynes
	NTAP	CLEVELAND	AMENDED Notice of Appeal	Lansing L. Haynes
12/5/2013	MISC	DEGLMAN	Amended Notice of Appeal	Lansing L. Haynes

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 3198

2013 JAN 25 PM 3: 01

CLERK DISTRICT COURT
Jonathan Carl
DEPUTY

1 MICHAEL T. HOWARD, ISB No. 6128
2 WINSTON & CASHATT, LAWYERS a
3 Professional Service Corporation
4 250 Northwest Boulevard, Suite 206
5 Coeur d'Alene, Idaho 83814
6 Telephone: (208) 667-2103
7 Facsimile: (208) 765-2121
8 mth@winstoncashatt.com

9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,
14
15 Plaintiffs,

16 vs.

17 KIRK-HUGHES DEVELOPMENT, LLC, a
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD, a Texas corporation;
INTERNAL REVENUE SERVICE;
TOMLINSON NORTH IDAHO, INC., an
Idaho corporation,

20 Defendants.

Case No. CV13-866

COMPLAINT FOR DECLARATORY
JUDGMENT

Fee Category: A
Filing Fee: \$96.00

21 COME NOW, Plaintiffs Alan Golub and Marilyn Golub, by and through their attorney of record,
22 Michael T. Howard of Winston & Cashatt, and hereby allege as follows:

23 1. JURISDICTION

24 1.1 At all relevant times, Plaintiffs Alan Golub and Marilyn Golub were residents of
25 Kootenai County, Idaho.

26 **Assigned to Judge Simpson**

1 1.2 At all relevant times, Defendant Kirk-Hughes Development, LLC was a Delaware limited
2 liability company owning property and transacting business in Kootenai County, Idaho.

3 1.3 At all relevant times, Defendant Kirk-Scott, Ltd. was a Texas corporation holding
4 interests in real property and transacting business in Kootenai County, Idaho.

5 1.4 At all relevant times, Defendant Internal Revenue Service was a federal agency
6 exercising its taxing authority and owning interests in real property in Kootenai County,
7 Idaho.

8 1.5 At all relevant times, Defendant Tomlinson North Idaho, Inc., formerly known as
9 Tomlinson Black North Idaho, Inc., was an Idaho corporation transacting business in
10 Kootenai County, Idaho.

11 1.6 The court has jurisdiction over the parties pursuant to I.C. § 5-514 and 28 USC § 2410.

12 **2. VENUE**

13 2.1 This suit seeks the determination of interests and priority in real property located within
14 Kootenai County, Idaho.

15 2.2 Venue is proper pursuant to I.C. § 5-401.

16 **3. FACTUAL ALLEGATIONS AND REQUEST FOR DECLARATORY RELIEF**

17 **Defendant Kirk-Hughes Development, LLC**

18 3.1 Kirk-Hughes Development, LLC owns in fee simple and possesses three parcels of real
19 property ("the Property") situated in Kootenai County, Idaho, more fully described in
20 **Exhibit A.**

21 3.2 On 4/6/09 Kirk-Hughes Development filed for Chapter 11 Bankruptcy protection in
22 Nevada, case number 09-15153-mkn.

23 3.3 On 10/28/10 an Order of Voluntary Dismissal was entered in the Kirk-Hughes
24 Development Chapter 11 bankruptcy.

25 3.4 On 5/4/11 Kirk-Hughes Development filed for Chapter 7 Bankruptcy protection in
26 Nevada, case number (11-16944-mkn).

1 3.5 On 5/29/12 an Order of Dismissal without Discharge was entered in the Kirk-Hughes
2 Development Chapter 7 bankruptcy.

3 **Plaintiffs Alan and Marilyn Golub**

4 3.6 Plaintiffs Alan and Marilyn Golub ("Golub") claim an interest in the Property as a result
5 of a Judgment recorded on 10/28/2010 as instrument 2287941000. (Exhibit B)

6 3.7 Golub seeks a declaration that the Judgment lien upon the Property is valid and has
7 priority over the interests of all Defendants.

8 **Defendant Kirk-Scott, Ltd.**

9 3.8 Defendant Kirk-Scott, Ltd. may claim an interest in the Property as a result of a Deed of
10 Trust recorded on 9/17/2010 as instrument 2282148000. (Exhibit C)

11 3.9 Kirk-Scott's Deed of Trust was recorded in violation of the automatic stay imposed by
12 Kirk-Hughes Development's Chapter 11 bankruptcy, which lasted from the date of filing
13 on 4/6/09 through date of dismissal on 10/28/10.

14 3.10 Golub seeks a declaration that Kirk-Scott's 9/17/10 recording is void and that Golub's
15 interest in the Property has priority over any interest claimed or held by Kirk-Scott.

16 3.11 Alternatively, Golub seeks a declaration that Kirk-Scott's Deed of Trust is invalid and
17 does not attach to one or more of the three parcels comprising the Property.

18 **Defendant Internal Revenue Service**

19 3.12 Defendant Internal Revenue Service may claim an interest in the Property as a result of
20 three Federal Tax Liens filed by its Cincinnati, Ohio office and recorded with the
21 Recorder of Kootenai County, Idaho on 11/12/08, 11/18/08, and 2/8/11 as instruments
22 2185434000, 2186284000, and 2302989000. (Exhibit D) The name and address of the
23 entity whose liability created the lien is:

24 Kirk-Hughes Development, LLC
25 33917 S Highway 97
26 Harrison, ID, 83833-7707

1 3.13 On 6/18/12 the IRS recorded releases of the three aforementioned tax liens as instruments
2 2362832000, 2362833000, and 2362835000. (Exhibit E)

3 3.14 Golub seeks a declaration that by virtue of its releases, the IRS has no interest in the
4 Property and alternatively, that Golub's interest in the Property has priority over the
5 2/8/11 lien filed by the IRS.

6 **Defendant Tomlinson North Idaho**

7 3.15 Defendant Tomlinson North Idaho may claim an interest in the Property as a result of
8 Judgments recorded on 7/1/08, 11/14/08, and 2/5/10, as instruments 2166632000,
9 2181705000, and 2252391000.

10 3.16 On 7/1/08 Tomlinson North Idaho recorded a Judgment obtained against Kirk-Hughes
11 Development, Geraldine Kirk-Hughes, Kirk-Hughes, LLC, and Kelly Polatis; instrument
12 2166632000. (Exhibit F)

13 3.17 On 2/5/10 Tomlinson recorded an Order assessing \$32,002.25 in attorney fees to
14 Geraldine Kirk-Hughes, d/b/a Kirk-Hughes Development, LLC; instrument 2252391000.
15 (Exhibit G)

16 3.18 On 10/14/10 Tomlinson recorded a Second Amended Judgment, which ordered that
17 Tomlinson take nothing of Kirk-Hughes Development, LLC; instrument 2181705000.
18 (Exhibit H)

19 3.19 Golub seeks a declaration that Tomlinson has no judgment against Kirk-Hughes
20 Development, LLC; has no interest in the Property; and that its interests, if any, are
21 inferior to Golubs' interests.

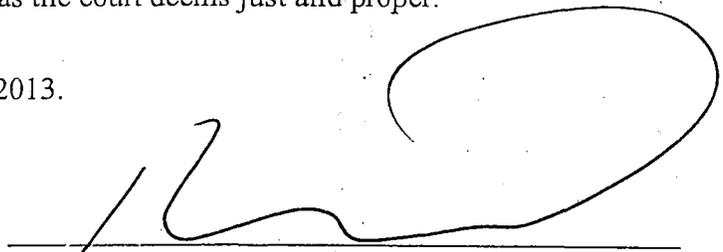
22 **WHEREFORE**, Plaintiffs pray for judgment against Defendants as follows:

- 23 1. That Defendants, and each of them, and all persons claiming under them, be required to set
24 forth the nature of their claims to said Property;
25 2. That all adverse claims to the Property be determined by decree of this Court;
26 3. That said decree declare and adjudge that Defendants Kirk-Scott, Ltd, IRS, and Tomlinson
North Idaho have no estate, right, title, lien, or interest in the Property;

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- 4. That said decree declare and adjudge that the interests, if any, of all Defendants is inferior to that of Plaintiffs; and
- 5. For such other and further relief as the court deems just and proper.

DATED this 25 day of January, 2013.



MICHAEL T. HOWARD, ISB No. 6128
WINSTON & CASHATT, LAWYERS, a Professional
Service Corporation
Attorneys for Plaintiffs

380556

EXHIBIT "A"

Parcel 1:

Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho lying westerly and southerly of the following 3 portions of said Government Lot 5 described as follows:

Beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, bears South 53°39.5' East, 2383.1 feet; thence South 89°50' West 150 feet to Corner No. 2; thence North 0°10' West 849.3 feet to corner No. 3; thence South 77°10' East 76.9 feet to Corner No. 4; thence South 79°39.5' East 121.5 feet to corner No. 5; thence South 88°18.5' East 93.1 feet to Corner No. 6; thence South 27°52' East 112.6 feet to Corner No. 7; thence South 7°40.5' West 64.4 feet to Corner No. 8; thence South 89°50' West 174.3 feet to Corner No. 9; thence South 0°10' East 611.6 feet to Corner No. 1, the place of beginning

and a parcel of land in Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as beginning at an iron pin that is North 43°40'30" West 1954.70 feet from the Southeast corner of Section 3; thence South 89°50' West, 569.8 feet to a point; thence North 0°10' West 16.57 feet to a point; thence North 68°54' East 516.44 feet to a point; thence South 41°05' East 56.93 feet to a point; thence South 16°44' East 163.50 feet to the point of beginning.

And beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, bears South 38°17' East 1801.9 feet; thence South 89°50' West 233.6 feet to Corner No. 2; thence North 16°44' West 163.5 feet to Corner No. 3; thence North 76°19' East, 154.4 feet to Corner No. 4; thence South 34°10' East 232.6 feet to Corner No. 1, the place of beginning;

Also except any portion lying with the following:

A portion of Government Lots 5 and 6; Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as follows: Beginning at the proportioned 1/16 corner said point being North 0°02'15" West 1323.84 feet from the Southeast corner of said Section 3; thence along the South boundary of said Government Lot 6, South 89°43'48" West 1023.70 feet to the true point of beginning; thence continuing South 89°43'48" West 278.29 feet to a point; thence North 16°43'20" West 124.68 feet to corner No. 2 of the Brown Tract; thence North 89°50'40" East 223.60 feet to corner No. 1 of Brown Tract; thence South 34°09'20" East 143.48 feet to the true point of beginning;

Also except a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho more specifically described as follows:

Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3 2027.13 feet to an iron pin; thence East 70.06 feet to an iron pin which is the point of beginning for this description; thence East 133.82 feet to an iron pin; thence North 0°48'36" West 434.22 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 145 feet plus or minus to a point which is North 0°48'36" West of the point of beginning; thence South 0°48'36" East 475.63 feet to the point of beginning.

Also excepting a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more specifically described as follows: Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3, 2027.13 feet to an iron pin; thence East 203.88 feet to an iron pin which is the point of beginning for this description; thence East 101.18 feet to an iron pin; thence North 0°48'36" West 368.72 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 120 feet, plus or minus to a point which is North 0°48'36" West of the point of beginning; thence continuing South 0°48'36" East 434.22 feet to the point of beginning.

BUT INCLUDING THE FOLLOWING:

A portion of Government Lot 5, Section 3 Township 49 North, Range 3 W.B.M., Kootenai County, Idaho, more particularly described as follows: Commencing at the South Quarter corner, said Section 3; thence

North 0°48'36" West, along the centerline of said Section 3, 2027.13 feet to an iron pin which is the POINT OF BEGINNING for this description; thence

East 70.06 feet to an iron pin; thence

North 0°48'36" West, 475.63 feet to a concrete monument on the shore of Lake Coeur d' Alene; thence

Northwesterly along the shore of Lake Coeur d' Alene 75 feet plus-or-minus to a concrete monument which is North 0°48'36" West of the POINT OF BEGINNING, said point being the Northwest Corner of Government Lot 5, said Section 3; thence

South 0°48'36" East along the West line of said Government Lot 5, 500 feet to the POINT OF BEGINNING.

APN 49N03W038050

PARCEL II:

The Northeast quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. *APN: 49N03W035000*

EXCEPTING THEREFROM: The Southeast quarter of the Northeast quarter of the Southwest quarter of Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. *APN 49N03W0355250*

PARCEL III:

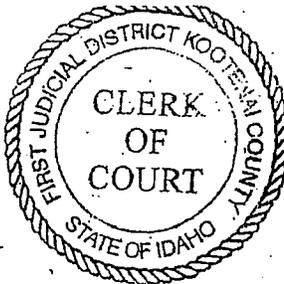
The Southeast quarter of the Northwest quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho.

APN: 49N03W035850

THIS IS TO CERTIFY THAT THE FOREGOING IS
A TRUE COPY OF THE ORIGINAL NOW ON
FILE OR RECORD IN THIS OFFICE.

SEALED ON THIS 25th DAY OF Aug 2009

DANIEL J. ENGLISH, CLERK OF THE DISTRICT
COURT BY Sandy Shellock
1-4 of 4 pages Deputy



2009 MAR 12 AM 10:59

CLERK DISTRICT COURT
Sum Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

vs.

GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-
HUGHES DEVELOPMENT, LLC, a Delaware
limited liability company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and
DELANO D. AND LENORE J. PETERSON,
husband and wife,

Defendants.

Case No. CV07-8038

JUDGMENT AND I.R.C.P. 54(b)
CERTIFICATE

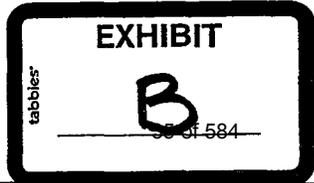
DANIEL J. ENGLISH 4P I 2229054000
KOOTENAI CO. RECORDER Page 1 of 4
BBB Date 08/25/2009 Time 12:03:35
REC-REQ OF WINSTON AND CASHATT
RECORDING FEE: 12.00
2229054000 XJ 4

DANIEL J. ENGLISH 4P I 2287941000
KOOTENAI CO. RECORDER Page 1 of 4
BBB Date 10/28/2010 Time 15:43:48
REC-REQ OF WINSTON AND CASHATT
RECORDING FEE: 19.00
2287941000 XJ 1

JUDGMENT SUMMARY

JUDGMENT CREDITORS	Alan and Marilyn Golub
JUDGMENT DEBTORS	Kelly Polatis Geraldine Kirk-Hughes Peter Sampson Kirk-Hughes Development, LLC Kirk-Hughes & Associates, LLC.
ATTORNEY FOR CREDITOR	Michael T. Howard of Winston & Cashatt Kenneth B. Howard, Jr.
PRINCIPAL JUDGMENT AMOUNT:	\$941,000.00
PRE-JUDGMENT INTEREST:	12% to run from March 11, 2005 through the date of this Judgment

JUDGMENT AND I.R.C.P. 54(b) CERTIFICATE -
PAGE 1



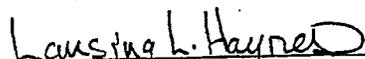
1 POST JUDGMENT INTEREST:

As determined by law to run from the date of this Judgment
2 until paid in full.

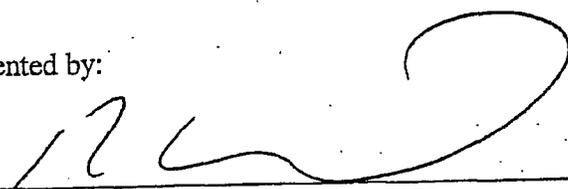
3
4 This matter, having come before the Court upon Plaintiffs' Motion for Default Judgment and
5 I.R.C.P. 54(b) Certificate against Debtor, and supported by the Affidavits of Michael T. Howard and
6 Alan Golub, and the pleadings on file, the Court does hereby enter Judgment against Debtors as follows:

- 7 1. Plaintiffs are granted judgment in the principal amount of \$941,000.00;
- 8 2. Plaintiffs are granted pre-judgment interest at a rate of 12% beginning March 11, 2005
9 through entry of this judgment.
- 10 3. Plaintiffs are granted post-judgment interest to be determined by law from entry of this
11 judgment.

12 DONE ~~IN OPEN COURT~~ this 11 day of March, 2009.

13
14 
15 _____
16 JUDGE LANSING L. HAYNES

16 Presented by:

17 
18 _____
19 MICHAEL T. HOWARD, ISB No. 6128
20 KENNETH B. HOWARD, ISB No. 1999
21 Attorneys for Plaintiffs
22
23
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JUDGMENT AND I.R.C.P. 54(b) CERTIFICATE -
PAGE 2

RULE 54(b) CERTIFICATE

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3 With respect to the issues determined by the above judgment, it is hereby CERTIFIED, in
4 accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay
5 in the entry of a final judgment and that the Court has and does hereby direct that the above judgment or
6 order shall be a final judgment upon which execution may issue and an appeal may be taken as provided
7 by the Idaho Appellate rules.

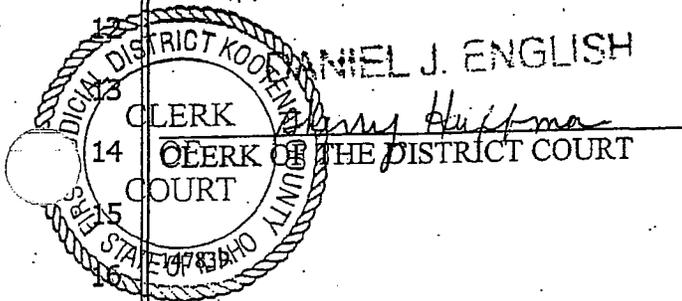
8 DONE IN OPEN COURT this _____ day of March, 2009.

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11 JUDGE LANSING L. HAYNES
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1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be [] mailed,
3 postage prepaid; [] hand delivered; [] sent
4 via facsimile on this 10 day of March,
2009, to:

5 Michael T. Howard ✓ *faxed*
6 Winston & Cashatt
7 601 W. Riverside Ave., Suite 1900
8 Spokane, WA 99201
9 Attorney for Plaintiffs

10 Edwin B. Holmes ✓ *faxed*
11 Holmes Law Offices, P.A.
12 8109 N. Wayne Drive
13 PO Box 569
14 Hayden, ID 83835-0569
15 Attorney for Defendants, Delano D. Peterson and Lenore J. Peterson



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JUDGMENT AND I.R.C.P. 54(b) CERTIFICATE -
PAGE 4

After Recording Return To:

Balinda Antoine
306 E. Randol Mill Road
Suite 100
Arlington, Texas 76016

DANIEL J. ENGLISH 4P I 2282148000
KOOTENAI CO. RECORDER Page 1 of 4
AAA Date 09/17/2010 Time 13:44:36
REC-REQ OF BALINDA ANTOINE
RECORDING FEE: 19.00
2282148000 MD 4

[Space Above This Line For Recording Data]

DEED OF TRUST

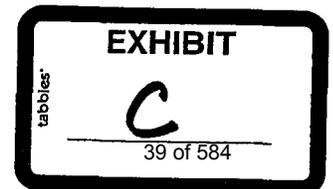
THIS DEED OF TRUST, made this 18th day of November, 2004, between KIRK—
HUGHES DEVELOPMENT, LLC, as TRUSTOR, whose address is 2551 S. Ft. Apache Road,
#103, Las Vegas, Nevada, 89117, with FIRST AMERICAN TITLE COMPANY as TRUSTEE,
with real property address being commonly known as 5697 Aripa Road, Harrison, Idaho, 83833 (a
house on a 10 acre parcel, more specifically described as follows:

FOR THE LEGAL DESCRIPTION OF THE PREMISES SEE EXHIBIT "A"
ATTACHED HERETO AND MADE A PART HEREOF

and KIRK-SCOTT, LTD., as BENEFICIARY, whose address is 306 E. Randol Mill Road, #100,
Arlington, Texas, 76016,

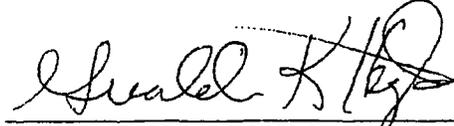
SUBJECT TO: 1) Taxes for the fiscal year; 2) Rights-of-way, reservations, restrictions,
easements and conditions-of-record; 3) Encumbrances held by Mortgagee; together with all and
singular the tenements, hereditament and appurtenances thereunto belonging or in anywise
appertaining.

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a Note
herewith in the amount of One Million Three Hundred Fifty Thousand Dollars (\$1,350,000.00) to
be paid by KIRK-HUGHES DEVELOPMENT to KIRK-SCOTT, LTD., within five (5) years and
thereafter as set forth in the Note which is secured by this Deed of Trust.



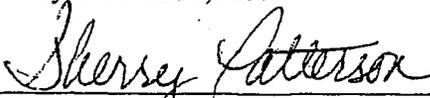
FIRST AMERICAN TITLE shall be designated as TRUSTEE on this Deed of Trust.

BY SIGNING BELOW, the TRUSTOR accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by the TUSTOR and recorder with it.

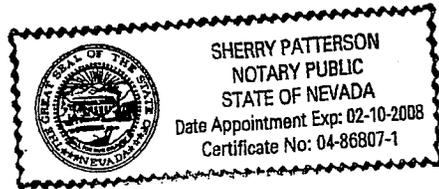


KIRK-HUGHES DEVELOPMENT, LLC -
TRUSTOR

SUBSCRIBED and AWORN to before me this
18th day of November, 2004



NOTARY PUBLIC in and for the
State of Nevada, County of Clark



[Space Below This Line For Acknowledgment]

EXHIBIT "A"

Parcel 1:

Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho lying westerly and southerly of the following 3 portions of said Government Lot 5 described as follows:

Beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, bears South 53°39.5' East, 2383.1 feet; thence South 89°50' West 150 feet to Corner No. 2; thence North 0°10' West 849.3 feet to corner No. 3; thence South 77°10' East 76.9 feet to Corner No. 4; thence South 79°39.5' East 121.5 feet to corner No. 5; thence South 68°18.5' East 93.1 feet to Corner No. 6; thence South 27°52' East 112.6 feet to Corner No. 7; thence South 7°40.5' West 64.4 feet to Corner No. 8; thence South 89°50' West 174.3 feet to Corner No. 9; thence South 0°10' East 611.6 feet to Corner No. 1, the place of beginning

and a parcel of land in Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as beginning at an iron pin that is North 43°40'30" West 1954.70 feet from the Southeast corner of Section 3; thence South 89°50' West, 569.8 feet to a point; thence North 0°10' West 16.57 feet to a point; thence North 68°54' East 516.44 feet to a point; thence South 41°05' East 56.93 feet to a point; thence South 16°44' East 163.50 feet to the point of beginning.

And beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, bears South 38°17' East 1801.9 feet; thence South 89°50' West 233.6 feet to Corner No. 2; thence North 16°44' West 163.5 feet to Corner No. 3; thence North 76°19' East, 154.4 feet to Corner No. 4; thence South 34°10' East 232.6 feet to Corner No. 1, the place of beginning;

Also except any portion lying with the following:

A portion of Government Lots 5 and 6; Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as follows: Beginning at the proportioned 1/16 corner said point being North 0°02'15" West 1323.84 feet from the Southeast corner of said Section 3; thence along the South boundary of said Government Lot 6, South 89°43'48" West 1023.70 feet to the true point of beginning; thence continuing South 89°43'48" West 278.29 feet to a point; thence North 16°43'20" West 124.68 feet to corner No. 2 of the Brown Tract; thence North 89°50'40" East 233.60 feet to corner No. 1 of Brown Tract; thence South 34°09'20" East 143.48 feet to the true point of beginning;

Also except a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho more specifically described as follows:

Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3 2027.13 feet to an iron pin; thence East 70.06 feet to an iron pin which is the point of beginning for this description; thence East 133.82 feet to an iron pin; thence North 0°48'36" West 434.22 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 145 feet plus or minus to a point which is North 0°48'36" West of the point of beginning; thence South 0°48'36" East 475.63 feet to the point of beginning.

Also excepting a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more specifically described as follows: Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3, 2027.13 feet to an iron pin; thence East 203.88 feet to an iron pin which is the point of beginning for this description; thence East 101.18 feet to an iron pin; thence North 0°48'36" West 368.72 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 120 feet, plus or minus to a point which is North 0°48'36" West of the point of beginning; thence continuing South 0°48'36" East 434.22 feet to the point of beginning.

BUT INCLUDING THE FOLLOWING:

A portion of Government Lot 5, Section 3 Township 49 North, Range 3 W.B.M., Kootenai County, Idaho, more particularly described as follows: Commencing at the South Quarter corner, said Section 3; thence

North 0°48'36" West, along the centerline of said Section 3, 2027.13 feet to an iron pin which is the POINT OF BEGINNING for this description; thence

East 70.06 feet to an iron pin; thence

North 0°48'36" West, 475.63 feet to a concrete monument on the shore of Lake Coeur d' Alene; thence

Northwesterly along the shore of Lake Coeur d' Alene 75 feet plus-or-minus to a monument which is North 0°48'36" West of the POINT OF BEGINNING, said point Northwest Corner of Government Lot 5, said Section 3; thence

South 0°48'36" East along the West line of said Government Lot 5, 500 feet to the BEGINNING.

APN 49N03W038050

← Atkinson
14.2 Ac.

PARCEL II:

The Northeast quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. APN: 49N03W035000

← Sloan
25.812 Ac.

EXCEPTING THEREFROM: The Southeast quarter of the Northeast quarter of the Southwest quarter of Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. APN 49N03W0355250

← Sloan
House +
1/4 Acre

PARCEL III:

The Southeast quarter of the Northwest quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho.

APN: 49N03W035850

← Sloan
10 Ac.

8801

Department of the Treasury - Internal Revenue Service

Form 668 (Y)(c)
(Rev. February 2004)

Notice of Federal Tax Lien

Area: SMALL BUSINESS/SELF EMPLOYED AREA #6 Lien Unit Phone: (800) 913-6050	Serial Number 491162208	For Optional Use by Recording Office
--	----------------------------	--------------------------------------

As provided by section 6321, 6322, and 6323 of the Internal Revenue Code, we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. We have made a demand for payment of this liability, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer KIRK-HUGHES DEVELOPMENT LLC , a Partnership

Residence 33917 S HIGHWAY 97
HARRISON, ID 83833-7707

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
941	09/30/2007	20-1772196	03/03/2008	04/02/2018	6150.37
941	12/31/2007	20-1772196	03/03/2008	04/02/2018	9791.06

DANIEL J. ENGLISH 1P I 2185434000
KOOTENAI CO. RECORDER Page 1 of 1
DLS Date 11/12/2008 Time 10:53:08
REC-REQ OF MAIL
RECORDING FEE: 3.00
2185434000 XN

INTERNAL REVENUE SERVICE
PO BOX 145595
STOP 8420G
CINCINNATI, OH 45250-9732

EXHIBIT

D

Place of Filing

COUNTY RECORDER
KOOTENAI
Coeur d'Alene, ID 83814

Total \$ 15941.43

This notice was prepared and signed at SEATTLE, WA , on this,

the 03rd day of November, 2008.

Signature

R. A. Mitchell

For S. GERTSEN

Title
REVENUE OFFICER
(208) 765-9316

26-06-3434

(NOTE: Certificate of officer authorized by law to take acknowledgment is not essential to the validity of Notice of Federal Tax Lien
41501-2013 and 41505-2013

REG-1017-K1461-0991, et C.B. 409)

Part 1 - Kept By Recording Office

Form 668(Y)(c) (Rev. 2-2004)
CAT. NO 60025X

8801

Department of the Treasury - Internal Revenue Service

Form 668 (Y)(c)

(Rev. February 2004)

Notice of Federal Tax Lien

Area: SMALL BUSINESS/SELF EMPLOYED AREA #6 Lien Unit Phone: (800) 913-6050	Serial Number 492039308	For Optional Use by Recording Office
--	----------------------------	--------------------------------------

As provided by section 6321, 6322, and 6323 of the Internal Revenue Code, we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. We have made a demand for payment of this liability, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer KIRK-HUGHES DEVELOPMENT LLC , a Partnership

Residence 33917 S HIGHWAY 97
HARRISON, ID 83833-7707

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
941	06/30/2008	20-1772196	09/08/2008	10/08/2018	10712.16
INTERNAL REVENUE SERVICE PO BOX 145595 STOP 8420G CINCINNATI, OH 45250-9732					DANIEL J. ENGLISH 1P I 2186284000 KOOTENAI CO. RECORDER Page 1 of 1 DLS Date 11/18/2008 Time 10:07:31 REC-REQ OF MAIL RECORDING FEE: 3.00  2186284000 XN
Place of Filing COUNTY RECORDER KOOTENAI Coeur d'Alene, ID 83814					Total \$ 10712.16

This notice was prepared and signed at SEATTLE, WA , on this,

the 05th day of November, 2008.

Signature for S. GERTSEN	<i>R. A. Mitchell</i>	Title REVENUE OFFICER (208) 765-9316	26-06-3434
-----------------------------	-----------------------	--	------------

(NOTE: Certificate of officer authorized by law to take acknowledgment is not essential to the validity of Notice of Federal Tax lien

Revised 7/14/06 (12/03) et al C.B. 409)

41501-2013 and 41505-2013

Part 1 - Kept By Recording Office

Form 668(Y)(c) (Rev. 2-2004)
CAT. NO 60025X

10182

Department of the Treasury - Internal Revenue Service

Form 668 (Y)(c)
(Rev. February 2004)

Notice of Federal Tax Lien

Area:
SMALL BUSINESS/SELF EMPLOYED AREA #6
Lien Unit Phone: (800) 913-6050Serial Number
751950611

For Optional Use by Recording Office

As provided by section 6321, 6322, and 6323 of the Internal Revenue Code, we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. We have made a demand for payment of this liability, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

INTERNAL REVENUE SERVICE
PO BOX 145595
STOP 8420G
CINCINNATI, OH 45250-9732

Name of Taxpayer KIRK-HUGHES DEVELOPMENT LLC
HUGHES GEARLDINE KIRK MBR
a Partnership

Residence PO BOX 3704
COEUR D ALENE, ID 83816-2529

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1065	12/31/2007	20-1772196	11/30/2009	12/30/2019	12240.00
1065	12/31/2008	20-1772196	11/30/2009	12/30/2019	2160.00
941	03/31/2009	20-1772196	06/01/2009	07/01/2019	2046.34
941	06/30/2009	20-1772196	09/28/2009	10/28/2019	538.10
941	12/31/2009	20-1772196	04/12/2010	05/12/2020	6254.62
941	03/31/2010	20-1772196	07/12/2010	08/11/2020	515.77

CLIFFORD T. HAYES 1P I 2302989000
KOOTENAI CO. RECORDER Page 1 of 1
JRB Date 02/15/2011 Time 15:03:02
REC-REQ OF MAIL
RECORDING FEE: 10.00
2302989000 XN

Place of Filing

COUNTY RECORDER
KOOTENAI
Coeur d'Alene, ID 83814

Total \$ 23754.83

This notice was prepared and signed at SEATTLE, WA, on this,

the 08th day of February, 2011.

Signature

for RENE FOSS



Title
REVENUE OFFICER
(208) 765-9316

26-06-3416

(NOTE: Certificate of officer, authorized by law to take acknowledgment is not essential to the validity of Notice of Federal Tax Lien.
Rev. Rul. 71-466, 1971-2 C.B. 409) 41501-2013 and 41505-2013 4501584

Part 1 - Kept By Recording Office.

Form 668(Y)(c) (Rev. 2-2004)
CAT. NO 60025X

6788

Department of the Treasury - Internal Revenue Service

Certificate of Release of Federal Tax Lien

Area: **SMALL BUSINESS/SELF EMPLOYED AREA #6**
 Alien Unit Phone: (800) 913-6050

Serial Number
491162208

For Use by Recording Office

I certify that the following-named taxpayer, under the requirements of section 6325 (a) of the Internal Revenue Code has satisfied the taxes listed below and all statutory additions. Therefore, the lien provided by Code section 6321 for these taxes and additions has been released. The proper officer in the office where the notice of internal revenue tax lien was filed on November 12 2008, is authorized to note the books to show the release of this lien for these taxes and additions.

Name of Taxpayer
KIRK-HUGHES DEVELOPMENT LLC, a Partnership

Residence **33917 S HIGHWAY 97**
HARRISON, ID 83833-7707

COURT RECORDING INFORMATION:

Liber: Page UCC No. Serial No.
n/a n/a n/a 2185434000

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
941	09/30/2007	20-1772196	03/03/2008	04/02/2018	6150.37
941	12/31/2007	20-1772196	03/03/2008	04/02/2018	9791.06

CLIFFORD T. HAYES 1P 2362832000
 KOOTENAI COUNTY RECORDER Page 1 of 1
 DAS Date 06/18/2012 Time 04:44:37
 REQ OF INTERNAL REVENUE SERVICE
 RECORDING FEE: \$10.00



2362832000 RM

Place of Filing

COUNTY RECORDER
 KOOTENAI
 Coeur d'Alene, ID 83814

Total \$ 15941.43

This notice was prepared and signed at SEATTLE, WA, on this 06th day of June, 2012.



Signature

[Handwritten Signature]

Title
 Operations Manager,
 Centralized Case Processing-Lien Unit

(NOTE) Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Certificate of Release of Federal Tax Lien Rev. Rul. 71-466, 1971 - 2 C.B. 409. 41001-2013 and 41505-2013 46 of 584

6788

Department of the Treasury - Internal Revenue Service
Certificate of Release of Federal Tax Lien

For Use by Recording Office

Area: **SMALL BUSINESS/SELF EMPLOYED AREA #6**
Lien Unit Phone: (800) 913-6050

Serial Number
492039308

I certify that the following-named taxpayer, under the requirements of section 6325 (a) of the Internal Revenue Code has satisfied the taxes listed below and all statutory additions. Therefore, the lien provided by Code section 6321 for these taxes and additions has been released. The proper officer in the office where the notice of internal revenue tax lien was filed on November 18 2008, is authorized to note the books to show the release of this lien for these taxes and additions.

Name of Taxpayer
KIRK-HUGHES DEVELOPMENT LLC, a Partnership

Residence **33917 S HIGHWAY 97
HARRISON, ID 83833-7707**

COURT RECORDING INFORMATION:
Liber Page UCC No. Serial No.
n/a n/a n/a 2186284000

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
941	06/30/2008	20-1772196	09/08/2008	10/08/2018	10712.16

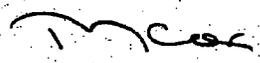
CLIFFORD T. HAYES 1P 2362833000
KOOTENAI COUNTY RECORDER Page 1 of 1
DAS Date 06/18/2012 Time 04:44:37
REQ OF INTERNAL REVENUE SERVICE
RECORDING FEE: \$10.00

2362833000 RM

Place of Filing
**COUNTY RECORDER
KOOTENAI
Coeur d'Alene, ID 83814**

Total \$ **10712.16**

This notice was prepared and signed at SEATTLE, WA, on this, the 06th day of June, 2012.

Signature:  Title: **Operations Manager, Centralized Case Processing-Lien Unit**

6788

Department of the Treasury - Internal Revenue Service
Certificate of Release of Federal Tax Lien

Area: **SMALL BUSINESS/SELF EMPLOYED AREA #6**
Lien Unit Phone: (800) 913-6050

Serial Number: **751950611**

For Use by Recording Office

I certify that the following-named taxpayer, under the requirements of section 6325 (a) of the Internal Revenue Code has satisfied the taxes listed below and all statutory additions. Therefore, the lien provided by Code section 6321 for these taxes and additions has been released. The proper officer in the office where the notice of internal revenue tax lien was filed on February 15 2011, is authorized to note the books to show the release of this lien for these taxes and additions.

Name of Taxpayer
KIRK-HUGHES DEVELOPMENT LLC, a Partnership
HUGHES GEARLDINE KIRK MBR

Residence **PO BOX 3704**
COEUR D ALENE, ID 83816-2529

COURT RECORDING INFORMATION:

Liber Page UCC No. Serial No.
n/a n/a n/a 2302989000

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1065	12/31/2007	20-1772196	11/30/2009	12/30/2019	12240.00
1065	12/31/2008	20-1772196	11/30/2009	12/30/2019	2160.00
941	03/31/2009	20-1772196	06/01/2009	07/01/2019	2046.34
941	06/30/2009	20-1772196	09/28/2009	10/28/2019	538.10
941	12/31/2009	20-1772196	04/12/2010	05/12/2020	6254.62
941	03/31/2010	20-1772196	07/12/2010	08/11/2020	515.77

CLIFFORD T. HAYES 1P 2362835000
KOOTENAI COUNTY RECORDER Page 1 of 1
DAS Date 06/18/2012 Time 04:44:37
REQ OF INTERNAL REVENUE SERVICE
RECORDING FEE: \$10.00



2362835000 RM

Place of Filing

COUNTY RECORDER
KOOTENAI
Coeur d'Alene, ID 83814

Total \$ **23754.83**

This notice was prepared and signed at SEATTLE, WA, on this, the 06th day of June, 2012.

Signature

Title
Operations Manager,
Centralized Case Processing-Lien Unit

DANIEL J. ENGLISH 1P I 2166632000
KOOTENAI CO. RECORDER Page 1 of 1
BBB Date 07/01/2008 Time 10:42:59
REC-REQ OF RAMSDEN AND LYONS
RECORDING FEE: 3.00
2166632000 XJ

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

TOMLINSON BLACK NORTH IDAHO,)	
)	
Plaintiff,)	
	)	Case No. CV-06-118-N-RHW
vs.)	
)	
GERALDINE KIRK-HUGHES and	)	AMENDED
	)	JUDGMENT ON JURY VERDICT
KELLY POLATIS, et al.,)	
)	
Defendants.)	

This action came on for trial before the Court and a Jury, Honorable Robert H. Whaley, United States Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

That plaintiff Tomlinson Black North Idaho recover from the defendants Geraldine Kirk-Hughes; Kirk-Hughes, LLC; Kirk-Hughes Development, LLC; and Kelly Polatis the sum of \$235,000.00, with interest thereon at the rate of 2.51 percent as provided by law, and its costs of action.

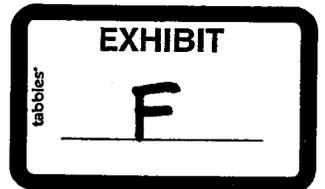
Dated this 24th day of June, 2008.

CAMERON S. BURKE, Clerk

by: Michelle Fox, Deputy

Certified to be a true and correct copy of original filed in my office.

Cameron S. Burke, Clerk
U.S. Courts, District of Idaho



By Jean Gerrells on Jun 24, 2008

Jean Gerrells

Digitally signed by Jean Gerrells
DN: cn=Jean Gerrells,
email=jean_gerrells@id.uscourts.gov,
o=US Courts, ou=US Courts, c=US
Date: 2008.06.24 15:23:09 -0700

FILED

UNITED STATES COURT OF APPEALS

JAN 27 2010

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TOMLINSON BLACK NORTH IDAHO,

Plaintiff - Appellee,

v.

GERALDINE KIRK-HUGHES, an individual doing business as Kirk-Hughes and Associates, doing business as Kirk-Hughes, LLC doing business as Kirk-Hughes Development, LLC,

Defendant - Appellant,

and

KELLY POLATIS, an individual; DOES 1-10; DELANO D. PETERSON,

Defendants.

No. 08-35900

D.C. No. 2:06-CV-00118-RHW

District of Idaho,

Boise

ORDER

DANIEL J. ENGLISH 2P I 2252391000
KOOTENAI CO. RECORDER Page 1 of 2
BBB Date 02/05/2010 Time 11:04:22
REC-REQ OF RAMSDEN & LYONS
RECORDING FEE: 6.00
2252391000 XJ

U.S. COURTS

JAN 29 2010

Rcvd Filed Time
ELIZABETH A. SMITH
CLERK, DISTRICT OF IDAHO

Appellee Tomlinson Black North Idaho, Inc.'s unopposed motion for attorneys' fees pursuant to Idaho Code § 12-120(3) is granted. Accordingly, attorneys' fees in the amount of \$32,002.25 are awarded in favor of appellee Tomlinson Black North Idaho, Inc. and against appellant Geraldine Kirk-Hughes. See 9th Cir. R. 39-1.6; 9th Cir. Gen. Order 6.3(a) & App. A, ¶ 50.

GML/Appellate Commissioner

UNITED STATES COURTS DISTRICT OF IDAHO
Certified to be a true and correct copy of original filed in my office
Elizabeth A. Smith, Clerk
U.S. Courts, District of Idaho
By Lindsay Holvett on Feb 04, 2010 11:33 am

EXHIBIT
G
tabbles

This order sent to the district court shall amend this court's mandate.

FOR THE COURT:
MOLLY C. DWYER
CLERK OF COURT

By: G. Martin Lewallen
Staff Attorney/Deputy Clerk
9th Cir. Rule 27-7
General Orders/Appendix A

GML/Appellate Commissioner

DANIEL J. ENGLISH 1P I 2181705000
KOOTENAI CO. RECORDER Page 1 of 1
RAR Date 10/14/2008 Time 15:38:29
REC-REG OF RAMSDEN & LYONS
RECORDING FEE: 3.00
2181705000 XJ 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

TOMLINSON BLACK NORTH IDAHO,)	
)	
Plaintiff,)	
vs.	)	Case No. 06-CV-118-N-RHW
)	
GERALDINE KIRK-HUGHES and	)	SECOND AMENDED
KELLY POLATIS, ET AL ,	)	JUDGMENT ON JURY VERDICT
)	
Defendants.)	

This action came on for trial before the Court and a Jury, Honorable Robert H. Whaley, United States Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

That plaintiff Tomlinson Black North Idaho recover from defendant Geraldine Kirk-Hughes in the amount of \$235,000.00; \$171,572.00 in attorney's fees; \$10,641.38 in costs; and \$1,937.63 in legal research fees, with interest thereon at the rate of 2.51 percent as provided by law.

That Plaintiff Tomlinson Black North Idaho take nothing of the Defendants Kirk-Hughes, LLC, Kirk-Hughes Development, LLC and Kelly Polatis.

Dated this 10th day of October, 2008.

CAMERON S. BURKE, Clerk

Sherri O'Larey
by: Sherri O'Larey, Deputy Clerk

UNITED STATES DISTRICT COURT
Dated and filed this 10th day of October, 2008.
Cameron S. Burke, Clerk
Sherri O'Larey, Deputy Clerk
Gollub vs. Kirk-Hughes, et al

EXHIBIT
H
52 of 84

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED:
2010 FEB 19 AM 10:32

In the Supreme Court of the State of Idaho

CLERK DISTRICT COURT
[Signature]
DEPUTY

ALAN GOLUB and MARILYN GOLUB,)
husband and wife,)

Plaintiffs-Respondents.)

v.)

GERALDINE KIRK-HUGHES and PETER)
SAMPSON, husband and wife; KIRK-)
HUGHES & ASSOCIATES, INC., a Nevada)
corporation; DELANO D. and LENORE J.)
PETERSON, husband and wife,)

Defendants-Appellants,)

and)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company; KELLY)
POLATIS, an individual,)

Defendants.)

REMITTITUR

Supreme Court Docket No. 36898-2009
Kootenai County Docket No. 2007-8038

TO: FIRST JUDICIAL DISTRICT, COUNTY OF KOOTENAI.

The Court having entered an Order dismissing this appeal January 20, 2010;
therefore,

IT IS HEREBY ORDERED that the appeal herein from the Judgment of the District
Court be, and hereby is, DISMISSED.

DATED this 10th day of February, 2010.

[Signature: Stephen Kuyon]
Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Court Reporter
District Court Judge

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 11027

2013 MAR 14 AM 10:26

CLERK DISTRICT COURT
[Signature]
DEPUTY

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Attorneys for Defendants

9 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
10 IDAHO, IN AND FOR THE COUNTY OF KOOTNEI

11 ALAN GOLUB and MARILYN GOLUB
12 husband and wife,
13
14 Plaintiffs,

Case No. CV13-866

14 vs.

**ANSWER FOR DEFENDANT KIRK-
SCOTT, LTD.**

15 KIRK-HUGHS DEVELOPMENT, LLC and
16 Delaware limited liability company; KIRK-
17 SCOTT, LTD a Texas corporation;
18 INTERNAL REVENUE SERVICE;
19 TOMLINSON NORTH IDAHO, INC., an
20 Idaho corporation
21 Defendants.

21 COMES NOW, Defendant Kirk-Scott, Ltd., by and through their counsel of record Ryan
22 M. Best of Best Law, PLLC and Matthew Crotty of Crotty & Son, PLLC and answer Plaintiffs'

23 complaint as follows:

ORIGINAL
27

I.

1. Defendant admits paragraph 1.1, 1.3, 1.5, 2.1 and 2.2 of Plaintiff's Complaint. Defendant Kirk-Scott, Ltd. denies paragraph 1.2, 1.4, 1.6 for lack of information.
2. Defendant Kirk-Scott, Ltd. denies 3.1, 3.6 through 3.11.
3. In regard to paragraph 3.2, Defendant admits bankruptcy was filed, but denies for lack of information in paragraph 3.2 as to the date of bankruptcy.
4. Defendant Kirk-Scott, Ltd. denies 3.3 through 3.5 for lack of information.
5. Defendant Kirk-Scott, Ltd. denies 3.12 through 3.19 for lack of information.

II. AFFIRMATIVE DEFENSES

WHEREFORE Defendant Kirk-Scott, Ltd., having fully answer Plaintiffs complaint, and for their affirmative defenses, states as follows:

1. Plaintiffs have failed to state a claim upon which relief may be granted.
2. Plaintiffs lack standing to assert a violation of the automatic stay.
3. Plaintiffs consented or waived their rights, if any, by their conduct.
4. Plaintiffs have unclean hand and may not assert an equitable remedy.
5. Plaintiffs have failed to name essential parties such that relief cannot be granted.
6. Plaintiffs owed duties to Defendant and have, by their conduct and this lawsuit, breached their duties to Defendant. Based on this breach of duties, including ethical duties, Plaintiff's requested relief should be denied.

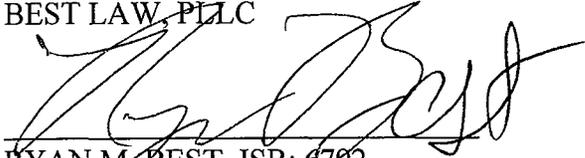
III. PRAYER FOR RELIEF

1. The Plaintiffs' complaint to be dismissed and to be awarded nothing in money damages and be awarded no declaratory relief,

- 1 2. For an award of reasonable cost and attorney's fees as allowed by federal statute and
2 Idaho law,
3 3. For such other and further relief as the court deems just.

4 DATED this 14th day of March, 2013.

5
6 BEST LAW, PLLC

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22 Attorney for Defendants
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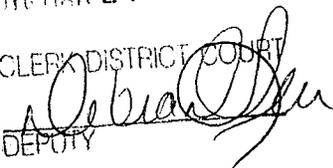
Attorney for Defendants

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 MAR 24 PM 3:14

CLERK DISTRICT COURT

DEPUTY



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

Case No. CV07-8038

ORDER TO SHOW CAUSE

vs.

GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-
HUGHES DEVELOPMENT, LLC, a Delaware
limited liability company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and
DELANO D. AND LENORE J. PETERSON,
husband and wife,

Defendants.

This matter came before the Court on Plaintiffs' Motion for an Order to Show Cause why an Order of Civil Contempt should not issue against Defendants Peter Sampson, Kelly Polatis, and Kirk-Hughes & Associates for failure and/or refusal to comply with the Court's February 10, 2010 Order To Compel Post-Judgment Discovery Responses. Based upon the pleadings filed in this action, it is hereby ORDERED: Plaintiff's motion is GRANTED and Defendants Peter Sampson, Kelly Polatis, and Kirk-

1 Hughes & Associates shall appear before this Court at Coeur d'Alene, Idaho at 3:30
2 o'clock p.m. on May 6th, 2010 and show cause why an Order of Civil Contempt
3 should not issue against each.

4 DONE ~~IN OPEN COURT~~ this 23 day of March, 2010.

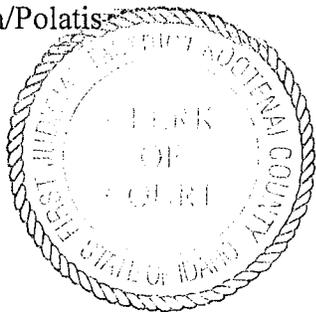
7 Lansing L. Haynes
8 JUDGE LANSING L. HAYNES

9 I hereby certify that I caused a true and
10 complete copy of the foregoing to be [] mailed,
11 postage prepaid; [] hand delivered; [] sent
12 via facsimile on this 24 day of March,
2010, to:

13 Michael T. Howard
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17 Fax #208-765-2121 #129
18 Attorney for Plaintiffs

19 L. Sanders Joiner
20 251 South Fort Apache Road, Suite 103
21 Las Vegas, NV 89117
22 Fax #702-233-8661 #129
23 Attorney for Defendants, Kirk-Hughes/Sampson/Polatis

24 **DANIEL J. ENGLISH**
25 _____
26 CLERK OF THE DISTRICT COURT
Linda Stedlo



STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: LSS

2013 APR 30 AM 11:03

CLERK DISTRICT COURT

Rebecca McKeon
DEPUTY *RM*

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10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

Case No. CV13-866

16 **DEFENDANT KIRK-SCOTT, LTD.'s**
17 **MEMORANDUM IN SUPPORT OF**
18 **MOTION TO DISMISS**

19 KIRK-HUGHS DEVELOPMENT, LLC and
20 Delaware limited liability company; KIRK-
21 SCOTT, LTD a Texas corporation;
22 INTERNAL REVENUE SERVICE;
23 TOMLINSON NORTH IDAHO, INC., an
24 Idaho corporation

25 Defendants.

26 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

27 Plaintiffs claim title to certain real property in Kootenai County and bring a declaratory
28 judgment action in support of that claim. Plaintiffs' claim is based on the allegation that
defendant Kirk-Scott, Ltd. ("Kirk Scott") recorded a deed of trust, which secures the same real
property, in violation of a bankruptcy stay and that the post bankruptcy petition recording voids

1 the deed of trust. Plaintiffs are wrong because:

2 1. In order to succeed on a declaratory judgment action the plaintiffs must establish
3 standing and the bankruptcy law upon which plaintiffs predicate their claim does not give
4 plaintiffs standing to remedy Kirk-Scott's alleged stay violation.¹ such standing belongs to the
5 bankruptcy trustee and/or the bankruptcy debtor and plaintiffs were not (and are not) the trustee
6 or debtor; and,

7
8 2. Even if the Court finds that the deed of trust was improperly (and thus never)
9 recorded, the Idaho Supreme Court consistently holds that an unrecorded deed of trust has
10 priority over a properly recorded judgment - - - which is precisely the case here.

11 Accordingly, plaintiffs' claims against Kirk-Scott, Ltd. should be dismissed.

12 II. FACTS

13
14 1. Kirk-Huges Development, LLC ("Kirk-Huges") owns real property ("the
15 Property") located in Kootenai County, Idaho. (Complaint ¶3.1)

16 2. Kirk-Huges filed for Chapter 11 Bankruptcy on April 6, 2009. (Complaint at
17 ¶3.2)

18
19 3. Kirk-Scott claims a security interest in the Property via a Deed of Trust that was
20 recorded on September 17, 2010. (Complaint at ¶3.8)

21 4. Kirk-Huges' April 6, 2009, Chapter 11 Bankruptcy filing was voluntarily
22 dismissed on October 28, 2010. (Complaint at ¶3.3)

23
24
25 ¹ Kirk-Scott contends that it did not violate the bankruptcy stay; but, solely for the purpose of
26 this motion concedes the point because, under Idaho law, facts stated in the plaintiffs' complaint
27 are construed as true for the purpose of a motion to dismiss. *Argonaut Ins. Co. v. White*, 86
28 Idaho 374, 376 (1963).

5. Plaintiffs, who obtained a default judgment against Kirk-Hughes (and others) recorded that Judgment on October 28, 2010. (Complaint at ¶3.6)

III. ARGUMENT

A. A Motion to Dismiss is proper in this case because plaintiffs do not state a claim for relief.

A I.R.C.P.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 (2002). If the plaintiff's complaint fails to set out any set of facts upon which relief can be granted then a dismissal motion is proper. I.R.C.P 12(b)(6). Accordingly, the "grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398 (1999).

The Court should dismiss plaintiffs' claim because it, as a matter of law, fails to state a claim. Plaintiffs lack standing to pursue Kirk-Scott's alleged stay violation and, even if such standing exists, plaintiffs still cannot obtain priority over Kirk-Scott's deed of trust.

B. Plaintiffs lack standing to remedy Kirk-Scott's violation of the bankruptcy stay because the plaintiffs are not the bankruptcy debtor or bankruptcy trustee.

Plaintiffs seek a declaration that Kirk-Scott's September 17, 2010, deed of trust recording violates 11 U.S.C. § 362(a)(4),² renders Kirk-Scott's deed of trust void and/or invalid,³ and gives plaintiffs' judgment lien priority over Kirk-Scott's deed. (Complaint ¶¶3.10, 3.11)

² 11 U.S.C. § 362 bars "any act to create, perfect, or enforce any lien against property of the estate."

³ Plaintiffs seek a declaration that Kirk-Scott's deed of trust be declared "void." (Complaint at ¶3.10) Plaintiffs alternatively seek a declaration that the deed of trust is "invalid." (Complaint at ¶3.11). Since "void" and "invalid" both mean "without legal effect", plaintiffs two declaratory

1 In order to prevail on a declaratory judgment action the plaintiff must establish standing.
 2 *Martin v. Camas Cnty. ex rel. Bd. Comm'rs*, 150 Idaho 508, 513 (2011)("[T]he [Uniform]
 3 Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the
 4 action in the first instance.") Courts consistently hold that a non-debtor/non-trustee lacks
 5 standing to enforce a violation of a bankruptcy stay. *In re Globe Inv. and Loan Co.*, 867 F.2d
 6 556, 559 (9th Cir. 1989); *In re Brooks*, 79 B.R. 479, 481 (Bankr. 9th Cir.1987)(holding that
 7 bank's post-petition re-recording of deed of trust cannot be avoided since "the debtor or the
 8 trustee chose not to invoke the protections of § 362, no other party [could] attack any acts in
 9 violation of the automatic stay"); *In re Stivers*, 31 B.R. 735 (Bankr.N.D.Cal.1983)("the
 10 automatic stay operates in favor of debtors and estates (represented by trustees and debtors-in-
 11 possession) only and that it gives junior lien holders and other parties interested in the property
 12 affected by the automatic stay no substantive or procedural rights")

15 *Globe* involved a bankrupt entity that owned a six percent interest in certain real
 16 property. *Id.* at 558. After the entity filed for bankruptcy the beneficiary of a second position
 17 deed of trust securing the same real property acquired possession of the real property via a non-
 18 judicial foreclosure. *Id.* at 558. Shortly thereafter the bankruptcy estate's creditors petitioned the
 19 trial court to set aside the foreclosure sale and make the creditors (who also held a secured
 20 interest in the same real property) owners of the property. *Id.* at 559. The Ninth Circuit affirmed
 21 the trial court's rejection of the creditors' request, held that the creditors lacked standing, and
 22 reasoned that the creditors' request to be declared owners of the property made those individuals

25 relief theories are distinctions without a difference and should be treated as one claim. *Compare*
 26 *Black's Law Dictionary*, at 664 (defining "invalid" as "[n]ot legally binding" *with* *Black's Law*
 27 *Dictionary*, at 1270 (defining "void" as "[o]f no legal effect."). Put differently: if something is
 28 not legally binding it has no legal effect.

1 aggrieved property owners incapable of utilizing the bankruptcy stay provision's benefits. *Id.* at
2 560 (citing *In re Fuel Oil Supply and Terminaling, Inc.*, 30 B.R. 360, 362
3 (Bankr.N.D.Tex.1983)("The automatic stay is for the benefit of the debtor and if it chooses to
4 ignore stay violations other parties cannot use such violations to their advantage")).

5 Plaintiffs do not (and cannot) plead that they are debtors, that the subject property at
6 issue in this case is/was part of their bankruptcy estate, or that plaintiffs are/were the bankruptcy
7 trustee. Accordingly, plaintiffs lack standing to use the bankruptcy code's stay provision to void
8 Kirk-Scott's September 17, 2010, post petition deed of trust recording. As such, this Court
9 should follow *Globe, Brooks, and Stivers* and dismiss plaintiffs' lawsuit for lack of standing.
10

11 **C. Kirk-Scott's Deed of Trust has priority over Plaintiffs' Judgment.**

12 Plaintiffs' claims fail even if the Court finds that plaintiffs have standing and Kirk-Scott
13 improperly recorded the deed of trust.
14

15 Idaho courts consistently hold that a unrecorded deed of trust has priority over a
16 subsequently recorded judgment. *Johnson v. Casper*, 75 Idaho 256, 261 (1954)(holding that
17 prior unrecorded deed of trust prevails over subsequently recorded judgment because the
18 judgment was not an instrument under IC §55-606); *Siegel Mobile Home Group, Inc. v. Bowen*,
19 114 Idaho 531 (Ct. App. 1988).
20

21 *Siegel* involved a judgment creditor arguing that its judgment lien was superior to a
22 secured party's improperly recorded deed of trust. *Siegel*, 114 Idaho, at 523. The trial court
23 granted summary judgment against the judgment creditor holding "that between a prior
24 unrecorded deed and a subsequent, recorded judgment, the deed prevail[ed]." *Id.* at 533, 535.
25
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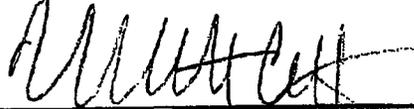
1 *Siegel and Johnson* mandate dismissal of plaintiffs' case. Plaintiffs ask the Court to
 2 declare that "Golub's interest in the Property has priority over any interest claimed by Kirk-
 3 Scott" and that "Kirk-Scott's Deed of Trust is invalid and does not attach to...the Property."
 4 (Complaint at ¶¶3.10, 3.11) But neither *Siegel* or *Johnson* allow such a result: for even if the
 5 Court rules that Kirk-Scott's deed of trust was improperly recorded, it would still remain valid
 6 as between Kirk-Scott and Kirk-Hughes and have priority over plaintiffs' judgment lien.
 7

8 **IV. CONCLUSION**

9 Kirk-Scott, Ltd's Motion to Dismiss should be granted.

10 DATED this 30th day of April 2013.

11
12 CROTTY & SON LAW FIRM, PLLC

13 

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20 Attorney for Defendants

CERTIFICATE OF SERVICE

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I hereby certify that on the 30th day of April 2013, I have faxed the document to the following participants at the addresses listed below:

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Attorney for Plaintiffs.

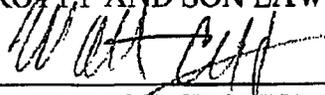
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Attorney for Defendant Kirk-Hughes Development, LLC

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Attorney for Defendant, Internal Revenue Service

CROTTY AND SON LAW FIRM, PLLC


MATTHEW Z. CROTTY, ISB: 8653
Attorney for Defendant Kirk-Scott, Ltd.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2013 MAY -3 AM 10:20

CLERK DISTRICT COURT

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10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC, a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD, a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation,

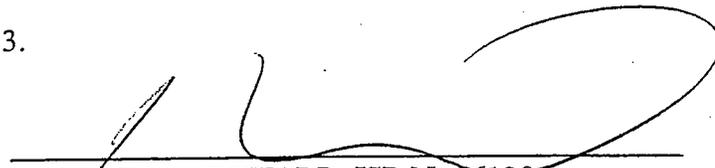
22 Defendants.

Case No. CV13-866

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT DECLARING INTEREST AND
PRIORITY IN PROPERTY

23 Pursuant to I.R.C.P. 56 and IC §10-1201, Plaintiffs move the Court for an Order of Summary
24 Judgment declaring Plaintiffs' interest and priority in property. This Motion is supported by the
25 Memorandum in Support of Motion for Summary Judgment Declaring Interest and Priority in Property,
the Affidavit of Michael T. Howard, and the Affidavit of Alan J. Golub.

1 DATED this 3 day of May, 2013.

2
3 
4 MICHAEL T. HOWARD, ISB No. 6128
5 WINSTON & CASHATT, LAWYERS, a Professional
6 Service Corporation
7 Attorneys for Plaintiffs
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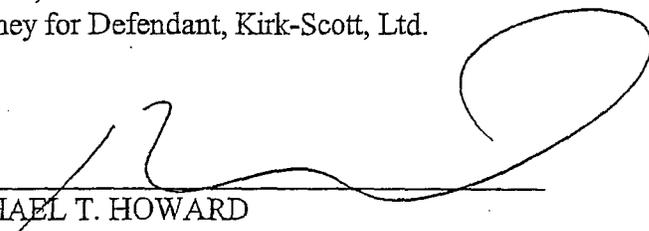
1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
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22 MICHAEL T. HOWARD

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2013 MAY -9 PM 3: 12

CLERK DISTRICT COURT

Patty Boyle
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10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,
14
15 Plaintiffs,

16 vs.

17 GERALDINE KIRK-HUGHES and PETER
18 SAMPSON, husband and wife; KIRK-
19 HUGHES DEVELOPMENT, LLC, a Delaware
20 limited liability company; KIRK-HUGHES &
21 ASSOCIATES, INC., a Nevada corporation;
22 KELLY POLATIS, an individual, and
23 DELANO D. AND LENORE J. PETERSON,
24 husband and wife,

25 Defendants.

Case No. CV07-8038

MEMORDANDUM RE: MOTION FOR
SUMMARY JUDGMENT, DECLARING
INTEREST AND PRIORITY IN PROPERTY

26 MEMORDANDUM RE: MOTION FOR SUMMARY
JUDGMENT, DECLARING INTEREST AND
PRIORITY IN PROPERTY

Golub vs Kirk-Hughes, et al

41501-2013 and 41505-2013

Winston & Cashatt
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2013 MAY -3 AM 10: 20

CLERK DISTRICT COURT

DEPUTY

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9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,
14
15 Plaintiffs,

Case No. CV13-866

MEMORDANDUM RE: MOTION FOR
SUMMARY JUDGMENT, DECLARING
INTEREST AND PRIORITY IN PROPERTY

16 vs.

17 KIRK-HUGHES DEVELOPMENT, LLC, a
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD, a Texas corporation;
20 INTERNAL REVENUE SERVICE;
21 TOMLINSON NORTH IDAHO, INC., an
22 Idaho corporation,

23 Defendants.

24 **1. Introduction and Requested Relief**

25 This matter arises out of several real estate transactions in 2004 and involves efforts by Plaintiffs (Golub) to satisfy the judgment entered in CV-07-8038 through foreclosure of a judgment lien on real property owned by Defendant Kirk-Hughes Development (KH Development) in Kootenai County, Idaho. Defendants Kirk-Scott Ltd. (Kirk-Scott), Tomlinson Black (Tomlinson); and the IRS may claim

1 an interest in the property. Golub seeks an Order, declaring the validity and priority of the various
2 interests.

3 **2. Summary of Argument**

4 2.1 Tomlinson has no interest in the property because it does not have a judgment against KH
5 Development.

6 2.2 IRS has no interest in the property because all recorded liens have been released.

7 2.3 Golubs' judgment lien is valid, with a priority date of October 28, 2010, and is superior
8 to any interest claimed by Defendants.

9 2.4 Kirk-Scott's Deed of Trust is "unrecorded" and junior to Golubs' judgment lien because
10 it was recorded in violation of the federal bankruptcy stay was not properly
11 acknowledged.

12 **3. Factual and Procedural History**

13 **3.1 The Players**

14 Plaintiff Alan Golub (Golub) was the real estate agent for two siblings, Mayvis Sloan (Sloan)
15 and Delano Peterson (Peterson), who sought to sell their family homestead overlooking Lake Coeur
16 d'Alene. In early 2004, Golub was successful in securing purchase and sale agreements for Sloan and
17 Peterson as described below. Golub has obtained a \$941,000 judgment against KH Development and
18 seeks to foreclose upon real property owned by KH Development in Kootenai County.
19

20 Geraldine Kirk-Hughes (Kirk-Hughes) is a Las Vegas lawyer and real estate developer who
21 sought to purchase properties in Kootenai County to develop a golf course and residential community
22 called "Chateau de Loire" (the Project). To this end, Kirk-Hughes and various investors utilized the
23 services of local real estate broker, Tomlinson Black (Tomlinson) to purchase property in Kootenai
24 County.
25

1 Kirk-Hughes Development (KH Development) is a Delaware company formed by Kirk-Hughes
2 in October 2004 to hold title to acquired land and to develop the Project. KH Development currently
3 holds title to three parcels of property in Kootenai County; the "Sloan properties" (tax numbers 5000
4 and 5850), and the "Atkinson property" (tax number 8050) (referred to collectively hereafter as "the
5 Property".
6

7 Kirk-Hughes & Associates (KH Associates) is a Las Vegas law firm, owed and operated by
8 Kirk-Hughes. KH Associates is also a member of KH Development with a 7% membership share.¹

9 Kirk-Scott Ltd. is a Texas company owned by BJK Enterprises, which is owned by Kirk-
10 Hughes's sister, Balinda Antoine. Kirk-Scott is a member of KH Development with a 51.1%
11 membership share. Kirk-Scott claims an interest in property held by KH Development by virtue of a
12 purported Deed of Trust² executed on November 17, 2004 and recorded in Kootenai County on
13 September 17, 2010.

14 Tomlinson Black (Tomlinson) is a real estate broker retained by Kirk-Hughes to acquire property
15 in Kootenai County.
16

17 3.2 The Sloan Property

18 The Sloan property is currently owned by KH Development and consists of three parcels: an
19 unimproved ten acre parcel (tax number 5850); an unimproved 25.8 acre parcel (tax number 5000); and
20 a ten acre parcel with a house (tax number 5250). On July 8, 2004 Kirk-Scott purchased the Sloan
21 property for \$1,312,000 and later transferred to KH Development. [See Exhibit I]
22

23
24 ¹ Kirk-Hughes denies any involvement by her law firm, but cannot otherwise explain why Kirk-Hughes and Associates is
25 listed as Grantee on the Warranty Deed from Atkinson and listed as a member of KH Development in its bankruptcy
schedules.

² Golub contends that Kirk-Scott's Deed of Trust is fraudulent and invalid, but reserves those factual issues to be addressed at
a later date.

1 **3.3 The Atkinson Property**

2 The Atkinson property is currently owned by KH Development and consists of a 14.2 acre parcel
3 (tax number 8050) adjacent to the Sloan property with lake access. On July 30, 2004 KH Associates
4 purchased and acquired title to the Atkinson property for \$345,000 and later transferred it to KH
5 Development. [See Exhibit 2]

6 **3.4 The Peterson Property**

7 The Peterson property is a 518 acre parcel on the hill above the Sloan and Atkinson properties
8 with a view of the lake. Kirk-Hughes' real estate business partner, Darlene Moore (Moore), entered into
9 a purchase and sale agreement in April, 2004 to acquire the Peterson property for \$6M. On July 28,
10 2004 Moore assigned that agreement to Kirk-Hughes.

11 However, the sale of the Peterson property to Kirk-Hughes was never consummated. Instead,
12 Kirk-Hughes allowed the sale to lapse in October 2004. Five months later, on March 11, 2005, the
13 Peterson property was sold to Kirk-Hughes' business partner, Kelly Polatis (Polatis), who deeded it to
14 KH Development the same day, thereby circumventing the large commissions owed to Golub and
15 Tomlinson.

16 This straw-man transfer led to suits by Tomlinson and Golub, which resulted in a \$419,151
17 judgment in favor of Tomlinson in federal court, and a \$941,000 judgment in favor of Golub in CV-07-
18 8038. Title to the Peterson property has since been returned to Peterson following a foreclosure action.

19 **3.5 Transfer of Sloan Property to KH Development**

20 Kirk-Scott acquired title to the Sloan properties on July 8, 2004. On October 13, 2004 KH
21 Development was formed to develop the Project. On November 18, 2004 Kirk-Scott deeded the Sloan
22 properties (5000, 5250, 5850) to KH Development. No promissory note, deed of trust, or other evidence
23 of an interest was recorded by Kirk-Scott at that time. [See Exhibit 3]

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3.6 Transfer of Atkinson Property to KH Development

The Atkinson property (8050) was deeded to KH Associates on July 30, 2004. On May 12, 2005 KH Associates deeded the Atkinson property to KH Development. No promissory note, deed of trust, or other evidence of interest was recorded relative to this transfer. [See Exhibit 4]

3.7 Deed of Trust to Kirk-Scott

Six years after the transfer of the Sloan properties from Kirk-Scott to KH Development, Balinda Antoine recorded a Deed of Trust from KH Development to Kirk-Scott in Kootenai County. [See Exhibit 5]

The Deed of Trust, which was dated November 18, 2004 and in the amount of \$1.35M, was recorded on September 17, 2010; a year after Golub obtained his Judgment in CV-07-8038 and one month before KH Development's Chapter 11 bankruptcy was dismissed.

Importantly, the Deed of Trust contains several notable irregularities. First, it includes an attached Exhibit A, which sets forth the legal descriptions of the encumbered property, but bears no indication it was made part of the original document, as opposed to being simply attached at a later date.

Second, the Deed itself identifies the encumbered property as: "real property address being commonly known as 5697 Aripa Rd. Harrison, Idaho, 83833, a house on a 10 acre parcel, more specifically described [in attached Exhibit A]." However, the legal descriptions set forth in Exhibit A to the Deed of Trust specifically *exclude* the 10 acre parcel with a house, which was later encumbered by two lenders in 2005 and 2007 respectively. [See Exhibit 5]

Third, the legal descriptions set forth in Exhibit A *include* the Atkinson property (8050), which was not owed by KH Development at the time the Deed of Trust was executed.³

³ KH Development purports to grant Kirk-Scott an interest in the Atkinson property on November 18, 2004, though KH Development did not have title to the Atkinson property until May 12, 2005.

1 Most importantly, the Deed of Trust contains no certification of acknowledgment, as required by
2 statute.

3 3.8 Procedural History

4 After being denied payment of real estate commissions arising from the sale of the Peterson
5 property, Tomlinson filed suit against Kirk-Hughes and KH Development in federal court and obtained
6 a \$235,000 judgment, which was recorded in Kootenai County on July 1, 2008. [See Exhibit 6]
7 Tomlinson's Judgment was later amended to apply *only* to Kirk-Hughes; not KH Development. [See
8 Exhibit 7]

9
10 In October 2007, Golub brought suit against Kirk-Hughes, KH Development, Peterson, and other
11 defendants in CV 07-8038 alleging damages arising from his unpaid realtor fees. After Kirk-Hughes
12 and KH Development failed to appear following withdrawal of their attorney, on March 3, 2009 the
13 court entered an Order of Default against KH Development and all defendants except Peterson. Because
14 the claims against Peterson had not yet been resolved, Golub filed a motion for judgment and Rule 54(b)
15 certificate to allow him to begin execution upon against KH Development and the defaulting defendants
16 while he continued the case against Peterson.

17
18 On March 12, 2009 the court entered a \$941,000 judgment against KH Development and the
19 defaulting defendants, but for some reason did not sign the Rule 54(b) certificate. [See Exhibit 8]
20 Because of this, Golub could not record the judgment and begin his collection efforts.

21
22 On April 6, 2009 KH Development filed Chapter 11 bankruptcy in Nevada (09-15153-mkn) and
23 the automatic stay prevented any further collection efforts against KH Development. [See Exhibit 9]
24 Despite the purported \$1.35M obligation to Kirk-Scott secured by the Deed of Trust, KH Development
25 did not list any secured claims regarding the Property and did not list either Kirk-Scott or Balinda
Antoine as a creditor on its Chapter 11 bankruptcy schedules. [See Exhibit 10, pp. 8, 12] Neither Kirk-

1 Scott nor Antoine filed a creditor's claim. [See Affidavit of Michael T. Howard ¶ 9]

2 On July 23, 2009 Golub filed a second motion for a Rule 54(b) certificate to begin collection
3 efforts against the other defendants.

4 On August 10, 2009 the claims against Peterson (the only remaining claims) were dismissed and
5 the court signed an Order of Final Judgment and 54(b) certificate, allowing Golub to proceed with
6 collection against all defendants except KH Development because it was still in bankruptcy. [See
7 Exhibit 11] Golub recorded the judgment in Kootenai County on August 25, 2009. [See Exhibit 8]

8 A year later, on September 17, 2010, Kirk-Scott recorded a \$1.35M Deed of Trust purportedly
9 issued to it by KH Development six years earlier. [See Exhibit 5] At the time the Deed of Trust was
10 recorded, KH Development was still in bankruptcy and the automatic stay still in effect.

11 A month later, on October 28, 2010 at 11:17 a.m., KH Development's bankruptcy was dismissed
12 and the automatic stay was lifted. [See Exhibit 12] On the same day at 3:45 p.m, Golub re-recorded
13 his judgment against KH Development and the other defendants in Kootenai County. [See Exhibit 8;
14 Affidavit of Michael T. Howard ¶ 10]

15 On May 4, 2011 KH Development filed Chapter 7 bankruptcy in Nevada (11-16944-mkn),
16 which again stayed any collection efforts by Golub. [See Exhibit 13] Despite its purported \$1.35M
17 Deed of Trust, again KH Development did not list any secured claims to the Property and did not list
18 Kirk-Scott as a secured creditor on its Chapter 7 bankruptcy schedules. [See Exhibit 13] Instead,
19 Balinda Antoine is listed as a secured creditor on the schedules, but no creditors' claim was filed and the
20 nature of the security interest is not identified. [See Exhibit 13 p. 10] KH Development's second
21 bankruptcy case was closed on May 29, 2012 without discharge. [See Exhibit 14]

1 The IRS recorded three tax liens against all property owned by KH Development on November
2 12, 2008, November 18, 2008, and February 8, 2011 respectively. [See Exhibit 15, 16, 17] However,
3 IRS subsequently recorded corresponding releases of all three liens on June 18, 2012. [See Exhibit 18]
4

5 4. Undisputed Facts

6 4.1 On July 8, 2004 Kirk-Scott acquired fee simple title to the Sloan properties (tax numbers
7 5000, 5250, 5850). [See Exhibit 1]

8 4.2 On July 30, 2004 Kirk-Hughes Associates acquired fee simple title to the Atkinson
9 properties (tax number 8050). [See Exhibit 2]

10 4.3 On October 13, 2004 KH Development was formed. [See Exhibit 19]

11 4.4 Golub was no longer involved with Kirk-Hughes or any of the real estate transactions by
12 November 12, 2004. [Affidavit of Alan Golub, ¶ 10]

13 4.5 On November 19, 2004 Kirk-Scott deeded the Sloan properties (tax numbers 5000, 5250,
14 5850) to KH Development [See Exhibit 3]

15 4.6 Kirk-Scott is a member of KH Development with a 51.5% interest. [See Exhibit 10, p.23]

16 4.7 On November 19, 2004 KH Development granted Kirk-Scott a \$1.35M Deed of Trust in
17 two of the Sloan properties (tax numbers 5000, 5850) and the Atkinson property (tax
18 number 8050) [See Exhibit 5]

19 4.8 On May 12, 2009 KH Associates deeded the Atkinson property (tax number 8050) to KH
20 Development [See Exhibit 4]

21 4.9 KH Associates is a member of KH Development with a 7% interest. [See Exhibit 10,
22 p.23]

23 4.10 Kirk-Scott did not record a Deed of Trust, promissory note, or any other evidence of
24 interest in the Sloan or Atkinson properties until September 17, 2010.
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- 4.11 Golub was unaware of any interest claimed by Kirk-Scott in the Sloan or Atkinson properties prior to Kirk-Scott's recording on September 17, 2010. [See Affidavit of Alan Golub, ¶¶ 12,13]
- 4.12 On October 30, 2007 Plaintiffs filed a Complaint against KH Development in CV 07-8038. [See Complaint; Affidavit of Michael T. Howard, ¶ 4].
- 4.13 On July 1, 2008 Tomlinson recorded a \$235,000 judgment against Kirk-Hughes and KH Development. [See Exhibit 6]
- 4.14 On October 14, 2008 Tomlinson recorded an amended judgment, which ordered that Tomlinson take nothing from KH Development. [See Exhibit 7]
- 4.15 On November 12, 2008 the IRS recorded a \$15,941.43 tax lien against KH Development. [See Exhibit 15]
- 4.16 On November 18, 2008 the IRS recorded a \$10,712.16 tax lien against KH Development. [See Exhibit 16]
- 4.17 On March 3, 2009 an Order of Default was entered against KH Development. [See March 3, 2009 Order of Default; Affidavit of Michael T. Howard, ¶ 5]
- 4.18 On March 4, 2009 Plaintiffs filed a motion for Final Judgment and 54(b) Certificate against KH Development. [See March 4, 2009 Motion for Final Judgment; Affidavit of Michael T. Howard, ¶ 6]
- 4.19 On March 11, 2009 the Court entered Judgment against KH Development, but did not sign the 54(b) certificate. [See Exhibit 8]
- 4.20 On April 6, 2009 KH Development filed for Chapter 11 Bankruptcy protection in Nevada, case number 09-15153-mkn. [See Exhibit 13]

- 1 4.21 Kirk-Scott did not file a notice of claim in the KH Development Chapter 11 Bankruptcy
2 and is not listed as a creditor, secured or otherwise. [See Exhibit 13, pp.10, 13]
- 3 4.22 On August 10, 2009 the Court entered an Order of Final Judgment and 54(b) certificate
4 against all defendants other than KH Development, which was in bankruptcy. [See
5 Exhibit 11]
- 6 4.23 On August 25, 2009 Golub recorded the Judgment in Kootenai County, Idaho (instrument
7 2229054000). [See Exhibit 8]
- 8 4.24 On September 17, 2010 Kirk-Scott recorded a Deed of Trust in Kootenai County, Idaho
9 (instrument 2282148000) purporting to perfect an interest in real property owned by KH
10 Development [See Exhibit 5]
- 11 4.25 On October 28, 2010 an Order of Voluntary Dismissal was entered in the KH
12 Development Chapter 11 bankruptcy and the automatic stay was lifted. [See Exhibit 12]
- 13 4.26 On October 28, 2010 Golub re-recorded the Judgment in Kootenai County, Idaho
14 (instrument 2287941000). [See Exhibit 8]
- 15 4.27 On February 8, 2011 the IRS recorded a \$23,754.83 tax lien against KH Development.
16 [See Exhibit 17]
- 17 4.28 On May 4, 2011 KH Development filed for Chapter 7 Bankruptcy protection in Nevada,
18 case number (11-16944-mkn). [See Exhibit 13]
- 19 4.29 Kirk-Scott did not file a notice of claim in the KH Development Chapter 7 Bankruptcy
20 and is not listed as a creditor, secured or otherwise. [See Exhibit 13, pp.10, 13]
- 21 4.30 Balinda Antoine is listed as a secured creditor in the KH Development Chapter 7
22 Bankruptcy, but did not file a notice of claim and the nature of her security is not
23 identified. [See Exhibit 13, p.10]
- 24
25

1 4.31 On May 29, 2012 an Order of Dismissal without Discharge was entered in the KH
2 Development Chapter 7 bankruptcy. [See Exhibit 14]

3 4.32 On June 18, 2012 the IRS recorded three releases of lien against KH Development in the
4 amounts of \$15,941.43, \$10,712.16, and \$23,754.83. [See Exhibit 18]

5
6 **5. Argument**

7 **5.1 Tomlinson has no interest in the Property because it does not have a**
8 **judgment against KH Development.**

9 Following the failure to pay real estate commissions stemming from the sale of the Peterson
10 property, Tomlinson filed suit in federal court against Kirk-Hughes, KH Development, and other
11 defendants claiming breach of contract, tortious interference with contract, in misrepresentation. The
12 jury returned a special verdict, finding breach of contract, but dismissing the other claims.

14 On July 1, 2008 Tomlinson recorded a judgment against Kirk-Hughes and KH Development in
15 the amount of \$235,000 [See Exhibit 6] However, upon motion to the court, Kirk-Hughes pointed out
16 that because KH Development was not a party to the contract, judgment could not be taken against it.
17 Subsequently, the Court entered an Amended Judgment, which entered judgment solely against Kirk-
18 Hughes and not KH Development or the other defendants. That judgment was recorded October 14,
19 2008. [See Exhibit 7]

20 Accordingly, because Tomlinson has no valid, enforceable judgment against KH Development, it
21 has no interest in the Property as a matter of law and the court should enter an Order, declaring that
22 Tomlinson has no interest in the Property because it does not have a judgment against KH Development.

23 **5.2 IRS has no interest in the Property because all recorded liens have been released.**

24 On November 12, 2008 IRS recorded a tax lien against KH Development in the amount of
25 \$15,941.43. [See Exhibit 15] On November 18, 2008 IRS recorded a second tax lien against KH

1 Development in the amount of \$10,712.16. [See Exhibit 16]. On February 8, 2011 IRS recorded a third
2 tax lien against KH Development in the amount of \$23,754.83. [See Exhibit 17]

3 On June 18, 2012 IRS recorded three releases of lien to KH Development in the amounts of
4 \$15,941.43, \$10,712.16, and \$23,754.83. [See Exhibit 18] By virtue of these releases, IRS no longer
5 has any interest in the Property. The IRS recently issued a "Disclaimer of Interest". [See Exhibit 21]

6 Accordingly, the Court should enter an Order, declaring that IRS has no interest in the Property
7 because any liens it has recorded against the Property have been released.

8
9 **5.3 Golub holds a valid judgment lien against property owned by KH**
10 **Development with a priority date of October 28, 2010.**

11 Idaho Code section 10-1110 governs the creation of a judgment lien and provides in relevant
12 part:

13 **10-1110. Filing transcript of judgments — Lien acquired.** A transcript or abstract of
14 any judgment or decree of any court of this state or any court of the United States the
15 enforcement of which has not been stayed as provided by law, if rendered within this
16 state, certified by the clerk having custody thereof, may be recorded with the recorder of
17 any county of this state, who shall immediately record and docket the same as by law
18 provided, and from the time of such recording, and not before, the judgment so recorded
19 becomes a lien upon all real property of the judgment debtor in the county, not exempt
20 from execution, owned by him at the time or acquired afterwards at any time prior to the
21 expiration of the lien. ...

22 I.C. §10-1110

23 Golub's judgment against KH Development was entered on March 11, 2009. [See Exhibit 18]
24 However, any attempt to perfect or enforce the judgment was stayed when KH Development filed notice
25 of bankruptcy on April 6, 2009. [See Exhibit 13] Therefore, Golub's recording of the Judgment on
August 10, 2009 did not create a lien on the Property. See I.C. §10-1110; 4.41 *infra*.

However, the automatic stay was lifted upon the dismissal of KH Development's bankruptcy on
October 28, 2010. [See Exhibit 12] Golub re-recorded the judgment against KH Development later that

1 day. [See Exhibit 8; Affidavit of Michael T. Howard ¶ 10] Pursuant to I.C. §10-1110, Golub's re-
2 recording of the judgment created lien on all property owned by KH Development with a priority date of
3 October 28, 2010. [See Exhibit 8] The undisputed facts establish that KH Development held title to the
4 Sloan and Atkinson properties on that date and therefore, the judgment lien attached to the Property.

5 Accordingly, the court should enter and Order, declaring Golub holds a valid judgment lien
6 against the Property with a priority date of October 28, 2010.

7
8 **5.4 Golub's judgment lien has priority over Kirk-Scott's Deed of Trust because**
9 **Golub did not have prior notice of Kirk-Scott's interest when the judgment**
10 **was recorded.**

11 With regard to determining priority of interests in real property, Idaho is a race-notice state,
12 meaning that priority is given to the first to record. When two recorded conveyances purport to convey
13 conflicting interests in real property, the conveyance first recorded controls. *See West v. Bowen*, 127
14 Idaho 128, 130 (1995). Idaho Code sections 55-606 and 55-812 govern the priority of interests in
15 transfers of real property and provide:

16 Every grant or conveyance of an estate in real property is conclusive against the grantor,
17 also against every one subsequently claiming under him, except a purchaser or
18 encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien
19 by an instrument or valid judgment lien that is first duly recorded.

20 I.C. §55-606.⁴

21 Every conveyance of real property other than a lease for a term not exceeding one (1)
22 year, is void as against any subsequent purchaser or mortgagee of the same property, or
23 any part thereof, in good faith and for a valuable consideration, whose conveyance is first
24 duly recorded.

25 I.C. § 55-812.

⁴ I.C. §55-606 was amended in 2008 to include judgment liens in its application, thereby superseding *Johnson v. Casper*, 75 Idaho 256 (1954) and *Siegel Mobile Home Group, Inc. v. Bowen*, 114 Idaho 531 (Ct. App. 1988).

1 The purpose of the recording statutes are to give notice to others that an interest in real property
2 is claimed, and to allow recorded interests to be effective against unrecorded interests when the recorded
3 interest is taken in good faith, i.e., without knowledge that the unrecorded interests exist. *See Matheson*
4 *v. Harris*, 98 Idaho 758, 761 (1977); *Froman v. Madden*, 13 Idaho 138 (1907). Good faith in this
5 context means a party purchased or encumbered the property without knowing or having notice of an
6 adverse claim to the property. *See Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 661
7 (1998).

8
9 **5.4.1 Kirk-Scott's September 17, 2010 recording did not provide notice**
10 **because it was done in violation of the federal bankruptcy stay is**
11 **therefore, void.**

12 KH Development filed a petition for Chapter 11 bankruptcy on April 6, 2009. [See Exhibit 13]
13 The bankruptcy was not dismissed until an Order of Voluntary Dismissal was entered October 28, 2010.
14 [See Exhibit 12] Kirk-Scott recorded its Deed of Trust on September 17, 2010, a time during which the
15 bankruptcy stay was in force, thereby rendering the recording void.

16 The United States Bankruptcy Code provides that a bankruptcy petition "operates as a stay,
17 applicable to all entities, of... (4) any act to create, *perfect*, or enforce any lien against property of the
18 estate..." 11 U.S.C. § 362 (emphasis added). The purpose of the stay has been described as follows:

19 [A] petition in bankruptcy operates as a stay against acts that may affect property of the
20 bankruptcy estate. The automatic stay is designed to protect debtors from all collection
21 efforts while they attempt to regain their financial footing. **It is also designed to protect**
22 **creditors from the "race of diligence," in which those who acted first would receive**
payment "in preference to and to the detriment of other creditors."

23 *In re National Environmental Waste Corp.*, 129 F.3d 1052, 1054 (9th Cir. 1997) (emphasis added;
24 internal citations omitted)

25 The effect of actions taken in violation of the stay was squarely addressed by the Ninth Circuit in
In re Schwartz, 954 F.2d 569 (9th Cir. 1992). There, the IRS assessed a penalty upon the debtor while

1 a matter of law. The court should enter an Order, declaring Kirk-Scott's recording void because it was
2 done in violation of the bankruptcy stay.

3 **5.4.2 Kirk-Scott's September 17, 2010 recording did not provide notice**
4 **because the Deed of Trust was not properly acknowledged and**
5 **certified.**

6 The primary purpose of recording is to give notice to others that an interest is claimed in real
7 property. *See Matheson v. Harris*, 98 Idaho 758, 761 (1977). An instrument must be properly
8 acknowledged, certified, and recorded to have the effect of giving notice. *See e.g. Jordan v. Securities*
9 *Credit Corp.*, 79 Idaho 284, 291 (1957). An instrument recorded without an acknowledgment or with a
10 defective acknowledgment is not entitled to be recorded and "cannot impart constructive notice." *Credit*
11 *Bureau v. Sleight*, 92 Idaho 210, 215 (1968). Determination of whether a recorded instrument confers
12 constructive notice is controlled by statute. *See Jordan*, 79 Idaho at 290.

13 Idaho Code section 55-811 governs the effect of recording a transfer in real property:

14 Every conveyance of real property *acknowledged or proved, and certified, and recorded*
15 *as prescribed by law, from the time it is filed with the recorder for record, is constructive*
16 *notice of the contents thereof to subsequent purchasers and mortgag(e)s. ...*

17 I.C. § 55-811 (emphasis added).

18 Idaho Code section 55-805 requires an instrument to be acknowledged in order to recorded it:

19 Before an instrument may be recorded, unless it is otherwise expressly provided, its
20 execution must be acknowledged by the person executing it ... or if executed by a limited
21 liability company, by the manager, member or other person executing the same on behalf
22 of the limited liability company

23 I.C. §55-805.

24 Idaho Code sections 55-709 and 55-711A dictate the form required for a valid acknowledgment:

25 An officer taking the acknowledgment of an instrument must endorse thereon a certificate
substantially in the forms hereinafter prescribed.

I.C. §55-709.

1
2 In Witness Whereof, I have hereunto set my
3 hand and affixed my official seal at _____ County,
4 Idaho, the day and year in this certificate first
5 above written.

6
7
8
9
10
11 Charles Croshaw.

12 The acknowledgment on these instruments does not even pretend to comply with the
13 corporate acknowledgment of I. C. sec. 55-711, and is therefore void because it fails to
14 disclose that he was a corporate officer of the corporation and with the authority to
15 execute it. This being a void acknowledgment, the instrument could not be filed for
16 record under the mandatory provisions of I. C. sec. 55-805. By not having an
17 acknowledgment and not being entitled to be recorded, the mortgages had no preference
18 as to the creditors of the Motor Center of Pocatello, Inc., a corporation. Without a
19 preference, the mortgagee was placed in the same category as the general creditors.

20 *Jordan*, 79 Idaho at 292.

21 Significantly more deficient than the acknowledgment held invalid by the *Jordan* court, the Deed
22 of Trust recorded by Kirk-Scott does not contain an acknowledgment at all; no less one that meets the
23 statutory requirements of I.C. §55-711A. By contrast, every other recorded conveyance related to the
24 Property bears a proper acknowledgement and certificate. [See Exhibits 1, 2, 3, 4]

25 Moreover, there is no indication that the person executing the Deed (Kirk-Hughes) was a
member of KH Development or had authority to sign on its behalf. Indeed, the undisputed facts
establish that Kirk-Hughes is *not* a member of KH Development.⁶ [See Exhibit 20, Deposition of
Geraldine Kirk-Hughes at p. 75, line 19; p. 76, line 17] An acknowledgment that fails to disclose that
that the signatory was a member of an entity with the authority to execute it is void. See, e.g. *Jordan* 79
Idaho at 292.

⁶ Kirk-Hughes has testified that she is not a member or managing member of KH Development, but that the Kirk-Hughes / Sampson Family Trust is a member, for which she is authorized to act.

1 This being a void acknowledgment, the instrument could not be filed for record under the
2 mandatory provisions of I.C. §55-805. By not having an acknowledgment and not being entitled to be
3 recorded, the Deed of Trust has no preference over Golub's judgment lien.

4 Accordingly, the court should enter an Order, declaring Kirk-Scott's recording void because it
5 failed to comply with Idaho's recording statutes.

6
7 **5.4.3 Golub had no prior knowledge of Kirk-Scott's interest in the
Property.**

8 In addition to having no constructive notice of Kirk-Scott's Deed of Trust, the undisputed facts
9 establish Golub had no actual knowledge.

10
11 Golub was the real estate agent for Sloan and Peterson; he was not an agent for Kirk-Hughes,
12 Kirk-Scott, KH Associates, or KH Development. [See Affidavit of Alan Golub ¶ 2] Golub's
13 involvement in the sale of the Sloan properties ended after it closed on July 9, 2004. [See Affidavit of
14 Alan Golub ¶ 5] Golub's involvement in the sale of the Atkinson property ended after it closed on July
15 30, 2004. [See Affidavit of Alan Golub ¶ 7] Golub's involvement in the sale of the Peterson property
16 ended when Kirk-Hughes failed to meet the November 12, 2004 closing date. [See Affidavit of Alan
17 Golub ¶ 10] Golub had no other communications regarding the Property with Kirk-Hughes after
18 November 12, 2004. [See Affidavit of Alan Golub ¶ 10] The Deed of Trust was purportedly executed
19 on November 18, 2004. [See Exhibit 5]

20
21 Golub was unaware of the formation of KH Development on October 13, 2004. [See Affidavit of
22 Alan Golub ¶ 11] Because he was no longer involved with Kirk-Hughes or any other aspect of the
23 Project, Golub was unaware of the transfer of the Sloan properties from Kirk-Scott to KH Development
24 on November 18, 2004. [See Affidavit of Alan Golub ¶ 12] Similarly, Golub was unaware of the
25 transfer of the Atkinson property from KH Associates to KH Development on May 12, 2005. [See

1 *Affidavit of Alan Golub* ¶ 13] Most importantly, Golub had no actual notice of any interest claimed by
2 Kirk-Scott in either property until the Deed of Trust was recorded on September 17, 2010. [See
3 *Affidavit of Alan Golub* ¶ 14]

4 Accordingly, the court should enter an Order, declaring that Golub had no actual knowledge of
5 Kirk-Scott's claimed interest in the Properties prior to September 17, 2010.

6
7 **5.4.4 Kirk-Scott had prior knowledge of Golub's interest when it recorded
8 the Deed of Trust on September 17, 2010.**

9 Kirk-Scott is a member of KH Development with at 51.5% interest. [See *Exhibit 10, p. 23*] As
10 such, Kirk-Scott was, at a minimum, constructively aware that Golub obtained a judgment against KH
11 Development on March 12, 2009, a full year prior to the Deed of Trust being recorded.

12 Moreover, to the extent that Kirk-Scott's September 17, 2010 recording is found to be valid
13 notwithstanding violation of the bankruptcy stay, so too would Golub's August 25, 2009 recording be
14 valid, giving Kirk-Scott statutory notice of Golub's interest over a year prior to Kirk-Scott's recordation.

15 **5.5 Golub's interest is superior to that of any other defendant.**

16 Idaho law is clear; when two recorded conveyances purport to convey conflicting interests in real
17 property, the conveyance first recorded controls. See *West v. Bowen*, 127 Idaho 128, 130 (1995).

18 Here, both Golub and Kirk-Scott assert an interest in the Property. The resolution of which
19 interest takes priority turns upon which was recorded first. Golub recorded his judgment on August 25,
20 2009. Kirk-Scott recorded its Deed of Trust a year later on September 17, 2010. Both recordings are
21 void and of no effect since they were recorded in violation of the bankruptcy stay, which lasted from
22 April 6, 2009 through October 28, 2010. If they are valid despite violation of the stay, Golub's
23 recording was first in time and has priority.
24
25

1 Golub re-recorded his judgment on October 28, 2010 immediately following the bankruptcy stay
2 being lifted, giving him a valid judgment lien against all property owned by KH Development with a
3 priority date of October 28, 2010. Kirk-Scott has not re-recorded the Deed of Trust or done anything to
4 otherwise perfect or secure its priority, leaving its interest **unrecorded** and junior to Golub's.

5 Tomlinson has no interest in property held by KH Development because it does not have a
6 judgment against KH Development. IRS has executed releases of all interests it claimed against
7 property held by KH Development.

8 Accordingly, the court should enter an Order, declaring that Kirk-Scott's Deed of Trust is
9 unrecorded and that Golub's interest in the Property is valid and superior to the interest of any other
10 defendant.
11

12 6. Conclusion

13 The court should enter an order, declaring:

- 14 • Tomlinson has no interest in the Property;
- 15 • IRS has no interest in the Property;
- 16 • Kirk-Scott's September 17, 2010 recording is void and its Deed of Trust unrecorded;
- 17 • Golub's judgment lien is valid with a priority date of October 28, 2010, and
- 18 • Golub's interest is superior to that of any other defendant.

19 DATED this 3 day of May, 2013.

20
21
22 MICHAEL T. HOWARD, ISB No. 6128
23 WINSTON & CASHATT, LAWYERS, a Professional
24 Service Corporation
25 Attorneys for Plaintiffs

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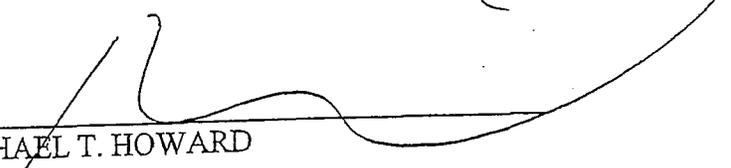
I hereby certify that I caused a true and complete copy of the foregoing to be mailed, hand delivered; sent via facsimile on May 3, 2013, to:

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CLERK DISTRICT COURT

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9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,
14
15 Plaintiffs,

16 vs.

Case No. CV07-8038

17 GERALDINE KIRK-HUGHES and PETER
18 SAMPSON, husband and wife; KIRK-
19 HUGHES DEVELOPMENT, LLC, a Delaware
20 limited liability company; KIRK-HUGHES &
21 ASSOCIATES, INC., a Nevada corporation;
22 KELLY POLATIS, an individual, and
23 DELANO D. AND LENORE J. PETERSON,
24 husband and wife,
25
26 Defendants.

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT DECLARING INTEREST AND
PRIORITY IN PROPERTY

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT DECLARING INTEREST AND
PRIORITY IN PROPERTY

Golub vs Kirk-Hughes et al 41501-2013 and 41505-2013

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
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Coeur d'Alene, Idaho 83814
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STATE OF IDAHO
COUNTY OF KOOTENAI) SS
FILED:

2013 MAY -3 AM 10:20

CLERK DISTRICT COURT

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10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,

14 Plaintiffs,

Case No. CV13-866

AFFIDAVIT OF ALAN J. GOLUB

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC, a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD, a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation,

22 Defendants.

23 STATE OF IDAHO)
24 : ss.
25 County of Kootenai)

I, ALAN J. GOLUB, being first duly sworn on oath, say:

1. That I am one of the Plaintiffs in this litigation, and have knowledge of the facts and
circumstances in this case.

1
2 2. I was the real estate agent for Delano Peterson and Mayvis Sloan with regard to their
3 attempts to sell their family property in 2004.

4 3. In the spring of 2004, I secured a contract for the sale and purchase of Mayvis Sloan's
5 property to Geraldine Kirk-Hughes.

6 4. The Sloan property was ultimately purchased by Kirk-Scott, Ltd., a company owned by
7 Kirk-Hughes' sister, Balinda Antoine. I did not represent or serve as the agent for Kirk-Hughes, Kirk-
8 Scott, or Antoine. In fact, I have never had any dealings with Kirk-Scott or Antoine.

9 5. My involvement with the sale of the Sloan property ended after it closed on July 9, 2004.

10 6. In the spring of 2004 I also secured a contract for the purchase of a neighboring property
11 that I had entered into, a contract to buy from Gary Atkinson. I assigned that purchase agreement to
12 Kirk-Hughes and the Atkinson property was ultimately purchased by Kirk-Hughes Associates. I did not
14 represent or serve as the agent for Kirk-Hughes or Kirk-Hughes Associates.

15 7. My involvement with the sale of the Atkinson property ended after it closed on July 30,
16 2004.

17 8. In April 2004 I secured a contract for the sale of Delano Peterson's property to Darlene
18 Moore, who later assigned it to Kirk-Hughes.

19 9. The Peterson sales contract was extended three times before the final closing date of
20 November 12, 2004. At that time, I had not been in contact with Kirk-Hughes for several weeks.

21 10. My involvement in the sale of the Peterson property ended after the sale failed to close
22 November 12, 2004. After that time, I had no further contact with Kirk-Hughes, Kirk-Scott, Antoine, or
23 Kirk-Hughes Associates. In fact, Kirk-Hughes refused to return my telephone calls.
24
25

1 11. I was not aware of the existence or formation of Kirk-Hughes Development prior to
2 Delano Peterson selling his property to Kelly Polatis, and Polatis quitclaiming the property to Kirk-
3 Hughes Development in May 2005.

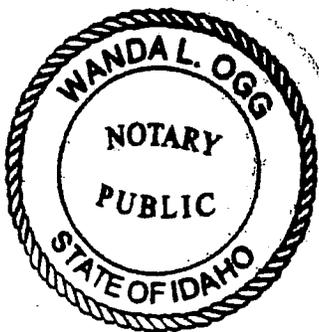
4 12. I was not aware of the transfer of the Sloan properties from Kirk-Scott to Kirk-Hughes
5 Development on November 18, 2004.

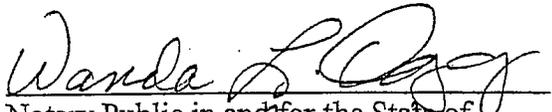
6 13. I was not aware of the transfer of the Atkinson property from Kirk-Hughes Associates to
7 Kirk-Hughes Development on May 12, 2005.

8 14. I was not aware that Kirk-Scott had executed a Deed of Trust to Kirk-Hughes
9 Development prior to Kirk-Scott recording one during Kirk-Hughes Development's bankruptcy on
10 September 17, 2010.
11

12
13
14 
ALAN J. GOLUB

15 SUBSCRIBED AND SWORN to before me this 3rd day of May, 2013.



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Notary Public in and for the State of
Idaho, residing at Spokane Valley, WA
My appointment expires April 4, 2017

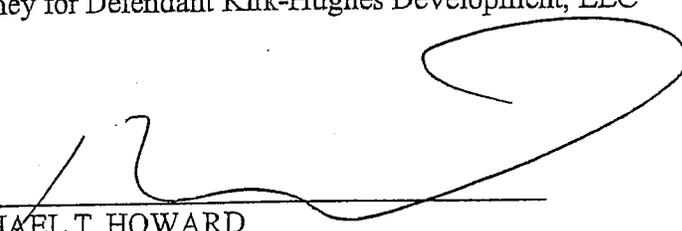
1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
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9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,
14 Plaintiffs,
15 vs.

16 GERALDINE KIRK-HUGHES and PETER
17 SAMPSON, husband and wife; KIRK-
18 HUGHES DEVELOPMENT, LLC, a Delaware
19 limited liability company; KIRK-HUGHES &
20 ASSOCIATES, INC., a Nevada corporation;
21 KELLY POLATIS, an individual, and
22 DELANO D. AND LENORE J. PETERSON,
23 husband and wife,
24 Defendants.

Case No. CV07-8038

PLAINTIFFS' RESPONSE RE: KIRK-
SCOTT'S MOTION TO DISMISS

25 ALAN GOLUB and MARILYN GOLUB,
26 husband and wife,
27 Plaintiffs,
28 vs.

29 KIRK-HUGHES DEVELOPMENT, LLC, a
30 Delaware limited liability company; KIRK-
31 SCOTT, LTD, a Texas corporation;
32 INTERNAL REVENUE SERVICE;
33 TOMLINSON NORTH IDAHO, INC., an
34 Idaho corporation,
35 Defendants.

Case No. CV13-866

1
2 Plaintiffs Alan and Marilyn Golub (Golub) submit this Memorandum in response to Defendant
3 Kirk-Scott Ltd.'s (Kirk-Scott) Motion to Dismiss. This Response is supported by the May 3, 2013
4 Affidavit of Michael T. Howard.

5
6 **1. Introduction and Requested Relief**

7 This matter arises out of several real estate transactions in 2004 and involves efforts by Golub to
8 satisfy the judgment entered in CV-07-8038 through foreclosure of a judgment lien on real property
9 owned by Defendant Kirk-Hughes Development (KH Development) in Kootenai County, Idaho.

10 Golub holds a judgment lien upon the Property by virtue of a Judgment recorded in Kootenai
11 County on October 25, 2010. Defendant Kirk-Scott claims an interest in the Property by virtue of a
12 Deed of Trust, purportedly executed on November 18, 2004, but not recorded until September 17, 2010.

13 Golub filed this Declaratory Action, asserting that Kirk-Scott's September 17, 2010 recording is
14 void and inferior to his judgment lien because it violated the federal bankruptcy stay imposed by KH
15 Development's Chapter 11 bankruptcy.

16 Kirk-Scott has filed this Motion to Dismiss Golub's claims¹ on the basis that: 1) Golub has no
17 standing under federal law to assert a violation of the bankruptcy stay; and 2) Idaho law gives an
18 unrecorded Deed of Trust priority over a judgment lien.

19
20 The Court should deny Kirk-Scott's Motion to Dismiss.

21
22 **2. Summary of Argument**

23 **2.1** Federal law provides that actions done in violation of the bankruptcy stay are void as a
24 matter of law, rendering the issue of standing moot.

25
26 ¹ Kirk-Scott has not moved to dismiss Golub's claim that the Deed of Trust is invalid; a claim requiring a factual determination of whether Geraldine Kirk-Hughes was authorized to execute the Deed of Trust and whether the legal descriptions contained in Exhibit "A" to the Deed of Trust were made part of the Deed of Trust when executed.

1 Judgment on March 12, 2009. However, because the claims against a co-Defendant remained
2 unresolved, and because the Court did not sign Golub's requested Rule 54(b) Certificate, Golub was
3 unable to record the Judgment and pursue collection at that time.

4 Three weeks later, on April 6, 2009, KH Development filed Chapter 11 Bankruptcy in Nevada
5 (09-15153-mkn) and the automatic stay prevented any further collection efforts against it. Golub filed a
6 creditor's claim in KH Development's Bankruptcy; Kirk-Scott did not.

7
8 On July 23, 2009 Golub requested issuance of a Rule 54(b) Certificate to begin collection efforts
9 against the other Defendants. On August 10, 2009 the court signed the 54(b) Certificate and Golub
10 recorded it along with the previously entered judgment in Kootenai County on August 25, 2009.

11 A year later, on September 17, 2010, Kirk-Scott recorded the Deed of Trust purportedly issued to
12 it by KH Development six years earlier. At the time the Deed of Trust was recorded, KH Development
13 was still in bankruptcy and the automatic stay still in effect.

14 A month later, on October 28, 2010, KH Development's Bankruptcy was dismissed and the
15 automatic stay was lifted. Given that the bankruptcy stay was lifted, Golub re-recorded his judgment
16 against KH Development the same day. Kirk-Scott has not re-recorded the Deed of Trust.

18 5. Undisputed Facts

19 5.1 Kirk-Scott is a member of KH Development with a 51.5% interest. [See Exhibit 10, p.23,
20 Affidavit of Michael T. Howard]

21 5.2 On November 19, 2004 KH Development granted Kirk-Scott a Deed of Trust in the
22 subject properties (tax numbers 5000, 5850, 8050), but did not record its Deed of Trust.
23 [See Exhibit 5, Affidavit of Michael T. Howard]

24 5.3 On October 30, 2007 Golub filed a civil Complaint against KH Development in CV 07-
25 8038 seeking damages arising from unpaid realtor fees. [See Complaint; Affidavit of
26

1 *Michael T. Howard, ¶ 4].*

2 **5.4** On March 3, 2009 the Court entered an Order of Default against KH Development. [*See*
3 *March 3, 2009 Order of Default; Affidavit of Michael T. Howard, ¶ 5]*

4 **5.5** On March 11, 2009 the Court entered Judgment against KH Development, but did not
5 sign the requested 54(b) Certificate. [*See Exhibit 8, Affidavit of Michael T. Howard*]

6 **5.6** On April 6, 2009 KH Development filed for Chapter 11 Bankruptcy protection in
7 Nevada, case number 09-15153-mkn. [*See Exhibit 13, Affidavit of Michael T. Howard*]

8 **5.7** Golub filed a notice of claim in the KH Development Chapter 11 Bankruptcy; Kirk-Scott
9 did not file a notice of claim and is not listed as a creditor, secured or otherwise. [*See*
10 *Exhibit 13, pp.10, 13, Affidavit of Michael T. Howard*]

11 **5.8** On August 10, 2009 the Court issued a 54(b) Certificate against all Defendants other than
12 KH Development, which was in bankruptcy. [*See Exhibit 11, Affidavit of Michael T.*
13 *Howard*]

14 **5.9** On August 25, 2009 Golub recorded the Judgment in Kootenai County, Idaho (instrument
15 2229054000). [*See Exhibit 8, Affidavit of Michael T. Howard*]

16 **5.10** On September 17, 2010 Kirk-Scott recorded a Deed of Trust in Kootenai County, Idaho
17 (instrument 2282148000) purporting to perfect an interest in real property owned by KH
18 Development [*See Exhibit 5, Affidavit of Michael T. Howard*]

19 **5.11** On October 28, 2010 an Order of Dismissal was entered in the KH Development Chapter
20 11 Bankruptcy and the automatic stay was lifted. [*See Exhibit 12, Affidavit of Michael T.*
21 *Howard*]

22 **5.12** On October 28, 2010 Golub re-recorded the Judgment in Kootenai County, Idaho
23 (instrument 2287941000). [*See Exhibit 8, Affidavit of Michael T. Howard*]

1 **6. Argument**

2 **6.1 Federal law provides that actions done in violation of the bankruptcy stay**
3 **are void as a matter of law, rendering the issue of standing moot.**

4 As its initial basis for dismissal, Kirk-Scott asserts that Golub “lacks standing to remedy Kirk-
5 Scott’s violation of the bankruptcy stay” because Golub is not the bankruptcy debtor or trustee. Kirk-
6 Scott’s motion should be denied because under federal law, any act done in violation of the bankruptcy
7 law is void as a matter of law and therefore, the issue of Golub’s standing to contest the recording is
8 moot.

9 Kirk-Scott relies upon *In re Globe Inv. and Loan Co.*, 867 F.2d 556 (9th Cir. 1989) as authority
10 for its request for dismissal, asserting that the automatic stay is for the benefit of the debtor and trustee
11 *only*, and if they choose to ignore a violation of the stay, any other party lacks standing to attack it.

12 In *Globe*, the claimants were third-party owners of real property disposed of by a creditor in
13 violation of the bankruptcy stay. Though attempting to make themselves “creditors” of the bankruptcy
14 by asserting certain damage claims against the debtor (*Globe*), the true purpose of the claimants’
15 participation in the bankruptcy was as aggrieved third-party property owners. In ruling that the
16 claimants lacked standing in the bankruptcy proceeding to set aside the property sale, the Court in *Globe*
17 held that the claimants were there seeking relief as owners of property, as opposed to creditors of the
18 bankruptcy estate. As such, the Court ruled that the claimants had no standing in the bankruptcy
19 proceeding to assert the relief they requested.

20 Kirk-Scott’s application of *Globe* to the facts of this case is strained and the Ninth Circuit has
21 since ruled that acts taken in violation of the automatic stay are void as a matter of law, regardless of a
22 debtor or trustee’s desire to enforce it.
23
24
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26

1 The United States Bankruptcy Code provides that a bankruptcy petition “operates as a stay,
2 applicable to all entities, of... (4) any act to create, *perfect*, or enforce any lien against property of the
3 estate...” 11 U.S.C. § 362 (emphasis added). The purpose of the stay has been described as follows:

4 [A] petition in bankruptcy operates as a stay against acts that may affect property of the
5 bankruptcy estate. The automatic stay is designed to protect debtors from all collection
6 efforts while they attempt to regain their financial footing. **It is also designed to protect
7 creditors from the “race of diligence,” in which those who acted first would receive
8 payment “in preference to and to the detriment of other creditors.”**

8 *In re National Environmental Waste Corp.*, 129 F.3d 1052, 1054 (9th Cir. 1997) (emphasis added;
9 internal citations omitted)

10 Shortly after its 1989 opinion in *Globe*, the Ninth Circuit squarely addressed the effect of actions
11 taken in violation of the stay in *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992). There, the IRS assessed a
12 penalty upon the debtor while the automatic stay was in effect; the sole issue was whether a violation of
13 the automatic stay was void, or simply voidable². In holding that *any* act done in violation of the stay is
14 void, the *Schwartz* Court reasoned:

15 In light of the automatic stay’s purpose, the issue before us requires some analysis of the
16 relevant policy considerations. Either the debtor must affirmatively challenge creditor
17 violations of the stay, or the violations are void without the need for direct challenge. If
18 violations of the stay are merely voidable, debtors must spend a considerable amount of
19 time and money policing and litigating creditor actions. If violations are void, however,
20 debtors are afforded better protection and can focus their attention on reorganization.

21 Given the important and fundamental purpose of the automatic stay and the broad debtor
22 protection of the Bankruptcy Code, we find that Congress intended violations of the
23 automatic stay to be void rather than voidable.

24 Concluding that acts in violation of the automatic stay were merely voidable would have
25 the effect of encouraging disrespect for the stay by increasing the possibility that
26 violators of the automatic stay may profit from their disregard for the law.

[W]e will not reward those who violate the automatic stay. ... Those taking post-petition
collection efforts have the burden of obtaining relief from the automatic stay.

² If void, the act automatically has no effect; If voidable, the act may avoided by election of one with standing to do so.

1 *Schwartz*, 954 F.2d at 571-572 (internal citations omitted)

2 Since *Schwartz*, the Ninth Circuit has continued to hold that the recordation of an interest in the
3 debtor's assets during the bankruptcy stay **voids** the recordation. See *In re Dyer*, 322 F.3d 1178, 1188
4 (9th Cir. 2003) (creditor's recordation of a deed of trust during automatic stay is void); *In re*
5 *Samaniedgo*, 224 B.R. 154, 163 (Bankr. E.D. Wash. 1998) (delivery and recording of Treasurer's deeds
6 done in violation of automatic stay were void and of no force and effect).

7
8 Here, the undisputed facts establish that Kirk-Scott recorded its Deed of Trust on September 17,
9 2010, a date during which KH Development was still in bankruptcy and the automatic stay still in effect.
10 [See *Exhibit 5; Exhibit 12, Affidavit of Michael T. Howard*] As such, it was not necessary for KH
11 Development, as debtor, or the bankruptcy trustee to contest Kirk-Scott's violation of the bankruptcy
12 stay³ since the act of recording was void as a matter of law. See *Schwartz*, 954 F.2d at 571-572.

13
14 Accordingly, the Court should deny Kirk-Scott's Motion to Dismiss because its recordation of
15 the Deed of Trust on September 17, 2010 is void as a matter of law and any issue over Golub's standing
16 to contest the recording under federal law is moot.

17 **6.2 The Idaho recording statutes were amended in 1989 to include judgment**
18 **liens, superseding the case-law supporting Kirk-Scott's Motion to Dismiss.**

19 As its second basis for dismissal, Kirk-Scott asserts that "Idaho courts consistently hold that an
20 unrecorded deed of trust has priority over a subsequently recorded judgment." While Kirk-Scott is
21 correct that Idaho courts have so held, Idaho's case law in this area was superseded by statute in 1989.

22 Prior to 1989, Idaho's recording statute, I.C. §55-606, limited its application to "an instrument
23 that is first duly recorded." Idaho courts construing the statute interpreted it as excluding recorded
24 judgments since they were not "instruments." See, e.g. *Johnson v. Casper*, 75 Idaho 256 (1954); *Siegel*
25

26 ³ There is no indication that either KH Development or the bankruptcy Trustee were aware of Kirk-Scott's September 17,
2010 recording and therefore, neither would have been placed on notice to contest it.

1 *Mobile Home Group, Inc. v. Bowen*, 114 Idaho 531 (Ct. App. 1988).

2 However, in direct response to the Court of Appeals decision in *Mobile Home Group*, the Idaho
3 legislature amended the statutory language to specifically **include** judgment liens:

4 IN THE SENATE
5 SENATE BILL NO 1149
6 BY JUDICARY AND RULES COMMITTEE

7 AN ACT

8 RELATING TO TRANSFERS OF REAL PROPERTY; AMENDING SECTION 55-
9 606, IDAHO CODE TO CLARIFY THE EFFECT OF A VALID JUDGMENT LIEN
10 REGARDING A GRANT OR CONVEYANCE OF AN ESTATE IN REAL
11 PROPERTY; AND DECLARING AN EMERGENCY.

12 Be it enacted by the Legislature of the State of Idaho:

13 SECTION 1. That Section 55-606, Idaho Code, be, and the same is hereby
14 amended to read as follows:

15 55-606. CONCLUSIVENESS OF CONVEYANCE -- BONA FIDE
16 PURCHASERS. Every grant or conveyance of an estate in real property is conclusive
17 against the grantor, also against every one subsequently claiming under him, except a
18 purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires
19 a title or lien by an instrument or valid judgment lien that is first duly recorded.

20 SECTION 2. An emergency existing therefore, which emergency is hereby
21 declared to exist, this act shall be in full force and effect on or after its passage and
22 approval.

23 S.L. 1989, Ch. 107 §1, p. 247; *see also*, I.C. §55-606.

24 Accordingly, Kirk-Scott's motion to dismiss should be denied because it has failed to provide
25 authority for its position that an unrecorded Deed of Trust has priority over an earlier recorded judgment
26 lien.

1 **7. Conclusion**

2 Kirk-Scott's Motion to Dismiss should be denied because Kirk-Scott's recording in violation of
3 the bankruptcy stay is void as a matter of law, and because I.C. § 55-606 was amended in 1998 to
4 specifically include judgment liens.
5

6 DATED this 14 day of May, 2013.

7
8
9 _____
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21 MICHAEL T. HOWARD

22 412309

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 5-20-13
AT 4:48 o'clock P.M.
CLERK, DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

07-8038
No. CV13-866

ORDER TO CONSOLIDATE

vs.

KIRK-HUGHES DEVELOPMENT, LLC, a
Delaware limited liability company; KIRK-
SCOTT, LTD, a Texas corporation;
INTERNAL REVENUE SERVICE;
TOMLINSON NORTH IDAHO, INC., an
Idaho corporation,

Defendants.

This matter came before the Court on the Stipulation of the parties waiving objection to
Plaintiffs' Motion to Consolidate this action into CV 07-8038.

Therefore, based upon the pleadings filed in this action, it is hereby ORDERED:
Plaintiff's motion to consolidate this action into CV 07-8038 is GRANTED.

DONE IN OPEN COURT this 20 day of May, 2013.

[Signature]
JUDGE BENJAMIN R. SIMPSON

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be [] mailed,
3 postage prepaid; [] hand delivered; [] sent
4 via facsimile on this 20 day of May,
5 2013, to:

6 Michael T. Howard
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CLERK OF THE DISTRICT COURT

413391

5194

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: SS

2013 JUN 24 AM 10:10

CLERK DISTRICT COURT

Patty Bailey
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10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. CV13-866

Case No. CV07-8038

**DEFENDANT KIRK-SCOTT, LTD.'s
MOTION TO VACATE DEFAULT
JUDGMENT**

23 Pursuant to I.R.C.P. 60(b)(4)(5)&(6) defendant Kirk-Scott, Ltd. moves the Court for an
24 Order that vacates the March 11, 2009, default judgment that plaintiffs obtained in *Golub v.
25 Kirk-Hughes Development, LLC CV07-8038.*

26 Kirk-Scott, Ltd's Motion is supported by the Memorandum of Authorities in support of
27 the same, the Affidavit of Matthew Crotty, the Combined Statement of Facts (CSOF), and the
28

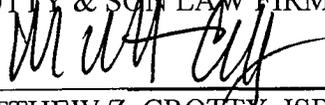
MOTION TO VACATE DEFAULT JUDGMENT - 1

CROTTY & SON LAW FIRM, PLLC

1 Court's file.

2 DATED this 14th day of June 2013.

3
4 CROTTY & SON LAW FIRM, PLLC

5 

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2013, I have emailed the document to the following participants at the addresses listed below:

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BEST LAW, PLLC


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STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2013 JUN 24 AM 10:10

CLERK DISTRICT COURT

Patty Hulse
DEPUTY *10*

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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,
14
15 Plaintiffs,

16 vs.

17 KIRK-HUGHES DEVELOPMENT, LLC a
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD a Texas corporation;
20 INTERNAL REVENUE SERVICE;
21 TOMLINSON NORTH IDAHO, INC., an
22 Idaho corporation

23 Defendants.

Case No. CV13-866

Case No. CV07-8038

**DEFENDANT KIRK-SCOTT, LTD.'s
COMBINED STATEMENT OF FACTS**

24 Defendant Kirk-Scott, Ltd. submits this Combined Statement of Facts (CSOF) in support
25 of (a) Kirk-Scott's response to plaintiffs' Motion for Summary Judgment and (b) Kirk-Scott's
26 Motion to Vacate plaintiffs' March 11, 2009, default Judgment.

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COMBINED STATEMENT OF FACTS

A. Alan Golub meets Balinda Antoine in Coeur d'Alene in 2004, gives Ms. Antoine an extensive presentation on the subject property, takes Ms. Antoine on a tour of the subject property, repeatedly checks title to the property, and learns that Ms. Antoine secures her investment in the subject property with a deed of trust.

1. Balinda Antoine is the president of Kirk-Scott, Ltd. (Antonie Aff. at ¶2) Ms. Antoine traveled to Coeur d'Alene, Idaho in 2004 in order to attend a presentation that Mr. Golub made regarding the subject property's development.¹ *Id.* ¶3.

2. That presentation took place at a seminar room located in the Coeur d'Alene Resort. *Id.* at ¶¶4-5, 6, 8. At the meeting Mr. Golub and Ms. Antoine had an extensive conversation in which Ms. Antoine asked Mr. Golub whether the subject property was encumbered by other liens. *Id.* Ms. Antoine then informed Mr. Golub that any loan regarding the subject property's development would be secured with a deed of trust. *Id.* Mr. Golub assured Ms. Antoine that the title to the property was clear. *Id.*

3. Mr. Golub's assurance as to the subject property's clear title is buttressed by Mr. Golub's September 25, 2007, deposition testimony. During the September 25, 2007, deposition Mr. Golub testified that he, repeatedly during 2004 and 2005, queried Melody Jones at First American Title regarding who had title to the Sloan, Atkinson, and Peterson properties. (Crotty Aff. at Ex. 1 *citing* Golub Dep. at 113:22-25; 114:1-2; 127:18-23; 129:7-13; 132:18-25; 133:1-17; 140:22-24; 145:12-18; 164:17-25; 165:1-4)

4. Regarding the 2004 meeting in the Coeur d'Alene resort with Ms. Antoine, Mr. Golub testified:

¹ For the purpose of this brief the phrase "subject property" means the Atkinson, Sloan, and Peterson properties. (Plfs.' Summ. J. Memo. at pg. 3-4)

1 Q. And if you already testified to this, I apologize. But who was present?

2 A. Tony Jansen, who was an architect at that time with ALSC from Spokane,
3 John Lasher from First American Title, Ron Hazard and Mike Harris with the
4 Stonehill Group, who were developers of a large project. Dean was present. I
5 was present. Ms. Kirk-Hughes was present. Darlene Moore was present. Ms.
6 Kirk-Hughes husband, Peter was present. Ms. Kirk-Hughes sister. I believe her
7 name is Belinda was present. There was also a conference call to architect Algie
8 Pulley. Also present was the engineer, Bart North from North Engineering. And
9 I believe also present was Sherry Howell, who formerly worked for the county.
10 She was present.

11 Q. I must say you have the best memory of anybody we talked to about this
12 presentation as far as who was present.

13 A. I don't remember the date.

14 Q. That's okay. That was my next question so you are very good. Do you
15 remember the date that the presentation occurred?

16 A. No, Ma'am.

17 Q. So please tell me what was the purpose of this presentation again?

18 A. It was my understanding Geraldine wished to have her sister, who lived in
19 Texas, come up to see Idaho to see the property and to elicit her interest in
20 investing in this project.

21 Q. And so the purpose of the presentation was to --

22 A. To --

23 Q. Sell her sister --

24 A. Sell her sister on this project. (Crotty Aff. at Ex. 1 *citing* Golub Dep. at
25 74:24-25; 75; 76; 77:1-7)(emphasis added).

26 5. The day after the presentation Mr. Golub drove Ms. Antoine to the subject property.
27 (Antoine Aff. at ¶6) As to the tour of the Peterson's property that followed the Coeur d'Alene
28 Resort meeting, Mr. Golub testified:

1 Q. Did you have conversations with any of the parties in that group that day
2 about purchasing the Peterson property?

3 A. I was basically showing them around the property. It was to -- my attention
4 actually was directed primarily at her sister, Belinda. I was personally showing
5 her the different attributes of the property, the views, and took her, thinking that
6 she was the key person that that meeting was set up for. So I spent my time
7 showing the property to her sister.

8 Q. What led you to believe she was the key person that you needed to show this
9 property to that day?

10 A. It was the fact that the meeting was arranged for her. When we were on the --
11 when Ms. Kirk-Hughes had the phone conversation with her sister she mentioned
12 -- this is at the first meeting on May 8th -- she mentioned that her sister lived in
13 Texas and had two major businesses in the medical field, that one was equipment,
14 medical equipment for oxygen, beds, this type of thing, medical equipment. And
15 also she had another company where she staffed private nursing, nurses for
16 resident care. And she described her sister as a very successful business woman
17 in Texas.

18 Q. You already had both the Sloan property and the Peterson property under
19 contract with Geraldine Kirk-Hughes and Darlene Moore so why did you care?

20 A. Because it was my impression that Ms. Kirk-Hughes did not individually
21 have the financial capability to close on the contract. And in her conversations
22 she talked about investors that she was looking to interest in the property. (Crotty
23 Aff. at Ex. 1 *citing* Golub Dep. at 80:25; 81, 82:1-9)(emphasis added).

24 6. But now Mr. Golub, in the May 3, 2013, affidavit he filed in support of his motion for
25 summary judgment in the CV 13-866 matter, declares that he "never had any dealings with
26 Kirk-Scott or Antoine." (Golub Aff. at ¶4) Mr. Golub's May 3, 2013, affidavit is suspect for
27 other reasons. Paragraph 14 states that Mr. Golub "was not aware that Kirk-Scott had executed
28 a Deed of Trust to Kirk-Hughes Development" before Kirk-Scott recorded the September 17,
2010 deed. (Golub Aff. at ¶14) Mr. Golub's statement is misleading: it was *Kirk Hughes*
Development, LLC - not Kirk-Scott - who *executed* the September 17, 2010, deed of trust.
(Howard Aff. at Ex. 5, pg. 2)

1 7. Mr. Golub's September 25, 2007, deposition testimony contradicts his May 3, 2013,
2 affidavit as Mr. Golub testified, in 2007, that he (a) knew Ms. Kirk-Hughes had a sister named
3 Balinda and that Balinda would be needed to assist Ms. Kirk-Hughes in purchasing both the
4 Peterson and Sloan properties, (b) made a presentation to Ms. Antoine regarding the subject
5 property, (c) escorted Ms. Antoine to the subject property, and (d) knew that Ms. Kirk-Hughes
6 was looking to Ms. Antoine and Kirk-Scott, Ltd. to fund Ms. Kirk-Hughes' real property
7 purchase. *Id.* (Crotty Aff. at Ex. 1 *citing* Golub Dep. at 43:16-18; 47:1; 71:18-25; 72:1-6; 73:23-
8 25; 74:1-21; 75:21-25; 76; 79:1-8; 80; 81; 82; 88:25; 89:1-24;)
9

10 **B. Mr. Golub sues seven defendants (but not Ms. Antoine or Kirk-Scott) on October**
11 **30, 2007, obtains a default judgment (on March 11, 2009) that exceeds what Mr. Golub**
12 **prayed for in the 2007 complaint, and obtains that default judgment with evidence**
13 **regarding only one of the seven defendants.**

14 8. On October 30, 2007, Alan Golub sued Geraldine Kirk-Hughes, Peter Sampson, Kirk-
15 Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Kelly Polatis, Delano Peterson,
16 and Lenore Peterson. (Crotty Aff. at Ex. 2, pg. 1)

17 9. Mr. Golub's October 30, 2007, Complaint asked for, *inter alia*, (a) "Judgment in favor of
18 Plaintiffs for all claims against Defendants in an amount to be proven at trial, but more than the
19 jurisdictional amount of \$10,000.00" and (b) "pre-judgment interest." (Crotty Aff. at Ex. 2, pg.
20

21 8) A single sentence in the complaint alleged that defendant "Peterson did not pay Golub the
22 \$941,000 under the Listing Agreement..." *Id.* at 5.

23 10. On June 11, 2008, Mr. Golub filed the "Affidavit of Alan Golub in Support of Motion
24 for Default Judgment Against Kelly Polatis" and defendant Kelly Polatis only. (Crotty Aff. at
25 Ex. 2, pg. 9)
26
27
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1 11. Exhibit 1 to Mr. Golub's June 11, 2008, Affidavit is what Mr. Golub calls a "listing
2 agreement". Mr. Golub testifies in his affidavit that pursuant to the "listing agreement" he is
3 entitled to \$941,000.00. (Crotty Aff. at Ex. 2, pg 9) The two page hand written "listing
4 agreement" does not contain the number \$941,000.00 or state that Mr. Golub is (or was) entitled
5 to that amount of money. *Id.* at 12-13. Those omissions were for good reason, for Mr. Golub
6 testified that he was not entitled to \$941,000.
7

8 12. On October 22, 2008, Kirk-Hughes Development, and others, filed a copy of certain
9 Requests for Admission that were propounded on Mr. Golub. (Crotty Aff. at Ex. 2, pg. 14) The
10 Requests for Admission cited September 25, 2007, deposition testimony from Mr. Golub in
11 which Mr. Golub did not characterize the \$941,000 as his real estate commission but "the real
12 estate commission" and stated that "the total commission to all real estate agents would have
13 been 941". *Id.* at 24-25 & Crotty Aff. at Ex. 1 *citing* Golub Dep. at 147:9-25; 148:1-17. Mr.
14 Golub then testified to the identities of the other real estate agents who would share the
15 \$941,000. *Id.* Specifically, Mr. Golub testified that the Darlene Moore would receive \$109,640,
16 Tomlinson Black would receive \$191,870, Pacific Real Estate would receive \$154,872.50, and
17 Mr. Golub would receive \$464,617.50. *Id.* Additionally, Mr. Golub testified that he (Golub)
18 would pay Darlene Moore a two percent commission based of the sale of the Peterson property.
19 (Crotty Aff. at Ex. 1 *citing* Golub Dep. at 193:3-18)
20
21

22 13. On February 26, 2009, attorney Michael Howard (who represented Mr. Golub in the
23 above-referenced litigation), moved, under I.R.C.P. 55(b)(1) for a Motion for Default Judgment.
24
25 *Id.* at 29. The memorandum in support of the default motion was supported by a February 18,
26
27
28

1 2009, Affidavit of Michael Howard, and the June 10² [sic], 2008, Affidavit that Alan J. Golub
2 filed against Kelly Polatis and Kelly Polatis only. (Crotty Aff. at Ex. 2, at pg. 9-13, 29-31) The
3 February 26, 2009, motion for default against Kirk-Hughes Development, LLC (and others) was
4 not supported by "an affidavit of the amount due showing the method of computation, together
5 with any original instrument evidencing the claim" against defendant Kirk-Hughes
6 Development, LLC (or any other defendant besides Polatis) as required by IRCP 55(b)(1) - - - it
7 was only supported by an Affidavit of amount due against Kelly Polatis and Kelly Polatis only.
8

9 *Id.*

10 14. On March 11, 2009, the Court signed Mr. Golub's Judgment but did not execute a IRCP
11 54(b) certificate. (Howard Aff. Ex. 8). The March 11, 2009, Judgment listed: "principal
12 judgment amount" as \$941,000, "pre-judgment interest: 12% to run from March 11, 2005
13 through the date of this Judgment," and "post judgment interest." *Id.* By way of contrast, Mr.
14 Golub's October 30, 2007, Complaint did not (a) ask for \$941,000 from any defendant, (b) seek
15 12% interest from any defendant, or (c) seek any prejudgment interest from any defendant.
16 (Crotty Aff. at Ex. 2, pg 1-8)
17
18

19 **C. Mr. Golub settles with two (of the seven) defendants in July 2010, re-records the**
20 **March 11, 2009, default judgment on October 28, 2010, but the re-recorded default**
21 **judgment does not take into account the monies received from the two settling defendants.**

22 15. On or about July 8, 2009, Mr. Golub settled his claims with defendants Delano and
23 Lenore Peterson. (Crotty Aff. at Ex. 2, pg. 40, lines 5-6)
24
25

26 ² The reference to the June 10, 2008, Golub Affidavit was a typographical error. The docket
27 contains no evidence of a June 10, 2008 Golub Affidavit but does contain evidence of a June 11,
28 2008 Golub Affidavit. (Crotty Aff. at Ex. 3)

1 16. On or about July 23, 2009, Mr. Golub moved to have the Court issue a Rule 54(b)
2 certificate against all defendants but Kirk-Hughes Development, LLC. (Crotty Aff. at Ex. 2, pg.
3 43) In seeking the Rule 54(b) certification Mr. Golub admitted that there were "technically still
4 parties" to the case but claimed that "immediate entry of judgment will allow Golub the
5 opportunity to begin execution upon the assets of the Defendants." *Id.* at 44, lines. 15-18.

6
7 17. On August 10, 2009, the Court executed the Rule 54(b) certificate. (Howard Aff. at Ex.
8 21)

9 18. On August 25, 2009, Mr. Golub recorded the March 11, 2009, Judgment but not the
10 signed Rule 54(b) certificate.

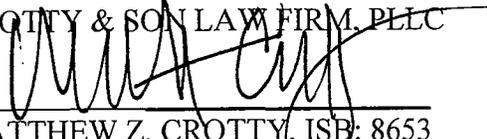
11
12 19. On July 15, 2010, defendants Delano and Lenore Peterson filed a "Full Satisfaction of
13 Mediated Settlement Agreement." (Crotty Aff. at Ex. 2, at pg. 46-48) The amount of the
14 settlement agreement is not known but both Mr. Golub and Mrs. Golub signed the document. *Id.*
15 at pg. 47) Although the settlement amount is not known, it is likely significant for the Petersons
16 had the financial wherewithal to pay the entire \$941,000 judgment as Mr. Golub admits that the
17 basis for the October 2007 action is "based upon the sales price of \$5,482,000 for the [sale of]
18 the Peterson property." (Crotty Aff. at Ex. 2 pg. 24)

19
20 20. On September 17, 2010, Kirk-Scott, Ltd.'s agent recorded the Deed of Trust. (Howard
21 Aff. at Ex. 5)

22
23 21. On October 28, 2010, Mr. Golub re-recorded the March 11, 2009, Judgment but that
24 Judgment did not contain a Rule 54 certificate. (Howard Aff. at Ex. 8) Additionally, the re-
25 recorded Judgment did *not* take into account the amount Mr. and Mrs. Golub received from the
26
27
28

1 Peterson defendants as a result of the July 2010 settlement - - - it sought the same \$941,000
2 amount as before. *See id.*

3 DATED this 14th day of June 2013.
4

5 CROTTY & SON LAW FIRM, PLLC
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2013, I have emailed the document to the following participants at the addresses listed below:

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RYAN M. BEST, ISB: 6792

Attorney for Defendant Kirk-Scott, Ltd.

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2013 JUN 24 AM 10:11

CLERK DISTRICT COURT
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10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,
14
15 Plaintiffs,

Case No. CV13-866
Case No. CV07-8038

16 vs.

**AFFIDAVIT OF MATTHEW Z.
CROTTY IN RESPONSE TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND IN
SUPPORT OF KIRK-SCOTT, LTD.'S
MOTION TO VACATE PLAINTIFFS'
DEFAULT JUDGMENT**

17 KIRK-HUGHES DEVELOPMENT, LLC and
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD a Texas corporation;
20 INTERNAL REVENUE SERVICE;
21 TOMLINSON NORTH IDAHO, INC., an
22 Idaho corporation
23 Defendants.

24 STATE OF WASHINGTON)
25 : ss.
26 County of Spokane)

27 I, MATTHEW Z. CROTTY, being first duly sworn on oath, say:

- 28 1. I am the attorney for Kirk-Scott, Ltd, defendant in the above-captioned actions.
- 2. This affidavit is submitted in response to plaintiffs' May 3, 2013, Motion for

1 Summary Judgment and in support of Kirk-Scott's Motion to Vacate Plaintiffs' March 11, 2009
2 Judgment.

3 3. Attached hereto as Exhibit 1 are true and correct copies of excerpts of Mr.
4 Golub's September 25, 2007, deposition. The September 25, 2007, deposition was taken before
5 certified court reporter Gary E. Heston.

6 4. Attached hereto as Exhibit 2 are true, correct, and certified copies of the October
7 30, 2007 Complaint, the June 11, 2008, Affidavit of Alan Golub in Support of Motion for
8 Default Judgment Against Kelly Polatis, the October 21, 2008, Affidavit of Patrick Miller in
9 Support of Kirk-Hughes' Motion to Strike, the February 18, 2009, Affidavit of Michael Howard,
10 the February 26, 2009, Motion and Memorandum for Default Judgment, the July 23, 2009,
11 Memorandum in Support of Motions to Dismiss Claims Against Peterson, Strike Pleadings,
12 Motions, and Papers by L. Sanders Joiner, and Issue a Rule 54(b) Certificate of Final Judgment,
13 and the July 15, 2010, Full Satisfaction of Mediated Settlement Agreement from the Golub v.
14 Geraldine Kirk-Hughes, et. al., matter CV - 2007 - 0008038.

15 5. Attached hereto as Exhibit 3 is a true and correct copy of the docket in the CV -
16 2007 - 0008038 matter.

17 6. On June 12, 2013, I took the deposition of Alan Golub. At the time of my
18 execution of this affidavit Mr. Golub's June 12, 2013, deposition has not been transcribed. At
19 the June 12, 2013, deposition Mr. Golub testified that he entered into a settlement agreement
20 with Delano and Lenore Peterson, that the Petersons paid him money as part of the settlement
21 on or about July 15, 2010, and that the money the Peterson's paid him was part of the \$941,000
22 he (Golub) sought in the 2007 lawsuit. At the deposition Mr. Golub admitted that he re-recorded
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1 his March 11, 2009, default judgment in October 2010 for the same \$941,000 even though he
2 had been paid part of that sum by the Petersons. At the June 12, 2013, deposition Mr. Golub
3 testified that he thought it was "fair" that he be allowed to recover twice as to the judgment:
4 once from the Petersons and a second time from the judgment debtors. At the deposition Mr.
5 Golub refused to disclose the settlement amount he received from the Petersons.

6
7 7. Mr. Golub testified at his June 12, 2013, deposition that he knew the Kootenai
8 County Recorder's office and/or title companies were sources of information as to whether real
9 property was encumbered by liens, easements, or other instruments.

10
11 8. Mr. Golub testified at his June 12, 2013, deposition that immediately following
12 his acquisition of the March 11, 2009, default judgment it was his expectation that his lawyer
13 would search out and collect on assets belonging to the judgment debtors. During the deposition
14 Mr. Golub's lawyer repeatedly instructed Mr. Golub not to answer questions regarding
15 communication he (Golub) had with his attorney regarding when Mr. Golub's lawyer (read:
16 agent) learned of the existence of the Kirk-Scott deed of trust and when Mr. Golub's lawyer
17 disclosed that knowledge to Mr. Golub.

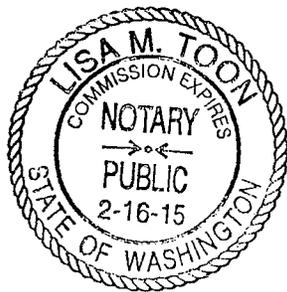
18
19 9. At his June 12, 2013, deposition Mr. Golub testified that his lawyer gave him a
20 copy of the Kirk-Scott deed of trust, that he (Golub) read the deed of trust, and that no words
21 contained in the deed of trust confused him.

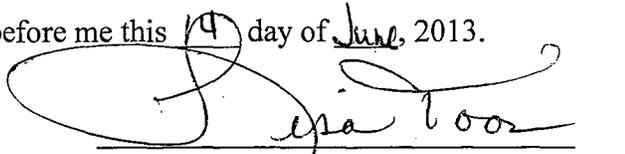
22
23 10. I am an officer in the Washington Army National Guard. I will be out of the
24 Contiguous United States (CONUS) on military orders from June 16, 2013 through June 29,
25 2103. During that June 16-29 timeframe it is my understanding that the June 12, 2013
26 deposition will be transcribed. Since I will be on military orders during that time I will not be
27
28

1 able to incorporate the transcripts from Mr. Golub's June 12, 2013, deposition into Kirk-Scott's
2 summary judgment response brief and/or motion to vacate brief. It is my understanding that co-
3 defendant Kirk-Hughes Development, LLC will supply the relevant pages of Mr. Golub's
4 deposition as part of its response to plaintiffs' Motion for Summary Judgment and joinder with
5 Kirk-Scott's motion to vacate. Accordingly, Kirk-Scott incorporates Kirk-Hughes
6 Development, LLC's factual and evidentiary submission (including Mr. Golub's June 12, 2013,
7 deposition transcript) by reference, including the deposition pages cited in paragraphs 6-9,
8
9 above.

10 
11 _____
12 MATTHEW Z. CROTTY

13 SUBSCRIBED AND SWORN to before me this 14 day of June, 2013.





Notary Public in and for the State of
Washington, residing at Spokane
My commission expires: 2/16/2015

CERTIFICATE OF SERVICE

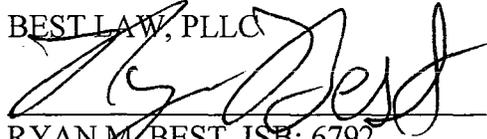
I hereby certify that on the 24th day of June 2013, I have emailed the document to the following participants at the addresses listed below:

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

TOMLINSON BLACK NORTH IDAHO,
INC., an Idaho Corporation,
Plaintiff,
vs File 06-CV-0118-EJL
GERALDINE KIRK-HUGHES, an
individual, d/b/a Kirk-Hughes
and Associates; KIRK-HUGHES,
LLC, a Nevada limited
liability company; KIRK-HUGHES
DEVELOPMENT, LLC, a Delaware
limited liability company;
KELLY POLATIS, an individual,
and DOES 1 through 10,
Defendants.

1 that. I don't know that for sure. I know that Dean
2 Anderson had conversations about the properties with
3 Darlene Moore. I don't know for a fact if she had
4 been to the property or not.

5 Q. Did Dean Anderson represent to you that
6 Darlene Moore was coming to look at these properties
7 for purchasing them individually and/or together?

8 A. Dean Anderson provided me with
9 Darlene Moore's name as well as possible clients of
10 Darlene Moore. Those included I believe a Calvin
11 Hisson. There was also the names of Larry Latham and
12 Geraldine Hughes. At the time that's the name I had.

13 Q. And he provided you with those names
14 previous to May 2004?

15 A. Yes.

16 Q. So you started to tell me that you went
17 to the Atkinson property first on May 8th, 2004; is
18 that correct?

19 A. Yes.

20 Q. And how long were you at the Atkinson
21 property?

22 A. Approximately 20 minutes.

23 Q. Did you get out of the vehicle?

24 A. Yes.

25 Q. Did you walk around?

1 Q. What did you say to her?

2 A. Well, right after that I believe she got
3 on her cell phone and made a call to her sister in
4 Texas.

5 Q. Why do you believe she called her sister
6 in Texas?

7 A. To tell her that she is in Idaho and she
8 just saw a gorgeous piece of property. And it is my
9 recollection that she wanted her sister to help with
10 the purchase of the property.

11 Q. And as you say the property it is your
12 testimony that you don't know if she was talking
13 about the Sloan property only or the Sloan property
14 and the Peterson property combined.

15 A. I do not.

16 Q. Is it possible she was talking only about
17 the Sloan property in those conversations?

18 MR. HOWARD: Object to form of the question.

19 MR. HARRIS: Join the objection. Calls for
20 speculation.

21 Q. You can answer.

22 A. It is possible.

23 Q. Did you look at anything else on the
24 Sloan property other than the house, and then you
25 said you drove to the other end of the property and

1 the buyer would be. I am not sure if it was from
2 Ms. Kirk-Hughes or from Ms. Moore.

3 Q. Okay. So it is possible it was Ms. Moore
4 sitting there telling him how to fill out this
5 document out.

6 A. It is possible.

7 Q. Okay. Was Ms. Kirk-Hughes sitting there
8 listening, if you recall?

9 A. I believe they were both there.

10 Q. And was there conversation between
11 Ms. Kirk-Hughes and Ms. Moore about why Darlene Moore
12 was going to be the buyer of the property?

13 A. I don't recall.

14 Q. Okay. So you don't recall hearing any
15 conversation between the two of them as to why
16 Darlene Moore was purchasing the Peterson property?

17 A. Not really.

18 Q. After the Exhibit #8 was filled out and
19 signed by the parties on May 8th, 2004, was it your
20 belief then that Darlene Moore was purchasing the
21 Peterson property and Geraldine Kirk-Hughes was
22 purchasing the Mavis Sloan property?

23 A. It was my -- it was my belief that
24 Geraldine was purchasing both properties.

25 Q. Why?

1 A. Because she wanted it to set up a meeting
2 with her sister to come out to see all the
3 properties, both properties. But it was also my
4 impression that Ms. Kirk-Hughes didn't have the
5 capital to acquire either of the properties, but she
6 was looking for her sister's assistance in purchasing
7 the property.

8 Q. Did she talk to you about having a
9 meeting? Did Ms. Kirk-Hughes talk to you on May 8th,
10 2004, while you were at the resort about having a
11 meeting with her sister and bringing her sister out
12 to look at the property?

13 A. No.

14 Q. What led you to believe that she wanted
15 her sister to come out and look at the properties?

16 A. That was a subsequent conversation.

17 Q. When?

18 A. I think it was communicated through Dean
19 approximately -- and I am not quite sure, but in
20 about a week -- a week, 10 day period after that.

21 Q. Okay. So you didn't have this
22 conversation directly with Geraldine Kirk-Hughes,
23 Dean Anderson relayed that information to you; is
24 that correct?

25 A. That's correct.

1 Q. My original question was what led you to
2 believe on May 8th, 2004, when you left the
3 Coeur d'Alene Resort that even though Darlene Moore
4 was listed as the buyer on the Peterson contract that
5 Geraldine Kirk-Hughes intended on buying that
6 property?

7 A. The only thing I can think was that
8 Darlene made a check out to Tomlinson Black for the
9 earnest money. But she stated she does not have the
10 money in her account to -- for that check. And I
11 heard Ms. Kirk-Hughes state that she would -- when
12 they got back to Las Vegas, would give her the money
13 to cover the check.

14 Q. So that conversation is what led you to
15 believe Ms. Kirk-Hughes was going to purchase the
16 Peterson property?

17 A. That if she was going to provide \$50,000
18 to Darlene Moore was my impression. I didn't know
19 this for a fact, but it was my impression that she
20 was going to give her the 50,000 to cover the earnest
21 money, that she was interested in purchasing the
22 property.

23 Q. So after May 8th, 2004, after you left
24 the resort that day what was the next contact you had
25 with Geraldine Kirk-Hughes?

1 A. I believe my next contact was when we had
2 the meeting at the Coeur d'Alene Resort.

3 Q. What meeting at the Coeur d'Alene Resort?

4 A. There was -- it was a meeting set up at
5 the request of Dean Anderson to bring together a
6 group of professionals in development to present how
7 large parcels similar to the Peterson Mavis parcels
8 can go from undeveloped land into a golf course
9 development.

10 Q. And you said Dean Anderson was putting
11 this meeting together?

12 A. Yes. And I worked with Dean to get a
13 team of people together to make that presentation.

14 Q. Previous to that meeting, or previous to
15 helping Dean put together this presentation that you
16 have testified about, did you visit Ms. Kirk-Hughes
17 in Las Vegas?

18 A. No.

19 Q. Did you visit Ms. Kirk-Hughes in
20 Las Vegas after this meeting?

21 A. Yes.

22 Q. Did you call Ms. Kirk-Hughes in Las Vegas
23 about this meeting that Dean Anderson wanted you to
24 help him put together with regards to golf course
25 size projects?

1 A. No.

2 Q. So if she testified -- if Ms. Kirk-Hughes
3 testified that you called her in Las Vegas to discuss
4 this presentation with her, is she lying?

5 MR. HOWARD: Object to the form of the
6 question.

7 A. I would have to -- I have to just say
8 what I testified, that I did not visit her in
9 Las Vegas and I don't believe I spoke to her in
10 Las Vegas.

11 Q. Previous to the presentation?

12 A. Correct.

13 Q. That is your testimony?

14 A. Yes.

15 Q. If you know then, how did Ms. Kirk-Hughes
16 know that this presentation was going to happen and
17 how did she know to buy airline tickets to be here
18 for it?

19 A. I believe she was in communication with
20 Mr. Anderson.

21 Q. Did this presentation actually take
22 place?

23 A. Yes, it did.

24 Q. And if you already testified to this, I
25 apologize. But who was present?

1 A. Tony Jansen, who was an architect at that
2 time with ALSC from Spokane, John Lasher from First
3 American Title, Ron Hazard and Mike Harris with the
4 Stonehill Group, who were developers of a large
5 project. Dean was present. I was present.
6 Ms. Kirk-Hughes was present. Darlene Moore was
7 present. Ms. Kirk-Hughes husband, Peter was
8 present. Ms. Kirk-Hughes sister. I believe her name
9 is Belinda was present. There was also a conference
10 call to architect Algie Pulley. Also present was the
11 engineer, Bart North from North Engineering. And I
12 believe also present was Sherry Howell, who formerly
13 worked for the county. She was present.

14 Q. I must say you have the best memory of
15 anybody we talked to about this presentation as far
16 as who was present.

17 A. I don't remember the date.

18 Q. That's okay. That was my next question
19 so you are very good. Do you remember the date that
20 the presentation occurred?

21 A. No, Ma'am.

22 Q. So please tell me what was the purpose of
23 this presentation again?

24 A. It was my understanding Geraldine wished
25 to have her sister, who lived in Texas, come up to

1 see Idaho to see the property and to elicit her
2 interest in investing in this project.

3 Q. And so the purpose of the presentation
4 was to --

5 A. To --

6 Q. Sell her sister --

7 A. Sell her sister on this project.

8 Q. And at the time of the presentation
9 Darlene Moore is still listed as the buyer of the
10 Peterson property; isn't that correct?

11 A. Yes.

12 Q. Within a day of the presentation -- and
13 I'm unclear as to whether it was the day of the
14 presentation, the day before the presentation or the
15 day after the presentation. Did you take a group of
16 people to view Black Rock again and view the Peterson
17 and the Sloan and the Atkinson properties?

18 A. After the morning meeting Gordon -- there
19 were two other people there also at that meeting, I
20 believe. There was a Mike and his wife that somehow
21 had -- I am not sure -- it just comes back to me.
22 There was a Mike and his wife that were also at that
23 meeting from Las Vegas.

24 Q. Mike Scillian by any chance.

25 A. It could be. And the people that went on

1 Q. In the clubhouse?

2 A. Right. There was interest, I believe,
3 not just with Ms. Kirk-Hughes but this Mike and his
4 wife were interested in looking at properties. So it
5 wasn't just showing Ms. Kirk-Hughes and her sister,
6 but it was also showing this other -- there were
7 conversations around the dinner table, or the lunch
8 table, between Gordon and the other people.

9 Q. What types of conversations was Gordon
10 having with the members of this lunch?

11 A. Describing the -- well, basically showing
12 the project in its greatest light, what lots were
13 available. And he was talking about the amenities of
14 Black Rock.

15 Q. He was trying to sell them property at
16 Black Rock, wasn't he?

17 A. Yes.

18 Q. Were you wanting them to buy property at
19 Black Rock?

20 A. Did I want them to buy property? No. I
21 was there for lunch. I was there to continue -- the
22 group would go after that to the Peterson and Sloan
23 properties.

24 Q. Was Dean Anderson trying to assist any of
25 the parties that were there that day in purchasing

1 property at Black Rock, or selling them property at
2 Black Rock?

3 A. I don't know. But I do know if this Mike
4 Scillian, or anyone that he brought, would -- since
5 he was the one that initiated the meeting with
6 Black Rock, you know, those would be his clients.
7 That's what I thought.

8 Q. Who initiated the meeting with Black
9 Rock?

10 A. Dean Anderson.

11 Q. So that day you left Black Rock, and
12 where did you go after that?

13 A. After Black Rock we went to the Peterson
14 and Sloan properties.

15 Q. And which one did you go to first?

16 A. I believe -- again you drive through the
17 Peterson property. I am not sure if we did an
18 overview first by going up the hill through the
19 Peterson property, but we ended up at the home, the
20 Mavis Sloan home on the Sloan property.

21 Q. Did you have any conversations with
22 Geraldine Kirk-Hughes that day about purchasing the
23 Peterson property?

24 A. Not that I recall.

25 Q. Did you have conversations with any of

1 the parties in that group that day about purchasing
2 the Peterson property?

3 A. I was basically showing them around the
4 property. It was to -- my attention actually was
5 directed primarily at her sister, Belinda. I was
6 personally showing her the different attributes of
7 the property, the views, and took her, thinking that
8 she was the key person that that meeting was set up
9 for. So I spent my time showing the property to her
10 sister.

11 Q. What led you to believe she was the key
12 person that you needed to show this property to that
13 day?

14 A. It was the fact that the meeting was
15 arranged for her. When we were on the -- when
16 Ms. Kirk-Hughes had the phone conversation with her
17 sister she mentioned -- this is at the first meeting
18 on May 8th -- she mentioned that her sister lived in
19 Texas and had two major businesses in the medical
20 field, that one was equipment, medical equipment for
21 oxygen, beds, this type of thing, medical equipment.
22 And also she had another company where she staffed
23 private nursing, nurses for resident care. And she
24 described her sister as a very successful business
25 woman in Texas.

1 Q. You already had both the Sloan property
2 and the Peterson property under contract with
3 Geraldine Kirk-Hughes and Darlene Moore so why did
4 you care?

5 A. Because it was my impression that
6 Ms. Kirk-Hughes did not individually have the
7 financial capability to close on the contract. And
8 in her conversations she talked about investors that
9 she was looking to interest in the property.

10 Q. But Geraldine Kirk-Hughes as of this date
11 was only under contract on the Mavis Sloan property,
12 she was only under contract for 1.5 million dollars.
13 So you believed on that date she didn't have 1.5
14 million dollars and she needed assistance from
15 investors to close on the Mavis Sloan property?

16 A. Yes, because she called her sister from
17 the property about wanting her to see it.

18 Q. Did Darlene Moore have any conversations
19 with you that day about needing investors to assist
20 her in closing on the Peterson property?

21 A. Not that I can recall.

22 Q. Did Darlene Moore indicate that any of
23 the people that were with you that day were potential
24 investors to assist her in closing on the Peterson
25 property?

1 A. Yes.

2 Q. And previous to me asking you to draw
3 this map for us today I asked you if you were
4 familiar with a Mosley property. And your response
5 was you're not; is that correct?

6 A. Yes, Ma'am.

7 Q. And you do not know who the parcel owners
8 are for these two lots in the horseshoe of the
9 Atkinson property.

10 A. No, Ma'am.

11 Q. And the Williams property, did you have a
12 listing agreement with the Williams to sell that
13 parcel?

14 A. It was her -- yes, I had the -- Mavis
15 Sloan was a family member of Mavis Sloan. So she --

16 Q. Williams is a family member to Sloan?

17 A. Correct. So she had the permission --
18 she was able to combine those three lots together to
19 what we call the Mavis Sloan property.

20 Q. Okay. So on your map the two parcels
21 that you have identified as Sloan and the Williams
22 parcel are what make up the entirety of the Mavis
23 Sloan property that we have been discussing?

24 A. Yes, Ma'am.

25 Q. Thank you very much. We were previously

1 discussing the presentation that was put together by
2 Dean Anderson with your assistance for Geraldine
3 Kirk-Hughes and her sister and other parties, whom
4 you were able to remember all of them, I believe,
5 which was amazing. Then we were talking about you
6 taking certain members of that group out to the
7 Peterson and the Sloan properties on the morning --
8 was it the morning of the presentation or the day of
9 the presentation?

10 A. It would be the afternoon of the
11 presentation.

12 Q. The afternoon of the presentation. And
13 it was your understanding -- I just want to make sure
14 the testimony was clear. It was your understanding
15 that you were showing these properties to --
16 specifically to Ms. Kirk-Hughes sister Belinda; is
17 that correct?

18 A. I was not showing the Black Rock
19 property.

20 Q. I apologize, you are correct. The Sloan
21 and the Peterson property.

22 A. But I was the listing agent and I was to
23 show the properties to Ms. Kirk-Hughes' sister
24 Belinda.

25 Q. Okay. After that tour that day of the

1 who is this Kirk-Hughes. And I explained that she
2 was -- Ms. Kirk-Hughes was the buyer of the property,
3 that she would be the one to purchase the property.

4 Q. Did you call Mr. Peterson and explain
5 that to him, or did you give that to him in written
6 form, do you know?

7 A. I called him.

8 Q. I will let the record reflect that
9 Mr. Harris is correct, Exhibit #14 to a previous
10 deposition dated July 6th, 2004, is the original
11 document assigning Darlene Moore's interest in the
12 Peterson contract to Geraldine Kirk-Hughes, the
13 original document.

14 MR. HARRIS: Thank you.

15 (OFF THE RECORD)

16 MR. HARRIS: Let's go back on the record.

17 Q. Did you have any part in preparing
18 documentation that would reflect that Darlene Moore
19 had assigned her interest as buyer in the Peterson
20 property to Geraldine Kirk-Hughes?

21 A. No.

22 Q. Were you presented with any documentation
23 previous to this assignment for you to review and/or
24 look at?

25 A. The assignment documents I believe were

1 presented to me by Melodie Jones at First American
2 Title Company.

3 Q. Were they presented to you previous to
4 them being signed or after?

5 A. I am not quite sure. I don't recall.

6 Q. As the listing agent for Mr. Peterson
7 were you under the impression that this assignment by
8 Darlene Moore to Geraldine Kirk-Hughes would bind
9 Geraldine to the same terms so to speak that Darlene
10 had already agreed to? Specifically closing date.

11 A. Yes.

12 Q. Did you participate in any communications
13 with Mr. Peterson about extensions of the closing
14 date?

15 A. Yes.

16 Q. Were you aware that Mr. Sternberg was
17 also participating in communications with
18 Mr. Peterson about extensions of the closing date?
19 And I say extensions because there were more than
20 one.

21 A. Yes.

22 Q. And were you authorizing at that time
23 Mr. Sternberg to call Mr. Peterson and relay
24 information about extensions of a closing date?

25 A. Not to negotiate or -- but I allowed

1 Q. July 27th of 04?

2 A. Approximately. I believe it is that
3 date, July 27th, 04. Plus or minus a couple days.

4 Q. Mr. Golub, you testified previously that
5 you believe Ms. Kirk-Hughes was going to be able to
6 close quickly on the Peterson property. And your
7 belief came from some correspondence that you had
8 received. Is it possible that Exhibit #31 that I am
9 handing you right now is the correspondence that you
10 are referring to?

11 A. No, this is not it.

12 MR. HARRIS: Look at the first page.

13 A. I am sorry. Yes, this is the
14 correspondence.

15 Q. Okay. And is this a fax cover sheet to
16 Dean Anderson dated July 29th, 2004?

17 A. Yes.

18 Q. And did Mr. Anderson then subsequently
19 send this to you after he received it, do you
20 remember?

21 A. Yes. Or I received it from the title
22 company. I am not quite sure. But I did get a copy
23 of it.

24 Q. Do you see anything on the front of this
25 document that indicates that it went directly to the

1 Atkinson property on July 30th, 2004?

2 A. Yes, I was able to do that.

3 Q. When did you become aware that
4 Ms. Kirk-Hughes did not close on the Peterson
5 property on November 12th, 2004?

6 A. Please state that again.

7 Q. Sure. When did you first become aware
8 that Ms. Kirk-Hughes had not closed on the Peterson
9 property pursuant to the agreement which stated she
10 would close November 12th, 2004?

11 A. I called First American Title on the 12th
12 or 13th and was told by Kathleen that there was no
13 closure of the transaction.

14 Q. Did you have any communication with Dean
15 Anderson about the fact that the closing had not
16 occurred?

17 A. I believe I might have.

18 Q. Would it have been before or after you
19 talked to First American Title?

20 A. I am not quite sure.

21 Q. What was the nature of that conversation
22 with Dean Anderson with regards to the closing
23 between Ms. Kirk-Hughes and Mr. Peterson not
24 occurring?

25 A. I believe it would have been prior to --

1 didn't like the terms of her financing. I kind of
2 remember that.

3 Q. And that was relayed to you by
4 Ms. Moore during the September visit?

5 A. Yes.

6 Q. What is bridge financing?

7 A. Short term private investor financing.

8 Q. Did you know that subsequent to November
9 12th, 2004, Kelly Polatis purchased the Peterson
10 property?

11 A. Yes.

12 Q. As you sit here today did you know that
13 that occurred?

14 A. Yes.

15 Q. When did you find that out?

16 A. I believe after November 12th, shortly
17 after.

18 Q. And who told you that?

19 A. I believe the title company, First
20 American Title.

21 Q. Do you believe First American Title
22 Company informed you that Mr. Polatis had purchased
23 Mr. Peterson's property?

24 A. When did I find out?

25 Q. That Mr. Polatis had purchased

1 Mr. Peterson's property.

2 A. You said November 12th. He purchased it
3 in May, I believe, of 2005.

4 Q. My original question was when did you --
5 did you know that Mr. Polatis first purchased -- I'm
6 sorry.

7 Did you know that Mr. Polatis purchased the
8 Peterson property? And you said yes, I did. And I
9 said, When did you first find that out?

10 A. In March. March of 2005.

11 Q. Okay. So your previous testimony was
12 that you found out shortly after November 12th.

13 A. It did not close. Did not close.

14 Q. But now -- your testimony is that you
15 found out in March of 2005 that Mr. Polatis had
16 purchased Mr. Peterson's property.

17 A. Yes.

18 Q. Did you have any conversations with
19 Mr. Anderson about the fact that Kelly Polatis had
20 purchased the Peterson property?

21 A. No.

22 Q. Did you have any conversations with
23 anyone about the fact that Kelly Polatis had
24 purchased Mr. Peterson's property?

25 A. My attorneys.

1 But I think that is where that name might have come
2 up.

3 Q. So other than the two incidents you have
4 testified to prior to the end of September, 2004, you
5 had no other interactions with Kelly Polatis?

6 A. None.

7 Q. Did you have any forewarning that
8 Mr. Polatis was going to be visiting with your
9 client, Mr. Peterson, in Alabama towards the end of
10 September, 2004?

11 A. No, sir.

12 Q. Are you aware that as a result of that
13 meeting Mr. Peterson agreed to another extension to
14 the closing date and signed a document which he faxed
15 directly to First American Title Company?

16 A. Yes, I am.

17 Q. Let me hand to you, Alan, what has been
18 marked as Exhibit #37 in this case. It is a two-page
19 document. Would you look through both of those pages
20 please. Have you seen Exhibit #37 before, Alan?

21 A. Yes.

22 Q. When did you receive a copy of that?

23 A. I was given a copy by Melodie Jones from
24 First American Title.

25 Q. And was that how you became aware that

1 acting as her agent?

2 A. I am not sure she used those words, but
3 she said she was under a lot of stress and she needed
4 help in getting an extension.

5 Q. Now I believe you testified this morning
6 that for this particular extension, the one that was
7 entered into towards the end of September 2004, you
8 had actually recommended to Delano Peterson that he
9 not grant another extension. Did I hear that
10 correctly?

11 A. That's correct, sir.

12 Q. And why did you recommend that at that
13 time?

14 A. Because of communications that
15 Ms. Kirk-Hughes had with Melodie Jones at First
16 American Title that she had her financing in place.
17 There was a Dr. McDonald that had the ability to
18 close on the transaction.

19 Q. So was it your recommendation to
20 Mr. Peterson, let's not give them another extension
21 and force them to close with the financing they have?

22 A. Yes.

23 Q. Prior to the end of September 2004, had
24 there ever been a request made to you as
25 Mr. Peterson's agent that Mr. Peterson consider

1 happened Mr. Carey called me and gave my name to --
2 actually, Mike Carey and Dean Anderson and I all went
3 to Candlelight Christian Fellowship, went to the same
4 church. So during the conversations -- and he must
5 have talked to other agents too, you know, who knows
6 of waterfront property. And then what I remembered
7 was of the fact that Marcheaso and Sternberg had
8 worked on -- had the property out with the Mavis
9 Sloan and Peterson property. So what I did was made
10 contact with -- with Dean Anderson. And that's how
11 we got together.

12 Q. So did you actually make contact with
13 Dean Anderson prior to acquiring the listing
14 agreements on either the Sloan or the Peterson
15 property?

16 A. The answer is yes.

17 Q. And during that contact you became aware
18 that Dean had potential clients who were interested
19 in lake property.

20 A. Yes.

21 Q. And when did you find out who those
22 clients might be? When did you first hear the names
23 Darlene Moore or Geraldine Kirk-Hughes?

24 A. Near the end of April.

25 Q. 2004. So you agreed to give Tomlinson

1 Black a three and a half percent commission because
2 Dean brought the purchasers to the table.

3 A. Yes.

4 Q. In the real estate parlance he was the
5 procuring cause, for finding buyers for the
6 property.

7 A. That's correct.

8 Q. Now you talked about your listing
9 agreement with Mavis Sloan being the first net
10 listing agreement that you had used.

11 A. Yes.

12 Q. And when you first met with Mr. Peterson
13 you gave him a copy of an agreement that you had --
14 this is something that had you prepared, or was it
15 just a form agreement that you kept?

16 A. What I had was a standard two -- we don't
17 have the multiple listing documents. It was a
18 standard two-page document that we had, but it really
19 didn't fit -- the categories really didn't fit for a
20 net listing agreement. So I also gave him what we
21 called the blue sheet, which is the agency card.
22 It's your first contact with who are the potential
23 clients we are to give the card that defines agency.
24 I gave that both to him. He had stated that he was
25 well versed in writing contracts and he would prefer

1 MS. JOVICK: No. This is marked as Exhibit #14
2 in a prior deposition. Would you review that
3 please? I will represent to you that that is a
4 document that I obtained out of the escrow files from
5 First American Title Company in this case.

6 A. Okay.

7 Q. Have you ever seen Exhibit #14 before?

8 A. I don't remember seeing it, sir.

9 Q. Okay. Do you have any understanding
10 about who prepared Exhibit #14?

11 A. I don't.

12 Q. Do you have any recollection that on or
13 about July 6th, 2004, there was some discussion about
14 having a formal assignment done from Darlene Moore to
15 Geraldine Kirk-Hughes on the Peterson contract?

16 A. I don't remember that, sir.

17 Q. Do you remember Melodie Jones, or anybody
18 else from First American Title Company questioning
19 the necessity of having a written assignment from
20 Darlene Moore to Geraldine Kirk-Hughes on the
21 Peterson contract?

22 A. Yes.

23 Q. What do you remember about that?

24 A. Melodie Jones says everything has to
25 be -- escrow companies work everything has to be in

1 writing and they need a formal assignment.

2 Q. When did she say that to you?

3 A. I don't -- it was during this whole
4 process. I am not sure of the exact date.

5 Q. Did you have any understanding about why
6 this has handwritten notations on there about it
7 being resent July 28th, 2004?

8 A. This is the first time I have seen this
9 document. I believe the time frame around July 6th
10 was the time that Ms. Kirk-Hughes and I talked about
11 the assignment of the Atkinson piece to her too. She
12 was very much interested in closing on the Peterson
13 property to the point that if I close on
14 Mr. Peterson's property, I have the right to buy your
15 property. So we all knew that she was interested in
16 all three properties during this time period.

17 Q. And I think you have that assignment in
18 front of you still. I will pull that out. That's
19 Exhibit #20. That's the document you are referring
20 to about the assignment of the Atkinson property?

21 A. Right. They are about the same time.
22 Your document is shown as July 6th. And my
23 assignment is July 8th, two days later. So by this
24 time I believe she already purchased the Mavis Sloan
25 property. And there was interest now in acquiring

1 Q. Is this in your handwriting?

2 A. Yes, sir.

3 Q. And is that your signature down below?

4 A. It is, sir.

5 Q. And you're agreeing to pay Darlene Moore
6 a two percent commission on the selling price of
7 certain properties?

8 A. That is correct.

9 Q. And the properties described there by
10 parcel number are the properties that comprise the
11 Peterson property.

12 A. Yes, sir.

13 Q. And this two percent commission that you
14 would be paying to Darlene Moore was not coming out
15 of any commission you were paying to Tomlinson Black
16 or Dean Anderson?

17 A. It was in addition to the three and a
18 half percent, yes, sir.

19 Q. Let me hand you what has been marked as
20 Exhibit #17.

21 MR. HARRIS: Have you got that one?

22 MS. JOVICK: No.

23 Q. Exhibit #17 appears to be a letter from
24 Algie Pulley to Geraldine Kirk-Hughes setting forth a
25 preliminary construction budget for building a golf

CERTIFICATE

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I, Gary E. Heston, do hereby certify that pursuant to the Rules of Civil Procedure, the witness named herein appeared before me at the time and place set forth in the caption herein; that at the said time and place, I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 6th day of October, 2007.

Signature

Expiration Date

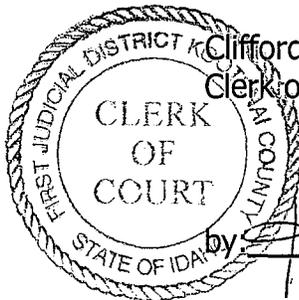
EXHIBIT 2

CERTIFICATE OF TRUE COPY

I, **Kally Mohler**, Deputy Clerk for the District Court of Kootenai County, First Judicial District, State of Idaho, hereby certify that I am an official custodian of the records of said court, located in the Kootenai County Justice Building, and that the attached photocopies of documents and court records (48 pages) are true and correct copies of original documents on file with the above court, kept in the ordinary course of business, pertaining to Kootenai County District Court case number:

CV-2007-0008038 ALAN GOLUB, ETAL. VS. GERALDINE KIRK-HUGHES, ETAL..

Dated Wednesday, May 08, 2013



Clifford T. Hayes
Clerk of the District Court

by

Kally Mohler
Deputy Clerk

2007 OCT 30 AM 11:21

CLERK DISTRICT COURT

DEPUTY

1
2
3 MICHAEL T. HOWARD, ISB No. 6128
4 WINSTON & CASHATT
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6 Coeur d'Alene, Idaho 83814
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8 KENNETH B. HOWARD, ISB No. 1999
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11 Telephone: (208) 676-8890

12 Attorneys for Plaintiffs

13 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
14 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

15 ALAN GOLUB and MARILYN GOLUB,
16 husband and wife,
17
18 Plaintiffs,

19 vs.

20 GERALDINE KIRK-HUGHES and PETER
21 SAMPSON, husband and wife; KIRK-
22 HUGHES DEVELOPMENT, LLC, a Delaware
23 limited liability company; KIRK-HUGHES &
24 ASSOCIATES, INC., a Nevada corporation;
25 KELLY POLATIS, an individual, and
26 DELANO D. and LENORE J. PETERSON,
27 husband and wife,
28 Defendants.

Case No. CU07-8038

COMPLAINT AND DEMAND FOR JURY TRIAL

FEE CATEGORY: A.1

FEE: \$88.00

Plaintiffs allege:

COMPLAINT
PAGE 1

ASSIGNED TO JUDGE HAYNES

LAW OFFICES OF
Winston & Cashatt
250 NORTHWEST BLVD., SUITE 107A
COEUR D'ALENE, IDAHO 83814
(208) 667-2103
FAX (208) 765-2121

1 **1. PARTIES**

2 1.1 At all relevant times, Plaintiffs Alan J. Golub and Marilyn Golub
3 (“Golub”) were husband and wife, residing in Hayden, Idaho.

4 1.2 At all relevant times, Defendants Geraldine Kirk-Hughes and Peter Sampson (“Geraldine
5 Kirk-Hughes”) were a married couple residing in Las Vegas, Nevada.

6 1.3 At all relevant times, Defendant Kirk-Hughes Development, LLC (“K-H Development”)
7 was an active Delaware limited liability company with members domiciled in Kootenai
8 County, Idaho and had its principal place of business in Kootenai County, Idaho.

9 1.4 At all relevant times, Defendant Kirk-Hughes & Associates, Inc. (“K-H Associates”) was
10 an active Nevada corporation.

11 1.5 At all relevant times, Defendant Kelly Polatis (“Polatis”) was an unmarried individual
12 residing in Carlsbad, California.

13 1.6 At all relevant times, Defendants Delano and Lenore Peterson (“Peterson”) were husband
14 and wife with their principal residence in Huntstville, Alabama.

15 **2. JURISDICTION/VENUE**

16 2.1 The acts giving rise to Plaintiffs’ claims occurred in Kootenai County, Idaho.

17 2.2 Jurisdiction and venue are proper in this Court.

18 **3. FACTUAL ALLEGATIONS**

19 3.1 At all relevant times Golub was a licensed Idaho real estate agent working with Pacific
20 Realty.

21 3.2 Geraldine Kirk-Hughes is an officer of K-H Associates, and the managing member of K-
22 H Development.
23
24
25
26

- 1 3.3 Polatis was, at all relevant times, an agent of Geraldine Kirk-Hughes, K-H Associates,
2 K-H Development.
3
4 3.4 Petersons were, at all relevant times, the owners of approximately 518 acres near Beauty
5 Bay in Kootenai County, Idaho (the Peterson Property).
6
7 3.5 On or about April 22, 2004 Golub and Pacific Realty entered into a "Listing Agreement"
8 with Petersons for the sale of the Peterson Property, which entitled Golub and Pacific
9 Realty to payment of a commission upon finding a buyer for the Property.
10
11 3.6 Golub has been assigned all right, title and interest to any claims which Pacific Realty
12 may have in this matter and is a successor in interest to those claims which he asserts
13 here.
14
15 3.7 Through Golub's efforts, Peterson entered into a written sales agreement to sell the
16 Peterson Property to Geraldine Kirk-Hughes.
17
18 3.8 Over the course of several months, several extensions were obtained from Peterson of
19 the closing date in order to obtain financing and perform feasibility studies on the
20 Peterson Property.
21
22 3.9 Polatis visited Peterson in Alabama on behalf of Geraldine Kirk-Hughes to obtain an
23 extension of the closing date to November 12, 2004.
24
25 3.10 To assure the sale of the Peterson Property would close by November 12, 2004, Golub
26 conditionally assigned his interest in an adjacent piece of lake-front property (the
Adkinson Property) to Kirk-Hughes.
3.11 Geraldine Kirk-Hughes did not close on the Peterson Property by the November 12,
2004 closing date and Peterson paid Golub nothing under the Listing Agreement.

1 3.12 Notwithstanding the failure of Geraldine Kirk-Hughes to close on the Peterson Property
2 by November 12, 2004, title to the Adkinson Property was transferred to Geraldine Kirk-
3 Hughes assignee, K-H Associates.

4 3.13 Notwithstanding the failure of Geraldine Kirk-Hughes to close on the Peterson Property
5 by November 12, 2004, between November 12, 2004 and March 11, 2005 Geraldine
6 Kirk-Hughes continued to access the Peterson Property and made efforts toward
7 development of the Peterson Property with Peterson's knowledge and permission.
8

9 3.14 In his discussions with Peterson, Polatis represented to Peterson that the Listing
10 Agreement with Golub was illegal and that Peterson would benefit from selling the
11 Peterson Property directly to Polatis.

12 3.15 Peterson was aware that if he sold the Peterson Property to Polatis, it would ultimately
13 be transferred to Geraldine Kirk-Hughes or an entity she was involved with, but did not
14 want to transfer title directly to Geraldine Kirk-Hughes.
15

16 3.16 On March 1, 2005, Polatis entered into a written agreement with Peterson to purchase
17 the Peterson Property and took title to it on March 4, 2005.

18 3.17 On March 11, 2005 Polatis transferred title in the Peterson Property to K-H
19 Development, whose managing member is Geraldine Kirk-Hughes.

20 3.18 On April 18, 2005, K-H Associates, whose sole owner is Geraldine Kirk-Hughes,
21 transferred title in the Adkinson property to K-H Development.
22

23 3.19 By April 18, 2005, Geraldine Kirk-Hughes, as managing member of K-H Development,
24 had acquired title to both the Adkinson and Peterson Properties.
25
26

1 3.20 As a result of Peterson's sale of the Peterson Property to Polatis and subsequent transfer
2 to K-H Development, Petersons received roughly \$500,000 more than they would have
3 by selling the Peterson Property to Geraldine Kirk-Hughes.

4 3.21 As a result of Peterson's sale of the Peterson Property to Polatis and subsequent transfer
5 to K-H Development, Geraldine Kirk-Hughes and K-H Development purchased the
6 Peterson Property for roughly \$500,000 less than would have been paid under the
7 original Real Estate Purchase and Sale Agreement and also acquired title to the
8 Adkinson Property.
9

10 3.22 As a result of Peterson's sale of the Peterson Property to Polatis and subsequent transfer
11 to K-H Development, Polatis extinguished a large debt owed to Geraldine Kirk-Hughes.

12 3.23 As a result of Peterson's sale of the Peterson Property to Polatis and subsequent transfer
13 to K-H Development, Peterson did not pay Golub the \$941,000 commission under the
14 Listing Agreement and Golub lost his interest in the Adkinson Property.
15

16 4. **FIRST CAUSE OF ACTION – BREACH OF CONTRACT**

17 4.1 Plaintiffs re-allege paragraphs 1.1 through 3.23 of the Complaint as though fully set forth
18 herein.

19 4.2 By virtue of the Listing Agreement, Petersons were under a contractual obligation to pay
20 Golub the agreed-to commission so long as Golub's efforts were the procuring cause of
21 the sale of the Peterson Property.
22

23 4.3 The sale of the Peterson Property to Polatis was a direct result of Golub's efforts.

24 4.4 Petersons breached their contractual obligations when they failed to pay Golub a
25 commission after selling the Peterson Property to Polatis.
26

1
2 4.5 As a direct and proximate result of said breaches, Golub has been damaged in an amount
3 to be proven at trial.

4 **5. SECOND CAUSE OF ACTION – BREACH OF DUTY OF GOOD FAITH**

5 5.1 Plaintiffs re-allege paragraphs 1.1 through 4.5 of the Complaint as though fully set forth
6 herein.

7
8 5.2 By virtue of the Listing Agreement, Petersons owed Golub an implied duty of good faith.

9 5.3 Petersons breached their duty of good faith when they failed to pay Golub the
10 commission owed and otherwise acted to frustrate and circumvent the contractual
11 obligations of the Listing Agreement.

12 5.4 As a direct and proximate result of said breaches, Golub has been damaged in an amount
13 to be proven at trial.

14
15 **6. THIRD CAUSE OF ACTION – TORTIOUS INTERFERENCE WITH CONTRACT**

16 6.1 Plaintiffs re-allege paragraphs 1.1 through 5.4 of the Complaint as though fully set forth
17 herein.

18 6.2 Defendants were aware of the Listing Agreement between Petersons and Golub.

19 6.3 Defendants intentionally interfered with the contractual relationships and expectations of
20 Golub when they acted to frustrate and circumvent the purpose of the Listing Agreement.

21 6.4 As a direct and proximate result of said breaches, Golub has been damaged in an amount
22 to be proven at trial.
23
24
25
26

1 **7. FOURTH CAUSE OF ACTION – FRAUD**

2 7.1 Plaintiffs re-allege paragraphs 1.1 through 6.4 of the Complaint as though fully set forth
3 herein.

4 7.2 Defendants Geraldine Kirk-Hughes, K-H Associates, and K-H Development, through
5 words and conduct, intentionally misrepresented their intent to close on the Peterson
6 Property. Specifically, said Defendants repeatedly assured Golub that the Peterson
7 Property would close at a time when Kirk-Hughes accepted the assignment to purchase
8 the Atkinson property and while Polatis was brokering an alternate purchase of the
9 Peterson Property for Defendants' benefit.

10 7.3 Golub reasonably relied upon Defendants' material misrepresentations when title to the
11 Adkinson Property passed to K-H Associates in the absence of a closing on the Peterson
12 Property.

13 7.4 As a direct and proximate result of Defendants' conduct as described, Golub has been
14 damaged in an amount to be proven at trial.

15 **8. FOURTH CAUSE OF ACTION – QUANTUM MERUIT**

16 8.1 Plaintiffs re-allege paragraphs 1.1 through 7.4 of the Complaint as though fully set forth
17 herein.

18 8.2 Golub provided valuable realtor services to Petersons through which the Peterson
19 Property was sold for Petersons' benefit.

20 8.3 Plaintiffs are entitled to the reasonable value of the services provided in an amount to be
21 proven at trial.

1 **9. FIFTH CAUSE OF ACTION – CONSPIRACY TO DEFRAUD**

2 9.1 Plaintiffs re-allege paragraphs 1.1 through 8.3 of the Complaint as though fully set forth
3 herein.

4 9.2 Defendants conspired to deprive Golub of the benefits of the Listing Agreement and
5 through their actions, furthered that conspiracy.

6 9.3 As a direct and proximate result of Defendants' conduct as described, Golub has been
7 damaged in an amount to be proven at trial.
8

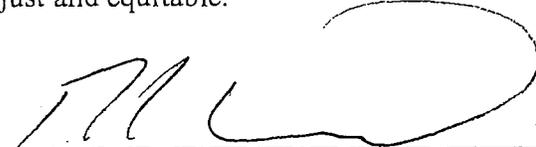
9 **10. DEMAND FOR JURY TRIAL**

10 10.1 Pursuant to I.R.C.P. 38(b), Plaintiffs demand a jury trial consisting of twelve (12) jurors.
11

12 **WHEREFORE**, Plaintiffs pray that:

- 13 1. Judgment be granted in favor of Plaintiffs for all claims against Defendants in an amount
14 to be proven at trial, but more than the jurisdictional limit in excess of \$10,000.00;
15
16 2. Plaintiffs be granted equitable relief against Defendants;
17
18 3. Plaintiff recover all costs and attorneys' fees incurred in bringing these claims against
19 Defendants pursuant to I.C. §§12-120(3); and 12-121 and other appropriate authority;
20
21 4. Plaintiffs recover pre-judgment interest; and
22
23 5. For such other relief the Court deems just and equitable.

24 DATED this 29 day of October, 2007.

25
26

MICHAEL T. HOWARD, ISB No. 6128
KENNETH B. HOWARD, ISB No. 1999
WINSTON & CASHATT
Attorneys for Plaintiffs

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED 143

2008 JUN 11 PM 1:43

CLERK DISTRICT COURT
DEPUTY
[Signature]

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11 Telephone: (208) 676-8890

12 Attorneys for Plaintiffs

13 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
14 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

15 ALAN GOLUB and MARILYN GOLUB,
16 husband and wife,

17 Plaintiffs,

18 vs.

19 GERALDINE KIRK-HUGHES and PETER
20 SAMPSON, husband and wife; KIRK-
21 HUGHES DEVELOPMENT, LLC, a Delaware
22 limited liability company; KIRK-HUGHES &
23 ASSOCIATES, INC., a Nevada corporation;
24 KELLY POLATIS, an individual, and
25 DELANO D. AND LENORE J. PETERSON,
26 husband and wife,

Defendants.

Case No. CV07-8038

AFFIDAVIT OF ALAN GOLUB IN SUPPORT
OF MOTION FOR DEFAULT JUDGMENT
AGAINST KELLY POLATIS

AFFIDAVIT OF ALAN GOLUB
PAGE 1

1 STATE OF IDAHO)
2)
3) :ss
4 County of Kootenai)

5 ALAN J. GOLUB, being first duly sworn and upon oath, deposes and states as follows:

6 1. That I am a Plaintiff in the above matter and have knowledge of the facts and
7 circumstances in this case.

8 2. That I am a licensed real estate agent within the State of Idaho.

9 3. On April 22, 2004 I entered into a listing agreement with Delano Peterson for sale his
10 property, under which he would receive a net amount of \$2 million for the property on the north side of
11 Highway 97 and \$2 million for the property south of Highway 97. Under this agreement, I would
12 receive 100% of any amounts between \$4 and \$4.4 million, and 50% of any amounts over \$4.4 million.

13 4. A true and correct copy of the listing agreement is attached hereto as Exhibit 1.

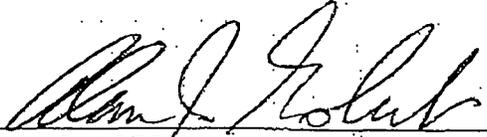
14 5. On May 8, 2004, I procured a \$6,000,000.00 dollar offer from Geraldine Kirk-Hughes to
15 purchase the property. This offer was accepted by Peterson and the two entered into a purchase and sale
16 agreement.

17 6. The purchase and sale agreement was later modified to reflect a net sale price of
18 \$5,482,000.00 and ultimately set to close on November 12, 2004.

19 7. Peterson's sale to Ms. Kirk-Hughes did not close on November 12, 2004, but the property
20 was ultimately transferred to her on March 11, 2005.

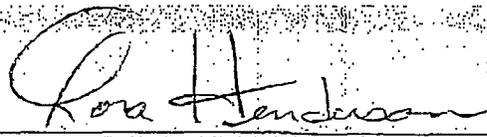
21 8. Pursuant to the listing agreement, I was entitled to a realtor fee of \$941,000.00 from the
22 sale to Ms. Kirk-Hughes.
23
24
25
26

1 9. Neither Peterson nor Kirk-Hughes paid my realtor fees.

2
3 
4 ALAN J. GOLUB

5 SUBSCRIBED AND SWORN to before me this 11th day of June, 2008.

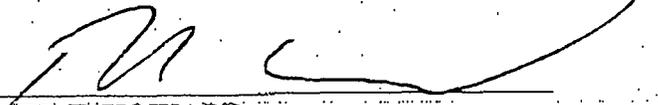


6
7 
8 Notary Public in and for the State of Idaho
9 Residing at Allied
10 My Commission Expires: 10-25-10

11 I hereby certify that I caused a true and
12 complete copy of the foregoing to be mailed,
13 postage prepaid; hand delivered; sent
via facsimile on June 7, 2008, to:

14 Edwin B. Holmes
15 Holmes Law Offices, P.A.
16 8109 N. Wayne Drive
17 PO Box 569
Hayden, ID 83835-0569
Attorney for Defendants, Delano D. Peterson and Lenore J. Peterson

18 Patrick E. Miller
19 Paine, Hamblen, Coffin, Brooke & Miller LLP
20 701 Front Ave., Suite 101
21 P.O. Box E
Coeur d'Alene, ID 83816-0328
Attorney for Defendants, Kirk-Hughes/Sampson

22
23 
24 MICHAEL T. HOWARD
128365

Pacific Real Estate & Investment
To: ~~Lee Sternberg~~ Alan Golub
Money America, LLC
Hayden ~~Coeur d'Alene~~, Idaho

Pg 1/2

22 April 2004

FM; Delano D. Peterson
13484 Hwy 97 - S
Hamison, ID 83823-8722

Subject: Agreement for potential land sale.

AGREEMENT

I (~~LEE STERNBERG~~ ALAN GOLUB), agree to allow ~~LEE STERNBERG~~ ALAN GOLUB to pursue obtaining a buyer for some, or all, of my property located in Sects 3, 10 & 11. 49N03W-3, 10, & 11

(CONDITIONS)

1. 240A ± on North side of Hwy 97.
 - A. Sale must result in a minimum of \$2 million (NET) for Peterson
 - B. Should the gross sale exceed \$2.2 million, the excess will be shared equally (50/50) between Peterson & Sternberg.
 - C. The Real Estate Lease between Peterson and Kootenai County must be maintained (Solid Waste collection). Renewals for this lease must be negotiated in good faith.
2. 280A ± on South side of Hwy 97
 - A. Sale must result in a minimum of \$2.0 million for Peterson.

Alan Golub 4/22/04

Delano D Peterson 4/22/04

12



Pg 2/2

B. Should the gross sale exceed \$2.1 million, ^{22 Apr '04} the excess will be shared equally (50/50) between Peterson & Sternberg.

C. Peterson would be allowed occupancy of the portion of land in section 10 for a period of 2 yrs after closing to remove personal property. (Except permanent structures)

D. Peterson would be allowed a period of 18 mos after closing to ~~log~~ log the timbered area.

3. TERM OF AGREEMENT

A. This agreement expires at COB 7 May 2004, unless agreed to in writing.

B. Seller cannot negotiate a sale, with a registered buyer, for a period of 180 days, after listing expiration date, without paying a commission. Pacific Real Estate to register in writing, all potential buyers, with seller

Delano D Peterson 4/22/04
Landowner
DELANO D PETERSON

Alan Golub 4/22/04
Lee Sternberg
Money America LLC
Pacific Real Estate & Inv
Alan Golub

This agreement is extended until 10/ May / 2004 / ~~2004~~ terms remain the same. Delano D Peterson Alan Golub

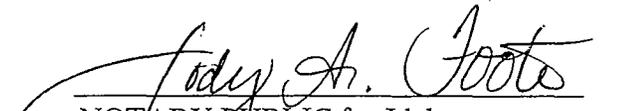
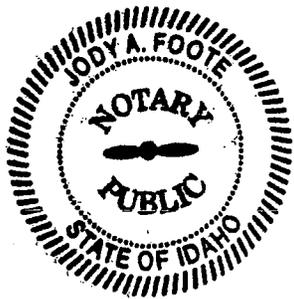
2. Attached hereto as Exhibit A is a true and correct copy of Plaintiffs' Responses to Defendants Kirk-Hughes' Second Set of Requests for Admission.

DATED this 21st day of October, 2008.



Patrick E. Miller

SUBSCRIBED AND SWORN TO before me this 21st day of October, 2008.



NOTARY PUBLIC for Idaho
Residing at Coeur d'Alene
My commission expires: 7/10/2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael T. Howard
Kenneth B. Howard
WINSTON & CASHATT
601 W. Riverside, Suite 1900
Spokane, WA 99201

- U.S. MAIL
- HAND DELIVERED
- OVERNIGHT MAIL
- TELECOPY (FAX) to:
(509) 838-1416

Edwin B. Holmes
P. O. Box 569
Hayden, ID 83835-0569

- U.S. MAIL
- HAND DELIVERED
- OVERNIGHT MAIL
- TELECOPY (FAX) to:
762-0199

Bruce Owens
Regina M. McCrea
Owens & Crandall, PLLC
1859 N. Lakewood Drive, Suite 104
Coeur d'Alene, ID 83814

- U.S. MAIL
- HAND DELIVERED
- OVERNIGHT MAIL
- TELECOPY (FAX) to:
667-1939



Patrick E. Miller

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EXHIBIT A

1
2
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12 Attorneys for Plaintiffs

13 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
14 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

15 ALAN GOLUB and MARILYN GOLUB,
16 husband and wife,

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18 vs.

19 GERALDINE KIRK-HUGHES and PETER
20 SAMPSON, husband and wife; KIRK-
21 HUGHES DEVELOPMENT, LLC, a Delaware
22 limited liability company; KIRK-HUGHES &
23 ASSOCIATES, INC., a Nevada corporation;
24 KELLY POLATIS, an individual, and
25 DELANO D. AND LENORE J. PETERSON,
26 husband and wife;

Defendants.

Case No. CV07-8038

PLAINTIFFS RESPONSES TO
DEFENDANTS KIRK-HUGHES' SECOND
SET OF REQUESTS FOR ADMISSIONS

TO: PLAINTIFFS AND TO YOUR ATTORNEY, Michael T. Howard

YOU WILL PLEASE TAKE NOTICE that Defendants Geraldine Kirk-Hughes and Peter
Sampson, Kirk-Hughes Development, LLC, and Kirk-Hughes & Associates, Inc. (collectively

PLAINTIFFS' RESPONSES TO DEFENDANTS' KIRK-
HUGHES SECOND SET OF REQUESTS FOR
ADMISSIONS: PAGE 1

LAW OFFICES OF
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250 NORTHWEST BLVD., SUITE 107A
COEUR D'ALENE, IDAHO 83814
(208) 667-2103
FAX (208) 785-2121

1 hereinafter "Kirk-Hughes"), by and through their counsel of record, hereby request that you admit the
2 truth of the following Requests for Admissions within thirty (30) days from service hereof, in
3 accordance with the provisions of Rule 26, 36, and 37 of the Idaho Rules of Civil Procedure.

4 Idaho Rule of Civil Procedure 37(c) provides that, if a party fails to admit the truth of any
5 matters requested under Idaho Rule of Civil Procedure 36 and, if the party requesting the admission
6 therefore proves the truth of the matter, the Court may award to the requesting party the reasonable
7 expenses it incurs in making that proof, including reasonable attorney's fees.

8
9 Idaho Rule of Civil Procedure 36(a) provides that each matter for which admission is requested
10 is admitted unless, within thirty (30) days after service of this request, the party to whom this request is
11 directed serves upon the party requesting the admission a written answer, under oath, or objection
12 addressed to the matter and signed by the party or by his/her attorney. If objection is made, you must
13 state the reasons therefore. If you cannot truthfully admit or deny the matter, you must set forth in detail
14 the reasons why you cannot admit or deny the request for admission.

15
16 A denial shall fairly meet the substance of a requested admission. When good faith requires that
17 you qualify a response or deny only a part of the matter to which an admission is requested, you should
18 specify so much of it as is true and only qualify or deny the remainder.

19
20 You may not give lack of information or knowledge as a reason for an inability to admit or deny
21 a matter unless you have first made a reasonable inquiry and, despite it, the information known or
22 readily obtainable by you is sufficient to enable you to admit or deny it.

23 DEFINITIONS

24 In responding to this discovery, please apply the following definitions:
25
26

PLAINTIFFS' RESPONSES TO DEFENDANTS' KIRK-
HUGHES SECOND SET OF REQUESTS FOR
ADMISSIONS - PAGE 2

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1 1. "You" or "Your" refers to the party to whom this discovery is addressed (i.e., the
2 responding party). Further, "You" and "Your" refer as well to the responding party's spouse, attorney(s),
3 agent(s), representative(s), accountant(s) and/or investigator(s), as applicable.

4 2. "Registered Buyer" conveys the same meaning as set forth in the April 22, 2004
5 "Agreement for Potential Land Sale" signed by you.

6 3. "Communication(s)" or "Communicated" refers to telephone calls, e-mails, letters, in-
7 person meetings, or facsimile transmissions.

8
9 REQUEST FOR ADMISSION NO. 1: Admit that Defendants Petersons sold the Peterson
10 property for \$5 million dollars to Defendant Kelly Polatis.

11 RESPONSE: Admit.

12
13
14 REQUEST FOR ADMISSION NO. 2: Admit that you entered into an "Agreement for
15 Potential Land Sale" with Delano Peterson on April 22, 2004.

16 RESPONSE: Admit that Golub entered into a real estate brokerage agreement with
17 Delano Peterson regarding the subject of "Agreement for Potential Land Sale" on April 22, 2004.

18
19 REQUEST FOR ADMISSION NO. 3: Admit that Exhibit A is a true and correct copy of the
20 "Agreement for Potential Land Sale" you signed on April 22, 2004.

21 RESPONSE: Deny. Exhibit A is a copy of the Brokerage Agreement as amended on a
22 later date.

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PLAINTIFFS' RESPONSES TO DEFENDANTS' KIRK-
HUGHES SECOND SET OF REQUESTS FOR
ADMISSIONS - PAGE 3

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1 REQUEST FOR ADMISSION NO. 4: Admit that the "Agreement for Potential Land Sale"
2 represents the only contract entered into between Pacific Real Estate & Investment and Delano Peterson
3 regarding the Peterson property identified in your Complaint.

4 RESPONSE: Admit.

6 REQUEST FOR ADMISSION NO. 5: Admit that the "Agreement for Potential Land Sale"
7 represents the entire agreement between Pacific Real Estate & Investment and Delano Peterson
8 regarding the Peterson property identified in your Complaint.

9 RESPONSE: Deny.

10 REQUEST FOR ADMISSION NO. 6: Admit that paragraph 3(A) of the "Agreement for
11 Potential Land Sale" states: "This agreement expires at COB on May 7, 2004, unless agreed to in
12 writing."
13

14 RESPONSE: Admit.

15 REQUEST FOR ADMISSION NO. 7: Admit that paragraph 3(B) of the "Agreement for
16 Potential Land Sale" states: "Seller cannot negotiate a sale, with a registered buyer, for a period of 180
17 days, after the listing expiration date, without paying a commission. Pacific Real Estate to register in
18 writing, all potential buyers with seller."
19

20 RESPONSE: Admit.
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PLAINTIFFS' RESPONSES TO DEFENDANTS' KIRK,
HUGHES SECOND SET OF REQUESTS FOR
ADMISSIONS - PAGE 4

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1 REQUEST FOR ADMISSION NO. 8: Admit that the expiration date of the "Agreement for
2 Potential Land Sale" was "extended until 10/May/04."

3 RESPONSE: Admit that the period of time for Alan Golub to fulfill his contractual
4 obligations of obtaining a buyer and registering all potential buyers was extended in writing to
5 May 10, 2004. However, deny that May 10, 2004 was the expiration date of the brokerage
6 agreement once Mr. Golub fulfilled his contractual obligations.
7

8
9 REQUEST FOR ADMISSION NO. 9: Admit that November 6, 2004 is 180 days after May 10,
10 2004.

11 RESPONSE: Admit that November 6, 2004 is 180 calendar days after May 10, 2004. Deny
12 that November 6, 2004 is 180 days after expiration of the brokerage agreement between Golub
13 and Peterson.
14

15
16 REQUEST FOR ADMISSION NO. 10: Admit that you were deposed in the case entitled
17 *Tomlinson Black North Idaho v. Geraldine Kirk-Hughes, et al.* (Case No. 06-CV-0118- EJL) on
18 September 25, 2007.

19 RESPONSE: Admit.
20

21
22 REQUEST FOR ADMISSION NO. 11: Admit that Exhibit B is a true and correct copy of your
23 September 25, 2007 deposition transcript.

24 RESPONSE: Admit.
25
26

PLAINTIFFS' RESPONSES TO DEFENDANTS' KIRK-
HUGHES SECOND SET OF REQUESTS FOR
ADMISSIONS - PAGE 5

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1 **REQUEST FOR ADMISSION NO. 12:** Admit that you were placed under oath before
2 testifying in the September 25, 2007, deposition.

3 **RESPONSE:** Admit.

4
5 **REQUEST FOR ADMISSION NO. 13:** Admit that you were represented by counsel in your
6 September 25, 2007, deposition.

7 **RESPONSE:** Admit.

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9
10 **REQUEST FOR ADMISSION NO. 14:** Admit that in your September 25, 2007, deposition
11 you testified as follows: "Because it was my impression that Ms. Kirk-Hughes did not individually have
12 the financial capability to close on the contract. And in her conversations she talked about investors that
13 she was looking to interest in the property." (September 25, 2007, Depo. of Alan Golub, 82:5-9.)

14 **RESPONSE:** Admit the fact that such statement was made, but DENY the substance,
15 foundation, validity, or legal effect of such statements, conclusions, or opinions as they relate to
16 Plaintiff's legal claims against Defendants.

17
18
19 **REQUEST FOR ADMISSION NO. 15:** Admit that in your September 25, 2007, deposition, it
20 was your impression that as of May 22, 2004, Geraldine Kirk-Hughes did not individually have financial
21 capacity to close on the Peterson contract.

22 **RESPONSE:** Admit.

1 REQUEST FOR ADMISSION NO. 16: Admit that the amount of your real estate commission
2 was based upon the sales prices of the Peterson property.

3 RESPONSE: Admit the contractual amount of the commission was based upon the sales
4 price of the Peterson property. However, deny that Golub's claims are limited to the contractual
5 amount the Peterson Property was ultimately sold for.
6

7
8 REQUEST FOR ADMISSION NO. 17: Admit that your contention that this dispute involves
9 "approximately \$941,000 in real estate commission" is based upon a sales price of \$5,482,000 for the
10 Peterson property.

11 RESPONSE: Admit.

12
13 REQUEST FOR ADMISSION NO. 18: Admit that in your September 25, 2007, deposition
14 you testified as follows: "The amount -- the total commission to all real estate agents would have been
15 941. We had agreed to two percent commission to Darlene Moore. And we have that in writing to
16 Darlene Moore, which represented 109,640. The 3.5 percent commission to Tomlinson represented
17 191,870. Estimated closing cost of 20,000. And then my agreement with -- my contract with Pacific
18 Real Estate is a 75/25 split. So the remaining dollars 154,872.50 would go to Pacific Real Estate. And to
19 Alan Golub 464,617.50. So what we wanted to show clearly to Mr. Peterson in writing exactly what --
20 what he would have been receiving in our contract." (September 25, 2007, depo. of Alan Golub, 148:5-
21 17.)
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PLAINTIFFS' RESPONSES TO DEFENDANTS' KIRK-
HUGHES SECOND SET OF REQUESTS FOR
ADMISSIONS - PAGE 7

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(208) 887-2103
FAX (208) 785-2121

1 **RESPONSE:** Admit the fact that such statement was made, but **DENY** the substance,
 2 foundation, validity, or legal effect of such statements, conclusions, or opinions as they relate to
 3 Plaintiff's legal claims against Defendants.

4
 5 **REQUEST FOR ADMISSION NO. 19:** Admit that under the terms of "Agreement for
 6 Potential Land Sale" the total commission payable to all real estate agents would be \$700,000 if the
 7 Peterson property sold for \$5 million.

8
 9 **RESPONSE:** Admit that the contractual amount due upon sale of the Peterson Property
 10 for a sum of \$5,000,000 would be \$700,000. However, deny that Golub's claims are limited to the
 11 contractual amount the Peterson Property was ultimately sold for.

12
 13 **REQUEST FOR ADMISSION NO. 20:** Admit that Defendant Polatis was not a "registered
 14 buyer."

15
 16 **RESPONSE:** Deny.

17
 18 **REQUEST FOR ADMISSION NO. 21:** Admit that Defendant Polatis first offered to purchase
 19 the Peterson property in February 2005.

20
 21 **RESPONSE:** Deny.

22
 23 **REQUEST FOR ADMISSION NO. 22:** Admit that you communicated with Delano Peterson
 24 after September 27, 2004.

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 26 **RESPONSE:** Admit.

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REQUEST FOR ADMISSION NO. 23: Admit that Geraldine Kirk-Hughes was unable to obtain financing by November 12, 2004, to purchase the Peterson property for \$5,482,000.

RESPONSE: Deny.

DATED this 16th day of September, 2008.

By: _____

Patrick E. Miller
Attorney for Defendants Kirk-Hughes

1 STATE OF IDAHO)

: ss:

2 County of Kootenai)

3 ALAN GOLUB, being first duly sworn, on oath, deposes and says:

4 I am one of the Plaintiffs herein; that I have read the foregoing Requests for Admissions to
5 Plaintiffs and my answers thereto, know the contents thereof and believe the same to be true and
6 accurate to the best of my personal knowledge and information.

7
8 ALAN GOLUB

9 SUBSCRIBED AND SWORN to before me on the _____ day of _____, 2008.

10
11 NOTARY PUBLIC in and for the
12 State of Idaho, residing at _____
13 My Commission Expires: _____

14 STATE OF IDAHO)

: ss:

15 County of Kootenai)

16 MARILYN GOLUB, being first duly sworn, on oath, deposes and says:

17 I am one of the Plaintiffs herein; that I have read the foregoing Requests for Admissions to
18 Plaintiffs and my answers thereto, know the contents thereof and believe the same to be true and
19 accurate to the best of my personal knowledge and information.

20
21 MARILYN GOLUB

22 SUBSCRIBED AND SWORN to before me on the _____ day of _____, 2008.

23
24 NOTARY PUBLIC in and for the
25 State of Idaho, residing at _____
26 My Commission Expires: _____

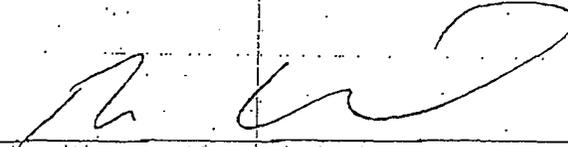
PLAINTIFFS' RESPONSES TO DEFENDANTS' KIRK-
HUGHES SECOND SET OF REQUESTS FOR
ADMISSIONS - PAGE 10

LAW OFFICES OF
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280 NORTHWEST BLVD., SUITE 107A
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(208) 667-2103
FAX: (208) 785-2121

ATTORNEY CERTIFICATION

The undersigned attorney for the party responding to the above discovery matters signs this response in compliance with Rule 26(f) of the Idaho Rules of Civil Procedure.

DATED this 15 day of October, 2008.

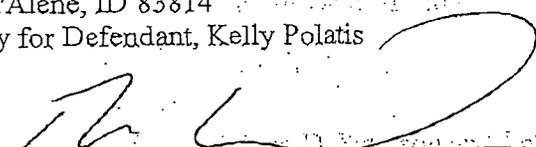

MICHAEL T. HOWARD, ISB #6128
Attorney for Plaintiffs

I hereby certify that I caused a true and complete copy of the foregoing to be mailed, postage prepaid; hand delivered; sent via facsimile on October 15, 2008, to:

Edwin B. Holmes
Holmes Law Offices, P.A.
8109 N. Wayne Drive
PO Box 569
Hayden, ID. 83835-0569
Attorney for Defendants, Delano D. Peterson and Lenore J. Peterson

Patrick E. Miller
Paine, Hamblen, Coffin, Brooke & Miller LLP
701 Front Ave., Suite 101
P.O. Box E
Coeur d'Alene, ID 83816-0328
Attorney for Defendants, Kirk-Hughes/Sampson

Regina M. McCrea
Owens & Crandall, PLLC
1859 N. Lakewood Dr., Suite 104
Coeur d'Alene, ID 83814
Attorney for Defendant, Kelly Polatis


MICHAEL T. HOWARD
136059.doc

PLAINTIFFS' RESPONSES TO PLAINTIFFS
RESPONSES TO DEFENDANTS KIRK-HUGHES'
SECOND SET OF REQUESTS FOR ADMISSIONS
PAGE 11

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Winston & Cashatt
250 NORTHWEST BLVD., SUITE 107A
COEUR D'ALENE, IDAHO 83814
(208) 667-2103
FAX (208) 785-2121

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 2-26-09
AT 2:57 O'CLOCK P.M.
CLERK, DISTRICT COURT
Susan Taylor DEPUTY

1
2
3 MICHAEL T. HOWARD, ISB No. 6128
4 WINSTON & CASHATT
5 250 Northwest Boulevard, Suite 107A
6 Coeur d'Alene, Idaho 83814
7 Telephone: (208) 667-2103

8 KENNETH B. HOWARD, ISB No. 1999
9 250 Northwest Boulevard, Suite 107A
10 Coeur d'Alene, Idaho 83814
11 Telephone: (208) 676-8890

12 Attorneys for Plaintiffs

13 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
14 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

15 ALAN GOLUB and MARILYN GOLUB,
16 husband and wife,

17 Plaintiffs,

18 vs.

19 GERALDINE KIRK-HUGHES and PETER
20 SAMPSON, husband and wife; KIRK-
21 HUGHES DEVELOPMENT, LLC, a Delaware
22 limited liability company; KIRK-HUGHES &
23 ASSOCIATES, INC., a Nevada corporation;
24 KELLY POLATIS, an individual, and
25 DELANO D. AND LENORE J. PETERSON,
26 husband and wife,

Defendants.

Case No. CV07-8038

AFFIDAVIT OF MICHAEL T. HOWARD

MICHAEL T. HOWARD, being first duly sworn and upon oath, deposes and states as follows:

1. I am one of the attorneys for the Plaintiffs herein and make this Affidavit on Plaintiffs' behalf. I have personal knowledge of the facts described in this Affidavit and am competent to testify

AFFIDAVIT OF MICHAEL T. HOWARD - PAGE 1

1 thereto. This Affidavit is submitted in support of Plaintiffs' Motion for Default Judgment against Kelly
2 Polatis and Kirk-Hughes, et. al.

3 2. On October 30, 2007, I filed suit against Kelly Polatis and Hughes et. al, on Plaintiffs'
4 behalf.

5 3. On November 6, 2007, Kelly Polatis was personally served with process.

6 4. On November 25, 2007, Geraldine Kirk-Hughes and Peter Sampson were personally
7 served with process.
8

9 5. On November 6, 2007, Kirk-Hughes Development, LLC was personally served with
10 process.

11 6. On November 25, 2007, Kirk-Hughes & Associates, Inc. was personally served with
12 process.
13

14 7. I hereby certify that to the best of my knowledge, the name of the persons/entities against
15 whom judgment is requested, the address most likely to give notice of default judgment is as follows:

16 a. Kelly Polatis, 3227 Millwright, Coeur d'Alene, ID 83815;

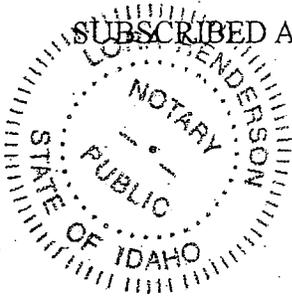
17 b. Geraldine Kirk-Hughes and Peter Sampson, 7400 Oak Grove Avenue, Las Vegas, NV;

18 c. Kirk-Hughes Development, LLC, is c/o The Corporation Trust Company, 1209 North
19 Orange Street, Wilmington, Delaware 19801;

20 d. Kirk-Hughes & Associates, Inc., c/o Ollie Kirk, 8013 Ryans Reef Lane, Las Vegas, NV.
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3 MICHAEL T. HOWARD

4 SUBSCRIBED AND SWORN to before me this 18 day of February, 2009.



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L. Henderson
Notary Public in and for the State of Idaho
Residing at Coeur d'Alene, Idaho

My Commission Expires: 10-25-10

I hereby certify that I caused a true and complete copy of the foregoing to be mailed, postage prepaid; hand delivered; sent via facsimile on February 26th, 2009, to:

Edwin B. Holmes
Holmes Law Offices, P.A.
8109 N. Wayne Drive
PO Box 569
Hayden, ID 83835-0569
Defendants, Delano D. Peterson and Lenore J. Peterson

M. T. Howard
MICHAEL T. HOWARD
146683

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS #422
FILED:

2009 FEB 26 PM 2:57 J.R.

CLERK DISTRICT COURT

Molly Rosenbusch
DEPUTY *NR*

1
2
3 MICHAEL T. HOWARD, ISB No. 6128
4 WINSTON & CASHATT
5 250 Northwest Boulevard, Suite 107A
6 Coeur d'Alene, Idaho 83814
7 Telephone: (208) 667-2103

8 KENNETH B. HOWARD, ISB No. 1999
9 250 Northwest Boulevard, Suite 107A
10 Coeur d'Alene, Idaho 83814
11 Telephone: (208) 676-8890

12 Attorneys for Plaintiffs

13 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
14 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

15 ALAN GOLUB and MARILYN GOLUB,
16 husband and wife,
17
18 Plaintiffs,

19 vs.

20 GERALDINE KIRK-HUGHES and PETER
21 SAMPSON, husband and wife; KIRK-
22 HUGHES DEVELOPMENT, LLC, a Delaware
23 limited liability company; KIRK-HUGHES &
24 ASSOCIATES, INC., a Nevada corporation;
25 KELLY POLATIS, an individual, and
26 DELANO D. AND LENORE J. PETERSON,
husband and wife,
Defendants.

Case No. CV07-8038

PLAINTIFFS' MOTION AND
MEMORANDUM FOR DEFAULT
JUDGMENT RE: DEFENDANTS POLATIS
AND KIRK-HUGHES et. al.

MOTION FOR DEFAULT JUDGMENT

Pursuant to I.R.C.P 55(b)(1) Plaintiffs move the Court for Default Judgment against Defendants

PLAINTIFFS' MOTION AND MEMORANDUM FOR
DEFAULT JUDGMENT RE: DEFENDANTS' POLATIS
AND KIRK-HUGHES et. al. - PAGE 1

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1 Kelly Polatis ("Polatis"), Geraldine Kirk-Hughes, Peter Sampson, Kirk-Hughes Development, LLC, and
2 Kirk-Hughes & Associates, Inc. (collectively referred to as "Kirk-Hughes"). This motion is supported
3 by the proceeding Memorandum and the February 18, 2009 Affidavit of Michael T. Howard and the
4 June 10, 2008 Affidavit of Alan J. Golub.

5
6 **MEMORANDUM IN SUPPORT OF DEFAULT JUDGMENT**

7 **1. RELIEF REQUESTED**

8 Plaintiffs seek default judgment against Defendants Polatis and Kirk-Hughes in the principal
9 amount of \$941,000.00, interest of 12% running from March 11, 2005 to the date of entry of this Order,
10 and thereafter, post-judgment interest to be determined by law until fully satisfied.

11 **2. SUMMARY OF ARGUMENT**

12 Plaintiffs' motion for default judgment should be granted because Defendants have failed to
13 appear or otherwise defend the claims within the time provided by law or by the Court's Order, and
14 Plaintiffs' damages are capable of sum certain calculation.

15 **3. FACTS**

16
17 3.1 On October 30, 2007, Plaintiffs filed a Complaint against Defendants Polatis and Kirk-Hughes.

18 [See Complaint]

19
20 3.2 Polatis was personally served on November 6, 2007 [See Affidavit of Return of Service].

21 3.3 Geraldine Kirk-Hughes and Peter Sampson were personally served on November 25, 2007. [See

22 Affidavits of Service]

23 3.4 Kirk-Hughes Development, LLC was personally served on November 6, 2007. [See Affidavit of

24 Process Server]

25
26
PLAINTIFFS' MOTION AND MEMORANDUM FOR
DEFAULT JUDGMENT RE: DEFENDANTS' POLATIS
AND KIRK-HUGHES et. al. - PAGE 2

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(208) 667-8100
FAX (208) 768-2121

- 1 3.5 Kirk-Hughes & Associates, Inc. was personally served on November 25, 2007. [See Affidavit of
2 Service]
- 3 3.6 On February 7, 2008 Kirk-Hughes et. al. personally appeared and answered through their
4 attorney, Patrick Miller. [See Kirk-Hughes Answer]
- 5 3.7 On January 8, 2008 an Order of Default was entered against Polatis for failure to appear within
6 the time provided by law. [See January 8, 2008 Order of Default]
- 7 3.8 On June 13, 2008 attorneys Bruce Owens and Regina McCrea appeared on behalf of Polatis and
8 moved to set aside the Order of Default. [See June 13, 2008 Appearance]
- 9 3.9 On August 27, 2008 the Court denied Polatis' motion to set aside the Order of Default.
- 10 3.10 Upon motion, on December 5, 2008 the Court granted attorneys Owens and McCrea leave to
11 withdraw from representation of Polatis and entered an Order directing that Polatis appear or
12 secure substitute counsel within 20 days or have Default Judgment entered against him. [See
13 December 5, 2008 Order of Withdrawal]
- 14 3.11 Upon motion, on February 4, 2009 the Court granted attorney Miller leave to withdraw from
15 representation of Kirk-Hughes and entered an Order directing that Kirk-Hughes appear or secure
16 substitute counsel within 20 days or have Default Judgment entered against them. [See
17 February 4, 2009 Order of Withdrawal]
- 18 3.12 As of February 25, 2009 neither Polatis nor Kirk-Hughes have obtained substitute counsel or
19 otherwise appeared to defend Plaintiffs' claims.
- 20
21
22

23 **4. ARGUMENT**

24 This motion is made pursuant I.R.C.P. 55(b)(1), which provides in pertinent part:

25 When the plaintiff's claim against a defendant is for a sum certain or for a
26 sum which can by computation be made certain, the court or the clear

PLAINTIFFS' MOTION AND MEMORANDUM FOR
DEFAULT JUDGMENT RE: DEFENDANTS' POLATIS
AND KIRK-HUGHES et. al. - PAGE 3

LAW OFFICES OF
Winston & Bashoff
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FAX (208) 755-8131

thereof may, upon request of the plaintiff, and upon the filing of an affidavit of the amount due showing the method of computation, together with any original instrument evidencing the claim . . . shall enter judgment for that amount and costs against the defendant.

I.R.C.P. 55(b)(1).

Defendants were personally served in or around November, 2007. Following withdrawal of their respective counsel, by Court order, Defendants were given twenty (20) days to secure substitute counsel, appear, or have default judgment entered against them. Plaintiffs' damages are based directly upon the contractual commission Plaintiff was to receive under his Real Estate Listing Agreement with Defendants Peterson, said amount being \$941,000. [See Affidavit of Alan J. Golub dated June 10, 2008]

Accordingly, because Defendants have not yet secured substitute counsel, have not otherwise appeared and are in violation of the Court's order, and Plaintiffs' damages are capable of mathematical computation, entry of default judgment is appropriate.

5. CONCLUSION

Plaintiffs request this Court enter an Order of Default Judgment against Defendants Polatis and Kirk-Hughes et. al. in the principal amount of \$941,000.00, together with costs and pre-judgment interest of 12% running from March 11, 2005 to the date of entry of this Order, and thereafter, post-judgment interest to be determined by law until fully satisfied.

Judgment is requested to be entered against Kelly Polatis, who's last known address, and that which is most likely to give him notice of this Judgment is 3227 Millwright, Coeur d'Alene, ID 83815. [See Affidavit Michael T. Howard]

Judgment is requested to be entered against Geraldine Kirk-Hughes and Peter Sampson, who's last known address, and that which is most likely to give them notice of this Judgment is 7400 Oak Grove Avenue, Las Vegas, Nevada. [See Affidavit Michael T. Howard]

PLAINTIFFS' MOTION AND MEMORANDUM FOR
DEFAULT JUDGMENT RE: DEFENDANTS' POLATIS
AND KIRK-HUGHES et. al. - PAGE 4

LAW OFFICES OF
Winston & Bashall
250 NORTHWEST BLVD., SUITE 107A
COEUR D'ALENE, IDAHO 83814
(208) 867-2100
FAX (208) 766-2121

1 Judgment is requested to be entered against Kirk-Hughes Development, LLC, which last known
2 address, and that which is most likely to give it notice of this Judgment is c/o The Corporation Trust
3 Company, 1209 North Orange Street, Wilmington, Delaware. [See Affidavit Michael T. Howard]

4 Judgment is requested to be entered against Kirk-Hughes & Associates, Inc., which last known
5 address, and that which is most likely to give it notice of this Judgment is c/o Ollie Kirk, 8013 Ryans
6 Reef Lane, Las Vegas, Nevada. [See Affidavit Michael T. Howard]

8 DATED this 26 day of February, 2009.

9
10 
11 MICHAEL T. HOWARD, ISB No. 6128
12 WINSTON & CASHATT
Attorneys for Plaintiffs

13 I hereby certify that I caused a true and
14 complete copy of the foregoing to be mailed,
15 postage prepaid; hand delivered; sent
via facsimile on February 26, 2009, to:

16 Edwin B. Holmes
17 Holmes Law Offices, P.A.
18 8109 N. Wayne Drive
19 PO Box 569
Hayden, ID 83835-0569
Defendants, Delano D. Peterson and Lenore J. Peterson

20 
21 MICHAEL T. HOWARD
146679

22
23
24
25
26
PLAINTIFFS' MOTION AND MEMORANDUM FOR
DEFAULT JUDGMENT RE: DEFENDANTS' POLATIS
AND KIRK-HUGHES et. al. - PAGE 5

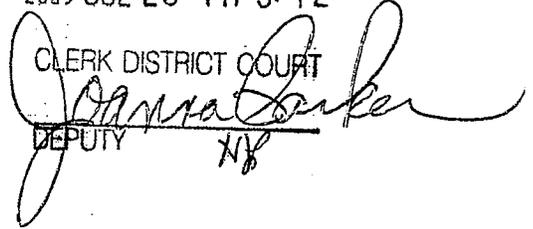
LAW OFFICES OF
Winston & Cashatt
260 NORTHWEST BLVD., SUITE 107A
COEUR D'ALENE, IDAHO 83014
(208) 897-2103
FAX (208) 786-2121

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 682
KJ

2009 JUL 23 PM 3:12

CLERK DISTRICT COURT

DEPUTY



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2 MICHAEL T. HOWARD, ISB No. 6128
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4 250 Northwest Boulevard, Suite 107A
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7 KENNETH B. HOWARD, ISB No. 1999
8 250 Northwest Boulevard, Suite 107A
9 Coeur d'Alene, Idaho 83814
10 Telephone: (208) 676-8890

11 Attorneys for Plaintiffs

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

vs.

GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-
HUGHES DEVELOPMENT, LLC, a Delaware
limited liability company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and
DELANO D. AND LENORE J. PETERSON,
husband and wife,

Defendants.

Case No. CV07-8038

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTIONS TO:

- 1) DISMISS CLAIMS AGAINST PETERSON;
- 2) STRIKE ALL PLEADINGS, MOTIONS,
AND PAPERS FILED BY L. SANDERS
JOINER; AND
- 3) ISSUE A RULE 54(b) CERTIFICATE OF
FINAL JUDGMENT

Plaintiffs submit this Memorandum in support of its motions to: 1) dismiss Plaintiffs' claims against Peterson; 2) strike all pleadings, motions or papers filed by L. Sanders Joiner; and 3) issue an IRCP 54(b) Certificate of Final Judgment.

PLAINTIFFS' SUPPORTING MEMORANDUM - PAGE

1

Golub vs Kirk-Hughes, etal

41501-2013 and 41505-2013

LAW OFFICES OF
Winston & Cashatt
250 NORTHWEST BLVD, SUITE 107A
COEUR D'ALENE, IDAHO 83814
(208) 667-2103
FAX (208) 785-2121

37

1 This Memorandum is not intended as a substantive response to any Motion filed by
2 Defendants, which have not yet been noted for hearing, and Plaintiffs reserve the right to submit
3 a substantive response consistent with the court rules if and when a Notice of Hearing is filed.

4 **1. RELIEF REQUESTED**

- 5 1) Plaintiffs request that the Court enter an Order, dismissing Peterson with prejudice and
6 without costs based upon a July 8, 2009 mediated settlement agreement.
7 2) Plaintiffs request that the Court enter an Order, striking all pleadings, motions, and other
8 papers signed or filed by L. Sanders Joiner.
9 3) Plaintiffs request that the Court issue a Rule 54(b) Certificate of Final Judgment against
10 all defendants except Kirk-Hughes Development, which is currently affected by an
11 automatic bankruptcy stay.

12 **2. SUMMARY OF ARGUMENT**

13 This case began as a multi-party lawsuit. On March 11, 2009 default judgments were
14 entered against all defendants except Peterson. However, those judgments were not final because
15 the Court denied Golubs' request for Rule 54(b) certification. Now, Golubs have settled their
16 remaining claims against Peterson, which effectively ends this litigation. However, because of an
17 automatic stay effecting Kirk-Hughes Development and subsequent filings by the purported
18 attorney for the defaulting Defendants, Golubs now request rulings from the Court necessary to
19 enter final judgment.

20 An order dismissing Peterson should be granted because Golubs have settled their claims
21 with Peterson and no other counter or cross claims exist. The defaulting Defendant's motions to
22 set aside the default judgments should be stricken because they were signed in violation of
23 I.R.C.P. 11(a)(1). Finally, because there are not additional claims or issues regarding any of the
24 parties, but because final judgment against Kirk-Hughes Development would violate the
25 bankruptcy stay, the Court should issue a Rule 54(b) certification of final judgment against all
26

1 defendants except Kirk-Hughes Development.

2 **3. PROCEDURAL BACKGROUND**

3 This is a multiple party action. On March 3, 2009 the Court entered an Order of Default
4 against all Defendants ("defaulting Defendants") except Peterson based upon the defaulting
5 Defendants' failure to appear within 20 days after the withdrawals of attorneys Owens and Miller
6 on 12/5/08 and 2/4/08 respectively. On March 4, Golubs filed a Motion for Final Judgment and
7 Rule 54(b) Certificate against the defaulting Defendants. On March 11, 2009 the Court entered
8 Default Judgment against the defaulting Defendants, but declined Golubs' request for Rule 54(b)
9 certification.

10 On March 11, 2009, an attorney by the name of L. Sanders Joiner filed a "Substitute of
11 Attorney" on behalf of the defaulting Defendants along with a "Motion to Set Aside Default and
12 Opposition to Judgment and 54(b) Certification." On March 26, 2009 Mr. Joiner filed a "Motion
13 to Set Aside Default Judgment or Reconsideration of Opposition to Motion for Default and 54(b)
14 Certification." Neither the defaulting Defendants nor Mr. Joiner noted either of the motions for
15 hearing.

16 On April 8, 2009 Golubs received notice that one of the defaulting Defendants, Kirk-
17 Hughes Development, had filed bankruptcy in Nevada. Because of this, on April 9 the Court
18 issued a Notice of Hearing to counsel for all parties, including Mr. Joiner, for a May 18, 2009
19 status conference. On May 18, 2009 the Court held a status conference to discuss the effect of
20 the automatic bankruptcy stay on the uninvolved defendants and upon the progression of the case.
21 Despite receiving notice, neither Mr. Joiner nor the defaulting Defendants appeared or
22 participated in the status conference. After argument, the Court ruled that the automatic
23 bankruptcy stay only affected Kirk-Hughes Development and that the August 17, 2009 trial date
24 and preparation for trial among the remaining parties remained unaffected.

1 Golubs and Peterson subsequently agreed to a July 8, 2009 mediation. Both Peterson's
2 counsel and the mediator, Charles Lempesis, provided notice of the mediation to Mr. Joiner.

3 *[Affidavit of Mike Howard]*

4 Golubs settled their claims against Peterson during the July 7 mediation. Again, neither
5 Mr. Joiner nor the defaulting Defendants participated. Pursuant to I.R.C.P. 41(a)(2), on July 23,
6 2009 Golubs filed a Motion for Dismissal of the claims against Peterson. Golubs also filed a
7 motion to strike any pleadings, motions, or other papers signed or filed by Mr. Joiner as well a
8 motion for final judgment and Rule 54(b) certification against all defendants except Kirk-Hughes
9 Development.

10 **4. ARGUMENT**

11 **4.1 The Court Should Enter An Order Dismissing Peterson.**

12 On July 8, 2009 Golubs entered into a mediated settlement agreement with Peterson,
13 agreeing to dismiss their claims against Peterson with prejudice and without costs to either party.
14 *[Affidavit of Michael Howard]* Peterson has previously answered and pursuant to I.R.C.P.
15 41(a)(1) can only be dismissed by stipulation of all parties that have appeared or by order of the
16 court. *See I.R.C.P. 41(a)(1)*. Though default judgments have been entered as to the remaining
17 parties, the Court has previously declined to issue a Rule 54(b) Certificate of Final Judgment and
18 therefore, they are technically still parties and Golubs have not obtained their stipulation for
19 dismissal of Peterson.

20 Pursuant to I.R.C.P. 41(a)(2), the Court is vested with authority to order dismissal of
21 Peterson notwithstanding a stipulation of the defaulting parties. Under the circumstances here,
22 the Court should enter the requested order of dismissal. There are no counter or cross claims by
23 or between Peterson and any other party. Accordingly, no other party will be affected by the
24 requested dismissal.
25
26

40

1
2 **4.2 The Court Should Enter An Order Striking All Motions, Pleadings,**
3 **and Other Papers Signed by L. Sanders Joiner.**

4 Pursuant to I.R.C.P. 11(a)(1) the Court should strike the purported appearance of Mr.
5 Joiner on behalf of the defaulting Defendants and should strike the motions to set aside Default
6 because they were not filed or signed by any of the defaulting Defendants and because Mr. Joiner
7 is not an attorney licensed to practice law in Idaho, and cannot otherwise appear as an agent of
8 the defaulting Defendants.

9 On March 11, 2009 two documents entitled "Substitute of Attorney" were signed and
10 filed by L. Sanders Joiner. Those documents bear Mr. Joiner's name, along with an address of
11 "2551 S. Apache Rd., # 105, Las Vegas, Nevada, 89117," Idaho Bar number of "7828," and the
12 denotation "Attorney for [Defendants]." In addition to his "appearance" as attorney for the
13 defaulting Defendants, Mr. Joiner also filed two motions to set aside the default order and
14 judgment on March 11 and March 26.

15 Despite their denomination as Substitution of Attorney, neither document bears the
16 signature of the substituted attorneys, Mr. Owens or Mr. Miller. Pursuant to I.R.C.P. 11(b)(1),
17 the documents do not operate as a substitution of counsel due to their lack of signatures by the
18 withdrawing attorneys. Moreover, they were filed subsequent to the withdrawal by attorneys
19 Owens and Miller. Therefore, at best they could be considered as an appearance on behalf of the
20 defaulting Defendants. *See I.R.C.P. 4(i).*

21 However, the documents filed by Mr. Joiner are also ineffective and void as an
22 appearance or any other motion because they are not signed by the defaulting Defendants and Mr.
23 Joiner is not licensed to practice law in the state of Idaho.

24 Idaho Rule 11(a)(1) governs the signing of pleadings, motions and other papers and states
25 in relevant part:
26

1 Every pleading, motion, and other paper of a party represented by an attorney shall be
2 signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's
3 individual name, whose address shall be stated before the same may be filed. A party who
4 is not represented by an attorney shall sign the pleading, motion or other paper and state
5 the party's address.

6 **If a pleading, motion or other paper is not signed, it shall be stricken** unless it is
7 signed promptly after the omission is called to the attention of the pleader or movant. . . .

8 *I.R.C.P. 11(a)(1)*(emphasis added).

9 Despite the listing of Idaho State Bar number 7828, Mr. Joiner is not licensed to practice
10 law in Idaho because his status as a member of the bar is "inactive." [See Affidavit of Michael
11 Howard] Based upon the Idaho State Bar Rules, a lawyer designated as an "inactive member"
12 has failed to meet requirements for licensure for the current year and cannot engage in the
13 practice of law in Idaho. See *IBR 301(i)*.

14 The express language of Rule 11 requires either a party, or a party's Idaho licensed
15 attorney to sign the pleading. See *I.R.C.P. 11(a)(1)*; *Black v. Ameritel Inn*, 139 Idaho 511, 513
16 (2003). Because of his status as an inactive member of the bar, Mr. Joiner is not an Idaho
17 licensed attorney and neither document bears the signature of any of the defaulting Defendants.

18 Neither can Mr. Joiner act as an agent of the defaulting Defendants for the purpose of
19 filing pleadings, motions or other papers. In *Black*, supra, the Supreme Court specifically held
20 that pursuant to the signature requirements of Rule 11, an agent cannot sign a pleading for an
21 unrepresented party. See *id.* at 514.

22 Finally, the lack of a valid signature cannot now be cured by the signature of the
23 defaulting Defendants. In addressing the validity of a pleading bearing the signature of a
24 Washington attorney, the Supreme Court in *Black* held that the Idaho Rule 11 cure provision only
25 applies to unsigned pleadings. See *id.* One that is signed in violation of the rule is invalid and
26 cannot be cured by a subsequent signature. Here, all of the documents submitted subsequent to
the entry of default judgment were signed by Mr. Joiner. Therefore, they are not subject to cure
as unsigned documents and Idaho law is exceedingly clear; where a pleading is signed in

1 violation of Rule 11, it shall be stricken. See *I.R.C.P. 11(a)(1)*; *Black*, 139 Idaho 511; *Anderson*
2 *v. Coolin*, 27 Idaho 334 (1915).

3 Accordingly, because Mr. Joiner is not licensed to practice law in Idaho and because of a
4 lack of signature from the defaulting Defendants, the documents entitled "Substitute of Attorney"
5 "Motions to Set Aside" filed March 11 and 26, 2009 should be stricken.

6
7 **4.3 The Court Should Issue A Rule 54(b) Certificate of Final Judgment
Against All Defendants Except Kirk-Hughes Development.**

8 The Court should enter a Rule 54(b) Certification of Final Judgment against all
9 defendants except Kirk-Hughes Development because upon entry of an Order dismissing
10 Peterson, all issues involving all parties are resolved.

11 A final judgment is an order or judgment that ends the lawsuit, adjudicates the subject
12 matter of the controversy, and represents a final determination of the rights of the parties. See
13 *Dominquez v. Evergreen Resources*, 142 Idaho 7, 13 (2005). Regardless of its denomination as
14 an order or judgment, any ruling that effectively ends the controversy acts as final judgment. See
15 *Eastern Idaho Economic Development v. Lockwood Packaging Corp.*, 139 Idaho 142, 145
16 (2003). When multiple parties are involved, entry of a final judgment against less than all of the
17 parties can only be made upon express determination that there is no just reason for delay in
18 entering judgment. See *I.R.C.P. 54(b)*.

19 Golubs previously submitted a request for Rule 54(b) certification based upon the entry of
20 default judgments against the defaulting Golubs. The judicial effect of the entry of default is that
21 all of the allegations contained in the Complaint are taken as true. See *Dominquez*, 142 Idaho at
22 13. At the time of entry of default on March 11, 2008 all that was left in controversy were the
23 claims involving Peterson. Had an order of dismissal been entered regarding Peterson at that
24 time, a Rule 54(b) certification would not have been necessary and all orders would have
25 automatically become final as a matter of law. See *e.g. Dominquez*, supra, (although grant of
26

1 summary partial summary judgment adjudicated less than all claims, it was the last of a series and
2 disposed of all remaining claims leaving none pending and negating the need for a Rule 54
3 certification).

4 However, subsequent to the entry of default judgment against the defaulting Defendants
5 and prior to dismissal of the claims against Peterson, an automatic stay was imposed upon any
6 proceedings regarding Kirk-Hughes Development. Because of this, it is Golubs' position that a
7 final judgment cannot issue against Kirk-Hughes Development without violating the automatic
8 stay. Accordingly, even though no issues remain regarding any parties, none of the decrees,
9 orders or judgments issued in this case are final and appealable in the absence of a Rule 54(b)
10 Certificate from the Court.

11 Now, in light of the dismissal of Peterson, there truly is no just reason to delay entry of
12 final judgment against all defendants except Kirk-Hughes Development. All of the issues have
13 been adjudicated and all orders would be final by operation of law were it not for the automatic
14 stay imposed by the Kirk-Hughes Development bankruptcy.

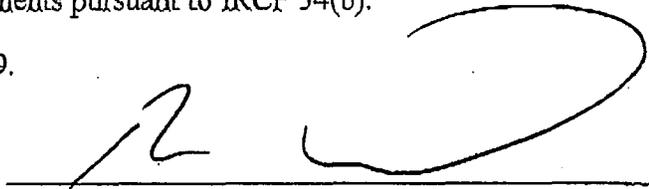
15 More importantly, immediate entry of judgment will allow Golub the opportunity to begin
16 execution upon the assets of Defendants, which have in the past been moved around to various
17 shell corporations in an effort to avoid the effects of judgments and foreclosures. A protraction
18 of judgment will only increase the likelihood that Defendants' assets will be either liquidated or
19 transferred. The filing of bankruptcy by Kirk-Hughes Development following Golub's previous
20 request for certification is a prim example.

21 Accordingly, Golubs request that the Court make an express determination that there is no
22 just reason for delay in the entry of final judgment against all defendants except Kirk-Hughes
23 Development and that the Court make an express direction for entry of the same.

1 **5. CONCLUSION**

2 Default judgments have been entered against all defendants except Peterson. Golubs
3 request that the Court now enter and order, dismissing the claims against Peterson. Any motions
4 or other papers filed on behalf of the defaulting Defendants since entry of the default judgment
5 are invalid because they were not signed by the parties or a licensed Idaho attorney. As a result,
6 nothing remains to be determined and all judgments except as against Kirk-Hughes Development,
7 should be certified as final, appealable judgments pursuant to IRCP 54(b).

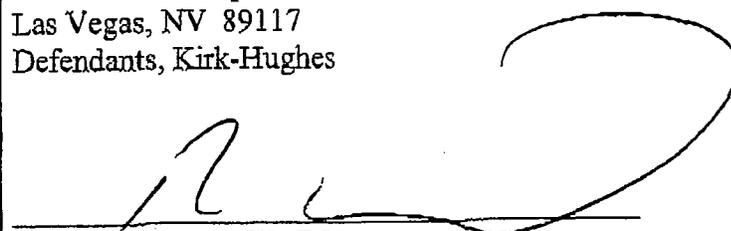
8 DATED this 23 day of July, 2009.

9
10 
11 MICHAEL T. HOWARD, ISB No. 6128
12 WINSTON & CASHATT
Attorneys for Plaintiffs

13 I hereby certify that I caused a true and
14 complete copy of the foregoing to be mailed,
15 postage prepaid; hand delivered; sent
via facsimile on July 23, 2009, to:

16 Edwin B. Holmes
17 Holmes Law Offices, P.A.
18 8109 N. Wayne Drive
19 PO Box 569
Hayden, ID 83835-0569
Defendants, Delano D. Peterson and Lenore J. Peterson

20 L. Sanders Joiner
21 251 South Fort Apache Road, Suite 103
22 Las Vegas, NV 89117
Defendants, Kirk-Hughes

23
24 
25 MICHAEL T. HOWARD
159275

EDWIN B. HOLMES, ISB 4668
HOLMES LAW OFFICE, P.A.
8109 N WAYNE DRIVE
POST OFFICE BOX 569
HAYDEN ID 83835-0569
VOICE: (208) 762-0100
FACSIMILE: (208) 762-0199
E-MAIL: holmeslawoffice@verizon.net

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: #769 dlt

2010 JUL 15 PM 12:28

CLERK DISTRICT COURT
Paul C. [Signature]
DEPUTY

Attorney for DELANO D. PETERSON and LENORE J. PETERSON

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

<p>ALAN GOLUB AND MARILYN GOLUB, HUSBAND AND WIFE, PLAINTIFFS,</p> <p>vs.</p> <p>GERALDINE KIRK-HUGHES AND PETER SAMPSON, HUSBAND AND WIFE; KIRK- HUGHES DEVELOPMENT, LLC, A DELAWARE LIMITED LIABILITY COMPANY; KIRK-HUGHES & ASSOCIATES, INC., A NEVADA CORPORATION; KELLY POLATIS, AN INDIVIDUAL, AND DELANO D. AND LENORE J. PETERSON, HUSBAND AND WIFE, DEFENDANTS.</p>	<p>Case No. CV-2007-8038</p> <p>FULL SATISFACTION OF MEDIATED SETTLEMENT AGREEMENT</p>
--	---

The undersigned, Plaintiffs ALAN GOLUB and MARILYN GOLUB, husband and wife, currently of c/o Michael T. Howard, Winston & Cashatt, 250 Northwest Blvd, Ste 107A, Coeur d'Alene ID 83814, hereby acknowledges the receipt of all amounts due under that certain Mediated Settlement Agreement entered into by the undersigned with Defendants DELANO D. PETERSON and LENORE J. PETERSON, husband and wife, currently of 1440 Jeff Road, Huntsville AL 35806 (hereafter collectively referred to as "PETERSON") on July 8, 2009 as full settlement of the undersigneds' claims against PETERSON in the above captioned matter. Said

CERTIFICATE OF SERVICE

I, EDWIN B. HOLMES, a resident attorney of the State of Idaho (ISB No. 4668), do hereby certify that on the 15 day of July, 2010 I served, or caused to be served, a true and correct copy of the foregoing document upon the following person as indicated:

MICHAEL T. HOWARD
WINSTON & CASHATT
250 NORTHWEST BLVD, STE 107A
COEUR D'ALENE ID 83814
FACSIMILE: 765-2121
 first class mail, postage prepaid
 facsimile machine
 hand delivery
 other _____

KENNETH B. HOWARD
250 NORTHWEST BLVD, STE 107A
COEUR D'ALENE ID 83814
 first class mail, postage prepaid
 facsimile machine
 hand delivery
 other _____

L SANDERS JOINER
251 SOUTH FORT APACHE ROAD, #103
LAS VEGAS NV 89117
FACSIMILE: 702-233-8661
 first class mail, postage prepaid
 facsimile machine
 hand delivery
 other _____



EDWIN B. HOLMES

EXHIBIT 3

Case Number Result Page

Kootenai

1 Cases Found.

Alan Golub, etal. vs. Geraldine Kirk-Hughes, etal.

Case: **CV-2007-0008038** District Filed: **10/30/2007** Subtype: **Other Claims** Judge: **L. Lansing Haynes** Status: **Closed pending clerk action 05/01/2013**

Defendants: **Kirk Hughes & Associates Inc Kirk Hughes Development LLC Kirk-Hughes, Geraldine Peterson, Delano D Peterson, Lenore J Polatis, Kelly Sampson, Peter**
 Plaintiffs: **Golub, Alan Golub, Marilyn**

Pending hearings: Date/Time Judge Type of Hearing
 07/09/2013 3:30 PM Lansing L. Haynes Motion for Summary Judgment

Disposition: Date	Judgment Type	Disposition Date	Disposition Type	Parties	In Favor Of
08/10/2009	Dismissal			Peterson, Delano D (Defendant), Peterson, Lenore J (Defendant), Golub, Alan (Plaintiff), Golub, Marilyn (Plaintiff)	All Parties
08/10/2009	Dismissal			Kirk-Hughes, Geraldine (Defendant), Sampson, Peter (Defendant), Kirk Hughes & Associates Inc (Defendant), Polatis, Kelly (Defendant), Peterson, Delano D (Defendant), Peterson, Lenore J (Defendant), Golub, Alan (Plaintiff), Golub, Marilyn (Plaintiff)	All Parties

Register Date of actions:

10/30/2007 New Case Filed - Other Claims
 10/30/2007

Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Winston & Cashatt Receipt number: 0768243 Dated: 10/30/2007 Amount: \$88.00 (Check) For: [NONE]

10/30/2007 Summons Issued

Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Holmes Law Receipt number: 0770333 Dated: 11/14/2007 Amount: \$58.00 (Check) For: [NONE]

11/14/2007

11/14/2007 Notice Of Appearance/Edwin Holmes

11/16/2007 Notice of Discovery

11/16/2007 Notice of Discovery

11/16/2007 Notice of Discovery

11/29/2007 Hearing Scheduled (Motion for Summary Judgment 02/12/2008 03:30 PM) E. Holmes 1 hr

11/30/2007 Notice of discovery

11/30/2007 Affidavit Of Service-Alfred Braun 11/26/2007

Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Patrick Miller Receipt number: 0772648 Dated: 12/3/2007 Amount: \$58.00 (Check) For: [NONE]

12/03/2007

12/03/2007 Motion To Enlarge Time To Answer Complaint

12/03/2007 Affidavit Of Service/Amended for Michael T Howard and Kenneth B Howard via facsimile on 12-3-07

12/03/2007 Notice Of Service of Defendants/First Set of Interrogatories to Plaintiffs

12/04/2007 Plaintiffs' Motion for Order of Default Against Defendant Kelly Polatis

12/04/2007 Plaintiffs' Memorandum of Law in Support of Motion for Default Order Against Defendant Kelly Polatis

12/04/2007 Affidavit of Michael T Howard in Support of Plaintiffs' Motion for Order of Default

12/04/2007 Affidavit Of Service on Lenore J. Peterson 11/8/07

12/04/2007 Affidavit Of Service on Delano D. Peterson 11/8/07

12/04/2007 Affidavit Of Service on Kirk-Hughes Development, LLC to Scott LaScala of The Corporation Trust Company, Registered Agent 11/6/07

12/04/2007 Affidavit Of Service on Kirk-Hughes & Associates to Ollie Kirk, Resident Agent 11/25/07

12/04/2007 Affidavit Of Service on Geraldin Kirk-Hughes 11/25/07

12/04/2007 Affidavit Of Service on Peter Sampton 11/25/07

12/04/2007 Return Of Service on Kelly Polatis 11/6/07

12/05/2007 Amended Notice of Discovery

12/07/2007 Amended Notice of Discovery

12/13/2007 Plaintiffs' Notice Of Service Of Discovery

12/13/2007 Notice Of Service Of Discovery

12/18/2007 Letter to Court

01/08/2008 Order For Entry Of Default Against Def Kelly Polatis

Affidavit of Delano D. Peterson in Support of Delano D. Peterson and Lenore J. Petersons' Motion for Partial Summary Judgment

01/15/2008

Affidavit of Edwin B. Holmes in Support of Delano D. Peterson and Lenore J. Petersons' Motion for Partial Summary Judgment

01/15/2008

01/15/2008 Affidavit of Lenore J. Peterson in Support of Delano D. Peterson and Lenore J. Petersons' Motion for Partial Summary Judgment

01/15/2008 Brief in Support of Delano D. Peterson and Lenore J. Petersons' Motion for Partial Summary Judgment

01/15/2008 Notice Of Service Of Discovery

01/15/2008 Defendants Delano D. Peterson and Lenore J. Petersons' Motion For Partial Summary Judgment

01/15/2008 Notice Of Hearing on Defendants Delano D. and Lenore J. Petersons' Motion for Partial Summary Judgment

01/16/2008 Notice of change of address

01/16/2008 Plaintiff's Motion For Order Of Default Against Defendants Geraldine Kirk-Hughes; Peter Sampson; Kirk-Hughes Development, LLC; And Kirk-Hughes & Associates, INC.

01/16/2008 Plaintiff's Memorandum Of Law

01/16/2008 Affidavit Of Michael T. Howard

01/18/2008 Notice Of Service Of Defendants Geraldine Kirk-Hughes' And Peter Sampson's Answers And Responses To Plaintiffs First Set Of Interrogatories And Requests For Production Of Documents

01/23/2008 Hearing Scheduled (Motion to Continue 02/05/2008 03:30 PM) Motion to Continue 2/12/08 MSJ Hearing Howard

01/23/2008 Notice Of Hearing

01/23/2008 Affidavit in Support of Motion to Continue

01/23/2008 plaintiff's Motion To Continue

01/29/2008 Hearing result for Motion to Continue held on 02/05/2008 03:30 PM: Hearing Vacated Motion to Continue 2/12/08 MSJ Hearing Howard

01/31/2008 Notice of Postponement of Hearing on def's Delano & Peterson's motion for partial summary judgment

01/31/2008 Hearing result for Motion for Summary Judgment held on 02/12/2008 03:30 PM: Hearing Vacated E. Holmes 1 hr

01/31/2008 New File Created *****FILE #2*****

02/07/2008 Notice Of Discovery

02/07/2008 Answer - Patrick Miller OBO Geraldine Kirk Hughes & Peter Sampson & Kirk-Hughes Development LLC & Kirk-Hughes & Associates Inc

02/08/2008 Hearing Scheduled (Status Conference 03/24/2008 03:30 PM)

02/08/2008 Notice of Hearing

03/20/2008 Response to Status Conference Notice - Michael Howard

03/20/2008 Response to Status Conference Notice - Edwin Holmes

03/21/2008 Response to Status Conference Notice-Patrick Miller

03/24/2008 Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Kelly Polatis Receipt number: 0788018 Dated: 3/24/2008 Amount: \$58.00 (Check) For: [NONE]

03/24/2008 Answer - Kelly Polatis

03/24/2008 Hearing Scheduled (Jury Trial Scheduled 01/20/2009 09:00 AM) 4 day

03/24/2008 Notice of Trial

03/24/2008

Hearing result for Status Conference held on 03/24/2008
 03:30 PM: District Court Hearing Held Court Reporter:
 LAURIE JOHNSON Number of Transcript Pages for this
 hearing estimated: LESS THAN 100

04/17/2008 Hearing Scheduled (Motion for Summary Judgment
 06/17/2008 03:30 PM) Holmes, 1 hr

04/25/2008 Notice of Rescheduled Hearing on Defendants Delano D
 and Lenore J Petersons' Motion for Partial Summary
 Judgment

06/03/2008 Affidavit of Alan J Golub in Support of Plaintiffs'
 Memorandum in Opposition To Defendants' Delano D and
 Lenore J Peterson's Motion for Partial Summary
 Judgment

06/03/2008 Plaintiffs' Memorandum in Opposition To Defendants'
 Delano D and Lenore J Peterson's Motion For Partial
 Summary Judgment

06/03/2008 Affidavit of Michael T howard in Support of Plaintiffs'
 Memorandum in Opposition To Defendants' Dalano D and
 Lenore J Peterson's Motion for Partial Summary
 Judgment

06/04/2008 Hearing Scheduled (Motion 06/17/2008 03:30 PM) Mtn
 for Default Jdmt Howard

06/04/2008 New File Created *****FILE
 3*****

06/09/2008 Objection & Reply Brief in Support of Motion of Partial
 Summary Judgment

06/10/2008 Plaintiffs' Motion To Continue June 17, 2008 Hearing On
 Motion For Summary Judgment

06/10/2008 Affidavit Of Michael T. Howard In Support Of Motion To
 Continue Hearing On Summary Judgment

06/11/2008 Hearing Scheduled (Motion to Continue 06/17/2008
 03:30 PM) Howard

06/11/2008 Notice Of Hearing

06/11/2008 Motion For Entry Of Default Judgment against Defendant
 Kelly Polatis

06/11/2008 Affidavit of Michael T. howard in Support of Plaintiff's
 Motion for Default Judgment against Kelly Polatis

06/11/2008 Affidavit of Alan Golub In Support of Motion for default
 Judgment Against Kelly Polatis

06/11/2008 Supplemental Affidavit of Michael T. Howard In support
 of Plaintiffs' Response to Defendant Peterson's Motion for
 Summary Judgment

06/11/2008 Plaintiffs' Memorandum in Opposition to Defendant
 Petersons' Objection to Evidence

06/11/2008 Plaintiffs' Motion to shorten Time

06/11/2008 Notice Of Hearing

06/12/2008 Notice Of Hearing

06/12/2008 Supplemental Affidavit of Michael T. Howard In Support
 of Plaintiff's Response to Defendant Peterson's Motion for
 Summary Judgment

06/13/2008 Filing: I1A - Civil Answer Or Appear. More Than \$1000
 No Prior Appearance Paid by: R Bruce Owens Receipt
 number: 0799752 Dated: 6/13/2008 Amount: \$58.00
 (Cash) For: [NONE]

06/13/2008 Objection to Motion to Continue and Renewed Attempt to
 Introduce Hearsay Evidence

06/13/2008 Affidavit of Edwin B. Holmes
06/13/2008 Declaration of Kelly Polatis
06/13/2008 Affidavit of Counsel
06/13/2008 Motion To Continue Hearing on Motion for Default
06/13/2008 Notice Of Appearance/Regina McCrea
06/17/2008 Hearing result for Motion held on 06/17/2008 03:30 PM:
Hearing Held Mtn for Default Jdmt Howard
06/17/2008 Hearing result for Motion to Continue held on
06/17/2008 03:30 PM: Hearing Vacated Howard -
Hearing result for Motion for Summary Judgment held on
06/17/2008 06/17/2008 03:30 PM: Hearing Held Holmes, 1 hr
TAKEN UNDER ADVISEMENT
06/17/2008 Order (shorten time)
06/26/2008 Hearing Scheduled (Motion 07/25/2008 10:00 AM) Mtn
to Set Aside Default, McCrea
06/27/2008 Notice Of Hearing Re: Motion to Vacate Order of Default
06/27/2008 Affidavit of Kelly Polatis
06/27/2008 Motion to Vacate Order of Default
06/27/2008 Memorandum In Support of Motion to Vacate Order of
Default
Affidavit of Michael Howard In Support of Plaintiffs'
07/11/2008 Response to Defendant Polatis' Motion to Vacate Default
Order
07/11/2008 Plaintiff's Response To Defendant Polatis' Motion To Set
Aside Default Order
07/22/2008 Hearing Scheduled (Motion for Summary Judgment
10/21/2008 03:30 PM) Holmes, 1 hr
07/24/2008 Reply Memorandum In Support Of Motion to Vate Order
of Default
07/24/2008 Second Affidavit of Kelly Polatis
Hearing result for Motion held on 07/25/2008 10:00 AM:
07/25/2008 Hearing Held Mtn to Set Aside Default, McCrea TAKEN
UNDER ADVISEMENT
08/11/2008 Memorandum Opinion and Order in Re: Def's Motion for
Partial Summary Judgment
08/12/2008 Hearing Scheduled (Motion 08/13/2008 03:00 PM) Mtn
pursuant to IAR 12, Holmes, 15 min.
08/12/2008 Notice Of Hearing
08/12/2008 Peterson's Motion for Shortening of time and Notice of
Hearing
Delano D. Peterson & Lenore J Petersons' Motion for
08/12/2008 Permission to Appeal From an Interlocutory Order of the
Trial Court
Hearing result for Motion held on 08/13/2008 03:00 PM:
08/13/2008 Hearing Held Mtn pursuant to IAR 12, Holmes, 15 min.
TAKEN UNDER ADVISEMENT
Plaintiffs' Opposition To Defendants' Motion For
08/13/2008 Permission To Appeal From An Interlocutory Order Of
The Trial Court
08/18/2008 Hearing Scheduled (Motion for Summary Judgment
09/30/2008 03:30 PM) Miller, 30 min
08/18/2008 Notice Of Service of Defendants Geraldine Kirk-Hughes'
First Set of Requests for Admissions to Plaintiffs
08/18/2008 Notice Of Service of Defendants Geraldine Kirk-Hughes
and Peter Sampson's; Kirk-Hughes Development, LLC's

and Kirk-Hughes & Associates Inc.'s First Set of Interrogatories to Plaintiffs

08/19/2008 Delano D Peterson and Lenore J Petersons' Pretrial Compliance (Expert Witness Disclosure In Conformity With IRCP 26(b)(4))

08/20/2008 SUPPLEMENTAL Notice Of Service of Defendants Geraldine Kirk-Hughes' First Set of Requests for Admissions To Plaintiffs

08/20/2008 SUPPLEMENTAL Notice Of Service of Defendants Geraldine Kirk-Hughes' and Peter Sampson's; Kirk-Hughes Development LLC's and Kirk-Hughes & Associates Inc.'s Second Set of Interrogatories and First Set of Requests for Production of Documents To Plaintiffs

08/21/2008 New File Created *****FILE
4*****

08/25/2008 pet's Notice Of Service of Discovery

08/25/2008 pet's Notice Of Service of Discovery

08/26/2008 Affidavit of Patrick E. Miller in Support of Defendant Kirk-Hughes' Motion for Partial Summary Judgment

08/26/2008 Defendants Kirk-Hughes's Memorandum In Support Of Motion for Partial Summary Judgment

08/26/2008 Defendants Kirk-Hughes's Motion for Partial Summary Judgment

08/26/2008 Notice Of Hearing

08/26/2008 Plaintiffs' Notice Of Service Of Discovery

08/27/2008 Memorandum Opinion and Order in re: Defendant's Motion to Set Aside Entry of Default

08/27/2008 Order Disapproving Defendants' Permissive Appeal

09/03/2008 Plaintiffs' Motion and Memorandum For Clarification of Order Re Default Judgment

09/04/2008 Hearing Scheduled (Motion 09/30/2008 03:30 PM)
Motion for Clarification of Order Re: Polatis, Howard

09/04/2008 Notice Of Hearing

09/08/2008 notice of service of defs 3rd set of interrogatories

09/17/2008 Motion To Amend Complaint

09/17/2008 Plaintiffs' Memorandum in Opposition to Defendant Kirk-Hughes' Motion for Partial Summary Judgment

09/17/2008 Notice Of Hearing

09/19/2008 Notice Of Service of Defendants 2nd set of Requests for Admissions to Plaintiffs

09/22/2008 Notice Of Service Of Discovery Responses

09/23/2008 Defendants Kirk-Hughes's Objection to Plaintiffs' Motion to Amend the Complaint

09/23/2008 Defendants Delano d. Peterson & Lenore J. Petersons' Renewed Motion for Partial Summary Judgment

09/23/2008 Notice Of Hearing on Defendants Delano D. & Lenore J. Petersons' Renewed Motion for Partial Summary Judgment

09/23/2008 Brief in Support of Delano D. Peterson & Lenore J. Petersons' Renewed Motion for Partial Summary Judgment

09/24/2008 Defendant Polatis's Response To Plaintiffs' Motion For Clarification Of Memorandum Opinion and Order

09/24/2008 Notice Of Discovery

09/25/2008

Defendant's Response Brief in support of Motion for
Partial Summary Judgment
09/30/2008 Hearing result for Motion held on 09/30/2008 03:30 PM:
Hearing Held Motion for Clarification of Order Re: Polatis,
Howard
09/30/2008 Hearing result for Motion for Summary Judgment held on
09/30/2008 03:30 PM: Hearing Held Miller, 30 min
TAKEN UNDER ADVISEMENT
10/02/2008 Memorandum Opinion and Order Clarifying Order Re:
Default
10/02/2008 Hearing Scheduled (Decision 10/21/2008 03:30 PM)
10/02/2008 Notice of Hearing
10/02/2008 Seven Day Notice of intent to serve Subpoena For
Inspection Of Doc Upon A third Party
10/03/2008 Notice Of Service of Defendants Answers
10/07/2008 Plaintiffs Memorandum in Opposition to Petersons
Renewed Motion
10/07/2008 Affidavit of Michael Howard
10/07/2008 Affidavit of Cheryl Reed
10/07/2008 Affidavit of Alice Sackman
10/07/2008 New File Created *****FILE #5*****
10/10/2008 Notice of Unavailability
10/14/2008 Hearing result for Motion for Summary Judgment held on
10/21/2008 03:30 PM: Hearing Vacated Holmes, 1 hr
10/14/2008 Notice Of Deposition
10/14/2008 Notice Of Deposition of Norman Gissell
10/14/2008 Objection, Withdrawal of Motion and Vacation of Hearing
10/15/2008 Notice Of Transcript Delivery - Deponent Dusty
Obermayer
10/16/2008 Notice Of Service Of Discovery Responses
10/16/2008 Notice Of Service Of Discovery Responses
10/16/2008 Plaintiffs' Motion and Memorandum to Amend Scheduling
Order and for Expedited Hearing
10/21/2008 Hearing Scheduled (Motion 11/21/2008 10:00 AM)
Motion to Strike, Motion to Amend, Pat Miller
10/21/2008 Hearing result for Decision held on 10/21/2008 03:30
PM: Hearing Held
10/21/2008 Defendants Kirk-Hughes' Objection to Plaintiff's Motion
to Amend Scheduling Order
10/21/2008 Defendants Kirk-Hughes' Objection to Plaintiff's Motion
to Amend Scheduling Order
10/22/2008 Affidavit of Patrick E. Miller in Support of Defendant Kirk-
Hughes' Motion to Amend
10/22/2008 Affidavit of Patrick E. Miller in Support of Defendant Kirk-
Hughes' Motion to Strike
10/22/2008 Defendants Kirk-Hughes' Memorandum In Support Of
Motion to Amend Answer
10/22/2008 Defendants Kirk-Hughes' Motion and Memorandum to
Strike Plaintiffs' Responses to Defendant's Request for
Admission
10/22/2008 Notice Of Hearing
10/22/2008 Affidavit Of Service on 10/14 served Dr. Steven Liss
10/22/2008 Affidavit Of Service on 10/14 served Norman Gissel
10/22/2008 Notice Of Service Of Discovery

10/27/2008 Notice Of Deposition Duces Tecum of Marilyn Golub
10/27/2008 Notice Of Deposition Duces Tecum of Alan Golub
10/29/2008 Hearing Scheduled (Motion to Reconsider 11/21/2008
10:00 AM) Holmes
10/29/2008 Notice Of Service of Defendants
Defendants Delano D Peterson and Lenore J Petersons'
10/30/2008 Motion for Reconsideration of the Court's Decision on
Partial Summary Judgment (In Re: Peterson's Motion to
Dismiss Conspiracy to Defraud
Brief in Support of Delano D Peterson and Lenore J
10/30/2008 Petersons' Motion for Reconseration of the Court's
Decision on Partial Summary Judgment (In Re:
Peterson's Motion to Dismiss Conspiracy to Defraud)
Notice Of Hearing on Defendants Delano D and Lenore J
10/30/2008 Petersons' Renewed Motion for Reconsideration of the
Court's Decision on Partial Summary Judgment (In Re:
Peterson's Motion to Dismiss Conspiracy to Defraud)
10/31/2008 Order (re: Summary Jdmt)
11/03/2008 Notice Of Transcript Lodged
11/12/2008 Joint Stipulation to Continue Trial Date
11/13/2008 Hearing result for Motion to Reconsider held on
11/21/2008 10:00 AM: Hearing Vacated Holmes
11/13/2008 Hearing Scheduled (Motion to Reconsider 12/05/2008
10:00 AM) Holmes
11/13/2008 Hearing Scheduled (Motion to Reconsider 12/23/2008
10:00 AM) Holmes (if not heard on 12/5)
11/13/2008 Hearing Scheduled (Motion 12/05/2008 10:00 AM)
Motion to Strike, Motion to Amend Pat Miller
Hearing result for Motion held on 11/21/2008 10:00 AM:
11/13/2008 Hearing Vacated Motion to Strike, Motion to Amend, Pat
Miller
11/13/2008 AMENDED Notice Of Deposition Duces Tecum - Alan
Golub
11/13/2008 AMENDED Notice Of Deposition Duces Tecum - Marilyn
Golub
AMENDED Notice Of Hearing on Defendants Delano D.
and Lenore J. Petersons' Renewed Motion for
11/13/2008 Reconsideration of the Court's Decision of Partial
Summary Judgment (In Re: Peterson's Motion to Dismiss
Conspiracy to Defraud)
2nd AMENDED Notice Of Hearing on Defendants Delano
D. and Lenore J. Petersons' Renewed Motion for
11/13/2008 Reconsideration of the Court's Decision of Partial
Summary Judgment (In Re: Peterson's Motion to Dismiss
Conspiracy to Defraud)
11/17/2008 Amended Notice Of Hearing-12/5/2008 10:00am
11/20/2008 Order (IN RE: JOINT STIPULATION TO CONTINUE TRIAL
DATE)
11/20/2008 Hearing result for Jury Trial Scheduled held on
01/20/2009 09:00 AM: Hearing Vacated 4 day
11/20/2008 Hearing Scheduled (Jury Trial Scheduled 08/17/2009
09:00 AM) 4 day
11/20/2008 AMENDED Notice of Trial
11/25/2008 Hearing Scheduled (Motion to Withdraw 12/05/2008
10:00 AM) McCrea
11/25/2008 Notice of Lodging Transcript

11/25/2008 Motion For Leave To Withdraw As Attorney
11/25/2008 Notice Of Hearing
11/26/2008 Plaintiffs Memorandum in Opposition to Defendant
Petersons Motion for Reconsideration
Plaintiffs Memorandum in Opposition to Defendant Kirk
11/26/2008 Hughes Motion to Strike Responses to Requests for
Admission
Plaintiffs Memorandum in Opposition to Defendant Kirk
11/26/2008 Hughes Motion to Amend Answer to Add Affirmative
Defense
11/26/2008 Amended Motion for Withdrawal
12/01/2008 AMENDED Notice Of Hearing
12/01/2008 AMENDED Notice Of Hearing
Reply Brief In Support Of Delano D Peterson and Lenore
12/02/2008 J Petersons' Motion For Reconsideration of The Court's
Decision On Partial Summary Judgment (In RE:
Peterson's Motion to Dismiss Conspiracy to Defraud)
12/02/2008 New File Created --File 6--
12/03/2008 Hearing Scheduled (Motion for Summary Judgment
02/03/2009 03:30 PM) Howard, 1 hr
12/03/2008 Defendants Kirk-Hughes Reply in Support of Motion To
Amend Answer
12/03/2008 Defendants Kirk-Hughes Reply in Support of Motion to
Strike Plaintiffs Responses to Requests for Admission
12/04/2008 Plaintiffs' Motion in Support of Summary Judgment Re:
Legal Description
12/04/2008 Note for Hearing
12/05/2008 Hearing result for Motion to Withdraw held on
12/05/2008 10:00 AM: Hearing Held McCrea--GRANTED
Hearing result for Motion held on 12/05/2008 10:00 AM:
12/05/2008 Hearing Held Motion to Strike--DENIED, Motion to
Amend Pat Miller--GRANTED
12/05/2008 Hearing result for Motion to Reconsider held on
12/05/2008 10:00 AM: Hearing Held Holmes--GRANTED
Hearing result for Motion to Reconsider held on
12/05/2008 12/23/2008 10:00 AM: Hearing Vacated Holmes (if not
heard on 12/5)
12/05/2008 Notice of Postponement of Deposition Duces Tecum
12/05/2008 Notice of Postponement of Deposition Duces Tecum
12/05/2008 Order Allowing Withdrawal Of Attorney
12/08/2008 Notice Of Service -- Kelly Polatis -- served 12/08/2008
Order (In Re: Delano D Peterson and Lenore J Petersons'
12/18/2008 Motion for Reconsideration of the Court's Decision on
Partial Summary Judgment to Dismiss the Plaintiffs' 5th
Cause of Action, Conspiracy to Defraud)
12/18/2008 Order Granting Defendants Kirk-Hughes' Motion to
Amend Answer
12/18/2008 Order Denying Defendants Kirk-Hughes' Motion to Strike
12/22/2008 Defendants Kirk-Hughes' AMENDED Answer
01/13/2009 Motion For Leave To Withdraw As Attorney - Patrick
Miller
01/20/2009 SECOND Affidavit of Delano D Peterson
01/20/2009 Affidavit of Patrick Miller in Support of Motion to
Withdraw as Attorneys for Geraldine Kirk-Hughes, Peter
Sampson, Kirk-Hughes Development, LLC and Kirk-

Hughes & Associates, Inc Pursuant to Rule 11(b)(2),
IRCP

01/20/2009 Notice Of Hearing

01/20/2009 Answering Brief in of Delano Peterson and Lenore Peterson in Opposition to Plaintiffs' Motion for Partial Summary Judgment

01/20/2009 Second Affidavit of Delano Peterson

01/27/2009 Plaintiffs' Reply Brief Re: Motion for Summary Judgment on Sufficiency of Legal Description

02/03/2009 Hearing result for Motion for Summary Judgment held on 02/03/2009 03:30 PM: Hearing Held Howard, 1 hr - TAKEN UNDER ADVISEMENT

02/04/2009 Order Granting Permission To Withdraw Atty Patrick Miller

02/06/2009 Affidavit Of Mailing

02/13/2009 Plaintiff's Supplemental Memorandum Re: Legal Description

02/13/2009 Supplemental Brief Of Delano D. Peterson And Lenore J. Petersons (In Re: Enforceability Of Legal Description)

02/18/2009 Plaintiff's Disclosure of Expert Witnesses

02/23/2009 Order RE: Plaintiffs' Motion for Summary Judgment RE: Legal Discription

02/26/2009 Plaintiffs' Motion and Memorandum for Default Judgment Re: Defendants Polatis and Kirk-Hughes et. al.

02/26/2009 Affidavit of Michael T. Howard

02/26/2009 New File Created *****FILE #7*****

03/03/2009 Order for Default Against Defs Kelly Polatis; Geraldine Kirk-Hughes; Peter Sampson; Kirk-Hughes Development, LLC: and Kirk-Hughes & Associates, Inc.

03/04/2009 Motion for Final Judgment & Certificate Under I.R.C.P. 54 (b)

03/11/2009 Substitution Of Counsel

03/11/2009 Atty Substitution For Geraldine Kirk-Hughes Atty L. Sanders Joiner Inactive With Bar List

03/11/2009 Defendants', Except For Petersons, Motion To Set Aside Default Ant Opposition To Plaintiffs' Motion And Memorandum For Default Judgment And for Final Judgment & Certificate Under I.R.C.P.54(b)

03/11/2009 Affidavit Of L. Sanders, Joiner In Support Of Motion To Set Aside Default And the Oppoisition Of Plaintiffs' Motion And Memorandum For Default Judgment And For Final Judgmetn & Certification Under I.R.C.P. 54(b)

03/12/2009 Judgment

03/16/2009 Defendants', Except For Petersons, Motion To Set Aside Default and Opposition To Plaintiffs' Motion and Memorandum For Default Judgment and For Final Judgment & Certificate Under IRCP 54(b)

03/16/2009 Affidavit Of L Sanders Joiner In Support Of Motion To Set Aside Default and The Opposition Of Plaintiffs' Motion and Memorandum For Default Judgment and For Final Judgment & Certificate Under IRCP 54(b)

03/26/2009 Affidavit of Judith H Braeklein in Support of Motion to Set Aside Default Judgment or for Reconsideration of Defendants Opposition to Plaintiffs Motion for Default Judgment & 54(b) Certification

03/26/2009

Affidavit of Geraldine Kirk-Hughes in Support of Motion to Set Aside Default Judgment or for Reconsideration of Defendants opposition to Plaintiffs Motion for Default Judgment & 54(b) Certification

03/26/2009 Affidavit of Peter Sampson Jr In Support of Motion to Set Aside Default Judgment or for Reconsideration of Defendants Opposition to Plaintiffs Motion for Default Judgment & 54(b) Certification

03/26/2009 Defendants Except for Petersons Motion to Set Aside Default Judgment or for Reconsideration of Defendants Opposition to Plaintiffs Motion for Default Judgment & 54 (b) Certification

04/08/2009 Bankruptcy Filed - Kirk Hughes Development

04/08/2009 Case status changed: Inactive

04/09/2009 Hearing Scheduled (Status Conference 05/18/2009 03:30 PM)

04/09/2009 Case status changed: Reopened

04/09/2009 Notice of Hearing

04/09/2009 Case status changed: inactive BANKRUPTCY KIRK-HUGHES DEVELOPMENT

05/18/2009 Hearing result for Status Conference held on 05/18/2009 03:30 PM: Interim Hearing Held HEARING REQUESTED BY MR HOLMES DUE TO BANKRUPTCY FILED

05/18/2009 District Court Hearing Held Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated: LESS THAN 100 PAGES

05/19/2009 Notice Of Discovery

06/17/2009 Notice Of Deposition Duces Tecum of Marilyn Golub on 07/10/09 at 9:00 AM

06/17/2009 Amended Notice of Deposition Duces Tecum - Deponent: Alan Golub - 7/14/09 10:30 AM

06/17/2009 Amended Notice of Deposition Duces Tecum - Deponent: Marilyn Golub - 7/14/09 9:00 AM

06/17/2009 Notice of Deposition Duces Tecum - Deponent: Alan Golub 7/10/09 10:30 AM

07/09/2009 Notice Of Cancellation of Deposition Duces Tecum of Marilyn Golub

07/09/2009 Notice Of Cancellation of Deposition Duces Tecum of Alan Golub

07/15/2009 Hearing Scheduled (Motion 08/07/2009 09:00 AM) Re: Default Judgments, Howard

07/22/2009 Acknowledgment Pursuant to Rul 16(k)(7) IRCP Regarding Case Status/Mediation

07/23/2009 Plaintiffs' Motion to Strike All Pleadings, Motion and Other Papers Signed of Filed by L Sanders Joiner

07/23/2009 Plaintiffs' Motion for Dismissal of All Claims Against Defendant Peterson

07/23/2009 Motion for Final Judgment and Certificate

07/23/2009 Affidavit of Michael T Howard

07/23/2009 Plaintiffs' Memorandum in Support of Motion to: 1) Dismiss Claims Against Peterson; 2) Strike all Pleadings, Motions, and Papers Filed by L Sanders Joiner; and 3) Issue a Rule 54(b) Certificate of Final Judgment

07/23/2009 Note for Hearing

07/29/2009 Affidavit Of Edwin B. Holmes In Re: Plaintiffs' Motion To Dismiss, ET Seq.

07/29/2009 No Objection In Re: Plaintiffs' Motion To Dismiss, ET Seq. Defendants', Except For Petersons, Opposition To

07/31/2009 Plaintiff's Motion To Strike All Pleadings, Motions and Other Papers Filed By L Sanders Joiner

07/31/2009 Defendant Kirk-Hughes Development, Cda, LLC's Answer to Plaintiff's Complaint

07/31/2009 New File Created *****FILE #8*****

08/03/2009 Plaintiffs' Witness List

08/04/2009 Defendant's Witness List

08/04/2009 Plaintiffs Reply Re: Motion to Strike Defendants', Except for Petersons, Supplement Exhibit to

08/06/2009 Opposition to Plaintiff's Motion To Strike All Pleadings, Motions, and Other Papers Filed By L. Sanders Joiner

08/07/2009 Hearing result for Jury Trial Scheduled held on 08/17/2009 09:00 AM: Hearing Vacated 4 day

08/07/2009 Hearing result for Motion held on 08/07/2009 09:00 AM: District Court Hearing Held GRANTED Court Reporter: BYRL CINNAMON Number of Transcript Pages for this hearing estimated: Re: Default Judgments, Howard

08/10/2009 Civil Disposition entered for: Golub, Alan, Plaintiff; Golub, Marilyn, Plaintiff; Peterson, Delano D, Defendant; Peterson, Lenore J, Defendant. Filing date: 8/10/2009

08/10/2009 Final Judgement, Order Of Dismissal - Delano D Peterson & Lenore Peterson

08/10/2009 Case status changed: Closed

08/10/2009 Civil Disposition entered for: Kirk Hughes & Associates Inc, Defendant; Kirk-Hughes, Geraldine, Defendant; Peterson, Delano D, Defendant; Peterson, Lenore J, Defendant; Polatis, Kelly, Defendant; Sampson, Peter, Defendant; Golub, Alan, Plaintiff; Golub, Marilyn, Plaintiff. Filing date: 8/10/2009

08/10/2009 Final Judgement, Order Of Final Judgement - Except Kirk-Hughes Development

08/19/2009 Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: David-Lanz Mtg Receipt number: 0862397 Dated: 8/19/2009 Amount: \$1.00 (E-payment)

08/25/2009 Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Winston/Cashatt Receipt number: 0863444 Dated: 8/25/2009 Amount: \$.50 (Check)

08/25/2009 Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Winston/Cashatt Receipt number: 0863444 Dated: 8/25/2009 Amount: \$2.00 (Check)

08/31/2009 Miscellaneous Payment: Writs Of Execution Paid by: Michael Howard Receipt number: 0864213 Dated: 8/31/2009 Amount: \$2.00 (Cash)

08/31/2009 Application for Writ of Execution

08/31/2009 Affidavit in Support of Execution

08/31/2009 Writ Issued \$941,000

09/03/2009 Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Kirk-Hughes, Geraldine (defendant) Receipt number: 0865100 Dated: 9/3/2009 Amount: \$101.00 (E-payment) For: Kirk-Hughes, Geraldine (defendant)

09/03/2009 Bond Posted - Cash (Receipt 865105 Dated 9/3/2009 for 100.00)
09/03/2009 Case status changed: Closed pending clerk action
09/03/2009 Appealed To The Supreme Court
09/03/2009 Notice of Appeal
09/04/2009 Case status changed: Reopened
Clerks Certificate of Appeal - Mailed to Supreme Court
09/09/2009 Certified Mail *****7008 1830 0003 7217
5550*****
09/14/2009 Return Certificate 7008 1830 0003 7217 5550-9/11/09
09/21/2009 Order Suspending Appeal
09/30/2009 Notice of Appeal - L Sanders Joiner
Miscellaneous Payment: For Making Copy Of Any File Or
09/30/2009 Record By The Clerk, Per Page Paid by: L Sanders Joiner
Receipt number: 0869094 Dated: 10/1/2009 Amount:
\$4.00 (E-payment)
10/06/2009 Bond Posted - Cash (Receipt 869573 Dated 10/6/2009
for 300.00)
10/29/2009 Bond Converted (Transaction number 9503066 dated
10/29/2009 amount 52.25)
10/29/2009 Notice of Lodging Transcript/Laurie Johnson
10/29/2009 Notice of Lodging Transcript/Byrl Cinnamon
11/10/2009 Bond Converted (Transaction number 9503168 dated
11/10/2009 amount 58.75)
11/10/2009 Bond Converted (Transaction number 9503169 dated
11/10/2009 amount 189.00)
11/10/2009 Bond Converted (Transaction number 9503170 dated
11/10/2009 amount 100.00)
11/13/2009 Letter to Attorney Joiner for payment for Appeal
11/16/2009 Called Attorneys Howard and Holmes to Pick up Appeal
11/18/2009 Receipt Of Clerk's Record & Reporter's Trans. hand
delivered to Michael T Howard
11/20/2009 Receipt Of Clerk's Record & Reporter's Trans. hand
delivered to Ed Holmes
12/16/2009 Order Conditionally Dismissing Appeal
12/21/2009 Hearing Scheduled (Motion 02/05/2010 10:00 AM) Mtn
for Charging Order, Howard, 30 min.
12/21/2009 Notice Of Service Of Discovery
12/21/2009 Affidavit of Michael T Howard
12/21/2009 Notice Of Hearing
12/21/2009 Notice Of Service Of Discovery
01/20/2010 Affidavit of Michael T. Howard
01/20/2010 Plaintiffs' Motion To Compel Discovery
01/20/2010 Notice Of Hearing
01/29/2010 Bankruptcy Filed - Geraldine Kirk-Hughes
01/29/2010 Inactive - Bankruptcy filed
01/29/2010 Case status changed: Inactive
02/03/2010 Supreme Court Order Dismissing Appeal
Hearing result for Motion held on 02/05/2010 10:00 AM:
02/05/2010 Motion Granted Mtn for Charging Order and Motion to
Compel, Howard

02/05/2010 District Court Hearing Held Court Reporter: LAURIE JOHNSONSYC Number of Transcript Pages for this hearing estimated:

02/08/2010 Charging Order RE: Peter Sampson and Kelly Polatis

02/12/2010 Order to Compel Post-Judgment Discovery

02/19/2010 Remittitur

03/08/2010 Affidavit of Michael T Howard re: Motion for Order to Show Cause

03/08/2010 Motion For Order To Show Cause

03/23/2010 Hearing Scheduled (Order to Show Cause 05/06/2010 03:30 PM) Howard

03/24/2010 Order To Show Cause

05/06/2010 Hearing result for Order to Show Cause held on 05/06/2010 03:30 PM: District Court Hearing Held Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated: Howard

05/06/2010 Case status changed: closed

07/15/2010 Full Satisfaction of Mediated Settlement Agreement

01/11/2011 File sent to judge's office to advise on status - per Suzi, case still ongoing

07/11/2011 Reviewed And Retained

06/15/2012 Hearing Scheduled (Status Conference 07/17/2012 04:00 PM)

06/15/2012 Case status changed: Closed pending clerk action

06/15/2012 Notice of Hearing

07/12/2012 Hearing result for Status Conference scheduled on 07/17/2012 04:00 PM: Hearing Vacated

07/12/2012 Hearing Scheduled (Status Conference 07/19/2012 09:30 AM)

07/12/2012 AMENDED Notice of Hearing

07/19/2012 Hearing result for Status Conference scheduled on 07/19/2012 09:30 AM: District Court Hearing Held Court Reporter: DEBRA BURNHAM Number of Transcript Pages for this hearing estimated:

07/19/2012 Case status changed: closed

05/01/2013 Hearing Scheduled (Motion for Summary Judgment 06/04/2013 03:30 PM) Howard

05/01/2013 Case status changed: Closed pending clerk action

05/03/2013 Notice Of Hearing

05/08/2013 Hearing Scheduled (Motion for Summary Judgment 06/27/2013 03:30 PM) Howard

05/08/2013 Hearing result for Motion for Summary Judgment scheduled on 06/04/2013 03:30 PM: Hearing Vacated Howard

05/09/2013 Hearing Scheduled (Motion for Summary Judgment 07/09/2013 03:30 PM) Howard

05/09/2013 Hearing result for Motion for Summary Judgment scheduled on 06/27/2013 03:30 PM: Hearing Held Howard

Connection: Public

2013 JUN 24 AM 10:11

CLERK DISTRICT COURT

Patty Barber
DEPUTY *10*

1 Matthew Z. Crotty
2 ISB #8653
3 CROTTY & SON LAW FIRM, PLLC
4 421 W. Riverside Ave. Ste 1005
5 Spokane, WA 99201
6 Telephone: (509) 850-7011
7 Facsimile: (509) 703-7957
8 Email: matt@crottyandson.com

9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

Case No. CV13-866
Case No. CV 07-8038

**DEFENDANT KIRK-SCOTT, LTD.'s
BRIEF IN RESPONSE TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

16 KIRK-HUGHES DEVELOPMENT, LLC and
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
Idaho corporation

21 Defendants.

22 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

23 Courts disfavor default judgments because they are not adjudications on the merits. This
24 case illustrates why.

25 On September 25, 2007, plaintiff Alan Golub testified, under oath, about a \$941,000 real
26 estate commission arising out of a land sale involving real property owned by Delano and
27
28

1 Lenore Peterson. Mr. Golub testified that he (personally) was entitled to approximately
2 \$464,000 of the \$941,000 commission with the remainder going to Darlene Moore, Tomlinson
3 Black, and others. Mr. Golub apparently forgot about what he testified to on September 25,
4 2007, because one month later he sued the Petersons, Geraldine Kirk-Hughes, Peter Sampson,
5 Kelly Polatis, Kirk-Hughes Development, LLC, and Kirk-Hughes Associates for the entire
6 \$941,000. On March 11, 2009, Mr. Golub obtained a default judgment for \$941,000 against all
7 of the defendants but the Petersons.¹ On July 15, 2010, Mr. Golub settled with the Petersons for
8 a unknown amount.² Yet on October 28, 2010, Mr. Golub recorded the March 11, 2009, default
9 judgment for the full \$941,000 deducting nothing for the Peterson settlement nor taking into
10 account his September 25, 2007, testimony where he admitted that half of the \$941,000 wasn't
11 even his to begin with.
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13
14 Mr. Golub now plans to use that \$941,000 default judgment to foreclose on real property
15 that is secured by a Deed of Trust for which Kirk-Scott, Ltd. (a non-party to the 2007 action) is
16 the beneficiary and seeks summary judgment adjudication on that point. Plaintiffs' Motion for
17 Summary Judgment should be denied because:
18

19 1. Mr. Golub cannot claim bona fide purchaser status under IC 55-606 because Mr.
20 Golub knew that the subject property was secured by Kirk-Scott's deed of trust years before he

21 ¹ Kirk-Scott, Ltd., the author of this summary judgment response brief, *was not* one of those
22 defendants. Kirk-Scott, Ltd was not even a party to the October 30, 2007, lawsuit that gave rise
23 to the March 11, 2009, default judgment.

24 ² Mr. Golub was asked about the Peterson settlement amount during a June 12, 2013, deposition.
25 (Crotty Aff. at ¶6) Although Mr. Golub refused to disclose the exact settlement amount he did
26 admit that the monies he received from the Petersons accounted for some of the \$941,000 he
27 sought in his 2007 lawsuit but that he still seeks to collect the entire \$941,000 awarded in the
28 March 11, 2009 default judgment. *Id.* Mr. Golub also testified that, in his opinion, it was
perfectly fair that he be entitled to recover twice, once from the Petersons and a second time
from the default judgment debtors.

1 recorded the March 11, 2009, default judgment;

2 2. Mr. Golub's March 11, 2009 default judgment does not have priority over Kirk-
3 Scott's September 17, 2010 deed of trust under IC 55-606 because the 2009 default judgment is
4 not a valid judgment lien as it (a) is not supported by "valuable consideration" and (b) lacks a
5 Rule 54(b) certificate;

6
7 3. Kirk-Scott's Deed of Trust is not invalid under Idaho law because (a) it was
8 executed in Nevada in compliance with Nevada law, (b) Idaho law allows such instruments to
9 be recorded, and, undisputedly, (c) the Kootenai County Recorder's office allowed the Kirk-
10 Scott Deed of Trust to be recorded - - - and the Idaho Supreme Court holds that the recording of
11 an instrument constitutes constructive notice to encumbers like plaintiffs; and,

12
13 4. The Kirk-Scott Deed of Trust is not void because plaintiffs lack standing to claim
14 that the instrument is void.

15 Accordingly, plaintiffs' Motion for Summary Judgment should be denied and this case
16 should go to trial.

17 II. ARGUMENT³

18 19 A. **Summary Judgment should be denied because issues of fact exist as to whether Mr. 20 Golub knew about Kirk-Scott, Ltd.'s Deed of Trust before he recorded his default 21 judgment.**

22 Summary judgment is proper when "the pleadings, depositions, and admissions on file,
23 together with the affidavits, if any, show that there is no genuine issue as to any material fact and
24 that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "In
25 considering such evidence, it is well recognized that the facts are to be liberally construed in

26 ³ Kirk-Scott incorporates, in the argument section of this brief, the Combined Statement of Facts
27 (CSOF) it submitted in support of its summary judgment response and motion to vacate brief.

1 favor of the party opposing the motion and he is given the benefit of all favorable inferences
2 which might be reasonably drawn from the evidence." *Farmer's Ins. Co. of Idaho v. Brown*, 97
3 Idaho 380, 381 (1976).

4 Here reasonable inferences exist in Kirk-Scott's favor and summary judgment should be
5 denied.

6
7 First, Mr. Golub knew that Balinda Antoine, Kirk-Scott's President, invested millions in
8 developing the subject property and secured that investment with a deed of trust on the subject
9 properties - - - for Ms. Antoine told Mr. Golub just that in 2004 at a presentation Mr. Golub gave
10 for Ms. Antoine's benefit. (CSOF ¶¶1-2, 4)

11
12 Second, Mr. Golub testifies in his May 3, 2013, affidavit that he "never had any dealings
13 with Balinda Antoine" but in his September 25, 2007, deposition he testified to the exact
14 opposite - - - that he had extensive personal dealings with Ms. Antoine insofar as Golub,
15 personally, directed his efforts at Ms. Antoine knowing that she was the lynch-pin in ensuring
16 that the property development project was funded. (CSOF ¶¶5-6) Thus, Mr. Golub simply lacks
17 the credibility⁴ to claim he had no actual or constructive knowledge of the Kirk-Scott deed of
18 trust's existence and this Court should not accept his statements as the ground truth in this case.

19
20 Third, Mr. Golub's own evidence fails to support his case. In order to establish that he
21 was a bona-fide purchaser (whose default judgment is prior to Kirk-Scott's deed of trust) Mr.
22 Golub must show that he had no actual or constructive notice of the Kirk-Scott deed of trust. Mr.
23 Golub presents *no* evidence on that point. Mr. Golub states that he "was not aware that Kirk-

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25
26 ⁴ Additionally, Mr. Golub's failure to account for the Peterson settlement when he re-recorded
27 his default judgment and initial claim for \$941,000 (of which he, at best, only has a right to half)
28 further calls his credibility into question.

1 Scott had executed a Deed of Trust to Kirk-Hughes Development prior to Kirk-Scott recording
2 one during Kirk-Hughes Development's bankruptcy on September 17, 2010." (Golub Aff. at ¶14)
3 Yet Kirk-Scott did not execute the Deed of Trust. Kirk-Hughes Development executed the deed
4 of trust (which is at issue here) in favor of Kirk-Scott and Mr. Golub submits no evidence that he
5 was unaware of the Kirk-Scott deed of trust's existence. (Howard Aff. at Ex. 5) Mr. Golub's
6 motion should be denied outright for failure of proof.
7

8 **B. Issues of fact exist as to whether Mr. Golub had prior knowledge of the Kirk-Scott**
9 **Deed.**

10 Idaho courts consistently hold that a subsequent purchaser's actual knowledge of a prior
11 interest in real property renders the first lien prior to the subsequent purchaser's lien even though
12 the first lien was not properly recorded. *Farm Bureau Fin. Co. v. Carney*, 100 Idaho 745, 747
13 (1980). To that end, Idaho courts hold "that one cannot be a good faith purchaser or
14 encumbrancer when a reasonable investigation of the property would have revealed the existence
15 of the conflicting claim in question." *Langroise v. Becker*, 96 Idaho 218, 221 (1974). "Good
16 faith" means that a party purchases the property without knowing or having notice of any adverse
17 claims to the property. *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 661 (1998).
18

19 Plaintiffs agree with the above authorities as plaintiffs cite *Froman v. Madden*, 13 Idaho
20 138 (1907) (Plfs.' Summ J. Memo. at pg. 14). *Froman* held:
21

22 Of course, if the defendant should be able to show that the plaintiff
23 had actual knowledge of the sale and conveyance to her prior to his
24 receiving a deed and parting with the purchase price, she would be
25 entitled to recover in this action, or, if she could show that he had
26 knowledge of such facts and circumstances as would have led to
27 the discovery of her purchase and conveyance by a reasonably
28 prudent man, she would be entitled to recover, but, in order to
recover, she must show that he was not a purchaser in good faith

1 within the meaning of the statute. *Froman v. Madden*, 13 Idaho
2 138, 88 P. 894, 895 (1907)(emphasis added).

3 Certainly issues of fact exist as to the "facts and circumstances" Mr. Golub was aware of
4 and whether those "facts and circumstances" would have led to discovery of Kirk-Scott's interest
5 in the property "by a reasonably prudent man."⁵ Issues of fact exist as to whether Mr. Golub
6 knew, or should have known, that the subject property was encumbered by Kirk-Scott, Ltd.'s
7 deed of trust and whether Mr. Golub should have conducted a reasonable investigation as to
8 devices encumbering the real property. First, Ms. Antoine testifies that she informed Mr. Golub
9 in 2004 that Kirk-Scott would secure the subject property with a deed of trust. That testimony is
10 enough to put Mr. Golub on notice of Kirk-Scott's interest. (CSOF ¶¶ 1-2) Second, Mr. Golub's
11 May 3, 2013, affidavit testimony, which contradicts his September 25, 2007, deposition
12 testimony, calls Mr. Golub's credibility into question. For this court should not accept Mr.
13 Golub's self-serving affidavit that (implies) he had no idea the subject property was subject to
14 Kirk-Scott's deed of trust given the undisputed fact that his affidavit directly contradicts his prior
15 sworn deposition testimony. *Id.* ¶¶4-7. Third, it is beyond dispute that Mr. Golub is a
16 sophisticated real estate professional well aware of the importance of ensuring that title to real
17 property he markets is free and clear of other encumbrances.⁶ In fact, he made repeated inquiries
18 as to the title to the Peterson, Atkinson, and Sloan properties throughout 2004 and 2005. (CSOF
19 ¶3) Indeed, he claims that he is entitled to \$941,000 for the work he did facilitating the purchase
20 of the subject property. Accordingly, it logically follows that an individual who claims he is
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24 ⁵ Idaho courts consistently hold that the issue of reasonableness is an issue of fact. *Langroise v.*
25 *Becker*, 96 Idaho 218, 221 (Idaho 1974).

26 ⁶ At his June 12, 2013, deposition Mr. Golub testified that he knew he could locate information
27 on real property encumbrances at the Kootenai County Recorder's office and/or through a title
28 company. (Crotty Aff. at ¶7)

1 entitled to such a hefty amount must have the technical know-how to ensure that the real
2 property subject to such a transaction is not encumbered by other liens. Fourth, Mr. Golub
3 admits that as early as March 11, 2009, it was his expectation that his agent (Michael Howard,
4 his attorney) would identify assets belonging to the judgment debtors and collect upon those
5 assets. (Crotty Aff. at ¶8) Yet, Mr. Golub's lawyer will not allow Mr. Golub to disclose when he
6 (the lawyer) learned of the existence of the Kirk-Scott deed of trust and when he (the lawyer)
7 told Mr. Golub of the deed of trust's existence. *Id.*⁷

9 Simply stated, Mr. Golub both knew that Kirk-Scott would (and did) secure the subject
10 property with a deed of trust and had the knowledge and wherewithal to conduct a title-search of
11 the subject property before encumbering it with his (void) judgment.⁸

12
13 **C. Kirk-Scott, Ltd's Deed has priority under the terms of IC 55-606 and Idaho law.**

14 **1. *Kirk-Scott's Deed has priority under the plain terms of IC 55-606 because Mr.***
15 ***Golub's Judgment is not supported by "valuable consideration."***

16 IC 55-606 provides, in full:

17 55-606. Conclusiveness of conveyance -- Bona fide
18 purchasers. Every grant or conveyance of an estate in real property
19 is conclusive against the grantor, also against every one
20 subsequently claiming under him, except a purchaser or
encumbrancer, who in good faith, and for a valuable consideration,

21 ⁷ Kirk-Scott, Ltd. reserves the right to bring either a motion to compel or motion to disqualify
22 counsel on this point. A key (if not the key) issue in this case is when Mr. Golub, or Mr. Golub's
23 agents, learned of the existence of the Kirk-Scott Deed of Trust. If it is discovered that Mr.
24 Golub (or his agent) knew of the deed's existence before re-recording the default judgment on
25 October 28, 2010, then the default judgment does not have priority over the Kirk-Scott Deed of
Trust under the bona-fide purchaser doctrine. Accordingly, the issue of when Mr. Golub and his
agents learned of the trust deed's existence is crucial and plaintiffs should not be allowed to hide
that information under the guise of privilege.

26 ⁸ Kirk-Scott, Ltd. has filed a motion to vacate the March 11, 2009, default judgment in its
27 entirety.

1 acquires a title or lien by an instrument or valid judgment lien that
2 is first duly recorded.

3 The word "valuable" means "[w]orth a good price; having financial or market value."
4 Black's Law Dictionary, at 1256 (7th Ed. 2000). The "word consideration" means "[s]omething
5 of value (such as an act, a forbearance, or a return promise) received by a promisor from a
6 promisee." *Id.* at 245. Courts defining the phrase "valuable consideration" in the context of
7 instruments conferring title to real property mirror Black's Law Dictionary's definition. *Life Ins.*
8 *Co. v. Rose Chapel Mortuary, Inc.*, 95 Idaho 599, 603 (1973)(stating "valuable consideration"
9 means a "detriment to the promisee or a benefit to the promisor."); *Gardiner v. Gardiner*, 36
10 Idaho 664, 214 P. 219, 220 (1923)(love and affection not valuable consideration); *Hiddleson v.*
11 *Cahoon*, 37 Idaho 142, 214 P. 1042, 1043 (1923).

12
13 *Mountain Home Lumber Co., Ltd. v. Swartout*, 30 Idaho 559, 166 P. 271 (1917) is
14 illustrative and analogous to this case. *Swartout* involved Mr. Swartout obtaining title to real
15 property, from Mr. Garrett, and recording the deed. *Id.* at 273. Thereafter another entity,
16 Mountain Home Lumber Company, obtained a judgment against Mr. Garrett. *Id.* Mountain
17 Home Lumber Company then executed on its judgment and obtained title to the subject real
18 property. *Id.* The *Swartout* court (without addressing whether Mr. Swartout's deed was properly
19 recorded) held that Mr. Swartout's deed was prior to Mountain Home's judgment because
20 Mountain Home's judgment "was not valuable consideration; for it amounted to nothing more
21 than a cancellation of pre-existing indebtedness" and reasoned that Mountain Home was "[a]
22 purchaser who part[ed] with a consideration [that was] neither valuable or irrevocable [and was]
23 not a bona fide purchaser." *Id.* *Swartout* found that the deed was not irrevocable because the
24 lumber company's judgment against Garrett could be revived, subject to Mr. Swartout's equities.
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1 *Id. Swartout* is not an outlier either. *Rexburg Lumber Co. v. Purrington*, 62 Idaho 461, 113 P.2d
2 511, 513-514 (1941)("his judgment is merely credited on the purchase price...is not a bona fide
3 purchaser because he has parted with nothing, merely a paper exchange and no valuable
4 consideration has passed. Thus respondent was not a bona fide purchaser...and not protected
5 against secret liens.")(citations omitted); *American Credit Co. v. Stuyvesant Ins. Co.*, 173 S.E.2d
6 523, 526 (N.C. Ct. App. 1970)(affirming vacation of default judgment "because the motion for
7 judgment, sounding in contract, failed to allege 'valuable consideration.'").

9 *Swartout* applies here. First, Mr. Golub's judgment is nothing more than a device that he
10 seeks to use to cancel Kirk Hughes Development's pre-existing indebtedness. Indeed, Mr. Golub
11 seeks to do just that in this lawsuit by foreclosing on the default judgment. (Plfs' Summ. J. Memo
12 at 1) Second, the judgment is not irrevocable: Mr. Golub can execute on the default judgment
13 subject to Kirk-Scott's deed of trust. Stated differently: Mr. Golub still has a remedy against the
14 judgment debtors, just not against Kirk-Scott. Third, the judgment is not "valid consideration"
15 against Kirk-Scott. There is no "promisor" - "promisee" relationship between Kirk-Scott and
16 plaintiffs. Kirk-Scott neither gave (or received) value, forbearance, or other consideration
17 regarding the judgment. Accordingly, plaintiffs' default judgment against Kirk-Scott fails for
18 lack of consideration.

21 **2. *Mr. Golub's judgment is not a "valid judgment lien" because it lacks a Rule***
22 ***54(b) certificate.***

23 Additionally, Mr. Golub's judgment is not a valid judgment because a valid I.R.C.P.
24 54(b) certificate was not recorded with the judgment. (Howard Aff. Ex. 8 - - - note that the Rule
25 54(b) certificate attached to the default judgment is not signed)

1 A "valid judgment lien" is as "an order or judgment that ends the lawsuit, adjudicates the
2 subject matter of the controversy, and represents a final determination of the rights of the parties.
3 It must be a separate document that on its face states the relief granted or denied." *T.J.T., Inc. v.*
4 *Mori*, 148 Idaho 825, 826 (2010). A final judgment must be final as to all parties and all claims
5 and contain a signed I.R.C.P. 54(b) certificate. *Bishop v. Capital Fin. Servs.*, 109 Idaho 866, 867,
6 (1985). And Mr. Golub admits that he "could not record the judgment and begin his collection
7 efforts" because the court did not sign the Rule 54(b) certificate. (Plfs' Summ. J. Memo. at 6:10-
8 20; Crotty Aff. at Ex. 2, pg. 43-44)

10 What Mr. Golub argues is true today and supported by Mr. Golub's own evidence. The
11 March 2009 default judgment that Mr. Golub recorded in October 2010 *still* does not have a
12 signed Rule 54(b) certificate attached. (Howard Aff. at Ex. 8) Accordingly, it is not a "valid
13 judgment lien" as contemplated under IC 55-606 and as stated in plaintiffs' own briefing.

15 **D. The acknowledgement on the Kirk-Scott Deed is proper and even if it wasn't its
16 defects do not vitiate it.**

17 Plaintiffs argue that the Kirk-Scott Deed is invalid because it was not properly
18 acknowledged. Plaintiffs' arguments fail

19 ***1. The Kirk-Scott deed was properly acknowledged under Nevada law.***

20 An instrument is properly recorded in Idaho if that instrument was acknowledged in
21 accord with the laws of the state where it was created. Idaho Code 55-805 provides, in part:

22 Before an instrument may be recorded, unless it is otherwise
23 expressly provided, its execution must be acknowledged or if
24 executed by a limited liability company, by the manager, member
25 or other person executing the same on behalf of the limited liability
26 company, or the execution must be proved and the
27 acknowledgment or proof, certified in substantially the manner
28 prescribed by chapter 7, title 55, Idaho Code; provided, that if such
instrument shall have been executed and acknowledged in any

1 other state or territory of the United States, or in any foreign
2 country, according to the laws of the state, territory or country
3 wherein such acknowledgment was taken, the same shall be
4 entitled to record, and a certificate of acknowledgment indorsed
5 upon or attached to any such instrument purporting to have been
6 made in any such state, territory or foreign country, shall be prima
7 facie sufficient to entitle the same to such record. IC 55-805
8 (emphasis added).

9 The Kirk-Scott Deed of Trust was executed in Nevada. (Howard Aff. Ex. 5)

10 Nevada law relating to written conveyances of real property provides, in full:

11 Every conveyance in writing whereby any real property is
12 conveyed or may be affected must be acknowledged or proved and
13 certified in the manner provided in this chapter and in NRS
14 240.161 to 240.169, inclusive. Nev. Rev. Stat. Ann. § 111.240.

15 Nev. Rev. Stat. Ann. § 240.1655(1)(a) states that:

16 A notarial act must be evidenced by a certificate that: (a) Identifies
17 the county, including, without limitation, Carson City, in this State
18 in which the notarial act was performed in substantially the
19 following form: State of Nevada, County of ____

20 Nev. Rev. Stat. Ann. § 240.1655(7) provides, in full:

21 By executing a certificate of a notarial act, the notarial officer
22 certifies that the notarial officer has complied with all the
23 requirements of this section.

24 Kirk-Scott's deed of trust complies with the Nevada rules because it sets out the State and
25 County where the deed of trust was executed and because it was signed by a notary - - - an act
26 which certifies that the requirements of §240.1655 were met. Accordingly, since the Kirk-Scott
27 deed of trust was executed in accordance with Nevada's law it complies with IC 55-805 and was
28 recorded properly. Further, the undisputed fact that the Kootenai County Auditor's office
allowed the Kirk-Scott deed of trust to be recorded is further proof of its validity. *Matheson v.*

1 *Harris*, 98 Idaho 758, 761 (1977)("If entitled to recordation, it was constructive notice as to its
2 contents; if not, the contrary is the case.")⁹

3 Plaintiffs' arguments about the Kirk-Scott deed's supposed defects should be disregarded
4 on that argument alone.

5 **2. Lack of acknowledgement does not vitiate a deed.**

6 Plaintiffs argue that lack of acknowledgment voids Kirk-Scott's deed. (Plfs' Summ. J.
7 Memo. at 19:4-6) Plaintiffs arguments fail.

8 As a starting point, "[t]he policy of the law is not to defeat a grantor's intent" given the
9 purpose of Idaho's recording statute. *Mollendorf v. Derry*, 95 Idaho 1, 3 (1972). To wit:

10
11 The primary purpose of the recording statutes is to give notice to
12 others that an interest is claimed in real property, and thus give
13 protection against bona fide third parties who may be dealing in
14 the same property. Here the earnest money agreement was signed
15 by all parties, but not acknowledged by the sellers, the Mathesons.
16 In this condition, with an acknowledged cover sheet, the county
17 recorders of two counties accepted and recorded the document. **If**
18 **entitled to recordation, it was constructive notice as to its**
19 **contents; if not, the contrary is the case.** I.C. s 55-811. In either
20 event, the extent of the interest claimed was clear for all to see, the
21 earnest money agreement itself being part of the recordation. To
22 record, whether a deed, a mortgage, or a contract, is to give notice,
23 and we are unable to see that attaching a "Notice" cover sheet, to
24 that which under the statutes is notice, either adds or subtracts.
25 *Matheson*, 98 Idaho at 761 (1977)(emphasis added).

26 To that end, deeds that lack both an acknowledgement and contain deficiencies in the
27 legal description have not been voided. *Mollendorf*, 95 Idaho, at 4 ("Chapters 5 and 6 of Title
28 55, I.C., do not require such an acknowledgment, except for the purpose of recording."). *Farm*

29 _____
30 ⁹ At his June 12, 2012, deposition Mr. Golub testified that he read the Kirk-Scott deed of trust
31 and was not confused, at all, as to its wording. (Crotty Aff. at ¶6) Additionally, plaintiffs cite
32 *Matheson v. Harris* in their own summary judgment briefing. (Plfs.' Summ. J. Memo. at 14)

1 *Bureau Fin. Co., Inc. v. Carney*, 100 Idaho 745, 750 (1980)("Generally, technical deficiencies in
2 the certificate of acknowledgment will not render the certificate defective if the alleged
3 deficiency can be cured by reference to the instrument itself, in this case, the deed of trust" and
4 "the omission of the acknowledger's name in the blank in the certificate will not render the
5 certificate ineffective if his name can be ascertained from other sources, as from the face of the
6 instrument itself or from other parts of the certificate."); *Pacific Coast Joint Stock Land Bank v.*
7 *Security Prods. Co.*, 56 Idaho 436 (1936)(Substantial compliance with statute is sufficient and
8 technicalities will be disregarded.)

9
10 Accordingly, even if the Kirk-Scott deed of trust did not comply with Idaho law its
11 supposed deficiencies do not render it void. Again, it was recorded and recording, alone, is
12 constructive notice.
13

14 **3. *Plaintiffs' other acknowledgement arguments and authorities fail.***

15 Plaintiffs repeatedly cite *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 291 (1975) for
16 proposition that instrument must be acknowledged, certified, and recorded to have the effect of
17 giving notice. (Plfs' Summ. J. Memo. at 16 & 17) Plaintiffs argue that *Jordan* mandates
18 avoidance of Kirk-Scott's deed of trust. *Id.*
19

20 *Jordan* is not controlling because it has been overruled. *In re Big River Grain, Inc.*, 718
21 F.2d 968, 971 (9th Cir. 1983)("The [Uniform Commercial] Code overrules *Jordan* by
22 eliminating acknowledgments in chattel mortgages, thus benefitting "good faith mortgagees who
23

1 had inadvertently failed to comply with the statutory niceties."). *In re Big River Grain*, in
2 overruling a decision based on *Jordan*¹⁰, further stated:

3 Recently...the Idaho Supreme Court pronounced liberal guidelines
4 for reviewing technical deficiencies in acknowledgments. Since the
5 notary's function is to protect against recording false instruments,
6 the court reasoned, 'If the notary faithfully carries out his statutory
7 duties, it makes little difference whether he remembers to fill in the
8 blanks in the certificate.' The court noted further that, 'In Idaho, as
9 in most states, there is a presumption of regularity in the
10 performance of official duties by public offices,' including notaries
11 public. (citation omitted) The district court recognized these
12 policies as well as the "harsh result" that would follow from its
13 decision. Nonetheless, the court, relying on *Jordan*, considered the
14 failure to include a sworn statement that Dave Walker possessed
15 the authority to execute the deed on behalf of Big River Grain so
16 material as to preclude constructive notice. As noted above, we
17 find *Jordan* distinguishable. We respect the careful analysis of the
18 district court, but find more persuasive the conclusion of the
19 bankruptcy court that the acknowledgment, considered in
20 conjunction with the deed itself, substantially complied with the
21 requirements of the Idaho code. Accordingly we reverse the
22 decision of the district court and affirm the decision of the
23 bankruptcy court. *Id.* at 791.

24 Therefore, Kirk-Scott's September 2010 deed of trust recording provided notice, to Mr.
25 Golub and/or his agents, of Kirk-Scott's interest in the subject property. And not only did the
26 September 2010 deed of trust recording provide notice, so too did Balinda Antoine in 2004 when
27 she told Mr. Golub that she would secure the subject property with a deed of trust. (CSOF ¶¶1-

28 2)

E. Plaintiffs lack standing to claim that Kirk-Scott's September 2010 Deed of Trust recording is void.

In order to prevail on a declaratory judgment action the plaintiff must establish standing.

¹⁰ *Jordan*, which was decided in 1957, is also factually distinguishable as it involved liens relating to the personal property belonging to an automobile dealership, not real property. *Jordan*, 79 Idaho at 289.

1 *Martin v. Camas Cnty. ex rel. Bd. Comm'rs*, 150 Idaho 508, 513 (2011)("[T]he [Uniform]
2 Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the
3 action in the first instance.") Courts consistently hold that a non-debtor/non-trustee lacks
4 standing to enforce a violation of a bankruptcy stay. *In re Brooks*, 79 B.R. 479, 481 (Bankr. 9th
5 Cir.1987) *aff'd*, 871 F.2d 89 (9th Cir.1989)(holding that bank's post-petition re-recording of deed
6 of trust cannot be avoided since "the debtor or the trustee chose not to invoke the protections of §
7 362, no other party [could] attack any acts in violation of the automatic stay"); *In re Stivers*, 31
8 B.R. 735 (Bankr.N.D.Cal.1983); *In re Fuel Oil Supply and Terminaling, Inc.*, 30 B.R. 360, 362
9 (Bankr.N.D.Tex.1983).

11 Plaintiff cites *In re Schwartz*¹¹ for the proposition that a deed of trust recorded during a
12 bankruptcy stay is void as a matter of law. (Plfs' Summ. J. Memo. at 14-15). But in order for
13 *Schwartz* to apply plaintiffs must establish that they have standing to complain of Kirk-Scott's
14 violation of the bankruptcy stay. Plaintiffs lack standing as *Schwartz* cites *In re Brooks* and, in
15 citing *Brooks*, *Schwartz* holds:

18 Finally, the government argues in the alternative that its violation of the automatic
19 stay falls within the narrow exception for technical violations of the automatic
20 stay carved out by *In re Brooks*, 79 B.R. 479 (Bankr. 9th Cir.1987), *aff'd*, 871
21 F.2d 89 (9th Cir.1989). *See also In re Wingo*, 89 B.R. 54, 57 (Bankr. 9th
22 Cir.1988). In *Brooks*, the BAP held that a minor technical violation of the stay-the
23 rerecording of a deed to correct a property description mistake-was voidable
rather than void. However, on appeal we did not address the void/voidable issue
and instead decided the case on the issue of standing, 871 F.2d at 90, and we
expressed no opinion on the validity of the exception recognized by the BAP in
Brooks. Because the BAP's *Brooks* reasoning is not dispositive in this case, we

24 ¹¹ Plaintiffs also cite *In re National Environmental Waste Corp.*, 129 F.3d 1052 (9th Cir. 1997),
25 *In re Dyer*, 322 F.3d 1178, 1188 (9th Cir. 2003), and *In re Samanidego*, 224 B.R. 154, 163
26 (Bankr. E.D. Wn. 1998), Each case cited and based its holdings on *Schwartz* and did not address
27 the standing issue because the actions involved lawsuits initiated by aggrieved debtors or
28 trustees.

1 again refrain from addressing the validity of the *Brooks* exception. *In re Schwartz*,
2 954 F.2d 569, 574 (9th Cir. 1992)(emphasis added).

3 Since *Schwartz* did not overrule, question, or dispose of *Brooks*, then *Brooks'* standing
4 requirement controls. And since plaintiffs do not have standing under *Brooks* plaintiffs cannot
5 utilize *Schwartz* to claim the Kirk-Scott deed of trust is void.

6 **F. Red herrings: responses to plaintiffs' other arguments.**

7 • Plaintiffs imply that Kirk-Scott's failure to file a creditor claim in the Kirk-
8 Hughes bankruptcy proceedings of 2009 and 2011 somehow waives Kirk-Scott's rights to its
9 lien. (Plfs.' Summ. J. Memo. at 6-7) Plaintiffs are incorrect:

11 A secured creditor can bypass his debtor's bankruptcy proceeding
12 and enforce his lien in the usual way, which would normally be by
13 bringing a foreclosure action in state court. This is the principle
14 that liens pass through bankruptcy unaffected. If the creditor
15 follows this route, the discharge in bankruptcy will not impair his
16 lien. *In re Hudson*, 260 B.R. 421, 438, n.37 (Bankr. W.D. Mich.
2001)(citation omitted).

16 • Plaintiffs make three arguments regarding the supposed irregularity of the Kirk-
17 Scott deed of trust. (Plfs.' Summ. J. Memo. at 5) Plaintiffs argue, without proof, that the Kirk-
18 Scott deed's legal description may not be part of the original deed of trust. Argument is not
19 evidence and summary judgment motions must be decided on evidence. *Hecla Min. Co. v. Star-*
20 *Morning Min. Co.*, 122 Idaho 778, 785 (1992)(Evidence presented in support of or in opposition
21 to a motion for summary judgment must be admissible.) Plaintiffs argue, without proof, that the
22 legal description on the deed of trust is questionable because parts of the property were
23 supposedly encumbered in 2005 and 2007. Yet plaintiffs submit no evidence in support of their
24 argument. Again, argument is not evidence and insufficient for summary judgment. *Id.* Lastly,
25
26
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28

1 plaintiffs argue that the legal descriptions on the Kirk-Scott deed of trust include the Atkinson
2 property (parcel 8050) but the Atkinson property was not owned by Kirk-Hughes development
3 on November 18, 2004, the date the deed of trust was executed. But the Atkinson property
4 (8050) is referenced in the Promissory Note between Kirk-Scott and Kirk Hughes, that
5 Promissory Note is dated November 18, 2004, and that Promissory Note incorporates the Kirk-
6 Scott deed of trust. (Antoine Aff. at Ex. A)

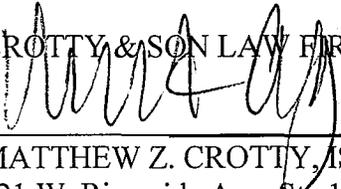
8 • Plaintiffs argue that if the Court finds the Kirk-Scott deed valid then it must find
9 plaintiffs' August 25, 2009, recording of the March 11, 2009, default judgment valid. (Plfs.
10 Summ. J. Memo at 20) This point fails for two reasons. First, Mr. Golub knew in 2004 that
11 Kirk-Scott's investment in the project was secured by a deed of trust. (CSOF ¶¶1-2) Second,
12 since plaintiffs' entire March 11, 2009, judgment is invalid as a matter of law (Kirk-Scott has
13 filed a companion motion for this Court to address that issue) its August 25, 2009 recording is of
14 no consequence.

16 III. CONCLUSION

17 Plaintiffs' Motion for Summary Judgment should be denied.

19 DATED this 14th day of June 2013.

21 CROTTY & SON LAW FIRM, PLLC

22 
23 MATTHEW Z. CROTTY, ASB: 8653
24 421 W. Riverside Ave. Ste 1005
25 Spokane, WA 99201
26 Telephone: (509) 850-7011
27 Email: matt@crottyandson.com

28 Attorney for Defendant Kirk-Scott, Ltd.

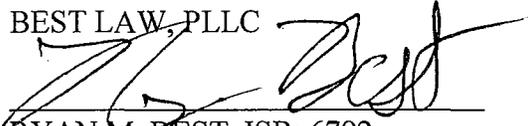
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2013, I have emailed the document to the following participants at the addresses listed below:

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250 Northwest Boulevard, Suite 206
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Douglas S. Marfice
Ramsden & Lyons
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Attorney for Defendant Tomlinson North Idaho, Inc.

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Attorney for Defendant Kirk-Hughes Development, LLC

BEST LAW, PLLC

RYAN M. BEST, ISB: 6792
Attorney for Defendant Kirk-Scott, Ltd.

2013 JUN 24 AM 10:10

CLERK DISTRICT COURT

Patty Bradley
DEPUTY *JB*

1 Matthew Z. Crotty
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6 Telephone: (509) 850-7011
7 Facsimile: (509) 703-7957
8 Email: matt@crottyandson.com

9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC and
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
Idaho corporation

21 Defendants.

Case No. CV13-866

Case No. CV 07-8038

**DEFENDANT KIRK-SCOTT, LTD.'s
MOTION TO DISMISS REPLY BRIEF**

22 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

23 This Court should dismiss plaintiffs' case because:

24 1. Kirk-Scott, Ltd.'s September 17, 2010, deed of trust filing is not void because
25 plaintiffs lack standing to make that claim; and,

26 2. Plaintiffs do not have priority over Kirk-Scott, Ltd.'s deed of trust under IC 55-
27
28

1 606 because *Siegel* is good law.

2 **II. ARGUMENT**

3 **A. Plaintiffs lack standing to claim that Kirk-Scott's September 2010 Deed of Trust**
4 **recording is void.**

5 In order to prevail on a declaratory judgment action the plaintiff must establish standing.
6 *Martin v. Camas Cnty. ex rel. Bd. Comm'rs*, 150 Idaho 508, 513 (2011)("[T]he [Uniform]
7 Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the
8 action in the first instance.") Courts consistently hold that a non-debtor/non-trustee lacks
9 standing to enforce a violation of a bankruptcy stay. *In re Brooks*, 79 B.R. 479, 481 (Bankr. 9th
10 Cir.1987) *aff'd*, 871 F.2d 89 (9th Cir.1989)(holding that bank's post-petition re-recording of deed
11 of trust cannot be avoided since "the debtor or the trustee chose not to invoke the protections of §
12 362, no other party [could] attack any acts in violation of the automatic stay"); *In re Stivers*, 31
13 B.R. 735 (Bankr.N.D.Cal.1983); *In re Fuel Oil Supply and Terminaling, Inc.*, 30 B.R. 360, 362
14 (Bankr.N.D.Tex.1983).

15
16
17 Plaintiff cites *In re Schwartz*¹ for the proposition that a deed of trust recorded during a
18 bankruptcy stay is void as a matter of law. (Plfs' Reply Memo. at 6-7) But in order for *Schwartz*
19 to apply plaintiffs must establish that they have standing to complain of Kirk-Scott's violation of
20 the bankruptcy stay. To that end, *Schwartz* cites *In re Brooks* for that point. To wit:

21
22 Finally, the government argues in the alternative that its violation of the automatic
23 stay falls within the narrow exception for technical violations of the automatic
24 stay carved out by *In re Brooks*, 79 B.R. 479 (Bankr. 9th Cir.1987), *aff'd*, 871

25 ¹ Plaintiffs also cite *In re National Environmental Waste Corp.*, 129 F.3d 1052 (9th Cir. 1997),
26 *In re Dyer*, 322 F.3d 1178, 1188 (9th Cir. 2003), and *In re Samanidego*, 224 B.R. 154, 163
27 (Bankr. E.D. Wn. 1998), Each case cited and based its holdings on *Schwartz* and did not address
28 the standing issue because the actions involved lawsuits initiated by aggrieved debtors or
trustees, not creditors which is the case here.

1 F.2d 89 (9th Cir.1989). *See also In re Wingo*, 89 B.R. 54, 57 (Bankr. 9th
2 Cir.1988). In *Brooks*, the BAP held that a minor technical violation of the stay-the
3 rerecording of a deed to correct a property description mistake-was voidable
4 rather than void. However, on appeal we did not address the void/voidable issue
5 and instead decided the case on the issue of standing, 871 F.2d at 90, and we
6 expressed no opinion on the validity of the exception recognized by the BAP in
7 *Brooks*. Because the BAP's *Brooks* reasoning is not dispositive in this case, we
8 again refrain from addressing the validity of the *Brooks* exception. *In re Schwartz*,
9 954 F.2d 569, 574 (9th Cir. 1992)(emphasis added).

10 Since *Schwartz* did not overrule, question, or dispose of *Brooks*, then *Brooks'* standing
11 requirement controls. And since plaintiffs do not have standing under *Brooks* plaintiffs cannot
12 utilize *Schwartz* and their claim should be dismissed on that ground alone.

13 **B. Kirk-Scott, Ltd's Deed has priority under *Siegel*.**

14 Plaintiffs imply that *Siegel Mobile Home Group, Inc. v. Bowen*, 114 Idaho 531 (Ct. App.
15 1988) is no longer good law because of changes the Idaho legislature made to IC 55-606 in
16 1989. (Mot. to Dismiss Reply at 9) But plaintiffs cite no case or legislative history for the
17 proposition that *Siegel* is overruled.

18 As such, *Siegel* is good law and, under *Siegel* Kirk-Scott's deed of trust is prior to the
19 plaintiffs' judgment.

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III. CONCLUSION

Plaintiffs' Motion to Dismiss should be granted.

DATED this 14th day of June 2013.

CROTTY & SON LAW FIRM, PLLC



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Attorney for Defendant Kirk-Scott, Ltd.

CERTIFICATE OF SERVICE

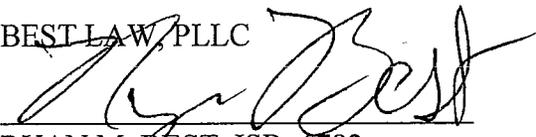
I hereby certify that on the 24th day of June 2013, I have emailed the document to the following participants at the addresses listed below:

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Attorney for Plaintiffs.

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Attorney for Defendant Kirk-Hughes Development, LLC

BEST LAW, PLLC


RYAN M. BEST, ISB: 6792
Attorney for Defendant Kirk-Scott, Ltd.

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

2013 JUN 24 AM 10:11

CLERK DISTRICT COURT

Patty Swick
DEPUTY

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10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
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12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

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15 vs.

16 KIRK-HUGHS DEVELOPMENT, LLC and
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. CV13-866

Case No. CV07-8038

AFFIDAVIT OF BALINDA ANTOINE

23 STATE OF TEXAS)
24 : ss.
25 County of Tarrant)

26 I, BALINDA ANTOINE, being first duly sworn on oath, say:

27 1. I am competent to testify and have personal knowledge of what is written in this
28 affidavit.

AFFIDAVIT OF BALINDA ANTOINE - 1

CROTTY & SON LAW FIRM, PLLC

421 W. Riverside Avenue, Suite 1005

1 2. I am the President of Kirk-Scott, Ltd. I am familiar with its books and records,
2 am a custodian of the same, and am aware of how Kirk-Scott's records are maintained.

3 3. In 2004 I traveled from my home in Texas, to Coeur d'Alene, Idaho. I traveled
4 to Coeur d'Alene in order to attend a presentation regarding the proposed acquisition and
5 development of real property in Kootenai County. That presentation was given by Alan Golub,
6 who I understood to be a real estate agent who worked in the Coeur d'Alene, Idaho area. I base
7 my understanding on my observation of Mr. Golub during the presentation. Mr. Golub held
8 himself out as a sophisticated real estate professional. He conveyed that he had both a
9 understanding of the Kootenai County real estate market as well as the processes that go into
10 such a real estate development project. Those processes include the importance of making sure
11 that the property you acquire doesn't have any liens associated with it.
12
13

14 4. Mr. Golub's presentation took place in a seminar room in the Coeur d'Alene
15 Resort. There were about eight to ten people present but Mr. Golub focused the majority of the
16 presentation at me. Mr. Golub directed his presentation at me because I, as the President of
17 Kirk-Scott, Ltd., had the financing available to make the real estate development project
18 happen.
19

20 5. In fact, Mr. Golub and I had a lot of exchanges during Mr. Golub's presentation.
21 One such exchange centered around the property itself. I asked about who owned the property
22 and whether anyone else had an interest in the property. I asked that question because I wanted
23 to make it clear to Mr. Golub that Kirk-Scott, Ltd. wanted first position title to the property. For
24 if the project went bad I wanted to at least be able to recover the property and didn't want my
25 loan secured by a piece of property that had other liens associated with it. I wanted to make
26
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1 clear, and made clear, that Kirk-Scott wasn't going to loan \$1,350,000.00 without getting a deed
2 to the property. Mr. Golub made it clear to me that it was his practice to do title searches, that
3 he had done a title search on the subject property, that the property was free and clear of other
4 liens, and that title I'd later get wouldn't be encumbered by other liens.

5
6 6. The next morning Mr. Golub picked me, Judy New, and my sister Geraldine
7 Kirk-Hughes, up in Mr. Golub's SUV. Mr. Golub drove the SUV. We drove to the property. At
8 the property Mr. Golub answered more questions about the development and the property's
9 history.

10 7. Based, in part, on Mr. Golub's assurances about the property, Kirk-Scott, Ltd.
11 agreed to lend Kirk-Hughes Development, LLC, \$1,350,000.00 to purchase the real property.
12 Attached hereto as Exhibit A is a true and correct copy of the November 18, 2004, promissory
13 note that Kirk-Hughes Development, LLC, executed regarding the above-referenced loan.
14

15 8. Kirk-Scott, Ltd. protected its \$1,350,000.00 loan with a deed of trust. Again, Mr.
16 Golub was aware that Kirk-Scott, Ltd. would be using such a deed to secure its interest in the
17 property because I told him that at the presentation he gave in the Coeur d'Alene Resort. That
18 Deed of Trust, which was also dated November 18, 2004, is Exhibit C to the Complaint that Mr.
19 Golub filed in this action. I was given assurances (immediately after the Deed of Trust was
20 signed) that the Deed of Trust would be recorded. The assurances were given to me in the late
21 2004 timeframe by Geraldine Kirk-Hughes.
22

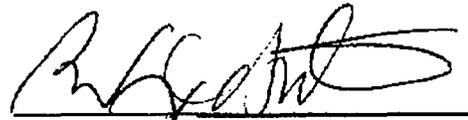
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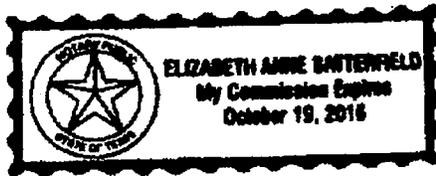
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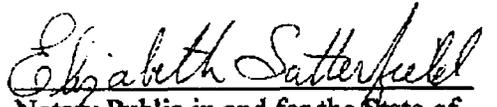
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9. For reasons unknown to me, the Deed of Trust was not recorded until September 2010.


BALINDA ANTOINE

SUBSCRIBED AND SWORN to before me this 4 day of June 2013.




Notary Public in and for the State of
Texas, residing at Grand Prairie
My commission expires: 10/19/13

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2013, I have emailed the document to the following participants at the addresses listed below:

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250 Northwest Boulevard, Suite 206
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Attorney for Plaintiffs.

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BEST LAW, PLLC

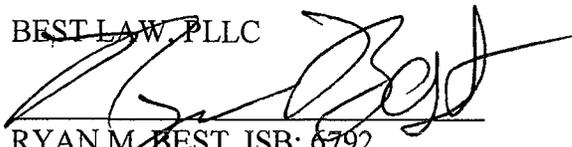

RYAN M. BEST, ISB: 6792
Attorney for Defendant Kirk-Scott, Ltd.

EXHIBIT A

NOTE SECURED BY DEED OF TRUST

On November 18, 2004, for value received, KIRK-HUGHES DEVELOPMENT, LLC, promises to pay to KIRK-SCOTT, LTD. the sum of One Million Three Hundred Fifty Thousand Dollars (\$1,350,000.00) with interest from November 18, 2004, until paid, at the rate of seven percent (7%) per annum. Payment is due in full from KIRK-DEVELOPMENT, LLC. In five (5) years to KIRK-SCOTT, LTD.

Should default be made in payment of any installment of principal or interest or in the performance of any obligation contained in the Deed of Trust by which this Note is secured, the whole sum of principal and interest shall become immediately due at the option of the holder of this Note. Principal and interest is payable in lawful money of the United States. If action is instituted in any Court to enforce any obligation secured by such Deed of Trust, KIRK-HUGHES DEVELOPMENT, LLC, promises to pay such sum as the Court may fix as attorney's fees in such action.

This Note is secured by a Deed of Trust on the property designated by the following parcel numbers and legal description: 49N03W035250, SE-NE-SW;

49N03W035000, NE-SW EX SE-NE-SW; 49N03W035850, SE-NW-SW
and 49N03W038050, GOV'T LT 5 EX TAX #'S, TAX # 12996.

DATED this 18th day of November, 2004, in Coeur
d'Alene, Idaho.


GERALDINE KIRK-HUGHES
Managing Member of KHD, LLC

1. I am an attorney for Defendant Kirk-Hughes Development, LLC, in the above-captioned matter. I have personal knowledge of and am competent to testify concerning the matters contained herein.

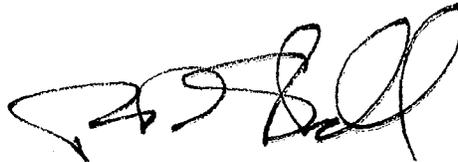
2. Attached hereto are true and correct copies of the following pages to the Deposition of Alan Golub which was taken on September 25, 2007:

- a. p. 148:5-17; and
- b. pp. 173:2-179:13.

3. Attached hereto are true and correct copies of the following pages and exhibits to the Deposition of Alan Golub which was taken on June 12, 2013:

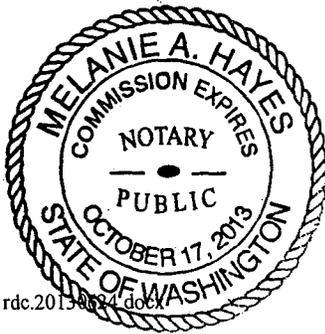
- a. p. 8:9-23;
- b. p. 9:19-25;
- c. pp. 12:1-14:18;
- d. pp. 49:25-52:1;
- e. pp. 49:25-54:2;
- f. p. 53:1-16;
- g. pp. 60:5-63:19
- h. pp. 61:3-63:19;
- i. pp. 62:3-64:23;
- j. pp. 74:23-76:15;
- k. pp. 74:19-77:23;
- l. pp. 87:1-89:18;
- m. pp. 89:13-90:1;
- n. pp. 89:19-90:2;

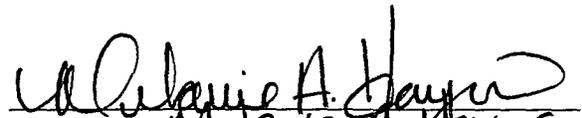
- o. p. 92:6-18;
- p. p. 94:1-9;
- q. pp. 94:2-96:23;
- r. p. 98:3-19;
- s. p. 99:8-22; and
- t. p. 100:6-10.



RICHARD D. CAMPBELL

SUBSCRIBED AND SWORN to before me this 24th day of June, 2013.




Print Name: Melanie A. Hayes
Notary Public in and for the State of
Washington, residing at: Deer Park
My Commission Expires: 10.17.2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

Michael T. Howard
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601 W. Riverside #1900
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- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
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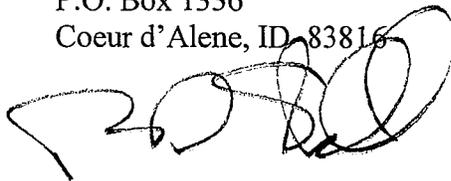
Matthew Z. Crotty
Crotty & Son Law Firm, PLLC
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MICHAEL S. BISSELL

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
TOMLINSON BLACK NORTH IDAHO,
INC., an Idaho Corporation,
Plaintiff,
vs File 06-CV-0118-EJL
GERALDINE KIRK-HUGHES, an
individual, d/b/a Kirk-Hughes
and Associates; KIRK-HUGHES,
LLC, a Nevada limited
liability company; KIRK-HUGHES
DEVELOPMENT, LLC, a Delaware
limited liability company;
KELLY POLATIS, an individual,
and DOES 1 through 10,
Defendants.

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DEPOSITION OF ALAN GOLUB

SEPTEMBER 25, 2007

The deposition of ALAN GOLUB, a witness in the above-entitled cause, taken before Gary E. Heston, Certified Shorthand Reporter and Notary Public in and for Kootenai County, Idaho, on the 25th day of September 2007, commencing at 9:10 a.m., pursuant to the Federal Rules of Civil Procedure. DEPOSITION TAKEN AT THE INSTANCE OF THE DEFENDANTS Geraldine Kirk-Hughes, Kirk-Hughes, LLC, Kirk-Hughes Development, LLC

1 way ahead from a financial standpoint.

2 Q. So the amount of the commission you would
3 have received had this thing closed on or before
4 November 12, 2004, was \$941,000.

5 A. The amount -- the total commission to all
6 real estate agents would have been 941. We had
7 agreed to two percent commission to Darlene Moore.
8 And we have that in writing to Darlene Moore, which
9 represented 109,640. The 3.5 percent commission to
10 Tomlinson represented 191,870. Estimated closing
11 cost of 20,000. And then my agreement with -- my
12 contract with Pacific Real Estate is a 75/25 split.
13 So of the remaining dollars 154,872.50 would go to
14 Pacific Real Estate. And to Alan Golub 464,617.50.
15 So what we wanted to show clearly to Mr. Peterson in
16 writing exactly what -- what he would have been
17 receiving in our contract.

18 Q. When did you first become aware that
19 Mr. Peterson was unhappy about the amount of the
20 commission that he would be paying?

21 A. He seemed to be cordial until after the
22 visit by Mr. Polatis at the end of September.

23 Q. Prior to the visit by Mr. Polatis had
24 Mr. Peterson ever communicated to you that he was
25 unhappy with the commission amount?

1 Ms. Kirk-Hughes?

2 A. Ms. Kirk-Hughes called me after the first
3 of the year. It must have been February or January.

4 Q. Of 2005?

5 A. 2005. And the question she asked me was
6 how do you handle Mr. Peterson, he is not following
7 along with our agreement.

8 Q. Excuse me. Let me stop you there. Were
9 you surprised to get this telephone call?

10 A. I was stunned. Stunned to get this phone
11 call.

12 Q. So this is the first time you talked to
13 after November 12, 2004?

14 A. Yes.

15 Q. And she asked you how do you handle
16 Mr. Peterson, he is not going along with our
17 agreement?

18 A. And I said what agreement. I thought
19 your deal was dead on November 12th.

20 Q. And how did she respond to that?

21 A. And she responded by saying she spent a
22 lot of money on this so far. And she went into
23 detail what she spent. One of the -- I am just
24 trying to think of -- she gave me numbers at that
25 time. One of them was the Autoban International that

1 she sent 10,000 to. She talked about -- I am trying
2 to remember what the number was to Sherry Howell, in
3 the 50,000 plus range, to Hirtson, the architect,
4 that she had done testing, soil testing, water
5 testing. She had bills with engineers. She had
6 bills with surveyors. She had -- I think her total
7 was approximately a quarter million dollars. And
8 Mr. Peterson --

9 Q. Did that include the hundred thousand
10 dollars non-refundable earnest money she had paid to
11 Mr. Peterson by that time?

12 A. She was naming fees that were in addition
13 to that. One of them was John Emmerling, who was the
14 appraiser that did the property. I think she named
15 Emmerling. Bart North was one of the names. Sherry
16 Howell was the big name. Sherry Howell was the one
17 that coordinated that. I think it was also ATS -- I
18 think that was the name of their surveying company.
19 And then there were a series -- she told me there was
20 a series -- she spent a lot of money drilling
21 sample -- sample wells, or sample soil testing for --
22 I think it might have been moisture capacity that the
23 civil engineers -- she did a lot of work on multiple
24 sites. And actually delineated the work that she
25 did. And how do you handle Mr. Peterson. I said,

1 well, I said, well, why are you asking me. I said
2 you know -- you know, one of the mistakes I think
3 that you made is that you never paid the real estate
4 agents. She said, well, you should know better than
5 that, Alan. It's not my job to pay commissions, it's
6 the seller. She said but you know what your problem
7 was, Alan. Your problem was you want -- you cared
8 too much for your commission. You should have done
9 what Mike and Melodie did. And I said well, what did
10 Mike and Melodie do. She said, well, they came down
11 and visited me two, three times and they went for the
12 listing. You should have gone for the listing like
13 they did. That's how you could have got your money.

14 Q. Is that Mike and Melodie Jones?

15 A. Yes, sir.

16 Q. Why was she calling you?

17 A. That's a very good question.

18 Q. Did she ask you for some kind of
19 assistance in dealing with Mr. Peterson?

20 A. It sounds like she asked for advice
21 because probably in some conversation in the past I
22 might have mentioned that Mr. Peterson can be
23 difficult to work with sometimes. And I'll give you
24 one example. This was earlier on -- we are writing a
25 contract for six million dollars, Mr. Peterson.

1 Mr. Peterson was insistent that not only does he get
2 to keep his personal property on the land for a year
3 and a half to maybe two and a half years, but he also
4 wanted to cut down -- he had wanted the right to cut
5 timber on the property. And that goes back to why I
6 utilized Mr. Sternberg.

7 Q. Well, as a result of this -- this was a
8 telephone conversation?

9 A. This was a conversation, yes, to my cell
10 phone.

11 Q. Did anybody participate in it other than
12 you and Ms. Kirk-Hughes?

13 A. No.

14 Q. As a result of this conversation did she
15 ask you to -- did Ms. Kirk-Hughes ask you to do
16 anything?

17 A. No.

18 Q. Did she give you any indication that she
19 had been continuing to work with Mr. Peterson to try
20 to consummate the purchase of his property?

21 MS. JOVICK: Object to the form.

22 A. The answer is yes.

23 Q. What did she say to you in that regard?

24 A. That she just had spent so much time and
25 money she just wanted to get this deal done.

1 Q. Did she tell you specifically that she
2 had continued to do that after November 12, 2004?

3 MS. JOVICK: Object to the form.

4 A. The call was after the first of the
5 year. She talked about ongoing activities. She
6 didn't give me dates of when it happened but it's --
7 by defining what work was being done it sounded like
8 she was in a continuous -- she was continuously
9 spending money on this project.

10 Q. Did she say anything to you about sending
11 Kelly Polatis to visit with Mr. Peterson to discuss
12 purchasing his property?

13 MS. JOVICK: Object to the form.

14 A. She mentioned she tried everything. She
15 said Mr. -- not only did she send Kelly, but she
16 sent Unice, she mentioned Unice Polatis and Richard.
17 I sent Richard. I sent -- I am not sure whether it
18 was aunt -- the name Unice Polatis. She said that
19 Kelly speaks to Mr. Peterson on a almost daily basis,
20 but he is not cooperating. But she did say that --
21 she gave me those names that I did not hear before,
22 of Unice Polatis and Richard Polatis. Also on past
23 trips after the original September that I knew about
24 Polatis visiting Mr. Peterson. She mentioned there
25 were future trips by other members of the Polatis

1 family.

2 Q. Future trips, you mean in the future
3 after her telephone conversation with you in January
4 and February?

5 A. No, after the initial Kelly Polatis trip
6 on September 27th.

7 Q. Okay. So sometime between --

8 A. Between.

9 Q. -- the September trip of Kelly and the
10 time she was talking to you on the phone?

11 A. Yes.

12 Q. I got you. So you said you thought she
13 was asking you for advice on how to deal with
14 Mr. Peterson. Did you give her any advice?

15 A. No.

16 Q. Did you discuss with her at all that you
17 felt like what she was doing was wrong or improper?

18 MS. JOVICK: Object to the form.

19 A. My advice to her was to pay the real
20 estate agent.

21 Q. Now after -- well, let me back up. After
22 that telephone conversation have you had any further
23 or additional contact with Geraldine Kirk-Hughes?

24 A. I saw Ms. Kirk-Hughes at the -- I believe
25 first hearing before the county examiner for the

1 Chateau de Loire project, before the hearing
2 examiner.

3 Q. Did you talk with her then?

4 A. She spotted me in the crowd and said,
5 Aren't you going to give me a hug. And then she
6 introduced to her whole team of -- there was -- there
7 was an African American lady that was an LPGA pro
8 that was part of the golf. She introduced me to her
9 whole design team. I didn't know whether they were
10 people out of Colorado. And she treated me like a
11 celebrity saying Alan -- Alan is the one that brought
12 me the project, which kind of shocked me. I just sat
13 as a member of the public at the --

14 Q. Now you knew back in September when you
15 were recommending to Mr. Peterson that he not give
16 Geraldine any more extensions that the kind of
17 project that Geraldine wanted to build out there, the
18 Chateau de Loire type of project.

19 A. Yeah.

20 Q. And you knew that she had closed on the
21 Sloan property in September of 04, correct?

22 A. Before, yes.

23 Q. Yes. And you knew that she had closed on
24 the Atkinson property prior to September 2004?

25 A. Yes.

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BE IT REMEMBERED that the deposition of ALAN GOLUB was taken on behalf of the Defendants pursuant to the Idaho Rules of Civil Procedure before Amy Brown, RPR, CRR, Certified Shorthand Reporter for Washington and Idaho, on Wednesday, June 12, 2013, in the law offices of Winston & Cashatt, 250 Northwest Boulevard, Suite 206, Coeur d'Alene, Idaho, commencing at the hour of 12:56 p.m.

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1 time we were growing bluegrass.

2 Q. Okay.

3 A. Then there are the issues of grass burning
4 came up.

5 Q. Right.

6 A. And now I'm farming Timothy hay and some
7 different types of herbs.

8 Q. Okay. Cool.

9 A. But it was also land for future development,
10 so I was involved in some of the development issues of the
11 property.

12 Q. Okay. What development issues were those?

13 A. It was basically zoning issues. It had to do
14 with access, you know, roads, lights, and those types of
15 things.

16 Q. And what do you mean by "development"? I
17 mean, what were you developing on the property?

18 A. Basically the only thing that I developed on
19 the property was our existing building, which we built in
20 2000 -- excuse me, 1995.

21 Q. Okay.

22 A. So it was basically getting through the City
23 of Hayden to meet the regulations of the building permit.

24 Q. Okay. And I received your discovery
25 responses. Do you know what I mean by -- when I say the

1 word "discovery responses"?

2 A. Not really.

3 Q. Okay. I'll just represent to you in this case
4 Kirk-Hughes' lawyers, they sent you what are called
5 interrogatories and requests for production. Have you
6 heard those phrases before?

7 A. Yes.

8 Q. Okay. And through your lawyer we received
9 responses to those interrogatories and requests for
10 production.

11 A. Yes.

12 Q. Do you understand that?

13 A. Yes, sir.

14 Q. And in the discovery responses, I believe you
15 said that you developed -- developed properties. So one
16 of the developments would be this building you're talking
17 about in 1995?

18 A. That is correct.

19 Q. Okay. Are there any other properties that
20 you've developed?

21 A. Not that I developed. We did purchase
22 11 acres adjacent to the Hagadone resort golf course. It
23 was bought with zoning of -- it had an existing PUD on it
24 for 74 units, and I did go through the modification with
25 the City of Coeur d'Alene for my vacation of the PUD.

1 Q. Okay. And where would you find a legal
2 description of the property?

3 A. You could find it here at the Kootenai County,
4 but all of the title companies provide that as a service,
5 too.

6 Q. Okay. And where at Kootenai County would you
7 find a legal description of a property?

8 A. It would be right here at the -- right at
9 the -- at the county right here, at the recorder's office.

10 Q. Okay. And you said title companies provided
11 the same legal description information?

12 A. Yes.

13 Q. And were there any, during your ten years as a
14 real estate agent, were there any title companies that you
15 worked with?

16 A. I have worked with First American Title. I
17 worked with Allied Title, and I also worked with Kootenai
18 Title. Is it possible to get a drink of water?

19 MR. HOWARD: No. I'm just kidding. I'll
20 get you one. Go ahead.

21 MR. CROTTY: I'll wait.

22 Q. (BY MR. CROTTY:) So as a real estate agent,
23 what are the general duties of a real estate agent? What
24 does a real estate agent do? And pretend you're talking
25 to a five year old because I don't know.

1 A. A real estate agent is a person that
2 represents either a buyer or a seller --

3 Q. Okay.

4 A. -- in a transaction of real estate to
5 basically sell the property from one owner group to
6 another, or one owner to another.

7 Q. Okay. So you represent the buyer or the
8 seller?

9 A. Correct.

10 Q. And by "represent," what do you mean? I mean,
11 what -- did you owe certain obligations to the buyer or
12 the seller?

13 A. In the contract there are obligations if it is
14 a client versus if it's a customer. The requirement is to
15 look after the interest of your client and to represent
16 the property, if you are the seller agent, clearly to
17 what -- to what is being sold.

18 Q. Okay. And you used the word "client" and you
19 used the word "customer." Can you explain to me the
20 difference between the two?

21 A. You know, there is a legal description. I'm
22 not that strong on it because I've been out of the
23 industry for a while, but there was a -- there is a higher
24 level of responsibility if a person was a client that
25 making sure that all pertinent facts would be disclosed to

1 your client.

2 Q. And what pertinent facts should a real estate
3 agent disclose to his client?

4 A. Basically, what the land -- I mean, what is
5 being sold, the price, the terms of the property.

6 Q. Would a pertinent fact also be the identity of
7 the person or the entity that actually owns the property?

8 A. Yes.

9 Q. And how would you find out who owns the
10 property?

11 A. How would you find that out?

12 Q. Right. How would you determine the owner of a
13 piece of real property?

14 A. It would be through -- usually through the
15 title companies.

16 Q. Okay. And would you do that personally as a
17 real estate agent?

18 A. Yes. Or someone from our office would do
19 that, too.

20 Q. Okay.

21 MR. HOWARD: And just to clarify, are you
22 talking if you're an agent for a buyer or a seller, if
23 there's a difference?

24 Q. I can ask --

25 A. If you were -- if you were the seller, you

1 Q. Okay. So did you ever enter into a listing
2 agreement with Mr. Peterson?

3 A. Yes, sir, I did.

4 Q. And tell me about the listing agreement.

5 A. Well, the listing agreement was for 14 days.

6 Q. Okay.

7 A. I had a net listing with his sister and I came
8 with the form that we use as a document, which
9 Mr. Peterson -- he represented himself to me as a
10 sophisticated engineer -- did not like that form. So I
11 said, "You provide to me whatever you'd like."

12 Q. Okay.

13 A. So he drew up a handwritten agreement.

14 Q. Okay.

15 A. And basically he said, "I want \$2 million for
16 my land south of Highway 97."

17 Q. Uh-huh.

18 A. "And \$2 million for my lands north of 97."

19 Q. Okay.

20 A. "And you can keep 10 percent over that," which
21 means \$400,000 over the \$4 million, if it sold for 4.4.

22 Q. Okay.

23 A. And anything over that we split 50/50. That
24 was a document he drew.

25 Q. Okay. So you said the listing agreement with

1 Peterson was 14 days?

2 A. Yes.

3 Q. What do you mean by that?

4 A. From the date that we signed that I had
5 14 days to find a client.

6 Q. Okay. And then were you able to find a client
7 within 14 days?

8 A. I found a client on day 15.

9 Q. Okay.

10 A. And then -- and then what I did was I went to
11 visit him on day 15 -- no, excuse me, it was on day 16, I
12 believe, because I think the agreement was over on -- the
13 agreement was over on a Friday. Saturday was when we had
14 the visitation of Geraldine.

15 I believe the offer was made on a Saturday
16 where it was Darlene Moore and assigns, and I came to
17 Mr. Peterson on I guess it was Sunday morning and I came
18 to see him.

19 Q. Okay.

20 A. And he said, "What are you doing here?" He
21 said, "You're not my agent any more." He's, you know, an
22 interesting gentleman. I said, "Well, I have an offer."
23 I said, "Well, if I'm not your agent, maybe you can -- if
24 you gave me a couple more days -- if I'm not your agent I
25 don't have to present it to you, but you may want to see

1 it." So he granted me a two-day extension.

2 Q. Okay. Did this listing agreement have an
3 expiration clause?

4 A. The listing agreement had the -- I think the
5 closing was 16-day closing clause.

6 Q. Okay. Earlier when we were talking just in
7 generalities about listing agreements, what I understood
8 from you is customarily they last for a year and then if
9 the property is not sold within a year, then --

10 A. There's no customary. There's nothing
11 customary at all. It could be for one day, it could be
12 for five years.

13 Q. Okay.

14 A. It's whatever you agree to.

15 Q. So in this listing with Peterson, it's your
16 testimony it was for 14-day subsequently extended to 16?

17 A. Yes, sir.

18 Q. Okay. Do you have a memory of the listing
19 agreement having a 180-day clause in it?

20 A. I kind of do, yes, sir.

21 Q. Okay. Tell me about that.

22 A. That was -- it was all -- it was 180 days from
23 the -- if it was one of the -- I gave Mr. Peterson a list
24 actually on day 14 of the clients I spoke to.

25 Q. Okay.

1 A. Or had knowledge of. That including Darlene
2 Moore and that included Kirk-Hughes. It also was another
3 client of Dean Anderson's and/or Darlene Moore's who was
4 a -- represented as a wealthy computer gentleman from Las
5 Vegas.

6 Q. Okay.

7 A. And some other names. And two of the other
8 names were Michael Harris and Ron Hazard. These are
9 people I talked to.

10 Q. Okay. So on day 14 you give Mr. Peterson this
11 list?

12 A. Uh-huh.

13 Q. And then what happens?

14 A. Well, next time I see him is day 16.

15 Q. Okay.

16 A. And he granted me a two-day extension.

17 Q. All right. But earlier I was asking you about
18 this 180-day clause and you were in the process of
19 explaining that to me, so I'm just trying to close the
20 loop of that question.

21 A. It was something that was that if one of these
22 potential buyers should close within 180 days, that
23 commission would be -- would be paid to me.

24 Q. Okay. So just so I'm clear here, it's your
25 understanding that if one of the people on the list that

1 you gave Mr. Peterson closed within 180 days of you
2 handing Peterson that list, then you'd get the commission;
3 is that correct?

4 A. I believe so.

5 Q. Okay. And do you have a memory as to when you
6 gave Mr. Peterson this list of potential buyers?

7 A. I believe it was in early May 2004, because
8 the 180 days was going to be over in early November of
9 2004.

10 Q. And how do you know that?

11 A. I think it was part of the document.

12 Q. Okay. And this November 2004 date, do you
13 know if it was ever extended?

14 A. From 2000 --

15 Q. From November 2004 --

16 A. No, the listing was not extended.

17 Q. It was not extended?

18 A. (Witness nodded head).

19 Q. So if the property was sold sometime after
20 November 2004, it's your understanding that you wouldn't
21 get a commission?

22 A. Well, November of 2004 was after my
23 conversation with Mr. Polatis in September of 2004 and at
24 that time Mr. Peterson granted an extension to -- to -- to
25 I believe it was Kirk-Hughes to acquire -- I think the

1 November was part of the extension period for Kirk-Hughes
2 to close on the transaction.

3 Q. You said Peterson granted an extension to
4 Kirk-Hughes. Was that grant of extension in writing?

5 A. I believe it was. It was the extension that
6 Mr. Polatis acquired from Mr. Peterson on his travels to
7 Huntsville, Alabama.

8 Q. Have you seen the written document in which
9 Peterson grants this extension?

10 A. It's been such a long time ago I don't quite
11 remember.

12 Q. You don't have a memory of seeing that
13 document?

14 A. I believe I did. I believe I did.

15 Q. Do you have a copy of that extension document,
16 you know, obviously not on you today, but do you have a
17 copy of that in your records? Do you know?

18 A. Most likely we do, yes.

19 Q. Okay.

20 MR. HOWARD: You were provided everything
21 that he has, so.

22 THE WITNESS: Yeah, it's been a long time
23 ago. I had this -- not like in a shoebox, but I had these
24 papers, and what I did, I gave what papers I had to my
25 counsel.

1 briefly give me an understanding as to what you
2 were -- what you sued them for?

3 A. I believe we sued them it was inspiring to the
4 fraud, the real estate agents in the transaction.

5 Q. Okay. And what were your -- what were you
6 asking for in that lawsuit? What did you want? What was
7 the goal?

8 A. The commissions due.

9 Q. Okay. And by "commissions due," what do you
10 mean by that?

11 A. It was the commissions that were agreed to
12 between Mr. Peterson and I on the document he had drafted.

13 Q. Okay.

14 (Exhibit 8 marked for identification.)

15 Q. And let me know when you're done looking at
16 it.

17 A. Thank you. I've read it, sir.

18 Q. Okay. Have you seen this exhibit before?

19 A. Yes, sir.

20 Q. When is the last time you saw it before today?

21 A. Maybe 2007.

22 Q. Okay. Alford Braun, he was the broker for
23 Pacific Real Estate?

24 A. Yes.

25 Q. Any reason to question Mr. Braun's honesty?

1 A. No, sir.

2 Q. Any reason to question the accuracy of
3 Mr. Braun's work?

4 A. No, sir.

5 Q. Okay. Earlier you talked about one of the
6 goals of this 2007 lawsuit was to recover the commission;
7 is that a fair understanding of the lawsuit?

8 A. Yes, sir.

9 Q. Okay. And how much was that commission?

10 A. The full commission was 941,000.

11 Q. Okay. Why don't you go to Golub 118. Do you
12 see on the middle of the page on the right-hand side where
13 it says "credit"? Do you see that?

14 A. Yes, sir.

15 Q. And below that there's the number 941,000. Do
16 you see that?

17 A. Yes, sir.

18 Q. Does that \$941,000 represent the commission
19 that you just testified about?

20 A. Yes, sir.

21 Q. Okay. So over on the left-hand side there's a
22 column that says "Debit." Do you see that?

23 A. Yes.

24 Q. Okay. And then going down, it says "2 percent
25 commission to Darlene Moore Realty for \$109,640. Do you

1 see that?

2 A. Yes, sir.

3 Q. So of this \$941,000, is it fair to say that
4 Darlene Moore is entitled to \$109,640 of it?

5 MR. HOWARD: Object to the form.

6 Q. Go ahead and answer.

7 A. Yes, sir.

8 Q. She is entitled to that amount?

9 A. Based on that, yes.

10 Q. Okay. And then down below it says
11 "3.5 percent commission to Tomlinson Black, \$191,870." Do
12 you see that?

13 A. Yes.

14 Q. Is it fair to say that Tomlinson Black is
15 entitled to \$191,870 of the \$941,000 commission?

16 MR. HOWARD: Object to the form.

17 Q. Go ahead and answer.

18 A. Yes, sir.

19 Q. Okay. And then down below, still on the
20 "Debit" column, it says "75 percent/25% Golub/PRE." Do
21 you see that?

22 A. Yes, sir.

23 Q. And then moving on over to the right, there's
24 \$154,872.50. Do you see that?

25 A. Yes, sir.

1 Q. What's your understanding of the \$154,872.50
2 debit to Pacific Real Estate?

3 A. My contractual agreement with Pacific Real
4 Estate was that any commissions coming to Pacific Real
5 Estate would be on a 75/25 split.

6 Q. Okay. So out of this \$941,000 commission,
7 Pacific Real Estate would be entitled to \$154,872.50 of
8 it?

9 A. Yes.

10 Q. Okay. And then down below there's the --

11 A. Actually, Pacific Real Estate got the full
12 amount, which was if you add those two numbers together,
13 and then internally it would be split, or it could
14 be -- or it could be done -- basically, it would have been
15 done, the funds, had it gone through, would have been
16 dispersed in escrow.

17 Q. Okay. So meaning Pacific Real Estate would
18 get 154,000 and then you'd get 464,000 and some change?

19 A. That's correct.

20 Q. Okay. Earlier you talked about this lawsuit
21 that Tomlinson Black filed against Kirk-Hughes and you
22 testified at that lawsuit.

23 A. Yes, sir.

24 Q. Do you know who won the lawsuit?

25 A. Tomlinson Black won.

1 Q. Do you know how much money that Tomlinson
2 Black got?

3 A. It was more than their commission. I
4 believe -- let's see. I believe it was 235,000 plus
5 attorney fees.

6 Q. Okay. Do you know if the --

7 A. Plus interest.

8 Q. Right. Do you know if the 200-some thousand
9 dollars that Tomlinson Black got in this 2008 lawsuit is
10 the same as the 3.5 percent commission that is listed on
11 this page of Exhibit 8? Do you know if it's the same?

12 A. Yes, it would be the same.

13 Q. Okay. So is it fair to say that Tomlinson
14 Black has already been -- at least has a right to the
15 191,870 by virtue of the judgment it got in its 2008
16 lawsuit?

17 MR. HOWARD: Object to the form.

18 A. Had the transaction occurred, yes.

19 Q. Okay. So just so I'm clear, Tomlinson has
20 been given a judgment for this, you know, 191,870, plus
21 some, you know, attorneys' fees and interest; that's your
22 understanding?

23 A. Yes, sir.

24 Q. Okay. And then what about Darlene Moore, do
25 you know if she's been paid through some other means, this

1 Number 12, but before we talk about Exhibit 12, what phone
2 number did you have during calendar year 2004?

3 A. I believe I had (208) 660-3469.

4 Q. What's that again?

5 A. (208) 660-3469.

6 Q. And that's calendar year 2004?

7 A. I believe so.

8 Q. And is that a cell phone or a work phone?

9 A. That was both.

10 Q. Okay. Did you have any other telephone
11 numbers during calendar year 2004?

12 A. That's what I primarily used.

13 Q. Okay. How about calendar year 2005?

14 A. The same number.

15 Q. And that's (208) 660-3469?

16 A. Yes, sir.

17 Q. Is that still your number today?

18 A. It is.

19 Q. Okay. And then did Mr. Peterson ever file a
20 complaint against you with the Idaho Real Estate
21 Commission?

22 A. He did.

23 Q. What was that about?

24 A. There were -- there were two points, I
25 believe. One was that I did not tell him in a timely

1 fashion that the earnest money checked bounced, and the
2 second point was that of the \$50,000 that had been
3 dispersed of the non-refundable earnest money. We had
4 received \$20,000 without the written permission of
5 Ms. Kirk-Hughes.

6 Q. Okay. And do you have a memory as to what the
7 Idaho Real Estate Commission concluded, if anything, about
8 Mr. Peterson's complaint?

9 A. Yes. I was assigned before the hearing
10 a -- they wanted to get a fine of \$5,000 from me, and also
11 from my broker, Al Braun.

12 Q. Okay. "They" being the commission --

13 A. The commissioners, yes.

14 Q. -- wanted to get a fine of 5,000 from you?

15 A. That's what they were -- that's what the
16 prosecutor of the Idaho Real Estate Commission was asking
17 the commissioners to assign to me.

18 Q. Okay. What did the commissioners end up
19 doing?

20 A. The commissioners, basically, when I went
21 before them -- and I went without any representation.

22 Q. Uh-huh.

23 A. I said, "If I did anything wrong, you're my
24 fellow real estate professionals." I said, "To the first
25 point, could I have told Mr. Peterson earlier? Perhaps

1 maybe a few hours earlier, but I did not get the -- the
2 earnest money did not go to the Pacific Real Estate trust
3 account. It went to one of the other trust accounts. And
4 as soon as I found that, I made it known to Mr. Peterson."

5 I said, "But really it was a bogus contract
6 because you're tying up \$6 million worth of land with a
7 refundable earnest money, which means if I don't like the
8 color of your eyes or the smell on your teeth, for any
9 reason, Ms. Kirk-Hughes could back this out."

10 I said, "But this is what I did do,
11 Mr. Chairman. I got the real buyer, which was not Darlene
12 Moore, but Ms. Kirk-Hughes, and the real seller,
13 Mr. Peterson, in a real contract with real non-refundable
14 money, which I think it occurred around that end of
15 July/August time period.

16 "And July, August, September, November,
17 90 days later, Mr. Peterson files a complaint against
18 something that I corrected back in July/August. That
19 would have been the time that he should have made the
20 complaint."

21 "And for the second point, sir, if I gave you
22 a check for \$100 and you went to Albertsons up the street
23 and bought carrots and other produce, Albertsons did not
24 require me to sign off on the buying of your carrots
25 because the contract that I had with Mr. Peterson had

1 nothing to do with Ms. Kirk-Hughes having to sign off on
2 what he does with his \$15,000 after it was done."

3 The investigator was a fellow by the name of
4 Terry Ruetters. Terry Ruetters hated net listings and
5 he utilized this case to prosecute the concept of net
6 listings.

7 So what happened was the one who loses the
8 case pays the attorneys' fees. Mr. Braun's fine was
9 reduced from 5,000 to zero. My fine was reduced from
10 5,000 to \$250, but the Idaho Real Estate Commission paid
11 the attorney fees.

12 So I'm not sure what that meant, but they were
13 very responsive to my explanations. And there was a
14 gentleman there from southern Idaho who said, "I've been
15 the longest agent here in 56 years and if they have a
16 problem with net listings, they should change the statute.
17 They shouldn't try to prosecute you."

18 Q. Okay. So you were fined \$250 --

19 A. Yes.

20 Q. -- ultimately?

21 A. Uh-huh.

22 Q. Okay. And you paid that fine?

23 A. I did.

24 Q. All right. So you've been handed Exhibit
25 Number 12. Have you seen Exhibit Number 12 before?

1 Q. All right. So looking at Exhibit 11 on the
2 upper right-hand side, there's a "Clerk District Court"
3 stamp. Do you see that?

4 A. Yes, sir.

5 Q. And what's the date on that stamp?

6 A. July 15th, 2010.

7 Q. And the title of Exhibit 1 is "Full
8 Satisfaction of Mediated Settlement Agreement." Right?

9 A. Yes, sir.

10 Q. So is it fair to say by July 15th, 2010, you,
11 the plaintiff in the CV-2007-8038 lawsuit, had reached a
12 full satisfaction of mediated settlement agreement against
13 defendants Lenore Peterson and Delano Peterson?

14 A. Yes, sir.

15 Q. Okay. And then looking at Exhibit B, there's
16 two stamps on the right hand middle of Exhibit B. I'm
17 going to direct your attention to the lower stamp. Your
18 finger is right there by the lower stamp.

19 A. I see it, sir.

20 Q. And do you see where it says "BBB date"?

21 A. Yes, sir.

22 Q. And what's that date?

23 A. The date looks like 16th, but it must be
24 10/28/2018.

25 Q. Probably 2010, as opposed to 2018?

1 A. Oh, sorry. 2010.

2 Q. We're not there yet.

3 A. No.

4 Q. Okay.

5 A. But it almost looked like an 8, something
6 about that.

7 Q. No, it's all right. And do you have an
8 understanding what this 10/28/2010 date means as it
9 relates to Exhibit B?

10 A. No, I don't.

11 Q. Okay. I'm going to represent to you that
12 10/28/2010 is the date that this judgment, Exhibit B, was
13 recorded with the Kootenai County auditor. You understand
14 that?

15 A. Yes, sir.

16 Q. And the judgment that was rerecorded with the
17 Kootenai County auditor on October 28th, 2010, was for
18 \$941,000. Do you understand that?

19 A. Yes, sir.

20 Q. Okay. So my question to you is why didn't you
21 reduce the \$941,000 that you got in this judgment of
22 March 11th, 2009, based off of what you received from the
23 Petersons?

24 A. It wasn't disclosed and I had a judgment and I
25 didn't have to do it.

1 Q. Okay. So you're trying to recover twice then?

2 A. The judgement was the judgment and I'm just
3 recovering what the judgment was, what our judgment was
4 for.

5 Q. Okay. The judgment was for \$941,000?

6 A. Yes.

7 Q. And you received some of that, you can't tell
8 me what, from the Petersons; right?

9 A. Yes.

10 Q. And you received that on July -- on or about
11 July 15th, 2010?

12 A. Yes.

13 Q. And then in October 28th of 2010 you
14 re-recorded the judgment still asking for \$941,000; right?

15 A. Correct.

16 Q. Even though you've been paid some of it
17 already?

18 A. Yes.

19 Q. So you're trying to get paid twice to some
20 extent; right?

21 A. The judgment is what it is. There are other
22 costs involved with years of attorneys' fees and so forth.
23 The answer is the judgment -- I just stand for what the
24 judgment was.

25 Q. Do you think that's fair?

1 A. The answer is we received nothing all these
2 years and the answer is, yes, I think it is fair.

3 Q. Okay. Let's go to paragraph 3.8 of the
4 complaint. It's on page 3.

5 A. I'm sorry, sir?

6 Q. 3.8.

7 A. 3 point?

8 Q. Eight.

9 A. Yes, sir.

10 Q. Okay. Paragraph 3.8 of Exhibit 12, the
11 complaint in the CV13-866 action, says, "Defendant
12 Kirk-Scott, Limited, may claim an interest in the property
13 as a result of a deed of trust recorded on 9/17/2010 as
14 instrument 2282148000. (Exhibit C)."

15 Do you see that?

16 A. Yes, sir.

17 Q. Okay. Explain to me in your own words what
18 paragraph 3.8 means to you.

19 A. It means that the Defendant Kirk-Scott,
20 Limited, claims an interest based on a deed recorded on
21 9/17/2010.

22 Q. And how did you come to find out that
23 Kirk-Scott had this deed which was recorded on 9/17/2010?

24 MR. HOWARD: Object to the form.

25 A. I knew that Kirk-Scott had fee simple interest

1 A. That's why I used the "she," sir.

2 Q. Okay. You use the phrase "fee simple" though.
3 What do you mean by that?

4 A. Owning the property without any encumbrances
5 of a mortgage or trust deed on it.

6 Q. Okay. So clear title. You knew in 2004 that
7 Kirk-Scott had clear title to the property?

8 A. The property, yes.

9 Q. Okay. And what do you mean by "the property"?

10 A. The properties would have been, I believe, the
11 Mayvis Sloan and/or Atkinson property.

12 Q. Okay. And then how did you -- how did you
13 come about -- how do you know that? How do you come
14 about -- come into possession of this knowledge?

15 A. It was on the closing documents.

16 Q. The closing documents for what?

17 A. The closing of the Mayvis Sloan and
18 Atkinson -- and/or Atkinson parcels.

19 Q. Okay. So the original question, though, is
20 how did you -- your complaint references Exhibit C;
21 correct?

22 A. Yes.

23 Q. Okay. Turn to Exhibit C of your complaint.
24 And you're at Exhibit C of your complaint?

25 A. Yes.

1 2004/2005 -- strike that.

2 In 2005, did you take any steps to see if any
3 entity had title in the Sloan or Atkinson property?

4 A. The answer is that in 2005 I did not know the
5 deed nor did I take steps. As of the end of
6 November -- or the beginning of November, the contract
7 with Mr. Peterson and I was over and there was no
8 purchase -- there was -- I had no -- I had no
9 communication with anyone so I did not know about it and I
10 didn't take steps. If I knew about it, that would be one
11 thing, but I didn't know about it.

12 Q. Understanding you didn't know about it, but
13 did you take any steps in 2005 to see if any, any title,
14 not just that deed, but anybody else was claiming an
15 interest in the Sloan or Atkinson properties?

16 A. The answer is it -- the answer is no; however,
17 had I known about it, I would have, but I did have no
18 knowledge of this fee.

19 Q. Okay. Did you instruct any agents of yours,
20 and by "agents" I mean title company, employee, even
21 lawyer, any -- any agents to do any searches of
22 the -- hold on -- of the title of the Atkinson or Sloan
23 properties in 2005?

24 MR. HOWARD: To the extent it asks for any
25 communications between myself and him, I would instruct

1 him not to answer. With regard to the rest of the
2 question, you can answer that.

3 Q. Okay. Go ahead.

4 A. Which portion? Oh, the --

5 Q. Don't tell me about what you and your lawyer
6 discussed in 2005.

7 A. Right.

8 Q. But besides you and your lawyer --

9 A. Uh-huh.

10 Q. -- did you instruct any other agents to look
11 into who had title or who had a lien on the Atkinson or
12 Sloan property in 2005?

13 A. Besides my counsel, no.

14 Q. Okay. Same question for 2006. Besides your
15 lawyer, did you instruct anybody else to check out the
16 title to the Atkinson or Sloan properties in 2006?

17 A. No, sir.

18 Q. Okay. 2007. Besides your lawyer, did you
19 instruct any agent to check the title to the Sloan or
20 Atkinson properties in 2007?

21 A. My communication after that time was only with
22 my counsel.

23 Q. Okay.

24 A. With no other agents.

25 Q. Okay.

1 A. To this date.

2 Q. All right. So from 2007 to this date, the
3 only agent who you've addressed title, liens, encumbrances
4 on the Sloan and Atkinson property is your lawyer; right?

5 A. Only with Mr. Howard.

6 MR. CROTTY: Okay. And I -- Mr. Howard, I
7 take it if I start asking about that communication between
8 you and him regarding that, you're just going to tell him
9 to stop?

10 MR. HOWARD: (Nodding head).

11 MR. CROTTY: Okay. All right.

12 MR. HOWARD: Mr. Howard nods yes,
13 affirmatively.

14 Q. (BY MR. CROTTY:) So when is the first time
15 you actually saw Exhibit C to your 2013 complaint,
16 CV-13-866?

17 A. It was this spring in 2013.

18 Q. And your lawyer showed it to you?

19 A. Yes, he did.

20 Q. Okay. And you haven't -- nobody else other
21 than your lawyer has shown you the November 18th, 2004,
22 deed of trust; correct?

23 A. No, sir.

24 Q. All right. Are you married?

25 A. Yes, I am.

1 Q. Did you read it?

2 A. Yes, I did.

3 Q. Okay. And in reading the deed of trust dated
4 November 18th, 2004, was there anything in that document
5 that confused you?

6 A. I never heard of it. The answer is it was the
7 first time I saw it and anything that confused me,
8 Ms. Kirk-Hughes had multiple, multiple -- basically she
9 had multiple LLCs and different entities and the fact that
10 there would be communication among her various entities,
11 she had a great history of moving things from one to
12 another. So the fact that she would produce this, did it
13 surprise me? It didn't surprise me, but that was the
14 first time I saw it.

15 Q. Okay. That wasn't my question, though. My
16 question was: When you read this deed of trust, were
17 there any words in the deed of trust of November 18th,
18 2004, that confused you, that didn't make sense to you?

19 A. The words, no, sir.

20 Q. Okay. So there's nothing confusing to you
21 about the November 18th, 2004, deed of trust?

22 A. There's nothing confusing as to what the words
23 mean.

24 MR. CROTTY: Can we just take a couple of
25 minutes, talk to my colleague here, and that should be it.

1 (A brief recess was had.)

2 Q. (BY MR. CROTTY:) Okay. A couple more
3 questions.

4 A. Yes.

5 Q. We're still on the Kirk-Scott deed of trust on
6 November 18th, 2004. Do you understand?

7 A. Yes, sir.

8 Q. All right. So prior to 2013 when you were
9 first handed a physical copy of the November 18th, 2004,
10 Kirk-Scott deed of trust, did you have any idea that
11 Kirk-Scott claimed an interest in the properties?

12 A. I did not know of any claim of interest in the
13 properties or this deed of trust. No, I did not.

14 Q. Okay. Do you know if your agent had any idea
15 as to whether Kirk-Scott claimed an interest via a deed of
16 trust in the subject properties?

17 A. My agent?

18 Q. Yes. Your lawyer. I'm asking if you knew
19 what he knew.

20 MR. HOWARD: Claim of privilege. I mean,
21 you're -- don't answer that. If I told you something,
22 don't answer it.

23 MR. CROTTY: Okay.

24 THE WITNESS: The only thing that was odd
25 about this deed of trust, looking at this I understand --

1 MR. HOWARD: What was his question?

2 THE WITNESS: Oh, sorry.

3 MR. HOWARD: Okay. Listen to his
4 question; answer his question.

5 THE WITNESS: Sorry.

6 MR. HOWARD: I told you if -- if there's
7 anything I told you, don't tell him.

8 THE WITNESS: No. Okay.

9 MR. HOWARD: If there's something else,
10 feel free to tell him.

11 THE WITNESS: Okay. I'm sorry.

12 Q. (BY MR. CROTTY:) Okay. You were about ready
13 to say something. I don't want you to tell me anything
14 that you've told your lawyer or your lawyer told you; do
15 you understand that?

16 A. Yes.

17 Q. So is what you were about to tell me anything
18 involving attorney-client communication?

19 A. Yes, so I won't mention it.

20 MR. CROTTY: Okay. All right. Tyler, do
21 you have anything else?

22 MR. WAITE: No.

23 MR. CROTTY: Sir, thanks for your time. I
24 realize this isn't the most joyous of occasions, but we
25 appreciate it. Thanks.

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

2013 JUN 25 AM 10:44

CLERK DISTRICT COURT

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN)
GOLUB, husband and wife,)
)
 Plaintiffs,)

vs.)

KIRK-HUGHES DEVELOPMENT,)
LLC, a Delaware limited liability)
company; KIRK-SCOTT, LTD., a Texas)
corporation; INTERNAL REVENUE)
SERVICE; TOMLINSON NORTH)
IDAHO, INC., an Idaho corporation,)
)
 Defendants.)

Case No. CV ⁰⁷⁻⁸⁰³⁸ 2013-860

**AFFIDAVIT OF DARLENE
MOORE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, DARLENE MOORE, being first sworn upon oath, say as follows:

1. I am over the age of 18 and have personal knowledge of and am competent to testify concerning the matters contained herein.

2. In 2004 I was a licensed Real Estate Broker in Nevada and became a licensed Real Estate Broker in Idaho, as well.

AFFIDAVIT OF DARLENE MOORE IN OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT - 1

3. In the spring of 2004, I purchased some property in Coeur d'Alene, Idaho and utilized the services of Thomas & Black Real Estate Company. My representative with this Company was Dean Anderson. I explained to Dean that I was in the process of obtaining my broker's license in Idaho, at which time Dean advised that he was aware of several investment opportunities and wanted to introduce me to another individual he worked with of Pacific Realty known as Alan Golub.

4. On or about May 8, 2004, I traveled to Coeur d'Alene and requested a client of mine, Geraldine Kirk-Hughes, to accompany me. I had previously planned to travel to Coeur d'Alene that week with another client, Larry Lathan.

5. I met with Dean Anderson who introduced me to Alan Golub. We had a pre-arrangement that any commissions paid as a result of me introducing my client to them would be split equally among the three of us.

6. On or about May 2004, myself, Dean Anderson and Alan Golub introduced Geraldine Kirk-Hughes to the Sloan property, at which time she was also shown the Peterson property, as well as the Atkinson property. I was told by Alan that the commission that the seller had agreed to pay was 7%.

7. Prior to departing Coeur d'Alene, Geraldine Kirk-Hughes had made an offer on the Sloan Property and had stated that she would send the escrow deposit of \$25,000.00 upon her return to Las Vegas.

8. Alan Golub had explained that his listing agreement on the Peterson parcel was going to expire on May 10, 2004, and had hoped that my proposed buyer, Larry Lathan, was going to purchase the property. He also said that he had arranged for Arnold Palmer's Company to look at the property the following week. I then agreed to submit an

offer on the Peterson property, subject to Larry Lathan actually providing me with the \$50,000.00 earnest money. I had informed Mr. Golub that the check was not good and could only be made good upon Mr. Lathan's subsequent agreement to purchase the property and to provide me with the escrow money. He was told he could not deposit the check without my consent. Within days, I informed Mr. Golub that Larry Layton was not interested in purchasing the Peterson's parcel, at which time I suggested that we try to persuade Geraldine Kirk-Hughes to purchase the Peterson property, as well.

9. Alan Golub and Dean Anderson arranged for a group of professionals in Coeur d'Alene to present the potential development project to Geraldine Kirk-Hughes and her sister Balinda Antoine, who had traveled from Texas, in an attempt to persuade them to purchase the Peterson property.

10. Balinda Antoine made it clear to all of us that she was not interested in the Peterson property and if she decided to become involved at all, it would only be in reference to the Sloan parcel subject to the property being appraised at the proposed sale price. The property was subsequently appraised and was substantially less than the proposed sale price of 1.5 Million Dollars. I was then told by Mr. Golub that the sale price would be reduced to be consistent with the appraised value. He further advised that the commission would not be paid for several months, as the seller was being required to carry a Note of approximately \$300,000.00 and upon receipt of these funds I would be paid my 1/3 commission.

11. Subsequent to Mr. Golub's presentation, Melody Jones, Mr. Golub, Balinda Antoine, Geraldine Kirk-Hughes and I participated in a conference call to discuss the purchase of the Sloan property. During that call, Balinda made it clear that the property

title needed to be in Kirk-Scott, Ltd.'s name because Kirk-Scott Ltd., was the sole entity financing the transaction.

12. Alan Golub never revealed that there was a net listing involved in the Peterson and Sloan transaction and specifically advised that there was a standard commission agreement of 7%. In late July, Alan Golub asked me to assign my interest in the purchase contract on the Peterson parcel. I told him that I was reluctant to do this, as no consideration was ever paid for that escrow that it should have never be opened. I advised him to get a new contract signed by Geraldine and have her pay the earnest deposit. It is my understanding, from the information I received from Alan, that he did this on August 6, 2004.

13. Throughout the summer and fall of 2004, I continued to have contact with Alan on a weekly basis, as we both were trying to assist Ms. Kirk-Hughes in acquiring the necessary funding to purchase the Peterson property. Ms. Kirk-Hughes had advised both Alan and myself that she was relying on her sister, Balinda Antoine, to acquire the financing for the Sloan property.

14. Your Affiant was present when Alan advised Ms. Kirk-Hughes that the property should be owned by the entity that would be filing the application for development, at which time Ms. Kirk-Hughes stated that she would form a separate corporate entity for this purpose.

15. In November of 2004, Alan contacted me prior to my wedding on November 11, 2004, expressing his concern that the transaction was not going to close as scheduled in November, at which time I advised Alan that it was my belief that Ms. Kirk-Hughes was still interested in the property and still interested in pursuing the development because she

had recently created a corporation called Kirk-Hughes Development and had asked me to prepare a Note and Deed of Trust in favor of her sister, Balinda Antoine, to exchange for the title to the Sloan property that had been purchased in Kirk-Scott Ltd. name. Alan had proposed that Ms. Kirk-Hughes use the Sloan parcel to acquire financing to assist Ms. Kirk-Hughes in purchasing the Peterson property. I told them this was not possible as I had already prepared the mortgage in favor of Balinda. Alan and I continued to talk throughout the winter. Alan specifically requested that I encourage Ms. Kirk-Hughes to allow the two of us to be the resident real estate agents for the Development once she acquires the approval.

16. In about April of 2005, I was contacted by Geraldine Kirk-Hughes and informed that she had learned that there was a net listing in both transactions and that I had failed to disclose this to her. Subsequent to this revelation my relationship with Ms. Kirk-Hughes became estranged. I contacted Alan to discuss these revelations and to inquire about the monies he owed me in commissions, at which time he promised to pay the same and again requested my assistance in persuading Geraldine Kirk-Hughes to use his services in developing the project. I advised him that he would have to do this himself as Ms. Kirk-Hughes was no longer speaking with me.

17. In 2006, I was again contacted by Alan Golub requesting my cooperation in participating in a lawsuit against Geraldine Kirk-Hughes to recover unpaid commissions due as it relates to the Peterson parcel. I advised Alan that I was not interested in incurring any expenses in commencing litigation as it was my opinion that he did not have a meritorious claim for the following reasons: 1) His listing agreement expired on May 10, 2004, thus, the 180 day to collect a commission from a registered prospective buyer would

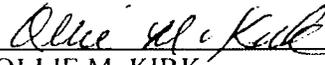
have expired in November 2004. 2) That I was the procuring cause on this transaction since I introduced the buyer to all three parcels and had yet to be paid the commission promised for the parcels that had already closed. 3) I reminded Alan that Balinda Antoine had a mortgage on the Sloan parcel so there would be no asset to collect against.

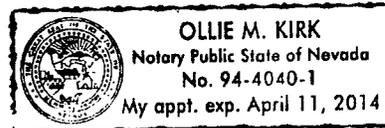
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 21st day of June, 2013.


DARLENE MOORE

SUBSCRIBED AND SWORN to
before me this 21st day of June, 2013.

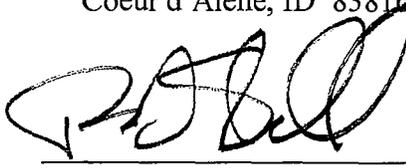

OLLIE M. KIRK
Notary Public in and for the state of Nevada
My Appointment Expires: April 2014
2551 South Fort Apache Road
Las Vegas, Nevada 89117



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|----------------|------------------------------------|
| <input type="checkbox"/> | HAND DELIVERY | Michael T. Howard |
| <input type="checkbox"/> | U.S. MAIL | Winston & Cashatt, P.S. |
| <input checked="" type="checkbox"/> | OVERNIGHT MAIL | 601 W. Riverside #1900 |
| <input type="checkbox"/> | FACSIMILE | Spokane, WA 99201 |
| <input type="checkbox"/> | EMAIL | |
| | | |
| <input type="checkbox"/> | HAND DELIVERY | Matthew Z. Crotty |
| <input type="checkbox"/> | U.S. MAIL | Crotty & Son Law Firm, PLLC |
| <input checked="" type="checkbox"/> | OVERNIGHT MAIL | 421 W. Riverside Avenue, Ste. 1005 |
| <input type="checkbox"/> | FACSIMILE | Spokane, WA 99201 |
| <input type="checkbox"/> | EMAIL | |
| | | |
| <input type="checkbox"/> | HAND DELIVERY | Ryan M. Best |
| <input type="checkbox"/> | U.S. MAIL | Best Law, PLLC |
| <input checked="" type="checkbox"/> | OVERNIGHT MAIL | 421 W. Riverside Avenue, Ste. 1005 |
| <input type="checkbox"/> | FACSIMILE | Spokane, WA 99201 |
| <input type="checkbox"/> | EMAIL | |
| | | |
| <input type="checkbox"/> | HAND DELIVERY | Douglas S. Marfice |
| <input type="checkbox"/> | U.S. MAIL | Ramsden & Lyons |
| <input checked="" type="checkbox"/> | OVERNIGHT MAIL | P.O. Box 1336 |
| <input type="checkbox"/> | FACSIMILE | Coeur d'Alene, ID 83816 |
| <input type="checkbox"/> | EMAIL | |



MICHAEL S. BISSELL

2013 JUN 25 AM 10: 44

CLERK DISTRICT COURT

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Development, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN
GOLUB, husband and wife,

Plaintiffs,

vs.

KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-SCOTT, LTD., a Texas
corporation; INTERNAL REVENUE
SERVICE; TOMLINSON NORTH
IDAHO, INC., an Idaho corporation,

Defendants.

Case No. CV 2013-866 ⁰⁷⁻⁸⁰³⁸

**AFFIDAVIT OF GERALDINE
KIRK-HUGHES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, GERALDINE KIRK-HUGHES, being first sworn upon oath, say as follows:

1. I am over the age of 18 and have personal knowledge of and am competent
to testify concerning the matters contained herein.

2. I have known Alan Golub since May 2004.

AFFIDAVIT OF GERALDINE KIRK-HUGHES IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT - 1

3. Mr. Golub held himself out as a competent and experienced real estate professional. Mr. Golub represented that he was knowledgeable regarding various permitting requirements pertaining to property development. Mr. Golub indicated that part of his professional due diligence required obtaining and reviewing title reports prior to facilitating any real estate transaction. Mr. Golub had an understanding of the importance for a purchaser to have clean title to property.

4. In May 2004, I traveled to Coeur d' Alene, Idaho, with Darlene Moore as her guest. She had previously advised that she was in the process of acquiring her Idaho Broker's License and had previously acquired several investment properties for herself.

5. While in Coeur d'Alene I was introduced by Darlene Moore to Dean Anderson of Tomilson & Black and to Alan Golub of Pacific Realty. I traveled with the three of them to visit various properties in the Coeur d'Alene area. I was specifically shown the Sloan property and other surrounding properties that I later learned were the Peterson property and the Atkinson property.

6. While at the Sloan property I contacted my sister Balinda Antoine. I informed her of the attributes of the Sloan property and asked if she would be interested in assisting me in purchasing the property, at which time she told me that she probably would.

7. Prior to my departure from Coeur d'Alene I submitted an offer on the Sloan property. I was specifically told that the commission on the Sloan property was 7% and that it would be equally divided between Darlene Moore, Alan Golub, and Dean Anderson. It was my understanding that Dean Anderson would actually represent me because Ms. Moore had yet to acquire her broker's license in the state of Idaho, but expected to receive her license prior to closing. Prior to my departure from Coeur d'Alene on May 8, 2004, I

made an offer to purchase the Sloan property with the understanding that I would submit the earnest money deposit of \$25,000.00 upon my return to Las Vegas and upon further consultation with my sister. Several days later I caused to be wired the \$25,000.00 to the Title Company to open the escrow. During the interim the property was appraised and it was determined that the value of the property was substantially less than the contract price, at which time I declined to close the transaction unless the sales price was adjusted. The seller agreed to adjust the sales price to be consistent with the appraised value.

8. Prior to the scheduled closing day of the Sloan parcel, my sister Balinda Antoine visited Coeur d'Alene to inspect the property, at which time she was introduced to Alan Golub. Alan Golub had arranged a team of local professionals to assist him in marketing additional properties to both me and my sister that were adjacent to the Sloan property. My sister advised that she was not interested in any of the adjacent properties and if she decided to proceed it would only be as to the Sloan property.

9. The majority of Mr. Golub's presentation was directed at Balinda because I communicated to Mr. Golub that in the event we were interested in purchasing any property, my sister would likely be financing a large part of the transaction. Mr. Golub always knew that Balinda would have an interest in the Sloan property.

10. Subsequent to Mr. Golub's presentation and prior to the closing on the Sloan parcel, Melody Jones, Mr. Golub, Balinda Antoine, and I participated in a conference call to discuss the purchase of the Sloan property. During that call, Balinda made it clear that the property title needed to be in Kirk-Scott, Ltd.'s name because Kirk-Scott Ltd. was the sole entity financing the transaction.

11. In July, after many phone calls from Darlene Moore and Alan Golub, I was

persuaded to make an offer on the Peterson parcel. Alan Golub was previously under contract to purchase the Atkinson property and advised your Affiant that he could not acquire the funds to close and pleaded with me to purchase the Atkinson parcel, so that he would not lose his earnest money deposit. On July 30, I received a phone call from Melody Jones with Alan Golub present, wherein I was informed that the transaction had to be closed that day or Alan would lose his deposit as the seller would cancel the escrow. As a result of Alan's plea, I made an arrangement for a check to be hand-delivered to Fidelity Title to close the transaction. From the monies delivered I agreed to pay \$50,000.00 as earnest money deposit to acquire the Peterson parcel and executed a sales contract dated August 6, 2004.

12. In September 2004, I attended a meeting in Las Vegas at Darlene Moore's home. Mr. Golub was present at that meeting and was staying in Ms. Moore's home during his trip to Las Vegas. During our meeting, Mr. Golub and I talked about the future development of the properties and his interest in marketing the development. Alan had previously advised me that a single entity would need to own the Sloan, Atkinson, and Peterson properties to obtain the necessary permitting. I told Mr. Golub that I was forming a separate entity to develop the land, and that title to all properties would be transferred to the new company. I specifically told Mr. Golub that I was giving my sister a mortgage or deed of trust to secure Kirk-Scott, Ltd.'s interest.

13. Mr. Golub recommended that I contact specific individuals to be part of a team to conduct due diligence to ensure that development of the Peterson property was feasible. In short, Mr. Golub was involved throughout the entire process while we were conducting due diligence in an effort to get the development underway.

14. Your Affiant made it clear to Darlene Moore and Alan Golub that financing was necessary to close the Peterson property, at which time your Affiant began to explore financing opportunities with the assistance of Darlene Moore and Alan Golub. Your Affiant made several efforts to obtain the financing but was unsuccessful, thus, I was unable to close the transaction on November 12, 2004, as scheduled.

15. In February of 2005, Kelly Polatis contacted Delano Peterson and asked if he was still interested in selling the property, at which time Mr. Peterson advised that he would not sell the property to Geraldine Kirk-Hughes or Kirk-Hughes Development but would sell the property to Kelly Polatis. Mr. Polatis negotiated the terms of the contract and Mr. Peterson agreed to provide 100% of the financing. A financial alternative that had not been provided to your Affiant.

16. On March 1st 2005, Kelly Polatis entered into a contract with Mr. Peterson to purchase the Peterson parcel. Thereafter, Kelly Polatis assigned his interest in the parcel to Kirk-Hughes Development and Kirk-Hughes Development began making the required payments to Mr. Peterson.

17. Mr. Golub remained in contact with me throughout most of 2005, even after Kelly Polatis purchased the Peterson property. I specifically remember an occasion in May 2005 when Mr. Golub brought me flowers while I was staying in Hayden. I was surprised to see Mr. Golub because I did not inform him I would be in town, and he just showed up at the Clark House in Hayden, where I was staying. The purpose of Mr. Golub's visit was to market himself as a potential member of my development team. Mr. Golub continued to call me for several months thereafter in an effort to become part of my development team. Mr. Golub did not threaten to sue until after Kirk-Hughes Development chose not to use

Mr. Golub to market the development. Alan stated that he felt that he had earned the opportunity because he had introduced me to the engineer, the planning director and most of the professionals that I was currently employing.

18. Alan would often invite himself to various design meetings. In the summer of 2005, I invited Jim Awtry and Renee Powell to review the project for suitability as a golf course community. Alan showed up at the restaurant where we were, along with his mother, at which time I asked him to excuse himself. I agreed at that time that he could schedule an appointment and meet with Brian Bills to discuss his continued involvement. I believe I last met with Alan in August of 2005; however, he showed up at every public hearing Kirk-Hughes Development had before the County Commissioner for the calendar years of 2006 and 2007.

19. Kirk-Hughes Development subsequently submitted an application for PUD Approval/Subdivision Approval and said request was denied.

20. Subsequently, Kirk-Hughes Development defaulted on the mortgage payments to Peterson and the property was subsequently reverted to Peterson's ownership.

21. Commissions were paid on the Sloan parcel and the Atkinson property. Commission was not paid on the Peterson property because no commission was due, as the contract that your Affiant had with Peterson never closed and could not close because of lack of financing. Secondly, I did not acquire an interest in the Peterson Property within 180 days of the expiration of the listing agreement that Pacific Realty had with Delano Peterson.

22. In November of 2004, your Affiant requested Darlene Moore to prepare a Note and Deed of Trust in favor of Kirk-Scott Ltd. to cover the monies spent by Balinda

Antoine to acquire the Sloan parcel. Your Affiant specifically informed Alan of this, as well as Darlene Moore, as they both were jointly working with your Affiant in November 2004, to acquire financing to close the Peterson parcel and to acquire subsequent project approval.

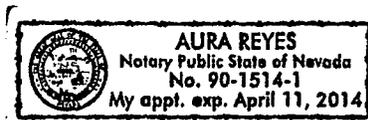
23. After Ms. Moore prepared the Note and Deed, your Affiant signed the same and submitted them to Kirk-Hughes Development Associates, Brian Bills and Kelly Polatis to file with the Recorder's Office. No one informed your Affiant that there was a defect in the legal description and that the Recorder's Office had rejected it for recording.

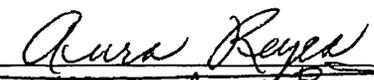
24. Your Affiant discovered that it had not been recorded in 2010, when I was reviewing some of Kirk-Hughes Development's files that were being stored in Coeur d'Alene in my search of documents regarding another matter. Your Affiant provided the Note and Deed of Trust to Melody Jones and asked her to confirm whether or not it had been recorded and if not, to record the same.

FURTHER, your affiant sayeth naught.


GERALDINE KIRK-HUGHES

SUBSCRIBED AND SWORN to before me this 20 day of June, 2013.




Printed Name: Aura Reyes
Notary Public in and for the State
of Nevada, Residing at: Las Vegas, NV
My Appointment Expires: 4/11/2014

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AFFIDAVIT OF GERALDINE KIRK-HUGHES IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT - 7

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of June, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

Michael T. Howard
Winston & Cashatt, P.S.
601 W. Riverside #1900
Spokane, WA 99201

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

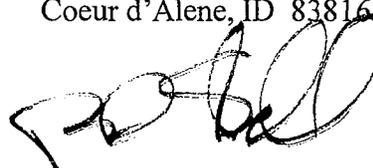
Matthew Z. Crotty
Crotty & Son Law Firm, PLLC
421 W. Riverside Avenue, Ste. 1005
Spokane, WA 99201

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

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Spokane, WA 99201

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- FACSIMILE
- EMAIL

Douglas S. Marfice
Ramsden & Lyons
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MICHAEL S. BISSELL

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2013 JUN 25 AM 10:44

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ISB No. 5762

CLERK DISTRICT COURT
April Regard
DEPUTY

Attorneys for Defendant Kirk-Hughes
Development, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN
GOLUB, husband and wife,

Plaintiffs,

Case No. CV ~~2013-800~~ ⁰⁷⁻⁸⁰³⁸

**AFFIDAVIT OF MELODY JONES
IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

vs.

KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-SCOTT, LTD., a Texas
corporation; INTERNAL REVENUE
SERVICE; TOMLINSON NORTH
IDAHO, INC., an Idaho corporation,

Defendants.

STATE OF IDAHO)
)
) :ss.
COUNTY OF KOOTENAI)

I, MELODY JONES, being first sworn upon oath, says as follows:

1. I am over the age of 18 and have personal knowledge of and am competent
to testify concerning the matters contained herein.

AFFIDAVIT OF MELODY JONES IN OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT - 1

2. I was an escrow officer and have worked in the real estate field for 39 years. I was employed by First American Title Company from June 2002 to October 15, 2004.

3. While I worked at First American Title Company, I was the escrow agent who assisted Mr. Golub with the closing of the Atkinson and Sloan properties which are at issue in this matter.

4. I have known Alan Golub and Geraldine Kirk-Hughes since the summer of 2004.

5. I have worked with Alan Golub on six separate real estate transactions. Mr. Golub, acting as an agent for Pacific Real Estate, used First American Title Company to check the title of each of the six aforementioned properties.

6. Based on my interactions with Mr. Golub, it was apparent that he understood that it was imperative for real estate agents to pull title reports to ensure that the underlying real estate is not encumbered.

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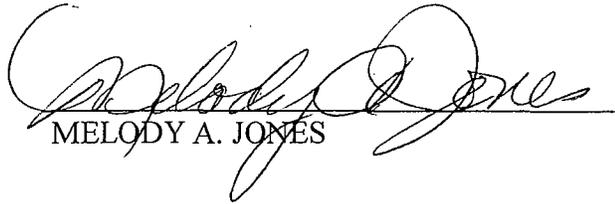
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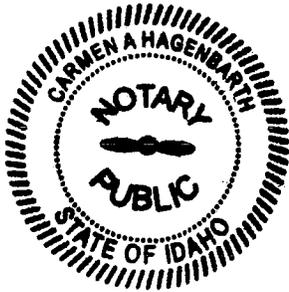
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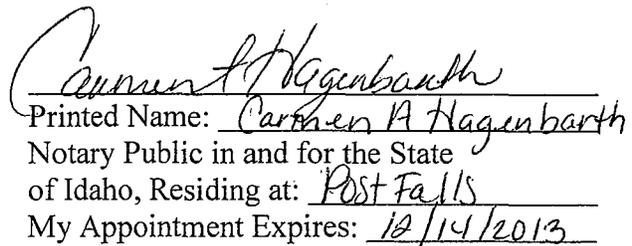
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7. Before the close of escrow, Mr. Golub was fully aware that Kirk-Scott, Ltd. was purchasing the property. There is no doubt that Mr. Golub knew that Ms. Antoine, acting on behalf Kirk-Scott, Ltd., was purchasing the property because of the collateral assignment that I facilitated and his extensive involvement throughout the process. The assignment was necessary so that Pacific Real Estate and Alan Golub could collect their entire commission.


MELODY A. JONES

SUBSCRIBED AND SWORN to before me this 17 day of June, 2013.




Printed Name: Carmen A Hagenbarth
Notary Public in and for the State
of Idaho, Residing at: Post Falls
My Appointment Expires: 12/14/2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

Michael T. Howard
Winston & Cashatt, P.S.
601 W. Riverside #1900
Spokane, WA 99201

- HAND DELIVERY
- U.S. MAIL
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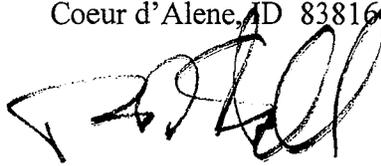
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MICHAEL S. BISSELL

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2013 JUN 25 AM 10:41

CLERK DISTRICT COURT
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Attorneys for Defendant Kirk-Hughes
Development, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN
GOLUB, husband and wife,

Plaintiffs,

vs.

KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-SCOTT, LTD., a Texas
corporation; INTERNAL REVENUE
SERVICE; TOMLINSON NORTH
IDAHO, INC., an Idaho corporation,

Defendants.

Case No. CV ⁰⁷⁻⁸⁰³⁸ ~~2013-866~~
**KIRK-HUGHES
DEVELOPMENT, LLC'S
RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

Mr. Alan Golub and Mrs. Marilyn Golub (collectively "Plaintiffs") sued the above named Defendants to determine the priority of various interests in real property in an effort to collect a \$941,000 default judgment¹ obtained from a lawsuit which began in 2007. Several parties claim an interest in the property at issue. Plaintiffs recently moved

¹ The referenced default judgment should be vacated for numerous reasons which are articulated in Kirk-Scott's motion to vacate, which Kirk-Hughes Development, LLC joins.

for summary judgment on the priority of the parties' relative interests.

The issue before the Court hinges on when Plaintiffs had actual or constructive knowledge of Kirk-Scott Ltd.'s ("Kirk-Scott") interest in the property at issue. Based on the affidavits and evidence in the Court record, this determination must be made by a trier of fact. If a trier of fact finds that Mr. Golub knew about Kirk-Scott's interest in the Sloan property prior to obtaining and recording the March 11, 2009 judgment, it is impossible for Plaintiffs to be considered good faith purchasers or encumbrancers under Idaho's race notice statute.

Plaintiffs go to great lengths arguing that the deed of trust was not properly acknowledged or recorded, and that they consequently did not have adequate notice. Rebuttals to these arguments are addressed in Kirk-Scott, Ltd.'s response memorandum which Kirk-Hughes Development incorporates herein by this reference. However, the Court need not reach any of the acknowledgement or bankruptcy recording issues in light of the evidence that Plaintiffs had actual knowledge of a prior adverse interest in the Sloan property.

Plaintiffs claim they had no knowledge of prior interests in the disputed property and that they recorded their judgment in good faith without knowledge of other parties' unrecorded interests. However, Plaintiffs have offered inconsistent testimony regarding when they knew about Kirk-Scott's interest in the property—and affidavits establish that the Plaintiffs did in fact have knowledge of a prior interest in the Sloan property. Thus, there is a genuine issue of material fact which precludes summary judgment and Plaintiffs' motion should be denied.

II. FACTS

In addition to the facts set forth in Kirk-Scott Ltd.'s Combined Statement of Facts, Defendant, Kirk-Hughes Development, LLC provides the following information:

1. In May 2004, Geraldine Kirk-Hughes and Balinda Antoine attended a real estate presentation held by Mr. Golub. At the presentation, Mr. Golub focused his sale efforts on Balinda Antoine because he knew that Kirk-Scott had the financing available to purchase the Sloan property. (Affid. of Antoine, ¶¶ 3-4; Affid of G. Kirk-Hughes, ¶ 8.)

2. Balinda Antoine told Mr. Golub that if Kirk-Scott, Ltd. purchased any property, Kirk Scott's interest in the property must be secured. (Affid. of Antoine, ¶¶ 5, 8.)

3. Mr. Golub was aware that Kirk-Scott, Ltd. was the sole entity purchasing the Sloan property. (Affid. of Jones, ¶ 7; 2013 Golub Dep. at 92:6-18; Affid. of R. Campbell, ¶ 3.)

4. Mr. Golub is a sophisticated real estate professional that regularly checked title to the underlying properties and understood the importance of checking title to ensure that land is not encumbered. (Affid. of Jones, ¶¶ 5-6, Affid. of Antoine, ¶ 5.)

5. Mr. Golub testified at his June 12, 2013, deposition that he knew the Kootenai County Recorder's office and/or title companies were sources of information as to who claimed an ownership interest in property. (2013 Golub Dep. at 12:1-14:18; Affid. of R. Campbell, ¶ 3.)

6. During the initial stages of development Mr. Golub was involved in discussions related to the development of the various properties and sought to be a

marketing agent for Kirk-Hughes Development. (Affid. of G. Kirk-Hughes, ¶¶ 12-14, Affid. of Moore, ¶¶ 14-15.)

7. Mr. Golub has personal experience developing real property in northern Idaho. (2013 Golub Dep. at 8:9-23, 9:19-25; Affid. of R. Campbell, ¶ 3.)

8. With regard to Mr. Golub's involvement in the development of the properties at issue, Mr. Golub advised Ms. Kirk-Hughes that a single entity needed to own all parcels of the real estate to facilitate development of the property. Mr. Golub was aware that Kirk-Hughes Development, LLC was created to take ownership of all properties and develop them. Additionally, Mr. Golub recommended that Ms. Kirk-Hughes contact certain individuals to ensure that the development of the Peterson property was feasible. (Affid. of G. Kirk-Hughes, ¶¶ 12-13; Affid. of Moore, ¶¶ 14-15.)

9. Mr. Golub visited Las Vegas to discuss the sale, development, and future marketing of the Sloan, Atkinson and Peterson properties. During that visit, Ms. Kirk-Hughes informed Mr. Golub that Kirk-Scott would transfer title to the Sloan property to a new entity in exchange for a deed of trust or mortgage on the Sloan property. (Affid. of G. Kirk-Hughes, ¶ 12.)

10. Mr. Golub was aware that Kirk-Hughes Development, LLC was created, and he made extensive efforts to be Kirk-Hughes Development, LLC's marketing agent from the fall of 2004 through the summer of 2005. (Affid. of G. Kirk-Hughes, ¶¶ 12-13; Affid. of Moore, ¶¶ 14-15.)

11. In Mr. Golub's affidavit filed in support of his motion for summary judgment, he states that "my involvement in the sale of the Peterson property ended after the sale failed to close November 12, 2004. After that time, I had no further contact with

Kirk-Hughes, Kirk-Scott, Antoine, or Kirk-Hughes Associates.” (Affid. of Golub, ¶ 10.) However, Ms. Kirk-Hughes and Ms. Moore have testified that Mr. Golub continued to contact each of them into the summer of 2005. (Affid. of Moore, ¶¶ 15-16; Affid. of G. Kirk-Hughes, ¶ 17.)

12. In addition to Ms. Kirk-Hughes and Ms. Moore’s testimony, Mr. Golub previously testified that he had contact with Ms. Kirk-Hughes. During a 2007 deposition, Mr. Golub stated that he spoke with Ms. Kirk-Hughes on the phone in January or February of 2005, and that he spoke with her again in the summer of 2005. (2007 Golub Dep. 173:2-179:13; Affid. of R. Campbell, ¶ 2.)

13. In his June 2013 deposition, Mr. Golub testified that he did not know Kirk-Scott’s deed of trust existed until recently in 2013, when he was informed of its existence by his counsel, Mr. Howard. (2013 Golub Dep. at 94:1-9; Affid. of R. Campbell, ¶ 3.)

14. Mr. Golub previously testified in his affidavit in support of Plaintiff’s motion for summary judgment that he “was not aware that Kirk-Scott had executed a Deed of Trust to Kirk-Hughes Development prior to Kirk-Scott recording one during Kirk-Hughes Development’s bankruptcy on September 17, 2010.” (Affid. of Golub, ¶ 14.)

15. Mr. Golub testified that his lawyer gave him a copy of the Kirk-Scott deed of trust, that he (Golub) read the deed of trust, and that no words contained in the deed of trust confused him. (2013 Golub Dep. at 98:3-19; Affid. of R. Campbell, ¶ 3.)

16. Mike Howard, Mr. Golub’s sole agent responsible for recording the March 11, 2009 judgment, re-recorded the default judgment within hours of when Kirk-Hughes

Development's bankruptcy was dismissed. (Affid. of M. Howard, ¶10.)

17. Mr. Howard acted as Mr. Golub's agent and was the sole person responsible for checking the title on Kirk-Hughes Development's properties prior to recording the March 11, 2009 judgment. (2013 Golub Dep. at 94:2-96:23; Affid. of R. Campbell, ¶ 3.)

18. When asked whether Mr. Golub's agent had previous knowledge of other encumbrances on the Sloan property, Mr. Golub claimed the attorney-client privilege and Mr. Howard instructed: "If I told you something, don't answer it." Mr. Howard repeatedly instructed Mr. Golub not to answer questions regarding when Mr. Howard learned about prior interests to the Sloan property. (2013 Golub Dep. at 99:8-22, 100:6-10; Affid. of R. Campbell, ¶ 3.)

III. ARGUMENT AND AUTHORITY

Idaho Rule of Civil Procedure 56(c) provides that summary judgment is only proper when "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. Inferences are to be drawn in favor of the nonmoving party. *Farmer's Ins. Co. of Idaho v. Brown*, 97 Idaho 380, 381, 544 P.2d 1150, 1151 (1976). On summary judgment, the district court is not permitted to weigh the evidence or to resolve disputed factual issues. *Carman v. Carman*, 114 Idaho 551, 553-54, 758 P.2d 710, 712 (Ct. App. 1988.) If any dispute over a material fact exists, summary judgment is improper. *Id.*

A. Mr. Golub Had Actual Knowledge of Kirk-Scott, Ltd's Deed of Trust before He Obtained an Interest in the Sloan Property.

There is a question of fact as to whether Mr. Golub had actual knowledge of Kirk-

Scott's deed of trust. Idaho is a race notice jurisdiction and the priority of interests in real property are governed by Idaho Code § 55-606, which provides as follows:

Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument or valid judgment lien that is first duly recorded.

Simply put, when a prior unrecorded interest exists, a purchaser or encumbrancer of real property can only acquire superior title by recording a valid instrument or valid² judgment in *good faith*. See I.C. §55-606. A good faith purchaser is one that gives valuable consideration³ for property, without knowledge of adverse claims to the property. *Sun Valley Land & Minerals v. Burt*, 123 Idaho 862, 853 P.2d 607 (Idaho Ct. App. 1993). Additionally, a good faith purchaser is repeatedly defined as a one that does not have "*actual*" or "*constructive*" knowledge of a prior interest in the property. See e.g. *Farm Bureau Finance Co., Inc. v. Carney*, 100 Idaho 745, 605 P.2d 509 (1980); *Johnson v. Casper*, 75 Idaho 256, 261, 270 P.2d 1012 (1954) (finding that a claimant's interest in property was subordinate because while the claimant was first in time to record a judgment, he had actual knowledge of a prior unrecorded conveyance) (emphasis added).

The purpose of Idaho's recording statute is to give notice to others that an interest in real property is claimed. See *Matheson v. Harris*, 98 Idaho 758, 761, 572 P.2d 861 (1977). Thus, "when a subsequent encumbrancer or purchaser has actual knowledge of a prior interest, it makes no difference whether a prior interest was properly acknowledged

² Kirk-Hughes Development joins Kirk-Scott's motion to vacate the default judgment which establishes that the judgment should not be considered "valid."

³ There are factual issues as to whether Plaintiffs gave valuable consideration. Those issues are addressed in Kirk-Scott's responsive brief and are incorporated herein.

and recorded.” *Farm Bureau Finance Co., Inc. v. Carney*, 100 Idaho 745, 605 P.2d 509 (1980). Put another way, “a duly recorded interest is effective against prior unrecorded interests only where the recorded interest is taken for a valuable consideration and in good faith, i.e., ‘without knowledge, either actual or constructive, that unrecorded interests exist.’” *Id.* Notably, Plaintiffs argue that they did not have constructive notice due to alleged recording and acknowledgement defects. (Plaintiff’s Memo. re: Mot. for Summ. J., P. 14-18.) However, neither the cases relied upon by Plaintiffs, nor Idaho Code § 55-606 grants priority to opportunistic purchasers or encumbrancers that have actual knowledge of a prior interest. *See* I.C. § 55-606.

In the present case, Plaintiffs did have actual knowledge of Kirk-Scott’s prior adverse claim to the Sloan property. Balinda Antoine testified that she informed Mr. Golub that Kirk-Scott would only invest in the development of the properties if her company’s interest was secured and protected. (Affid. of Antoine, ¶ 5.) Geraldine Kirk-Hughes testified that she personally told Mr. Golub that Kirk-Scott, Ltd. would transfer title to a new entity in exchange for a deed of trust or mortgage on the Sloan property. (Affid. of G. Kirk-Hughes, ¶ 12.) Additionally, Darlene Moore testified that she personally drafted the deed of trust on the Sloan property and informed Mr. Golub that Kirk-Scott had a deed of trust on the Sloan property. (Affid. of Moore, ¶ 15) Later, prior to the time Plaintiffs initially sued Kirk-Hughes Development, Ms. Moore again reminded Mr. Golub that Kirk-Hughes Development did not have any assets to collect against because Ms. Antoine held an interest in the only property Kirk-Hughes Development owned. (Affid. of Moore, ¶ 17.)

Whether Mr. Golub had actual knowledge of Kirk-Scott’s deed of trust is a

disputed material fact. Accordingly, summary judgment is not proper.

B. Mr. Golub's Testimony is Inconsistent with His Prior Testimony and the Affidavits of Ms. Moore and Ms. Kirk-Hughes.

There are numerous irregularities and contradictions in Mr. Golub's testimony. First, Mr. Golub testified that he was not aware that Kirk-Hughes Development existed until after Kelly Polatis quitclaimed the Peterson property to Kirk-Hughes Development in May 2005. (Affid. of Golub, ¶ 11.) However, both Darlene Moore and Geraldine Kirk-Hughes testified that Mr. Golub was aware that Kirk-Hughes Development was created in the fall of 2004. (Affid. of Moore, ¶ 15; Affid. of G. Kirk-Hughes, ¶ 12.) Specifically, Ms. Kirk-Hughes testified that she formed Kirk-Hughes Development based on the advice and information provided by Mr. Golub. (Affid. of G. Kirk-Hughes, ¶ 12.) Notably, it was Mr. Golub who advised Mr. Kirk-Hughes that a single entity needed to own all parcels of property in order to obtain the permits necessary to develop the land. (Affid. of G. Kirk-Hughes, ¶ 12.)

Second, Plaintiffs claim that Mr. Golub was "no longer involved with Kirk-Hughes or any other aspect of the Project" and that he was initially unaware of the transfer of the Sloan property to Kirk-Hughes Development on November 18, 2004. (Plaintiff's Memo. re: Mot. for Summ. J., P. 19.) Plaintiffs also claim that Mr. Golub's involvement in the Atkinson and Sloan properties ended as soon as the sales closed. *Id.* These statements are disingenuous at best considering Mr. Golub's continual efforts to be involved with the development of the property and Mr. Golub's numerous conversations with Darlene Moore and Geraldine Kirk-Hughes. (Affid of G. Kirk-Hughes, ¶¶ 17-18; Affid. of Moore, ¶ 15.) Mr. Golub was instrumental in the initial efforts to develop the various properties and he made continuous efforts to be a marketing agent for Kirk-

Hughes Development. *Id.*

Mr. Golub recently testified that after the Peterson sale failed to close in November of 2004, he “had no further contact with Kirk-Hughes, Kirk-Scott, Antoine, or Kirk-Hughes Associates.” (Affid. of Golub, ¶ 10.) However, Ms. Kirk-Hughes and Ms. Moore each testified that Mr. Golub continued to contact each of them into the summer of 2005. (Affid. of Moore, ¶¶ 13, 16; Affid. of G. Kirk-Hughes, ¶ 17.) More importantly, Mr. Golub previously testified that he spoke with Ms. Kirk-Hughes on the phone in January or February of 2005, and that he spoke with her again in the summer of 2005. (2007 Golub Dep. 173:2-179:13; Affid. of R. Campbell, ¶ 2.) These inconsistencies establish that Mr. Golub’s testimony is not credible.

As recently as May 3, 2013, Mr. Golub testified that he “was not aware that Kirk-Scott had executed a deed of trust to Kirk-Hughes Development prior to Kirk-Scott recording its deed during Kirk-Hughes Development’s bankruptcy on September 17, 2010.” (Affid. of Golub, ¶ 14.) This statement suggests that Mr. Golub was at the very least aware of the deed that was recorded during the bankruptcy stay. However, in Mr. Golub’s recent June 12, 2013 deposition, he testified that he first became aware of Kirk-Scott’s deed of trust in the spring of 2013. (2013 Golub Dep. at 94:1-9; Affid. of R. Campbell, ¶ 3.) These statements are particularly suspect because Mr. Golub’s story changed drastically over a short 40 day period. More importantly, this inconsistency directly impacts the present lawsuit because it provides evidence of when the Plaintiffs gained constructive knowledge of the Kirk-Scott’s deed. It is not possible that Mr. Golub learned about Kirk-Scott’s deed of trust for the first time in 2010, and then relearned about the same deed for the first time in 2013.

It is possible that this discrepancy might be explained by what Mike Howard, Mr. Golub's agent knew. However, when questioned about when any agent first learned about the Kirk-Scott deed, Mr. Golub refused to answer and claimed the attorney-client privilege. (2013 Golub Dep. at 99:8-22; Affid. of R. Campbell, 3.) While Kirk-Hughes Development has put forth sufficient evidence of Plaintiff's actual knowledge, there are factual issues related to constructive knowledge that cannot be answered because Plaintiffs are hiding behind the attorney-client privilege. Plaintiffs are essentially asking all parties and this Court to believe that they had no idea that Kirk-Scott had a deed of trust, and just happened to re-record their judgment within hours of when the bankruptcy was dismissed. It is far more likely that Plaintiffs were aware of the Kirk-Scott deed all along, and based on that knowledge, took careful measures to re-record at the earliest possible moment.

Still, the Court need not consider the issue of constructive knowledge because the record establishes that Plaintiffs had actual knowledge. (Affid. of G. Kirk-Hughes, ¶ 12; Affid. of Moore, ¶ 15.) Because the statements provided by Mr. Golub are inconsistent and there are material factual issues, Plaintiffs' motion should be denied in its entirety.

C. The Bankruptcy Recording and Acknowledgement Issues are Moot Due to Mr. Golub's Actual Knowledge of Kirk-Scott's Interest.

Plaintiffs argue in part that they have a priority interest in the Sloan property because Kirk-Scott's deed of trust was initially recorded while Kirk-Hughes Development was in bankruptcy and subject to an automatic stay. (Plaintiff's Memo. re: Mot. for Summ. J., P. 14.) Plaintiffs cite to federal case law and state that "Kirk-Scott's September 17, 2010 recording did not provide notice because it was done in violation of the federal bankruptcy stay and is therefore, void." (Plaintiff's Memo. re: Mot. for

Summ. J., P. 14.) However, the present issue is not a federal one; it is controlled by state law. As previously explained, Idaho Code § 55-606 expressly provides that a judgment gains priority over a prior adverse interest when taken for valuable consideration and in good faith. As a result, Kirk-Hughes Development's bankruptcy and any recording that occurred during the bankruptcy is completely irrelevant since Plaintiffs had actual knowledge of Kirk-Scotts deed of trust. Notably, it was Kirk-Hughes Development that caused the deed to be recorded, not Kirk-Scott, Ltd.⁴ (Affid. of G. Kirk-Hughes, ¶ 24.) Because Mr. Golub had actual knowledge of Kirk-Scott's deed of trust on the Sloan property, it was impossible for him to gain a superior interest in the property, regardless of whether the Kirk-Scott deed was ever recorded or recorded in violation of federal bankruptcy laws.

IV. CONCLUSION

Plaintiffs had actual knowledge of Kirk-Scott's deed of trust in the fall of 2004. Nevertheless, Plaintiffs seek to foreclose on real property in which they are well aware others have a prior interest. Fortunately, the law is clear on this issue, and Plaintiffs' judgment is subordinate due to Mr. Golub's intimate involvement in the project and his accompanying knowledge. Because there are factual issue that must be resolved by a

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⁴ Plaintiffs cite case law which states that the policy for the automatic stay is to provide a debtor with relief from creditors and not require debtors to litigate or police actions taken by creditors. (Plaintiff's Memo. re: Mot. for Summ. J., P. 15.) While the entire bankruptcy issue is a moot point, this is an instance of a debtor violating its own automatic stay.

trier of fact, Kirk-Hughes Development respectfully requests that the Court deny Plaintiffs' motion for summary judgment.

DATED this 21st day of June, 2013.

CAMPBELL & BISSELL, PLLC



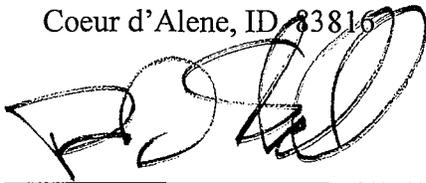
MICHAEL S. BISSELL
Attorneys for Defendant Kirk-Hughes
Development, LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

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| <input type="checkbox"/> | FACSIMILE | Coeur d'Alene, ID 83816 |
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For MICHAEL S. BISSELL

2013 JUN 25 AM 10:41

CLERK DISTRICT COURT
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Attorneys for Defendant Kirk-Hughes
Development, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN
GOLUB, husband and wife,

Plaintiffs,

vs.

KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-SCOTT, LTD., a Texas
corporation; INTERNAL REVENUE
SERVICE; TOMLINSON NORTH
IDAHO, INC., an Idaho corporation,

Defendants.

Case No. CV ~~2013-866~~ ⁰⁷⁻⁸⁰³⁸

**NOTICE OF JOINDER BY
DEFENDANT KIRK-HUGHES
DEVELOPMENT, LLC IN
DEFENDANT KIRK-SCOTT,
LTD.'S MOTION TO VACATE
AND MEMORANDUM IN
SUPPORT THEREOF**

Defendant Kirk-Hughes Development, LLC, by and through its attorney Michael S. Bissell, hereby joins in Defendant Kirk-Scott, Ltd.'s Motion and Memorandum in Support of Motion to Vacate (filed contemporaneously on June 25, 2013). Additionally, Kirk-Hughes Development submits the following in support of Kirk-Scott's motion to vacate.

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NOTICE OF JOINDER BY DEFENDANT KIRK-HUGHES DEVELOPMENT, LLC IN
DEFENDANT KIRK-SCOTT, LTD.'S MOTION TO VACATE AND

I. INTRODUCTION

Plaintiffs default judgment should be vacated for the numerous reasons addressed in Kirk-Scott's motion to vacate. Plaintiffs obtained a default judgment due to Kirk-Hughes Development's procedural shortcomings. However, the judgment obtained by Plaintiffs did not put Kirk-Scott Development on notice of the amount at stake due to deficiencies in Plaintiffs' complaint. Specifically, Plaintiffs' did not allege an amount of damage caused by Kirk-Hughes Development. Additionally, the default judgment grants Plaintiffs a double recovery in light of Plaintiffs' prior settlement with Delano Peterson. More importantly, the settlement awards Plaintiffs over twice the amount they would have received from the commission, if the sale had gone through. Kirk-Scott, Ltd.'s motion sets forth each of these points in detail and is accompanied by the supporting documents which provide evidence for each of these points. Because these issues and the applicable legal authority have been briefed at length and are incorporated here by reference, this memorandum is limited to factual issues that establish a defense on the merits.

II. FACTS

1. During Mr. Golub's June 12, 2013 deposition, he testified that he entered into a listing agreement with Delano Peterson which provided that Pacific Real estate would be entitled to a commission if any registered buyer bought the property within 180 days from May 10, 2004. (2013 Golub Dep. at 49:25-54:2, 60:5-63:19; Affid. of R. Campbell, ¶ 3.)

2. Mr. Golub testified at his deposition that 180 days from May 4th 2004 expired in early November 2004. (2013 Golub Dep. at 53:1-16; Affid. of R. Campbell, ¶ 3.)

NOTICE OF JOINDER BY DEFENDANT KIRK-HUGHES DEVELOPMENT, LLC IN
DEFENDANT KIRK-SCOTT, LTD.'S MOTION TO VACATE AND

3. This listing agreement initially gave Mr. Golub 14 days to secure an offer. Mr. Golub failed to bring an offer within that time period. On the fifteenth day, Mr. Golub visited Mr. Peterson, and Mr. Peterson said “what are you doing here . . . you’re not my agent anymore.” Mr. Peterson granted Mr. Golub a two day extension after Mr. Golub informed Mr. Peterson that he might have an offer. (2013 Golub Dep. at 49:25-52:1; Affid. of R. Campbell, ¶ 3.)

4. A day or two later, in an effort to keep his listing with Mr. Peterson open, Mr. Golub presented Mr. Peterson with a sham offer from Ms. Moore. Mr. Golub did not inform Mr. Peterson that Ms. Moore did not put up any earnest money. Ms. Moore informed Mr. Golub that her check would not clear, and that the \$50,000 would not go into escrow. (Affid. of Moore, ¶ 8); (2013 Golub Dep. at 49:25-52:1; Affid. of R. Campbell, ¶ 3.)

5. Mr. Golub testified that he did not tell Mr. Peterson that Ms. Moore’s check was not good because the money did not go into the Pacific Real Estate trust account. Instead Mr. Golub feigned ignorance and testified that he informed Mr. Peterson that the check was bad as soon as he knew. However, by that time, Mr. Golub was able to secure a valid offer with earnest money from Ms. Kirk-Hughes. (2013 Golub Dep. at 74:23-76:15; Affid. of R. Campbell, ¶ 3.)

6. Mr. Peterson filed a complaint against Mr. Golub with the Idaho Real Estate Commission alleging that Mr. Golub failed to inform him that the earnest money check had bounced. Mr. Golub was fined as a result of Mr. Peterson’s complaint. (2013 Golub Dep. at 74:19-77:23; Affid. of R. Campbell, ¶ 3.)

7. More than 180 days after May 10, 2004, Mr. Peterson sold his property to

NOTICE OF JOINDER BY DEFENDANT KIRK-HUGHES DEVELOPMENT, LLC IN
DEFENDANT KIRK-SCOTT, LTD.’S MOTION TO VACATE AND

Kelly Polatis on March 6, 2005. (2013 Golub Dep. at 53:1-16; Affid. of R. Campbell, ¶ 3); (Plaintiff's Memo. re: Mot. Summ. J., P. 4.)

8. Ms. Moore advised Mr. Golub that the contract with Mr. Peterson expired more than 180 days before Mr. Polatis purchased Mr. Peterson's property and that no commission was owed. (Affid. of Moore, ¶ 17.)

9. Prior to the time Mr. Golub commenced his 2007 lawsuit, Darlene Moore informed Mr. Golub that Kirk-Hughes did not have any property to collect a judgment against because Ms. Antoine had an interest in the waterfront property. (Affid. of Moore, ¶ 17.)

10. On multiple occasions, Mr. Golub testified that of the total \$941,000 commission that was to be split between Thomlinson Black, Darlene Moore, Pacific Real Estate and himself, he was only entitled to approximately \$464,000. (2007 Golub Dep. at 148:5-17; Affid. of R. Campbell, ¶ 2; 2013 Golub Dep. at 61:3-63:19; Affid. of R. Campbell, ¶ 3.)

11. Despite the fact that Mr. Golub would have received \$464,000 if the sale had gone through, he obtained a default judgment for \$941,000. (2007 Golub Dep. at 148:5-17; Affid. of R. Campbell, ¶ 2; 2013 Golub Dep. at 61:3-63:19; Affid. of R. Campbell, ¶ 3.)

12. During his June 12, 2013 deposition, Mr. Golub testified that he obtained settlement money from Delano Peterson and that the settlement money was a portion of the \$914,000 judgment Mr. Golub sought in his 2007 lawsuit. Mr. Howard, acting as Mr. Golub's agent, re-recorded the \$941,000 judgment after Mr. Golub settled with Mr. Peterson for a portion of that amount. (2013 Golub Dep. at 87:1-89:18; Affid. of R.

NOTICE OF JOINDER BY DEFENDANT KIRK-HUGHES DEVELOPMENT, LLC IN
DEFENDANT KIRK-SCOTT, LTD.'S MOTION TO VACATE AND

Campbell, ¶ 3.)

13. Mr. Golub testified that the settlement money obtained from Peterson constituted a portion of the \$941,000 judgment, but that it was “fair” to recover \$941,000 even though he had already collected a portion of it. (2013 Golub Dep. at 89:13-90:1; Affid. of R. Campbell, ¶ 3.)

14. Mr. Golub testified that of the \$941,000 commission to be split among the various real estate agents, Tomlinson Black was entitled to \$191,870 and that if the sale had gone through, the money would have been dispersed to Tomlinson Black in escrow. Mr. Golub also testified that Tomlinson Black had obtained a judgment for its portion of the commission in a separate lawsuit. (2013 Golub Dep. at 62:3-64:23; Affid. of R. Campbell, ¶ 3.)

15. When Mr. Golub approached Ms. Moore about commencing suit against the various Kirk-Hughes defendants, she informed him that she had no intention to pursue any commission, and that she did not believe that they were entitled to one pursuant to the terms of the listing agreement. (Affid. of Moore, ¶ 17.)

16. Mr. Golub testified that it is fair to recover twice because it has taken him a long time to recover the money he feels he is owed. (2013 Golub Dep. at 89:19-90:2; Affid. of R. Campbell, ¶ 3.)

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NOTICE OF JOINDER BY DEFENDANT KIRK-HUGHES DEVELOPMENT, LLC IN
DEFENDANT KIRK-SCOTT, LTD.'S MOTION TO VACATE AND

III. CONCLUSION

Kirk-Hughes Development rests upon Kirk-Scott, Ltd.'s motion to vacate. Based upon the foregoing facts, which support the argument in Kirk-Scott's motion to vacate, Kirk-Hughes Development requests that the default-judgment be vacated.

DATED this 24th day of June, 2013.

CAMPBELL & BISSELL, PLLC



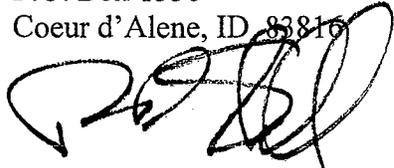
for MICHAEL S. BISSELL
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MICHAEL S. BISSELL

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9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,
14
15 Plaintiffs,

16 vs.

17 KIRK-HUGHES DEVELOPMENT, LLC, a
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD, a Texas corporation;
20 INTERNAL REVENUE SERVICE;
21 TOMLINSON NORTH IDAHO, INC., an
22 Idaho corporation,

23 Defendants.

07-8038
Case No. CV13-866

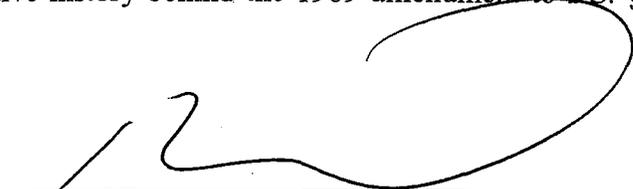
AFFIDAVIT OF MICHAEL T. HOWARD

24 STATE OF IDAHO)
25 : ss.
26 County of Kootenai)

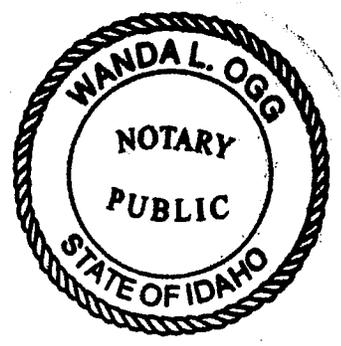
I, MICHAEL T. HOWARD, being first duly sworn on oath, say:

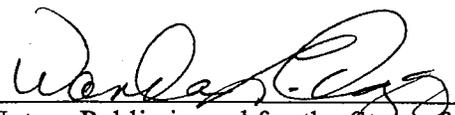
1. That I am the attorney for Plaintiffs, and have knowledge of the facts and circumstances
in this case.

1 2. That attached hereto is the legislative history behind the 1989 amendment to I.C. § 55-
2 606.

3
4 
5 MICHAEL T. HOWARD

6 SUBSCRIBED AND SWORN to before me this 2nd day of July, 2013.



7
8 
9 Notary Public in and for the State of
10 Idaho, residing at Spokane Valley, WA
11 My appointment expires April 4, 2017

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
4 via facsimile on July 2, 2013, to:

4 Douglas S. Marfice – HAND DELIVERED
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21
22 MICHAEL T. HOWARD

23 427833

1989

STATEMENT OF PURPOSE

RS21866

This legislation would provide that a valid judgment lien that is first duly recorded has priority over subsequently recorded grants or conveyances of an estate in real property.

FISCAL IMPACT

None.

5.1149

1989 Final Daily Data

3/13 2nd rdg - to 3rd rdg
 3/22 3rd rdg - PASSED - 75-0-9
 NAYS -- None.
 Absent and excused -- Danielson, Haagenson, Hartung,
 Lloyd, Loertscher, Neibaur, Newcomb, Smock, Tucker.
 Title apvd - to Senate
 3/23 To enrol
 3/24 Rpt enrol - Pres signed
 3/24 Sp signed
 3/27 To Governor
 3/29 Governor signed
 Session Law Chapter 176
 Effective: 7-1-89

S1145.....By Resources & Environment
 WATER RIGHTS -- ADJUDICATION -- Amends existing law to pro-
 vide an exemption from the Snake River adjudication for
 domestic or stock water use where the diversion rate claimed
 under a water right is 13,000 gallons or less per day.

2/7 Senate intro - 1st rdg - to printing
 2/8 Rpt prt - to Res/Env

S1146.....By Resources & Environment
 FORESTS AND FORESTRY -- SCALING -- Amends existing law to
 increase the maximum scaling assessment on the scale of for-
 est products.

2/7 Senate intro - 1st rdg - to printing
 2/8 Rpt prt - to Res/Env
 2/14 Rpt out - rec d/p - to 2nd rdg
 2/15 2nd rdg - to 3rd rdg
 2/21 3rd rdg - PASSED - 40-0-2
 NAYS--None.

Absent and excused--Crapo, Noh.
 Title apvd - to House
 2/22 House intro - 1st rdg - to Res/Con

3/16 Rpt out - rec d/p - to 2nd rdg
 3/17 2nd rdg - to 3rd rdg

3/23 3rd rdg - PASSED - 78-0-6
 NAYS -- None.

Absent and excused -- Childers, Deckard, Hartung,
 Pomeroy, White, Wood.
 Title apvd - to Senate

3/24 To enrol
 3/24 Rpt enrol - Pres signed

3/27 Sp signed
 3/28 To Governor

3/29 Governor signed
 Session Law Chapter 242
 Effective: 7-1-89

S1147.....By Resources & Environment
 IRRIGATION -- SUBDIVIDED LANDS -- Amends existing law to
 allow land within an irrigation district which has been sub-
 divided to be combined for assessment purposes.

2/7 Senate intro - 1st rdg - to printing
 2/8 Rpt prt - to Res/Env
 3/7 Rpt out - rec d/p - to 2nd rdg
 3/8 2nd rdg - to 3rd rdg
 3/9 3rd rdg - PASSED - 39-0-3
 NAYS -- None.

Absent and excused -- Blackbird, Christiansen,
 McLaughlin.
 Title apvd - to House

3/10 House intro - 1st rdg - to Res/Con

3/22 Rpt out - rec d/p - to 2nd rdg
 2nd rdg - to 3rd rdg

3/27 3rd rdg - PASSED - 77-0-7

NAYS -- None.

Absent and excused -- Brown, Childers, Crane, Duffin,
 Horvath, Neibaur, Vieselmeyer.
 Title apvd - to Senate

3/28 To enrol
 3/29 Rpt enrol - Pres signed
 3/30 Sp signed - to Governor
 4/5 Governor signed

 Session Law Chapter 368
 Effective: 4-5-89

S1148.....By State Affairs
 GOVERNOR -- RESIDENCE -- Adds to existing law to authorize
 the State Land Board to sell the residence provided for the
 governor.

2/7 Senate intro - 1st rdg - to printing

2/8 Rpt prt - to St Aff

2/13 Rpt out - rec d/p - to 2nd rdg

2/14 2nd rdg - to 3rd rdg

2/21 3rd rdg - PASSED - 40-0-2

NAYS -- None.

Absent and excused -- Crapo, Noh.

Title apvd - to House

2/22 House intro - 1st rdg - to St Aff

3/21 Rpt out - rec d/p - to 2nd rdg

2nd rdg - to 3rd rdg

3/27 3rd rdg - PASSED - 64-16-4

NAYS -- Deckard, Gurnsey, Haagenson, Hale, Hawkins,
 Hill, Jones(29), Kellogg, Montgomery, Neibaur,
 Robbins, Robison, Schaefer, Stoicheff, Taylor, Wood.
 Absent and excused -- Crow, Duffin, Newcomb, Tucker.
 Title apvd - to Senate

3/28 To enrol

3/29 Rpt enrol - Pres signed

3/30 Sp signed - to Governor

4/5 Governor signed

 Session Law Chapter 357
 Effective: 4-5-89

S1149.....By Judiciary & Rules
 PROPERTY, REAL - JUDGMENT LIENS. Amends existing law to
 clarify a valid judgment lien that is duly recorded on a
 grant or conveyance of an estate in real property.

2/7 Senate intro - 1st rdg - to printing

2/8 Rpt prt - to Jud

2/20 Rpt out - rec d/p - to 2nd rdg

2/21 2nd rdg - to 3rd rdg

2/28 3rd rdg - PASSED - 42-0-0

NAYS -- None.

Absent and excused -- None.

Title apvd - to House

3/1 House intro - 1st rdg - to Jud

3/6 Rpt out - rec d/p - to 2nd rdg

3/7 2nd rdg - to 3rd rdg

3/16 3rd rdg - PASSED - 70-1-13

NAYS -- Jones(29).

Absent and excused -- Crane, Danielson, Haagenson,
 Hartung, Hay, Jones(23), Lasuen, Lloyd, Mahoney, Ses-
 sions, Taylor, Wood, Mr. Speaker.

Title apvd - to Senate

3/17 To enrol

3/20 Rpt enrol - Pres signed

3/21 Sp signed

3/22 To Governor

3/27 Governor signed

 Session Law Chapter 107
 Effective: 3-27-89

S1150.....By Judiciary & Rules
 CRIME AND CRIMINAL PROCEDURES -- MALICIOUS HARASSMENT --

--Continued--

--Continued--

Senate Judiciary + Rules

MINUTES

JUDICIARY AND RULES COMMITTEE

Room 437

February 6, 1989

1:30 p.m.

PRESENT: All committee members were present.

MINUTES APPROVED It was moved by Furness, seconded by McRoberts, and approved by voice vote, that the minutes of Friday, February 3, 1989, be approved as written.

CONFIRMATION TO IDAHO JUDICIAL COUNCIL The committee discussed the appointment of Nicholas Ifft to the Idaho Judicial Council. Upon motion by Rydalch, seconded by Wetherell, and unanimously approved by voice vote, the committee moved to recommend that the Senate confirm Mr. Ifft to the Idaho Judicial Council.

S1102 PROOF OF FRAUDULENT INTENT
Senator Hyde introduced S1102 and stated that this bill would amend existing law to provide that showing a false admission ticket to obtain recreation or entertainment services is proof of theft.

Pat Kole, Office of the Attorney General, explained that convictions under this section of Idaho Code would be considered petty theft which is a misdemeanor.

MOTION CARRIED Moved by Bray, seconded by Rydalch, that S1102 be sent to the floor with a DO PASS recommendation. By voice vote, the motion carried.

→ RS21866 TRANSFER OF REAL PROPERTY; CLARIFICATION & EMERGENCY
Senator Darrington introduced RS21866 on behalf of Senator Crapo and explained that this legislation would provide that a valid judgment lien that is first duly recorded has priority over subsequently recorded grants or conveyances of an estate in real property.

MOTION CARRIED It was moved by Donesley, seconded by Staker, that RS21866 be introduced for print. By voice vote, the motion carried.

RS22480 PUBLIC DISPLAY OF OFFENSIVE SEXUAL MATERIAL-INCREASED PENALTY
HELD Because of Senator Larrey Anderson's absence, RS22480 will be held until Wednesday, February 8, 1989.

RS22214C1 MALICIOUS HARASSMENT CRIMES; COLLECT & REPORT STATISTICS
Senator Reed indicated that RS22214C1 came from Kootenai County's Task Force on Human Relations and would require annual reporting of malicious harassment crimes by the Director of Law Enforcement.

MOTION CARRIED Moved by Stocks, seconded by Bray, that RS22214C1 be introduced for print. By voice vote, the motion carried.

Senate Judiciary + Rules

Judiciary and Rules Committee
Page 2
February 17, 1989

S 1150

REPORTING OF MALICIOUS HARASSMENT CRIMES

Senator Reed presented this bill stating that it is very important to have reliable and accurate information about crimes in the state. This legislation would require an annual report to be compiled by the Department of Law Enforcement regarding the Malicious Harassment Law. By compiling a list of this information the rumors and severity of the problem in Idaho will be diminished.

Tony Stewart, President of the Northwest Coalition on Malicious Harassment, spoke in favor of this bill. He stressed that by turning the responsibility of reporting these incidents over to the police, the statistics will be much more accurate.

Joel Horton, Idaho Association of Prosecuting Attorneys, stated that they have no position on the bill.

MOTION
PASSED

It was moved by Senator Bray and seconded by Senator Brooks that S 1150 be sent to the floor with a DO PASS recommendation. By voice vote, the motion carried.

→ S 1149

RELATING TO THE TRANSFERS OF REAL PROPERTY

Senator Crapo presented this legislation and stated that it clarifies the effect of a valid judgment lien regarding a grant or conveyance of an estate in real property. The Supreme Court has recently allowed a judgment to be eliminated if the property is sold before collection can be made.

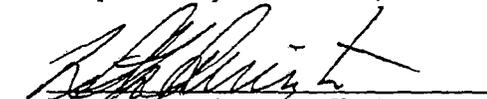
MOTION
PASSED

It was moved by Senator Donesley and seconded by Senator Rydalch that S 1149 be sent to the floor with a DO PASS recommendation. By voice vote, the motion carried.

ADJOURN

There being no further business to come before the committee, the meeting was adjourned at 2:25 p.m.

Respectfully submitted,


Denton Darrington, Chairman


Julie Blakeslee, Secretary

House Judiciary, Rules + Admin

JUDICIARY, RULES & ADMINISTRATION COMMITTEE

MINUTES - March 3, 1989

Page 2

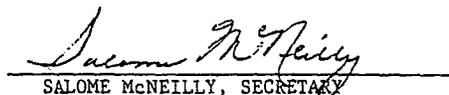
H 253 Mr. Patrick Kole, Asst. Attorney General, explained H 253 to the members of the committee, stating that modern discovery procedures eliminate the requirement that the state endorse on the information the names of its witnesses at the time of filing the information. After a short discussion, it was moved by Rep. Montgomery, seconded by Rep. Bengson that H 253 be sent to the floor with a Do Pass recommendation. Motion carried. Rep. Hansen will carry H 253 on the floor.

S 1085 The Chairman announced that the next item to be considered by the committee was S 1085. Rep. Lucas testified in its behalf, saying it is a house-keeping bill, making a work release grant discretionary on the part of a judge, rather than an obligation of the sheriff. He continued, saying that the judge should have this discretion on a case by case basis. There were no questions of Rep. Lucas. It was then moved by Rep. Bengson, seconded by Rep. Hay, that S 1085 be sent to the floor with a Do Pass recommendation. Motion passed. Rep. Lucas will carry S 1085 on the floor.

→ S 1149 At that time the committee considered S 1149. Sen. Crapo was the original sponsor of the bill; Mr. Patrick Kole testified for the bill in place of Sen. Crapo. He explained that this is in regard to valid judgment liens and their priority over subsequently recorded grants or conveyances of an estate in real property. It was moved by Rep. Hansen, seconded by Rep. Brown, that S 1149 be sent to the floor with a Do Pass recommendation. Motion carried. Rep. Brown will carry.

There being no further business to be considered by the committee, the Chairman declared the meeting adjourned.


DON C. LOVELAND, CHAIRMAN


SALOME McNEILLY, SECRETARY

2013 JUL -2 PM 4: 21

CLERK DISTRICT COURT

DEPUTY

1 MICHAEL T. HOWARD, ISB No. 6128
2 WINSTON & CASHATT, LAWYERS, a
3 Professional Service Corporation
4 250 Northwest Boulevard, Suite 206
5 Coeur d'Alene, Idaho 83814
6 Telephone: (208) 667-2103
7 Facsimile: (208) 765-2121
8 mth@winstoncashatt.com

9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,

14 Plaintiffs,

67-8038
Case No. CV13-866

AFFIDAVIT OF MICHAEL T. HOWARD

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC, a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD, a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation,

22 Defendants.

23 STATE OF IDAHO)
24 : ss.
25 County of Kootenai)

26 I, MICHAEL T. HOWARD, being first duly sworn on oath, say:

1. That I am the attorney for Plaintiffs, and have knowledge of the facts and circumstances
in this case.

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
4 via facsimile on July 2, 2013, to:

4 Douglas S. Marfice – HAND DELIVERED
5 Ramsden & Lyons
6 P.O. Box 1336
7 Coeur d'Alene, ID 83816
8 Fax: (208) 664-5884
9 Attorney for Defendant, Tomlinson North Idaho, Inc.

8 Michael S. Bissell
9 Campbell & Bissell, PLLC
10 Corbet Aspray House
11 820 W. 7th Avenue
12 Spokane, WA 99204
13 Fax: (509) 455-7111
14 Attorney for Defendant, Kirk-Hughes Development, LLC

12 Matthew Z. Crotty
13 Crotty & Son Law Firm, PLLC
14 421 W. Riverside Ave., Suite 1005
15 Spokane, WA 99201
16 Fax: (509) 703-7957
17 Attorney for Defendant, Kirk-Scott, Ltd.

16 Ryan M. Best - MAILED
17 Best Law, PLLC
18 421 W. Riverside Ave., Suite 1005
19 Spokane, WA 99201
20 Attorney for Defendant, Kirk-Scott, Ltd.

21
22 MICHAEL T. HOWARD

23 427911
24
25
26

1 **"Registered Buyer" or "Registered Buyers"** conveys the same meaning as set forth in the
2 April 22, 2004 "Agreement for Potential Land Sale" signed by you.

3 **INTERROGATORY NO. 1:** Please describe in detail all damages you have allegedly suffered
4 as a result of Defendants' conduct.

5 **ANSWER:**

6 **Plaintiffs have suffered a loss of the principal amount of the commission due under the**
7 **Listing Agreement with Peterson, based upon Peterson's Purchase and Sale Agreement with Kirk-**
8 **Hughes. Plaintiffs have also suffered a loss of the interest due on that commission beginning**
9 **November 12, 2004. Plaintiffs have also suffered a loss of the value of the Adkinson Property on**
10 **the date it was transferred Kirk-Hughes. Plaintiffs have and continue to incur costs and attorney**
11 **fees in pursuit of recovering the above-referenced damages.**

12 **REQUEST FOR PRODUCTION NO. 1:** Produce copies of all documents that illustrate or
13 explain your alleged damages.

14 **RESPONSE:**

15 **All documents relevant to this request have been previously produced, which include: 1)**
16 **Net Listing Agreement; and 2) Peterson / Kirk-Hughes Purchase and Sale Agreement. This**
17 **request will be supplemented as additional, relevant documents are discovered or identified.**

18 **INTERROGATORY NO. 2:** Set forth the date, identity, and substance of each conversation or
19 communication you had with a registered buyer (excluding Geraldine Kirk-Hughes and Darlene Moore)
20 between April 2004 through May 2005.



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
KOOTENAI COUNTY, IDAHO

ALAN GOLUB, et al

CV13-866

v.

KIRK-HUGHES DEVELOPMENT LLC,
et al

STATE OF TEXAS

PROOF OF SERVICE AFFIDAVIT

My name is MARC RIACO. I am over the age of eighteen, and competent to testify to matters stated in this affidavit. I have personal knowledge of the facts represented herein, and each is true and correct.

On FEBRUARY 22, 20 13 at 2:05 P.M. I served a true and correct copy of the following;

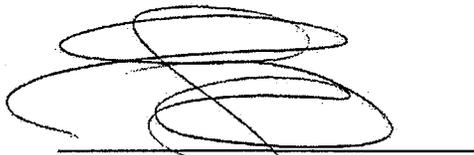
- 1. SUMMONS
- 2. COMPLAINT FOR DECLARATORY JUDGMENT

upon defendant KIRK-SCOTT, LTD by serving Balinda J Antoine its President

in person at 306 E Randol Mill Rd, Ste 100, Arlington, Texas 76016.

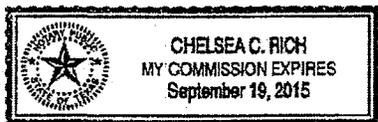
I am not a party to nor interested in the outcome of this suit.

Further, affiant saith naught.



Affiant: MARC RIACO SCH 623
555 Republic Dr., Ste 200
Plano, Texas 75074

SWORN AND SUBSCRIBED before me this 2 day of JULY 2013




Notary Public, State of Texas



STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2013 JUL -2 PM 4: 21

CLERK DISTRICT COURT
[Signature]
DEPUTY

1 MICHAEL T. HOWARD, ISB No. 6128
2 WINSTON & CASHATT, LAWYERS, a
3 Professional Service Corporation
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6 Telephone: (208) 667-2103
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8 mth@winstoncashatt.com

9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,
14
15 Plaintiffs,

16 vs.

Case No. CV ⁰⁷⁻⁸⁰³⁸ ~~13-866~~

GOLUB'S RESPONSE RE: KIRK-SCOTT
AND KIRK-HUGHES DEVELOPMENT'S
MOTION TO SET ASIDE JUDGMENT

17 KIRK-HUGHES DEVELOPMENT, LLC, a
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD, a Texas corporation;
20 INTERNAL REVENUE SERVICE;
21 TOMLINSON NORTH IDAHO, INC., an
22 Idaho corporation,

23 Defendants.

24 **1. Introduction**

25 Golub submits this brief in response to Kirk-Scott's Motion to Set Aside the Judgment, as well as
26 Kirk-Hughes Development's Joinder.

2. Summary of Argument

2.1 Timeliness is a prerequisite to relief under I.R.C.P. 60(b) and Kirk-Scott's Motion is
untimely.

1 2.2 Under I.R.C.P. 60(b), Kirk-Scott has no standing to collaterally attack the Judgment
2 unless it is void.

3 2.3 The Judgment is not void because the Court had subject matter jurisdiction and personal
4 jurisdiction over the parties at the time of its entry, and the Judgment does not differ from
5 that demanded by Golub in his Complaint.
6

7 2.4 Kirk-Hughes Development's joinder in Kirk-Scott's Motion should be dismissed for the
8 additional reason that it is a veiled motion for new trial under I.R.C.P. 59, under which it
9 is time-barred.

10 **3. Factual Background**

11 3.1 On October 30, 2007, Golub filed a Complaint against Kirk-Hughes Development
12 alleging that as a result of Peterson's sale of the Peterson Property to Polatis and
13 subsequent transfer to Kirk-Hughes Development, Peterson did not pay Golub the
14 \$941,000 commission owed under the Listing Agreement. [See Complaint]
15

16 3.2 Kirk-Hughes Development was personally served on November 6, 2007. [See Affidavit of
17 Process Server]

18 3.3 Kirk-Scott is a member of Kirk-Hughes Development with a 51.5% interest. Balinda
19 Antoine is a member with a 3% interest. [See May 9, 2013 Affidavit of Michael T.
20 Howard, Exhibit 10, p.23]

21 3.4 On February 7, 2008 Kirk-Hughes Development personally appeared and answered
22 through their attorney, Patrick E. Miller. [See Kirk-Hughes Answer]
23

24 3.5 Upon motion, on February 4, 2009 the Court granted Attorney Miller leave to withdraw
25 from representing Kirk-Hughes Development and entered an Order directing that Kirk-
26

1 Hughes Development appear or secure substitute counsel within 20 days or have Default
2 Judgment entered against it. [See February 4, 2009 Order of Withdrawal]

3 **3.6** Kirk-Hughes Development failed to obtain substitute counsel or otherwise appear to
4 defend Plaintiffs' claims within the prescribed time period.

5 **3.7** On February 26, 2009 Golub filed a Motion for Default Judgment against Kirk-Hughes
6 Development, which was supported by the June 10, 2008 Affidavit of Alan Golub and the
7 February 18, 2009 Affidavit of Michael T. Howard. [See February 26, 2009 Motion and
8 Memorandum for Default Judgment]

9 **3.8** On March 3, 2009, an Order of Default was entered against Kirk-Hughes Development.
10 [See March 3, 2009 Order of Default]

11 **3.9** On March 4, 2009, Golub filed a motion for Final Judgment and 54(b) Certificate against
12 Kirk-Hughes Development. [See March 4, 2009 Motion for Final Judgment]

13 **3.10** On March 11, 2009 Judgment was entered against Kirk-Hughes Development and all
14 Defendants except Peterson in the principal amount of \$941,000. [See March 11, 2009
15 Judgment]

16 **3.11** On April 6, 2009 Kirk-Hughes Development filed for Chapter 11 Bankruptcy protection
17 in Nevada, Case Number 09-15153-mkn, which placed an automatic stay on the case and
18 all collection efforts. [See May 9, 2013 Affidavit of Michael T. Howard, Exhibit 13]

19 **3.12** In August 2009, Golub entered into a settlement agreement with Peterson and on August
20 10, 2009 the Court entered a Stipulated Order of Dismissal against Peterson and a 54(b)
21 Certificate against all Defendants except Kirk-Hughes Development, which was still in
22 bankruptcy. [See August 10, 2009 Order of Final Judgment]

- 1 3.13 On August 25, 2009 Golub recorded the Judgment in Kootenai County, instrument
2 number 2229054000. [See May 9, 2013 Affidavit of Michael T. Howard, Exhibit 8]
- 3 3.14 On October 28, 2010 an Order of Voluntary Dismissal was entered in the Kirk-Hughes
4 Development Chapter 11 bankruptcy and the automatic stay was lifted. [See May 9, 2013
5 Affidavit of Michael T. Howard, Exhibit 12]
- 6 3.15 On October 28, 2010 Golub re-recorded the Judgment in Kootenai County, Idaho
7 (instrument 2287941000). [See May 9, 2013 Affidavit of Michael T. Howard, Exhibit 8]
- 8 3.16 On January 25, 2013 Golub filed this action against Kirk-Scott and other potential lien
9 holders, seeking a declaration of validity and priority in properties titled in the name of
10 Kirk-Hughes Development.
- 11 3.17 Kirk-Scott was served on February 22, 2013. [See July 2, 2013 Affidavit of Michael T.
12 Howard, Exhibit 2]
- 13 3.18 Kirk-Scott filed its Answer and Affirmative Defenses on March 14, 2013. Kirk-Scott's
14 Answer does not plead invalidity of Golub's judgment. [See Kirk-Scott Answer]
- 15 3.19 On April 30, 2013 Kirk-Scott filed a motion to dismiss Golub's Complaint on the basis
16 that Golub has no standing to contest a violation of the bankruptcy stay and that even and
17 unrecorded Deed of Trust has priority over a judgment lien as a matter of law. Kirk-
18 Scott's Motion to Dismiss does not attack the validity of Golub's judgment.

22 4. Applicable Legal Standard

23 Kirk-Scott has moved for relief under I.R.C.P. 60(b). The decision to grant or deny a motion
24 under I.R.C.P. 60(b) is committed to the sound discretion of the trial court. *See Viafax v. Stuckenbrock*,
25 134 Idaho 65, 69 (Ct. App. 2000). A trial court acts within its sound discretion on a motion to set aside
26

1 a default judgment if: (a) the trial court makes findings of fact which are not clearly erroneous, and (b)
2 the court applies to those facts the proper criteria under Rule 60(b). *Id.*

3 **5. Argument**

4 **5.1 Kirk-Scott's Motion is not timely.**

5 Kirk-Scott seeks to vacate Golub's judgment against Kirk-Hughes Development under I.R.C.P.
6 60(b)(4), (5), and (6), which provide in relevant part:
7

8 On motion and upon such terms as are just, the court may relieve a party or his legal
9 representative from a final judgment, order, or proceeding for the following reasons: ...
10 (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a
11 prior judgment upon which it is based has been reversed or otherwise vacated, or it is no
12 longer equitable that the judgment should have prospective application; or (6) any other
13 reason justifying relief from the operation of the judgment. **The motion shall be made
14 within a reasonable time**, and for reasons (1), (2), and (3) not more than six (6) months
15 after the judgment, order, or proceeding was entered or taken.

16 I.R.C.P. 60(b) (emphasis added)

17 A motion to set aside a judgment under any portion of Rule 60(b) "shall be made within a
18 reasonable time." What constitutes a reasonable time depends upon the facts in each individual case.
19 *See Viafax*, 134 Idaho at 71. Whether a motion under Rule 60(b) is timely is an issue of fact for the
20 district court. *See Davis v. Parrish*, 131 Idaho 595, 597 (1998). It must appear that "the defaulting party
21 is not guilty of indifference or unreasonable delay" and has acted "promptly and diligently in seeking
22 relief." *Stoner v. Turner*, 73 Idaho 117, 121 (1952). *See also Clark v. Atwood*, 112 Idaho 115, 117 (Ct.
23 App. 1986). A district court is only vested with discretion to set aside a default judgment if the moving
24 party has complied with the time for taking any such motion. *See Catledge v. Transport Tire Co.*, 107
25 Idaho 602 (1984).

26 When the movant challenges a judgment under Rule 60(b), the court examines the length of time
between the moment the judgment becomes apparent to the defendant and the date the Rule 60(b)

1 motion is filed. *See McGrew v. McGrew*, 139 Idaho 551, 559 (2003). When the movant alleges that a
2 judgment has become inequitable under Rule 60(b)(5), the court should also examine the movant's delay
3 after the moment it became reasonably apparent that the order is inequitable due to a change in law or
4 circumstances. *See Meyers v. Hansen*, 148 Idaho 283, 291 (2009).

5
6 The bringing of a motion within a reasonable time is a prerequisite to obtaining relief under any
7 portion of I.R.C.P. 60(b). *See Meyers*, 148 Idaho at 291. Kirk-Scott's motion for relief under I.R.C.P
8 60(b) here should be denied because it was not brought within a reasonable time. As the movant under
9 I.R.C.P 60(b), Kirk-Scott bears the burden of establishing its motion was brought within a reasonable
10 time, but has failed to do so. Kirk-Scott's only attempt to satisfy its burden is to state: "Kirk-Scott
11 timely brings this motion within three months of appearing in CV13-0866." [*See Kirk-Scott*
12 *Memorandum RE: Motion to Vacate, p.4*] However, Kirk-Scott has not provided **any** evidence to
13 demonstrate how long it has been aware of the Judgment or why it has waited until now to bring this
14 Motion. *See e.g. Harter v. Products Mgt. Corp.*, 117 Idaho 121 (Ct. App. 1990) (Motion made one year
15 after entry of judgment ruled not timely in absence of affidavit or other showing to establish timeliness
16 of motion).

17
18 To the contrary, the facts establish that Kirk-Scott should have been well-aware of Golub's claim
19 and Judgment since as early as 2007. Kirk-Scott is owned by Geraldine Kirk-Hughes' sister, Balinda
20 Antoine. Kirk-Scott is a member of Kirk-Hughes Development holding a 51.5% interest in the
21 company; Antoine is a member with a 3% interest. [*See May 9, 2013 Affidavit of Michael T. Howard,*
22 *Exhibit 10, p.23, Exhibit 13, p. 25*] Under these circumstances, it can hardly be said that Antoine and
23 Kirk-Scott were wholly unaware of the lawsuit filed by Golub against Kirk-Hughes and Kirk-Hughes
24 Development in October 2007, or unaware of the Judgment ultimately entered against Kirk-Hughes and
25 Kirk-Hughes Development in March 2009. Moreover, as members of Kirk-Hughes Development,
26

1 Antoine and Kirk-Scott were in privity and would have known of Kirk-Hughes Development's Chapter
2 11 Bankruptcy Petition filed in April 2009 and its subsequent Chapter 7 Bankruptcy Petition filed in
3 May 2011, both of which listed Golub as a creditor. Kirk-Scott has failed to meet its burden of
4 establishing by affidavit or otherwise, the timeliness of its motion. *See Harter*, 117 Idaho 121.

5 Even assuming Kirk-Scott was unaware of Golub's Judgment until receiving service of Golub's
6 Declaratory Complaint on February 22, 2013 Kirk-Scott has failed to provide **any** explanation for its
7 **four** month delay in seeking redress from the Court. Notably, Kirk-Scott did not raise the validity of
8 Golub's judgment as an affirmative defense in its Answer to Golub's Complaint for Declaratory relief,
9 nor did it attack the Judgment as a basis for its Motion to Dismiss, filed in April, 2013. [*See Kirk-*
10 *Scott's March 14, 2013 Answer in CV13-866; April 30, 2013 Motion to Dismiss*]
11

12 Accordingly, because Kirk-Scott has failed to meet its burden of establishing its Motion was
13 brought within a reasonable time, and because such proof is a pre-requisite to relief under any portion of
14 I.R.C.P. 60(b), the Court should deny Kirk-Scott's Motion to Vacate the Judgment. *See e.g. See Meyers*
15 *v. Hansen*, 148 Idaho 283 (2009) (Motion for relief from default judgment made 17 months after
16 receiving notice of it was untimely); *Harter v. Products Mgt. Corp.*, 117 Idaho 121 (Ct. App. 1990)
17 (Motion made one year after entry of judgment ruled not timely in absence of affidavit or other showing
18 to establish timeliness of motion); *Ellis v. Ellis*, 118 Idaho 468 (Ct. App. 1990) (Motion made 10 months
19 following entry of judgment for divorce held untimely); *Davis v. Parrish*, 131 Idaho 595 (1998) (Motion
20 made 5 months following default judgment held not timely in absence of explanation for delay).
21

22
23 **5.2 Under I.R.C.P. 60(b), Kirk-Scott has no standing to collaterally attack the Judgment**
24 **unless it is void.**

25 Kirk-Scott seeks redress under subsections 4, 5, and 6 of I.R.C.P. 60(b). However, because
26

1 Kirk-Scott was not a party to the underlying judgment, it has no standing to collaterally attack it unless
2 the Judgment is void.

3 By its terms, I.R.C.P 60(b) limits its application to motions made for relief from a final judgment
4 by "a party or his legal representative." I.R.C.P. 60(b). Kirk-Scott was not a party to the underlying
5 litigation or the judgment and therefore seeks to collaterally attack Golub's judgment. Generally, "final
6 judgments, *whether right or wrong*, are not subject to collateral attack." *Kukuruza v. Kukuruza*, 120
7 Idaho 630, 632 (Ct.App.1991) (emphasis in original). However, a void judgment can be attacked at any
8 time by any person adversely affected by it. *Burns v. Baldwin*, 138 Idaho 480, 486 (2003). What
9 constitutes a void judgment is narrowly construed. *See Hartman v. United Heritage Prop. & Cas. Co.*,
10 141 Idaho 193 (2005).

11 Here, Kirk-Scott seeks relief under Rule 60(b) subsections (4), (5), and (6). However, because
12 Kirk-Scott was not a party to the underlying litigation or Judgment, it may only attack Golub's
13 Judgment collaterally as void under subsection 4. *See, e.g. Johnson v. Hartford Ins. Group*, 99 Idaho
14 134 (1978) (Since the defect in the proceedings below did not make the default divorce decree
15 "absolutely void," the movant was without standing to challenge it).

16 Accordingly, any argument by Kirk-Scott relative to subsections (5) and (6) of I.R.C.P. 60(b)
17 should be disregarded. Under I.R.C.P. 60(b), Kirk-Scott has no standing to collaterally attack the
18 Judgment unless it is void¹.

19 //
20 //
21 //

22
23
24
25 ¹ Kirk-Scott appears to categorize relief under I.R.C.P. 60(b) subsections (5) and (6) with void
26 judgments. However, nothing in the rule or the authority addressing it provides any indication that a
judgment falling within these sections is "void."

1 **5.3 The Judgment is not void because the Court had subject matter jurisdiction and**
2 **personal jurisdiction over the parties at the time of its entry, and the Judgment does**
3 **not differ from that demanded by Golub in his Complaint.**

4 In order for a judgment to be void, there must generally be some jurisdictional defect in the
5 court's authority to enter the judgment, either because the court lacks personal jurisdiction or because it
6 lacks jurisdiction over the subject matter of the suit. *See Cuevas v. Barraza*, 152 Idaho 890, 894 (2012),
7 citing *Puphal v. Puphal*, 105 Idaho 302 (1983).

8 Here, there is no dispute that the Court had personal and subject matter jurisdiction over Kirk-
9 Hughes Development or the underlying claims. Instead, Kirk-Scott challenges the Court's authority to
10 enter the Default Judgment on the basis that it differed from the relief Golub prayed for in his
11 Complaint. A close review of the pleadings and procedural history of this case demonstrate the Court
12 did have authority to enter the Judgment.

13 **5.3.1 The Judgment does not differ from the relief sought in the Complaint.**

14 Kirk-Scott asserts that the Court lacked jurisdiction to enter the Judgment because it differed
15 from that sought in the Complaint. [*See Kirk-Scott Memorandum to Vacate, p. 4*] The facts do not
16 support this assertion.

17 The Judgment entered by the court on March 11, 2009 provided:

18 **This matter, having come before the Court upon Plaintiffs' Motion for Default**
19 **Judgment and I.R.C.P. 54(b) Certificate against Debtor, and supported by the**
20 **Affidavits of Michael T. Howard and Alan Golub, and the pleadings on file, the**
21 **Court does hereby enter Judgment against Debtors as follows:**

- 22 1. **Plaintiffs are granted judgment in the principal amount of**
23 **\$941,000.00;**
24 2. **Plaintiffs are granted pre-judgment interest at a rate of 12%**
25 **beginning March 11, 2005 through entry of this judgment;**
26 3. **Plaintiffs are granted post-judgment interest to be determined by law**
 from entry of this judgment.

1 [See March 11, 2009 Judgment]

2 I.R.C.P. 54(c) states that a judgment by default is limited the relief demanded in the Complaint.
3 See I.R.C.P. 54(c). The Idaho Supreme Court has interpreted this provision in conjunction with I.R.C.P.
4 8(f) to mean that where no answer is filed, the relief granted cannot exceed that actually demanded
5 somewhere in the complaint when considered in its entirety. See, *Johnson v. Hartford*, 99 Idaho 134,
6 138 (1978). The theory of this provision is that the defending party should be able to decide on the basis
7 of the relief requested whether he wants to expend the time, effort, and money necessary to defend the
8 action. See *id.*

9
10 Here, Golub's Complaint, when read in as a whole, fairly apprised Kirk-Hughes Development of
11 the type and amount of damages claimed. The Complaint alleges:

- 12 • Geraldine Kirk-Hughes was the managing member of Kirk-Hughes Development
13 and Polatis was an agent of Kirk-Hughes and Kirk-Hughes Development. [See
14 *Complaint* ¶¶ 3.2, 3.3]
- 15 • Golub and Pacific Realty had a "Listing Agreement" with Petersons for the sale
16 of the Peterson Property, which entitled Golub and Pacific Realty to payment of a
17 commission upon the sale of the Property. [See *Complaint* ¶ 3.5]
- 18 • Golub secured a written sales agreement with Geraldine Kirk-Hughes to buy the
19 Peterson Property. [See *Complaint* ¶ 3.7]
- 20 • Kirk-Hughes did not close on the Peterson Property, which was later sold to
21 Polatis and transferred to Kirk-Hughes Development. [See *Complaint* ¶¶ 3.11,
22 3.16, 3.17, 3.19]
- 23 • As a result of Peterson's sale of the Peterson Property to Polatis and subsequent
24 transfer to Kirk-Hughes Development, Peterson did not pay Golub the \$941,000
25 commission under the Listing Agreement and Golub lost his interest in the
26 Adkinson Property. [See *Complaint* ¶ 3.23]
- Pacific Realty assigned Golub its interests in the action. [See *Complaint* ¶ 3.6]
- Defendants were aware of the Listing Agreement between Petersons and Golub.
[See *Complaint* ¶ 6.2]

- 1 • Defendants intentionally interfered with the contractual relationships and
2 expectations of Golub when they acted to frustrate and circumvent the purpose of
3 the Listing Agreement. [See Complaint ¶ 6.3]
- 4 • As a direct and proximate result of said breaches, Golub has been damaged in an
5 amount to be proven at trial. [See Complaint ¶ 6.4]
- 6 • Wherefore, Plaintiff prays:
 - 7 ○ Judgment be granted in favor of Plaintiffs for all claims against Defendants in an
8 amount to be proven at trial, but more than the jurisdictional limit in excess of
9 \$10,000.00;
 - Plaintiffs recover pre-judgment interest; and
 - For such other relief the Court deems just and equitable.

10 When read as a whole, Golub's Complaint fairly apprised Kirk-Hughes Development that it was
11 seeking from all Defendants as damages the \$941,000 in commissions owed but never paid under the
12 Listing Agreement with Peterson. It also fairly apprised Kirk-Hughes Development that Golub was
13 seeking interest, which is provided by statute at the rate of 12% for pre-judgment interest, and at an
14 indexed rate for post-judgment interest. See I.C. §12-22-104; *Dillon v. Montgomery*, 138 Idaho 614,
15 617, (2003) (I.C. § 28-22-104(2) provides for the award of prejudgment interest at a rate of 12 percent
16 on "[m]oney after the same becomes due." Prejudgment interest may be awarded under this statute
17 where the amount of liability is liquidated or capable of ascertainment by a mathematical calculation.)

18 Moreover, unlike a typical judgment by default, Kirk-Hughes Development appeared, answered,
19 and defended Golub's claims for over a year and a half before an Order of Default was entered. When
20 an Answer is filed the court may grant any relief consistent with the case made by Complaint. See
21 *Schlieff v. Bistline*, 52 Idaho 353 (1932). During that time, Kirk-Hughes Development was apprised
22 more fully of Golub's claims and damages through discovery, to include the following:

23 **INTERROGATORY NO. 1: Please describe in detail all damages you have**
24 **allegedly suffered as a result of Defendants' conduct.**

1 **ANSWER:**

2 Plaintiffs have suffered a loss of the principal amount of the commission due under
3 the Listing Agreement with Peterson, based upon Peterson's Purchase and Sale
4 Agreement with Kirk-Hughes. Plaintiffs have also suffered a loss of the interest due
5 on that commission beginning November 12, 2004. Plaintiffs have also suffered a
6 loss of the value of the Adkinson Property on the date it was transferred Kirk-
7 Hughes. Plaintiffs have and continue to incur costs and attorney fees in pursuit of
8 recovering the above-referenced damages.

9 **REQUEST FOR PRODUCTION NO. 1:** Produce copies of all documents that
10 illustrate or explain your alleged damages.

11 **RESPONSE:**

12 All documents relevant to this request have been previously produced, which
13 include: 1) Net Listing Agreement; and 2) Peterson / Kirk-Hughes Purchase and
14 Sale Agreement. This request will be supplemented as additional, relevant
15 documents are discovered or identified.

16 [See July 2, 2013 Affidavit of Michael T. Howard, Exhibit 1]

17 The Purchase and Sale Agreement produced in discovery provided the sales price of the
18 property.

19 The Net Listing Agreement provided the method of calculating the realtor fees owed.

20 Accordingly, the March 11, 2009 Judgment entered by the Court did not differ from the relief
21 sought in the Complaint or asserted and learned during the subsequent year and a half of litigation
22 between the parties.

23 **5.3.2 The Judgment is not affected by settlement with Peterson.**

24 While not a basis to declare the Judgment void under I.R.C.P. 60(b), Kirk-Scott appears to assert
25 that the Judgment should be offset by amounts recovered from Peterson by way of settlement. [See
26 *Kirk-Scott Memorandum to Vacate, p. 8*] In support of this, Kirk-Scott cites I.C. §6-805, which governs
the effect of the release of one tort-feasor on the liability of others. However, Kirk-Scott's reliance upon
this statute under the facts of this case is misplaced. I.C. §6-805 applies to tort-claims – not contract

1 claims. While Golub asserted tort claims against Kirk-Hughes Development, Golub's claims against
2 Peterson were based upon contract². Therefore, Peterson and Kirk-Hughes Development could never be
3 held jointly and severally liable and I.C. §6-805 is inapplicable to the facts of this case.

4 **5.3.3 The Judgment was supported by affidavits of the amount due and supporting**
5 **documentation.**

6 Kirk-Scott asserts the judgment is void because the affidavits submitted with the Motion for
7 Default were insufficient to establish a liquidated amount of damages. [*See Kirk-Scott Memorandum to*
8 *Vacate, p. 9*]

9 I.R.C.P. 55(b)(1) governs entry of default judgments and provides in relevant part:

10
11 When the plaintiff's claim against a defendant is for a sum certain or for a sum which can
12 by computation be made certain, the court or the clerk thereof, upon request of the
13 plaintiff, and upon the filing of an affidavit of the amount due showing the method
14 of computation, together with any original instrument evidencing the claim unless
15 otherwise permitted by the court, shall enter judgment for that amount and costs against
16 the defendant, if the defendant has been defaulted for failure to appear and if the
17 defendant is not an infant or incompetent person, and has been personally served

18 I.R.C.P 55(b)(1).

19 On February 26, 2009 Golub filed a Motion for Default Judgment, which stated in
20 relevant part:

21 Pursuant to I.R.C.P. 55(b)(1) Plaintiffs move the Court for Default Judgment against
22 Defendants Kelly Polatis ("Polatis"), Geraldine Kirk-Hughes, Peter Sampson, Kirk-
23 Hughes Development, LLC, and Kirk-Hughes & Associates, Inc. (collectively referred to
24 as "Kirk-Hughes"). This motion is supported by the proceeding Memorandum and the
25 February 18, 2009 Affidavit of Michael T. Howard and the June 10, 2008 Affidavit of
26 Alan J. Golub.

[*See February 26, 2009 Motion and Memorandum for Default Judgment*]

The June 10, 2008 Affidavit of Alan Golub provided:

² Golub's claim for tortious interference with contract against Peterson was dismissed; the Court reasoning that one cannot tortiously interfere with his own contract. The remaining claims against Peterson were contract-based.

- 1 • On April 22, 2004 I entered into a listing agreement with Delano Peterson for sale his
2 property, under which he would receive a net amount of \$2 million for the property on
3 the north side of Highway 97 and \$2 million for the property south of Highway 97.
4 Under this agreement, I would receive 100% of any amounts between \$4 and \$4.4
5 million, and 50% of any amounts over \$4.4 million. [See June 10, 2008 Affidavit of Alan
6 Golub, ¶ 3]
- 7 • A true and correct copy of the listing agreement is attached hereto as Exhibit 1. [See June
8 10, 2008 Affidavit of Alan Golub, ¶ 4]
- 9 • On May 8, 2004, I procured a \$6,000,000.00 dollar offer from Geraldine Kirk-Hughes to
10 purchase the property. This offer was accepted by Peterson and the two entered into a
11 purchase and sale agreement. [See June 10, 2008 Affidavit of Alan Golub, ¶ 5]
- 12 • The purchase and sale agreement was later modified to reflect a net sale price of
13 \$5,482,000.00 and ultimately set to close on November 12, 2004. [See June 10, 2008
14 Affidavit of Alan Golub, ¶ 6]
- 15 • Pursuant to the listing agreement, I was entitled to a realtor fee of \$941,000.00 from the
16 sale to Ms. Kirk-Hughes. [See June 10, 2008 Affidavit of Alan Golub, ¶ 8]

17 The February 18, 2009 Affidavit of Michael T. Howard provided proof of the dates of service
18 upon the various Defendants, as well as the address most likely to give Defendants notice of the default.
19 [See February 18, 2009 Affidavit of Michael T. Howard]

20 The basis upon which Kirk-Scott asserts these affidavits are defective is unclear. Mr. Golub's
21 Affidavit provides a copy of the listing agreement with Peterson and references its terms under which
22 the amount of the commission is calculated: "100% of any amounts between \$4 and \$4.4 million, and
23 50% of any amounts over \$4.4 million." He then provides the negotiated sales price, which was
24 originally \$6M, but later reduced to \$5,482,000. Finally, he provides the calculated amount due under
25 the agreement: \$941,000.

26 Accordingly, Kirk-Scott has failed to demonstrate that the Court was without jurisdiction to enter
27 the March 11, 2009 Judgment against Kirk-Hughes Development and its Motion should be denied.

1 **5.4 Kirk-Hughes Development's joinder should be treated as an untimely motion**
2 **for new trial under I.R.C.P. 59.**

3 Kirk-Hughes Development is a party to the Judgment and has joined Kirk-Scott in seeking to
4 vacate the Judgment under I.R.C.P 60(b). Disposition of Kirk-Hughes Development's Motion in this
5 regard becomes somewhat more clear, as there is no dispute that Kirk-Hughes Development has been
6 aware of this Judgment since its entry on March 11, 2009 and has otherwise provided no explanation for
7 the over **four year** delay in making this Motion.

8 Moreover, Kirk-Hughes Development failed to seek a new trial under I.R.C.P. 59 or appeal the
9 Judgment within the time allowed under the rules. Judgment was entered against Kirk-Hughes
10 Development on March 11, 2009. At that time, the Judgment was not final and appealable because it
11 adjudicated the claims of less than all of the parties; the claims against Peterson remained. Kirk-Hughes
12 Development filed Chapter 11 bankruptcy on April 6, 2009, staying any further action by the Court.
13 The claims against Peterson were discussed on August 10, 2009, and the Court entered an Order of Final
14 Judgment and a 54(b) Certificate for all Defendants except Kirk-Hughes Development because it could
15 not violate the bankruptcy stay. However, the moment Kirk-Hughes Development's Chapter 11
16 Bankruptcy was dismissed on October 28, 2010 the automatic stay was lifted and the Judgment against
17 Kirk-Hughes Development became final and appealable, as the claims against all parties had been
18 resolved. *See e.g. M&H Rentals, Inc. v. Sales*, 108 Idaho 567 (Ct. App. 1985) (ruling that under I.R.C.P.
19 54 and I.A.R. 11 order was final and appealable where it disposed of all remaining claims, leaving none
20 pending.)
21
22

23 Following the dismissal of its bankruptcy, Kirk-Hughes Development failed to seek a new trial
24 under I.R.C.P. 59 with the fourteen day period, or appeal the Judgment within the 42 days as required by
25 I.A.R. 14. A party may not use a motion pursuant to I.R.C.P 60(b) as a substitute for a timely appeal.
26

1 See *Dustin v. Beckstrand*, 103 Idaho 780 (1982); *Bubak v. Evans*, 117 Idaho 510 (Ct. App. 1989).

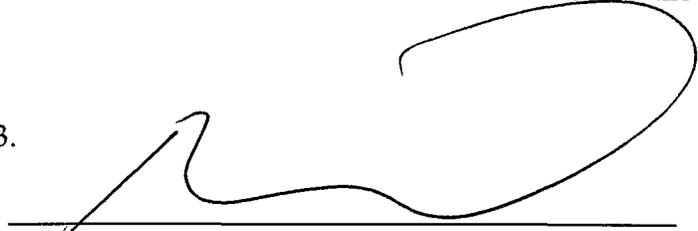
2 Accordingly, Kirk-Hughes Development's Joinder in Kirk-Scott's Motion to Vacate the
3 Judgment under I.R.C.P. 60(b) should be denied.

4 **6. Conclusion**

5 Kirk-Scott's Motion to Vacate the March 11, 2009 Judgment against Kirk-Hughes Development
6 should be denied. Kirk-Scott has failed to bring its Motion within a reasonable time. Kirk-Scott lacks
7 standing to attack the validity of the Judgment under I.R.C.P. 60(b) unless the Judgment is void and has
8 failed to establish that the Court was without jurisdiction to enter the Judgment.
9

10 Kirk-Hughes Development's Joinder in Kirk-Scott's Motion should be denied for the same
11 reasons.

12 DATED this 2 day of July, 2013.

13
14 
15 MICHAEL T. HOWARD, ISB No. 6128
16 WINSTON & CASHATT, LAWYERS, a Professional
17 Service Corporation
18 Attorneys for Plaintiffs
19
20
21
22
23
24
25
26

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
4 via facsimile on July 2, 2013, to:

4 Douglas S. Marfice – HAND DELIVERED
5 Ramsden & Lyons
6 P.O. Box 1336
7 Coeur d'Alene, ID 83816
8 Fax: (208) 664-5884
9 Attorney for Defendant, Tomlinson North Idaho, Inc.

8 Michael S. Bissell
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13 Fax: (509) 455-7111
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2013 JUL -2 PM 4:21

CLERK/DISTRICT COURT
[Signature]
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10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC, a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD, a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation,

22 Defendants.

Case No. CV13-866

GOLUB'S REPLY RE: MOTION FOR
SUMMARY JUDGMENT DECLARING
INTERESTS AND PRIORITY

23 Golub submits this Memorandum in Reply to the Responses of Defendants Kirk-Scott, Ltd. and
24 Kirk-Hughes Development, LLC regarding Golub's Motion for Summary Judgment Declaring Interest
25 and Priority in Property. This Reply is supported by the July 2, 2013 Affidavit of Michael T. Howard.

26 **1. Summary of Argument**

1.1 Kirk-Scott has failed to submit any evidence to contradict Golub's testimony or otherwise
show that Golub had knowledge of Kirk-Scott's Deed of Trust at the time he recorded his

1 Judgment on October 28, 2010. The affidavits submitted by Defendants do no more than
2 evidence *intent* to convey an interest, which is insufficient to impute knowledge to
3 Golub as a matter of law.

4 **1.2** I.C. §55-606 does not require Golub to provide any additional consideration, beyond the
5 underlying obligation giving rise to the Judgment, to avail himself to it's protections as a
6 valid judgment lien holder.

7
8 **1.3** Golub's judgment lien is valid because when the automatic stay was lifted on Kirk-
9 Hughes Development's bankruptcy on October 28, 2010 all claims had been resolved
10 against all parties and the Judgment became final and appealable by operation of law
11 without the need for a Rule 54(b) certificate.

12 **1.4** Kirk-Scott's Deed of Trust was not properly acknowledged or certified under Idaho or
13 Nevada Law. Therefore, because it was not *entitled* to be recorded under I.C. §55-805,
14 the Deed of Trust did not provide constructive notice of its existence or contents
15 notwithstanding its actual recordation by the Kootenai County Recorder.

16
17 **1.5** Kirk-Scott's position on standing is irrelevant in this case because Golub does not seek
18 redress from the bankruptcy court for Kirk-Scott's bankruptcy stay violation. Neither
19 Golub nor Kirk-Hughes Development needs to challenge Kirk-Scott's post-petition
20 recordation because it is void a matter of Federal Law.

21
22 **2. Argument**

23 **2.1 Kirk-Scott has failed to present evidence to contradict Golub's testimony or**
24 **create an issue of fact regarding Golub's knowledge of Kirk-Scott's Deed of**
25 **Trust.**

26 Kirk-Scott asserts that regardless of any recording deficiencies, Golub's judgment lien is inferior
to its Deed of Trust because Golub had knowledge of the encumbrance at the time he recorded his

1 Judgment and therefore did not take in "good-faith" under I.C. §55-606. However, Kirk-Scott has failed
2 to present any evidence to contradict Golub's testimony or create an issue of fact regarding whether
3 Golub held such knowledge.

4 On a motion for summary judgment, the burden of proving the absence of material facts is upon
5 the moving party. Once the moving party establishes the absence of a genuine issue of material fact, the
6 burden shifts to the non-moving party to show that a genuine issue of material fact does exist. A non-
7 moving party must come forward with evidence by way of affidavit or otherwise which contradicts the
8 evidence submitted by the moving party, and which establishes the existence of a material issue of
9 disputed fact. *See Kiebert v. Goss*, 144 Idaho 225, 228 (2007).

10 Here, Golub provided the following testimony regarding his knowledge of Kirk-Scott's Deed of
11 Trust:

- 12
- 13 12. I was not aware of the transfer of the Sloan properties from Kirk-Scott to Kirk-
14 Hughes Development on November 18, 2004.
- 15 13. I was not aware of the transfer of the Atkinson property from Kirk-Hughes
16 Associates to Kirk-Hughes Development on May 12, 2005.
- 17 14. I was not aware that Kirk-Scott had executed a Deed of Trust to Kirk-Hughes
18 Development prior to Kirk-Scott recording one during Kirk-Hughes
19 Development's bankruptcy on September 17, 2010.

20 [May 3, 2013 Affidavit of Alan Golub ¶¶ 12, 14]¹

21 Q. All right. Prior to 2013 when you were first handed a physical copy of the
22 November 18, 2004 Kirk-Scott deed of trust, did you have any idea that Kirk-
23 Scott claimed an interest in the properties?

24 A. I did not know of any claim of interest in the properties or this deed of trust. No, I
25 did not.

26 [June 12, 2013 Deposition of Alan Golub p. 99, Affidavit of Richard Campbell]

¹ Kirk-Scott takes issue with the apparent scrivener's error in paragraph 14 of Alan Golub's May 3, 2013 Affidavit. However, the intent of Mr. Golub's testimony should be clear, that he was unaware that Kirk-Hughes Development had executed a Deed of Trust to Kirk-Scott, without the need for a Preacipe.

1 In response to Golub's motion, Kirk-Scott and Kirk-Hughes Development submitted the
2 affidavits of Balinda Antoine, Geraldine Kirk-Hughes, and Darlene Moore for the purpose of attempting
3 to create an issue of fact by contradicting Golub's testimony that he had no knowledge of Kirk-Scott's
4 claimed Deed of Trust at the time he recorded his Judgment. However, a careful reading of the
5 proffered testimony reveals that Golub's testimony remains uncontroverted.
6

7 More specifically, the affidavits submitted to contradict Golub's testimony only provide
8 evidence that Golub had knowledge of a *desire or intent* to encumber the property; they provide no
9 evidence that he had knowledge that such an encumbrance *actually* attached to any of the subject
10 properties.²

11 As between a mortgagee and another claimant, one who has actual notice of the other's
12 prior claim or lien generally takes subject to it, even though the prior claim or lien is
13 unrecorded.

14 As between a mortgagee and another claimant and subject to exceptions with respect to
15 the necessity of recording under some statutes, one who has actual notice of the other's
16 prior claim or lien will take subject to it even though the prior claim or lien is unrecorded.

17 In order to have this effect, the notice or knowledge must be acquired prior to the
18 attaching of the rights of the party to be affected by it. Actual notice of a mortgage is
19 express, direct information. Notice does not mean a formal written warning served on a
20 party. Instead, it means actual knowledge of the fact in question, regardless of how it
21 was acquired. However, **it must be knowledge of the actual existence of the prior
22 conveyance or encumbrance and not merely information of a purpose or agreement
23 on the part of the grantor to make or give it.**

24 59 C.J.S. Mortgages § 298 (emphasis added)

25 Construing the priority of interests under I.C. §55-612, the Idaho Supreme Court has similarly
26 held that knowledge of an intent to create or acquire an interest in property is not a legally recognizable
interest that would constitute an adverse claim for purposes of defeating the status as a bona fide

² While Golub disputes much of what is set forth in the submitted affidavits, for the limited purpose of this Motion, Golub stipulates to the truth of the averments made therein without waiving his ability to contest or disavow the averments in any future motion or proceeding.

1 purchaser. In *Sun Valley Hot Springs v. Kelsey*, 131 Idaho 657, 661 (1998), the Court explained this
2 concept as follows:

3 In discussing whether a party had actual or constructive notice in regards to determining
4 its bona fide purchaser status, this Court in *Bear Island Water Ass'n, Inc. v. Brown*, 125
5 Idaho 717, 874 P.2d 528 (1994), concluded that a party's prior notice of another party's
6 use of a well did not create a real property right in the party using the well. A purchaser's
7 prior notice of another party's use of property does not create any real property right in
8 the using party that would serve as an adverse claim that could defeat the purchaser's
9 status as a bona fide purchaser. *Id.* at 725-26, 874 P.2d at 536-37. Where notice of
10 another party's "use" of property does not create a property right in the using party, it
11 follows that notice of another party's "intent" to use property in the future would not
12 create a property right in that party.

13 *Sun Valley Hot Springs*, 131 Idaho at 661.

14 In a recent decision addressing the same issue presented here, the Court in *Insight, LLC v.*
15 *Gunter*, 2013 WL 1730149 (Idaho 2013), rejected evidence similar to that proffered by Defendants,
16 holding:

17 It is not technically possible for IM to have notice of an encumbrance on property before
18 that encumbrance actually comes into existence. Though IM knew that Summitt was
19 intending to execute a deed of trust, that was notice of an intent to subsequently
20 encumber property, not notice of an actual encumbrance on property. Therefore, the
21 district court's finding that IM had notice of the Gunters' deed of trust is clearly
22 erroneous.

23 *Insight*, 2013 WL 1730149 at 3.

24 Here, Defendants have not provided any evidence to contradict Golub's testimony that he had no
25 knowledge of Kirk-Scott's encumbrance prior to recording his Judgment in October 2010. The
26 following provides the sum total of evidence submitted by Defendants on this issue:

Affidavit of Balinda Antoine

[During a presentation in Coeur d' Alene in 2004] I wanted to make it clear to Mr. Golub
that Kirk-Scott Ltd. wanted first position title to the property. For if the project went bad I
wanted to at least be able to recover the property and didn't want my loan secured by a
piece of property that had other liens associated with it. I wanted to make clear, and made

1 clear, that Kirk-Scott wasn't going to loan \$1,350,000 without getting a deed to the
2 property.

3 Kirk-Scott, Ltd. protected its \$1,350,000 loan with a deed of trust. Again, Mr. Golub was
4 aware that Kirk-Scott, Ltd. **would** be using such a deed to secure its interest in the
5 property **because I told him that in the presentation he gave at the Coeur d' Alene
6 Resort.**

7 [Affidavit of Balinda Antoine, ¶¶ 5, 8] (emphasis added)

8 Ms. Antoine's Affidavit does nothing more than demonstrate her intent to gain some future
9 security for the properties being purchased. Her statements to Golub in this regard pre-dated the
10 purported Deed of Trust by many months.

11 **Affidavit of Geraldine Kirk-Hughes**

12 In September 2004 ... I told Mr. Golub that I was forming a separate entity to develop the
13 land, and that title to all the properties **would** be transferred to the new company. I
14 **specifically told Mr. Golub that I was giving my sister a mortgage or deed of trust to**
15 **secure Kirk-Scott, Ltd.'s interest.**

16 [Affidavit of Geraldine Kirk-Hughes ¶ 12] (emphasis added)

17 In November of 2004, your affiant requested Darlene Moore to prepare a Note and Deed
18 of Trust in favor of Kirk-Scott, Ltd. to cover the monies spent by Balinda Antoine to
19 acquire the Sloan parcel. Your affiant specifically informed Alan of this

20 [Affidavit of Geradine Kirk-Hughes ¶ 22]

21 After Ms. Moore prepared the Note and Deed, your Affiant signed the same. ...

22 [Affidavit of Geradine Kirk-Hughes ¶ 23]

23 Ms. Kirk-Hughes' Affidavit demonstrates her September 2004 intent to give **Balinda Antoine**
24 (as opposed to Kirk-Scott, Ltd.) a future mortgage **or** deed of trust. It then states that Golub was
25 informed of **a request to prepare** a Deed of Trust to Kirk-Scott in November 2004. Finally, it
26 evidences that **after** the document was prepared, it was executed by Ms. Kirk-Hughes.

27 Importantly, Ms. Kirk-Hughes' Affidavit does not provide the evidence necessary to contradict
28 Golub's testimony; that Golub had knowledge that a Deed of Trust encumbering the properties at issue
29 here had been executed in favor of Kirk-Scott. Like that of Ms. Antoine, Ms. Kirk-Hughes' Affidavit

1 goes no further than to provide evidence that Golub was informed of an intent to provide Kirk-Scott
2 with a Deed of Trust interest in the property at some point in the future; not that he had knowledge that
3 one had in fact been created. See e.g. *Insight*, 2013 WL 1730149 at 3. (It is not technically possible to
4 have notice of an encumbrance on property before that encumbrance actually comes into existence.)
5

6 **Affidavit of Darlene Moore**

7 In November of 2004 ... I advised Alan that it was my belief that Ms. Kirk-Hughes was
8 still interested in the property and still interested in pursuing the development because
9 she had just recently created a corporation called Kirk-Hughes Development and had
10 **asked me to prepare a Note and Deed of Trust in favor of her sister, Balinda**
11 **Antoine**, to exchange for the title to the Sloan property that had been purchased in Kirk-
12 Scott, Ltd. name. Alan had proposed that Ms. Kirk-Hughes use the Sloan parcel to
13 acquire financing to assist Ms. Kirk-Hughes in purchasing the Peterson property. I told
14 them this was not possible as **I had already prepared the mortgage in favor of**
15 **Balinda**.

16 [*Affidavit of Darlene Moore* ¶ 15] (emphasis added)

17 In 2006 ... 3) I reminded Alan that Balinda Antoine had a mortgage on the Sloan parcel
18 so there would be no asset to collect against.

19 [*Affidavit of Darlene Moore* ¶ 17]

20 Like that of Ms. Kirk-Hughes', Ms. Moore's Affidavit only purports to establish that she
21 informed Golub that she prepared some instrument, but provides no testimony that Golub had
22 knowledge that an instrument encumbering the property was actually executed. Moreover, Moore's
23 Affidavit is unclear as to whether she informed Golub that she prepared a Deed of Trust or a mortgage.³
24 Clearly, if she informed Golub that she had prepared a mortgage, it cannot be said that he had
25 knowledge of a Deed of Trust.
26

³ Deeds of Trust differ from Mortgages in that deeds of trust always involve at least three parties, where the third party holds the legal title, while in the context of mortgages, the mortgagor gives legal title directly to the mortgagee.

1 What is clear from Ms. Moore's Affidavit is that whatever encumbrance was intended, she
2 informed Golub that it related solely to the Sloan property⁴ and was in favor of Balinda Antoine; **not**
3 Kirk-Scott, Ltd.⁵

4 Here, Golub has provided undisputed evidence that he had no knowledge of Kirk-Scott's
5 purported encumbrance on the properties at issue here. The Affidavits of Antoine, Kirk-Hughes, and
6 Moore do not contradict that evidence or otherwise create an issue of fact because they do not show that
7 Golub was in any manner aware of the Deed of Trust after it came into existence on November 18,
8 2004.

9
10 In a summary judgment proceeding, the record is to be viewed favorably to the non-moving
11 party either as to the evidentiary facts or as to inferences drawn from those facts. However, a non-
12 moving party is not invariably entitled to the drawing of favorable inferences. Where no jury trial has
13 been requested and the judge ultimately would be the trier of fact, the judge may draw those inferences
14 which he deems to be best supported by the uncontroverted facts. *See Riverside Development Co. v.*
15 *Ritchie*, 103 Idaho 515, (1982). However, when a judge exercises the *Ritchie* power, by electing among
16 permissible inferences or by choosing not to draw inferences he finds to be improbable, the judge should
17 make specific findings. *See Lind v. Perkins*, 107 Idaho 901, 903 (Ct. App. 1984).

18
19 Where, as here, Defendants have failed to produce any admissible evidence controverting
20 Golub's testimony, a summary ruling that Golub had no prior knowledge of Kirk-Scott's Deed of Trust
21 is appropriate.
22

23
24 ⁴ Exhibit A to the November 18, 2004 Deed of Trust identifies only two of the three Sloan parcels, and
25 includes the Atkinson parcel.

26 ⁵ Ms. Moore's Affidavit provides no foundation to establish she has personal knowledge of a mortgage
executed in favor of Balinda Antoine.

1 **2.2 Golub's judgment lien need not be supported by additional consideration**
2 **beyond the underlying obligation.**

3 Kirk-Scott asserts that Golub's judgment lien is inferior to Kirk-Scott's Deed of Trust under I.C.
4 §55-606 because it lacks valuable consideration. [See *Kirk-Scott Response Brief*, p. 7]

5 Idaho Code section 55-606 governs the treatment of a judgment lien in determining priority of
6 interests in real property and provides:

7 Every grant or conveyance of an estate in real property is conclusive against the grantor,
8 also against every one subsequently claiming under him, except a purchaser or
9 encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien
by an instrument or valid judgment lien that is first duly recorded.

10 I.C. §55-606.

11 Kirk-Scott's position rests upon an interpretation of I.C. § 55-606 that conditions the priority of a
12 judgment lien upon the giving of valuable consideration. Courts interpreting a statute are to give effect
13 to legislative intent. See *Robison v. Bateman-Hall*, 139 Idaho 207, 210 (2003). The interpretation of a
14 statute must begin with the literal words of the statute. *State v. Yzaguirre*, 144 Idaho 471, 475 (2007).
15 The plain meaning of a statute therefore will prevail unless clearly expressed legislative intent is
16 contrary or unless plain meaning leads to absurd results. *Id.* If the language of the statute is capable of
17 more than one reasonable construction it is ambiguous. An ambiguous statute must be construed to
18 mean what the legislature intended it to mean. *Id.* To ascertain legislative intent, the Court examines
19 not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy
20 behind the statute, and its legislative history. *Id.*

21 By its plain terms, I.C. § 55-606 does not condition the priority of a judgment lien upon the
22 giving of additional consideration. When read as a whole, the statute provides protection to one of two
23 classes of interest holders: 1) a purchaser or encumbrancer, who in good faith, and for a valuable
24 consideration, acquires a title or lien by an instrument; or 2) a valid judgment lien. Moreover, use of the
25
26

1 word "lien" more than once would be redundant and superfluous if the statute were not intended to
2 distinguish a valid judgment lien from a lien by any another instrument taken in good faith for
3 consideration.

4 A review of the legislative history behind the 1989 amendment to the statute supports this
5 reading. Prior to 1989, the statute did not include reference to judgment liens. In 1989, the legislature
6 amended the statute by including the single phrase "or valid judgment lien." [See July 2, 2013 Affidavit
7 of Michael T. Howard] The stated purpose of the amendment provides:

8 This legislation would provide that a valid judgment lien that is first duly recorded has
9 priority over subsequently recorded grants or conveyances of an estate in real property.

10 [See July 2, 2013 Affidavit of Michael T. Howard]

11 The minutes of the Judiciary and Rules Committee further provide:

12 Senator Crapo presented this legislation and stated that it clarifies the effect of a valid
13 judgment lien regarding a grant or conveyance of an estate in real property. The Supreme
14 Court has recently allowed a judgment to be eliminated if the property is sold before
15 collection can be made.

16 [See July 2, 2013 Affidavit of Michael T. Howard]

17 Finally, if the Court were to interpret I.C. § 55-606 as Kirk-Scott suggests (a judgment is not
18 valid consideration because it is a pre-existing obligation), it would render the Legislature's inclusion of
19 a judgment lien in the 1989 amendment meaningless.

20 Kirk-Scott relies upon *Mountain Home Lumber Co., Ltd. v. Swartout*, 30 Idaho 559 (1917) for
21 the proposition that a judgment is not valuable consideration for the purposes of determining a bona fide
22 purchaser. Notwithstanding the fact that *Mountain Home* was decided on creditor / debtor principles in
23 1917, a time well before the legislature enacted I.C. §55-606 and amended it to specifically include
24 judgment liens in 1989, Kirk-Scott misreads the facts and opinion in *Mountain Home* and its reliance is
25 therefore misplaced.
26

1 The court in *Mountain Home* was tasked with determining the priority of various interests in real
2 property. There, one Mr. Garrett had executed a warranty deed in property to one Mr. Swartwout.
3 Mountain Home Lumber was a creditor of Garrett's and obtained a money judgment against him, which
4 became a lien on real property in his name. Unbeknownst to Swartwout, Mountain Home foreclosed
5 upon its judgment lien by sheriff's sale. At the sale, Mountain Home bid the amount of the judgment it
6 was owed and received a Sheriff's Deed to the property. In holding that Swartwout's warranty deed had
7 priority over Mountain Home's Sheriff's Deed, the court noted that Mountain Home's creditor's bid was
8 not a valuable consideration (for the Sheriff's Deed), as it was simply cancellation of a pre-existing
9 indebtedness. See *Mountain Home*, 30 Idaho at 561. Contrary to Kirk-Scott's reading, the *Mountain*
10 *Home* court did not address the validity or priority of Mountain Home's judgment lien and provides no
11 authority for Kirk-Scott's position.
12

13
14 Accordingly, neither the text of I.C. § 55-606 nor the courts interpreting it require that any
15 additional consideration, beyond the underlying obligation giving rise to the judgment, is necessary for
16 the holder of a valid judgment lien to avail himself to the protections of I.C. § 55-606.

17 **2.3 Golub's judgment lien is valid.**

18 Kirk-Scott asserts that Golub's judgment lien is invalid because an I.R.C.P. 54(b) certificate was
19 not recorded with the judgment. [See *Kirk-Scott Response Brief*, p. 7] However, at the time Golub
20 recorded the judgment on October 28, 2010 Golub did not require a 54(b) Certificate because the court
21 had already entered judgment against all parties on all issues.
22

23 An order or judgment is final if it disposes of all remaining claims, leaving none pending. See
24 *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 519 (1978); *M&H Rentals, Inc. v. Sales*,
25 108 Idaho 567, 569 (Ct. App. 1985). A certificate of final judgment is only required where the court
26 seeks to direct entry of final judgment upon one or more, but less than all of the claim or parties. See

1 I.R.C.P. 54(b). Rule 54(b) is designed to prevent piecemeal appellate litigation. By its own terms, it is
2 inapplicable to a judgment that leaves no claims undecided. *See M&H*, 108 Idaho at 569.

3 Here, the Court entered a Default Judgment against all Defendants except Peterson on March 11,
4 2009. [See *May 3, 2013 Affidavit of Michael T. Howard, Ex. 8*] At that time, all claims against KH
5 Development were resolved but were not final for purposes of appeal because the claims against
6 Peterson remained unresolved. *See* I.R.C.P. 54(b); I.A.R. 11. Kirk-Hughes Development filed a Notice
7 of Bankruptcy on April 6, 2009, which prevented any further proceedings against it. [See *May 3, 2013*
8 *Affidavit of Michael T. Howard, Ex. 9*] On August 10, 2009 the Court entered an Order, dismissing the
9 remaining claims against Peterson. [See *May 3, 2013 Affidavit of Michael T. Howard, Ex. 11*]
10 However, because the Judgment against Kirk-Hughes Development remained in bankruptcy stasis, it
11 lacked finality for appeal purposes and the Court entered a Rule 54(b) Certificate with regard to the
12 remaining Defendants. [See *May 3, 2013 Affidavit of Michael T. Howard, Ex. 11*] When the Order of
13 Dismissal was entered in Kirk-Hughes Development's bankruptcy on October 28, 2010, the automatic
14 stay was lifted and the Default Judgment against Kirk-Hughes Development became final automatically
15 without the need for a 54(b) Certificate. Golub recorded the Judgment abstract later that day. [See *May*
16 *3, 2013 Affidavit of Michael T. Howard, Ex. 8*] Accordingly, Golub's October 28, 2010 Judgment lien is
17 valid.
18
19

20
21 **2.4 Kirk-Scott's September 17, 2010 recording is invalid because the Deed of**
22 **Trust was not properly acknowledged or certified under Idaho or Nevada**
23 **Law.**

24 Golub has asserted that Kirk-Scott's September 17, 2010 recording was invalid because the Deed
25 of Trust was not properly acknowledged and certified under Idaho law. [See *Golub Memorandum in*
26 *Support of S.J., § 5.4.2*] In its Response, Kirk-Scott appears to acquiesce to the impropriety of the
acknowledgment under Idaho law, instead asserting that the Deed of Trust was properly acknowledged

1 and certified under Nevada law. [See *Kirk-Scott Response Brief*, p. 10] Unfortunately, Kirk-Scott's
2 reliance upon Nevada's law governing acknowledgments does not advance its argument because it is not
3 materially different than Idaho's.

4 Idaho Code section 55-811 governs the effect of recording a transfer in real property:

5 Every conveyance of real property *acknowledged* or proved, *and certified, and recorded*
6 as prescribed by law, from the time it is filed with the recorder for record, is constructive
7 notice of the contents thereof to subsequent purchasers and mortgag(e)es. ...

8 I.C. § 55-811 (emphasis added). Idaho Code section 55-805 requires an instrument to be acknowledged
9 in order to record it:

10 Before an instrument may be recorded, unless it is otherwise expressly provided, its
11 execution must be acknowledged by the person executing it ... or if executed by a limited
12 liability company, by the manager, member or other person executing the same on behalf
13 of the limited liability company ... ; **provided, that if such instrument shall have been**
14 **executed and acknowledged in any other state or territory of the United States, or in**
15 **any foreign country, according to the laws of the state ... the same shall be entitled to**
16 **record, and a certificate of acknowledgement indorsed upon or attached to any such**
17 **instrument ... shall be prima facie sufficient to entitle the same to such record.**

18 I.C. §55-805. (emphasis added)

19 Kirk-Scott sets out only *a portion* of Nevada's law governing execution and acknowledgment of
20 instruments. [See *Kirk-Scott Response Brief*, p. 10] Like Idaho, Nevada law requires a certificate of
21 acknowledgment; something more than the bare notary signature at issue here:

22 Every conveyance in writing whereby any real property is conveyed or may be affected
23 **must be acknowledged or proved and certified in the manner provided in this**
24 **chapter and NRS 240.161 to 240.169, inclusive.**

25 NRS 111.240. (emphasis added)

26 3. A certificate of a notarial act is sufficient if it meets the requirements of
subsections 1 and 2 **and it:**

(a) **Is in the short form set forth in NRS 240.166 to 240.169 inclusive;**

NRS 240.1655(3). (emphasis added)

1 violation. Neither Golub nor KH Development needs to challenge Kirk-Scott's post-petition recordation
2 because it is void a matter of federal law.

3 This topic is more fully addressed in *Golub's Response to Kirk-Scott's Motion to Dismiss*. In
4 short, Kirk-Scott's position on standing is only relevant if its violation of the bankruptcy stay is
5 *voidable*. In such a circumstance, Golub would need to establish his standing in the bankruptcy
6 proceeding to challenge the violation. Indeed, the authority relied upon by Kirk-Scott involves issues of
7 standing in federal bankruptcy court, not state court. *See, e.g. In re Brooks*, 79 B.R. 479 (Bankr. 9th Cir.
8 1987); *In re Stivers*, 31 B.R. 735 (Bankr. N.D. Cal. 1983); *In re Fuel Oil Supply and Terminaling, Inc.*,
9 30 B.R. 360 (N.D. Tex. 1983).

10
11 However, federal law is clear that the recordation of a Deed of Trust or other instrument
12 attempting to perfect an interest in real property during the stay is *void*. *See In re Schwartz*, 954 F.2d
13 569 (9th Cir. 1992); *In re Ellis*, 441 B.R. 656, 662 (Bankr. D. Idaho 2010) ("If a creditor attempts to
14 create an unauthorized post-petition lien on property of the estate, that transfer is void as a violation of
15 the automatic stay."); *In re Hegel*, 99-21108, 2000 WL 33712298 (Bankr. D. Idaho Apr. 11, 2000) (the
16 offending party need not have knowledge of the stay, since it is the violation of the stay, and not the
17 mens rea, which controls); *In In re Franck*, 171 B.R. 893, 895 (Bankr. D. Idaho 1994).

18
19 Being void, the act is ineffective as a matter of federal law and the issue of Golub's standing is
20 moot. Beyond its bare assertions, Kirk-Scott cites no authority for the apparent proposition that an act
21 declared void under federal bankruptcy law can nonetheless be valid and enforceable in a related state
22 court proceeding.

23 24 **3. Conclusion**

25 Golub's Motion for Summary Judgment declaring his interest valid and superior to all others
26 should be granted.

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
4 via facsimile on July 2, 2013, to:

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20 Spokane, WA 99201
21 Attorney for Defendant, Kirk-Scott, Ltd.

21 MICHAEL T. HOWARD

22 427010

2013 JUL -3 AM 10: 02

CLERK DISTRICT COURT

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ISB No. 5762

Attorneys for Defendant Kirk-Hughes
Development, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN	)	Case No. CV 2013-866
GOLUB, husband and wife,)	
	)	NOTICE OF JOINDER BY
Plaintiffs,	)	DEFENDANTS KIRK-HUGHES &
	)	ASSOCIATES, INC., GERALDINE
vs.	)	KIRK-HUGHES, AND PETER
	)	SAMPSON IN DEFENDANT
KIRK-HUGHES DEVELOPMENT,	)	KIRK-SCOTT, LTD.'S MOTION
LLC, a Delaware limited liability	)	TO VACATE AND BRIEF IN
company; KIRK-SCOTT, LTD., a Texas	)	SUPPORT THEREOF, AND
corporation; INTERNAL REVENUE	)	KIRK-HUGHES
SERVICE; TOMLINSON NORTH	)	DEVELOPMENT, LLC'S
IDAHO, INC., an Idaho corporation,	)	MEMORANDUM IN SUPPORT
	)	OF THE SAME
Defendants.)	

ALAN GOLUB and MARILYN	)	Case No.: CV 07-8038
GOLUB, husband and wife,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
GERALDINE KIRK-HUGHES and)	
PETER SAMPSON, husband and wife;)	
KIRK-HUGHES DEVELOPMENT,)	

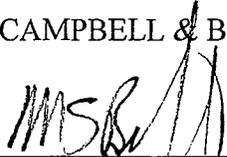
NOTICE OF JOINDER BY DEFENDANTS KIRK-HUGHES & ASSOCIATES, INC.,
GERALDINE KIRK-HUGHES, AND PETER SAMPSON IN DEFENDANT KIRK-
SCOTT, LTD.'S MOTION TO VACATE AND BRIEF IN SUPPORT THEREOF, AND
KIRK-HUGHES DEVELOPMENT, LLC'S MEMORANDUM IN SUPPORT OF THE
SAME.

LLC, a Delaware limited liability)
 company; KIRK-HUGHES &)
 ASSOCIATES, INC., a Nevada)
 corporation; KELLY POLATIS, an)
 individual, and DELANO D. and)
 LENORE J. PETERSON, husband and)
 wife,)
)
 Defendants.)

Defendants Kirk-Hughes & Associates, Inc., and Geraldine Kirk-Hughes and Peter Sampson, husband and wife, by and through their attorney Michael S. Bissell, hereby joins in: 1) Defendant Kirk-Scott, Ltd.'s Motion to Vacate Default Judgment and Brief in Support thereof; and 2) Defendant Kirk-Hughes Development, LLC's Memorandum in Support of Kirk-Scott, Ltd.'s Motion to Vacate Default Judgment (both contemporaneously filed June 25, 2013).

DATED this 2nd day of July, 2013.

CAMPBELL & BISSELL, PLLC



 MICHAEL S. BISSELL
 Attorneys for Defendant Kirk-Hughes
 Development, LLC

z:\1723\drafts\joinder.mtn.vacate.20130701.docx

NOTICE OF JOINDER BY DEFENDANTS KIRK-HUGHES & ASSOCIATES, INC.,
 GERALDINE KIRK-HUGHES, AND PETER SAMPSON IN DEFENDANT KIRK-
 SCOTT, LTD.'S MOTION TO VACATE AND BRIEF IN SUPPORT THEREOF, AND
 KIRK-HUGHES DEVELOPMENT, LLC'S MEMORANDUM IN SUPPORT OF THE

CERTIFICATE OF SERVICE

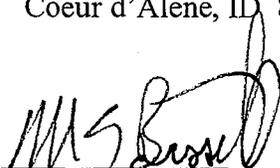
I HEREBY CERTIFY that on the 21 day of July, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 FACSIMILE
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Winston & Cashatt, P.S.
601 W. Riverside #1900
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MICHAEL S. BISSELL

NOTICE OF JOINDER BY DEFENDANTS KIRK-HUGHES & ASSOCIATES, INC.,
GERALDINE KIRK-HUGHES, AND PETER SAMPSON IN DEFENDANT KIRK-
SCOTT, LTD.'S MOTION TO VACATE AND BRIEF IN SUPPORT THEREOF, AND
KIRK-HUGHES DEVELOPMENT, LLC'S MEMORANDUM IN SUPPORT OF THE

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2013 JUL -9 PM 2:30

CLERK DISTRICT COURT

Lisa Dixon
DEPUTY

pd

1 MICHAEL T. HOWARD, ISB No. 6128
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9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,
14
15 Plaintiffs,

16 vs.

17 KIRK-HUGHES DEVELOPMENT, LLC, a
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD, a Texas corporation;
20 INTERNAL REVENUE SERVICE;
21 TOMLINSON NORTH IDAHO, INC., an
22 Idaho corporation,

23 Defendants.

CV 07-8038

Case No. ~~CV13-866~~

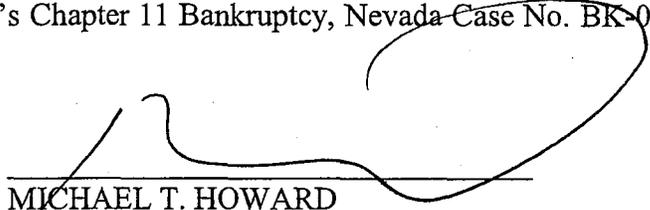
AFFIDAVIT OF MICHAEL T. HOWARD

24 STATE OF IDAHO)
25 : ss.
26 County of Kootenai)

I, MICHAEL T. HOWARD, being first duly sworn on oath, say:

1. That I am the attorney for Plaintiffs, and have knowledge of the facts and circumstances
in this case.

1 2. That attached hereto as Exhibit 1 is a true and correct copy of *Declaration of Geraldine*
2 *Kirk-Hughes in Support of Debtor's Response to Golubs' Motion to Dismiss Complaint* dated October
3 13, 2010, filed in Kirk-Hughes Development, LLC's Chapter 11 Bankruptcy, Nevada Case No. BK-09-
4 15153-MKN.

5
6 
MICHAEL T. HOWARD

7
8 SUBSCRIBED AND SWORN to before me this 9th day of July, 2013.



Wanda OGG
Notary Public in and for the State of
Idaho, residing at Spokane Valley, WA
My appointment expires: April 4, 2017

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
4 via facsimile on July 9, 2013, to:

4 Douglas S. Marfice
5 Ramsden & Lyons
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7 Coeur d'Alene, ID 83816
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17 Attorney for Defendant, Kirk-Scott, Ltd.

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18 421 W. Riverside Ave., Suite 1005
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20 Attorney for Defendant, Kirk-Scott, Ltd.

21
22 MICHAEL T. HOWARD

23 429305
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E-FILED October 13, 2010

1 Geraldine Kirk-Hughes
2 Nevada Bar No: 3444
3 Managing Member, KDH, LLC
4 2551 South Ft. Apache Rd, #103
5 Las Vegas, Nevada 89117
6 Phone: (702) 233-8683
7 Facsimile: (702) 233-8661
8 E-Mail: gkhughes@kirkhugheslaw.com

9 For Debtor,
10 KIRK-HUGHES DEVELOPMENT, LLC

11 UNITED STATES BANKRUPTCY COURT
12 DISTRICT OF NEVADA

13 In re
14 KIRK-HUGHES DEVELOPMENT, LLC,
15 Debtor.

16 Case No: BK-09-15153-MKN
17 Chapter 11

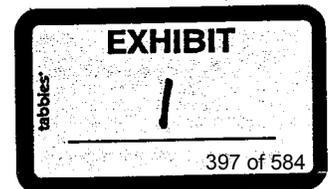
18 DECLARATION OF GERALDINE KIRK-HUGHES IN SUPPORT OF
19 DEBTOR'S RESPONSE TO GOLUBS' MOTION TO DISMISS COMPLAINT

20 Date of Hearing: October 20, 2010
21 Time of Hearing: 9:30 A. M.

22 STATE OF NEVADA)
23) SS:
24 COUNTY OF CLARK)

25 I, Geraldine Kirk-Hughes, under penalty of perjury and pursuant to NRS
26 15.010, and NRS 53.045 declare the following:

27 ///



1 1. That your Declarant is over the age of eighteen years and if called upon
2 to testify as a witness could and would testify as to those matters attested to herein
3 from my own personal knowledge, except for those matters attested to herein upon
4 information and belief; and as to those matters, I believe them to be true.
5

6 2. That your Declarant is the managing member of Kirk-Hughes
7 Development, LLC, a Delaware Corporation. This company was created in 2004 and
8 filed for Bankruptcy protection on or about April 6, 2009.
9

10 3. That following the Court's granting of Creditors Delano and Lenore
11 Peterson's Motion to Lift Stay in order for the Petersons to proceed with the
12 foreclosure on the property that is the subject of this Bankruptcy and said property
13 having been subsequently foreclosed upon, there is currently no need for the
14 Bankruptcy.
15

16 4. That your Declarant has read the Motion of Alan and Marilyn Golub
17 asking the Court to dismiss the above-captioned Bankruptcy Petition. Since the land
18 in question has been foreclosed upon, your Declarant has no objection to the
19 dismissal.
20

21 5. That as the Managing Member for KHD, your Declarant has discussed
22 the matter of this Bankruptcy with KHD's other shareholders. The Debtor believes
23 there is no current reason for the Bankruptcy since the property has been foreclosed
24 upon.
25

26 6. That the Debtor is prepared to proceed with litigation in the State Court
27
28

///

///

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with regard to the Golubs.

7. Further your Declarant sayeth naught.

DATED this 13th day of October 2010.

/s/ Geraldine Kirk-Hughes

GERALDINE KIRK-HUGHES
MANAGING MEMBER OF
KIRK-HUGHES DEVELOPMENT, Cda, LLC

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: #57dub

2013 JUL 25 AM 10:19

CLERK DISTRICT COURT

DEPUTY *Cherry Huffma*

PS

1 Matthew Z. Crotty
2 ISB #8653
3 CROTTY & SON LAW FIRM, PLLC
4 421 W. Riverside Ave. Ste 1005
5 Spokane, WA 99201
6 Telephone: (509) 850-7011
7 Facsimile: (509) 703-7957
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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. ~~CV13-866~~
Case No. CV07-8038

Consolidated with

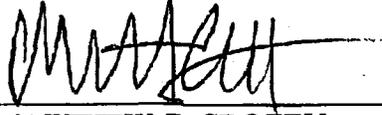
23 **AFFIDAVIT OF MATTHEW Z.
24 CROTTY RE MOTION TO COMPEL**

25 STATE OF WASHINGTON)
26 : ss.
27 County of Spokane)

28 I, MATTHEW Z. CROTTY, being first duly sworn on oath, say:

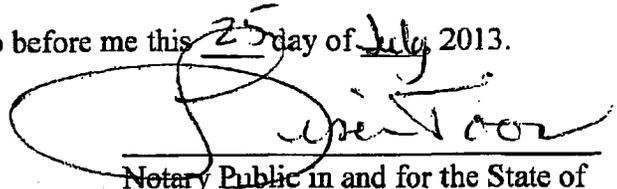
- 1. I am the attorney for Kirk-Scott, Ltd, defendant in the above-captioned actions.
- 2. On July 22, 2013, at 11:00 a.m. I conducted a I.R.C.P. 37(a)(2) meet and confer

1 conference with attorney Michael Howard. Unfortunately, the parties could not agree on
 2 whether the amount of money Lenore and Delano Peterson paid Mr. Golub in the 2009-2010
 3 timeframe was discoverable. Mr. Howard took the position that such a request was "irrelevant".

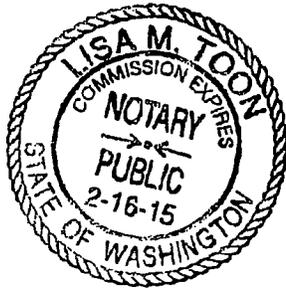
4 

5 _____
 6 MATTHEW Z. CROTTY

7 SUBSCRIBED AND SWORN to before me this 25 day of July, 2013.

8 

9 Notary Public in and for the State of
 10 Washington, residing at Spokane
 11 My commission expires: 2/10/15



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CERTIFICATE OF SERVICE

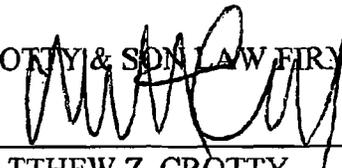
I hereby certify that on the 28th day of July 2013, I have emailed the document to the following participants at the addresses listed below:

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MATTHEW Z. CROTTY
Attorney for Defendant Kirk-Scott, Ltd.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: #5500

2013 JUL 25 AM 10:17

CLERK DISTRICT COURT

Sherry Hulford
~~DEPUTY~~ p.0

1 Matthew Z. Crotty
2 ISB #8653
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5 Spokane, WA 99201
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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,
14
15 Plaintiffs,

16 vs.

Case No. CV13-866
Case No. CV07-8038

**DEFENDANT KIRK-SCOTT, LTD.'s
MOTION TO COMPEL**

17 KIRK-HUGHS DEVELOPMENT, LLC and
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD a Texas corporation;
20 INTERNAL REVENUE SERVICE;
21 TOMLINSON NORTH IDAHO, INC., an
22 Idaho corporation
23 Defendants.

24 Pursuant to I.R.C.P. 37(a)(2) defendant Kirk-Scott, Ltd. moves the Court for an Order
25 the compels plaintiffs to disclose the amount of money plaintiffs received from Delano and
26 Lenore Peterson in the CV07-8038 case. Counsel for Kirk-Scott, Ltd. and Plaintiffs met and
27 conferred at 11 a.m. on July 22, 2013, per I.R.C.P. 37(a)(2) in order to resolve their discovery
28 dispute but could not reach an agreement.

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Kirk-Scott, Ltd's Motion is supported by the Memorandum of Authorities in support of the same, the declaration of Matthew Crotty, and the Court's record.

DATED this 27th day of July 2013.

CROTTY & SON LAW FIRM, PLLC

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Attorney for Defendant Kirk-Scott, Ltd.

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CERTIFICATE OF SERVICE

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Attorney for Defendant Kirk-Scott, Ltd.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: #56 de 6

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CLERK DISTRICT COURT

Sherry Wilson
DEPUTY *ps*

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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,
14
15 Plaintiffs,

16 vs.

17 KIRK-HUGHS DEVELOPMENT, LLC and
18 Delaware limited liability company; KIRK-
19 SCOTT, LTD a Texas corporation;
20 INTERNAL REVENUE SERVICE;
21 TOMLINSON NORTH IDAHO, INC., an
22 Idaho corporation

23 Defendants.

Case No. ~~CV13-866~~
Case No. CV07-8038

consolidated into

24 DEFENDANT KIRK-SCOTT, LTD.'s
25 MEMORANDUM IN SUPPORT OF
26 MOTION TO COMPEL

27 "[I]t goes without saying that the courts can and should preclude double recovery by an
28 individual." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002).

29 I. INTRODUCTION & SUMMARY OF ARGUMENT

30 Plaintiffs are trying to get paid twice. This Court should put a stop to it. Kirk-Scott,
31 Ltd. moves the Court for an Order compelling the plaintiffs to disclose just how much the
32 plaintiffs have already been paid.

1 In 2007 plaintiffs sued Lenore and Delano Peterson, Geraldine Kirk-Hughes, Peter
 2 Sampson, Kelly Polatis, Kirk-Hughes Development, LLC, and Kirk-Hughes Associates for
 3 \$941,000. On March 11, 2009, plaintiffs obtained a default judgment for \$941,000 against all
 4 of the defendants but the Petersons. On July 15, 2010, plaintiffs settled with the Petersons for a
 5 unknown amount. Yet on October 28, 2010, Mr. Golub recorded the March 11, 2009, default
 6 judgment for the full \$941,000 deducting nothing for the Peterson settlement. Mr. Golub admits
 7 that he is recovering twice; but, contrary to the well established law of our country, believes that
 8 there's nothing wrong with getting paid twice for the same injury.
 9

10 Kirk-Scott, Ltd.'s Motion to Compel should be granted.

11 **II. FACTS**

12
 13 1. Plaintiffs sued Lenore and Delano Peterson, Geraldine Kirk-Hughes, Peter
 14 Sampson, Kelly Polatis, Kirk-Hughes Development, LLC, and Kirk-Hughes Associates for
 15 \$941,000. (Crotty Aff. in Support of Motion to Vacate Default Judgment. at Ex. 2, pg. 5, filed
 16 June 24, 2013)

17
 18 2. On March 11, 2009, Plaintiffs obtained a default judgment against all of the
 19 defendants except the Petersons. (Howard Aff. in Support of Motion for Summary Judgment, at
 20 Ex. 8, filed May 9, 2013)

21
 22 3. On July 15, 2010, Plaintiffs settled with Petersons for a unknown amount of
 23 money. (Crotty Aff. in Support of Motion to Vacate Default Judgment. at Ex. 2, ppg. 46-48,
 24 filed June 24, 2013)

25
 26 4. Mr. Golub admitted, during his June 12, 2013, deposition, that the monies he
 27 received from the Petersons accounted for some of the \$941,000 he sought in his 2007 lawsuit
 28

1 but that he still seeks to collect the entire \$941,000 awarded in the March 11, 2009 default
 2 judgment. (Campbell Aff. *citing* A. Golub dep. at ppg. 88-90, filed June 24, 2013) Mr. Golub
 3 also testified that, in his opinion, it was perfectly fair that he be entitled to recover twice, once
 4 from the Petersons and a second time from the default judgment debtors. *Id.* Mr. Golub would
 5 not disclose the settlement amount at his June 12, 2013, deposition. *Id.*

6
 7 5. Counsel for Kirk-Scott, Ltd. and plaintiffs met and conferred at 11 a.m. on July 22,
 8 2013, in order to resolve their discovery dispute but could not reach an agreement. During the
 9 July 22, 2013, meet and confer conference plaintiffs' counsel stated that the amount the Petersons
 10 paid Plaintiffs was irrelevant. (Crotty Affidavit re Motion to Compel, at ¶2)

11
 12 **III. ARGUMENT**

13 **A. Motion to Compel standard.**

14 A party may move to compel under I.R.C.P. 37(a)(2) if (i) a deponent fails to answer a
 15 question posed at deposition and (ii) the parties meet and confer prior to bringing the motion to
 16 compel.
 17

18 Here Alan Golub refused to disclose, at deposition, the amount of money he received
 19 from the Petersons as part of the July 15, 2010, settlement. On July 22, 2013, the undersigned
 20 counsel and Mr. Golub's attorney met and conferred but were unable to resolve the discovery
 21 issue.
 22

23 **B. Plaintiffs' "irrelevance" objection fails.**

24 Courts consistently hold that lack of relevance is not a proper objection to a discovery
 25 request. "[B]oilerplate relevancy objections, without setting forth any explanation or argument
 26
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1 why the requested documents are not relevant, are improper." *A. Farber & Partners, Inc. v.*
2 *Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006).

3 Such "relevance" objections are improper because "[r]elevant information for purposes of
4 discovery is information 'reasonably calculated to lead to the discovery of admissible
5 evidence.'" *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir.2005). A
6 discovery request is relevant if it bears on a party's claim or affirmative defense. I.R.C.P.
7 26(b)(1)(allowing discovery on "any matter...relat[ing] to the claim or defense of the party
8 seeking discovery."); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350-51 (1978)(A party
9 "may obtain discovery regarding any matter, not privileged, which is relevant to the subject
10 matter involved in the pending action, whether it relates to the claim or defense of the party
11 seeking discovery or to the claim or defense of any other party.").

14 Notwithstanding plaintiffs' improper "relevance" objection, the amount Petersons paid
15 Golub is relevant. First, the issue of how much the Petersons reduced the \$941,000 owing on
16 the default judgment goes to Kirk-Scott, Ltd.'s unclean hands affirmative defense. (Kirk-Scott
17 Answer pg. 2, II(4)) Plaintiffs' attempt to recover twice goes to the issue of unclean hands as one
18 who has already been compensated for a wrong cannot, in good conscience, ask to be paid a
19 second time - - - courts hold that equity allows such a double recovery defense. *See infra*
20 ¶III(C). This is especially relevant when Kirk-Scott, the entity that holds a secured interest in the
21 asset the plaintiffs are seeking to foreclose upon (the Sloan and Atkinson property) was not a
22 party to the action in which the default judgment was obtained. Kirk-Scott was never afforded
23 the opportunity to represent its interests in the 2007 action and equity required Golub to be
24 forthcoming with the Court regarding the judgment (and settlement) he obtained so as to not
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1 work a harm to parties (like Kirk-Scott) who later became involved in the action. Second, the
2 issue of how much the Petersons reduced the \$941,000 owing on the default judgment goes to
3 Kirk-Scott, Ltd.'s waiver affirmative defense. (Kirk-Scott Answer pg. 2 II(3)) Since plaintiffs
4 have already been paid by the Petersons then Plaintiffs have waived, via the offset doctrine, the
5 right to ask for that amount a second time. Third, if discovery reveals that Mr. Golub obtained
6 hundreds of thousands of dollars (or even less) from the Petersons, but omitted to inform the
7 Court of that when it recorded its default judgment, then that goes to Mr. Golub's credibility. For
8 it is unlikely that the trier-of-fact will find credible one who attempts to get paid twice for a
9 singular (and supposed) wrong. Fourth, Idaho law requires a party to re-record a judgment once
10 that judgment has been partially satisfied and failure to do so could give rise to a negligence
11 counter-claim. I.R.C.P. 58(b); *See generally McPheters v. Maile*, 138 Idaho 391, 395 (2003).
12 Accordingly, discovery on the amount paid by the Petersons is relevant to determining whether
13 Kirk-Scott, Ltd. is entitled to bring a counter-claim against plaintiffs.
14
15

16 **C. Fairness dictates that Plaintiffs be compelled to disclose the amount of monies**
17 **Plaintiffs received from the Petersons.**

18 Lastly, courts consistently hold that equity bars a party from recovering twice. *Nizan v.*
19 *Wells Fargo Bank Minnesota Nat. Ass'n*, 274 Va. 481, 491 (2007)("The defense of double
20 recovery is thus rooted in common law and equitable principles..."). Indeed, there can be only
21 one recovery of damages for one wrong or injury. *EEOC v. Waffle House, Inc.*, 534 U.S. 279,
22 297 (2002) ("[I]t goes without saying that the courts can and should preclude double recovery by
23 an individual."); *Meade v. Slonaker*, 183 W. Va. 66, 69 (1990)("Double recovery of damages is
24 not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may
25 not recover damages twice for the same injury simply because he has two legal theories."); *S.*
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1 *California Fed. Sav. & Loan Ass'n. v. United States*, 422 F.3d 1319, 1332-33 (Fed. Cir.
 2 2005)("The purpose of damages for breach of contract is generally to put the wronged party in as
 3 good a position as he would have been had the contract been fully performed. In light of this
 4 general purpose, a wronged party is typically not allowed to recover twice for the same harm,
 5 here a breach of contract.").

6
 7 The law of Idaho is in accord. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 31
 8 (2005)("Our Court has held there can only be one award of damages for a single injury.
 9 Furthermore, the trial court may reduce the judgment to a single recovery, if it believes the jury
 10 awarded a party twice for the same injury.").

11 Here it is undisputed that Golub has already been paid, by Peterson, some of the
 12 \$941,000 he claims Kirk-Scott, among others, still owes him. The Court should not let plaintiffs
 13 sleight of hand lie. The Court should compel the plaintiffs to inform Kirk-Scott of the amount
 14 the Petersons paid, for failure to do so will result in plaintiffs recovering twice for the same
 15 injury.
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IV. CONCLUSION

Kirk-Scott, Ltd's Motion to Compel should be granted.

DATED this 25th day of July 2013.

CROTTY & SON LAW FIRM, PLLC



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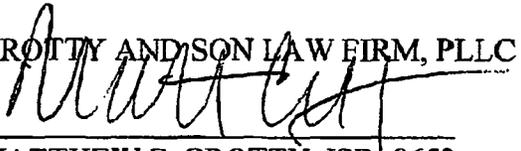
CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July 2013, I have emailed the document to the following participants at the addresses listed below:

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MATTHEW Z. CROTTY, ISB# 8653
Attorney for Defendant Kirk-Scott, Ltd.

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

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CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,)
husband and wife,)
Plaintiffs,)

vs.)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company;)
KIRK-SCOTT, LTD., a Texas corporation;)
INTERNAL REVENUE SERVICE; TOMLINSON)
NORTH IDAHO, INC., an Idaho corporation,)
Defendants.)

Case No. CV 07-8038
[Consolidated Case No.: CV 13-866]

MEMORANDUM DECISION AND
ORDER RE: (1) Defendant
Kirk-Scott, Ltd.'s Motion to Vacate
Judgment, (2) Defendant Kirk-Scott,
Ltd.'s Motion to Dismiss, and (3)
Plaintiffs' Motion for Summary
Judgment

ALAN GOLUB and MARILYN GOLUB,)
husband and wife,)
Plaintiffs,)

vs.)

GERALDINE KIRK-HUGHES and PETER)
SAMPSON, husband and wife; KIRK-HUGHES)
DEVELOPMENT, LLC, a Delaware limited)
liability company; KIRK-HUGHES &)
ASSOCIATES, INC., a Nevada corporation;)
KELLY POLATIS, an individual, and DELANO)
D. and LENORE J. PETERSON, husband and wife,)
Defendants.)

Michael T. Howard, Attorney for Plaintiffs
Matthew Crotty, Attorney for Kirk-Scott, Ltd.
Michael Bissell, Attorney for Kirk-Hughes Development

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Alan and Marilyn Golub (Golub) obtained a \$941,000.00 judgment against Defendant Kirk-Hughes Development, LLC (K-H), and now seek to foreclose upon real property allegedly owned by K-H in Kootenai County.¹ Kirk-Scott, Ltd. (K-S) is a subsidiary of an entity owned by Geraldine Kirk-Hughes's sister, Balinda Antoine, and K-S owns a 51.1% membership share of K-H. K-S claims an interest in a portion of the real property that is the subject of Plaintiffs' foreclosure efforts. K-S' claimed interest is based on a purported Deed of Trust executed November 18, 2004, and recorded in Kootenai County September 17, 2010.

Kootenai County case CV-13-866, a Complaint for Declaratory Judgment, was filed January 25, 2013. In that case, Golub seeks a judicial declaration that K-S, the I.R.S. and Tomlinson North Idaho have no estate, right, title, lien or interest in the subject property, or that any interest held by any defendant is inferior to that of Plaintiffs.²

II. ISSUES

1. K-S has moved to set aside Plaintiffs' judgment against K-H; K-H has joined this motion.
2. K-S has moved for dismissal of Plaintiffs' action in CV-13-866; K-H has joined this motion.
3. Plaintiffs have moved for summary judgment in CV-13-866.

III. DISCUSSION

1. K-S's Motion to Set Aside Judgment

K-S invokes I.R.C.P. 60(b)(4),(5) and (6), as well as I.R.C.P. 55(b)(1). A decision regarding setting aside a prior judgment is one of discretion.

¹ The judgment was awarded in Kootenai County Case No. CV 07-8038.

K-S's Rule 60(b) motion must have been filed within a reasonable time, which is calculated as the length of time between the moment the judgment becomes apparent to the moving party and the date the Rule 60(b) motion is filed. *McGrew v. McGrew*, 139 Idaho 551, 559, 82 P.3d 833, 841 (2003). This is an issue of fact for the Court's determination, and the moving party has the burden of establishing that it has brought its motion within a reasonable time. K-S has provided no evidence to the Court as to when it became aware of the judgment in question. Thus, K-S has failed to meet its burden of showing that its Rule 60(b) motion is timely.

Golub concedes that a void judgment can be attacked at any time by any person adversely affected by it, and asserts that K-S's Rule 60(b)(4) facet of its motion addresses whether Plaintiffs' judgment against K-H was void. However, K-S has made no demonstration showing that the Court lacked personal jurisdiction over K-H, nor that the Court lacked subject matter jurisdiction to grant the \$941,000.00 judgment against K-H.

K.S. further argued that the subject judgment can be attacked because the judgment is different from the amount sought in the 2007 Complaint. K-S cites to I.R.C.P. 54(c) for support of its assertion. However, a fair and complete reading of the 2007 Complaint reveals that Plaintiffs were claiming they were wrongfully and unlawfully deprived of \$941,000.00 in commission plus interest from the sale of certain real property. Thus, the judgment in question did not differ from the relief sought in the 2007 Complaint.

K-H conceded at oral argument that it has no explanation for why it waited a matter of years to seek to set aside Plaintiffs' judgment. Thus, K-H's joinder of K-S's Motion to Set Aside Judgment is untimely and its request is denied.

² The parties requested that the two cases be consolidated. CV 13-866 was consolidated into CV 07-8038.

2. K-S's Motion to Dismiss

K-S claims a superior interest in the subject property by virtue of receiving it through a deed of trust executed November 18, 2004, and recorded in Kootenai County on September 17, 2010. Therefore, K-S argues, pursuant to I.R.C.P. 12(6)(6), Plaintiffs' 2013 Complaint fails to state a claim upon which relief can be granted because Plaintiffs' claim to the property is by virtue of its judgment that was recorded in Kootenai County October 25, 2010.

Plaintiffs' 2013 declaratory judgment action asserts that K-S's September 17, 2010, recording is void and inferior to Plaintiffs' judgment lien because the September 17, 2010, recording by K-S violated the federal bankruptcy stay imposed by K-H's Chapter 11 bankruptcy.

K-S's Motion to Dismiss is not presented solely on the Complaint filed by Plaintiffs'; therefore, it is analyzed by the Court as a Rule 56 Motion for Summary Judgment because the motion is based on matters contained outside of the pleadings.³

The Court is aware that summary judgment is proper when the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there are no genuine issues of any material fact, and that the moving party is entitled to judgment as a matter of law. On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion.

This Court is aware that federal law provided that actions done in violation of a bankruptcy stay are void. K-S does not dispute this matter of law, but asserts that Golub lacks standing to remedy K-S's recording of the deed of trust during the bankruptcy stay because the

³ At the July 9, 2013, hearing on the present motions, the Court asked the parties if the Motion to Dismiss should be converted to a Motion for Summary Judgment. All parties were in agreement that the dismissal motion should be converted to a summary judgment motion.

Golubs were neither bankruptcy debtors nor trustees. A bankruptcy stay is designed to protect debtors from collection efforts but is also designed to protect creditors. *In Re National Environmental Waste Corp.*, 129 F.3d 1052, 1054 (9th Circ. 1997).

In the Ninth Circuit case of *In Re Schwartz*, 954 F.2d 569, 571-572 (9th Circ. 1992), the court held that Congress intended violations of an automatic bankruptcy stay to be void. Since *Schwartz*, the Ninth Circuit has continued to hold that the recordation of an interest in the debtor's assets during the bankruptcy stay voids the recordation. *In Re Dyer*, 322 F.3d 1178, 1188 (9th Circ. 2003); *In Re Samaniego*, 224 B.R. 154, 163 (Bankr. E.D. Wash. 1998).

Since K-S recorded its deed of trust on September 17, 2010, a date during which K-H was in bankruptcy with the automatic stay in effect, such recording is void as a matter of law.

K-S has also argued that its unrecorded deed of trust has priority over a subsequently recorded judgment. However, I.C. § 55-606 provides that a grant or conveyance of an estate in real property is conclusive against the grantor, and every other person subsequently claiming under him, except an encumbrancer who acquires a lien by valid judgment that is first duly recorded. Thus, K-S's unrecorded deed of trust is not superior to Plaintiffs' recorded judgment.

3. Plaintiffs' Motion for Summary Judgment

Plaintiffs' argument in support of their Motion for Summary Judgment is primarily a counterpoint to K-S's Motion to Dismiss/Summary Judgment. In addition, Plaintiffs' have moved for summary judgment against Tomlinson North Idaho, Inc. (Tomlinson) and the Internal Revenue Service (IRS).

Tomlinson has not filed a response to Plaintiffs' motion, nor has it defended against the motion in any way. Pursuant to I.R.C.P. 56 Plaintiffs prevail against Tomlinson. Similarly, the

IRS has released all liens and has filed its notice of non-opposition to Plaintiffs' claims on May 6, 2013.

Plaintiffs hold a valid judgment lien against the subject property with a priority date of October 28, 2010. This judgment lien has priority over K-S's deed of trust because Idaho law gives priority to the first recorded conveyance. K-S's September 17, 2010, recording of its deed of trust is void for the reasoning discussed above.

Further, K-S's deed of trust recordation was not properly acknowledged and certified--as required by I.C. § 55-805 and § 55-811, as well as I.C. § 55-709 and § 55-711A—because the K-S recorded deed of trust contained no acknowledgment.

Based upon the foregoing, this Court finds that there exist no genuine issues of material fact regarding Plaintiffs' claim of priority and superiority in its interest over the subject property. The issue is capable of being decided as a matter of law, and is so decided in favor of Plaintiffs.

IV. CONCLUSION AND ORDER

Based upon the foregoing, now therefore, IT IS HEREBY ORDERED:

1. K-D's and K-H's Motion to Vacate Judgment is DENIED in this Court's discretion.
2. K-S's and K-H's Motion to Dismiss/Summary Judgment is DENIED.
3. Plaintiffs' Motion for Summary Judgment is GRANTED.

Plaintiffs are ordered to present a Judgment to the Court consistent with this Memorandum Decision and Order and I.R.C.P. 54(a).

Further, K-H filed a Motion for Summary Judgment on July 19, 2013, and K-S has joined in the motion. K-S filed a Motion to Compel on July 25, 2013, which K-H has joined. The Motion to Compel is now moot based upon this Court's Decision.

Additionally, this Court has reviewed K-H's summary judgment motion and finds that it contains the very same arguments made in the motions discussed *supra*.

As such, the September 18, 2013, hearings on both motions are VACATED.

Dated this 8 day of August, 2013.

Lansing L. Haynes
LANSING L. HAYNES, District Judge

CERTIFICATE OF SERVICE

On this 9 day of August, 2013, a true and correct copy of the foregoing was mailed in the U.S. Mails, postage prepaid, sent via interoffice mail, or sent via facsimile, addressed to the following (as indicated below):

MICHAEL T. HOWARD
WINSTON & CASHATT
250 Northwest Boulevard, Suite 107A
Coeur d'Alene, ID 83814
Facsimile: 208-765-2121

#669

MICHAEL S. BISSELL
CAMPBELL & BISSELL
Corbet-Aspray House
820 W. 7th Avenue
Spokane, WA 99204
Facsimile: 509-455-7111

#670

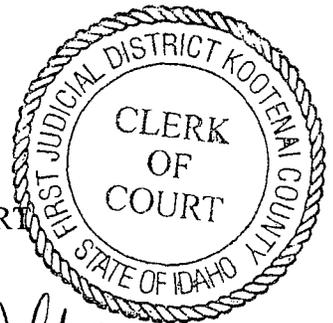
MATTHEW A. CROTTY
CROTTY & SON LAW FIRM
421 W. Riverside Avenue, Ste. 1005
Spokane, WA 99201
Facsimile: 509-703-7957

#671

DOUGLAS MARFICE
RAMSDEN & LYONS
P.O. BOX 1336
Coeur d'Alene, ID 83816
Facsimile: 208-664-5884

#672

CLIFFORD T. HAYES
CLERK OF THE DISTRICT COURT



By Rebecca DeGner
(Deputy Clerk)

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2013 AUG 15 PM 1:31

CLERK DISTRICT COURT
Chris Lendzls
DEPUTY

1
2 MICHAEL T. HOWARD, ISB No. 6128
3 WINSTON & CASHATT
4 250 Northwest Boulevard, Suite 206
5 Coeur d'Alene, Idaho 83814
6 Telephone: (208) 667-2103

Attorneys for Plaintiffs

7
8 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
9 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

10 ALAN GOLUB and MARILYN GOLUB,
husband and wife,

11 Plaintiffs,

Case No. CV07-8038

AFFIDAVIT IN SUPPORT OF EXECUTION

12 vs.

13
14 GERALDINE KIRK-HUGHES and PETER
15 SAMPSON, husband and wife; KIRK-
16 HUGHES DEVELOPMENT, LLC, a Delaware
17 limited liability company; KIRK-HUGHES &
18 ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and
DELANO D. AND LENORE J. PETERSON,
husband and wife,

19 Defendants.

20
21 MICHAEL T. HOWARD, being first duly sworn on oath, deposes and states as follows:

22 1. I am one of the attorneys for the Plaintiffs, and as such I am familiar with the facts
23 and circumstances surrounding this action.

24 2. A Judgment was entered against all defendants on March 11, 2009, a true and
25 correct copy of which is attached as **Exhibit B**. The principle amount due on said Judgment is
26

AFFIDAVIT IN SUPPORT OF EXECUTION - PAGE 1

1 \$941,000.00. \$444,255.12 in pre-judgment interest accrued from March 11, 2005 through
2 March 11, 2009. Thereafter, \$225,904.45 in post-judgment interest accrued through the date of
3 this affidavit, and continues to accrue at the statutory rate of \$135.35 per diem.
4

5 3. The total amount of the Judgment as of this date is \$1,611,159.58.

6 4. There has been \$ 12,506.70 collected in satisfaction of this Judgment to date,
7 leaving an unsatisfied Judgment amount of **\$1,598,652.48**.

8 5. On August 25, 2009 the Judgment was recorded in Kootenai County against
9 Defendants Geraldine Kirk-Hughes, Peter Sampson, Kirk-Hughes & Associates, Inc., and Kelly
10 Polatis, recording number 2229054000.
11

12 6. On October 28, 2010 the Judgment was recorded in Kootenai County against all
13 Defendants, including Kirk-Hughes Development, LLC, recording number 2287941000.
14

15 7. As of October 28, 2010, Kirk-Hughes Development is the fee-simple owner of
16 three parcels of undeveloped property in Kootenai County, more specifically described in
17 Exhibit A. The recording of the judgment has created a lien upon those parcels of real property.
18

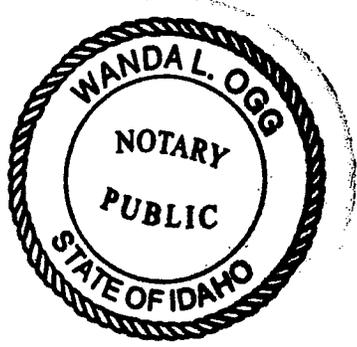
19 8. On August 8, 2013 the Court ruled that the liens created by the Judgment were
20 superior to all other interest claimed against the properties described in Exhibit A.

21 9. Golub seeks to foreclose upon the described in **Exhibit A** to satisfy some, or all of
22 the Judgment.
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MICHAEL T. HOWARD

SUBSCRIBED AND SWORN to before me this 13th day of August, 2013.



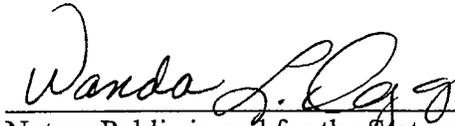

Notary Public in and for the State of Idaho
Residing at ~~Coeur d'Alene, ID~~ Spokane Valley, WA
My Commission Expires: April 4, 2017

EXHIBIT "A"

Parcel 2

Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho lying westerly and southerly of the following 3 portions of said Government Lot 5 described as follows:

Beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, bears South 53°39.5' East, 2383.1 feet; thence South 89°50' West 150 feet to Corner No. 2; thence North 0°10' West 849.3 feet to corner No. 3; thence South 77°10' East 76.9 feet to Corner No. 4; thence South 79°39.5' East 121.5 feet to corner No. 5; thence South 68°18.5' East 93.1 feet to Corner No. 6; thence South 27°52' East 112.6 feet to Corner No. 7; thence South 7°40.5' West 64.4 feet to Corner No. 8; thence South 89°50' West 174.3 feet to Corner No. 9; thence South 0°10' East 611.6 feet to Corner No. 1, the place of beginning

and a parcel of land in Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as beginning at an iron pin that is North 43°40'30" West 1954.70 feet from the Southeast corner of Section 3; thence South 89°50' West, 569.8 feet to a point; thence North 0°10' West 16.57 feet to a point; thence North 68°54' East 516.44 feet to a point; thence South 41°05' East 56.93 feet to a point; thence South 16°44' East 163.50 feet to the point of beginning.

And beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, bears South 38°17' East 1801.9 feet; thence South 89°50' West 233.6 feet to Corner No. 2; thence North 16°44' West 163.5 feet to Corner No. 3; thence North 76°19' East, 154.4 feet to Corner No. 4; thence South 34°10' East 232.6 feet to Corner No. 1, the place of beginning;

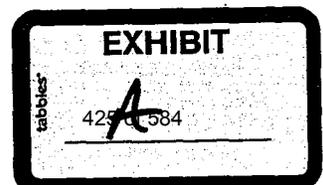
Also except any portion lying with the following:

A portion of Government Lots 5 and 6; Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as follows: Beginning at the proportioned 1/16 corner said point being North 0°02'15" West 1323.84 feet from the Southeast corner of said Section 3; thence along the South boundary of said Government Lot 6, South 89°43'48" West 1023.70 feet to the true point of beginning; thence continuing South 89°43'48" West 278.29 feet to a point; thence North 16°43'20" West 124.68 feet to corner No. 2 of the Brown Tract; thence North 89°50'40" East 233.60 feet to corner No. 1 of Brown Tract; thence South 34°09'20" East 143.48 feet to the true point of beginning;

Also except a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho more specifically described as follows:

Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3 2027.13 feet to an iron pin; thence East 70.06 feet to an iron pin which is the point of beginning for this description; thence East 133.82 feet to an iron pin; thence North 0°48'36" West 434.22 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 145 feet plus or minus to a point which is North 0°48'36" West of the point of beginning; thence South 0°48'36" East 475.63 feet to the point of beginning.

Also excepting a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more specifically described as follows: Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3, 2027.13 feet to an iron pin; thence East 203.88 feet to an iron pin which is the point of beginning for this description; thence East 101.18 feet to an iron pin; thence North 0°48'36" West 368.72 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 120 feet, plus or minus to a point which is North 0°48'36" West of the point of beginning; thence continuing South 0°48'36" East 434.22 feet to the point of beginning.



BUT INCLUDING THE FOLLOWING:

A portion of Government Lot 5, Section 3 Township 49 North, Range 3 W.B.M., Kootenai County, Idaho, more particularly described as follows: Commencing at the South Quarter corner, said Section 3; thence

North 0°48'36" West, along the centerline of said Section 3, 2027.13 feet to an iron pin which is the POINT OF BEGINNING for this description; thence

East 70.06 feet to an iron pin; thence

North 0°48'36" West, 475.63 feet to a concrete monument on the shore of Lake Coeur d' Alene; thence

Northwesterly along the shore of Lake Coeur d' Alene 75 feet plus-or-minus to a concrete monument which is North 0°48'36" West of the POINT OF BEGINNING, said point being the Northwest Corner of Government Lot 5, said Section 3; thence

South 0°48'36" East along the West line of said Government Lot 5, 500 feet to the POINT OF BEGINNING.

APN B 49N03W03 8050

PARCEL II:

The Northeast quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. *APN: 49N03W035000*

EXCEPTING THEREFROM: The Southeast quarter of the Northeast quarter of the Southwest quarter of Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. *APN 49N03W0355250*

PARCEL III:

The Southeast quarter of the Northwest quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho.

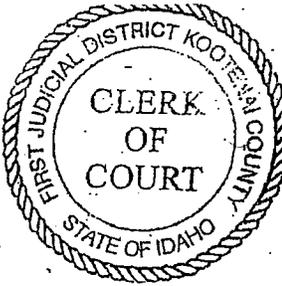
APN: 49N03W035850

STATE OF IDAHO
COUNTY OF KOOTENAI

THIS IS TO CERTIFY THAT THE FOREGOING IS
A TRUE COPY OF THE ORIGINAL NOW ON
FILE OR RECORD IN THIS OFFICE.

SEALED ON THIS 25th DAY OF Aug 2009

DANIEL J. ENGLISH, CLERK OF THE DISTRICT
COURT BY Dana Sheela
1-4 of 4 pgs Deputy



STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 739

2009 MAR 12 AM 10:59

CLERK DISTRICT COURT
Wm Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

vs.

GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-
HUGHES DEVELOPMENT, LLC, a Delaware
limited liability company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and
DELANO D. AND LENORE J. PETERSON,
husband and wife,

Defendants.

Case No. CV07-8038

JUDGMENT AND I.R.C.P. 54(b)
CERTIFICATE

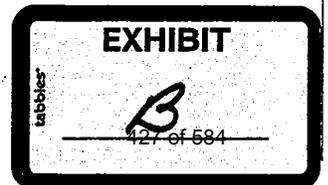
DANIEL J. ENGLISH 4P I 2229054000
KOOTENAI CO. RECORDER Page 1 of 4
BBB Date 08/25/2009 Time 12:03:35
REC-REQ OF WINSTON AND CASHATT
RECORDING FEE: 12.00
2229054000 XJ

DANIEL J. ENGLISH 4P I 2287941000
KOOTENAI CO. RECORDER Page 1 of 4
BBB Date 10/28/2010 Time 15:43:48
REC-REQ OF WINSTON AND CASHATT
RECORDING FEE: 19.00
2287941000 XJ

JUDGMENT SUMMARY

JUDGMENT CREDITORS	Alan and Marilyn Golub
JUDGMENT DEBTORS	Kelly Polatis Geraldine Kirk-Hughes Peter Sampson Kirk-Hughes Development, LLC Kirk-Hughes & Associates, LLC
ATTORNEY FOR CREDITOR	Michael T. Howard of Winston & Cashatt Kenneth B. Howard, Jr.
PRINCIPAL JUDGMENT AMOUNT:	\$941,000.00
PRE-JUDGMENT INTEREST:	12% to run from March 11, 2005 through the date of this Judgment

JUDGMENT AND I.R.C.P. 54(b) CERTIFICATE -
PAGE 1

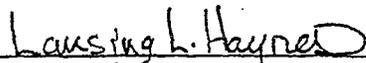


1 POST JUDGMENT INTEREST: As determined by law to run from the date of this Judgment
2 until paid in full.

3
4 This matter, having come before the Court upon Plaintiffs' Motion for Default Judgment and
5 I.R.C.P. 54(b) Certificate against Debtor, and supported by the Affidavits of Michael T. Howard and
6 Alan Golub, and the pleadings on file, the Court does hereby enter Judgment against Debtors as follows:

- 7 1. Plaintiffs are granted judgment in the principal amount of \$941,000.00;
8 2. Plaintiffs are granted pre-judgment interest at a rate of 12% beginning March 11, 2005
9 through entry of this judgment.
10 3. Plaintiffs are granted post-judgment interest to be determined by law from entry of this
11 judgment.

12 DONE ~~IN OPEN COURT~~ this 11 day of March, 2009.

13
14 
15 JUDGE LANSING L. HAYNES

16 Presented by:

17 
18 MICHAEL T. HOWARD, ISB No. 6128
19 KENNETH B. HOWARD, ISB No. 1999
20 Attorneys for Plaintiffs

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2013 AUG 15 PM 1:31

CLERK DISTRICT COURT

[Signature]
DEPUTY

1 MICHAEL T. HOWARD, ISB No. 6128
2 WINSTON & CASHATT, LAWYERS, a
3 Professional Service Corporation
4 250 Northwest Boulevard, Suite 206
5 Coeur d'Alene, Idaho 83814
6 Telephone: (208) 667-2103
7 Facsimile: (208) 765-2121
8 mth@winstoncashatt.com

9 Attorneys for Plaintiffs

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

vs.

GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-
HUGHES DEVELOPMENT, LLC, a Delaware
limited liability company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and
DELANO D. and LENORE J. PETERSON,
husband and wife,

Defendants.

Case No. CV07-8038

APPLICATION FOR WRIT OF EXECUTION

TO THE CLERK OF THE DISTRICT COURT OF KOOTENAI COUNTY:

The undersigned requests that you issue a Writ of Execution in the above entitled action against the personal property of the Defendants: GERALDINE KIRK-HUGHES and PETER SAMPSON, husband and wife; KIRK-HUGHES DEVELOPMENT, LLC, a Delaware limited liability company;

APPLICATION FOR WRIT OF EXECUTION -

PAGE 1
Golub vs Kirk-Hughes, etal

41501-2013 and 41505-2013

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
250 Northwest Blvd. 206
Coeur d'Alene, Idaho 83814
Phone: (208) 667-2103

1 KIRK-HUGHES & ASSOCIATES, INC., a Nevada corporation; and KELLY POLATIS, an individual,
2 hereinafter the "Judgment Debtors", and deliver it to the Sheriff of Kootenai County.

3
4 DATED this 13. day of August, 2013.

5
6
7 MICHAEL T. HOWARD, ISB No. 6128
8 WINSTON & CASHATT, LAWYERS, a Professional
9 Service Corporation
10 Attorneys for Plaintiffs
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APPLICATION FOR WRIT OF EXECUTION -

PAGE 2

Gold vs Kirk-Hughes, etal

41501-2013 and 41505-2013

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
250 Northwest Blvd. 438.06504
Coeur d'Alene, Idaho 83814
Phone: (208) 667-2103

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2013 AUG 15 PM 1:32

CLERK DISTRICT COURT
[Signature]
DEPUTY

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

Case No. CV07-8038

WRIT OF EXECUTION: REAL PROPERTY

vs.

GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-
HUGHES DEVELOPMENT, LLC, a Delaware
limited liability company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and
DELANO D. AND LENORE J. PETERSON,
husband and wife,

Defendants.

THE PEOPLE OF THE STATE OF IDAHO TO THE SHERIFF OF KOOTENAI
COUNTY, IDAHO, GREETINGS:

WHEREAS, it appears from the records of the above entitled court that on March 11,
2009 a Judgment was duly entered in the District Court of the First Judicial District of the
State of Idaho, in and for the County of Kootenai against the defendants: GERALDINE
KIRK-HUGHES and PETER SAMPSON, husband and wife; KIRK-HUGHES

1 DEVELOPMENT, LLC, a Delaware limited liability company; KIRK-HUGHES &
2 ASSOCIATES, INC., a Nevada corporation; and KELLY POLATIS, an individual,
3 hereinafter "the Judgment Debtors" in the principal amount of \$941,000, plus interest.
4

5 The Judgment was duly recorded in Kootenai County against all Judgment Debtors
6 except KIRK-HUGHES DEVELOPMENT, LLC on August 25, 2009, and against KIRK-
7 HUGHES DEVELOPMENT, LLC on October 28, 2010; said recordings creating a judgment
8 lien on property owned by Judgment Debtors on those dates, or at any time thereafter.
9

10 The current, unsatisfied amount of said Judgment is \$1,598,652.48, U.S., with interest
11 accruing at \$135.35 per diem.

12 NOW, THEREFORE, you are commanded to satisfy the Judgment, with interest and
13 Sheriff's fees, out of the real property of the Judgment Debtors, and if sufficient personal
14 property cannot be found, then out of the real property belonging to the Judgment Debtors, as set
15 forth in the attached **Exhibit A**, and make return of this Writ within sixty (30) days. This Writ shall
16 be continuing until satisfied.
17

18 DATED this 15 day of August, 2013

CLIFFORD T. HAYES

CLERK OF THE DISTRICT COURT

Susan McCoy

By: Deputy

163904

EXHIBIT "A"

Parcel 1:

Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho lying westerly and southerly of the following 3 portions of said Government Lot 5 described as follows:

Beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, bears South 53°39.5' East, 2383.1 feet; thence South 89°50' West 150 feet to Corner No. 2; thence North 0°10' West 849.3 feet to corner No. 3; thence South 77°10' East 76.9 feet to Corner No. 4; thence South 79°39.5' East 121.5 feet to corner No. 5; thence South 88°18.5' East 93.1 feet to Corner No. 6; thence South 27°52' East 112.6 feet to Corner No. 7; thence South 7°40.5' West 64.4 feet to Corner No. 8; thence South 89°50' West 174.3 feet to Corner No. 9; thence South 0°10' East 611.6 feet to Corner No. 1, the place of beginning

and a parcel of land in Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as beginning at an iron pin that is North 43°40'30" West 1954.70 feet from the Southeast corner of Section 3; thence South 89°50' West, 569.8 feet to a point; thence North 0°10' West 16.57 feet to a point; thence North 68°54' East 516.44 feet to a point; thence South 41°05' East 56.93 feet to a point; thence South 16°44' East 163.50 feet to the point of beginning.

And beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, bears South 38°17' East 1801.9 feet; thence South 89°50' West 233.6 feet to Corner No. 2; thence North 16°44' West 163.5 feet to Corner No. 3; thence North 76°19' East, 154.4 feet to Corner No. 4; thence South 34°10' East 232.6 feet to Corner No. 1, the place of beginning;

Also except any portion lying with the following:

A portion of Government Lots 5 and 6; Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as follows: Beginning at the proportioned 1/16 corner said point being North 0°02'15" West 1323.84 feet from the Southeast corner of said Section 3; thence along the South boundary of said Government Lot 6, South 89°43'48" West 1023.70 feet to the true point of beginning; thence continuing South 89°43'48" West 278.29 feet to a point; thence North 16°43'20" West 124.68 feet to corner No. 2 of the Brown Tract; thence North 89°50'40" East 233.60 feet to corner No. 1 of Brown Tract; thence South 34°09'20" East 143.48 feet to the true point of beginning;

Also except a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho more specifically described as follows:

Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3 2027.13 feet to an iron pin; thence East 70.06 feet to an iron pin which is the point of beginning for this description; thence East 133.82 feet to an iron pin; thence North 0°48'36" West 434.22 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 145 feet plus or minus to a point which is North 0°48'36" West of the point of beginning; thence South 0°48'36" East 475.63 feet to the point of beginning.

Also excepting a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more specifically described as follows: Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3, 2027.13 feet to an iron pin; thence East 203.88 feet to an iron pin which is the point of beginning for this description; thence East 101.18 feet to an iron pin; thence North 0°48'36" West 368.72 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 120 feet, plus or minus to a point which is North 0°48'36" West of the point of beginning; thence continuing South 0°48'36" East 434.22 feet to the point of beginning.

EXHIBIT
433 of 684

A

BUT INCLUDING THE FOLLOWING:

A portion of Government Lot 5, Section 3 Township 49 North, Range 3 W.B.M., Kootenai County, Idaho, more particularly described as follows: Commencing at the South Quarter corner, said Section 3; thence

North 0°48'36" West, along the centerline of said Section 3, 2027.13 feet to an iron pin which is the POINT OF BEGINNING for this description; thence

East 70.06 feet to an iron pin; thence

North 0°48'36" West, 475.63 feet to a concrete monument on the shore of Lake Coeur d' Alene; thence

Northwesterly along the shore of Lake Coeur d' Alene 75 feet plus-or-minus to a concrete monument which is North 0°48'36" West of the POINT OF BEGINNING, said point being the Northwest Corner of Government Lot 5, said Section 3; thence

South 0°48'36" East along the West line of said Government Lot 5, 500 feet to the POINT OF BEGINNING.

APN: 49N03W038D50

PARCEL II:

The Northeast quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. APN: 49N03W035000

EXCEPTING THEREFROM: The Southeast quarter of the Northeast quarter of the Southwest quarter of Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. APN 49N03W0355250

PARCEL III:

The Southeast quarter of the Northwest quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho.

APN: 49N03W035850

2013 AUG 21 AM 9:17

CLERK DISTRICT COURT

Cherry Hillman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

vs.

KIRK-HUGHES DEVELOPMENT, LLC, a
Delaware limited liability company; KIRK-
SCOTT, LTD, a Texas corporation;
INTERNAL REVENUE SERVICE;
TOMLINSON NORTH IDAHO, INC., an
Idaho corporation,

Defendants.

Case No. CV07-8038

JUDGMENT RE: INTEREST AND PRIORITY
IN PROPERTY

The Court, having issued its Memorandum Decision and Order on Plaintiffs' Motion to Declare Interest and Priority in Property,

IT IS ORDERED, ADJUDGED and DECREED:

1. Plaintiffs hold a final and valid Judgment against Kirk-Hughes Development, LLC in the principal amount of \$941,000, with pre-judgment interest of 12% from March 11, 2005 through March 11, 2009, and post-judgment interest as determined by law from March 11, 2009 until paid in full;
2. Plaintiffs hold a valid judgment lien, to the extent of the Judgment, against all real property owned or subsequently acquired by Kirk-Hughes Development, LLC within Kootenai County as of October 28, 2010;

JUDGMENT RE: INTEREST AND PRIORITY

PAGE 1

1 3. Plaintiffs' judgment lien attached to the following parcels of real property on October 28,
2 2010, has priority, and is superior to any interest claimed by Internal Revenue Service,
3 Tomlinson North Idaho, Inc., or Kirk-Scott, Ltd.:

- 4 a. A 14.2 acre parcel identified as APN: 49N03W038050 and more specifically
5 described as Parcel I in the attached Exhibit A;
6 b. A 25.8 acre parcel identified as APN: 49N03W035000 and more specifically
7 described as Parcel II in the attached Exhibit A;
8 c. A 10 acre parcel identified as APN: 49N03W035850 and more specifically described
9 as Parcel III in the attached Exhibit A.
10

11 DONE this 19 day of August 2013.

12
13 Lansing L. Haynes
14 JUDGE LANSING L. HAYNES

15 Presented by: 

16
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22 MICHAEL T. HOWARD, ISB No. 6128
Attorneys for Plaintiffs
23
24
25

26 441730

JUDGMENT RE: INTEREST AND PRIORITY

EXHIBIT "A"

Parcel 2

Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho lying westerly and southerly of the following 3 portions of said Government Lot 5 described as follows:

Beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, bears South 53°39.5' East, 2383.1 feet; thence South 89°50' West 150 feet to Corner No. 2; thence North 0°10' West 849.3 feet to corner No. 3; thence South 77°10' East 76.9 feet to Corner No. 4; thence South 79°39.5' East 121.5 feet to corner No. 5; thence South 88°18.5' East 93.1 feet to Corner No. 6; thence South 27°52' East 112.6 feet to Corner No. 7; thence South 7°40.5' West 64.4 feet to Corner No. 8; thence South 89°50' West 174.3 feet to Corner No. 9; thence South 0°10' East 611.6 feet to Corner No. 1, the place of beginning

and a parcel of land in Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as beginning at an iron pin that is North 43°40'30" West 1954.70 feet from the Southeast corner of Section 3; thence South 89°50' West, 569.8 feet to a point; thence North 0°10' West 16.57 feet to a point; thence North 68°54' East 516.44 feet to a point; thence South 41°05' East 56.93 feet to a point; thence South 16°44' East 163.50 feet to the point of beginning.

And beginning at Corner No. 1, from which the Southeast corner of Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, bears South 38°17' East 1801.9 feet; thence South 89°50' West 233.6 feet to Corner No. 2; thence North 16°44' West 163.5 feet to Corner No. 3; thence North 76°19' East, 154.4 feet to Corner No. 4; thence South 34°10' East 232.6 feet to Corner No. 1, the place of beginning;

Also except any portion lying with the following:

A portion of Government Lots 5 and 6; Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more particularly described as follows: Beginning at the proportioned 1/16 corner said point being North 0°02'15" West 1323.84 feet from the Southeast corner of said Section 3; thence along the South boundary of said Government Lot 6, South 89°43'48" West 1023.70 feet to the true point of beginning; thence continuing South 89°43'48" West 278.29 feet to a point; thence North 16°43'20" West 124.68 feet to corner No. 2 of the Brown Tract; thence North 89°50'40" East 233.60 feet to corner No. 1 of Brown Tract; thence South 34°09'20" East 143.48 feet to the true point of beginning;

Also except a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho more specifically described as follows:

Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3 2027.13 feet to an iron pin; thence East 70.06 feet to an iron pin which is the point of beginning for this description; thence East 133.82 feet to an iron pin; thence North 0°48'36" West 434.22 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 145 feet plus or minus to a point which is North 0°48'36" West of the point of beginning; thence South 0°48'36" East 475.63 feet to the point of beginning.

Also excepting a portion of Government Lot 5, Section 3, Township 49 North, Range 3 WBM, Kootenai County, Idaho, more specifically described as follows: Commencing at the South quarter corner of said Section 3; thence North 0°48'36" West along the centerline of said Section 3, 2027.13 feet to an iron pin; thence East 203.88 feet to an iron pin which is the point of beginning for this description; thence East 101.18 feet to an iron pin; thence North 0°48'36" West 368.72 feet to a concrete monument on the shore of Lake Coeur d'Alene; thence Northwesterly along the shore of Lake Coeur d'Alene 120 feet, plus or minus to a point which is North 0°48'36" West of the point of beginning; thence continuing South 0°48'36" East 434.22 feet to the point of beginning.

BUT INCLUDING THE FOLLOWING:

A portion of Government Lot 5, Section 3 Township 49 North, Range 3 W.B.M., Kootenai County, Idaho, more particularly described as follows: Commencing at the South Quarter corner, said Section 3; thence

North 0°48'36" West, along the centerline of said Section 3, 2027.13 feet to an iron pin which is the POINT OF BEGINNING for this description; thence

East 70.06 feet to an iron pin; thence

North 0°48'36" West, 475.63 feet to a concrete monument on the shore of Lake Coeur d' Alene; thence

Northwesterly along the shore of Lake Coeur d' Alene 75 feet plus-or-minus to a concrete monument which is North 0°48'36" West of the POINT OF BEGINNING, said point being the Northwest Corner of Government Lot 5, said Section 3; thence

South 0°48'36" East along the West line of said Government Lot 5, 500 feet to the POINT OF BEGINNING.

APN: 49N03W038050

PARCEL II:

The Northeast quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. APN: 49N03W035000

EXCEPTING THEREFROM: The Southeast quarter of the Northeast quarter of the Southwest quarter of Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho. APN 49N03W0355250

PARCEL III:

The Southeast quarter of the Northwest quarter of the Southwest quarter, Section 3, Township 49 North, Range 3 West, Boise Meridian, Kootenai County, Idaho.

APN: 49N03W035850

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
via facsimile on August 21st, 2013, to:

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5 Ramsden & Lyons
6 P.O. Box 1336
7 Coeur d'Alene, ID 83816
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CLIFFORD T. HAYES

Clifford T. Hayes
CLERK OF THE DISTRICT COURT



JUDGMENT RE: INTEREST AND PRIORITY
PAGE 3

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 632

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MC

2013 AUG 21 AM 11:00

CLERK DISTRICT COURT

DEPUTY

Patty Balda
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1 Matthew Z. Crotty
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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC and
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. CV13-866
Case No. CV07-8038

**DEFENDANT KIRK-SCOTT, LTD.'s
MOTION TO AMEND/ALTER
JUDGMENT**

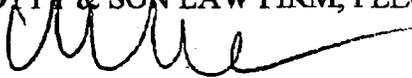
23 Pursuant to I.R.C.P. 59(a)(1)(6)&(7) defendant Kirk-Scott, Ltd. moves the Court for an
24 Order the amends the Court's August 9, 2013, Order and August 19, 2013, judgment in the
25 CV07-8038 case.

26 Kirk-Scott, Ltd's Motion is supported by the Memorandum of Authorities in support of
27 the same, the affidavit of Matthew Crotty, the second affidavit of Balinda Antoine, and the
28

1 Court's record.

2 DATED this 25 day of August 2013.

3
4 CROTTY & SON LAW FIRM, PLLC

5 

6 MATTHEW Z. CROTTY, ISB: 8653

7 421 W. Riverside Ave. Ste 1005

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11 Attorney for Defendant Kirk-Scott, Ltd.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of Aug, 2013, I have emailed the document to the following participants at the addresses listed below

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STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: 632

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CLERK DISTRICT COURT

Patty Boyle
DEPUTY

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6 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC and
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. CV13-866
Case No. CV07-8038

**DEFENDANT KIRK-SCOTT, LTD.'s
MEMORANDUM IN SUPPORT OF
MOTION TO AMEND JUDGMENT**

23 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

24 **I. Introduction.**

25 Plaintiffs sued Delano Peterson, Lenore Peterson, Kelly Polatis, Geraldine Kirk-Hughes,
26 Peter Sampson, Kirk-Hughes Development, LLC, and Kirk-Hughes Associates, Ltd. in 2007
27 and obtained a default judgment for \$941,000 against all but the Peterson defendants on March
28

1 11, 2009. Kirk-Scott, Ltd. was not a party to the 2007 action and did not know of the 2009
 2 default judgment's existence until February 22, 2013 - - - the day Plaintiffs served Kirk-Scott
 3 with a lawsuit. Plaintiffs' 2013 lawsuit (CV13-866) seeks declaration that the 2009 default
 4 judgment is superior to a deed of trust of which Kirk-Scott is the beneficiary.

5 Kirk-Scott, who never had opportunity to defend its interests in the 2007 action,
 6 immediately commenced discovery. Discovery revealed (a) that Mr. Golub testified, under oath
 7 in September 2007, that he did not have a claim to over half of the \$941,000, (b) that Mr. Golub
 8 recovered some of the \$941,000 from the Peterson defendants via a July 2010 settlement, (c)
 9 that Mr. Golub re-recorded the default judgment in October 2010 but did not deduct the monies
 10 he recovered from the Petersons when he re-recorded the judgment, and (d) that Mr. Golub had
 11 extensive dealings with Balinda Antonie, Kirk-Scott's president - - - a fact that Mr. Golub, again
 12 under oath, denied in a declaration that he filed in support of his summary judgment motion.

13 On June 24, 2013, Kirk-Scott moved to vacate the default judgment under I.R.C.P.
 14 60(b)(4)(5)&(6). On July 9, 2013, the Court heard oral argument on Kirk-Scott's motion and
 15 Plaintiffs' motion for summary judgment. At oral argument the Court, over Kirk-Scott's
 16 objection, allowed Plaintiffs to file an affidavit (which contained a declaration signed by
 17 Geraldine Kirk-Hughes and dated October 13, 2010) for the proposition that Kirk-Scott and its
 18 president Balinda Antoine were aware of the default judgment. Notwithstanding the undisputed
 19 fact that the declaration did not mention Kirk-Scott or Balinda Antoine, the Court allowed its
 20 admission and, on August 9, 2013, denied Kirk-Scott's motion to vacate because (a) Kirk-Scott
 21 did not provide evidence as to when it became aware of the March 11, 2009, default judgment
 22 and (b) the Court did not award Plaintiffs (in the default judgment) more than what was asked
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1 for in the 2007 Complaint.

2 Kirk-Scott requests that the Court reconsider points (a) and (b), above regarding the
3 August 9, 2013, Order and also alter/amend the Court's August 19, 2013, "Judgment re: Interest
4 and Priority in Property" for the reasons stated below.

5 **2. Summary of argument - point (a).**

6 Kirk-Scott moves that the Court amend its August 9, 2013, Order as allowed by I.R.C.P.
7
8 59(a)(1)&(7) regarding the Court's holding that Kirk-Scott's motion to vacate failed because
9 Kirk-Scott failed to provide evidence as to "when" it became aware of the default judgment. The
10 Court's holding and July 9, 2013 ruling that admitted the late-filed declaration is:

11 (i) Factually incorrect because up until February 22, 2013, Kirk-Scott did not know
12 of the March 11, 2009 default judgment. Indeed, as part of its June 24, 2013, Motion to Vacate
13 Kirk-Scott cited, as evidence, Plaintiffs' service on Kirk-Scott:
14

15 Plaintiffs' February 22, 2013, service of the CV13-866 [action] put
16 Kirk-Scott on notice that Plaintiffs, via the March 11, 2009, default
17 judgment (which Plaintiffs attached to the complaint as an exhibit),
18 had an interest in real property owned by Kirk-Scott.

19 Based on that evidence Kirk-Scott argued:

20 Kirk-Scott was unaware of Plaintiffs' desire to foreclose upon
21 Kirk-Scott's property until Kirk-Scott was served [with the 2013
22 Complaint on 2/22/13];

23 (ii) Legally incorrect because the Court' holding that Kirk-Scott, a non-party to the 2007
24 Complaint, must prove "when" it became aware of the default judgment is contrary to I.R.C.P.
25 60(b)(4)(5)&(6). Nothing in the rule requires a non-party to the action in which the default
26 judgment was obtained (here the 2007 action of which Kirk-Scott was not a party) to prove
27 "when" it became aware of a default judgment affecting a stranger (here the defendants in the
28

2007 action); and,

(iii) Prevented Kirk-Scott from having a fair trial by allowing the late submission of the 2010 Kirk-Hughes declaration as Kirk-Scott did not have opportunity to respond to that late submission. Kirk-Scott submits the Second Affidavit of Balinda Antoine to rebut Plaintiffs' late filed affidavit. Ms. Antoine's affidavit clearly states that Kirk-Scott did not know of the default judgment until February 22, 2013. As such, the Court should do what the facts and law compel and amend its August 9, 2013, order to show that Kirk-Scott established "when" it learned of the default judgment.

3. Summary of argument - point (b).

The Court should, under I.R.C.P. 59(a)(6): (1) amend its holding that the default judgment did not award more than what was prayed for in the 2007 complaint; (2) amend the August 9, 2013, order and August 19, 2013, judgment to reflect that the evidence shows that Plaintiffs are not entitled to any of the \$941,000; (3) amend the August 9, 2013, order to address Kirk-Scott's I.R.C.P. 60(b)(5) & (6) motions; (4) amend the August 9, 2013 order and August 19, 2013, judgment to reflect that the \$941,000 default judgment should be reduced because allowing it to stand untouched is contrary to the Idaho (and U.S.) Supreme Court's bar on allowing a party to recover twice for the same wrong - - - and the evidence before the Court is that Mr. Golub has recovered twice in the 2007 lawsuit;¹ and (5) amend the August 9, 2013, order to address Alan Golub's credibility.

Kirk-Scott, Ltd.'s Motion to Amend should be granted.

¹ Allowing such a double recovery also prevents Kirk-Scott from having a fair-trial under I.R.C.P. 59(a)(1).

II. ARGUMENT

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A. Motion to Amend standard.

Kirk-Scott brings its Motion to Amend/Alter the August 9, 2013, order and August 19, 2013, judgment under I.R.C.P. 59(a)(1), (6), and (7) and I.R.C.P. 59(e).

Under I.R.C.P. 59(a)(1), Kirk-Scott must show "[i]rregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial."

Under I.R.C.P. 59(a)(6), Kirk-Scott must establish "[i]nsufficiency of the evidence to justify the verdict or other decision, or that it is against the law" by setting forth factual grounds with particularity. *See Scafco Boise, Inc. v. Rigby*, 98 Idaho 432, 434 (1977). The factual grounds must establish where the evidence was insufficient or where the court erred. *Paullus v. Liedkie*, 92 Idaho 323, 326 (1968). "The object of the rule is to exclude evidence that is irrelevant to the specified fact and to notify the opposing party of the particular finding questioned so that he may fairly present evidence bearing on the matter." *Scafco*, 98 Idaho at 434. When a motion for a new trial is based on the ground of insufficient evidence to justify the verdict, "the trial court must weigh the evidence presented at trial and grant the motion only where the verdict is not in accord with its assessment of the clear weight of the evidence." *Pocatello Auto Color, Inc. v. Akzo Coatings, Inc.*, 127 Idaho 41, 45 (1995). When ruling on such a motion the "trial court must independently assess the credibility of the witnesses." *Mendenhall v. MacGregor Triangle Company*, 83 Idaho 145, 150 (1961).

Under I.R.C.P. 59(a)(7), Kirk-Scott must show "[e]rror in law, occurring at the trial."

1 Lastly, a new trial should not be granted under Rule 59 "unless it appears that a different
2 result would follow a retrial." *Blaine v. Byers*, 91 Idaho 665, 671 (1967).

3 **B. The Court misapprehended the law in denying Kirk-Scott's motion to vacate**
4 **because (1) Kirk-Scott did not need to prove when it first became aware of the default**
5 **judgment, (2) the record reflects that Kirk-Scott became aware of the default judgment in**
6 **February 2013, (3) a plain reading of Plaintiffs' 2007 complaint does make any of the**
7 **defendants liable for \$941,000, and (4) the Court didn't even address Kirk-Scott's I.R.C.P.**
8 **60(b)(5) & (6) motions to vacate.**

9 **1. The Court misapprehended the law in denying Kirk-Scott's motion to vacate.**

10 The Court's August 9, 2013, opinion states that Kirk-Scott "provided no evidence to the
11 Court as to when it became aware of the judgment in question." (Opinion at 3) The Court cites
12 *McGrew v. McGrew*, 139 Idaho 551, 563 (2003) in support. The Court's August 9, 2013,
13 opinion should be amended under I.R.C.P. 59(a)(1), (6) & (7).

14 *McGrew* is distinguishable and the August 9, 2013, order should be amended under Rule
15 59(a)(7) to reflect the same. *McGrew*, a divorce action, involved Party A suing Party B, Party A
16 obtaining a default judgment against Party B, and Party B moving under Rule 60 to vacate the
17 default judgment. *McGrew* found that Party B's motion to vacate the default judgment was
18 untimely because it was filed on April 1, 1999, but that Party B did not move to vacate the
19 default judgment until February 13, 2001 - twenty-one months later. *McGrew* at 559. Had Kirk-
20 Scott been a party to the 2007 action where the default judgment was obtained, *McGrew* would
21 arguably apply. But Kirk-Scott was not a party to the 2007 action. And since Kirk-Scott was not
22 a party to the 2007 action the issue of whether it became aware of the default judgment *before*
23 Plaintiffs sued (and served) Kirk-Scott (in 2013) to enforce the default judgment is irrelevant.
24

25 This case involves A (Golub) suing B (Kirk-Hughes), A obtaining a default judgment
26 against B, and, years later, A (Golub) suing C (Kirk-Scott) in an attempt to foreclose upon the
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1 default judgment it obtained against B (Kirk-Hughes). The Court's opinion implicitly mandates
2 that non-party C (Kirk-Scott) has an obligation to monitor *and actively participate in* the legal
3 events involving parties A and B and that party C's failure to intervene in matters (here by
4 allegedly failing to prove "when it became aware of the judgment in question") involving party B
5 renders party C's collateral attack against the default judgment untimely.
6

7 Illustrated differently: even if Kirk-Scott knew (it didn't, *see infra*) that Plaintiffs obtained
8 a default judgment against Kirk-Hughes Development in 2009, Kirk-Scott had no way of
9 knowing what Plaintiffs intended to do with that default judgment. The Court's ruling essentially
10 requires that Kirk-Scott guess at what Plaintiffs intended to do with the default judgment and
11 then take legal action based off of that guess. Indeed, I.R.C.P. 60(b)(4)(5)&(6), by its express
12 terms, does not require a party to establish "when" it became aware of the default judgment, the
13 Rule requires the motion be brought in a "reasonable time." In order for the Court to
14 affirmatively require non-party C (Kirk-Scott) to prove "when" it became aware of the default
15 judgment some authority must be cited. The Court cites no case (and Plaintiffs cited none in their
16 response brief) for the proposition that a non-party to the action that spawned the default
17 judgment unreasonably delays in moving to vacate a default judgment within 3 months of
18 becoming a defendant to a lawsuit seeking foreclosure on that default judgment.²
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24 ² At oral argument Plaintiffs' counsel, without citation to any authority, argued that Kirk-Scott,
25 Ltd's 51% ownership in Kirk-Hughes Development, LLC somehow imposed a duty on Kirk-
26 Scott to actively monitor *and independently in its personal capacity* participate in the legal
27 affairs of an entity in which it shared an ownership interest. That is not what Idaho law requires.
28 For holding otherwise would impose an impermissible burden on entities who have an ownership
interest in a party to a lawsuit.

2. ***The Court misapprehended the facts in denying Kirk-Scott's motion to vacate.***

The Court held that Kirk-Scott "provided no evidence to the Court as to when it became aware of the judgment in question." (Opinion at 3) The Court should amend its holding under I.R.C.P. 59(a)(1)(6) & (7).

Kirk-Scott provided the following evidence as to "when it became aware of the judgment in question:"

- Kirk-Scott cited Plaintiffs' January 25, 2013, filing of the CV 13-866 declaratory judgment action against Kirk-Scott, Ltd. and others. (Kirk-Scott Reply Br. at 6)
- Kirk-Scott cited Plaintiffs' February 22, 2013, personal service of CV 13-866 case on Balinda Antoine, Kirk-Scott's president, for the proposition that Kirk-Scott "for the first time" received notice that Plaintiffs' claimed an interest adverse to Kirk-Scott's interest on the subject property. *Id.* at 7.
- Kirk-Scott briefed that "[n]o such evidence exists [that Kirk-Scott knew of the default judgment before February 22, 2013] because Kirk-Scott was unaware of Plaintiffs' desire to foreclose upon Kirk-Scott's property until Kirk-Scott was served." *Id.* at 8.

Filed with this brief is the Second Affidavit of Balinda Antoine which reaffirms that neither Kirk-Scott nor Balinda Antoine knew of the existence of the "judgment in question" until February 22, 2013.³

³ Kirk-Scott submits that Ms. Antoine's second affidavit is not needed given the law and facts that were before the Court. Nonetheless, any argument that Ms. Antoine's affidavit is improper should be rejected. At oral argument on July 9, 2013, the Court allowed Golubs' attorney (over Kirk-Scott's objection) to submit - that day - a bankruptcy declaration of Ms. Kirk-Hughes. Golubs' attorney submitted that declaration for the purpose of establishing that Kirk-Scott knew of the default judgment's existence. Accordingly, the irregularity of the Court's July 9, 2013, decision, which allowed the filing of evidence the day of the hearing without giving Kirk-Scott opportunity to respond, dictates that Ms. Antoine's affidavit be considered to rebut Plaintiffs' untimely filing under I.R.C.P. 59(a)(1). Put differently: Kirk-Scott did not get a fair trial because it did not have time to respond to Plaintiffs' July 9, 2013, submission.

1 Accordingly, the Court should amend its judgment to reflect that Kirk-Scott's motion to
 2 vacate the default judgment was timely because the motion to vacate was made within three
 3 months of Kirk-Scott becoming aware of the existence of the default judgment. The Court
 4 should also amend its judgment, by vacating the 2009 default judgment, under I.R.C.P.
 5 60(b)(4)(5) & (6).

6
 7 **3. The Court misapprehended the law and facts in determining that it had**
 8 **jurisdiction to award Plaintiffs a default judgment in excess of the**
 9 **relief prayed for in the 2007 Complaint.**

10 The Court further denied Kirk-Scott's motion to vacate claiming that "a fair and complete
 11 reading of the 2007 Complaint reveals that Plaintiffs were claiming they were wrongfully and
 12 unlawfully deprived of \$941,000 in commission plus interest in the sale of certain property."
 13 (Opinion at 3) The Court's decision should be reconsidered under I.R.C.P. 59(a)(6)&(7) as it is
 14 an error of law.

15 The 2007 Complaint pleads five causes of action. (Crotty Aff. at Ex. 2, pg. 5-8) Each
 16 cause of action pled that "Golub has been damaged in an amount to be proven at trial." *Id.* The
 17 2007 Complaint's prayer for relief asked that "Judgment be granted in favor of Plaintiffs on all
 18 claims in an amount to be proven at trial, but more than the jurisdictional limit in excess of
 19 \$10,000.00." *Id.* at Ex. 2, pg. 8. Plaintiffs' 2007 Complaint makes one reference to \$941,000 and
 20 that reference reads: "Peterson did not pay Golub the \$941,000 commission under the Listing
 21 Agreement and Golub lost his interest in the Adkinson Property."
 22

23 Accordingly, a "fair and complete" reading of the 2007 Complaint reveals (1) that
 24 Peterson (two of the seven defendants in the 2007 action) did not pay Golub \$941,000 but that
 25 (2) Golub did not seek \$941,000 against Peterson (or any other defendant) but, instead, "an
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1 amount to be proven at trial." Therefore, under *Angel v. Mellen*, 48 Idaho 750, 285 P. 461, 461
 2 (1930), the \$941,000 amount the Court awarded Golubs not only exceeded the relief sought in
 3 the complaint but was also in gross excess to what Mr. Golub, himself, admits he is entitled to.
 4 *See infra.*

5 **4. The Court did not address Kirk-Scott's I.R.C.P. 60(b)(5) & (6) motions.**

6 The Court should amend its August 9, 2013, Order to address Kirk-Scott's I.R.C.P.
 7 60(b)(5)&(6) motions. For reasons unknown to Kirk-Scott the Court did not address Kirk-Scott's
 8 Rule 60(b)(5)&(6) motions. Kirk-Scott requests that the Court do so.

9 **C. The Court's decision is an injustice as it allows Mr. Golub to maintain a \$941,000**
 10 **default judgment when the record undisputedly reflects that Mr. Golub is not entitled to**
 11 **any of that amount.**

12 **1. The record reflects that Mr. Golub is entitled to none of the \$941,000.**

13 The Court's August 9, 2013, order and August 19, 2013, judgment allows Mr. Golub's
 14 \$941,000 default judgment to stand. The \$941,000 number should be reduced under I.R.C.P.
 15 59(a)(6) because there is insufficient evidence to justify the \$941,000 award. To wit:

- 16 • Alan Golub claims he is entitled to \$941,000 based on a "listing agreement" he signed with Delano Peterson. (Crotty Aff. at Ex. 2, pg. 12)
- 17 • The "listing agreement" states that "should the gross sale of [the Peterson] property exceed [a total of \$4.4 million], the excess will be shared equally (50/50) between Petersons and Stenberg [sic]. (Crotty Aff. at Ex. 2, ppg. 12-13)
- 18 • Plaintiffs admit that the Peterson property sold for \$5 million. (Crotty Aff. at Ex. 2, pg. 20)
- 19 • \$5 million - \$4.4 million = \$600,000.00. Per the "listing agreement" the \$600,000 is to be split between Golub and Peterson. Golub gets \$300,000 and Peterson gets \$300,000.

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- The record reflects that total commission of \$300,000 (not the \$941,000) should be reduced even further given that Golub admits that Darlene Moore is entitled to \$109,640 of the commission and that Tomlinson Black is entitled to \$191,870 of the commission. (Crotty Aff. at Ex. 1 *citing* Golub Dep. at 147:9-25; 148:1-17; 193:3-18)

Accordingly, based on Plaintiffs' evidence Mr. Golub's commission is zero and the default judgment should be reduced to that amount because that is exactly what the evidence shows.

2. The Court's ruling improperly allows Plaintiffs to recover twice.

The Court's August 9, 2013, order and August 19, 2013, judgment, which leave Plaintiffs' \$941,000 default judgment untouched, allow Plaintiffs to recover twice. Such an order/judgment is contrary to I.R.C.P. 59(a)(1)(6)&(7) and should be altered to account for the monies the plaintiffs have already received from the Petersons. Plaintiffs do not dispute:

- On March 11, 2009, Mr. Golub obtained a default judgment in the 2007 action it brought against Delano Peterson, Lenore Peterson, Kelly Polatis, Geraldine Kirk-Hughes, Peter Sampson, Kirk-Hughes Development, LLC, and Kirk-Huges Associates. (Howard Aff. Ex. 8)
- On or about July 8, 2009, Mr. Golub settled his claims with defendants Delano and Lenore Peterson. (Crotty Aff. at Ex. 2, pg. 40, lines 5-6)
- On July 15, 2010, defendants Delano and Lenore Peterson filed a "Full Satisfaction of Mediated Settlement Agreement." (Crotty Aff. at Ex. 2, at pg. 46-48)
- On October 28, 2010, Mr. Golub recorded the March 11, 2009, Judgment. (Howard Aff. at Ex. 8)
- The re-recorded Judgment *did not* take into account the amount Mr. and Mrs. Golub received from the Peterson defendants as a

1 result of the July 2010 settlement - - - it sought the same \$941,000
2 amount as before. *See id.*

3 Kirk-Scott moved to compel Plaintiffs to disclose the exact amount of settlement monies
4 the Plaintiffs received from Mr. Golub. The Court rendered the motion to compel moot in its
5 August 9, 2013, Order. (Opinion at 6) The Court's Order allows Plaintiffs to recover twice (once
6 from the Petersons and a second time from the remaining defendants in the 2007 Complaint, and
7 now, Kirk-Scott). Such a holding, which was confirmed in the Court's August 19, 2013,
8 "Judgment re: Interest and Priority in Property", prevented Kirk-Scott from having a fair trial as
9 Kirk-Scott did not get to obtain, via the now-mooted motion to compel, evidence of money that
10 Golubs obtained as it is undisputed that the \$941,000 judgment would be reduced by that
11 amount.
12

13 The Idaho Supreme Court hold that "there can only be one award of damages for a single
14 injury" and "the trial court may reduce the judgment to a single recovery, if it believes the jury
15 awarded a party twice for the same injury." *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 31
16 (2005). Here Golub admits to recovering twice:
17

18 Q. So is it fair to say by July 15th, 2010, you, the plaintiff in the
19 CV-2007-8038 lawsuit, had reached a full satisfaction of mediated
20 settlement agreement against defendants Lenore Peterson and
21 Delano Peterson?

22 A. Yes, sir.

23 Q. Okay. I'm going to represent to you that 10/28/2010 is the
24 date that this judgment, Exhibit B, was recorded with the Kootenai
25 County auditor. You understand that?

26 A. Yes, sir.
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Q. And the judgment that was rerecorded with the Kootenai County auditor on October 28th, 2010, was for \$941,000. Do you understand that?

A. Yes, sir.

Q. Okay. So my question to you is why didn't you reduce the \$941,000 that you got in this judgment of March 11th, 2009, based off of what you received from the Petersons?

A. It wasn't disclosed and I had a judgment and I didn't have to do it.

Q. Okay. So you're trying to recover twice then?

A. The judgement was the judgment and I'm just recovering what the judgment was, what our judgment was for.

Q. Okay. The judgment was for \$941,000?

A. Yes.

Q. And you received some of that, you can't tell me what, from the Petersons; right?

A. Yes.

Q. And you received that on July -- on or about July 15th, 2010?

A. Yes.

Q. And then in October 28th of 2010 you re-recorded the judgment still asking for \$941,000; right?

A. Correct.

Q. Even though you've been paid some of it already?

A. Yes.

Q. So you're trying to get paid twice to some extent; right?

1 A. The judgment is what it is. There are other costs involved
2 with years of attorneys' fees and so forth. The answer is the
3 judgment -- I just stand for what the judgment was.

4 Q. Do you think that's fair?

5 A. The answer is we received nothing all these years and the
6 answer is, yes, I think it is fair. (Campbell Aff. citing Golub Dep.
7 at 88-90)

8 Allowing such a result works an injustice. The United States Supreme Court, like the
9 Idaho Supreme Court, holds that there can be only one recovery of damages for one wrong or
10 injury. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) ("[I]t goes without saying that the
11 courts can and should preclude double recovery by an individual."); *Nizan v. Wells Fargo Bank*
12 *Minnesota Nat. Ass'n*, 274 Va. 481, 491 (2007)("The defense of double recovery is thus rooted in
13 common law and equitable principles..."); *Meade v. Stonaker*, 183 W. Va. 66, 69 (1990)("Double
14 recovery of damages is not permitted; the law does not permit a double satisfaction for a single
15 injury. A plaintiff may not recover damages twice for the same injury simply because he has two
16 legal theories."); *S. California Fed. Sav. & Loan Ass'n. v. United States*, 422 F.3d 1319, 1332-33
17 (Fed. Cir. 2005)("The purpose of damages for breach of contract is generally to put the wronged
18 party in as good a position as he would have been had the contract been fully performed. In light
19 of this general purpose, a wronged party is typically not allowed to recover twice for the same
20 harm, here a breach of contract.").

21 Here it is undisputed that Golub has already been paid, by Peterson, some of the
22 \$941,000 he claims Kirk-Scott, among others, still owes him. The Court should not let Plaintiffs'
23 sleight of hand lie. The Court should compel the Plaintiffs to inform Kirk-Scott of the amount
24 the Petersons paid and amend the default judgment accordingly.
25
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3. **The court should address Mr. Golub's credibility on reconsideration.**

When ruling on a motion for reconsideration the "trial court must independently assess the credibility of the witnesses." *Mendenhall*, 83 Idaho at 150.

The Court's August 9, 2013, opinion does not address Mr. Golub's credibility. It should.

Mr. Golub testified in his May 3, 2013, affidavit that he "never had any dealings with Balinda Antoine" but in his September 25, 2007, deposition he testified to the exact opposite - - that he had extensive personal dealings with Ms. Antoine insofar as Golub, personally, directed his efforts at Ms. Antoine knowing that she was the lynch-pin in ensuring that the property development project was funded. (Crotty Aff. at Ex. 1 *citing* Golub Dep. at 80:25; 81, 82:1-9; Golub Aff. at ¶4; Golub Aff. at ¶14; Howard Aff. at Ex. 5, pg. 2) Mr. Peterson, the individual with whom Mr. Golub entered into the above-referenced listing agreement, fired Mr. Golub because of Mr. Golub's failure to communicate and the Idaho authorities fined Mr. Golub for actions relating to the real estate listing agreement. (Campbell Aff. *citing* Golub Dep. at 74-77) Mr. Golub' simply lacks the credibility⁴ to claim he had no actual or constructive knowledge of the Kirk-Scott deed of trust's existence and this Court should not accept his statements as the ground truth in this case.

Assessing Mr. Golub's credibility (or lack thereof) is necessary to assist the Court in reconsidering whether the evidence supports reduction of the \$941,000 default judgment amount.

C. Granting the motion to amend will allow a different result at trial.

⁴ Additionally, Mr. Golub's failure to account for the Peterson settlement when he re-recorded his default judgment and initial claim for \$941,000 (of which he, at best, only has a right to half) further calls his credibility into question. (Campbell Aff. *citing* A Golub Dep. at 60-64)

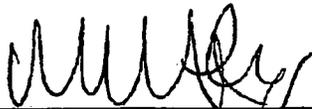
1 Amending the August 9, 2013, Order on any of the points above will allow a different
 2 result to take place at trial. Holding that Kirk-Scott does not need to establish "when" it learned
 3 of the default judgment (pre-2013) will allow the Court to address Kirk-Scott's I.R.C.P.
 4 60(b)(4)(5) & (6) arguments and, in turn, allow a different result at trial for the reasons set out in
 5 Kirk-Scott's Rule 60(b)(4)(5)&(6) arguments. Holding that the default judgment awarded more
 6 than what was prayed for in the 2007 complaint will result in the jury considering Mr. Golub's
 7 admission that he was not entitled to half of the \$941,000 commission, Mr. Golub's poor
 8 credibility, and the evidence which shows that Mr. Golub is entitled to no commission what-so-
 9 ever. Certainly a jury would have trouble awarding \$941,000 to a man who got fired by his real
 10 estate client and sanctioned by the Idaho Real Estate Commission.
 11

12
13 **III. CONCLUSION**

14 Kirk-Scott, Ltd's Motion to Amend should be granted.

15 DATED this 21st day of August 2013.
16

17 CROTTY & SON LAW FIRM, PLLC

18 

19
20 MATTHEW Z. CROTTY, ISB: 8653
21 421 W. Riverside Ave. Ste 1005
22 Spokane, WA 99201
23 Telephone: (509) 850-7011
24 Email: matt@crottyandson.com

25 Attorney for Defendants
26
27
28

CERTIFICATE OF SERVICE

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I hereby certify that on the 21st day of August 2013, I have emailed the document to the following participants at the addresses listed below.

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Attorney for Defendant Kirk-Scott, Ltd.

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 632

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CLERK DISTRICT COURT

Matthew Crotty
DEPUTY

PA

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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. CV13-866
Case No. CV07-8038

**AFFIDAVIT OF MATTHEW Z.
CROTTY RE MOTION TO
AMEND/ALTER JUDGMENT**

23 STATE OF WASHINGTON)
24 : ss.
25 County of Spokane)

26 I, MATTHEW Z. CROTTY, being first duly sworn on oath, say:

- 27 1. I am the attorney for Kirk-Scott, Ltd, defendant in the above-captioned actions.
28 2. On July 9, 2013, at 3:00 p.m. I attended oral argument on plaintiffs' motion for

summary judgment, Kirk-Scott's motion to dismiss, and Kirk-Scott's motion to vacate.

3. Immediately prior to the oral argument commencing attorney Mike Howard, counsel for plaintiffs, filed and sought to have admitted, a document titled Affidavit of Mike Howard. That Affidavit contained, as an exhibit, a declaration of Geraldine Kirk-Hughes. The Kirk-Hughes declaration was dated October 13, 2010.

4. Both me and attorney Mike Bissell (counsel for defendants Kirk-Hughes Development, LLC, Geraldine Kirk-Hughes, and others) objected to the late admission of the Kirk-Hughes declaration/Howard Affidavit. The Court admitted the Howard Affidavit (and attached Kirk-Hughes declaration) over our objections.

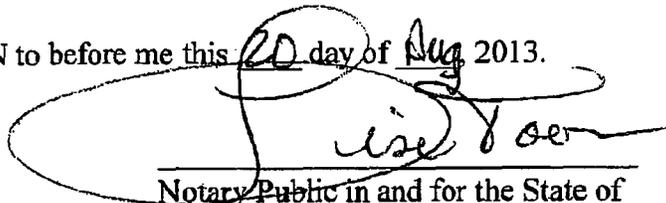
5. In addition, the Court's August 19, 2013, judgment and August 9, 2013, order (which rendered Kirk-Scott's motion to compel moot) prevent Kirk-Scott from getting a fair trial. It is undisputed that Mr. Golub has already been paid, by the Peterson defendants, some of the \$941,000 he obtained via his March 11, 2009 default judgment. Kirk-Scott moved to compel discovery of that amount. Allowing discovery to proceed to determine the amount of money Golub has been paid will (a) reveal that number and (b) enable the Court to reduce the default judgment amount by that number for it is an injustice that Kirk-Scott, a non-party to the action where the default judgment was obtained, will be subject to a judgment that has already been paid.

6. Kirk-Scott was prejudiced by the admission of the Howard Affidavit (and attached Kirk-Hughes declaration) because Kirk-Scott did not have time to submit evidence to rebut what plaintiffs' counsel argued regarding the Affidavit and enclosed declaration. Specifically, the Court let plaintiffs' counsel argue that the declaration was evidence that Kirk-Hughes, Ltd. knew of the existence of plaintiffs' March 11, 2009, default judgment. The Court apparently agreed with plaintiffs' counsel because it denied Kirk-Scott's motion to vacate because Kirk-Scott allegedly failed to provide evidence as to "when" Kirk-Scott was made aware of the default judgment. Had Kirk-Scott been given proper notice of the Howard Affidavit it would have obtained evidence from Kirk-Scott to rebut plaintiffs' argument. That evidence is filed with this affidavit as the Second Affidavit of Balinda Antoine.

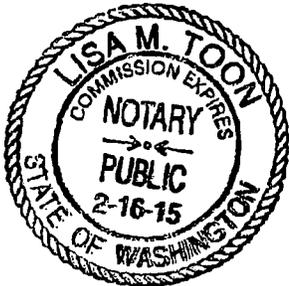


MATTHEW Z. CROTTY

SUBSCRIBED AND SWORN to before me this 20 day of Aug 2013.



Notary Public in and for the State of Washington, residing at Spokane
My commission expires: 2/16/2015



CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August 2013, I have emailed the document to the following participants at the addresses listed below:

Michael T. Howard, ISB No. 6128
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250 Northwest Boulevard, Suite 206
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Attorney for Plaintiffs.

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Attorney for Defendant Tomlinson North Idaho, Inc.

Michael S. Bissell
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Attorney for Defendant Kirk-Hughes Development, LLC

CROTTY & SON LAW FIRM, PLLC



MATTHEW Z. CROTTY
Attorney for Defendant Kirk-Scott, Ltd.

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2. I am the President of Kirk-Scott, Ltd. I am familiar with its books and records, am a custodian of the same, and am aware of how Kirk-Scott's records are maintained. I am authorized to bind Kirk-Scott, Ltd.

3. Kirk-Scott, Ltd. is a one person corporate entity and has been that size since its inception. Kirk-Scott is a company that was created for the purpose of developing property and maintaining those properties. Kirk-Scott has no full-time employees nor has ever had any full-time employees. Again, I am the sole person who occupies a position in Kirk-Scott.

4. On February 22, 2013, I was personally served with a copy of the summons and complaint in the Golub v. Kirk-Scott, et. al. case, CV13-866. The complaint that I was served with contained many exhibits. On February 22, 2013, I read those exhibits, including Exhibit B. Exhibit B of the complaint is titled "Judgment and L.R.C.P. 54(b) Certificate" (the "Judgment"). The Judgment was in the Golub v. Geraldine Kirk-Hughes, et. al. matter, CV07-8038. The Judgment is dated March 11, 2009. Neither my name or Kirk-Scott's name was (or is) mentioned, at all, in the Judgment.

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SECOND AFFIDAVIT OF BALINDA ANTOINE - 2

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
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Phone: 509.850.7011
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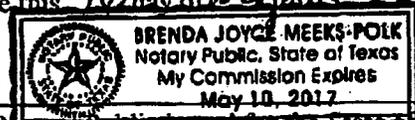
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5. February 22, 2013, was the first time Kirk-Scott, in its corporate capacity (and me in my personal capacity) became aware of the Judgment's existence. To be clear: prior to February 22, 2013, neither Kirk-Scott or the undersigned affiant were aware that Alan Golub and Marilyn Golub had obtained a judgment of any type against any of the defendants in the above-referenced CV07-8038 action or any other legal proceeding.

[Handwritten Signature]
BALINDA ANTOINE

SUBSCRIBED AND SWORN to before me this *16* day of *Aug* 2013

[Handwritten Signature]



Texas, residing at *Tarrant Co.*
My commission expires: *May 10, 2017*

SECOND AFFIDAVIT OF BALINDA ANTOINE - 3

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2013, I have emailed the document to the following participants at the addresses listed below:

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CROTTY & SON LAW FIRM, PLLC



MATTHEW Z. CROTTY
Attorney for Defendant Kirk-Scott, Ltd.

SECOND AFFIDAVIT OF BALINDA ANTOINE - 4

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI } 45
FILED: } 6/2

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CLERK DISTRICT COURT
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Attorneys for Defendant Kirk-Hughes
Development, LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN
GOLUB, husband and wife,

Plaintiffs,

vs.

KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-SCOTT, LTD., a Texas
corporation; INTERNAL REVENUE
SERVICE; TOMLINSON NORTH
IDAHO, INC., an Idaho corporation,

Defendants.

) Case No. CV 2013-866

)
) DEFENDANTS KIRK-HUGHES
) DEVELOPMENT, LLC, KIRK-
) HUGHES & ASSOCIATES, INC.,
) GERALDINE KIRK-HUGHES,
) AND PETER SAMPSON'S
) MOTION TO STAY EXECUTION
) OF WRIT

ALAN GOLUB and MARILYN
GOLUB, husband and wife,

Plaintiffs,

vs.

) Case No. CV 07-8038

DEFENDANTS KIRK-HUGHES DEVELOPMENT, LLC, KIRK-HUGHES &
ASSOCIATES, INC., GERALDINE KIRK-HUGHES, AND PETER SAMPSON'S
MOTION TO STAY EXECUTION OF WRIT - 1

GERALDINE KIRK-HUGHES and)
 PETER SAMPSON, husband and wife;)
 KIRK-HUGHES DEVELOPMENT,)
 LLC, a Delaware limited liability)
 company; KIRK-HUGHES &)
 ASSOCIATES, INC., a Nevada)
 corporation; KELLY POLATIS, an)
 individual, and DELANO D. and)
 LENORE J. PETERSON, husband and)
 wife,)
)
)
 Defendants.)

Defendants Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., and Geraldine Kirk-Hughes and Peter Sampson, husband and wife, by and through their attorney Michael S. Bissell, hereby move the Court to stay the execution of Plaintiffs' judgment. This motion is made pursuant to Rule 62(b).

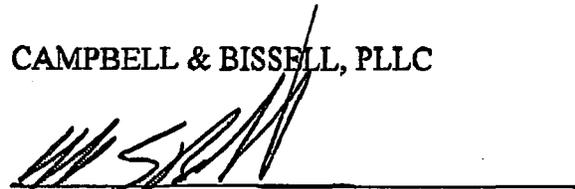
Rule 62(b) grants this Court discretion to stay execution of a judgment pending a motion to alter or amend a judgment made pursuant to Rule 59. I.R.C.P. 62(b). Plaintiffs obtained a writ of execution and seek to execute on real property owned by Defendants. Defendant Kirk-Scott, Ltd. recently filed a Rule 59 motion to amend the Plaintiffs' judgment, and the above named Defendants joined in Kirk-Scott's motion. Under Rule 62(b), the Court has authority to stay execution on a judgment provided that the security of the adverse party is protected. Here, Plaintiffs' writ of execution is against Defendants' real estate. This is not a situation where the Plaintiff is at risk of the property being disposed of. Thus, the Plaintiffs' interests are protected as the real property is not going anywhere. Defendants only request that the Court not allow Plaintiffs to execute on the real estate until after the Court hears Defendants' motion to

DEFENDANTS KIRK-HUGHES DEVELOPMENT, LLC, KIRK-HUGHES & ASSOCIATES, INC., GERALDINE KIRK-HUGHES, AND PETER SAMPSON'S MOTION TO STAY EXECUTION OF WRIT - 2

amend Plaintiffs' judgment. For the foregoing reasons, Defendants respectfully request that this court grant this motion and stay execution pending the previously filed Rule 59 motion.

DATED this 27 day of August, 2013.

CAMPBELL & BISSELL, PLLC



MICHAEL S. BISSELL
Attorneys for Defendants Kirk-Hughes
Development, LLC, Kirk-Hughes &
Associates, Inc., Geraldine Kirk-Hughes,
and Peter Sampson

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**DEFENDANTS KIRK-HUGHES DEVELOPMENT, LLC, KIRK-HUGHES &
ASSOCIATES, INC., GERALDINE KIRK-HUGHES, AND PETER SAMPSON'S
MOTION TO STAY EXECUTION OF WRIT - 3**

CERTIFICATE OF SERVICE

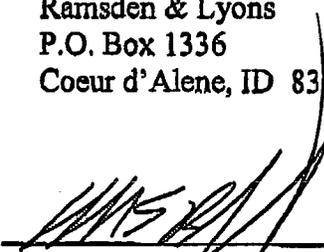
I HEREBY CERTIFY that on the ____ day of August, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

<input type="checkbox"/>	HAND DELIVERY	Michael T. Howard
<input checked="" type="checkbox"/>	U.S. MAIL	Winston & Cashatt, P.S.
<input type="checkbox"/>	OVERNIGHT MAIL	601 W. Riverside #1900
<input type="checkbox"/>	FACSIMILE	Spokane, WA 99201
<input type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Matthew Z. Crotty
<input checked="" type="checkbox"/>	U.S. MAIL	Crotty & Son Law Firm, PLLC
<input type="checkbox"/>	OVERNIGHT MAIL	421 W. Riverside Avenue, Ste. 1005
<input type="checkbox"/>	FACSIMILE	Spokane, WA 99201
<input type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Ryan M. Best
<input checked="" type="checkbox"/>	U.S. MAIL	Best Law, PLLC
<input type="checkbox"/>	OVERNIGHT MAIL	421 W. Riverside Avenue, Ste. 1005
<input type="checkbox"/>	FACSIMILE	Spokane, WA 99201
<input type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Douglas S. Marfice
<input checked="" type="checkbox"/>	U.S. MAIL	Ramsden & Lyons
<input type="checkbox"/>	OVERNIGHT MAIL	P.O. Box 1336
<input type="checkbox"/>	FACSIMILE	Coeur d'Alene, ID 83816
<input type="checkbox"/>	EMAIL	



MICHAEL S. BISSELL

DEFENDANTS KIRK-HUGHES DEVELOPMENT, LLC, KIRK-HUGHES & ASSOCIATES, INC., GERALDINE KIRK-HUGHES, AND PETER SAMPSON'S MOTION TO STAY EXECUTION OF WRIT - 4

2013 SEP -5 PM 2: 27

CLERK DISTRICT COURT

Patty Barkley
DEPUTY *ps*

1 MICHAEL T. HOWARD, ISB No. 6128
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9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,

14 Plaintiffs,

Case No. CV07-8038

15 vs.

GOLUB'S RESPONSE RE: MOTION FOR
STAY OF EXECUTION

16 GERALDINE KIRK-HUGHES and PETER
17 SAMPSON, husband and wife; KIRK-
18 HUGHES DEVELOPMENT, LLC, a Delaware
19 limited liability company; KIRK-HUGHES &
20 ASSOCIATES, INC., a Nevada corporation;
21 KELLY POLATIS, an individual, and
22 DELANO D. and LENORE J. PETERSON,
23 husband and wife,

24 Defendants.

25 **1. INTRODUCTION**

26 Plaintiffs Alan and Marilyn Golub submit this brief in response to Kirk-Hughes Development's
Motion to Stay Execution of Writ.

1 **2. SUMMARY OF RESPONSE**

2 Kirk-Hughes Development's Motion to Stay Execution on the Judgment should be denied. Kirk-
3 Scott's pending motion, while brought under the guise of I.R.C.P. 59(a) is actually a motion for
4 reconsideration of the Court's ruling on its Rule 60(b) motion, which is prohibited by I.R.C.P.
5 11(a)(2)(B). Therefore, I.R.C.P. 62(b) does not give the Court discretion to grant KH Development's
6 requested relief. Additionally, Golub would be prejudiced by the requested stay because he has already
7 initiated efforts to execute on the property and KH Development's interests in the properties are
8 adequately protected.
9

10 **3. FACTUAL / PROCEDURAL BACKGROUND**

11 In 2007 Golub filed suit against Kirk-Hughes Development (KH Development), Geraldine Kirk-
12 Hughes, Delano Peterson, and other Defendants for damages arising from commissions owed on a real
13 estate sales transaction. In March 2009, Golub obtained a \$941,000 default judgment against KH
14 Development and Kirk-Hughes.
15

16 KH Development holds title to four parcels of real property in Kootenai County. Immediately
17 following entry of the Judgment, KH Development filed Chapter 11 bankruptcy in order to stay
18 execution on the Judgment. Golub submitted a claim in the bankruptcy and filed a motion to dismiss the
19 case. Two weeks prior to dismissal of the bankruptcy case, Kirk-Scott, a member of KH Development
20 with 51% ownership, recorded a \$1.3M Deed of Trust against the properties owned by KH
21 Development.
22

23 Following dismissal of the Chapter 11, KH Development filed Chapter 7 bankruptcy, which
24 stayed execution on the Judgment until dismissal of that case in May 2012.
25
26

1 As a result of the Deed of Trust recorded by Kirk-Scott, Golub brought this declaratory action to
2 determine the validity and priority of interests in the property owned by KH Development; Kirk-Scott
3 was made a party the declaratory action, which was consolidated with the prior case.
4

5 Golub filed a Motion for Summary Judgment on the declaratory issues. In response, Kirk-Scott
6 and KH Development filed a Motion under I.R.C.P. 60(b), seeking to vacate Golub's 2009 judgment
7 against KH Development. Following hearing on both motions, the Court entered an Order on August 9,
8 2013, denying Kirk-Scott's Rule 60(b) motion and granting Golub's request for declaratory relief.
9

10 On August 15 a Writ of Execution was issued on Golub's 2009 judgment. On August 21, Kirk-
11 Scott and KH Development filed a "Motion to Amend Judgment" pursuant to I.R.C.P. 59; a Motion that
12 seeks only reconsideration of the Court's ruling on Rule 60(b) Motion. A hearing on that Motion was
13 set for September 27.
14

15 On August 22 Golub delivered the Writ of Execution to the Kootenai County Sheriff, along with
16 the \$1,000 fee and documentation necessary for execution on the KH Development properties, which is
17 set to occur by public auction on September 25, 2013. [See September 5, 2013 Affidavit of Michael
18 Howard, ¶ 3] On August 29 the Kootenai County Sheriff posted the Notice of Sale on the subject
19 properties. [See September 5, 2013 Affidavit of Michael Howard, ¶ 5] On September 5, the first of three
20 Notices was published in the Coeur d'Alene Press, with second and third Notices scheduled for
21 publication on September 12 and 19. [See September 5, 2013 Affidavit of Michael Howard, ¶ 6]
22

23 KH Development has filed this Motion to stay execution on the properties, which is set for
24 hearing without oral argument on September 17, 2013.
25
26

1 **4. ARGUMENT**

2 **4.1 KH Development's request for Stay of Execution cannot be granted under I.R.C.P.**
3 **62(b) because there are no motions pending under I.R.C.P. 59.**

4 KH Development seeks a stay of execution on the Golub's 2009 Judgment until after the
5 September 27 hearing scheduled on its joint I.R.C.P. 59(e) Motion with Kirk-Scott. KH Development
6 bases its Motion on I.R.C.P. 62(b), which grants the Court discretion to stay execution on a Judgment
7 where a motion is pending under I.R.C.P. 59. However, Kirk-Scott's pending Motion cannot be brought
8 under I.R.C.P. 59 because it seeks reconsideration of a ruling on a 60(b) Motion and is therefore
9 prohibited under I.R.C.P 11(a)(2)(B). Therefore, KH Development's I.R.C.P. 62(b) Motion should be
10 denied.

11
12 More specifically, the Court's August 9, 2013 Order addressed three separate motions: 1)
13 Golub's Motion for Declaratory Judgment to determine priority of interest in property; 2) Kirk-Scott's
14 I.R.C.P. 12(b)(6)¹ Motion to Dismiss the declaratory claim; and 3) Kirk-Scott's I.R.C.P. 60(b) Motion to
15 vacate Golub's 2009 Judgment. Kirk-Scott's Motion to Amend Judgment only seeks redress from the
16 Court's denial of its I.R.C.P. 60(b) Motion to Vacate Golub's 2009 Judgment. Kirk-Scott's "I.R.C.P.
17 59" Motion does not contest the Court's ruling on declaration of priorities of interest in the property –
18 only its I.R.C.P. 60(b) collateral attack on Golub's 2009 Judgment. Accordingly, Kirk-Scott's Motion is
19 essentially a Motion for reconsideration of that Order, which is prohibited by I.R.C.P. 11(a)(2)(B).
20 Indeed, Kirk-Scott plainly requests the Court to "reconsider" the Order on its I.R.C.P. 60 Motion under
21 I.R.C.P. 59. [*See Kirk-Scott Memo RE: Motion to Amend, p.3, ln. 2; p. 9, ln.13*]

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26 ¹ This motion was entertained by the Court as a Rule 56 Motion for Summary Judgment because of
 consideration of evidence beyond the pleadings.

1 Idaho Rule of Civil Procedure 11(a)(2)(B) governs motions for reconsideration and provides in
2 relevant part:

3
4 A motion for reconsideration of any interlocutory orders of the trial court may be made at
5 any time before the entry of final judgment but not later than fourteen (14) days after the
6 entry of the final judgment. A motion for reconsideration of any order of the trial court
7 made after entry of final judgment may be filed within fourteen (14) days from the entry
8 of such order; provided, **there shall be no motion for reconsideration of an order of
9 the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a),
10 59(e), 59.1, 60(a), or 60(b).**

11 I.R.C.P. 11(a)(2)(B) (emphasis added)

12 Here, a final Judgment was entered by the Court in March 2009. Kirk-Scott filed a Motion to
13 Vacate that Judgment under I.R.C.P. 60(b), which was denied by the Court's August 9, 2013 Order. The
14 clear language of I.R.C.P. 11 prohibits Kirk-Scott from filing the current Motion to Reconsider that
15 ruling. *See also, Watson v. Navistar Int'l Transp., Corp.*, 121 Idaho 643 (1992). The fact that Kirk-
16 Scott has attempted to couch its motion in terms of a Motion to Amend under I.R.C.P. 59 does not alter
17 the request made: to have the Court reconsider its prior denial of a I.R.C.P. 60(b) Motion.

18 KH Development's Motion to Stay is based upon I.R.C.P. 62(b), which only grants the Court
19 discretion to stay execution of a judgment where a *valid* I.R.C.P. 59 motion is pending. Because Kirk-
20 Scott's pending I.R.C.P.59 Motion is prohibited, KH Development's I.R.C.P. 62(b) Motion should be
21 denied.

22 **4.2 Golub would be prejudiced by the requested stay and KH Development's interests
23 are adequately protected.**

24 A grant of KH Development's Motion would prejudice Golub and further stymie his five years
25 of collection efforts; denial of the Motion would not affect KH Development's interests.

26 KH Development has obstructed Golub's attempts to collect on the Judgment for over five years.
Its current Motion would do no more than further frustrate those attempts. Golub has already delivered

1 the Writ of Execution and supporting documentation to the Kootenai County Sheriff for levy on the
2 properties. Doing so required a fee of \$1,000 to cover the costs of publication, etc. [See September 5,
3 2013 Affidavit of Michael Howard, ¶ 3] The sale is set to occur on September 25, 2013. [See September
4 5, 2013 Affidavit of Michael Howard, ¶ 4] The Sheriff has already posted Notice of the Sale on the
5 properties – a process that took over two hours. [See September 5, 2013 Affidavit of Michael Howard, ¶
6 5] The Notice of Sale has already been sent to affected parties, been published in the Coeur d'Alene
7 Press, and will be published again before this Motion is considered. [See September 5, 2013 Affidavit of
8 Michael Howard, ¶ 6]

10 A grant of KH Development's Motion would prejudice Golub by requiring that he and the
11 Sheriff to go through the entire process again: issuance of a new Notice of Sale; Instructions to the
12 Sheriff; another \$1,000 fee; re-posting of the property by the Sheriff; and additional publication in the
13 Coeur d'Alene Press. At the same time, KH Development's interests are protected, as it retains the right
14 to redeem the property from the purchaser. See I.C. §11-401, 402.

16 Accordingly, notwithstanding the lack of discretion to stay the execution under I.R.C.P. 62(b),
17 the Court should deny KH Development's motion because KH Development's interest in the properties
18 is adequately protected and Golub would be prejudiced otherwise.

19 **5. CONCLUSION**

20 KH Developments' Motion for Stay of Execution should be denied.

21 DATED this 5 day of September, 2013.

22
23
24
25
26

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Attorneys for Plaintiffs

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3 postage prepaid; hand delivered; sent
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MICHAEL T. HOWARD

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CLERK DISTRICT COURT

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9 Attorneys for Plaintiffs

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
11 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB,
13 husband and wife,

14 Plaintiffs,

Case No. CV07-8038

AFFIDAVIT OF MICHAEL T. HOWARD

15 vs.

16 GERALDINE KIRK-HUGHES and PETER
17 SAMPSON, husband and wife; KIRK-
18 HUGHES DEVELOPMENT, LLC, a Delaware
19 limited liability company; KIRK-HUGHES &
20 ASSOCIATES, INC., a Nevada corporation;
21 KELLY POLATIS, an individual, and
22 DELANO D. and LENORE J. PETERSON,
23 husband and wife,

24 Defendants.

25 STATE OF IDAHO)
26 : ss.
County of Kootenai)

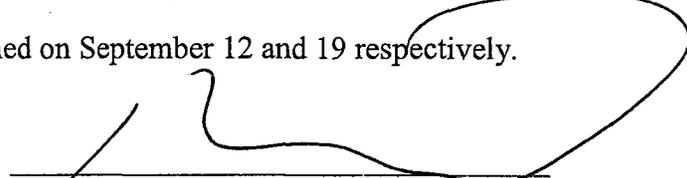
I, MICHAEL T. HOWARD, being first duly sworn on oath, say:

1. That I am the attorney for Plaintiffs, and have knowledge of the facts and circumstances
in this case.

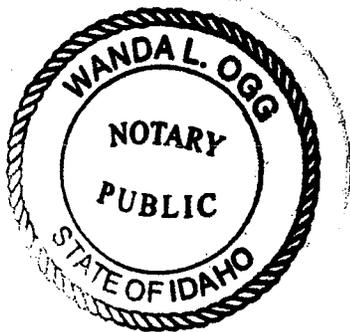
AFFIDAVIT OF MICHAEL T. HOWARD -
PAGE 1

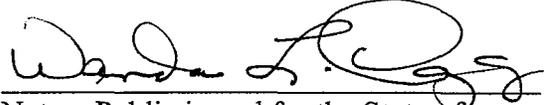
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Phone: (208) 667-2103
479 of 584

2. On August 15, 2013 a Writ of Execution was issued on Golub's money Judgment.
3. On August 22, 2013, I delivered the Writ of Execution to the Kootenai County Sheriff, along with a Notice of Sale, instructions to the Sheriff, and a check for \$1,000 to cover the costs of publication.
4. The Sheriff scheduled a public sale of the subject properties to occur on September 25, 2013 at 10:00 a.m. at the Kootenai County Sheriff's office.
5. On August 29, 2013 I assisted the Kootenai County Sheriff in posting the Notice of Sale on the subject properties. Due to their remote location, that process took over two hours.
6. On September 5, 2013 the first of three Notices was published in the Coeur d'Alene Press. The second and third Notices will be published on September 12 and 19 respectively.


 MICHAEL T. HOWARD

SUBSCRIBED AND SWORN to before me this 5th day of September, 2013.




 Notary Public in and for the State of
 Idaho, residing at Spokane Valley, WA
 My appointment expires April 4, 2017

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
via facsimile on September 5, 2013, to:

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AFFIDAVIT OF MICHAEL T. HOWARD -
PAGE 3

ASSOCIATES, INC., a Nevada)
 corporation; KELLY POLATIS, an)
 individual, and DELANO D. and)
 LENORE J. PETERSON, husband and)
 wife,)
)
 Defendants.)

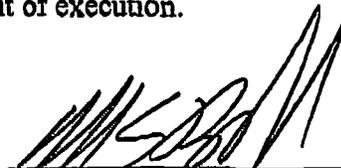
STATE OF WASHINGTON)
)
) ss.
 County of Spokane)

I, MICHAEL S. BISSELL, being first duly sworn upon oath, say as follows:

1. I am an attorney for Defendants Kirk-Hughes Development, LLC, Geraldine Kirk-Hughes, Peter Sampson, and Kirk-Hughes & Associates, Inc. in the above-captioned matter. I have personal knowledge of and am competent to testify concerning the matters contained herein.

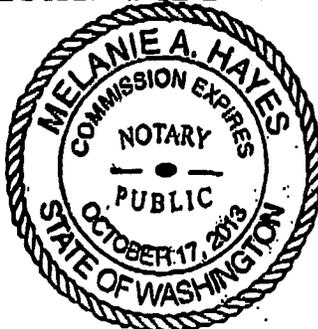
2. I did not receive notice of Plaintiffs' writ of execution until August 22, 2013.

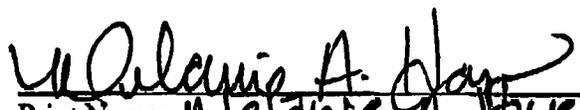
3. I joined in Kirk-Scott, Ltd.'s motion to amend the judgment on August 23, immediately after receiving notice of the writ of execution.



 MICHAEL S. BISSELL

SUBSCRIBED AND SWORN to before me this 9th day of September, 2013.




 Print Name: Melanie A. Hayes
 Notary Public in and for the State of
 Washington, residing at: Deer Park
 My Commission Expires: 10.17.2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9 day of September, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

Michael T. Howard
Winston & Cashatt, P.S.
601 W. Riverside #1900
Spokane, WA 99201

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

Matthew Z. Crotty
Crotty & Son Law Firm, PLLC
421 W. Riverside Avenue, Ste. 1005
Spokane, WA 99201

- HAND DELIVERY
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Ryan M. Best
Best Law, PLLC
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- EMAIL

Douglas S. Marfice
Ramsden & Lyons
P.O. Box 1336
Coeur d'Alene, ID 83816



MICHAEL S. BISSELL

2013 SEP 13 PM 3:57

CLERK DISTRICT COURT
Suzanne
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,)
husband and wife,)
Plaintiffs,)

Case No. CV 07-8038
[Consolidated Case No.: CV 13-866]

vs.)

ORDER RE: KIRK-HUGHES
DEVELOPMENT, LLC, ET AL'S
MOTION TO STAY
EXECUTION OF WRIT

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company;)
KIRK-SCOTT, LTD., a Texas corporation;)
INTERNAL REVENUE SERVICE; TOMLINSON)
NORTH IDAHO, INC., an Idaho corporation,)
Defendants.)

ALAN GOLUB and MARILYN GOLUB,)
husband and wife,)
Plaintiffs,)

vs.)

GERALDINE KIRK-HUGHES and PETER)
SAMPSON, husband and wife; KIRK-HUGHES)
DEVELOPMENT, LLC, a Delaware limited)
liability company; KIRK-HUGHES &)
ASSOCIATES, INC., a Nevada corporation;)
KELLY POLATIS, an individual, and DELANO)
D. and LENORE J. PETERSON, husband and wife,)
Defendants.)

On September 13, 2013, Defendants Kirk-Hughes Development, LLC, Geraldine Kirk-Hughes, Kirk-Hughes & Associates, and Peter Sampson's Motion to Stay Execution of Writ

came on for hearing. No oral argument was requested, and no party or counsel for any party appeared. The Court having reviewed all of the parties' written submissions, and being fully advised, made its oral ruling in open court.

Now therefore, based upon the reasoning provided in open court and pursuant to I.R.C.P. 62(b), this Court, in its discretion, **denies** Defendants' Motion to Stay Execution of Writ.

IT IS SO ORDERED.

Dated this 13 day of September, 2013.

Lansing L. Haynes
LANSING L. HAYNES, District Judge

CERTIFICATE OF SERVICE

On this 13 day of September, 2013, a true and correct copy of the foregoing was mailed in the U.S. Mails, postage prepaid, sent via interoffice mail, or sent via facsimile, addressed to the following (as indicated below):

MICHAEL T. HOWARD
WINSTON & CASHATT
250 Northwest Boulevard, Suite 107A
Coeur d'Alene, ID 83814
Facsimile: 208-765-2121

MICHAEL S. BISSELL
CAMPBELL & BISSELL
Corbet-Aspray House
820 W. 7th Avenue
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Facsimile: 509-455-7111

MATTHEW A. CROTTY
CROTTY & SON LAW FIRM
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Facsimile: 509-703-7957

DOUGLAS MARFICE
RAMSDEN & LYONS
P.O. BOX 1336
Coeur d'Alene, ID 83816
Facsimile: 208-664-5884

CLIFFORD T. HAYES
CLERK OF THE DISTRICT COURT

By 
(Deputy Clerk)

611

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 38

2013 SEP 19 AM 11:40

CLERK DISTRICT COURT

Cathy Victoria
DEPUTY *PS*

1 MICHAEL T. HOWARD, ISB No. 6128
2 WINSTON & CASHATT, LAWYERS, a
3 Professional Service Corporation
4 250 Northwest Boulevard, Suite 206
5 Coeur d'Alene, Idaho 83814
6 Telephone: (208) 667-2103
7 Facsimile: (208) 765-2121
8 mth@winstoncashatt.com

9 Attorneys for Plaintiffs

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

9 ALAN GOLUB and MARILYN GOLUB,
10 husband and wife,
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Plaintiffs,

vs.

13 GERALDINE KIRK-HUGHES and PETER
14 SAMPSON, husband and wife; KIRK-
15 HUGHES DEVELOPMENT, LLC, a Delaware
16 limited liability company; KIRK-HUGHES &
17 ASSOCIATES, INC., a Nevada corporation;
18 KELLY POLATIS, an individual, and
19 DELANO D. and LENORE J. PETERSON,
20 husband and wife,

Defendants.

19 ALAN GOLUB and MARILYN GOLUB,
20 husband and wife,
21
22
23
24
25
26
Plaintiffs,

vs.

22 KIRK-HUGHES DEVELOPMENT, LLC, a
23 Delaware limited liability company; KIRK-
24 SCOTT, LTD, a Texas corporation;
25 INTERNAL REVENUE SERVICE;
26 TOMLINSON NORTH IDAHO, INC., an
Idaho corporation,

Defendants.

Consolidated Case No. CV07-8038

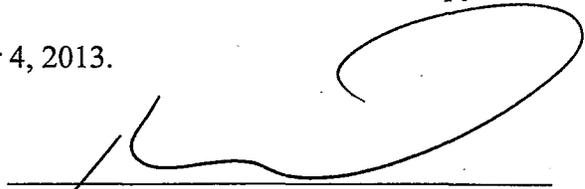
AFFIDAVIT OF MICHAEL T. HOWARD

1 STATE OF IDAHO)
2 : ss.
3 County of Kootenai)

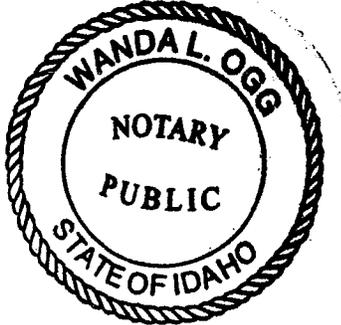
4 I, MICHAEL T. HOWARD, being first duly sworn on oath, say:

5 1. That I am the attorney for Plaintiffs, and have knowledge of the facts and circumstances
6 in this case.

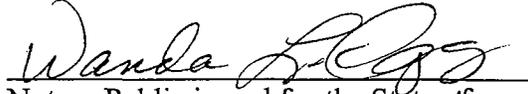
7 2. That attached hereto and marked Exhibit 1 is a true and correct copy of Michael T.
8 Howard's letter to Matthew Crotty dated September 4, 2013.

9
10 
11 MICHAEL T. HOWARD

12 SUBSCRIBED AND SWORN to before me this 19th day of September, 2013.



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Notary Public in and for the State of
Idaho, residing at Spokane Valley, WA
My appointment expires: April 4, 2017

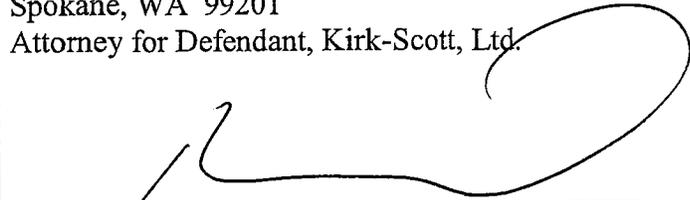
1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
via facsimile on September 20th, 2013, to:

4 Douglas S. Marfice
5 Ramsden & Lyons
6 P.O. Box 1336
7 Coeur d'Alene, ID 83816
8 Fax: (208) 664-5884
9 Attorney for Defendant, Tomlinson North Idaho, Inc.

8 Michael S. Bissell
9 Campbell & Bissell, PLLC
10 Corbet Aspray House
11 820 W. 7th Avenue
12 Spokane, WA 99204
13 Fax: (509) 455-7111
14 Attorney for Defendant, Kirk-Hughes Development, LLC

12 Matthew Z. Crotty
13 Crotty & Son Law Firm, PLLC
14 421 W. Riverside Ave., Suite 1005
15 Spokane, WA 99201
16 Fax: (509) 703-7957
17 Attorney for Defendant, Kirk-Scott, Ltd.

16 Ryan M. Best
17 Best Law, PLLC
18 421 W. Riverside Ave., Suite 1005
19 Spokane, WA 99201
20 Attorney for Defendant, Kirk-Scott, Ltd.

21 
22 MICHAEL T. HOWARD

23 454943
24
25
26

AFFIDAVIT OF MICHAEL T. HOWARD - PAGE 3

Coeur d'Alene Office
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Fax: (208) 765-2121
website: www.winstoncashatt.com

Winston & Cashatt
L A W Y E R S

A Professional Service Corporation

*Winston & Cashatt has offices in Spokane, Washington
and Coeur d'Alene, Idaho*

September 4, 2013

VIA FACSIMILE TO (509) 703-7957

Matthew Z. Crotty
Crotty & Son Law Firm, PLLC
421 W. Riverside Ave., Suite 1005
Spokane, WA 99201

Re: Golub v. Kirk-Hughes

Dear Matt:

This letter is in regard to Kirk-Scott's Motion to Amend filed on August 21, 2013. The purpose of this letter is as a professional courtesy to provide you the choice of withdrawing your motion. In reviewing the motion and drafting my response, it became immediately apparent that this motion is prohibited by IRCP 11(a)(2)(B). More specifically, Kirk-Scott's initial motion to the Court was brought to vacate the judgment against KH Development under IRCP 60(b); that motion was denied by the Court in its August 9, 2013 Memorandum Order. At the same time, the Court granted our motion for summary judgment on our claim for declaratory relief, which was then reduced to Judgment.

Your Motion to Amend is aimed wholly at the Court's ruling on Kirk-Scott's Rule 60(b) motion. The motion is improperly characterized as a Motion to Amend the Judgment under IRCP 59(e), but is instead simply a Motion to Reconsider the Court's Ruling on the Rule 60(b) Motion. Indeed you mention several times that the Court should "reconsider" its decision. Such a motion is clearly prohibited by IRCP 11(a)(2)(B). As such, I do not believe there is a reasonable basis in law or fact to pursue the motion.

Because of this, I would offer you the opportunity to withdraw your motion prior to my bringing the issue to the Court's attention and asking for sanctions for having to do so. I do not intend this as a threat, but simply to advise you of what I perceive to be an obvious error and give you the opportunity to cure it. It is something I would appreciate if the roles were reversed. Because I

C. Matthew Andersen ^{MT}
Beverly L. Anderson
Kevin H. Breck ^{MT}
Patrick J. Cronin ^{MT}
Kevin J. Curtis ^{CA}
Greg M. Devlin ^{MT}
Timothy R. Fischer
David P. Gardner ^{MT}
Scott A. Gingras ^{MT}
Erika B. Grubbs ^{MT}
Golub vs Kirk-Hughes, etal

Jeffrey A. Herbster ^{MT}
Michael T. Howard ^{MT}
Carl E. Hueber ^{MT}
Collette C. Leland ^{MT}
Kammi Mencke Smith ^{MT}
Richard W. Relyea
Jeffrey R. Ropp
Elizabeth A. Tellessen ^{MT}
Lawrence H. Vance, Jr. ^{MT}
Meriwether D. Williams ^{MT}

Of Counsel
Courtney R. Beaudoin ^{MT}
Stephen L. Farnell
Kenneth B. Howard ^{MT}
Fred C. Pflanz
Lynden O. Rasmussen
James E. Reed
Lucinda S. Whaley

Retired
Robert P. Beschel
Richard L. Cease
James P. Connelly
Leo J. Driscoll
Tim M. Higgins

41501-2013 and 41505-2013

EXHIBIT

/ 491 of 584

Matthew Z. Crotty
September 4, 2013
Page 2

have a deadline within which to respond, I'd appreciate knowing your intention no later than Friday, September 6.

Very truly yours,



MICHAEL T. HOWARD

MTH:mth

cc: Michael Bissell (via fax to 509-455-7111)

449920

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2013 SEP 19 AM 11:39

CLERK DISTRICT COURT

Cathy Victoria
DEPUTY *PB*

1 MICHAEL T. HOWARD, ISB No. 6128
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9 Attorneys for Plaintiffs

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,
Plaintiffs,

vs.

GERALDINE KIRK-HUGHES and PETER
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limited liability company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and
DELANO D. and LENORE J. PETERSON,
husband and wife,

Defendants.

ALAN GOLUB and MARILYN GOLUB,
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KIRK-HUGHES DEVELOPMENT, LLC, a
Delaware limited liability company; KIRK-
SCOTT, LTD, a Texas corporation;
INTERNAL REVENUE SERVICE;
TOMLINSON NORTH IDAHO, INC., an
Idaho corporation,

Defendants.

Consolidated Case No. CV07-8038

GOLUB'S RESPONSE RE: MOTION TO
AMEND JUDGMENT

1
2 **1. INTRODUCTION**

3 Plaintiffs Alan and Marilyn Golub submit this brief in response to Kirk-Scott and Kirk-Hughes
4 Development's Motion for New Trial

5 **2. SUMMARY OF RESPONSE**

6 Kirk-Scott's Motion to Amend Judgment is prohibited by I.R.C.P. 11(a)(2)(B) because it is
7 essentially a motion for reconsideration of an order entered on a motion under I.R.C.P. 60(b).
8 Moreover, Kirk-Scott's Motion is simply a restatement of its previous arguments and provides no new
9 factual or legal basis for relief. Because Kirk-Scott's Motion has no basis in law or fact, the Court
10 should award sanctions to Golub for the time required to respond to Kirk-Scott's motion.

11 **3. FACTUAL / PROCEDURAL BACKGROUND**

12 In 2007 Golub filed suit against Kirk-Hughes Development (KH Development), Geraldine Kirk-
13 Hughes, Delano Peterson, and other Defendants for damages arising from commissions owed on a real
14 estate sales transaction. In March 2009, Golub obtained a \$941,000 default judgment against KH
15 Development and Geraldine Kirk-Hughes; Golub settled his claims against Peterson. KH Development
16 did not pursue an appeal of that Judgment.

17 KH Development subsequently filed Chapter 11 Bankruptcy in Las Vegas, Nevada. That
18 bankruptcy placed a stay on Golub's attempts to collect on the judgment. A month prior to dismissal of
19 the bankruptcy, while the automatic stay was in effect, Kirk-Scott, Ltd., a Texas entity wholly owned by
20 Kirk-Hughes' sister, Balinda Antoine, recorded a \$1.3M Deed of Trust in property owned by KH
21 Development. A month later KH Development's bankruptcy was dismissed and Golub recorded his
22 Judgment.

23 In March 2013 Golub brought this declaratory action to determine the validity and priority of
24 interests in the property owned by KH Development. Because of its recorded Deed of Trust, Kirk-Scott
25 was made a party the declaratory action.

26 Golub filed a Motion for Summary Judgment on their declaratory action and Kirk-Scott filed a
response. Additionally, Kirk-Scott filed a Motion under I.R.C.P. 60(b) collaterally attacking Golub's
2009 judgment against KH Development, which KH Development joined. However, in attempting to
prove that the Motion was made "within a reasonable time," as required by the rule, Kirk-Scott failed to

1 provide any admissible evidence as to when Kirk-Scott became aware of Golub's judgment; only
2 argument from its counsel.

3 On August 9, 2013 the Court entered an Order; 1) granting Golub's Motion for Summary
4 Judgment on the declaratory claims, and 2) denying Kirk-Scott's Rule 60(b) Motion. A Judgment on
5 Golub's declaratory claim was entered August 21, 2013. Kirk-Scott and KH Development now seek
6 reconsideration of the Court's denial of their Rule 60(b) motion under the guise of a Rule 59 Motion to
Alter or Amend the Judgment.

7 4. ARGUMENT

8 4.1 Kirk-Scott's Motion should be denied because it is an improper motion to reconsider under I.R.C.P. 11(a)(2)(B).

9 4.1.1 Kirk-Scott's Motion is made under I.R.C.P Rule 59(e).

10 Kirk-Scott states that it brings its Motion to Amend the Judgment under I.R.C.P. 59(a)(1), (6),
11 and (7). By its terms, I.R.C.P. 59(a) allows for grant of a new trial where one has occurred. Where, as
12 here, no trial took place, Kirk-Scott's Motion under I.R.C.P. 59(a) cannot be sustained and any
13 assertions or argument relying upon I.R.C.P. 59(a) should be rejected. It is therefore presumed that
14 Kirk-Scott's Motion is made pursuant to I.R.C.P. 59(e) and will be addressed by Golub as a Motion to
15 Amend under that rule.

16 4.1.2 Kirk-Scott's Motion is an improper motion to reconsider a Rule 60(b) Order.

17 The Court's August 9, 2013 Order addressed three separate motions: 1) Golub's Motion for
18 Declaratory Judgment to determine priority of interest in property; 2) Kirk-Scott's I.R.C.P. 12(b)(6)¹
19 Motion to Dismiss the declaratory claim; and 3) Kirk-Scott's I.R.C.P. 60(b) collateral attack on the
20 underlying Judgment. Kirk-Scott's Motion here only seeks redress from the Court's ruling on its motion
21 for relief from judgment under Rule 60(b). More specifically, Kirk-Scott does not contest the Court's
22 ruling on declaration of priorities of interest in the property – only its Rule 60(b) collateral attack on the
23 underlying judgment. Accordingly, Kirk-Scott's Motion is essentially a motion for reconsideration of
24 that order, which is prohibited by I.R.C.P. 11(a)(2)(B). Indeed, Kirk-Scott plainly requests the Court to
25 “reconsider” the Order on its Rule 60 Motion under I.R.C.P. 59. [*See Kirk-Scott Memo RE: Motion to
Amend, p.3, ln. 2; p. 9, ln.13*]

26 ¹ This Motion was entertained by the Court as a Rule 56 Motion for Summary Judgment because of
consideration of evidence beyond the pleadings.

1 Idaho Rule of Civil Procedure 11(a)(2)(B) governs motions for reconsideration and provides in
2 relevant part:

3 A motion for reconsideration of any interlocutory orders of the trial court may be made at
4 any time before the entry of final judgment but not later than fourteen (14) days after the
5 entry of the final judgment. A motion for reconsideration of any order of the trial court
6 made after entry of final judgment may be filed within fourteen (14) days from the entry
7 of such order; provided, **there shall be no motion for reconsideration of an order of
8 the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a),
9 59(e), 59.1, 60(a), or 60(b).**

10 I.R.C.P. 11(a)(2)(B) (emphasis added)

11 Here, a final Judgment was entered against KH Development in March 2009. Kirk-Scott
12 collaterally attacked that Judgment under I.R.C.P. 60(b), which was denied by the Court's August 9,
13 2013 Order. The clear language of I.R.C.P. 11 prohibits Kirk-Scott from filing the current Motion to
14 reconsider that ruling. *See also, Watson v. Navistar Int'l Transp., Corp.*, 121 Idaho 643 (1992). The
15 fact that Kirk-Scott has attempted to couch its Motion in terms of a motion for new trial under I.R.C.P.
16 59 does not alter the request made: to have the Court reconsider its denial of a Rule 60(b) motion. Kirk-
17 Scott's redress from the Court's August 9, 2013 Order and subsequent Judgment lies in a timely appeal,
18 not a Rule 59(e) motion.

19 **4.2 Kirk-Scott has not provided any additional factual or legal basis to support its Motion.**

20 Notwithstanding the propriety of Kirk-Scott's Motion under I.R.C.P. 11, Kirk-Scott has provided
21 no additional evidence or legal authority to support its position, beyond restatement of its earlier
22 arguments.

23 **4.2.1 Rule 60(b) requires the moving party to prove that the motion was brought
24 within a reasonable time, and Kirk-Scott did not bear its burden of proof.**

25 Kirk-Scott asserts that the Court erred in ruling that it had not established that the Rule 60(b)
26 Motion was brought within a reasonable time. In this regard, Kirk-Scott argues that the Court erred
because "nothing in the rule requires a non-party ... to prove *when* it became aware of the judgment."
Kirk-Scott further argues that the Court erred because Kirk-Scott provided proof that its first awareness
of the Judgment was when Kirk-Scott was served with a summons in February 2013.

Kirk-Scott sought relief under I.R.C.P. 60(b). The text of the rule, and the cases discussing it,
place the burden on the moving party to establish the motion was made within a reasonable time after
becoming aware of the Judgment. Kirk-Scott's reasoning is somewhat circular since proof of *when*

1 Kirk-Scott first became aware of the Judgment is essential to determine whether its Rule 60(b) Motion
2 was filed within a reasonable time. While criticizing the Court for its citation to authority, Kirk-Scott
3 cites none for its rather untenable position.

4 Similarly, Kirk-Scott argues that the evidence presented to the Court established that Kirk-Scott
5 filed its Motion within a reasonable time and asserts error in the Court's consideration of a late-filed
6 Affidavit. However, nothing in the record before the Court at the time of the hearing established *when*
7 Kirk-Scott first became aware of the Judgment. Indeed, the only mention of such knowledge came
8 before the Court through argument contained in Kirk-Scott's briefing. Notably, Kirk-Scott's current
9 Motion cites only the same argument in its own briefing and not to any admissible evidence by affidavit
10 or otherwise. [See *Kirk-Scott Memo RE: Motion to Amend*, p.8] In short, Kirk-Scott provided no
11 evidence; only argument.

12 Notwithstanding the lack of evidence provided by Kirk-Scott, Golub submitted evidence
13 establishing that: 1) Antoine was the sole member of Kirk-Scott; 2) Antoine is the sister of Kirk-Hughes;
14 and 3) Antoine and Kirk-Scott together hold an 81% interest in KH Development. [See *May 9, 2013*
15 *Affidavit of Michael T. Howard, Exhibit 10, p.23; Exhibit 20, p.75-76*] Golub's evidence further
16 established that KH Development's bankruptcy filings listed Golub as a judgment creditor and that
17 Antoine was also listed as a creditor in KH Development's Chapter 7 bankruptcy, requiring notice to
18 her. [See *May 9, 2013 Affidavit of Michael T. Howard, ¶ 12; Exhibit 13*] From this evidence, a
19 reasonable inference can be made that Antoine and Kirk-Scott were aware of the \$941,000 Judgment
20 entered against KH Development well before being served with a Summons in February 2013.

21 The late-filed Affidavit submitted by Golub did no more than bolster this already existing
22 evidence, as it merely presented additional affidavit testimony by Kirk-Hughes stating that by October
23 2010 she had discussed KH Development's bankruptcy issues with "its members". [See *July 9, 2013*
24 *Affidavit of Michael T. Howard, Exhibit 1, p. 2*] Moreover, the Affidavit of Balinda Antoine filed in
25 support of Kirk-Scott's current motion cannot be considered on a Rule 59(e) Motion to Amend. See
26 *Johnson v. Labros*, 143 Idaho 468 (Ct. App. 2006). (Because a motion to amend is brought after a
judgment, new evidence may not be presented) Even if Kirk-Scott had been allowed to respond with the
newly filed Affidavit of Balinda Antoine, the weight of the evidence clearly supports the factual
conclusion that Kirk-Scott's Rule 60 Motion was not brought within a reasonable time.

1 **4.2.2 The Court had jurisdiction to enter the Default Judgment.**

2 Kirk-Scott reiterates is previous argument that the Court lacked jurisdiction to enter the Default
3 Judgment against KH Development because Golub had not alleged that KH Development was liable for
4 \$941,000. This argument deserves little additional comment, other than to state that the Complaint
5 alleges rather clearly that under the Listing Agreement, Peterson was required to pay Pacific Realty
6 [Golub] \$941,000 in commissions, KH Development and other Defendants tortiously interfered with
7 that contract, and as a result Peterson did not pay the \$941,000 owed.

8 **4.2.3 Kirk-Scott's assertion of "injustice" is not a basis for relief under I.R.C.P. 59
9 and the law does not support its position.**

10 Kirk-Scott's final basis for relief is what it terms an "injustice." This request does not fit within
11 the scope of Rule 59(e) for several reasons. The substance of Kirk-Scott's argument is that "it's not
12 fair" for Golub to recover what is now owed under the Judgment. Kirk-Scott argues that the Judgment:
13 1) reflects money Golub would not have received; and 2) should be offset by any amounts received in
14 settlement from Peterson. However, Kirk-Scott fails to provide any authority for its assertion that the
15 Judgment should be altered.

16 Kirk-Scott's argument that Golub is receiving more than what he would have been entitled to
17 had the underlying real estate transaction gone through is irrelevant. Pacific Realty held the contract
18 rights to the entire commission owed by Peterson, and Golub received an assignment of those rights.
19 Any obligations to divide that commission by and between Golub, Pacific Realty, or any other
20 individual are immaterial to the Judgment; Golub holds all of the sticks and is entitled to exercise them.

21 Kirk-Scott similarly provides no authority for its position that the Judgment should be offset by
22 amounts received in settlement from Peterson. Kirk-Scott cites several State and Federal cases for the
23 proposition that a party may not recover twice for the same harm. However, Kirk-Scott fails to
24 recognize one critical distinction between this case and those it cites for authority; Golub never obtained
25 a Judgment against Peterson. Kirk-Scott's cited authority involves situations where parties are jointly
26 liable on the same judgment, or where alternate theories of recovery are asserted for the same harm.
However, this case is not governed by Federal law, and Idaho does not require that monies received
from a settling defendant offset a judgment against a non-settling defendant unless the parties are jointly
and severally liable. *See* I.C. § 6-805.

1 Here, Peterson was never a party to the Judgment and Peterson and KH Development could
2 never be jointly liable under I.C. §6-805 because Golub's claim against KH Development was based in
3 tort, while the claim against Peterson was based in contract.

4 Accordingly, Kirk-Scott's request for relief under I.R.C.P. 59(e) on the basis that "it's not fair"
5 lacks any legal basis.

6 **4.2.4 The Court should sanction Kirk-Scott.**

7 Kirk-Scott's Motion to Amend lacks a reasonable basis in law or fact. I.R.C.P. 11(a)(1) governs
8 the signing of pleadings and other papers and provides in relevant part:

9 The signature of an attorney or party constitutes a certificate that the attorney or party has
10 read the pleading, motion or other paper; that to the best of the signer's knowledge,
11 information, and belief **after reasonable inquiry it is well grounded in fact and is**
12 **warranted by existing law or a good faith argument for the extension, modification,**
13 **or reversal of existing law,** and that it is not interposed for any improper purpose, such
14 as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
15 ... If a pleading, motion or other paper is signed in **violation of this rule, the court,**
16 **upon motion or upon its own initiative, shall impose** upon the person who signed it, a
17 represented party, or both, **an appropriate sanction, which may include an order to**
18 **pay to the other party or parties the amount of the reasonable expenses incurred**
19 **because of the filing of the pleading, motion, or other paper, including a**
20 **reasonable attorney's fee.**

21 I.R.C.P. 11(a)(1). (emphasis added)

22 Whether a motion is sanctionable under I.R.C.P. 11 is determined by assessing the knowledge of
23 the relevant facts and law that reasonably could have been acquired at the time the document was
24 submitted to the court. *See Landvik v. Herbert*, 130 Idaho 54 (Ct. App. 1997).

25 Kirk-Scott has already filed and argued a motion based upon case-law plainly superseded by
26 statute. *See Kirk-Scott 12(b)(6) Motion to Dismiss*. Here, a reasonable inquiry by Kirk-Scott would
have revealed the prohibition upon filing a Motion to Reconsider a Rule 60(b) Order. Notwithstanding
that imputed knowledge, on September 4, 2013 Kirk-Scott was actually notified of the apparent error
and given an opportunity to withdraw its motion in order to avoid this request for sanctions, but chose
not to do so. [*See September 19, 2013 Affidavit of Michael Howard, Ex. 1*]

Given KH Development's long history of utilizing this Court to delay Golub's collection efforts,
coupled with Kirk-Scott's successive filings, sanctions for the time necessary to respond to this Motion
are warranted and appropriate.

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be mailed,
3 postage prepaid; hand delivered; sent
via facsimile on September 20th, 2013, to:

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MICHAEL T. HOWARD

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COUNTY OF KOOTENAI } SS
FILED

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CLERK DISTRICT COURT

Patty Bayly
DEPUTY

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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. CV13-866
Case No. CV07-8038

23 **SECOND AFFIDAVIT OF MATTHEW
24 Z. CROTTY RE MOTION TO
25 AMEND/ALTER JUDGMENT**

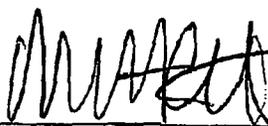
26 STATE OF WASHINGTON)
27 : ss.
28 County of Spokane)

I, MATTHEW Z. CROTTY, being first duly sworn on oath, say:

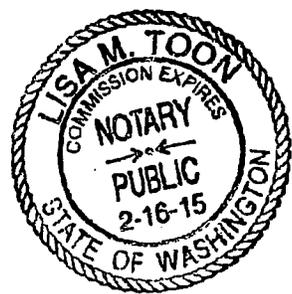
- 1. I am the attorney for Kirk-Scott, Ltd, defendant in the above-captioned actions.
- 2. On September 5, 2013, I sent an email-response to Mr. Howard's September 4,

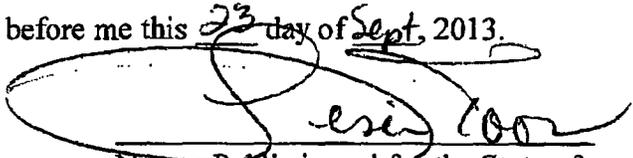
1 2013, letter. A true and correct copy of that email response is attached hereto as Exhibit A.

2 3. The parties in this action have agreed to email service. I did not receive email
3 non-delivery notice for the attached email.

4
5 
6 MATTHEW Z. CROTTY

7 SUBSCRIBED AND SWORN to before me this 23 day of Sept, 2013.



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9 
10 Notary Public in and for the State of
11 Washington, residing at Spokane
12 My commission expires: 2/16/2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September 2013, I have emailed the document to the following participants at the addresses listed below:

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CROTTY & SON LAW FIRM, PLLC



MATTHEW Z. CROTTY
Attorney for Defendant Kirk-Scott, Ltd.

EXHIBIT A

Matt Crotty

From: Matt Crotty [matt@crottyandson.com]
Sent: Thursday, September 05, 2013 6:13 PM
To: 'Michael T. Howard'
Cc: 'mbissell@campbell-bissell.com'; 'Tyler Waite'
Subject: Motion to Amend/Alter

Mike,

I'm in receipt of your letter dated 9/4/13. I am out of town so please excuse the informal email response.

A brief background is in order to put your sanctions threat into context.

You appeared at the 7/9/13 hearing with your affidavit that attached Ms. Kirk-Hughes' 2010 declaration. My client did not have opportunity to rebut that evidence.

You then submitted the judgment in this case without giving Mr. Bissell or me advance notice of the judgment's form or filing. Indeed, you could not provide the proper certificates of service when asked. Without notice, you submitted that order to the Court. That's ex parte contact.

You then, without notice to Mr. Bissell or me, filed a Writ of Execution. I asked you to withdraw the Writ of Execution giving Kirk-Scott's pending IRCP 59 motion. You refused.

Against this backdrop you ask me to withdraw Kirk-Scott's IRCP 59 motion and threaten me with sanctions if I don't. You cite no authority to support your threat. None exists.

Nonetheless, Kirk-Scott partially withdraws part of its motion. Kirk-Scott withdraws its request that the Court amend "its holding that that default judgment did not award more than what was prayed for in the 2007 complaint." (See Motion to Amend at pg. 4, lines 11-12; pg. 9, lines 7-26; pg. 10; lines 1-4) That issue will be addressed on appeal. The remainder of Kirk-Scott's motion stands.

Matt

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STATE OF IDAHO }
COUNTY OF KOOTENAI } SS

BO# 303

SEP 23 AM 11:50

CLERK DISTRICT COURT

Patty Bradley
DEPUTY *Off*

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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. CV13-866

Case No. CV 07-8038

**DEFENDANT KIRK-SCOTT, LTD.'s
MOTION TO AMEND/ALTER REPLY
BRIEF**

23 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

24 The issue is whether Kirk-Scott should suffer in 2013 because Kirk-Hughes had a
25 default judgment entered against it in 2009. Kirk-Scott was not a party to the lawsuit that gave
26 rise to the 2009 default judgment. Kirk-Scott did not know of the default judgment until
27 February 2013. Kirk-Scott did not have opportunity to contest Golub's evidence prior to the
28

1 2009 default. In addressing this issue the Court is faced with the choice of amending the 2009
2 default judgment to conform with the record or allowing plaintiffs to take Kirk-Scott's real
3 property via a default judgment whose amount is simply not based on the record.

4 The evidence before the Court undisputedly reveals that Golub is entitled to none of the
5 \$941,000 he obtained by default. Golub admits the Peterson property was sold for \$5 million.
6 Golub submitted a "listing agreement" in support of his 2009 Motion for Default. The "listing
7 agreement" unambiguously states that Golub and Peterson would split the difference between
8 \$4.4 million and the admitted \$5 million sale price: \$600,000. Of Golub's \$300,000, the record
9 reflects that \$109,640 and \$191,870 should go to Darlene Moore and Tomlinson Black
10 respectively. Kirk-Scott asks the Court to use its Rule 59(a)(6) powers to reduce Golub's
11 August 19, 2013, Judgment to conform to the record.
12

13
14 Golub ignores the facts and submits an untimely and disingenuous sanctions threat
15 against Kirk-Scott. That sanctions threat should be disregarded and Kirk-Scott's motion should
16 be granted.
17

18 II. ARGUMENT

19 A. Kirk-Scott's Motion is proper under I.R.C.P. 59(a).

20 Golub claims that I.R.C.P. 59(a) does not apply because "no trial took place." (Golub
21 Response at pg. 3). Golub's argument fails for three reasons.

22 First, Rule 59(a) is titled "New Trial - Amendment of Judgment - Grounds." By its terms
23 Rule 59 applies not only to "trials" but "amendment of judgment[s]". Kirk-Scott's motion seeks
24 to amend the August 19, 2013, judgment to conform to the evidence that Golub placed before the
25 Court. That evidence undisputedly shows that Golub is not entitled to one cent of the
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1 \$941,000.00 to which he claims entitlement. (Kirk-Scott Motion to Amend/Alter, pg. 10
2 §IIC(1)). Notably, Golub does not dispute the record in his response to Kirk-Scott's motion.

3 Second, Rule 59(a)(6) allows altering/amendment of a verdict "*or other decision*" based
4 on insufficient evidence. Kirk-Scott moves to alter/amend a "other decision" (here the Court's
5 August 9, 2013, Order and August 19, 2013, Judgment) under Rule 59 because no evidence
6 exists that Golub is entitled to \$941,000 (or the \$1.2 million he now claims). Rule 59(a)(1) is
7 similar, it allows amending/altering "any order of the court or abuse of discretion by which either
8 party was prevented from having a fair trial." The Court allowed Mr. Howard's late-filed July 9,
9 2013, affidavit to be admitted at oral argument. Kirk-Scott objected to the affidavit's admission.
10 The Court overruled Kirk-Scott's objection. The Court's ruling deprived Kirk-Scott of the
11 opportunity to respond to the information contained in the affidavit. The Court's ruling
12 constitutes both an "order of the court" and "abuse of discretion." Rule 59(a)(1) & (6) allow
13 Kirk-Scott to bring that issue before the Court.

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16 Third, contrary to Golub's argument, a trial did take place. That trial was Golub's
17 summary judgment motion that was argued on July 9, 2013. Courts consistently hold that "a
18 summary judgment motion is like a trial motion for a directed verdict and that 'genuine' allows
19 some quantitative determination of the sufficiency of the evidence." *McFeely v. United States*,
20 700 F. Supp. 414, 417 (S.D. Ind. 1988)(citing *Collins v. Associated Pathologists, Ltd.*, 844 F.2d
21 473 (7th Cir.1988)).
22

23 Rule 59 applies. Kirk-Scott's motion is proper under Rule 59.
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1 **B. Kirk-Scott did not have standing to contest Golub's 2009 default judgment until it**
 2 **was made a party to the action in February 2013; thus the issue of when Kirk-Scott became**
 3 **aware of the 2009 default judgment is irrelevant and the Court erred in denying Kirk-**
 4 **Scott's motion to vacate by requiring such proof.**

5 Golub argues that the Court properly required Kirk-Scott to prove "when" it became
 6 aware of the 2009 default judgment. (Golub Response, pg. 5) Golub overlooks the issue of
 7 standing. It was not until Golub served Kirk-Scott with its 2013 lawsuit that Kirk-Scott (a non-
 8 party to the 2007 action) had standing to vacate the 2009 default judgment.

9 The Idaho Supreme Court holds that aggrieved parties have standing to sue and a "party
 10 aggrieved" is "as any party injuriously affected by the judgment." *First State Bank of Eldorado*
 11 *v. Rowe*, 142 Idaho 608, 612 (2006). Indeed "one must either be a party or a party's legal
 12 representative in order to have standing to bring any Rule 60(b) motion." *In re La Sierra Fin.*
 13 *Servs., Inc.*, 290 B.R. 718, 727 (B.A.P. 9th Cir. 2002); *Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517,
 14 1520 (11th Cir.1987).

15 Kirk-Scott was not injuriously affected by the 2009 default judgment: it was not named
 16 in that judgment nor a party to the 2007 lawsuit that resulted in the 2009 default judgment. As
 17 such, Kirk-Scott lacked standing to vacate the default judgment and did not obtain standing until
 18 February 2013 when Golub named Kirk-Scott a party to Golub's lawsuit and sought to foreclose
 19 on the subject property. Accordingly, the issue of "when" (or "whether") Kirk-Scott became
 20 aware of the default judgment pre-2013 is irrelevant to whether Kirk-Scott's motion to vacate
 21 was timely. Stated differently: even if Kirk-Scott was aware of the default judgment before
 22 February 2013 it would have lacked standing to contest the judgment because it was not injured
 23 by the judgment.
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1 Accordingly, Kirk-Scott moves the court to amend/alter its August 9, 2013, Order under
2 Rule 59(a)(6)&(7)'s error of law standard.

3 **C. Kirk-Scott's motion to alter/amend is proper.**

4 Golub states "Kirk-Scott's Motion here only seeks redress from the Court's ruling on its
5 motion for relief from judgment under Rule 60(b)." (Golub Response, pg. 3) Golub's statement
6 is false for (at least) three reasons.
7

8 First, Kirk-Scott seeks to have the August 9, 2013, Order amended to address Alan
9 Golub's credibility. The issue on Golub's summary judgment was whether Golub met the "good
10 faith" requirement under I.C. 55-606. The issue of "good faith" relates to when the foreclosing
11 party (Golub) knew whether the real property (here the subject property) was encumbered (here
12 by Kirk-Scott's deed of trust): if the foreclosing party knew of the encumbrance then its
13 instrument does not gain priority over the foreclosed-upon party's secured interest in the
14 property. The issue of "good faith" turns on a party's credibility.
15

16 Golub raised the "good faith" issue in its summary judgment motion; Kirk-Scott
17 responded, and Kirk-Scott's response contained ample evidence that called Golub's credibility
18 (read: "good faith" under I.C. 55-606) into question. (Kirk-Scott Mot. Summ. J. Resp. at ppg. 3-
19 5; Golub Mot. Summ. J. at pg. 9, ¶4.11, pg. 14) The Court did not address I.C. 55-606's "good
20 faith" requirement in its August 9, 2013, Order nor address Golub's credibility. Kirk-Scott asks
21 the Court to address Golub's credibility in amending/altering the August 9, 2013, Order and
22 August 19, 2013, Judgment. (Kirk-Scott Motion, pg. 15) Plainly stated: Golub's credibility does
23 not relate to the Rule 60 motion.
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1 Second, Kirk-Scott's motion to alter/amend relates the issue of double recovery. Kirk-
 2 Scott sought to amend/alter the August 19, 2013, Judgment because the Court's August 9, 2013,
 3 Order and August 19, 2013, Judgment allows Golub to recover twice. (Kirk-Scott Mot., pg. 11-
 4 15) Golub admits to recovering twice and thinks it's fair. (Kirk-Scott Mot., pg. 11-14) Kirk-
 5 Scott, and the U.S. Supreme Court, disagree. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297
 6 (2002) ("[I]t goes without saying that the courts can and should preclude double recovery by an
 7 individual."). Kirk-Scott never got the opportunity to know how much money Peterson paid
 8 Golub because the Court's August 9, 2013, Order mooted Kirk-Scott's Motion to Compel Golub
 9 to disclose the amount of money Golub obtained from the Petersons. Kirk-Scott seeks to
 10 alter/amend the August 9, 2013, Order regarding the Order's mooted of Kirk-Scott's Motion to
 11 Compel. Rule 59 is the proper vehicle to raise that issue. Kirk-Scott is not asking the Court to
 12 "reconsider" its denial of Kirk-Scott's Rule 60 motion.

15 Third, Kirk-Scott's motion to alter/amend relates to the issue of whether sufficient
 16 evidence exists to justify awarding Golub \$941,000 (now approximately \$1.2 million). (Kirk-
 17 Scott Mot., at 10-11). In raising the "there is no evidence to support the amount of the
 18 judgment" issue Kirk-Scott is not asking the Court to "reconsider" its denial of Kirk-Scott's Rule
 19 60 motion. Kirk-Scott is asking the Court to look at the record because Rule 59(a)(6) allows the
 20 Court to amend a judgment on "insufficiency of evidence to justify the verdict *or other*
 21 *decision.*" (emphasis added) The August 19, 2013, Judgment is the "other decision" that Kirk-
 22 Scott seeks to alter and Kirk-Scott does so because the record shows that Golub should not have
 23 been paid a cent of the \$941,000 claimed. (Kirk-Scott Mot., pg. 10-11)

1 **D. The Rule 11 provision of Golub's response brief should be disregarded and no**
 2 **sanctions should issue.**

3 Golub's Rule 11 threat fails for a variety of reasons.

4 First, Kirk-Scott's motion to amend is brought under Rule 59, not Rule 11(a)(2).
 5 Nowhere does Kirk-Scott's motion mention Rule 11(a)(2). That Kirk-Scott's Rule 59 motion is
 6 not written to Golub's liking is not grounds for sanctions.

7 Second, I.R.C.P. 11(a)(1) authorizes sanctions "upon motion or upon [the Court's] own
 8 initiative." I.R.C.P. 7(b)(1)&(2) set out a motion's form. I.R.C.P. 7(b)(3) sets out the timeframe
 9 by which motions must be noted for hearing. Golub has not filed a "motion" for Rule 11
 10 sanctions. Argument in a response brief is not a motion. Accordingly Golub's sanctions threat
 11 should be disregarded because it is not properly before the Court on a motion.
 12

13 Third, "Rule 11(a)(1) is 'a court management tool' which should be exercised narrowly."¹
 14 *Landvik by Landvik v. Herbert*, 130 Idaho 54, 61 (Ct. App. 1997)(citing *Conley v. Looney*, 117
 15 Idaho 627, 631 (Ct. App. 1990); *State of Alaska ex rel. Sweat v. Hansen*, 116 Idaho 927, 929
 16 (Ct.App.1989)). Kirk-Scott seeks to protect itself from, *inter alia*, (a) having to pay Golub a
 17 double recovery; and, (b) being subject to an inflated default judgment that is not based on the
 18 record. Such acts are advocacy, not sanctionable conduct. If Mr. Golub were in Kirk-Scott's
 19 shoes he'd undoubtedly be informing the Court of the exact same issues.
 20
 21

22 Fourth, even if the Court were to find that Kirk-Scott's motion was a Rule 11(a)(2)
 23 motion the Rule 11 requirements would still not be met. Rule 11 requires that a paper be (1) well

24 ¹ *Riggins v. Smith*, 126 Idaho 1017, 1021 (1995) illustrates the narrow range of Rule 11. *Smith*
 25 held that "Smith's awareness of Koehn's perjury during depositions without correcting her or
 26 informing the opposing counsel of the misrepresentation, may be unethical conduct by Smith,
 27 but such trial activities do not support Rule 11 sanctions."
 28

1 grounded in fact, (2) warranted by existing law or a good faith argument for the extension,
 2 modification, or reversal of existing law, and (3) not interposed for any improper purpose, such
 3 as to harass or cause unnecessary delay or needless increases in the costs of litigation. I.R.C.P.
 4 11(a)(1). "Reasonableness under the circumstances" is the appropriate standard to apply under
 5 Rule 11. *Durrant v. Christensen*, 117 Idaho 70, 74 (1990). The "reasonableness under the
 6 circumstances" standard requires the trial court to focus on whether the attorney conducted a
 7 "proper investigation upon reasonable inquiry" into the facts and legal theories of the case. *Hanf*
 8 *v. Syringa Realty, Inc.*, 120 Idaho 364, 369 (1991).

10 Kirk-Scott moved to vacate Golub's default judgment under IRCP 60(b)(4), IRCP
 11 60(b)(5), and IRCP 60(b)(6). The Court's August 9, 2013, Order only addresses Kirk-Scott's
 12 Rule 60(b)(4) motion. The August 9, 2013, Order does not explain why Kirk-Scott's Rule
 13 60(b)(5) and (b)(6) motions were denied. One purpose of Rule 59 is to allow a Court to
 14 alter/amend its orders and/or judgments in order to narrow (or avoid) the issues on appeal. Kirk-
 15 Scott's motion to amend/alter seeks to advance the policy of narrowing appellate issues (and thus
 16 limiting litigation costs) by asking the Court to explain the reason for not ruling on the Rule
 17 60(b)(5) and Rule 60(b)(6) motions. If such a request constitutes a Rule 11(a)(2) motion for
 18 reconsideration then such a request is certainly "reasonable under the circumstances." Kirk-Scott
 19 (who never had the chance to defend itself in the 2007 action that gave rise to the 2009 default
 20 judgment) is trying to narrow (or outright avoid) the issues on appeal by (a) informing the Court
 21 (under a proper Rule 59 motion) that the Court's July 9, 2013, evidentiary ruling deprived Kirk-
 22 Scott of opportunity to respond to Rule 60 "timeliness" issue and (b) informing the Court that the
 23 issue of "when" non-party Kirk-Scott became aware of the default judgment is irrelevant because
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1 Kirk-Scott would have lacked standing to contest the default judgment even if it knew of the
2 judgment. Since Kirk-Scott does not know why the Court did not address the 60(b)(5) and
3 60(b)(6) motions it (under Rule 59) submits factual and legal bases to assist the Court in
4 addressing the 60(b)(5) and 60(b)(6) issues.

5 Fifth, Mr. Howard submits a September 4, 2013, letter that he sent Kirk-Scott's counsel.
6 Mr. Howard neglected to inform the Court of Kirk-Scott's reply. (Crotty Aff. at ¶2) In a gesture
7 of good faith Kirk-Scott agreed to strike the Rule 60(b)(4) component of its Motion to
8 Amend/Alter brief. *Id.* at Ex. A. Yet Golub's lawyer did not inform the Court of that
9 communication and addressed the Rule 60(b)(4) issue in response. Sanctions are not proper
10 when the party pursuing such sanctions fails to fully inform the Court of its attempts to confer.
11

12 Six, Golub cites one case in support of his "sanctions" threat: *Landvik v. Herbert*, 130
13 Idaho 54 (Ct. App. 1997). If anyone party should be sanctioned under *Landvik* it is Golub.

14 *Landvik* involved a personal injury action in which the plaintiff suffered personal
15 physical harm at a rock concert and sued varied concert promoters. *Id.* at 57. An issue was
16 whether defendant Herbert was such a promoter. The Court found that:
17

18 [b]efore Herbert filed his motion for summary judgment, his role with
19 respect to the concert was thoroughly explored in depositions and other
20 discovery. Herbert, Martin and West all testified in deposition that Herbert
21 did not help plan, organize, produce, sponsor or finance the concert, did
22 not furnish any equipment or facilities for the event and did not receive
23 any proceeds from the ticket sales.

24 Plaintiff's counsel, following discovery, did not dismiss Herbert from the case even
25 though the evidence clearly exculpated Herbert. *Landvik*, 130 Idaho, at 58. Herbert successfully
26 obtained summary judgment dismissal and moved for Rule 11 sanctions. The trial court denied
27 the Rule 11 sanctions. *Id.* at 61. The appellate court remanded the matter to the trial court for
28

1 further proceedings in order to determine whether plaintiff should be sanctioned for not
 2 dismissing Herbert after learning (through discovery) that Herbert was not at fault. *Id.* at 63. In
 3 remanding the case *Landvik* indicated that Rule 11 sanctions would be appropriate after
 4 "opportunity for formal discovery where answers must be provided under oath and relevant
 5 documentary evidence produced" and such discovery and evidence revealed that no factual basis
 6 existed to support or continue the litigation. *Id.* at 62.

7 If any party in this case runs afoul of *Landvik* then it is Golub. Before Golub filed his
 8 2007 lawsuit he was deposed. Golub's "formal discovery [deposition] ... answers ... provided
 9 under oath" revealed:

- 10
- 11 • On September 25, 2007, Golub testified at deposition under oath
 12 that "the total commission to all real estate agents would have been
 13 941,000." (Combined Statement of Facts ¶12)
- 14 • On September 25, 2007, Golub testified at deposition under oath
 15 that Darlene Moore would receive \$109,640, Tomlinson Black
 16 would receive \$191,870, Pacific Real Estate would receive
 17 \$154,872.50, and Golub would receive \$464,617.50 of the
 18 \$941,000 commission. *Id.*
- 19 • Although Golub testified, under oath, that he was entitled to (at
 20 best) \$464,617.50 of the \$941,000, he sued for the entire \$941,000
 21 on October 30, 2007.²

22 Golub testified in his own words that he was entitled to only \$464,617.50 of the \$941,000
 23 yet sued for the entire \$941,000 nearly 30 days later. Such conduct is akin to what *Landvik*
 24 forbids. Golub knew (before filing his 2007 lawsuit) he was not entitled to half of the \$941,000,
 25 sued for the entire amount anyway, and, by virtue of Kirk-Hughes' lawyer withdrawing, won the
 26 \$941,000 not on the merits but a technicality. Kirk-Scott now unjustly suffers as a result. The
 27 Court should put a stop to Golub's actions and if anyone should be sanctioned it is the plaintiffs.

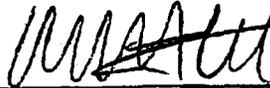
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² The evidence Golub subsequently brought before the Court shows that Golub is entitled to none
 of that amount. (Kirk-Scott Mot. to Amend/Alter, pg. 10-11) Kirk-Scott asks the Court to
 amend the August 19, 2013, Judgment to conform to the evidence that is before the Court.

III. CONCLUSION

Plaintiffs' Motion to Alter/Amend should be granted.

DATED this 23rd day of September 2013.

CROTTY & SON LAW FIRM, PLLC



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Email: matt@crottyandson.com

Attorney for Defendant Kirk-Scott, Ltd.

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CERTIFICATE OF SERVICE

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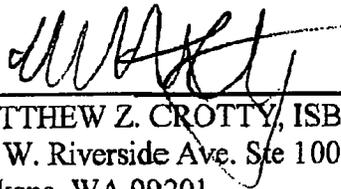
I hereby certify that on the 23rd day of September 2013, I have emailed the document to the following participants at the addresses listed below:

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STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
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9 Attorneys for Defendants

10 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
11 IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

12 ALAN GOLUB and MARILYN GOLUB
13 husband and wife,

14 Plaintiffs,

15 vs.

16 KIRK-HUGHES DEVELOPMENT, LLC a
17 Delaware limited liability company; KIRK-
18 SCOTT, LTD a Texas corporation;
19 INTERNAL REVENUE SERVICE;
20 TOMLINSON NORTH IDAHO, INC., an
21 Idaho corporation

22 Defendants.

Case No. CV13-866
Case No. CV07-8038

**AFFIDAVIT OF MATTHEW Z.
CROTTY RE CREDIT BID**

23 STATE OF WASHINGTON)
24 : ss.
25 County of Spokane)

26 I, MATTHEW Z. CROTTY, being first duly sworn on oath, say:

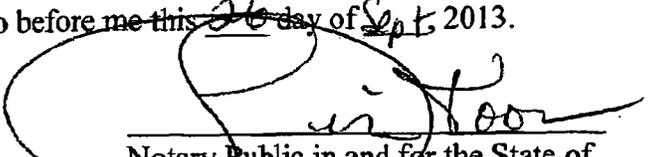
- 27 1. I am the attorney for Kirk-Scott, Ltd, defendant in the above-captioned actions.
28 2. Attached hereto as Exhibit A is a true and correct copy of a September 25, 2013,

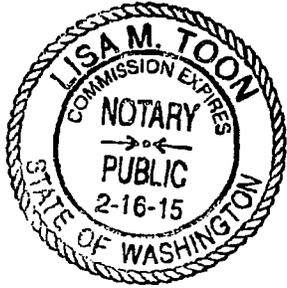
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letter that I received from plaintiffs' counsel via facsimile on September 25, 2013.


MATTHEW Z. CROTTY

SUBSCRIBED AND SWORN to before me this ~~26~~ day of ~~Sept~~ 2013.





Notary Public in and for the State of
Washington, residing at Spokane
My commission expires: 2/16/2015

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September 2013, I have emailed the document to the following participants at the addresses listed below:

Michael T. Howard, ISB No. 6128
Winston & Cashett
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Attorney for Plaintiffs.

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Attorney for Defendant Kirk-Hughes Development, LLC

CROTTY & SON LAW FIRM, PLLC



MATTHEW Z. CROTTY
Attorney for Defendant Kirk-Scott, Ltd.

EXHIBIT A

Coeur d'Alene Office
 250 Northwest Blvd., Suite 206
 Coeur d'Alene, Idaho 83814

Phone: (208) 667-2103
 Fax: (208) 765-2121
 website: www.winstoncashatt.com

Winston & Cashatt

LAWYERS

A Professional Service Corporation

*Winston & Cashatt has offices in Spokane, Washington
 and Coeur d'Alene, Idaho*

September 25, 2013

VIA FACSIMILE TO 509-703-7957

Matthew Z. Crotty
 Crotty & Son Law Firm, PLLC
 421 W. Riverside Ave., Suite 1005
 Spokane, WA 99201

VIA FACSIMILE TO 509-455-7111

Michael S. Bissell
 Campbell & Bissell, PLLC
 Corbet Aspray House
 820 W. 7th Avenue
 Spokane, WA 99204

Re: Golub v. Kirk-Hughes

Gentlemen:

The purpose of this letter is to propose a settlement of the claims amongst our respective clients. In this regard, Mr. Golub has authorized me to make a settlement offer to your clients, under which he would transfer his interest in the three parcels of property at issue, and enter a full satisfaction of the underlying judgment in exchange for payment of \$1,250,000.00, along with a mutual stipulation and dismissal of the pending litigation.

As you know, Mr. Golub holds a Judgment against Ms. Kirk-Hughes, Peter Sampson, Kirk-Hughes Development, Kirk-Hughes Associates, Inc., and Kelly Polatis in the current amount of \$1,604,337.55 (\$1,616,844.25 less \$12,506.70 recovered from bank accounts belonging to Kirk-Hughes Associates). That Judgment is final and not appealable by the judgment debtors. Kirk-Scott has taken a run at declaring that judgment void, but lost that motion. Accordingly, the Judgment will remain in force unless Kirk-Scott is successful in the difficult task of persuading the Idaho Supreme Court to overturn the trial court's discretionary ruling.

C. Matthew Anderson
 Beverly L. Anderson
 Kevin H. Brock
 Patrick J. Cronin
 Kevin J. Curtis
 Greg M. Devlin
 Timothy R. Fischer
 David P. Gardner
 Scott A. Gingras
 Erica B. Grubbs

Jeffrey A. Herbster
 Michael T. Howard
 Carl E. Hueber
 Collette C. Leland
 Kammi Mencke Smith
 Richard W. Relyea
 Jeffrey R. Ropp
 Elizabeth A. Tolleson
 Lawrence H. Vance, Jr.
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Of Counsel
 Courtney R. Beaudoin
 Stephen L. Farnall
 Kenneth B. Howard
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 Lynden O. Rasmussen
 James E. Reed
 Lucinda S. Whaley

Retired
 Robert P. Beuchel
 Richard L. Caste
 James P. Connelly
 Leo J. Driscoll
 Tim M. Higgins

September 25, 2013

Page 2

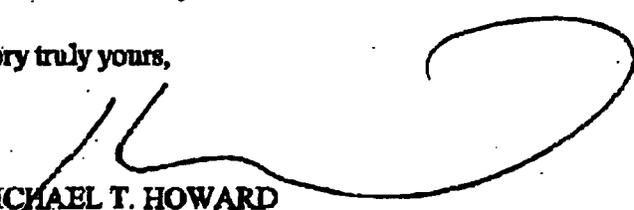
As a result of that Judgment, Mr. Golub is now the owner of the three Idaho parcels, having paid \$1,400,000.00 of his judgment at the recent Sheriff Sale. This leaves a \$204,337.55 deficiency judgment to continue to pursue against Ms. Kirk-Hughes and her related entities under the domesticated judgment in Nevada.

Having financed KH Development's purchase of the property, and now having no security, Kirk-Scott is facing a loss of \$1.3M. While Kirk-Scott does have the ability to appeal the trial court's rulings, such an appeal: 1) will be costly; 2) will likely take two years to resolve and at best result in a remand; and 3) carries poor odds of success. In the meantime, Golub is free to sell the property unless Kirk-Scott posts a \$2.2M supersedeas bond. Even if it were to prevail upon its slim chances at appeal, Kirk-Scott runs the risk that: 1) Golub will have no ability to repay and/or those funds will be exempt from execution; or 2) it will have to litigate against the new owner for title to the properties.

With these issues in mind, our proposal presents Kirk-Scott with the opportunity to obtain clear title to the three properties for \$1.25M (\$150,000 less than the cost to redeem). Having a current combined value of approximately \$1.5M, this would provide Kirk-Scott with perhaps the only opportunity to recoup a portion of its \$1.3M loss. At the same time, it would absolve Kirk-Hughes and the related judgment debtors from the remaining \$204k deficiency judgment which Golub has every intent on pursuing. Finally, acceptance of this settlement would eliminate Kirk-Scott's certain appeal-related legal expenses (\$30k+). In short, a settlement of \$1.25M would: 1) result in a net return to Kirk-Scott and Kirk-Hughes of \$500k+; 2) provide an end to this lengthy litigation; and 3) preserve Kirk-Scott's ability to pursue any remaining loss under its Promissory Note from KH Development.

Under the circumstances, I believe that this proposal provides reasonable resolution to this ongoing matter. I look forward to hearing from you after you have had an opportunity to discuss these issues with your clients.

Very truly yours,



MICHAEL T. HOWARD

MTH:mth
457165

corporation; KELLY POLATIS, an)
individual, and DELANO D. and)
LENORE J. PETERSON, husband and)
wife,)
)
Defendants.)

TO: THE ABOVE NAMED RESPONDENTS, ALAN AND MARILYN GOLUB AND
THE PARTYS' ATTORNEY, MICHAEL T. HOWARD, AND THE CLERK OF THE
ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant Kirk-Scott, Ltd. (Kirk-Scott) appeals against the above named respondents to the Idaho Supreme Court from: (1) the August 9, 2013, Order (i) Denying Kirk-Scott's Motion to Dismiss, (ii) Denying Kirk-Scott's Motion to Vacate, and (iii) Granting Respondents' Motion for Summary Judgment; (2) the August 19, 2013, Judgment; and, (3) the September 27, 2013, Order¹ Denying Kirk-Scott's Motion to Alter/Amend the aforementioned August 9, 2013, and August 19, 2013, Order and Judgment. The above-referenced Orders and Judgment were entered in the above entitled action on August 9, 2013, August 19, 2013, and September 27, 2013, with the Honorable Judge Lansing Haynes, presiding.
2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgments or Orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1)(3)(5)(7) I.A.R.

This is an EXPEDITED APPEAL pursuant to I.A.R. 12.2.

3. The issues on appeal that the appellant intends to assert in the appeal are:

¹ The September 27, 2013, Order referenced was orally entered by the Court on September 27, 2013. The Court gave Respondents' counsel instruction to prepare an Order. That yet-to-be-published Order is incorporated by Kirk-Scott as part of its Notice of Appeal.

(A) The trial court erred in granting respondents' Motion for Summary Judgment by failing to address whether respondent met the "good faith" element required under IC 55-606. By not addressing the "good faith" element of IC 55-606 the Court missed, *inter alia*, a clear issue of fact.

(B) The trial court erred in denying Kirk-Scott, Ltd.'s motion to vacate because Kirk-Scott did not establish "when" it became aware of the existence of a March 11, 2009, default judgment. Kirk-Scott was not a party to the action in which the March 11, 2009, default judgment was entered; accordingly, the Court erred in making a non-party to the action that gave rise to the default judgment establish "when" it became aware of the default judgment *before* respondent named Kirk-Scott in the above-referenced 2013 action. Stated simply, before being named in the 2013 lawsuit non-party Kirk-Scott lacked standing to contest the default judgment thus the issue of "when" Kirk-Scott became aware of the 2009 default judgment is irrelevant and the trial court erred in denying Kirk-Scott's motion to vacate on that ground.

(C) The Idaho Supreme Court consistently holds that a default judgment cannot grant relief greater than what was prayed for in the Complaint. The March 11, 2009, default judgment granted relief greater than what was prayed for in the underlying Complaint. The trial court erred in denying Kirk-Scott, Ltd.'s motion to vacate on that ground.

(D) The trial court erred in granting respondents' motion for summary judgment by not addressing, in its Order, Kirk-Scott, Ltd.'s arguments that: (a) respondents' default judgment was invalid because it was not supported by valuable consideration; (b) respondents' default judgment was invalid because it lacked a Rule 54(b) certificate; and, (c) respondent's default judgment was invalid because the affidavit in support of said default judgment named only one defendant but the Court allowed the default judgment to be entered against four other defendants who were not named in the affidavits in support of the default judgment.

(E) The trial court erred in granting respondents' motion for summary judgment by finding that Kirk-Scott, Ltd.'s deed of trust was not properly acknowledged.

(F) The trial court erred in denying Kirk-Scott, Ltd.'s motion to dismiss by finding that Kirk-Scott improperly recorded its deed of trust during a bankruptcy proceeding.

(G) The trial court erred in denying Kirk-Scott, Ltd.'s IRCP 60(b)(5) & (6) motions to vacate by, *inter alia*, not specifically addressing those motions in its order denying Kirk-Scott, Ltd.'s IRCP 60(b)(4) motion to vacate. Kirk-Scott moved to vacate respondents' default judgment under IRCP 60(b)(4), (5), and (6) but the Court's August 9, 2013, Order, which denied the Rule 60(b)(4) motion, did not address Kirk-Scott's Rule 60(b)(5) & (6) motions.

(H) The trial court erred in denying Kirk-Scott's motion to vacate under IRCP 60(b)(6) because the respondents' default judgment did not comport with IRCP 55(b)(1) as the affidavit in support of the default judgment named one defendant but the trial court granted the default judgment against four other defendants who were not named in the affidavit in support of the March 11, 2009, default judgment.

(I) The trial court erred in denying Kirk-Scott's motion to vacate under IRCP 60(b)(5) because the March 11, 2009, default judgment was a prospective judgment.

(J) The trial court erred in denying Kirk-Scott's motion to amend/alter the judgment. Kirk-Scott's Rule 59(a)(1)(6)&(7) motion sought to amend the August 19, 2013, Judgment because the Judgment was (i) not supported by the evidence and (ii) allowed respondents to recover twice for the same harm.

4. Has an order been entered sealing all or any portion of the record? No.
If so, what portion? N/A.
5. (a) Is a reporter's transcript requested? Yes.
(b) The appellant requests the preparation of the following portions

of the reporter's standard transcript, as defined in Rule 25(c), I.A.R., in hard copy and electronic copy: Appellant requests transcripts of the July 9, 2013, motion for summary judgment, motion to vacate, and motion to dismiss hearing and the September 27, 2013, motion to amend/alter hearing. The court reporter for the July 9, 2013, and September 27, 2013, hearings was Valarie E. Nunmacher, Kootenai County District Court 324 West Garden Ave. Coeur d'Alene, ID 83816. On September 27, 2013, Ms. Nunmacher informed Kirk-Scott's counsel that the transcription costs was approximately \$325.00 for both hearings.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:
 - (A) Respondents' Complaint - Filed 1/25/13
 - (B) Kirk-Scott's Answer - Filed 3/14/13
 - (C) Kirk-Scott's Motion to Dismiss and Memorandum in Support of Motion to Dismiss - Filed 4/30/13
 - (D) Respondents' Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, Affidavit of Michael T. Howard, and Affidavit of Alan Golub - Filed 5/9/13
 - (E) Respondents' Response to Kirk-Scott's Motion to Dismiss - Filed 5/14/13
 - (F) Kirk-Scott's Motion and Memorandum re Motion to Vacate Default Judgment - Filed 6/24/13
 - (G) Kirk-Scott's Combined Statement of Facts - Filed 6/24/13
 - (H) Kirk-Scott's Response to Respondents' Motion for Summary Judgment - Filed 6/24/13
 - (I) Affidavit of Balinda Antoine - Filed 6/24/13
 - (J) Affidavit of Matthew Z. Crotty - Filed 6/24/13
 - (K) Kirk-Scott's Motion to Dismiss Reply Brief - Filed 6/24/13
 - (L) Kirk-Hughes' et al's Notice of Joinder - Filed 6/24/13
 - (M) Kirk-Hughes' et al's Summary Judgment Response - Filed 6/24/13
 - (N) Affidavit of Richard L. Campbell - Filed 6/24/13

- (O) Affidavit of Melody Jones, Affidavit of Geraldine Kirk-Hughes, Affidavit of Darlene Moore - Filed 6/24/13
- (P) Golubs' Reply re Summary Judgment, 2xHoward Affidavits (Mr. Howard filed two affidavits on 7/2/13, one contains discovery responses, the second contains legislative history) and Golub's Response re Kirk-Scott's Motion to Vacate - Filed 7/2/13
- (Q) Kirk-Scott's Motion to Vacate Reply Brief and Kirk-Hughes' Joinder and Response to Kirk-Scott's Reply Brief - Filed 7/3/13
- (R) Affidavit of Michael Howard - Filed 7/9/13
- (S) Kirk-Scott's Motion to Compel, Memorandum in Support of Motion to Compel, Note for Hearing, and Affidavit of Matt Crotty re Motion to Compel - Filed 7/25/13
- (T) Court's Memorandum Decision and Order - Filed 8/9/13
- (U) Judgment - Filed 8/21/13 (but signed 8/19/13)
- (V) Kirk-Scott's Motion and Memorandum re Motion to Alter/Amend, Affidavit of Matthew Z. Crotty, Note for Hearing, and Second Affidavit of Balinda Antoine - Filed 8/21/13
- (W) Golub's Response re Motion to Amend/Alter and Affidavit of Howard - Filed 9/19/13
- (X) Kirk-Scott's Motion to Amend/Alter Reply Brief and Second Affidavit of Crotty - Filed 9/23/13
- (Y) Affidavit of Matthew Crotty re Credit Bid - Filed 9/26/13
- (Z) Writ of Execution, Affidavit in Support of Execution, Application for Writ of Execution - Filed 8/15/13
- (AA) Kirk-Hughes' Motion and Memorandum re Stay Writ of Execution - Filed 8/27/13
- (BB) Golubs' Response re Motion to Stay and Affidavit of Howard - Filed 9/5/13
- (CC) Kirk-Hughes' Reply and Affidavit of Mike Bissell - Filed 9/9/13
- (DD) Order re Kirk-Hughes' Motion to Stay - Filed 9/13/13

7. Civil Cases Only. The appellate requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court. N/A

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: Valarie E. Nunmacher, Kootenai County District Court, 324 West Garden Ave. Coeur d'Alene, ID 83816.

(b) (1) That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript. (Defendants Geraldine Kirk-Hughes, et. al, are filing a Notice of Appeal on 9/30/13. Said defendants' Notice of Appeal is filed in conjunction with - and will be joined with - Kirk-Scott's Notice of Appeal. Therefore Defendants Kirk-Hughes, et. al. are paying for the transcription costs, including Kirk-Scott's costs.)

(c) (1) That the estimated fee for preparation of the clerk's or agency's record has been paid. (Defendants Geraldine Kirk-Hughes, et. al, are filing a Notice of Appeal on 9/30/13. Said defendants' Notice of Appeal is filed in conjunction with - and will be joined with - Kirk-Scott's Notice of Appeal. Therefore Defendants Kirk-Hughes, et. al. are paying for the record copying costs, including Kirk-Scott's costs.)

(d) (1) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

//

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//

//

DATED THIS 30th day of September, 2013.

Matthew Z. Crotty

Matthew Z. Crotty

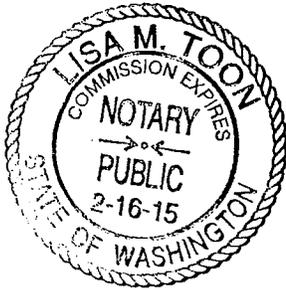
Attorneys for the Appellant Kirk-Scott, Ltd.

SUBSCRIBED AND SWORN to before me this 30 day of Sept, 2013.

Lisa M. Toon

Notary Public in and for the State of
Washington, residing at Spokane

My commission expires: 2/16/2015



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

<input type="checkbox"/>	HAND DELIVERY	Michael T. Howard
<input checked="" type="checkbox"/>	U.S. MAIL	Winston & Cashatt, P.S.
<input type="checkbox"/>	OVERNIGHT MAIL	601 W. Riverside #1900
<input type="checkbox"/>	FACSIMILE	Spokane, WA 99201
<input checked="" type="checkbox"/>	EMAIL	

<input checked="" type="checkbox"/>	HAND DELIVERY	Michael S. Bissell
<input type="checkbox"/>	U.S. MAIL	CAMPBELL & BISSELL, PLLC
<input type="checkbox"/>	OVERNIGHT MAIL	Corbet-Aspray House
<input type="checkbox"/>	FACSIMILE	820 W. 7 th Avenue
<input checked="" type="checkbox"/>	EMAIL	Spokane, Washington 99204

<input type="checkbox"/>	HAND DELIVERY	Douglas S. Marfice
<input type="checkbox"/>	U.S. MAIL	Ramsden & Lyons
<input type="checkbox"/>	OVERNIGHT MAIL	P.O. Box 1336
<input type="checkbox"/>	FACSIMILE	Coeur d'Alene, ID 83816
<input checked="" type="checkbox"/>	EMAIL	



MATTHEW Z. CROTTY

STATE OF IDAHO
COUNTY OF KOOTENAI SS
FILED: 40588
2013 SEP 30 PM 1:38

CLERK DISTRICT COURT
[Signature]
DEPUTY

MICHAEL S. BISSELL
CAMPBELL & BISSELL, PLLC
Corbet-Aspray House
820 W. 7th Avenue
Spokane, Washington 99204
Telephone: (509) 455-7100
Facsimile: (509) 455-7111
ISB No. 5762

Attorneys for Defendants/Appellants Kirk-Hughes
Development, LLC, Kirk-Hughes &
Associates, Inc., Geraldine Kirk-Hughes,
and Peter Sampson

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN)
GOLUB, husband and wife,)
)
Plaintiff/Respondents,)

Case No. CV 07-8038
[Consolidated Case No.: CV 13-866]

NOTICE OF APPEAL

vs.)

KIRK-HUGHES DEVELOPMENT,)
LLC, a Delaware limited liability)
company; KIRK-SCOTT, LTD., a Texas)
corporation; INTERNAL REVENUE)
SERVICE; TOMLINSON NORTH)
IDAHO, INC., an Idaho corporation,)

Defendants,)

KIRK-HUGHES DEVELOPMENT,)
LLC, a Delaware limited liability)
company;)

Appellant.)

ALAN GOLUB and MARILYN)
GOLUB, husband and wife,)
)
Plaintiffs/Respondents,)

vs.

GERALDINE KIRK-HUGHES and
PETER SAMPSON, husband and wife;
KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada
corporation; KELLY POLATIS, an
individual, and DELANO D. and
LENORE J. PETERSON, husband and
wife,

Defendants,

GERALDINE KIRK-HUGHES and
PETER SAMPSON, husband and wife;
KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada
corporation;

Appellants.

TO: The Above-Named Respondents, ALAN AND MARILYN GOLUB
AND TO: Their Attorney, MICHAEL T. HOWARD,
AND TO: THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson ("Appellants") appeal against the above-named respondents to the Idaho Supreme Court from:
 - (1) the August 9, 2013, Order Denying Kirk-Scott's Motion to Dismiss, Denying Kirk-Scott's Motion to Vacate, and Granting Respondents' Motion for Summary Judgment;
 - (2) the August 19, 2013, Judgment; and
 - (3) the September 13, 2013, Order re: Kirk-Hughes Development, LLC, et al.'s Motion to Stay Execution of Writ.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the Judgments or Orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) I.A.R.

This is an EXPEDITED APPEAL pursuant to I.A.R. 12.2.

3. The issues on appeal that the Appellants intend to assert in the appeal are:

- (A) Does a deed of trust which was executed in Nevada and in accordance with Nevada law, and which encumbers Idaho real property, have priority over subsequent interests in the property when the deed of trust does not have an acknowledgement as required by Idaho law?
- (B) Does a deed of trust which existed before the debtor filed for bankruptcy, but which was recorded during the debtor's bankruptcy, have priority over a judgment which is recorded after the bankruptcy is dismissed when the judgment creditor was aware of the deed of trust?
- (C) Did the trial court error in denying Appellants Motion to Stay the Writ of Execution?

4. Has an order been entered sealing all or any portion of the record? No.

If so, what portion? N/A.

5. (a) Is a reporter's transcript requested? Yes.
(b) Appellants request the preparation of the following portions of the reporter's standard transcript, as defined in Rule 25(c), I.A.R., in hard copy and electronic format:

- Transcripts of the July 9, 2013, motion for summary judgment, motion to vacate, and motion to dismiss hearing.
- Transcripts of the September 27, 2013, motion to amend/alter hearing.

Court Reporter, Valerie E. Nunmacher, Kootenai County District Court, 324 West Garden Avenue, Coeur d'Alene, ID 83816, transcribed both hearings. On September 27, 2013, Ms. Larson informed counsel that the transcription costs were approximately \$325.00.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

- (A) Respondents' Complaint (Filed 1/25/13);
(B) Kirk-Scott's Answer (Filed 3/14/13);

- (C) Kirk-Scott's Motion to Dismiss and Memorandum in Support of Motion to Dismiss (Filed 4/30/13);
- (D) Respondents' Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, Affidavit of Michael T. Howard, and Affidavit of Alan Golub (Filed 5/9/13);
- (E) Respondents' Response to Kirk-Scott's Motion to Dismiss (Filed 5/14/13);
- (F) Kirk-Scott's Motion and Memorandum re Motion to Vacate Default Judgment (Filed 6/24/13);
- (G) Kirk-Scott's Combined Statement of Facts (Filed 6/24/13);
- (H) Kirk-Scott's Response to Respondents' Motion for Summary Judgment (Filed 6/24/13);
- (I) Affidavit of Balinda Antoine (Filed 6/24/13);
- (J) Affidavit of Matthew Z. Crotty (Filed 6/24/13);
- (K) Kirk-Scott's Motion to Dismiss Reply Brief (Filed 6/24/13);
- (L) Kirk-Hughes' et al's Notice of Joinder (Filed 6/24/13);
- (M) Kirk-Hughes' et al's Summary Judgment Response (Filed 6/24/13);
- (N) Affidavit of Richard L. Campbell (Filed 6/24/13);
- (O) Affidavit of Melody Jones, Affidavit of Geraldine Kirk-Hughes, Affidavit of Darlene Moore (Filed 6/24/13);
- (P) Golubs' Reply re Summary Judgment, Mike Howard Affidavits (two) (filed on 7/2/13, one contains discovery responses, the second contains legislative history) and Golub's Response re Kirk-Scott's Motion to Vacate (Filed 7/2/13);
- (Q) Kirk-Scott's Motion to Vacate Reply Brief and Kirk-Hughes' Joinder and Response to Kirk-Scott's Reply Brief (Filed 7/3/13);
- (R) Affidavit of Michael Howard (Filed 7/9/13);
- (S) Kirk-Scott's Motion to Compel, Memorandum in Support of Motion to Compel, Affidavit of Matt Crotty re Motion to Compel (Filed 7/25/13);
- (T) Court's Memorandum Decision and Order (Filed 8/9/13);

- (U) Judgment (Filed 8/21/13, but signed 8/19/13);
- (V) Kirk-Scott's Motion and Memorandum re Motion to Alter/Amend, Affidavit of Matthew Z. Crotty, and Second Affidavit of Balinda Antoine (Filed 8/21/13);
- (W) Golub's Response re Motion to Amend/Alter and Affidavit of Howard (Filed 9/20/13);
- (X) Kirk-Scott's Motion to Amend/Alter Reply Brief and Second Affidavit of (Crotty - Filed 9/23/13);
- (Y) Affidavit of Matthew Crotty re Credit Bid - Filed 9/26/13;
- (Z) Writ of Execution, Affidavit in Support of Execution, Application for Writ of Execution (Filed 8/15/13);
- (AA) Kirk-Hughes' Motion and Memorandum re Stay Writ of Execution (Filed 8/27/13);
- (BB) Golubs' Response re Motion to Stay and Affidavit of Howard (Filed 9/6/13);
- (CC) Kirk-Hughes' Reply and Affidavit of Mike Bissell (Filed 9/9/13); and
- (DD) Order re Kirk-Hughes' Motion to Stay Execution of Writ (Filed 9/13/13).

7. Civil Cases Only. The appellate requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court. N/A

8. I certify:

- (a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Valerie E. Nunmacher
 Kootenai County District Court
 324 West Garden Avenue
 Coeur d'Alene, ID 83816

- (b) (1) That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript. (Defendant Kirk-Scott, Ltd. is filing a Notice of Appeal on 9/30/13. Said defendant's

Notice of Appeal is filed in conjunction with - and will be joined with Appellants Notice of Appeal. Therefore Appellants are paying for the transcription costs, including Kirk-Scott's costs.)

(c) (1) That the estimated fee for preparation of the clerk's or agency's record has been paid. (Defendant Kirk-Scott, Ltd. is filing a Notice of Appeal on 9/30/13. Said defendant's Notice of Appeal is filed in conjunction with - and will be joined with Appellants Notice of Appeal. Therefore Appellants are paying for the record copying costs, including Kirk-Scott's costs.)

(d) (1) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED this 30 day of September, 2013.

CAMPBELL & BISSELL, PLLC



MICHAEL S. BISSELL

Attorneys for Defendants/Appellants Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson

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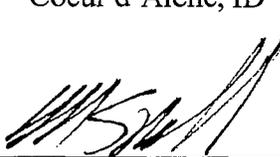
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

<input type="checkbox"/>	HAND DELIVERY	Michael T. Howard
<input checked="" type="checkbox"/>	U.S. MAIL	Winston & Cashatt, P.S.
<input type="checkbox"/>	OVERNIGHT MAIL	601 W. Riverside #1900
<input type="checkbox"/>	FACSIMILE	Spokane, WA 99201
<input checked="" type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Matthew Z. Crotty
<input checked="" type="checkbox"/>	U.S. MAIL	Crotty & Son Law Firm, PLLC
<input type="checkbox"/>	OVERNIGHT MAIL	421 W. Riverside Avenue, Ste. 1005
<input type="checkbox"/>	FACSIMILE	Spokane, WA 99201
<input type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Douglas S. Marfice
<input checked="" type="checkbox"/>	U.S. MAIL	Ramsden & Lyons
<input type="checkbox"/>	OVERNIGHT MAIL	P.O. Box 1336
<input type="checkbox"/>	FACSIMILE	Coeur d'Alene, ID 83816
<input type="checkbox"/>	EMAIL	



MICHAEL S. BISSELL

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CLERK DISTRICT COURT

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DEPUTY

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7 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
8 STATE OF IDAHO, COUNTY OF KOOTENAI
9

10 ALAN GOLUB and MARILYN GOLUB,
husband and wife,
11 Plaintiffs,

12 vs.

13 GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-
14 HUGHES DEVELOPMENT, LLC, a
Delaware limited liability company; KIRK-
15 HUGHES & ASSOCIATES, INC., a
Nevada corporation; KELLY POLATIS, an
16 individual, and DELANO D. and LENORE
J. PETERSON, husband and wife,
17

18 Defendants.

19 ALAN GOLUB and MARILYN GOLUB,
husband and wife,

20 Plaintiffs,

21 vs.

22 KIRK-HUGHES DEVELOPMENT, LLC, a
Delaware limited liability company; KIRK-
23 SCOTT, LTD, a Texas corporation;
INTERNAL REVENUE SERVICE;
24 TOMLINSON NORTH IDAHO, INC., an
Idaho corporation,
25 Defendants.
26

Consolidated Case No. CV07-8038

**ORDER RE KIRK-SCOTT'S MOTION TO
AMEND/ALTER JUDGMENT**

ORDER RE KIRK-SCOTT'S MOTION TO
AMEND/ALTER JUDGMENT - PAGE 1

1
2 On September 27, 2013, Matthew Z. Crotty, Attorney for Defendant Kirk-Scott, Ltd.,
3 joined by Attorney Michael S. Bissell, Attorney for Defendants Kirk-Hughes Development,
4 LLC; Kirk-Hughes & Associates, Inc.; Geraldine Kirk-Hughes; and Peter Sampson, appeared
5 before the undersigned to argue their Motion to Amend/Alter Judgment. Michael T. Howard,
6 attorney for Plaintiffs, also appeared.
7

8 Having reviewed the pleadings filed by the parties and after hearing the arguments of the
9 parties, the Court made its oral ruling in open court.

10 **THEREFORE, IT IS HEREBY ORDERED:** Based upon the reasoning provided in
11 open court, this Court, in its discretion, **denies** Defendants' Motion to Amend/Alter Judgment.

12 DONE IN OPEN COURT this 2 day of October, 2013.

13
14
15 Lansing L. Haynes
16 JUDGE LANSING L. HAYNES
17
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24
25
26

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be [] mailed,
3 postage prepaid; [] hand delivered; [x] sent
4 via facsimile on this 2 day of Oct.,
5 2013, to:

6 Michael T. Howard
7 Winston & Cashatt, Lawyers, a Professional Service Corporation
8 250 Northwest Boulevard, Suite 206
9 Coeur d'Alene, ID 83814
10 Fax: 208-765-2121
11 Attorney for Plaintiffs

12 Douglas S. Marfice
13 Ramsden & Lyons
14 P.O. Box 1336
15 Coeur d'Alene, ID 83816
16 Fax: (208) 664-5884
17 Attorney for for Defendant, Tomlinson North Idaho, Inc.

18 Michael S. Bissell
19 Campbell & Bissell, PLLC
20 Corbet Aspray House
21 820 W. 7th Avenue
22 Spokane, WA 99204
23 Fax: (509) 455-7111
24 Attorney for Defendant, Kirk-Hughes Development, LLC

25 Matthew Z. Crotty
26 Crotty & Son Law Firm, PLLC
421 W. Riverside Ave., Suite 1005
Spokane, WA 99201
Fax: (509) 703-7957
Attorney for Defendant, Kirk-Scott, Ltd.

27 
28 _____
29 CLERK OF THE DISTRICT COURT

30 458660.doc

31 ORDER RE KIRK-SCOTT'S MOTION TO
32 AMEND/ALTER JUDGMENT - PAGE 3

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2013 OCT 10 AM 10:03

CLERK DISTRICT COURT

Cathy [Signature]
DEPUTY

MICHAEL S. BISSELL
CAMPBELL & BISSELL, PLLC
Corbet-Aspray House
820 W. 7th Avenue
Spokane, Washington 99204
Telephone: (509) 455-7100
Facsimile: (509) 455-7111
ISB No. 5762

Attorneys for Defendants/Appellants Kirk-Hughes
Development, LLC, Kirk-Hughes &
Associates, Inc., Geraldine Kirk-Hughes,
and Peter Sampson

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN	)	Case No. CV 07-8038
GOLUB, husband and wife,	)	[Consolidated Case No.: CV 13-866]
)	
Plaintiff/Respondents,)	
	)	REQUEST FOR ADDITIONAL
vs.	)	TRANSCRIPT
)	
KIRK-HUGHES DEVELOPMENT,)	
LLC, a Delaware limited liability)	
company; KIRK-SCOTT, LTD., a Texas)	
corporation; INTERNAL REVENUE)	
SERVICE; TOMLINSON NORTH)	
IDAHO, INC., an Idaho corporation,)	
)	
Defendants,)	
)	
KIRK-HUGHES DEVELOPMENT,)	
LLC, a Delaware limited liability)	
company;)	
)	
Appellant.)	
<hr/>		
ALAN GOLUB and MARILYN)	
GOLUB, husband and wife,)	
)	
Plaintiffs/Respondents,)	

vs.)
)
)
 GERALDINE KIRK-HUGHES and)
 PETER SAMPSON, husband and wife;)
 KIRK-HUGHES DEVELOPMENT,)
 LLC, a Delaware limited liability)
 company; KIRK-HUGHES &)
 ASSOCIATES, INC., a Nevada)
 corporation; KELLY POLATIS, an)
 individual, and DELANO D. and)
 LENORE J. PETERSON, husband and)
 wife,)
 Defendants,)
)
 GERALDINE KIRK-HUGHES and)
 PETER SAMPSON, husband and wife;)
 KIRK-HUGHES DEVELOPMENT,)
 LLC, a Delaware limited liability)
 company; KIRK-HUGHES &)
 ASSOCIATES, INC., a Nevada)
 corporation;)
 Appellants.)

TO: The Above-Named Respondents, ALAN AND MARILYN GOLUB
 AND TO: Their Attorney, MICHAEL T. HOWARD,
 AND TO: THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

The above-named Appellants, Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson (“Appellants”) in the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the reporter's transcript in hard copy and electronic format in addition to that required to be included by the I.A.R. and the notice of appeal.

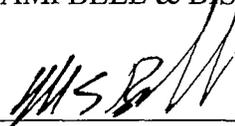
- Transcript of the September 13, 2013, Motion to Stay Execution of Writ hearing.

Court Reporter: Valerie E. Nunmacher, Kootenai County District Court, 324 West Garden Avenue, Coeur d'Alene, ID 83816, transcribed the hearing. On October 9, 2013, Ms. Nunmacher informed counsel that the transcription costs were approximately \$32.50.

I certify that a copy of this request was served upon the (reporter) (clerk) of the district court or administrative agency and upon all parties required to be served pursuant to Rule 20 (and upon the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.).

DATED this 9th day of October, 2013.

CAMPBELL & BISSELL, PLLC



MICHAEL S. BISSELL

Attorneys for Defendants/Appellants Kirk-Hughes
Development, LLC, Kirk-Hughes &
Associates, Inc., Geraldine Kirk-Hughes,
and Peter Sampson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of October, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|----------------|---|
| <input type="checkbox"/> | HAND DELIVERY | Michael T. Howard |
| <input checked="" type="checkbox"/> | U.S. MAIL | Winston & Cashatt, P.S. |
| <input type="checkbox"/> | OVERNIGHT MAIL | 601 W. Riverside #1900 |
| <input type="checkbox"/> | FACSIMILE | Spokane, WA 99201 |
| <input type="checkbox"/> | EMAIL | |
| | | |
| <input type="checkbox"/> | HAND DELIVERY | Matthew Z. Crotty |
| <input checked="" type="checkbox"/> | U.S. MAIL | Crotty & Son Law Firm, PLLC |
| <input type="checkbox"/> | OVERNIGHT MAIL | 421 W. Riverside Avenue, Ste. 1005 |
| <input type="checkbox"/> | FACSIMILE | Spokane, WA 99201 |
| <input type="checkbox"/> | EMAIL | |
| | | |
| <input type="checkbox"/> | HAND DELIVERY | Douglas S. Marfice |
| <input checked="" type="checkbox"/> | U.S. MAIL | Ramsden & Lyons |
| <input type="checkbox"/> | OVERNIGHT MAIL | P.O. Box 1336 |
| <input type="checkbox"/> | FACSIMILE | Coeur d'Alene, ID 83816 |
| <input type="checkbox"/> | EMAIL | |
| | | |
| <input type="checkbox"/> | HAND DELIVERY | Valerie E. Nunmacher, Court Reporter to |
| <input checked="" type="checkbox"/> | U.S. MAIL | Judge Haynes |
| <input type="checkbox"/> | OVERNIGHT MAIL | Kootenai County District Court |
| <input type="checkbox"/> | FACSIMILE | 324 West Garden Avenue |
| <input type="checkbox"/> | EMAIL | Coeur d'Alene, ID 83816 |



MICHAEL S. BISSELL

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: SS

2013 NOV 21 AM 11:11

CLERK DISTRICT COURT
[Signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,
Plaintiffs,

Consolidated Case No. CV 07-8038

vs.

DECISION AND ORDER RE:
I.R.C.P. 11(a)(1) SANCTIONS

KIRK-HUGHES DEVELOPMENT, LLC, a
Delaware limited liability company;
KIRK-SCOTT, LTD., a Texas corporation;
INTERNAL REVENUE SERVICE; TOMLINSON
NORTH IDAHO, INC., an Idaho corporation,
Defendants.

ALAN GOLUB and MARILYN GOLUB,
husband and wife,
Plaintiffs,

vs.

GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-HUGHES
DEVELOPMENT, LLC, a Delaware limited
liability company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada corporation;
KELLY POLATIS, an individual, and DELANO
D. and LENORE J. PETERSON, husband and wife,
Defendants.

Matthew Z. Crotty, CROTTY & SON LAW FIRM, PLLC, for Defendant Kirk-Scott, Ltd.
Michael S. Bissell, CAMPBELL & BISSELL, PLLC, for Defendant Kirk-Hughes Development, LLC, et al.
Michael T. Howard, WINSTON & CASHETT, for Plaintiffs Alan and Marilyn Golub.

Plaintiffs' I.R.C.P. 11(a)(1) sanctions request is denied; however, the Court *sua sponte* grants sanctions.

I. Introduction

On August 9, 2013, this Court entered its Memorandum Decision and Order denying Defendant Kirk-Scott, Ltd.'s ("Kirk-Scott") and Defendants Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson's ("Kirk-Hughes") motions to set aside a 2009 money judgment entered against Kirk-Hughes and in favor of Plaintiffs Alan and Marilyn Golub ("Golub"). On August 21, 2013, this Court entered its Judgment Re: Interest and Priority in Property.

On August 21, 2013, Kirk-Scott filed its Motion to Amend/Alter Judgment, pursuant to I.R.C.P. 59(a)(1), (6) and (7), along with an affidavit of counsel and the Second Affidavit of Balinda Antoine. On August 23, 2013, Kirk-Hughes filed a Notice of Joinder in Kirk-Scott's motion. On September 19, 2013, Golub filed their responsive brief and an affidavit of counsel. On September 23, 2013, Kirk-Scott filed its reply brief and an additional affidavit of counsel. Also on September 23, 2013, Kirk-Hughes filed a Notice of Joinder in Kirk-Scott's reply brief.

On September 27, 2013, Kirk-Scott's and Kirk-Hughes's Motion to Amend/Alter Judgment came on for hearing. Matthew Crotty appeared and argued on behalf of Kirk-Scott, Michael Bissell appeared telephonically and argued on behalf of Kirk-Hughes, Michael Howard appeared and argued on behalf of Golub.

At the conclusion of argument, the Court issued its oral ruling denying the defendants' Motion to Amend/Alter Judgment. The Court took Golub's I.R.C.P. 11(a)(1) sanctions request under advisement. On October 2, 2013, the Court entered its Order Re: Kirk-Scott's Motion to Amend/Alter Judgment denying the motion.

II. Standards

Awarding attorney fees as per Rule 11(a)(1) is a discretionary decision. *Slack v. Anderson*, 140 Idaho 38, 89 P.3d 878 (2004); *Gubler v. Brydon*, 125 Idaho 112, 867 P.2d 986 (1994). Rule 11(a)(1) provides in 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 . . .

I.R.C.P. 11(a)(1) allows for the imposition of attorney fees against either a party or the party's attorney. The rule provides that the signature of an attorney on a pleading or motion certifies that "after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Id.* Additionally, by signing, the party or attorney certifies that the pleading is "not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation." *Id.*

The Idaho Supreme Court has provided, "[t]he reasons for which attorney fees may be awarded pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1) are not reasons that will support an award of sanctions pursuant to I.R.C.P. 11(a)(1)." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 96, 803 P.2d 993, 1002 (1991); *see also Tolley v. THI Co.*, 140 Idaho 253, 263, 92 P.3d 503, 513 (2004); *Landvik by Landvik v. Herbert*, 130 Idaho 54, 61, 936 P.2d 697,

704 (Ct. App. 1997); *Gubler v. Brydon*, 125 Idaho 112, 867 P.2d 986 (1994). “Rule 11(a)(1) is not a broad compensatory law. It is a court management tool. 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, 23–24, 773 P.2d 290, 291–92 (Ct. App. 1989).

In *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990) (*Durrant I*) and *Durrant v. Christensen*, 120 Idaho 886, 821 P.2d 319 (1991) (*Durrant II*), after much discussion, the Idaho Supreme Court concluded that I.R.C.P. 11(a)(1) fees are not a question of bad faith, but instead Rule 11 attorney fees can be awarded even though the attorney has not acted in bad faith. In addition, the Court cannot simply award attorney fees as a sanction under Rule 11(a)(1) because the claims are not “well grounded in fact,” but instead “the trial court must determine whether the litigant made a proper investigation upon reasonable inquiry.” *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991).

III. Analysis

Initially, the Court denies Golub’s request for Rule 11 sanctions because Rule 11 provides “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 ...” (emphasis added). Golub did not file a motion for sanctions. Rather Golub, in the opposition brief to the defendants’ motion, requested that the Court sanction Golub pursuant to Rule 11. Nevertheless, the Court, upon its own initiative and in its discretion, imposes Rule 11 sanctions upon Kirk-Scott and Kirk-Hughes based upon the following required findings and for the following reasoning.

A. Findings

1. On August 9, 2013, this Court entered its Memorandum Decision and Order denying Kirk-Scott's and Kirk-Hughes's motions to set aside a 2009 money judgment entered against Kirk-Hughes and in favor of Golub. On August 21, 2013, this Court entered its Judgment Re: Interest and Priority in Property.
2. On August 21, 2013, Defendant Kirk-Scott filed its Motion to Amend/Alter Judgment, pursuant to I.R.C.P. 59(a)(1), (6) and (7), and a supporting brief. Both were signed by Kirk-Scott's counsel Mr. Crotty. On August 23, 2013, Kirk-Hughes filed a Notice of Joinder in Kirk-Scott's motion, which was signed by Kirk-Hughes's counsel Mr. Bissell.
3. Kirk-Scott asserted in its supporting memorandum that "[o]n June 24, 2013, Kirk-Scott moved to vacate the default judgment under I.R.C.P. 60(b)(4)(5)&(6)." *Kirk-Scott's Memorandum in Support of Motion to Amend Judgment at p. 2.*
4. Kirk-Hughes asserts "[i]n addition to the arguments raised in Kirk-Scott's Motion and Memorandum, Defendants point out that by its terms Rule 60(b), relied upon by Kirk-Scott in its current Motion and its underlying Motion to Vacate, does not limit the power of a court to set aside a judgment for fraud [on] the court, and neither does it place any time limitations on bringing a motion on such grounds (which impacts not only the significance of "timeliness" on Kirk-Scott's motion, but also Defendants' motions to join therein)". *Kirk-Hughes's Notice of Joinder at p. 2 (emphasis added).*
5. On September 4, 2013, Mr. Howard, Golub's counsel, wrote a letter to Mr. Crotty informing him that the Motion to Amend/Alter Judgment was seeking reconsideration of the Court's I.R.C.P. 60(b) order and was not permitted by I.R.C.P. 11(a)(2)(B). Mr. Howard provided that "as a professional courtesy" Golub would not seek sanctions if the Motion to Amend/Alter Judgment was withdrawn. *Affidavit of Michael Howard, filed September 19, 2013, Exhibit 1.*
6. On September 5, 2013, Mr. Crotty sent a responsive email to Mr. Howard providing that Kirk-Scott would press forward with its motion and that there was no legal basis for Mr. Howard's assertion. *Second Affidavit of Matthew Z. Crotty, filed September 23, 2013, Exhibit A.*
7. On September 19, 2013, Golub filed an opposing brief providing legal analysis as to why the Motion to Amend/Alter Judgment should be denied, i.e. no trial was held in this matter and the motion requested that the Court reconsider its order denying the defendants' motions to set aside the 2009 judgment.
8. On September 23, 2013, Kirk-Scott filed its reply brief; signed by Mr. Crotty. Also on September 23, 2013, Kirk-Hughes filed its notice of joinder in Kirk-Scott's reply brief; the notice was signed by Mr. Bissell.

9. In the reply brief, Kirk-Scott provides, “Kirk-Scott is not asking the Court to ‘reconsider’ its denial of Kirk-Scott’s Rule 60 motion.” *Reply Brief at p. 6*. Further, Kirk-Scott asserted that it was requesting that the Court amend the August 9, 2013, order denying the motions to set aside the judgment and the August 19, 2013, Judgment. Lastly, Kirk-Scott asserted that I.R.C.P. 59(a) was an appropriate basis for the Motion to Amend/Alter Judgment because a summary judgment motion is equivalent to a directed verdict at trial. The defendants cited this Court to *McFeely v. U.S.*, 700 F. Supp. 414 (S.D. Ind. 1988), in support of their assertion. *Reply Brief at p. 3*.
10. This Court asked Mr. Crotty and Mr. Bissell, at the September 27, 2013, hearing, if there was any Idaho authority for their assertion that a summary judgment motion was equivalent to a trial. Mr. Crotty replied that he could not find any Idaho authority and Mr. Bissell had no reply.
11. At the conclusion of the hearing, this Court denied the defendants motion finding that I.R.C.P. 59(a) was inapplicable because no trial had taken place in this action. Further, that the motion requested the Court reconsider its order denying the defendants motions to set aside the 2009 judgment and that I.R.C.P. 11(a)(2)(B) expressly prohibits reconsideration of a Rule 60(b) order.

B. Conclusions/Reasoning

First, this Court concludes that under the existing facts, known to the parties and counsel, that no trial had taken place in this matter. Further, that the assertion that a summary judgment motion/determination is ultimately equivalent to a directed verdict/trial was not warranted by existing law or a good faith argument for the extension of existing law. While the caption of Rule 59(a) does provide “New Trial – Amendment of judgment –Grounds[,]” a careful reading of the rule, in particular subsection 7, explains that a judgment may be amended if a bench trial has been conducted. Also, the language, relied upon by defendants in subsection 6, “the verdict or other decision” relates to decisions made at or after a trial. There is abundant case law addressing the applicability of subsection 6; none applying to a summary judgment. Lastly, *McFeely v. U.S.*, 700 F. Supp. 414 (S.D. Ind. 1988)(citing *Collins v. Associated Pathologists*,

Ltd., 844 F.2d 473 (7th Cir. 1988)), does not stand for the proposition asserted, i.e., that a summary judgment decision is the equivalent of a trial. The *McFeely* court provided:

After citing to the trilogy of Supreme Court summary judgment cases, the Seventh Circuit explained the change in attitude towards Rule 56 at length, writing:

This language [from the summary judgment cases] indicates that a summary judgment motion is like a trial motion for a directed verdict and that 'genuine' allows some quantitative determination of the sufficiency of the evidence. The trial court still cannot resolve factual disputes that could go to a jury at trial, but weak factual claims can be weeded out through summary judgment motions. The existence of a triable issue is no longer sufficient to survive a motion for summary judgment. Instead, the triable issue must be evaluated in its factual context, which suggests that the test for summary judgment is whether sufficient evidence exists in the pre-trial record to allow the non-moving party to survive a motion for directed verdict. *Collins*, 844 F.2d at 476 (citation omitted).

McFeely, 700 F. Supp. 414, 417.

Consequently, the defendants did not cite any relevant authority supporting their assertions that Rule 59(a) was a proper basis upon which to base their Motion to Amend/Alter Judgment.

Second, while the defendants captioned their motion as one to amend/alter a judgment, the motion was not brought under I.R.C.P. 59(e). In fact, while Golub's counsel--out of an abundance of caution--construed the motion as a Rule 59(e) motion, the defendants continued to assert Rule 59(a) as the basis for their motion.

Third, while the defendants asserted that they were requesting that the Court “amend” the 2013 Judgment¹, it was apparent from the defendants’ briefing that they were requesting that the Court “reconsider” its order denying their motions to set aside the 2009 judgment. Indeed, both defendants provided that their previous motions were Rule 60(b) motions. Kirk-Hughes even went so far as to say that the present motion to amend/alter was based upon Rule 60(b), and Kirk-Scott asserted that it was requesting that the Court amend the Order. The entirety of the briefing and argument addressed the Court’s decision denying the motions to set aside the 2009 judgment. As such, this Court is left with the abiding belief that the defendants requested this Court to reconsider its August 9, 2013, order denying the defendants’ Rule 60(b) motions. Additionally, this Court concludes that the defendants’ attempt to skirt around Rule 11(a)(2)(B)’s prohibition against reconsideration of Rule 60(b) orders is the exact litigative misconduct that Rule 11 sanctions was intended to address.

Therefore, this Court concludes that a reasonable inquiry by the defendants would have revealed the prohibition against seeking reconsideration of a Rule 60(b) order and, as such, they and their counsel did not conduct a proper investigation upon reasonable inquiry as required of Rule 11(a)(1). Consequently, this Court finds that Kirk-Scott’s and Kirk-Hughes’ Motion to Amend/Alter Judgment and supporting briefing were not (1) grounded in fact, (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law of existing law, (3) were interposed for the improper purpose of unnecessary delay and (4) did cause needless increases in the cost of litigation.

¹ The 2013 judgment recited that Golub had a money judgment against Kirk-Hughes, the same as provided in the 2009 judgment. The 2013 judgment did add language re: interest and priority of the 2009 judgment. The defendants do not seek to amend the interest and priority portions of the 2013 judgment.

As such, this Court, on its own initiative and in its discretion, awards Golub Rule 11(a)(1) sanctions to include reasonable expenses and attorney's fees incurred because of the filing of the Motion to Amend/Alter Judgment and supporting briefing.

IV. Order

Based upon the foregoing findings and conclusions, this Court HEREBY ORDERS:

1. Rule 11(a)(1) sanctions are awarded, in this Court's discretion, in favor of Alan and Marilyn Golub and against the following parties: Kirk-Scott, Ltd.; Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson;
2. The sanctions are the Golub's reasonable expenses and attorney's fees incurred because of the filing of the Motion to Amend/Alter Judgment and supporting briefing;
3. The Golubs shall file, and serve on the defendants' counsel, a memorandum of costs, attorney's fees, and a proposed judgment with the Court within fourteen (14) days from the service of this Decision and Order; and
4. The memorandum of costs and attorney's fees shall apportion the incurred reasonable costs and attorney's fees between the Kirk-Scott and Kirk-Hughes parties.

Dated this 21 day of November, 2013.

Lansing L. Haynes
LANSING L. HAYNES, District Judge

CERTIFICATE OF SERVICE

On this 21 day of November, 2013, a true and correct copy of the foregoing was served on the below by the method indicated:

MICHAEL T. HOWARD
WINSTON & CASHATT
250 Northwest Boulevard, Suite 107A
Coeur d'Alene, ID 83814
Facsimile: 208-765-2121
Attorney for Golub

MAIL: _____
FAX:

MICHAEL S. BISSELL
CAMPBELL & BISSELL
Corbet-Aspray House
820 W. 7th Avenue
Spokane, WA 99204
Facsimile: 509-455-7111
Attorney for Kirk-Hughes Development, LLC, et al.

MAIL: _____
FAX:

MATTHEW A. CROTTY
CROTTY & SON LAW FIRM
421 W. Riverside Avenue, Ste. 1005
Spokane, WA 99201
Facsimile: 509-703-7957
Attorney for Kirk-Scott, Ltd.

MAIL: _____
FAX:

DOUGLAS MARFICE
RAMSDEN & LYONS
P.O. BOX 1336
Coeur d'Alene, ID 83816
Facsimile: 208-664-5884
Attorney for Tomlinson North Idaho, Inc.

MAIL: _____
FAX:

Ryan M. Best
Best Law, PLLC
421 W. Riverside Ave., Ste. 1005
Spokane, WA 99201
Facsimile: 509-703-7957
Attorney for Kirk-Scott, Ltd.

MAIL: _____
FAX:

Clifford T. Hayes, Clerk of the Court

By: *Luzi Herdelt*
(Deputy Clerk)

In the Supreme Court of the State of Idaho

CLERK DISTRICT COURT
[Signature]
DEPUTY

ALAN GOLUB and MARILYN GOLUB,
husband and wife,)

Plaintiffs-Respondents,)

v.)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company; KIRK-)
HUGHES & ASSOCIATES, INC., a Nevada)
corporation; GERALDINE KIRK-HUGHES)
and PETER SAMPSON, husband and wife,)

Defendants-Appellants,)

and)

KIRK-SCOTT, LTD., a Texas corporation;)
INTERNAL REVENUE SERVICE;)
TOMLINSON NORTH IDAHO, INC., an)
Idaho corporation; KELLY POLATIS, an)
individual; DELANO D. and LENORE J.)
PETERSON, husband and wife,)

Defendants.)

ALAN GOLUB and MARILYN GOLUB,
husband and wife,)

Plaintiffs-Respondents,)

v.)

KIRK-SCOTT, LTD., a Texas corporation,)

Defendant-Appellant,)

and)

KIRK-HUGHES DEVELOPMENT, LLC, a)

ORDER CONSOLIDATING APPEALS

Supreme Court Docket No. 41501-2013
Kootenai County No. 2007-8038

Supreme Court Docket No. 41505-2013
Kootenai County No. 2007-8038

ORDER CONSOLIDATING APPEAL – Docket Nos. 41501-2013/41505-2013

Delaware limited liability company;)
 INTERNAL REVENUE SERVICE;)
 TOMLINSON NORTH IDAHO, INC., an)
 Idaho corporation; GERALDINE KIRK-)
 HUGHES and PETER SAMPSON, husband)
 and wife; KIRK-HUGHES & ASSOCIATES,)
 INC., a Nevada corporation; KELLY)
 POLATIS, an individual; DELANO D. and)
 LENORE J. PETERSON, husband and wife,)
)
 Defendants.)

It appearing that these appeals should be consolidated for Clerk's Record and Reporter's Transcript for reasons of judicial economy; therefore,

IT HEREBY IS ORDERED that appeal No. 41501 and 41505 shall be CONSOLIDATED FOR CLERK'S RECORD AND REPORTER'S TRANSCRIPT under No. 41501, but all documents filed shall bear both docket numbers.

IT FURTHER IS ORDERED that the District Court Clerk shall prepare a CLERK'S RECORD, which shall include the documents requested in the Notices of Appeal, together with a copy of this Order.

IT FURTHER IS ORDERED that the District Court Reporter shall prepare a REPORTER'S TRANSCRIPT, which shall include the transcripts requested in the Notices of Appeal.

DATED this 21st day of November, 2013.

For the Supreme Court

Dorothy Beaver

 Stephen W. Kenyon, Clerk

cc: Counsel of Record
 District Court Clerk
 District Court Reporter

To: Clerk of the Courts
Idaho Supreme Court Building
P.O. Box 83720
Boise, Idaho 83720-0101
Fax 208-334-2616

2013 DEC -4 AM 10: 51

CLERK DISTRICT COURT
[Signature]
DEPUTY

Golub, et al.,)	
)	
Plaintiff/Respondent,)	
)	
vs.	)	SUPREME COURT NO.:
	)	41501; 41505
)	
Kirk-Hughes Development, et)	
al.,)	
)	
Defendant/Appellant.)	

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on December 4, 2013, I lodged an original transcript, totaling 110 pages, and three copies of the following hearing(s): 7-9-13 Motion to Dismiss, Motion to Vacate, Motion For Summary Judgment; 9-13-13 Decision on Motion to Stay Execution of Write; 9-27-13 Motion to Amend/Alter, for the above-referenced appeal with the District Court Clerk of the County of Kootenai in the First Judicial

Valerie Nunemacher
Valerie Nunemacher, CSR, CCR, RPR

2013 DEC -4 AM 10: 20

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN GOLUB,
husband and wife,
Plaintiffs,

vs.

GERALDINE KIRK-HUGHES and PETER
SAMPSON, husband and wife; KIRK-
HUGHES DEVELOPMENT, LLC, a
Delaware limited liability company; KIRK-
HUGHES & ASSOCIATES, INC., a
Nevada corporation; KELLY POLATIS, an
individual, and DELANO D. and LENORE
J. PETERSON, husband and wife,

Defendants.

ALAN GOLUB and MARILYN GOLUB,
husband and wife,

Plaintiffs,

vs.

KIRK-HUGHES DEVELOPMENT, LLC, a
Delaware limited liability company; KIRK-
SCOTT, LTD, a Texas corporation;
INTERNAL REVENUE SERVICE;
TOMLINSON NORTH IDAHO, INC., an
Idaho corporation,

Defendants.

Consolidated Case No. CV07-8038

ORDER RE SANCTIONS

1
2 On September 27, 2013, Matthew Z. Crotty, Attorney for Defendant Kirk-Scott, Ltd.,
3 joined by Attorney Michael S. Bissell, Attorney for Defendants Kirk-Hughes Development,
4 LLC; Kirk-Hughes & Associates, Inc.; Geraldine Kirk-Hughes; and Peter Sampson, appeared
5 before the undersigned to argue their Motion to Amend/Alter Judgment. Michael T. Howard,
6 attorney for Plaintiffs, also appeared.
7

8 On November 21, 2013, this Court issued its Order Re: I.R.C.P. 11(a)(1) Sanctions,
9 allowing Plaintiffs to submit their Memorandum of fees and costs with respect to Defendants'
10 Motion to Amend/Alter Judgment. Having reviewed the filings and pleadings of counsel
11 submitted in this matter,
12

13 **NOW THEREFORE, IT IS HEREBY ORDERED:** This Court, in its discretion,
14 awards the amount of \$ 4,800.00 to Plaintiffs, which amount shall be
15 divided equally between the Defendants, and paid by them to Plaintiffs' counsel on or before
16 Dec. 17, 2013, 2013.

17 DONE this 3 day of Dec., 2013.

18
19 Lansing L. Haynes
20 JUDGE LANSING L. HAYNES
21
22
23
24
25
26

1 I hereby certify that I caused a true and
2 complete copy of the foregoing to be [] mailed,
3 postage prepaid; [] hand delivered; sent
4 via facsimile on this 4 day of Dec.,
5 2013, to:

6 Michael T. Howard
7 Winston & Cashatt, Lawyers, a Professional Service Corporation
8 250 Northwest Boulevard, Suite 206
9 Coeur d'Alene, ID 83814
10 Fax: 208-765-2121 #490
11 Attorney for Plaintiffs

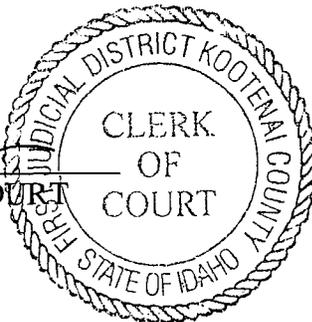
12 Douglas S. Marfice
13 Ramsden & Lyons
14 P.O. Box 1336 #491
15 Coeur d'Alene, ID 83816
16 Fax: (208) 664-5884
17 Attorney for for Defendant, Tomlinson North Idaho, Inc.

18 Michael S. Bissell
19 Campbell & Bissell, PLLC
20 Corbet Aspray House
21 820 W. 7th Avenue #492
22 Spokane, WA 99204
23 Fax: (509) 455-7111
24 Attorney for Defendant, Kirk-Hughes Development, LLC

25 Matthew Z. Crotty
26 Crotty & Son Law Firm, PLLC
421 W. Riverside Ave., Suite 1005
Spokane, WA 99201 #493
Fax: (509) 703-7957
Attorney for Defendant, Kirk-Scott, Ltd.

CLIFFORD T. HAYES

Clifford T. Hayes
CLERK OF THE DISTRICT COURT



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ORDER RE SANCTIONS - PAGE 3

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: SM 9/15/11
DEC -4 PM 1:23

CLERK DISTRICT COURT
John Paul
DEPUTY

Matthew Z. Crotty
ISB #8653
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Email: matt@crottyandson.com

Attorneys for Defendant Kirk-Scott, Ltd.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN)
GOLUB, husband and wife,)
) Supreme Court Docket No. 41505-
) 2013
)
) Plaintiffs,) Case No. CV 07-8038
) [Consolidated Case No.: CV 13-866]

vs.)

KIRK-HUGHES DEVELOPMENT,)
LLC, a Delaware limited liability)
company; KIRK-SCOTT, LTD., a Texas) **AMENDED NOTICE OF APPEAL**
corporation; INTERNAL REVENUE)
SERVICE; TOMLINSON NORTH)
IDAHO, INC., an Idaho corporation,)
)
)
) Defendants.)

ALAN GOLUB and MARILYN)
GOLUB, husband and wife,)
)
) Plaintiffs,)

vs.)

GERALDINE KIRK-HUGHES and)
PETER SAMPSON, husband and wife;)
KIRK-HUGHES DEVELOPMENT,)
LLC, a Delaware limited liability)
company; KIRK-HUGHES &)
ASSOCIATES, INC., a Nevada)

corporation; KELLY POLATIS, an)
 individual, and DELANO D. and)
 LENORE J. PETERSON, husband and)
 wife,)
)
 Defendants.)

TO: THE ABOVE NAMED RESPONDENTS, ALAN AND MARILYN GOLUB AND
 THE PARTYS' ATTORNEY, MICHAEL T. HOWARD, AND THE CLERK OF THE
 ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

Kirk-Scott, Ltd. amends the Notice of Appeal it filed on September 30, 2013, to appeal the trial court's November 21, 2013, *sua sponte* "Decision and Order re: I.R.C.P. 11(a)(1) Sanctions." Pursuant to I.A.R. 17(m), the contents of the Amended Notice of Appeal are underlined.

1. The above named appellant Kirk-Scott, Ltd. (Kirk-Scott) appeals against the above named respondents to the Idaho Supreme Court from: (1) the August 9, 2013, Order (i) Denying Kirk-Scott's Motion to Dismiss, (ii) Denying Kirk-Scott's Motion to Vacate, and (iii) Granting Respondents' Motion for Summary Judgment; (2) the August 19, 2013, Judgment; (3) the September 27, 2013, Order¹ Denying Kirk-Scott's Motion to Alter/Amend the aforementioned August 9, 2013, and August 19, 2013, Order and Judgment; ~~and~~, (4) the November 21, 2013, Decision and Order re: I.R.C.P. 11(a)(1) Sanctions; and, (5) the December 3, 2013, Order re Sanctions. The above-referenced Orders and Judgment were entered in the above entitled action on August 9, 2013, August 19, 2013, September 27, 2013, November 21, 2013, and December 3, 2013 with the Honorable Judge Lansing Haynes, presiding.

¹ The September 27, 2013, Order referenced was orally entered by the Court on September 27, 2013. The Court gave Respondents' counsel instruction to prepare an Order. That yet-to-be-published Order is incorporated by Kirk-Scott as part of its Notice of Appeal.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgments or Orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1)(3)(5)(7) I.A.R.

This is an EXPEDITED APPEAL pursuant to I.A.R. 12.2.

3. The issues on appeal that the appellant intends to assert in the appeal are:
 - (A) The trial court erred in granting respondents' Motion for Summary Judgment by failing to address whether respondent met the "good faith" element required under IC 55-606. By not addressing the "good faith" element of IC 55-606 the Court missed, *inter alia*, a clear issue of fact.
 - (B) The trial court erred in denying Kirk-Scott, Ltd.'s motion to vacate because Kirk-Scott did not establish "when" it became aware of the existence of a March 11, 2009, default judgment. Kirk-Scott was not a party to the action in which the March 11, 2009, default judgment was entered; accordingly, the Court erred in making a non-party to the action that gave rise to the default judgment establish "when" it became aware of the default judgment *before* respondent named Kirk-Scott in the above-referenced 2013 action. Stated simply, before being named in the 2013 lawsuit non-party Kirk-Scott lacked standing to contest the default judgment thus the issue of "when" Kirk-Scott became aware of the 2009 default judgment is irrelevant and the trial court erred in denying Kirk-Scott's motion to vacate on that ground.
 - (C) The Idaho Supreme Court consistently holds that a default judgment cannot grant relief greater than what was prayed for in the Complaint. The March 11, 2009, default judgment granted relief greater than what was prayed for in the underlying Complaint. The trial court erred in denying Kirk-Scott, Ltd.'s motion to vacate on that ground.
 - (D) The trial court erred in granting respondents' motion for summary judgment by not addressing, in its Order, Kirk-Scott, Ltd.'s arguments that: (a) respondents' default judgment was invalid because it was not supported by valuable consideration; (b) respondents' default judgment was invalid because it

lacked a Rule 54(b) certificate; and, (c) respondent's default judgment was invalid because the affidavit in support of said default judgment named only one defendant but the Court allowed the default judgment to be entered against four other defendants who were not named in the affidavits in support of the default judgment.

(E) The trial court erred in granting respondents' motion for summary judgment by finding that Kirk-Scott, Ltd.'s deed of trust was not properly acknowledged.

(F) The trial court erred in denying Kirk-Scott, Ltd.'s motion to dismiss by finding that Kirk-Scott improperly recorded its deed of trust during a bankruptcy proceeding.

(G) The trial court erred in denying Kirk-Scott, Ltd.'s IRCP 60(b)(5) & (6) motions to vacate by, *inter alia*, not specifically addressing those motions in its order denying Kirk-Scott, Ltd.'s IRCP 60(b)(4) motion to vacate. Kirk-Scott moved to vacate respondents' default judgment under IRCP 60(b)(4), (5), and (6) but the Court's August 9, 2013, Order, which denied the Rule 60(b)(4) motion, did not address Kirk-Scott's Rule 60(b)(5) & (6) motions.

(H) The trial court erred in denying Kirk-Scott's motion to vacate under IRCP 60(b)(6) because the respondents' default judgment did not comport with IRCP 55(b)(1) as the affidavit in support of the default judgment named one defendant but the trial court granted the default judgment against four other defendants who were not named in the affidavit in support of the March 11, 2009, default judgment.

(I) The trial court erred in denying Kirk-Scott's motion to vacate under IRCP 60(b)(5) because the March 11, 2009, default judgment was a prospective judgment.

(J) The trial court erred in denying Kirk-Scott's motion to amend/alter the judgment. Kirk-Scott's Rule 59(a)(1)(6)&(7) motion sought to amend the August 19, 2013, Judgment because the Judgment was (i) not supported by the evidence and (ii) allowed respondents to recover twice for the same harm.

(K) The trial court abused its discretion in awarding sanctions against Kirk-Scott, Ltd.

4. Has an order been entered sealing all or any portion of the record? No.
If so, what portion? N/A.

5. (a) Is a reporter's transcript requested? Yes.
(b) The appellant requests the preparation of the following portions of the reporter's standard transcript, as defined in Rule 25(c), I.A.R., in hard copy and electronic copy: Appellant requests transcripts of the July 9, 2013, motion for summary judgment, motion to vacate, and motion to dismiss hearing and the September 27, 2013, motion to amend/alter hearing. The court reporter for the July 9, 2013, and September 27, 2013, hearings was Valarie E. Nunmacher, Kootenai County District Court 324 West Garden Ave. Coeur d'Alene, ID 83816. On September 27, 2013, Ms. Nunmacher informed Kirk-Scott's counsel that the transcription costs was approximately \$325.00 for both hearings.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:
 - (A) Respondents' Complaint - Filed 1/25/13
 - (B) Kirk-Scott's Answer - Filed 3/14/13
 - (C) Kirk-Scott's Motion to Dismiss and Memorandum in Support of Motion to Dismiss - Filed 4/30/13
 - (D) Respondents' Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, Affidavit of Michael T. Howard, and Affidavit of Alan Golub - Filed 5/9/13
 - (E) Respondents' Response to Kirk-Scott's Motion to Dismiss - Filed 5/14/13
 - (F) Kirk-Scott's Motion and Memorandum re Motion to Vacate Default Judgment - Filed 6/24/13
 - (G) Kirk-Scott's Combined Statement of Facts - Filed 6/24/13

- (H) Kirk-Scott's Response to Respondents' Motion for Summary Judgment - Filed 6/24/13
- (I) Affidavit of Balinda Antoine - Filed 6/24/13
- (J) Affidavit of Matthew Z. Crotty - Filed 6/24/13
- (K) Kirk-Scott's Motion to Dismiss Reply Brief - Filed 6/24/13
- (L) Kirk-Hughes' et al's Notice of Joinder - Filed 6/24/13
- (M) Kirk-Hughes' et al's Summary Judgment Response - Filed 6/24/13
- (N) Affidavit of Richard L. Campbell - Filed 6/24/13
- (O) Affidavit of Melody Jones, Affidavit of Geraldine Kirk-Hughes, Affidavit of Darlene Moore - Filed 6/24/13
- (P) Golubs' Reply re Summary Judgment, 2xHoward Affidavits (Mr. Howard filed two affidavits on 7/2/13, one contains discovery responses, the second contains legislative history) and Golub's Response re Kirk-Scott's Motion to Vacate - Filed 7/2/13
- (Q) Kirk-Scott's Motion to Vacate Reply Brief and Kirk-Hughes' Joinder and Response to Kirk-Scott's Reply Brief - Filed 7/3/13
- (R) Affidavit of Michael Howard - Filed 7/9/13
- (S) Kirk-Scott's Motion to Compel, Memorandum in Support of Motion to Compel, Note for Hearing, and Affidavit of Matt Crotty re Motion to Compel - Filed 7/25/13
- (T) Court's Memorandum Decision and Order - Filed 8/9/13
- (U) Judgment - Filed 8/21/13 (but signed 8/19/13)
- (V) Kirk-Scott's Motion and Memorandum re Motion to Alter/Amend, Affidavit of Matthew Z. Crotty, Note for Hearing, and Second Affidavit of Balinda Antoine - Filed 8/21/13
- (W) Golub's Response re Motion to Amend/Alter and Affidavit of Howard - Filed 9/19/13
- (X) Kirk-Scott's Motion to Amend/Alter Reply Brief and Second Affidavit of Crotty - Filed 9/23/13
- (Y) Affidavit of Matthew Crotty re Credit Bid - Filed 9/26/13

- (Z) Writ of Execution, Affidavit in Support of Execution, Application for Writ of Execution - Filed 8/15/13
- (AA) Kirk-Hughes' Motion and Memorandum re Stay Writ of Execution - Filed 8/27/13
- (BB) Golubs' Response re Motion to Stay and Affidavit of Howard - Filed 9/5/13
- (CC) Kirk-Hughes' Reply and Affidavit of Mike Bissell - Filed 9/9/13
- (DD) Order re Kirk-Hughes' Motion to Stay - Filed 9/13/13
- (EE) Decision and Order re: IRCP 11(a)(1) Sanctions - Filed 11/21/2013
- (FF) Order re Sanctions - Filed 12/3/2013

7. Civil Cases Only. The appellate requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court. N/A

8. I certify:

(a) That a copy of ~~this notice of appeal~~ the September 30, 2013, Notice of Appeal ~~has been~~ was served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: Valarie E. Nunmacher, Kootenai County District Court, 324 West Garden Ave. Coeur d'Alene, ID 83816. No additional transcript is needed regarding the November 21, 2013, and December 3, 2013, Orders that are the subject of this Amended Notice of Appeal.

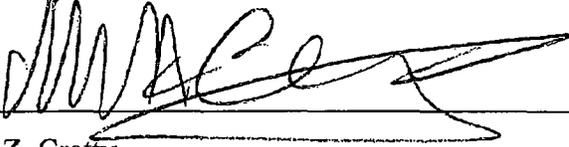
(b) (1) X That the clerk of the district court or administrative agency ~~has been~~ was paid the estimated fee for preparation of the reporter's transcript on September 30, 2013. (~~Defendants — Geraldine Kirk-Hughes, et. al, are filing a Notice of Appeal on 9/30/13. Said — defendants' Notice of Appeal is filed in conjunction with — and will be joined with — Kirk Scott's Notice of Appeal. Therefore Defendants Kirk-Hughes, et. al. are — paying for the transcription costs, including Kirk Scott's costs.~~)

(c) (1) X That the estimated fee for preparation of the clerk's or agency's record ~~has been was paid on September 30, 2013. (Defendants — Geraldine Kirk-Hughes, et. al, are filing a Notice of Appeal on 9/30/13. Said defendants' Notice of Appeal is filed in conjunction with and will be joined with Kirk-Scott's Notice of Appeal. Therefore Defendants Kirk-Hughes, et. al. are paying for the record copying costs, including Kirk-Scott's costs.)~~

(d) (1) X That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

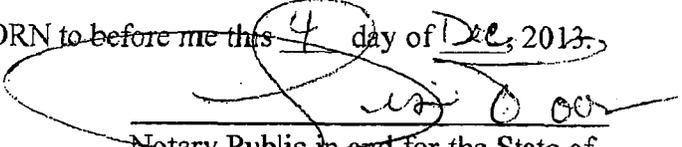
DATED THIS 4th day of December 2013.



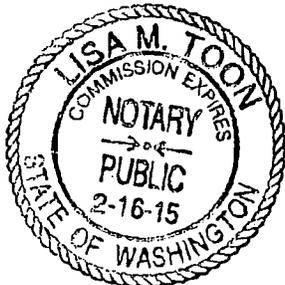
Matthew Z. Crotty

Attorneys for the Appellant Kirk-Scott, Ltd.

SUBSCRIBED AND SWORN to before me this 4 day of Dec, 2013.



Notary Public in and for the State of Washington, residing at Spokane
My commission expires: 2-16-2015



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

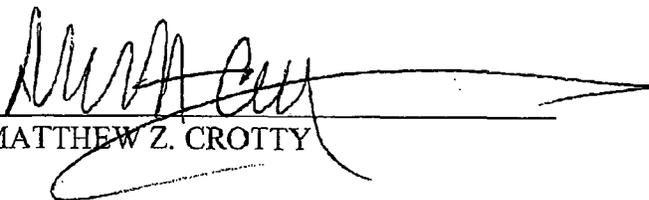
Michael T. Howard
 Winston & Cashatt, P.S.
 601 W. Riverside #1900
 Spokane, WA 99201

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

Michael S. Bissell
 CAMPBELL & BISSELL, PLLC
 Corbet-Aspray House
 820 W. 7th Avenue
 Spokane, Washington 99204

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

Douglas S. Marfice
 Ramsden & Lyons
 P.O. Box 1336
 Coeur d'Alene, ID 83816


 MATTHEW Z. CROTTY

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

985
AD

2013 DEC -5 PM 4:10

CLERK DISTRICT COURT
Robert DeGman
DEPUTY

MICHAEL S. BISSELL
CAMPBELL & BISSELL, PLLC
Corbet-Aspray House
820 W. 7th Avenue
Spokane, Washington 99204
Telephone: (509) 455-7100
Facsimile: (509) 455-7111
ISB No. 5762

Attorneys for Defendants/Appellants Kirk-Hughes
Development, LLC, Kirk-Hughes &
Associates, Inc., Geraldine Kirk-Hughes,
and Peter Sampson

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

ALAN GOLUB and MARILYN) Case No. CV 07-8038
GOLUB, husband and wife,) [Consolidated Case No.: CV 13-866]

Plaintiff/Respondents,)

vs.)

KIRK-HUGHES DEVELOPMENT,)
LLC, a Delaware limited liability)
company; KIRK-SCOTT, LTD., a Texas)
corporation; INTERNAL REVENUE)
SERVICE; TOMLINSON NORTH)
IDAHO, INC., an Idaho corporation,)

Defendants,)

KIRK-HUGHES DEVELOPMENT,)
LLC, a Delaware limited liability)
company;)

Appellant.)

ALAN GOLUB and MARILYN)
GOLUB, husband and wife,)

Plaintiffs/Respondents,)

AMENDED NOTICE OF APPEAL

vs.

GERALDINE KIRK-HUGHES and
PETER SAMPSON, husband and wife;
KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada
corporation; KELLY POLATIS, an
individual, and DELANO D. and
LENORE J. PETERSON, husband and
wife,

Defendants,

GERALDINE KIRK-HUGHES and
PETER SAMPSON, husband and wife;
KIRK-HUGHES DEVELOPMENT,
LLC, a Delaware limited liability
company; KIRK-HUGHES &
ASSOCIATES, INC., a Nevada
corporation;

Appellants.

TO: The Above-Named Respondents, ALAN AND MARILYN GOLUB
AND TO: Their Attorney, MICHAEL T. HOWARD,
AND TO: THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson ("Appellants") appeal against the above-named respondents to the Idaho Supreme Court from:
 - (1) the August 9, 2013, Order Denying Kirk-Scott's Motion to Dismiss, Denying Kirk-Scott's Motion to Vacate, and Granting Respondents' Motion for Summary Judgment;
 - (2) the August 19, 2013, Judgment; and
 - (3) the September 13, 2013, Order re: Kirk-Hughes Development, LLC, et al.'s Motion to Stay Execution of Writ;
 - (4) the November 21, 2013, Decision and Order re: I.R.C.P. 11(a)(1) Sanctions; and

(5) the December 2, 2013, Order re: Sanctions.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the Judgments or Orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) I.A.R.

This is an EXPEDITED APPEAL pursuant to I.A.R. 12.2.

3. The issues on appeal that the Appellants intend to assert in the appeal are:

- (A) Does a deed of trust which was executed in Nevada and in accordance with Nevada law, and which encumbers Idaho real property, have priority over subsequent interests in the property when the deed of trust does not have an acknowledgement as required by Idaho law?
- (B) Does a deed of trust which existed before the debtor filed for bankruptcy, but which was recorded during the debtor's bankruptcy, have priority over a judgment which is recorded after the bankruptcy is dismissed when the judgment creditor was aware of the deed of trust?
- (C) Did the trial court error in denying Appellants Motion to Stay the Writ of Execution?
- (D) Did the trial court abuse its discretion in awarding sanctions against Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Geraldine Kirk-Hughes, and Peter Sampson?

4. Has an order been entered sealing all or any portion of the record? No.

If so, what portion? N/A.

5. (a) Is a reporter's transcript requested? Yes.
 (b) Appellants request the preparation of the following portions of the reporter's standard transcript, as defined in Rule 25(c), I.A.R., in hard copy and electronic format:

- Transcripts of the July 9, 2013, motion for summary judgment, motion to vacate, and motion to dismiss hearing.
- Transcripts of the September 27, 2013, motion to amend/alter hearing.

Court Reporter, Valerie E. Nunmacher, Kootenai County District Court, 324 West Garden Avenue, Coeur d'Alene, ID 83816, transcribed both hearings. On September 27, 2013, Ms. Larson informed counsel that the transcription costs were approximately \$325.00.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

- (A) Respondents' Complaint (Filed 1/25/13);
- (B) Kirk-Scott's Answer (Filed 3/14/13);
- (C) Kirk-Scott's Motion to Dismiss and Memorandum in Support of Motion to Dismiss (Filed 4/30/13);
- (D) Respondents' Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, Affidavit of Michael T. Howard, and Affidavit of Alan Golub (Filed 5/9/13);
- (E) Respondents' Response to Kirk-Scott's Motion to Dismiss (Filed 5/14/13);
- (F) Kirk-Scott's Motion and Memorandum re Motion to Vacate Default Judgment (Filed 6/24/13);
- (G) Kirk-Scott's Combined Statement of Facts (Filed 6/24/13);
- (H) Kirk-Scott's Response to Respondents' Motion for Summary Judgment (Filed 6/24/13);
- (I) Affidavit of Balinda Antoine (Filed 6/24/13);
- (J) Affidavit of Matthew Z. Crotty (Filed 6/24/13);
- (K) Kirk-Scott's Motion to Dismiss Reply Brief (Filed 6/24/13);
- (L) Kirk-Hughes' et al's Notice of Joinder (Filed 6/24/13);
- (M) Kirk-Hughes' et al's Summary Judgment Response (Filed 6/24/13);
- (N) Affidavit of Richard L. Campbell (Filed 6/24/13);
- (O) Affidavit of Melody Jones, Affidavit of Geraldine Kirk-Hughes, Affidavit of Darlene Moore (Filed 6/24/13);
- (P) Golubs' Reply re Summary Judgment, Mike Howard Affidavits (two) (filed on 7/2/13, one contains discovery responses, the second contains legislative history) and Golub's Response re Kirk-Scott's Motion to Vacate (Filed 7/2/13);
- (Q) Kirk-Scott's Motion to Vacate Reply Brief and Kirk-Hughes' Joinder and Response to Kirk-Scott's Reply Brief (Filed 7/3/13);

- (R) Affidavit of Michael Howard (Filed 7/9/13);
- (S) Kirk-Scott's Motion to Compel, Memorandum in Support of Motion to Compel, Affidavit of Matt Crotty re Motion to Compel (Filed 7/25/13);
- (T) Court's Memorandum Decision and Order (Filed 8/9/13);
- (U) Judgment (Filed 8/21/13, but signed 8/19/13);
- (V) Kirk-Scott's Motion and Memorandum re Motion to Alter/Amend, Affidavit of Matthew Z. Crotty, and Second Affidavit of Balinda Antoine (Filed 8/21/13);
- (W) Golub's Response re Motion to Amend/Alter and Affidavit of Howard (Filed 9/20/13);
- (X) Kirk-Scott's Motion to Amend/Alter Reply Brief and Second Affidavit of (Crotty - Filed 9/23/13);
- (Y) Affidavit of Matthew Crotty re Credit Bid - Filed 9/26/13;
- (Z) Writ of Execution, Affidavit in Support of Execution, Application for Writ of Execution (Filed 8/15/13);
- (AA) Kirk-Hughes' Motion and Memorandum re Stay Writ of Execution (Filed 8/27/13);
- (BB) Golubs' Response re Motion to Stay and Affidavit of Howard (Filed 9/6/13);
- (CC) Kirk-Hughes' Reply and Affidavit of Mike Bissell (Filed 9/9/13); and
- (DD) Order re Kirk-Hughes' Motion to Stay Execution of Writ (Filed 9/13/13);
- (EE) Decision and Order re: I.R.C.P. 11(a)(1) Sanctions (Filed 11/21/13);
- (FF) Plaintiff's Memorandum of Costs and Fees Re: Order for Sanctions (Filed 11/26/2013);
- (GG) Affidavit of Michael T. Howard (Filed 11/26/2013);
- (HH) Defendants Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson's Response in Opposition to Plaintiff's Memorandum of Costs & Fees Re: Sanctions (Filed 11/26/2013); and

(II) Order re: Sanctions (Filed 12/3/2013).

7. Civil Cases Only. The appellate requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court. N/A

8. I certify:

(a) That a copy of ~~this~~ the September 30, 2013, Notice of Appeal ~~has been was~~ served on each reporter of whom a transcript has been requested as named below at the address set out below:

Valerie E. Nunmacher
Kootenai County District Court
324 West Garden Avenue
Coeur d'Alene, ID 83816

No additional transcript is needed regarding the November 21, 2013, and December 3, 2013, Orders that are the subject of this Amended Notice of Appeal.

(b) (1) That the clerk of the district court or administrative agency ~~has been was~~ paid the estimated fee for preparation of the reporter's transcript on September 30, 2013. (~~Defendant Kirk Scott, Ltd. is filing a Notice of Appeal on 9/30/13. Said defendant's Notice of Appeal is filed in conjunction with and will be joined with Appellants Notice of Appeal. Therefore Appellants are paying for the transcription costs, including Kirk Scott's costs.~~)

(c) (1) ~~That~~ The estimated fee for preparation of the clerk's or agency's record has been was paid on September 30, 2013. (~~Defendant Kirk Scott, Ltd. is filing a Notice of Appeal on 9/30/13. Said defendant's Notice of Appeal is filed in conjunction with and will be joined with Appellants Notice of Appeal. Therefore Appellants are paying for the record copying costs, including Kirk Scott's costs.~~)

(d) (1) That the appellate filing fee has been paid.

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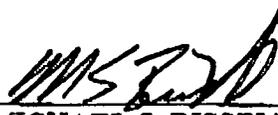
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////

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED this 5th day of December, 2013.

CAMPBELL & BISSELL, PLLC



MICHAEL S. BISSELL

Attorneys for Defendants/Appellants Kirk-Hughes
Development, LLC, Kirk-Hughes &
Associates, Inc., Geraldine Kirk-Hughes,
and Peter Sampson

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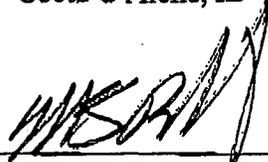
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of December, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

<input type="checkbox"/>	HAND DELIVERY	Michael T. Howard
<input checked="" type="checkbox"/>	U.S. MAIL	Winston & Cashatt, P.S.
<input type="checkbox"/>	OVERNIGHT MAIL	601 W. Riverside #1900
<input type="checkbox"/>	FACSIMILE	Spokane, WA 99201
<input type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Matthew Z. Crotty
<input type="checkbox"/>	U.S. MAIL	Crotty & Son Law Firm, PLLC
<input type="checkbox"/>	OVERNIGHT MAIL	421 W. Riverside Avenue, Ste. 1005
<input type="checkbox"/>	FACSIMILE	Spokane, WA 99201
<input checked="" type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Douglas S. Marfice
<input checked="" type="checkbox"/>	U.S. MAIL	Ramsden & Lyons
<input type="checkbox"/>	OVERNIGHT MAIL	P.O. Box 1336
<input type="checkbox"/>	FACSIMILE	Coeur d'Alene, ID 83816
<input type="checkbox"/>	EMAIL	



 MICHAEL S. BISSELL

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALAN GOLUB and MARILYN GOLUB, husband)
and wife,)

Plaintiffs-Respondents,)

v.)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company; KIRK-)
HUGHES & ASSOCIATES, INC., a Nevada)
corporation; GERALDINE KIRK-HUGHES and)
PETER SAMPSON, husband and wife,)

Defendants-Appellants,)

and)

KIRK-SCOTT, LTD., a Texas corporation;)
INTERNAL REVENUE SERVICE;)
TOMLINSON NORTH IDAHO, INC., an Idaho)
corporation; KELLY POLATIS, an individual;)
DELANO D. and LENORE J. PETERSON,)
husband and wife,)

Defendants.)

ALAN GOLUB and MARILYN GOLUB, husband)
and wife,)

Plaintiffs-Respondents,)

v.)

KIRK-SCOTT, LTD., a Texas corporation,)

Defendant-Appellant,)

and)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company; INTERNAL)
REVENUE SERVICE; TOMLINSON NORTH)
IDAHO, INC., an Idaho corporation;)
GERALDINE KIRK-)
HUGHES and PETER SAMPSON, husband and)
wife; KIRK-HUGHES & ASSOCIATES, INC., a)

Supreme Court Docket No. 41501-2013
Kootenai County No. 2007-8038

Supreme Court Docket No. 41505-2013
Kootenai County No. 2007-8038

Nevada corporation; KELLY POLATIS, an)
individual; DELANO D. and LENORE J.)
PETERSON, husband and wife,)
)
Defendants.)

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

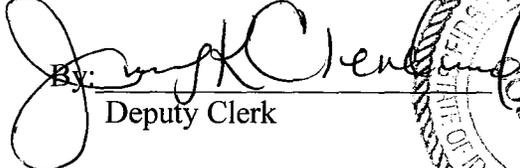
I further certify that no exhibits were offered in this case.

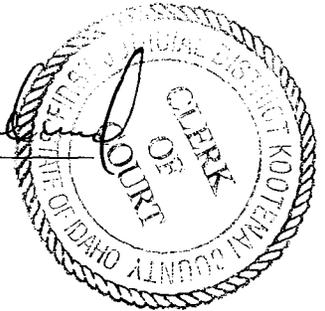
I certify that the Attorneys for the Appellant and Respondent were notified that the Clerk's Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid on the 2nd day of January, 2014.

I do further certify that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 2nd day January, 2014.

Jim Beannon
Clerk of the District Court

By: 
Deputy Clerk



IN THE SUPREME COURT OF THE STATE OF IDAHO

ALAN GOLUB and MARILYN GOLUB, husband)
and wife,)

Plaintiffs-Respondents,)

v.)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company; KIRK-)
HUGHES & ASSOCIATES, INC., a Nevada)
corporation; GERALDINE KIRK-HUGHES and)
PETER SAMPSON, husband and wife,)

Defendants-Appellants,)

and)

KIRK-SCOTT, LTD., a Texas corporation;)
INTERNAL REVENUE SERVICE;)
TOMLINSON NORTH IDAHO, INC., an Idaho)
corporation; KELLY POLATIS, an individual;)
DELANO D. and LENORE J. PETERSON,)
husband and wife,)

Defendants.)

ALAN GOLUB and MARILYN GOLUB, husband)
and wife,)

Plaintiffs-Respondents,)

v.)

KIRK-SCOTT, LTD., a Texas corporation,)

Defendant-Appellant,)

and)

KIRK-HUGHES DEVELOPMENT, LLC, a)
Delaware limited liability company; INTERNAL)
REVENUE SERVICE; TOMLINSON NORTH)
IDAHO, INC., an Idaho corporation;)
GERALDINE KIRK-)
HUGHES and PETER SAMPSON, husband and)

Supreme Court Docket No. 41501-2013
Kootenai County No. 2007-8038

Supreme Court Docket No. 41505-2013
Kootenai County No. 2007-8038

wife; KIRK-HUGHES & ASSOCIATES, INC., a)
Nevada corporation; KELLY POLATIS, an)
individual; DELANO D. and LENORE J.)
PETERSON, husband and wife,)
)
Defendants.)

CLERK'S CERTIFICATE OF SERVICE

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record and Transcript to each of the Attorneys of record in this cause as follows:

MICHAEL S. BISSELL
820 W. 7th Avenue
Spokane, WA 99204

MATTHEW Z. CROTTY
421 W. Riverside Ave Ste 1005
Spokane, WA 99201

IN WITNESS WHEREOF, I have unto set my hand and affixed the seal of the said Court this 2nd day of January, 2014.

Jim Brannon
Clerk of District Court
By: 