

4-3-2017

Petrus Fam. Trust Dated May 1, 1991 v. Kirk Clerk's Record Dckt. 44784

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IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
(INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

PETRUS FAMILY TRUST DATED MAY 1,)
1991, and EDMOND A. PETRUS JR.,) SUPREME COURT NO. 44784
individually and as Co-trustee of the Petrus)
Family Trust Dated May 1, 1991,) Dist. Court No. CV-2014-00071-C
)
Plaintiff,)
)
-vs-)
)
CHRIS KIRK, dba KIRK ENTERPRISES,)
)
and)
)
NANCY GENTRY-BOYD; TODD MCKENNA)
dba HOMECRAFT HOME INSPECTIONS;)
RE/MAX RESORT REALTY; KEVIN)
BATCHELOR; and DOES 1-4,)
)
Defendant.)

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District of the
State of Idaho, in and for the County of Valley.

Honorable Jason D Scott , District Judge
Presiding

Arkoosh Law Offices
Daniel Nevala
PO Box 2900
Boise ID 83701
ATTORNEY FOR APPELLATE

Parsons Behle & Latimer
Amy Lombardo
800 West Main St Suite 1300
Boise ID 83702
ATTORNEY FOR RESPONDENT

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User	Judge
3/11/2014	NCOC	GKNAPP	New Case Filed - Other Claims Thomas F. Neville
	APER	GKNAPP	Plaintiff: Petrus Family Trust Dated May 1, 1991 Appearance Richard H. Greener Thomas F. Neville
	APER	GKNAPP	Plaintiff: Petrus, Edmond Jr Appearance Richard H. Greener Thomas F. Neville
		GKNAPP	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Greener, Richard H. (attorney for Petrus Family Trust Dated May 1, 1991) Receipt number: 0001097 Dated: 3/11/2014 Amount: \$96.00 (Check) For: Petrus Family Trust Dated May 1, 1991 (plaintiff) Thomas F. Neville
	COMP	GKNAPP	Complaint Filed Thomas F. Neville
	SMIS	GKNAPP	Summons Issued Thomas F. Neville
	DOSI	GKNAPP	Summons: Document Service Issued: on 3/11/2014 on Nancy Gentry-Boyd; Assigned to Private Server. Service Fee of \$0.00. Thomas F. Neville
	DOSI	GKNAPP	Summons: Document Service Issued: on 3/11/2014 for Chris Kirk; Assigned to Private Server. Service Fee of \$0.00 Thomas F. Neville
	DOSI	GKNAPP	Summons: Document Service Issued: on 3/11/2014 for Todd Mckenna; Assigned to Private Server. Service Fee of \$0.00 Thomas F. Neville
9/8/2014	NOTC	GKNAPP	Notice Of Substitution Of Counsel Thomas F. Neville
	APER	GKNAPP	Plaintiff: Petrus Family Trust Dated May 1, 1991 Appearance Thomas A. Banducci Thomas F. Neville
	COMP	GKNAPP	First Amended Complaint And Demand For Jury Trial Thomas F. Neville
	SMIS	GKNAPP	Summons Issued X3 Thomas F. Neville
	DOSI	GKNAPP	Summons: Document Service Issued: on 9/8/2014 to Nancy Gentry-Boyd; Assigned to Private Server. Service Fee of \$0.00. Thomas F. Neville
	DOSI	GKNAPP	Summons: Document Service Issued: on 9/8/2014 to Chris Kirk; Assigned to Private Server. Service Fee of \$0.00. Thomas F. Neville
	DOSI	GKNAPP	Summons: Document Service Issued: on 9/8/2014 to Todd Mckenna; Assigned to Private Server. Service Fee of \$0.00. Thomas F. Neville
9/19/2014		DONLONMC	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Millemann Pittenger Receipt number: 0004339 Dated: 9/19/2014 Amount: \$13.00 (Credit card) Thomas F. Neville
		DONLONMC	Miscellaneous Payment: Technology Cost - CC Paid by: Millemann Pittenger Receipt number: 0004339 Dated: 9/19/2014 Amount: \$3.00 (Credit card) Thomas F. Neville

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User		Judge
9/29/2014	NOAP	DONLON	Notice Of Appearance	Thomas F. Neville
	APER	PERRY	Defendant: Mckenna, Todd Appearance Michael G. Pierce	Thomas F. Neville
		DONLON	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Pierce, Michael G. (attorney for Mckenna, Todd) Receipt number: 0004446 Dated: 9/29/2014 Amount: \$136.00 (Check) For: Mckenna, Todd (defendant)	Thomas F. Neville
		DONLON	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Cameron Purchase Receipt number: 0004452 Dated: 9/29/2014 Amount: \$136.00 (Credit card) For: Kirk, Chris (defendant)	Thomas F. Neville
		DONLON	Filing: Technology Cost - CC Paid by: Cameron Purchase Receipt number: 0004452 Dated: 9/29/2014 Amount: \$3.00 (Credit card) For: Kirk, Chris (defendant)	Thomas F. Neville
	APER	HON	Defendant: Kirk, Chris Appearance C. Thomas Arkoosh	Thomas F. Neville
	ANSW	HON	Answer	Thomas F. Neville
10/1/2014	APER	HON	Defendant: Kirk, Chris Appearance Daniel A Nevala	Thomas F. Neville
10/3/2014	NOAP	DONLON	Nancy Gentry-Boyd's Entry of Appearance	Thomas F. Neville
	APER	DONLON	Defendant: Gentry-Boyd, Nancy Appearance Steven J. Millemann	Thomas F. Neville
		DONLON	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Millemann, Steven J. (attorney for Gentry-Boyd, Nancy) Receipt number: 0004550 Dated: 10/3/2014 Amount: \$136.00 (Check) For: Gentry-Boyd, Nancy (defendant)	Thomas F. Neville
	NOSV	PERRY	Notice Of Service	Thomas F. Neville
10/14/2014	ANSW	HON	Nancy Gentry-Boyd's Answer To Amended Complaint	Thomas F. Neville
	NOSV	HON	Notice Of Service of Defendant Nancy Gentry-Boyd's First Interrogatories And Requests For Production Of Documents To Plaintiffs	Thomas F. Neville
10/29/2014	ANSW	HON	Answer	Thomas F. Neville
12/8/2014	NOSV	HON	Notice Of Service Of Discovery Responses	Thomas F. Neville
12/29/2014	HRSC	GKNAPP	Hearing Scheduled (Status 01/22/2015 02:00 PM) 968706	Thomas F. Neville
	NOTC	GKNAPP	Notice Of Hearing	Thomas F. Neville
1/20/2015	HRHD	GKNAPP	Hearing result for Status scheduled on 01/22/2015 02:00 PM: Hearing Held 968706	Thomas F. Neville

Petrus Family Trust Dated May 1, 1991, etal. vs. Nancy Gentry-Boyd, etal.

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User	Judge
1/26/2015	HRSC	GKNAPP	Hearing Scheduled (Status 03/12/2015 02:30 PM) Telephonic 968706
3/2/2015	CHJG	GKNAPP	Change Assigned Judge (batch process)
3/12/2015	HRHD	GKNAPP	Hearing result for Status scheduled on 03/12/2015 02:30 PM: Hearing Held Telephonic 968706
	HRSC	GKNAPP	Hearing Scheduled (Pretrial Conference 01/07/2016 02:30 PM)
	HRSC	GKNAPP	Hearing Scheduled (Jury Trial 02/01/2016 09:00 AM)
	ORDR	GKNAPP	Scheduling Order
3/13/2015	NOSV	HON	Notice Of Service Of Plaintiffs' First Supplemented Discovery Responses
3/19/2015	APER	GKNAPP	Plaintiff: Petrus, Edmond Jr Appearance Thomas A. Banducci
3/27/2015		DONLON	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Petrus Family Trust Dated May 1, 1991 Receipt number: 0001397 Dated: 3/27/2015 Amount: \$17.00 (Credit card)
		DONLON	Miscellaneous Payment: Technology Cost - CC Paid by: Petrus Family Trust Dated May 1, 1991 Receipt number: 0001397 Dated: 3/27/2015 Amount: \$3.00 (Credit card)
4/28/2015	HRVC	GKNAPP	Hearing result for Pretrial Conference scheduled on 01/07/2016 02:30 PM: Hearing Vacated
	HRSC	GKNAPP	Hearing Scheduled (Pretrial Conference 01/04/2016 02:30 PM)
	CONT	GKNAPP	Continued (Jury Trial 02/01/2016 03:00 PM)
	ORDR	GKNAPP	Order Resetting Pretrial Conference
6/19/2015	NOTC	KWILSON	Notice Of Service Of Discovery
7/10/2015	MOTN	GRINDOL	Motion For Leave To Amend Complaint
7/23/2015	NOTC	REDMON	Notice Of Non-Opposition
	MEMO	REDMON	Memorandum In Support Of Motion For Leave To Amend Complaint
	AFFD	REDMON	Affidavit Of Jason J. Rudd In Support Of Motion For Leave To Amend Complaint
	NOTC	KWILSON	Notice Of Non-Opposition
	NOTC	REDMON	Notice Of Non-Opposition
8/17/2015	NOTC	GKNAPP	Notice Of Service
8/26/2015	NOSV	KWILSON	Notice Of Service Of Responses To Discovery Requests
8/27/2015	NOSV	CWHITE	Notice Of Service Of Discovery Requests

Petrus Family Trust Dated May 1, 1991, etal. vs. Nancy Gentry-Boyd, etal.

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User	Judge
8/28/2015	NOTC	GKNAPP	Notice Of Service Of Defendant Nancy Gentry-Boyd's Responses To Plaintiff's First Set Of Interrogatories And Requests For Production Of Documents
	NOAP	GKNAPP	Notice Of Appearance
9/9/2015	MISC	GKNAPP	Defendant Nancy Gentry-Boyd's Expert Witness Disclosure
9/14/2015	WITN	KWILSON	Defendant Chris Kirk's dba Kirk Enterprises Expert Witness Disclosure
	ORDR	KWILSON	(Proposed) Order Granting Plaintiffs' Motion For Leave To Amend Complaint
9/21/2015	COMP	CWHITE	Second Amended Complaint And Demand For Jury Trial
	SMIS	CWHITE	Summons Issued
	DOSI	CWHITE	Summons: Document Service Issued: on 9/21/2015 to Re/Max Resort Realty; Assigned to Private Server. Service Fee of \$0.00.
	DOSI	CWHITE	Summons: Document Service Issued: on 9/21/2015 to Kevin Batchelor; Assigned to Private Server. Service Fee of \$0.00.
9/23/2015	AFSV	HON	Affidavit Of Service - ReMax Resort Realty, Kevin batchelor
	AFSV	HON	Affidavit Of Service- ReMax Resort Realty
	DOSS	HON	Summons: Document Returned Served on 9/21/2015 to Re/Max Resort Realty; Assigned to Private Server. Service Fee of \$0.00.
	DOSS	HON	Summons: Document Returned Served on 9/21/2015 to Kevin Batchelor; Assigned to Private Server. Service Fee of \$0.00.
9/29/2015	APER	GKNAPP	Defendant: Re/Max Resort Realty, Appearance Phillip J. Collaer
	APER	GKNAPP	Defendant: Batchelor, Kevin Appearance Phillip J. Collaer
		GKNAPP	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Collaer, Phillip J. (attorney for Batchelor, Kevin) Receipt number: 0005042 Dated: 9/29/2015 Amount: \$136.00 (Check) For: Batchelor, Kevin (defendant)
9/30/2015	ADJT	REDMON	Answer To Second Amended Complaint And Demand For Jury Trial
	ADJT	KWILSON	Answer And Demand For Jury Trial
10/5/2015	MOTN	HON	Motion To Continue Trial And Schedule Status Conference

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User		Judge
10/5/2015	AFFD	HON	Affidavit Of Phillip J Collear In Support Of Defendant's Motion To Continue Trial And Schedule Status Conference	Jason Scott
10/6/2015	NOTC	GKNAPP	Notice Of Non-Opposition	Jason Scott
10/7/2015	NOTC	REDMON	Notice Of Non-Opposition	Jason Scott
10/8/2015	CERS	REDMON	Amended Certificate Of Service	Jason Scott
10/9/2015	NOTC	GKNAPP	Notice Of Non-Opposition	Jason Scott
10/12/2015	NOTC	HON	Notice Of Non-Opposition	Jason Scott
	NOTC	HON	Notice Of Errata	Jason Scott
	NOTC	HON	Notice Of Non-Opposition	Jason Scott
10/15/2015	MOTN	KWILSON	Motion To Request Telephonic Hearing To Continue Trial And Schedule Status Conference	Jason Scott
10/28/2015	NOTC	GKNAPP	Notice Of Service Of Discovery	Jason Scott
10/30/2015	NOTC	REDMON	Notice Of Taking Deposition Of Beau Value	Jason Scott
	NOTC	REDMON	Notice Of Taking Deposition Of Eric Waite	Jason Scott
	NOTC	REDMON	Notice Of Taking Deposition Of Edward A Petrus Jr	Jason Scott
	NOTC	REDMON	Notice Of Taking Deposition Of Disaster Response LLC (formerly Disaster Pro LLC)	Jason Scott
11/5/2015	HRSC	GKNAPP	Hearing Scheduled (Tentatively Scheduled 11/16/2015 03:00 PM)	Jason Scott
11/6/2015	NOTC	GKNAPP	Notice Of Telephonic Hearing To Continue Trial And Schedule Status Conference	Jason Scott
	AFSV	CWHITE	Affidavit Of Service - Disaster Response, LLC	Jason Scott
	AFSV	CWHITE	Affidavit Of Service - Beau Value	Jason Scott
	AFSV	CWHITE	Affidavit Of Service - Eric Waite	Jason Scott
11/16/2015	HRHD	GKNAPP	Hearing result for Status scheduled on 11/16/2015 03:00 PM: Hearing Held Telephonic 968706	Jason Scott
	ORDR	GKNAPP	Order Resetting Trial And Pretrial	Jason Scott
11/17/2015	HRVC	GKNAPP	Hearing result for Jury Trial scheduled on 02/01/2016 03:00 PM: Hearing Vacated	Jason Scott
	HRVC	GKNAPP	Hearing result for Pretrial Conference scheduled on 01/04/2016 02:30 PM: Hearing Vacated	Jason Scott
	HRSC	GKNAPP	Hearing Scheduled (Pretrial Conference 08/01/2016 02:00 PM)	Jason Scott
	HRSC	GKNAPP	Hearing Scheduled (Jury Trial 08/16/2016 09:00 AM)	Jason Scott
	HRSC	GKNAPP	Hearing Scheduled (Jury Trial 08/22/2016 09:00 AM)	Jason Scott
	NOTC	GKNAPP	Amended Notice Of Taking Deposition Of Edmond A Petrus Jr.	Jason Scott

Petrus Family Trust Dated May 1, 1991, etal. vs. Nancy Gentry-Boyd, etal.

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User	Judge
11/30/2015		REDMON	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Vickie Ross Receipt number: 0005927 Dated: 11/30/2015 Amount: \$2.00 (Credit card)
		REDMON	Miscellaneous Payment: Technology Cost - CC Paid by: Vickie Ross Receipt number: 0005927 Dated: 11/30/2015 Amount: \$3.00 (Credit card)
	ANSW	KWILSON	Nancy Gentry-Boyd's Answer To Second Amended Complaint And Demand For Jury Trial
12/2/2015	ANSW	GKNAPP	Todd McKenna's Answer To Second Amended Complaint And Demand For Jury Trial
12/24/2015	NOTC	CWHITE	Notice Of Service Of Discovery
	LETT	CWHITE	Letter From Dameon Romero
1/15/2016	NOSV	HON	Notice Of Service Of Discovery
1/21/2016	NOSV	HON	Notice Of Service Of Discovery
2/18/2016	MISC	GKNAPP	Plaintiffs' Amended Expert Witness Disclosure
2/26/2016	NOTD	GRINDOL	Notice Of Taking Deposition Of Edmond A Petrus Jr.
	NOTD	GRINDOL	Notice Of Taking Deposition Of Beau Value
	NOTD	GRINDOL	Notice Of Taking Deposition Of Eric Waite
	NOTD	GRINDOL	Rule 30(b)(6) Notice Of Taking Deposition Of Disaster Response, LLC (Formerly Disaster Pro LLC)
	NOTD	GRINDOL	Notice Deuces Tecum Of Taking Deposition Of Mike Longmire
2/29/2016	NOTC	GKNAPP	Notice Of Service
3/1/2016	NOTC	REDMON	Notice Of Service- Plaintiffs Responses to Defendants Remax Resort and Kevin Batchelor's First Set of Interrogatories and Request For Production
	NOTC	REDMON	Notice Of Service-Plaintiffs Second Supplemented Responses to Defendant Gentry-Boyd's First Interrogatories and Request for Production
	NOTD	HON	Amended Rule 30(b)(6) Notice Of taking Deposition Of Disaster Response, LLC (formerly Disaster Pro LLC)
	NOTD	HON	Amended Notice Of taking Deposition Of Beau Value
	NOTD	HON	Amended Notice Of Taking Deposition Of Eric Waite
	NOTC	HON	Amended Notice Duces Tecum Of Taking Deposition Of Mike Longmire
3/28/2016	WITN	CWHITE	Defendant's Disclosure Of Expert Witnesses

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User	Judge
3/29/2016	WITN	HON	Defendant Chris Kirk's d/b/a Kirk Enterprises Amended Expert Witness Disclosure
	WITN	HON	Defendants' Disclosure Of Expert Witnesses
3/30/2016	WITN	HON	Defendant's Disclosure Of Expert Witnesses
5/12/2016	NOTC	GRINDOL	Notice Of Firm Name Change
5/13/2016		AKINSMAN	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Akoosh Law Offices Receipt number: 0002196 Dated: 5/13/2016 Amount: \$13.00 (Cash)
	MOTN	GKNAPP	****
	MEMO	GKNAPP	Memorandum In Support Of Defendant's Motion For Summary Judgment
	NOTC	GKNAPP	Notice Of Hearing Re Defendants' Motion For Summary Judgment
	AFFD	GKNAPP	Affidavit Of Phillip J. Collaer In Support Of Defendants' Motion For Summary Judgment
5/16/2016	HRSC	GKNAPP	Hearing Scheduled (Tentatively Scheduled 06/20/2016 03:00 PM)
5/17/2016	MOTN	GKNAPP	Plaintiffs' Motion For Leave To File Third Amended Complaint
	MEMO	GKNAPP	Memorandum In Support Of Plaintiffs' Motion For Leave To File Amended Complaint
	MISC	GKNAPP	Declaration Of Ed Petrus In Support Of Plaintiffs' Motion For Leave To Amend Pleadings
	MISC	GKNAPP	Declaration Of Alyson A. Foster In Support Of Plaintiffs' Motion For Leave To File Third Amended Complaint
	MOTN	GKNAPP	Defendant Nancy Gentry-Boyd's Motion For Summary Judgment
	MEMO	GKNAPP	Defendant Nancy Gentry-Boyd's Memorandum In Support Of Motion For Summary Judgment
	AFFD	GKNAPP	Affidavit Of Gregory C. Pittenger In Support Of Defendant Nancy Gentry-Boyd's Motion For Summary Judgment
	NOTC	GKNAPP	Notice Of Hearing On Defenant Nancy Gentry-Boyd's Motion For Summary Judgment
5/18/2016	MOTN	HON	Defendant Nancy Gentry-Boyd's Motion To Extend Time To Hear Summary Judgment Motion
	NOTH	HON	Notice Of Hearing On Defendant Nancy Gentry-Boyd's Motion To extend Time to Hear Summary Judgment Motion
	NOTH	HON	Notice Of Hearing

Petrus Family Trust Dated May 1, 1991, etal. vs. Nancy Gentry-Boyd, etal.

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User	Judge
5/23/2016	AFFD	HON	Affidavit Of Daniel Nevala In Support Of Defendant Chris Kirk DBA Kirk Enterprises' Motion For Summary Judgment
	MOTN	HON	Motion To Extend Time To Hear Defendant Chris Kirk DBA Kirk Enterprises' Motion For Summary Judgment
	MOTN	HON	Defendant Chris Kirk DBA Kirk Enterprises' Motin For Summary Judgment
	MEMO	HON	Memorandum In Support Of Defendant Chris Kirk DBA Kirk Enterprises' Motion For Summary Judgment
	AFFD	HON	Affidavit Of Chris Kirk In Support Of Defendant Chris Kirk DBA Kirk Enterprises' Motion For Summary Judgment
	NOTH	HON	Notice Of Hearing
5/27/2016	MOTN	GKNAPP	Defendants' Joinder To Defendant Nancy Gentry-Boyd's And Defendant Chris Kirk D/B/A Kirk Enterprises' Motion To Extend Time To Hear Summary Judgment Motion
	MOTN	GKNAPP	Plaintiffs' Motion To Continue Hearing Date On Motions For Summary Judgment
	MEMO	GKNAPP	Plaintiffs' Memorandum In Support Of Motion To Continue Hearing Date On Motions For Summary Judgment
	AFFD	GKNAPP	Affidavit Of Alyson A. Foster In Support Of Plaintiffs' Motion To Continue Hearing Date On Motions For Summary Judgment
	MISC	GKNAPP	Declaration Of Alyson A. Foster In Support Of Plaintiffs' Motion To Amend Scheduling Order And Continue Trial
	MOTN	GKNAPP	Plaintiffs' Motion To Amend Scheduling Order And Continue Trial
	MEMO	GKNAPP	Plaintiffs' Memorandum In Support Of Motion To AMend Scheduling Order And Continue Trial
5/31/2016	AFFD	GKNAPP	Affidavit Of Steven J. Millemann In Opposition To Plaintiffs' Motion To Amend Scheduling Order And Continue Trial ANd Motion To Continue Summary Judgment Hearing
6/2/2016	NOTC	GKNAPP	Notice Of Hearing
	NOTC	GKNAPP	Amended Notice Of Hearing
6/15/2016	OPPO	GKNAPP	Plaintiffs' Opposition To Defendant Nancy Gentry-Body's Motion For Summary Judgment
	OPPO	GKNAPP	Plaintiffs' Opposition To Re/Max Defendants' Motion For Summary Judgment

Petrus Family Trust Dated May 1, 1991, etal. vs. Nancy Gentry-Boyd, etal.

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User	Judge
6/12/2016	OPPO	GKNAPP	Plaintiffs' Opposition To Defendant Chris Kirk D/B/A Kirk Enterprises' Motion For Summary Judgment
	MISC	GKNAPP	Declaration Of Alyson A. Foster In Opposition To Defendants' Motions For Summary Judgment
	MISC	GKNAPP	Declaration Of Michael Longmire In Opposition To Defendants' Motions For Summary Judgment
	MISC	GKNAPP	Declaration Of Beau Value In Opposition To Defendants' Motions For Summary Judgment
	MISC	GKNAPP	Declaration Of Edmond A. Petrus In Opposition To Defendants' Motions For Summary Judgment
6/16/2016	REPL	GKNAPP	Plaintiffs' Reply In Support Of Motion For Leave To File Third Amended Complaint
	NOTC	GKNAPP	Notice Of Service OF Supplemental Responses To Discovery Requests
6/17/2016	REPL	HON	Reply Memorandum In Support Of Defendants' Motion For Summary Judgment
	AFFD	HON	Supplemental Affidavit Of Phillip J Collaer In Support Of Defendants' Motion For Summary Judgment
	AFFD	HON	Affidavit Of Steven J Millemann In Support Of Defendant Nancy Gentry-Boyd's Motion For Summary Judgment
	REPL	HON	Defendant Nancy Gentry-Boyd's reply Memorandum In Support Of Motion For Summary Judgment
	MEMO	GKNAPP	Reply Memorandum In Support Of Defendant Chris Kirk D/B/A Kirk Enterprises' Motion For Summary Judgment
	SUPP	GKNAPP	Supplemental Affidavit Of Daniel Nevala In Support Of Defendant Chris Kirk D/B/A Kirk Enterprises' Motion For Summary Judgment
6/20/2016	NOTC	GKNAPP	Notice Of Errata Regarding Plaintiffs' Motion For Leave To File Third Amended Complaint
	HRHD	GKNAPP	Hearing result for Motion for Partial Summary Judgment scheduled on 06/20/2016 03:00 PM: Hearing Held Motion to amend scheduling order
	ORDR	GKNAPP	Order Amending Case Schedule
6/21/2016	OPPO	HON	Defendants Re/Max Resort Realty And Kevin Batchelor's Opposition To Plaintiffs' Motion For Leave To File Third Amended Complaint
6/28/2016	BREF	GKNAPP	Supplemental Brief In Support Of Plaintiff's Motion For Leave To File Third Amended Complaint
7/7/2016	MEMO	GKNAPP	Memorandum Decision And Order

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User		Judge
7/18/2016	MOTN	HON	Plaintiffs' Motion In Limine to Bar Questioning, Argument, and Evidence Regarding Impermissible Character Evidence And Irrelevant Or Prejudicial Topics	Jason Scott
	NOTH	HON	Notice Of Hearing	Jason Scott
	MEMO	HON	Memorandum In Support Of Defendant Nancy Gentry-Boyd's First Set Of Motions In Limine	Jason Scott
	MOTN	HON	Defendant Nancy Gentry Boyd's First Set Of Motions In Limine	Jason Scott
	NOTH	HON	Notice Of Hearing On Defendant Nancy Gentry Boyd's First Set Of Motions In Limine	Jason Scott
7/19/2016	HRSC	GKNAPP	Hearing Scheduled (Motion in Limine 08/01/2016 03:00 PM)	Jason Scott
7/20/2016	MOTN	GKNAPP	Motion For Reconsideration Re Re/Max Resort Realty ANd Kevin Batchelor	Jason Scott
	MEMO	GKNAPP	Memorandum In Support Of Defendant's Re/Max Resort Realty And Kevin Batchelor's Motion Fro Reconsideration	Jason Scott
	NOTC	GKNAPP	Notice Of Hearing Re Defendants' Motion For Reconsideration	Jason Scott
7/21/2016	NOTC	GKNAPP	Amended Notice Of Hearing	Jason Scott
7/22/2016	MOTN	GKNAPP	Re/Max Defendants' Firrst Set Of Motions In Limine	Jason Scott
	MEMO	GKNAPP	Memorandum In Support Of Re/Max Defendants' First Set Of Motions In Limine	Jason Scott
7/25/2016	MEMO	HON	Defendant nancy Gentry-Boyd's memorandum In Response To Plainitffs' Motion In Limine To bar Questioning, Argument, and Evidence Regarding Impermissible Character Evidence And Irrelevant Or Prejudicial Topics	Jason Scott
	RSPN	HON	Plaintiffs' Response To Defendant Gentry's First Set Of Motions In Limine	Jason Scott
7/26/2016	MISC	GKNAPP	Plaintiffs' Opposition To Defendants Re/Max Resort Realty And Kevin Batchelor's Motion For Reconsideration	Jason Scott
7/29/2016		GKNAPP	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Millemann, Pittenger Receipt number: 0003712 Dated: 7/29/2016 Amount: \$32.00 (Check)	Jason Scott
8/1/2016	HRVC	GKNAPP	Hearing result for Motion in Limine scheduled on 08/01/2016 02:30 PM: Hearing Vacated 2 Motions in Limine, Motion for reconsideration	Jason Scott
	HRVC	GKNAPP	Hearing result for Pretrial Conference scheduled on 08/01/2016 02:30 PM: Hearing Vacated	Jason Scott
8/11/2016	STIP	HON	Stipulation For Dismissal With Prejudice	Jason Scott

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User	Judge
8/15/2016	ORDR	GKNAPP	Order Of Dismissal With Prejudice Jason Scott
	CDIS	GKNAPP	Civil Disposition entered for: Petrus Family Trust Dated May 1, 1991, Plaintiff; Petrus, Edmond Jr, Plaintiff; Mckenna, Todd, Defendant. Filing date: 8/15/2016 Jason Scott
9/2/2016	STIP	GKNAPP	Stipulation For Dismissal With Prejudice Jason Scott
9/19/2016	ORDS	GKNAPP	Order Of Dismissal With Prejudice Jason Scott
	CDIS	GKNAPP	Civil Disposition entered for: Petrus Family Trust Dated May 1, 1991, Plaintiff; Petrus, Edmond Jr, Plaintiff; Gentry-Boyd, Nancy, Defendant. Filing date: 9/19/2016 Jason Scott
9/20/2016	HRVC	GKNAPP	Hearing result for Jury Trial scheduled on 08/22/2016 09:00 AM: Hearing Vacated Cont. Jason Scott
	HRVC	GKNAPP	Hearing result for Jury Trial scheduled on 08/16/2016 09:00 AM: Hearing Vacated Jason Scott
11/15/2016	ORDR	CWHITE	Order Jason Scott
	JDMT	CWHITE	Judgment - Chris Kirk d/b/a Kirk Enterprises Only Jason Scott
	CDIS	CWHITE	Civil Disposition entered for: Kirk, Chris, Defendant; Petrus Family Trust Dated May 1, 1991, Plaintiff; Petrus, Edmond Jr, Plaintiff. Filing date: 11/15/2016 Jason Scott
11/25/2016	STIP	HON	Stipulation For Dismissal With Prejudice Jason Scott
11/28/2016	MOTN	CWHITE	Motion For Reconsideration Of Order Granting Summary Judgment To Chris Kirk D/B/A Kirk Enterprises Jason Scott
11/29/2016	MEMO	CWHITE	Memorandum In Support Of Plaintiffs' Motion For Reconsideration Of Order Granting Summary Judgment To Chris Kirk D/B/A Kirk Enterprises Jason Scott
	MOTN	CWHITE	Motion For Attorney Fees And Costs Jason Scott
	MEMO	CWHITE	Memorandum In Support Of Motion For Attorney Fees And Costs Jason Scott
	MEMO	CWHITE	Memorandum Of Costs And Fees Jason Scott
	ORDR	CWHITE	Order For Dismissal With Prejudice Jason Scott
	CDIS	CWHITE	Civil Disposition entered for: Batchelor, Kevin, Defendant; Re/Max Resort Realty,, Defendant; Petrus Family Trust Dated May 1, 1991, Plaintiff; Petrus, Edmond Jr, Plaintiff. Filing date: 11/29/2016 Jason Scott
	STAT	CWHITE	STATUS CHANGED: Closed pending clerk action Jason Scott
11/30/2016	NOTH	CWHITE	Notice Of Hearing Jason Scott
	HRSC	CWHITE	Hearing Scheduled (Motion 01/09/2017 01:30 PM) Motion to Reconsideration Jason Scott
12/5/2016	ORDR	CWHITE	Order Denying Motion To Reconsider Jason Scott

Petrus Family Trust Dated May 1, 1991, etal. vs. Nancy Gentry-Boyd, etal.

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User		Judge
12/6/2016	HRVC	CWHITE	Hearing result for Motion scheduled on 01/09/2017 01:30 PM: Hearing Vacated Motion to Reconsideration	Jason Scott
12/12/2016	NOTH	CWHITE	Notice Of Hearing	Jason Scott
12/13/2016	OBJC	CWHITE	Plaintiff's Objection To Defendant Kirk's Motion For Attorney Fees And Costs	Jason Scott
	MISC	CWHITE	Declaration Of Edmond A Petrus Jr In Support Of Plaintiff's Objection To Defendant Kirk's Motion For Attorney Fees And Costs	Jason Scott
1/13/2017	NOAP	CWHITE	Notice Of Appearance	Jason Scott
	APER	CWHITE	Plaintiff: Petrus Family Trust Dated May 1, 1991 Appearance Amy A Lombardo	Jason Scott
	APER	CWHITE	Plaintiff: Petrus, Edmond Jr Appearance Amy A Lombardo	Jason Scott
	NOTA	CWHITE	NOTICE OF APPEAL	Jason Scott
		CWHITE	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Lombardo, Amy A (attorney for Petrus Family Trust Dated May 1, 1991) Receipt number: 0000214 Dated: 1/18/2017 Amount: \$129.00 (Check) For: Petrus Family Trust Dated May 1, 1991 (plaintiff)	Jason Scott
	APSC	CWHITE	Appealed To The Supreme Court	Jason Scott
1/18/2017	NOTH	CWHITE	Notice Of Hearing	Jason Scott
	HRSC	CWHITE	Hearing Scheduled (Motion 02/06/2017 01:30 PM) Motion To Disallow Attorney's Fees	Jason Scott
1/24/2017	CCOA	CWHITE	Clerk's Certificate Of Appeal	Jason Scott
1/30/2017	CONT	CWHITE	Continued (Motion 02/06/2017 02:30 PM) Motion To Disallow Attorney's Fees	Jason Scott
	NOTH	CWHITE	Amended Notice Of Hearing	Jason Scott
	NOTH	CWHITE	Amended Notice Of Hearing	Jason Scott
	NOTH	CWHITE	Amended Notice Of Hearing	Jason Scott
2/1/2017	MEMO	CWHITE	Raply Memorandum In Support Of Motion For Attorney Fees And Costs	Jason Scott
2/6/2017	HRHD	GKNAPP	Hearing result for Motion scheduled on 02/06/2017 02:30 PM: Hearing Held Motion To Disallow Attorney's Fees	Jason Scott
2/13/2017	ORDR	CWHITE	Order Awarding Costs And Attorney Fees	Jason Scott
	JDMT	CWHITE	Amended Judgment	Jason Scott
	CDIS	CWHITE	Civil Disposition entered for: Kirk, Chris, Defendant; Petrus Family Trust Dated May 1, 1991, Plaintiff; Petrus, Edmond Jr, Plaintiff. Filing date: 2/13/2017	Jason Scott

Petrus Family Trust Dated May 1, 1991, Edmond Petrus Jr vs. Nancy Gentry-Boyd, Chris Kirk, Todd Mckenna, Re/Max Resort Realty, Kevin Batchelor

Date	Code	User		Judge
2/14/2017		AKINSMAN	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Victoria Receipt number: 0000520 Dated: 2/14/2017 Amount: \$8.00 (Credit card)	Jason Scott
		AKINSMAN	Miscellaneous Payment: Technology Cost - CC Paid by: Victoria Receipt number: 0000520 Dated: 2/14/2017 Amount: \$3.00 (Credit card)	Jason Scott
3/7/2017	NOTC	GKNAPP	Amended Notice Of Appeal	Jason Scott
3/23/2017		CWHITE	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Nevala Law Office Receipt number: 0001132 Dated: 3/23/2017 Amount: \$129.00 (Check) For: Kirk, Chris (defendant)	Jason Scott
	NOTC	CWHITE	Notice Of Cross Appeal	Jason Scott

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DOUGLAS A. MILLER, CLERK
By G. Knap Deputy

MAR 11 2014

Case No. _____ Inst. No. _____
Filed 11:22 A.M. _____ P.M.

Assigned To
Judge Neville

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

PETRUS FAMILY TRUST DATED MAY
1, 1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the
Petrus Family Trust Dated May 1, 1991,

Plaintiffs,

v.

NANCY GENTRY-BOYD, CHRIS KIRK
d/b/a KIRK ENTERPRISES, and TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS,

Defendants.

Case No. CV-2014-71-C

**COMPLAINT AND DEMAND FOR
JURY TRIAL**

Filing Fee: \$96

COME NOW Plaintiffs above-named and for causes of action against Defendants above-named, complain and allege as follows:

PARTIES

1. Plaintiff the Petrus Family Trust dated May 1, 1991 ("Petrus Family Trust") is an irrevocable trust formed in the state of Illinois, which acquired the leasehold interest in a Payette

Lake Cottage Site, title to the appurtenant improvements built thereon, and the personal property therein, in McCall, Idaho, in April 2012.

2. Plaintiff Edmond A. Petrus, Jr., is an individual residing in the State of California, and is a co-trustee of the Petrus Family Trust.

3. The Payette Lake Cottage Site is a tract of land leased from the Idaho Department of Lands, known as Lease Number R5067, and more particularly described as Lot 36, Amended Payette Lake Cottage Sites, located at 2130 Payette Drive, McCall, Idaho (“Property”).

4. Defendant Nancy Gentry-Boyd (“Defendant Boyd”) is a resident of La Jolla, California, and was the previous lessee of the Property and transferred her leasehold interest in the Property and conveyed title to the improvements located thereon and the personal property located therein to the Petrus Family Trust in April 2012.

5. Defendant Chris Kirk, d/b/a Kirk Enterprises (“Defendant Kirk”) is a resident of McCall, Idaho, and was the contractor and builder of the home located on the Property (“Home”).

6. Defendant Todd McKenna d/b/a Homecraft Home Inspections (“Defendant McKenna”) is a resident of McCall, Idaho, and performed an inspection of the Home on or about March 15, 2012, as a condition of, and prior to the purchase of the Home by the Petrus Family Trust.

JURISDICTION

7. Venue in Valley County is proper because Plaintiffs’ causes of action arose in Valley County and the Property which is the subject of this litigation is located in Valley County.

8. By owning real estate in Valley County, Defendant Boyd subjected herself to jurisdiction of the Idaho courts under Idaho’s long arm statute, Idaho Code Section 5-514(c).

COUNT I
FAILURE TO DISCLOSE PURSUANT TO I.C. §§ 55-2504 AND 55-2508
(Against Defendant Boyd)

9. Plaintiffs and Defendant Boyd entered into a written sales agreement for the sale of the Home located on the Property in 2012, executing a final agreement on or about April 5, 2012.

10. Defendant Boyd signed an RE-25 Seller's Property Condition Disclosure Form regarding the Property on February 7, 2011, and signed and delivered to the Plaintiffs on March 8, 2012 an Amended Disclosure Form (collectively "Disclosures").

11. The transaction closed on April 20, 2012.

12. Plaintiffs thereafter first occupied the Home in the summer of 2012.

13. Soon after occupying the Home, Plaintiffs encountered problems with the operation of the Property's exterior south-facing French Doors leading to the outdoor deck area ("Doors").

14. Upon further investigation, Plaintiffs discovered the extent of the problems with the Doors—significant water damage to the Doors and threshold, causing the Doors to cease proper operation.

15. Investigation also disclosed the presence of mold in the crawlspace and significant damage caused by the moisture related to the water damage below.

16. Defendant Boyd had knowledge concerning the defective Doors, damage caused by water, and existence of mold at the time she executed the Disclosures.

17. Defendant Boyd willfully or negligently failed to disclose the existing problems with the Doors, water damage, and mold as required by the Idaho Property Condition Disclosure Act, I.C. §§ 55-2501 to 55-2518 and the law.

18. Plaintiffs relied on the Disclosures in purchasing the Property and the Home.

19. A complete and correct copy of the Disclosures is attached to this Complaint as Exhibit "1." The Disclosures fail to disclose the existence of a problem with the Doors, water damage, or mold, including in the portion of the Disclosures labeled "MOISTURE & DRAINAGE CONDITIONS SECTION," where Defendant Boyd checked the corresponding "No" column to the questions asking "[h]as there been any water intrusion or moisture related damage to any portion of the property" and "[a]re you aware of the existence of any mold-related claims"; or in the "ADDITIONAL REMARKS AND/OR EXPLANATIONS SECTION" of the Disclosures requiring Defendant Boyd to "list any other existing problems that you know of concerning the property including legal, physical, product defects or others that are not already listed," where Defendant Boyd did not enter anything in the space provided.

20. As a direct result of the water damage, mold, and damage to the doors, and Defendant Boyd's failure to disclose the true condition of the Property, Plaintiffs' Property has been damaged in an amount exceeding Thirty Thousand and No/100 (\$30,000) Dollars, exclusive of attorney fees and costs.

COUNT II
VIOLATION OF THE CONSUMER PROTECTION ACT
(Against Defendant Boyd)

21. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

22. Plaintiffs purchased the Property in Valley County, Idaho.

23. Defendant Boyd's Disclosures represented to the Plaintiffs that the Property was in great condition and that it did not have any problems. Defendant Boyd failed to disclose the true, defective condition of the Property.

24. Defendant Boyd's Disclosures were misleading, false, or deceptive to Plaintiffs.

25. As a direct result of Defendant Boyd's misrepresentation of the true condition of the Property, Plaintiffs have suffered loss and damages in an amount exceeding Thirty Thousand and No/100 (\$30,000.00) Dollars, exclusive of attorney fees and costs.

COUNT III
FRAUD/MISREPRESENTATION
(Against Defendant Boyd)

26. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

27. Defendant Boyd signed the Disclosures on February 7, 2011, and the Amended Disclosure Form on March 8, 2012, representing to Plaintiffs that there existed no problems with the Doors, water damage, or mold, or any other problems with the Home.

28. The Disclosures' representation that there were no problems with the Doors, water damage, or mold was and is false.

29. Defendant Boyd previously attempted to mask or cover up the effects of water intrusion on the Doors with duct tape to prevent further water intrusion into the home.

30. The problems with the Doors and water damage materially affect the Doors' operation, access to and occupation and use of the Home.

31. Defendant Boyd was aware that the Doors did not operate correctly at the time the Disclosures were made.

32. Defendant Boyd intended that the Disclosures would influence and convince Plaintiff to purchase the Home.

33. Upon closing the purchase of the Home, Plaintiffs were not aware that the Doors were damaged and did not operate correctly, that there was damage caused by water, or that there was mold present in the home.

34. Plaintiffs relied on the Disclosures in purchasing the Home.

35. Plaintiffs were justified in relying on the Seller's Disclosures as a truthful and accurate representation of the Home's condition prior to purchase.

36. As a consequence of relying on Defendant Boyd's fraudulent Disclosures, Plaintiffs have encountered damaged to Plaintiffs' Home in an amount exceeding Thirty Thousand and No/100 (\$30,000.00) Dollars, exclusive of attorney fees and costs.

COUNT IV
BREACH OF CONTRACT/IMPLIED COVENANT OF GOOD FAITH AND FAIR
DEALING
(Against Defendant Boyd)

37. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

38. Plaintiffs and Defendant Boyd entered into an agreement for the purchase of the Home.

39. Defendant Boyd executed the Disclosures, representing to Plaintiffs that there existed no problem with the Doors, water damage, or mold.

40. The Disclosures' representation that there were no problems with the Doors, water damage, or mold was and is false.

41. The purchase agreement, Disclosures, and/or implied covenant of good faith and fair dealing obligated Defendant Boyd to disclose all structural issues with the Home.

42. Defendant Boyd breached the purchase agreement, Disclosures, and/or implied covenant of good faith and fair dealing by failing to disclose the issues with the Home, including without limitation the problem with the Doors and their operation, mold, and/or water damage or water inclusion.

43. Disclosure of the issues would have alerted Plaintiffs to the defective nature of the Home, that the Doors were not functioning properly, and that these issues warranted further investigation.

44. Plaintiffs relied on the Disclosures and the information provided by Defendant Boyd, which did not disclose any water damage to the Doors or other components of the Home, that did not function properly, or that warranted further investigation in purchasing of the Home.

45. As a direct and proximate result of Defendant Boyd's above-described breach, Plaintiffs have been subjected to property damage and other losses because of the failure to disclose the water damage and that the Doors did not function properly, among other things.

46. As a direct result of the abnormal water damage and the water damage to the Doors and the Defendant Boyd's breach, Plaintiffs' Home has been damaged in an amount exceeding Thirty Thousand and No/100 (\$30,000.00) Dollars, exclusive of attorney fees and costs.

COUNT V
RESERVATION OF RIGHT – PUNITIVE DAMAGES
(Against Defendant Boyd)

47. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

48. Plaintiffs reserve the right to move to amend their pleadings according to Idaho Code § 6-1604 to include claims for punitive damages against Defendant Boyd.

COUNT VI
NEGLIGENCE
(Against Defendant Kirk)

49. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

50. Defendant Kirk provided construction services, labor and/or materials to build the Home and served as the general contractor in the construction of the Home.

51. Defendant Kirk was negligent in the construction of the Home.

52. The Home was improperly constructed by Defendant Kirk, with such improper construction including, but not limited to the negligent installation of the Doors and flashing

around and in proximity to the Doors and threshold, all in violation of building standards and applicable standards of care.

53. The negligent construction and installation of the threshold and flashing was a latent defect and could not have been discovered by a reasonably thorough inspection.

54. The extent of the damage caused by the defects was not discoverable until the Fall of 2012 after the Plaintiffs first occupied the Home.

55. On August 7, 2013, Plaintiffs mailed via certified mail to Defendant Kirk the required written notice of claim pursuant to the Notice and Opportunity to Repair Act.

56. Subsequent to inspection of the Home by Defendant Kirk pursuant to I.C. § 6-2503(2)(a), Defendant Kirk disputed the claim by letter dated August 29, 2013.

57. As a direct and proximate result of Defendant Kirk's above-described negligence, Plaintiffs have been subjected to property damage and other losses because of the aforementioned negligent actions.

58. By engaging in the conduct described hereinabove, Defendant Kirk breached his duty of care to Plaintiffs, which conduct constitutes negligence. Such negligence proximately caused Plaintiffs' substantial damages, including, but not limited to:

- a. Damage and deterioration to the Doors, threshold, load point next to the Doors, floor sheeting, floor, deck, and insulation due to water intrusion; and
- b. Damage and deterioration to the crawlspace, and resulting mold found therein due to the water intrusion; and
- c. The cost to investigate, repair, replace and/or remediate defects in construction and/or damage caused thereby, and to protect from future damage or loss.

59. As a direct result of the water damage caused by the negligent construction to the Doors, Plaintiffs' Property has been damaged in an amount exceeding Twenty Five Thousand and No/100 (\$25,000.00) Dollars, exclusive of attorney fees and costs.

COUNT VII
NEGLIGENCE AND/OR GROSS-NEGLIGENCE
(Against Defendant McKenna)

60. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

61. Defendant McKenna provided home inspection services to Plaintiffs for the Home located on the Property and conducted an inspection of the Home on March 15, 2012, prior to Plaintiffs' purchase of the Home.

62. Defendant McKenna provided a written Inspection Report to Plaintiffs representing that all exterior doors, which includes the Doors, were inspected and operated, and were functioning properly, and that there was no evidence of water intrusion and mold in the crawlspace, all in violation of applicable standards of care.

63. An inspection of the Doors would have disclosed that the Doors were not functioning properly, and a proper and professional inspection of the crawlspace would have disclosed the existence of water intrusion and mold. Defendant McKenna discovered evidence of water intrusion in the crawlspace at the time of his inspection and the preparation of his written Inspection Report; but failed to fully disclose the results of that evidence and that further investigation was necessary to locate the cause and extent of the water intrusion, which any competent and professional home inspector would have recommended.

64. By failing to thoroughly inspect the exterior doors of the Home and the crawlspace, Defendant McKenna breached his duty of care to Plaintiffs, which conduct is a departure from the ordinary conduct of care for a home inspector.

65. As a direct and proximate result of Defendant McKenna's above-described negligence and gross negligence, Plaintiffs have been subjected to property damage and other losses because of the failure to report any water damage or that the Doors did not function properly.

66. As a direct result of the water intrusion and water damage to the Doors and the Defendant McKenna's failure to report that the Doors were not functioning properly or that there were problems with mold in the crawlspace, Plaintiffs' Property has been damaged in an amount exceeding Thirty Thousand and No/100 (\$30,000.00) Dollars, exclusive of attorney fees and costs.

COUNT VIII
FRAUD
(Against Defendant McKenna)

67. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

68. Defendant McKenna represented to Plaintiffs that he was a professional Home Inspector and that he held superior knowledge and abilities with respect to the construction of a home, such as the one at issue here; that he would completely and thoroughly inspect the Home and report all problems with the Home. Defendant McKenna also represented that all items in his Inspection Report would be thoroughly and competently investigated and truthfully reported to Plaintiffs.

69. Defendant McKenna's written Inspection Report provided to Plaintiffs represented that the Doors were inspected and operated, and were functioning properly.

70. A truthful and competent inspection of the Doors would have disclosed that the Doors were not functioning properly.

71. Defendant McKenna knew that the Plaintiffs would use the Inspection Report in determining whether to purchase the Home.

72. Defendant McKenna knew that the representations as related to the inspection of the proper operation of the Doors in his Inspection Report were false at the time he made them.

73. Defendant McKenna intended that all statements regarding the functionality of the exterior doors in the Inspection Report would be relied on by Plaintiffs.

74. Plaintiffs were not aware of and did not discover that the Doors were damaged and did not function properly.

75. Plaintiffs relied on Defendant McKenna's representations contained in the Inspection Report, which failed to disclose that there was a problem with the operation of the Doors.

76. The problems with the Doors materially affected the value of the Home.

77. By intentionally failing to thoroughly inspect the Doors, and by knowingly putting false representations in his written Inspection Report, Defendant McKenna committed fraud, which conduct is an extreme departure from the ordinary conduct of care for a home inspector.

78. Plaintiffs relied on Defendant McKenna's representations contained in the Inspection Report for their consideration concerning the purchase of the Property and were justified in relying on it as a professional's accurate representation of the operation of the Doors prior to its purchase.

79. As a direct and proximate result of Defendant McKenna's above-described fraudulent representation of the operation of the Doors, Plaintiffs have been subjected to property damage and other losses because of the failure to report that the Doors did not function properly.

80. As a direct result of Defendant McKenna's fraudulent representation of the operation of the Doors, Plaintiffs' Property has been damaged in an amount exceeding Thirty Thousand and No/100 (\$30,000.00) Dollars, exclusive of attorney fees and costs.

COUNT IX
VIOLATION OF THE CONSUMER PROTECTION ACT
(Against Defendant McKenna)

81. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

82. Defendant McKenna represented to the Plaintiffs in the Inspection Report that the Property had been inspected and that all doors were functioning properly and there was no signs of abnormal or harmful water penetration or condensation in the crawlspace, and failed to disclose the true, defective condition of the Property.

83. Defendant McKenna's representations in the Inspection Report were misleading, false, or deceptive to Plaintiffs.

84. As a direct result of the Defendant McKenna's misrepresentation of the true condition of the Property, Plaintiffs have suffered loss and damages in an amount exceeding Thirty Thousand and No/100 (\$30,000) Dollars, exclusive of attorney fees and costs.

ATTORNEY FEES

Plaintiffs have retained the law firm of Greener Burke Shoemaker Oberrecht, P.A. to prosecute this action and have agreed to pay reasonable attorney fees for their services. Plaintiffs are entitled to recover their reasonable attorney fees in accordance with Idaho Code Sections 48-608, 12-120(3), 12-121, and the written sales agreement.

JURY DEMAND

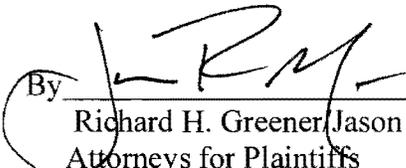
Plaintiffs demand a trial by jury as to all issues pursuant to I.R.C.P. 38(b).

NOW THEREFORE, Plaintiffs pray for judgment in their favor and against Defendants
as follows:

1. For damages in an amount to be proven at trial;
2. For costs and reasonable attorney fees, which in the event of default should be \$5,000.00; and
3. For such other and further relief as the Court deems just and equitable in the premises.

DATED THIS 10th day of March, 2014.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

By 
Richard H. Greener/ Jason R. Mau
Attorneys for Plaintiffs

DOUGLAS A. MILLER, CLERK
By G. Knapp Deputy

SEP 08 2014

Case No. _____ Inst. No. _____
Filed 8:14 A.M. _____ P.M.

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Attorneys for Plaintiffs

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

v.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; and DOES 1-4

Defendants.

Case No. CV-2014-71-C

**FIRST AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL**

Plaintiffs Petrus Family Trust dated May 1, 1991 (the "Petrus Family Trust") and Edmond A. Petrus, Jr., individually and as Co-Trustee of the Petrus Family Trust (collectively, "Plaintiffs"), by and through their counsel, Andersen Banducci PLLC, hereby submit this complaint against Defendants Nancy Gentry-Boyd ("Defendant Gentry-Boyd"), Defendant Chris Kirk, d/b/a Kirk Enterprises ("Defendant Kirk"), Defendant Todd McKenna d/b/a Homecraft

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 1

Home Inspections (“Defendant McKenna”), and Does 1-4 (all defendants collectively referred to as “Defendants”) by claiming, alleging, and on the basis of reasonable investigation and/or information and belief, pleading as follows:

PARTIES

1. Plaintiff the Petrus Family Trust is an irrevocable trust formed in the state of Illinois and domiciled in the state of California, which acquired the leasehold interest in a Payette Lake Cottage Site, title to the appurtenant improvements built thereon, and the personal property therein, in McCall, Idaho, in April 2012.

2. Plaintiff Edmond A. Petrus, Jr., is an individual residing in the State of California, is a co-trustee of the Petrus Family Trust, and is authorized to bring this action on his own behalf and on behalf of the Petrus Family Trust.

3. The Payette Lake Cottage Site is a tract of land leased from the Idaho Department of Lands, known as Lease Number R5067, and more particularly described as Lot 36, Amended Payette Lake Cottage Sites, located at 2130 Payette Drive, McCall, Idaho (the “Property”).

4. Defendant Gentry-Boyd is a resident of La Jolla, California, and was the previous lessee of the Property and transferred her leasehold interest in the Property and conveyed title to the improvements located thereon and the personal property located therein to the Petrus Family Trust in April 2012; Defendant Gentry-Boyd was also the owner-builder of the home located on the Property (the “Home”).

5. Defendant Kirk is a resident of Valley County, Idaho, and was the contractor and builder of the Home.

6. Defendant McKenna is a resident of Valley County, Idaho, and performed an inspection of the Home on or about March 15, 2012, as a condition of, and prior to the purchase of the Home by the Petrus Family Trust.

JURISDICTION AND VENUE

7. This Court has original subject matter jurisdiction over this action pursuant to Idaho Code § 1-705.

8. Defendant Gentry-Boyd is subject to this Court's jurisdiction under Idaho's long arm statute, I.C. § 5-514(c), because she owned, used, or possessed real property within the state of Idaho, and all Defendants are subject to the personal jurisdiction of this Court pursuant to I.C. § 5-514(a) because they each transacted business in Idaho.

9. Venue is proper in Valley County pursuant to Idaho Code § 5-401, et seq. because Plaintiffs' causes of action arose in Valley County and the Property which is the subject of this litigation is located in Valley County.

COUNT I
FAILURE TO DISCLOSE PURSUANT TO
I.C. §§ 55-2501 THROUGH 55-2518
(Against Defendant Gentry-Boyd)

10. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

11. Plaintiffs and Defendant Gentry-Boyd entered into a written Real Estate Purchase and Sale Agreement (the "PSA") in connection with the sale of the Home located on the Property in 2012, executing a final agreement on or about April 5, 2012.

12. Defendant Gentry-Boyd signed an RE-25 Seller's Property Condition Disclosure Form regarding the Property on February 7, 2011, and signed and delivered to Plaintiffs on March 8, 2012 an Amended Disclosure Form (collectively, the "Disclosures") upon which Plaintiffs relied.

13. The transaction closed on April 20, 2012.

14. Plaintiffs thereafter first occupied the Home in the summer of 2012.

15. Soon after occupying the Home, Plaintiffs encountered problems with the operation of the Home's exterior south-facing French doors leading to the outdoor deck area (the "Doors").

16. Upon further investigation, Plaintiffs discovered the extent of the problems with the Doors and other defects, including but not limited to significant water damage to the exterior walls, the Doors, and threshold, which caused the Doors to cease proper operation and let water and air into the Home; substandard and inferior construction of the exterior wall envelope which was insufficient to resist the weather and was installed in violation of the international building codes, state, county and local codes, ordinances, and similar statutes applicable to the building code; several windows and doors in the Home, including the Doors, were not sealed and/or painted on all six sides, vitiating their respective warranties and causing further damage; no final inspection was completed on the Home after completion of initial construction and prior to occupancy; no certificate of occupancy was issued for the Home; and the presence of mold in the crawlspace and significant damage caused by the moisture related to the above-described water intrusion (all defects above collectively, the "Defects").

17. Upon information and belief, Defendant Gentry-Boyd had actual knowledge concerning the Defects at the time she executed the Disclosures.

18. The Disclosures failed to disclose the existence of the Defects.

19. Defendant Gentry-Boyd willfully or negligently failed to disclose the existing Defects as required by the Idaho Property Condition Disclosure Act, I.C. §§ 55-2501-2518.

20. In the portion of the Disclosures labeled “MOISTURE & DRAINAGE CONDITIONS SECTION,” Defendant Gentry-Boyd checked the corresponding “No” column to the questions asking “[h]as there been any water intrusion or moisture related damage to any portion of the property” and “[a]re you aware of the existence of any mold-related claims,” and in the portion labeled “ADDITIONAL REMARKS AND/OR EXPLANATIONS SECTION” of the Disclosures requiring Defendant Gentry-Boyd to “list any other existing problems that you know of concerning the property including legal, physical, product defects or others that are not already listed,” Defendant Gentry-Boyd did not enter anything in the space provided.

21. Plaintiffs relied on the Disclosures in purchasing the Property and the Home.

22. As a direct result of Defendant Gentry-Boyd’s failure to disclose the Defects and the true condition of the Property, Plaintiffs have suffered damages in an amount to be proven at trial.

COUNT II
VIOLATION OF THE CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant Gentry-Boyd)

23. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

24. Plaintiffs purchased the Property in Valley County, Idaho.

25. Defendant Gentry-Boyd represented to Plaintiffs that the Home was in great condition; that the Home was built with the finest materials and finishes selected personally by Defendant Gentry-Boyd; that construction costs for the Home were approximately \$1,300,000; that Plaintiffs would not find a better built home on Payette Lake or anywhere in McCall; that the Home did not have any problems; that Defendant Kirk was one of the best contractors in McCall; and that the Home was built so solidly that it could withstand any weather on Payette Lake.

26. Defendant Gentry-Boyd further falsely represented to Plaintiffs that there had not been any water intrusion or moisture related damage to any portion of the Property.

27. Defendant Gentry-Boyd concealed the true, defective condition of the Property.

28. Defendant Gentry-Boyd knew, or in the exercise of due care should have known, her actions described herein constituted representations that the Home had certain characteristics, uses and benefits that it did not in fact have.

29. Defendant Gentry-Boyd knew, or in the exercise of due care should have known, her actions described herein constituted representations that the Home was of a particular standard, quality, or grade when, in reality, it was of a much lower standard, quality, or grade as a result of the Defects.

30. Defendant Gentry-Boyd's representations were misleading, false, or deceptive to Plaintiffs.

31. Defendant Gentry-Boyd's representations and false affirmative statements regarding the Property and failure to disclose the true, defective condition of the Property violated the Idaho Consumer Protection Act, I.C. §§ 48-603(5), (7), (17) and 48-603C.

32. As a direct result of Defendant Gentry-Boyd's misrepresentation of the true, defective condition of the Property, Plaintiffs have suffered damages in an amount to be proven at trial.

COUNT III
FRAUD/MISREPRESENTATION
(Against Defendant Gentry-Boyd)

33. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

34. Defendant Gentry-Boyd was the owner-builder of the Home and was responsible for overseeing the construction of the Home and the selection of concealed building materials for the construction of the Home that did not meet applicable building codes.

35. Defendant Gentry-Boyd represented to Plaintiffs that the Home was in great condition; that the Home was built with the finest materials and finishes selected personally by Defendant Gentry-Boyd; that construction costs for the Home were approximately \$1,300,000; that Plaintiffs would not find a better built home on Payette Lake or anywhere in McCall; that the Home did not have any problems; that Defendant Kirk was one of the best contractors in McCall; and that the Home was built so solidly that it could withstand any weather on Payette Lake.

36. Defendant Gentry-Boyd signed the Disclosures representing to Plaintiffs that no problems existed with the Home, including but not limited to the Defects.

37. Defendant Gentry-Boyd's representations that the Home was of the highest quality of the homes on Payette Lake and the Disclosures' representation that there were no problems with the Home, including but not limited to the Defects, were and are false.

38. Defendant Gentry-Boyd's false representations regarding the Home were material to Plaintiffs' decision to purchase the Home.

39. Defendant Gentry-Boyd was aware of the Defects at the time the Disclosures were made.

40. Defendant Gentry-Boyd intended that her representations in the Disclosures and her representations concerning the construction costs, the "high quality" of the Home, and lack of existing problems with the Home would materially influence and convince Plaintiffs to purchase the Home.

41. Upon closing the purchase of the Home, Plaintiffs were not aware and could not have been aware of the Defects without destructive testing, due to the concealed and latent nature of the Defects which were not discoverable upon a reasonable inspection.

42. Plaintiffs relied on Defendant Gentry-Boyd's false representations in determining to purchase the Home.

43. Plaintiffs were justified in relying on Defendant Gentry-Boyd's representations in the Disclosures and her representations concerning the construction costs, the "high quality" of the Home, and lack of existing problems with the Home, including but not limited to the Defects, as true and accurate representations of the Home's condition prior to purchase.

44. As a direct and proximate consequence of their reliance on Defendant Gentry-Boyd's fraudulent Disclosures and representations, Plaintiffs have been damaged in an amount to be proven at trial.

COUNT IV
BREACH OF CONTRACT
(Against Defendant Gentry-Boyd)

45. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

46. Plaintiffs and Defendant Gentry-Boyd entered into the PSA.

47. Defendant Gentry-Boyd executed the Disclosures and represented to Plaintiffs that there existed no problems with Home, including but not limited to the Defects.

48. The Disclosures' representations that there were no problems with the Home, including but not limited to the Defects, were and are false.

49. The PSA and Disclosures obligated Defendant Gentry-Boyd to disclose all known issues with the Home, including but not limited to the Defects.

50. Defendant Gentry-Boyd breached the PSA by failing to disclose the Defects.

51. Disclosure of the Defects would have alerted Plaintiffs to the Defects and that these issues warranted further investigation.

52. Plaintiffs relied on the Disclosures and the information provided by Defendant Gentry-Boyd, which did not disclose the Defects.

53. As a direct and proximate result of Defendant Gentry-Boyd's above-described breach, Plaintiffs have been denied benefits that should have accrued to them under the PSA and have sustained damages in an amount to be proven at trial.

COUNT V
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(Against Defendant Gentry-Boyd)

54. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

55. Plaintiffs and Defendant Gentry-Boyd entered into the PSA.

56. Under Idaho law, every contract contains an implied duty of good faith and fair dealing.

57. Defendant Gentry-Boyd, by her conduct described hereinabove, breached the implied duty of good faith and fair dealing imposed by the PSA.

58. As a direct and proximate result of Defendant Gentry-Boyd's breach of the implied duty of good faith and fair dealing, Plaintiffs sustained damages in an amount to be proven at trial.

COUNT VI
BREACH OF IMPLIED WARRANTY OF HABITABILITY
(Against Defendant Gentry-Boyd and Defendant Kirk)

59. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

60. Upon information and belief, Defendant Kirk provided construction services, labor and/or materials on behalf of Defendant Gentry-Boyd to build the Home and served as the general contractor in the construction of the Home.

61. Defendant Gentry-Boyd was the owner-builder of the Home and was responsible for overseeing the construction of the Home and the selection of concealed building materials for the construction of the Home that did not meet applicable building codes.

62. The sale of the Home to Plaintiffs gave rise to an implied warranty of habitability.

63. The Defects and deficiencies in the Home as set forth herein, which were latent and concealed, made the Home unfit for use and habitation.

64. On August 7, 2013, Plaintiffs mailed via certified mail to Defendant Kirk the required written notice of claim pursuant to the Notice and Opportunity to Repair Act ("Notice"). Defendant Gentry-Boyd received a copy of the Notice and was also given an opportunity to repair the Home.

65. Subsequent to inspection of the Home by Defendant Kirk pursuant to I.C. § 6-2503(2)(a), Defendant Kirk disputed the claim by letter dated August 29, 2013.

66. Defendants Gentry-Boyd and Kirk were both given, and both took advantage of, an additional opportunity to inspect the damage to the Home.

67. By reason of the conduct alleged hereinabove, Defendants Gentry-Boyd and Kirk materially breached the implied warranty of habitability extended in favor of the Plaintiffs and are liable for the aforesaid wrongful conduct and are liable to Plaintiffs for the substantial damages they suffered in connection with Defendants' conduct in relation to the Property and the Home.

68. As a result of Defendant Gentry-Boyd's and Defendant Kirk's breach of the implied warranty of habitability, Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT VII
CONSPIRACY TO COMMIT FRAUD
(Against Defendants Gentry-Boyd and Kirk)

69. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

70. At all relevant times hereto, Defendant Gentry-Boyd as owner-builder and Defendant Kirk as contractor agreed and combined to engage in a conspiracy to use and install in a substandard manner an exterior envelope that did not meet the applicable building codes and standard of care, in a manner that would be concealed from a general inspection of the Home, to intentionally cut costs in the construction of the Home and defraud the subsequent purchaser.

71. In furtherance of the conspiracy, Defendants Gentry-Boyd and Kirk, and each of them, conspired and agreed among themselves, and combined to engage in a conspiracy to commit the wrongs alleged in this Complaint, to build the Home using materials and standards that did not meet the applicable building codes and standards of care, and to avoid a final inspection to obtain a certificate of occupancy, of which the principal element was to cut costs and inflict wrongs on the subsequent purchaser, and that these wrongful acts were committed pursuant to and in furtherance of such conspiracy and agreement, and with the consent, approval, or ratification of Defendant Gentry-Boyd and Defendant Kirk, and each is liable as a direct participant, co-conspirator, or aider and abettor of the wrongful acts herein alleged.

72. As a result of these wrongful acts, Plaintiffs were unable to discover the use of materials that did not meet the applicable building codes and standards of code, and the substandard installation of same, prior to the purchase of the Home and have been required to

employ contractors to repair and remediate the problems and violations of applicable building codes.

73. As a direct result of Defendant Gentry-Boyd's and Defendant Kirk's wrongful actions, Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT VIII
NEGLIGENCE AND/OR GROSS-NEGLIGENCE
(Against Defendant McKenna)

74. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

75. Defendant McKenna provided home inspection services to Plaintiffs for the Home located on the Property and conducted an inspection of the Home on March 15, 2012, prior to Plaintiffs' purchase of the Home.

76. Defendant McKenna provided a written inspection report (the "Inspection Report") to Plaintiffs representing that all exterior doors, which includes the Doors, were inspected and operated, and were functioning properly, and that there was no evidence of significant water intrusion and mold in the crawlspace, all in violation of applicable standards of care.

77. A proper and professional inspection of the Home would have discovered and disclosed the Defects, including by not limited to the fact that the Doors were not functioning properly and existence of significant water intrusion and mold.

78. Defendant McKenna failed to fully disclose the true results of his inspection and that further investigation was necessary to locate the cause and extent of water intrusion, which any competent and professional home inspector would have recommended. In fact, Defendant McKenna represented that what little water intrusion he found in the crawl space was completely normal for the time of the year.

79. In undertaking to provide professional home inspection services to Plaintiffs, Defendant McKenna had a duty to Plaintiffs to exercise the reasonable degree of care, skill and knowledge that is ordinarily employed by such home inspection professionals in performing home inspections.

80. By failing to thoroughly inspect the Home, including the Doors and the crawlspace, and by giving the Home a clean bill of health, Defendant McKenna breached his duty of care to Plaintiffs, which conduct is a departure from the ordinary conduct of care for a home inspector.

81. As a direct and proximate result of Defendant McKenna's above-described negligence and/or gross negligence Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT IX
FRAUD
(Against Defendant McKenna)

82. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

83. Defendant McKenna represented to Plaintiffs that he was a professional home inspector and that he held superior knowledge and abilities with respect to the construction of a home, such as the one at issue here; that he would completely and thoroughly inspect the Home and report all problems with the Home. Defendant McKenna also represented that all items in his Inspection Report would be thoroughly and competently investigated and truthfully reported to Plaintiffs.

84. Defendant McKenna's written Inspection Report provided to Plaintiffs falsely represented that all doors in the Home were inspected and operated, and were functioning properly.

85. A proper and professional inspection of the Doors would have disclosed that the Doors were not functioning properly, and a proper and professional inspection of the crawlspace would have disclosed the existence of significant water intrusion and mold.

86. Defendant McKenna knew that the representations in the Inspection Report would be material to Plaintiffs in determining whether to purchase the Home.

87. Defendant McKenna knew that the material representations as related to the inspection of the proper operation of the Doors in his Inspection Report were false at the time he made them.

88. Defendant McKenna intended that all statements regarding the functionality of the exterior doors in the Inspection Report would be relied on by Plaintiffs.

89. Plaintiffs were not aware of and did not discover that the Doors were damaged and did not function properly.

90. The problems with the Doors materially affected the value of the Home.

91. By intentionally failing to thoroughly inspect the Doors, and by knowingly including false representations in his written Inspection Report, Defendant McKenna committed fraud, which conduct is an extreme departure from the ordinary conduct of care for a home inspector.

92. Plaintiffs relied on Defendant McKenna's representations contained in the Inspection Report for their consideration concerning the purchase of the Property and Home and were justified in relying on it as a professional's accurate representation of the operation of the Doors prior to their purchase of the Property and Home.

93. As a direct and proximate result of Defendant McKenna's above-described fraudulent representation of the operation of the Doors, Plaintiffs have been subjected to property damage and other losses because of the failure to report that the Doors did not function properly.

94. As a direct result of Defendant McKenna's fraudulent representation of the operation of the Doors, Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT X
VIOLATION OF THE CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant McKenna)

95. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

96. Defendant McKenna represented to the Plaintiffs in the Inspection Report that the Home had been inspected and that all doors were functioning properly and there were no signs of abnormal or harmful water penetration or condensation in the crawlspace.

97. Defendant McKenna's Inspection Report failed to disclose the true, defective condition of the Property.

98. Defendant McKenna's representations in the Inspection Report were misleading, false, or deceptive to Plaintiffs.

99. Defendant McKenna's failure to disclose the true, defective condition of the Property and the making of false affirmative statements violated the Idaho Consumer Protection Act, I.C. §§ 48-603(5), (7), (17) and 48-603C.

100. As a direct result of Defendant McKenna's misrepresentation of the true condition of the Property, Plaintiffs have suffered loss and damages in an amount to be proven at trial.

101. Plaintiffs are also entitled to additional costs and attorney's fees under I.C. § 48-608(5).

RESERVATION OF RIGHT – PUNITIVE DAMAGES

102. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

103. Plaintiffs reserve the right to move to amend their pleadings according to Idaho Code §§ 6-1604 and 48-608(1) to include claims for punitive damages against Defendants.

ATTORNEY FEES

Plaintiffs have retained the law firm of Andersen Banducci PLLC to prosecute this action and have agreed to pay reasonable attorney fees for their services. Plaintiffs are entitled to recover their reasonable attorney fees in accordance with Idaho Code §§ 48-608, 12-120(3), 12-121, and the written PSA.

JURY DEMAND

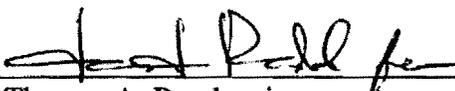
Plaintiffs demand a trial by jury as to all issues pursuant to I.R.C.P. 38(b).

NOW THEREFORE, Plaintiffs pray for judgment in their favor and against Defendants as follows:

1. For damages in an amount to be proven at trial;
2. For costs and reasonable attorney fees, which in the event of default should be \$10,000; and
3. For such other and further relief as the Court deems just and equitable in the premises.

DATED THIS ___ day of September, 2014.

ANDERSEN BANDUCCI PLLC

By  _____
Thomas A. Banducci
Jason J. Rudd
Attorneys for Plaintiffs

Plaintiffs and without assuming the burden of proof as to any issue in this litigation, answers and files his *Answer to Plaintiffs' First Amended Complaint and Demand for Jury Trial* (hereinafter, "Amended Complaint") as follows:

I.

RESPONSE TO ALL COUNTS

1. All matters not herein specifically admitted are denied.
2. Kirk admits the allegations contained in paragraph 5 of the Amended Complaint.
3. In answering paragraph 60, Kirk admits only that he built a home for Defendant Gentry-Boyd.
4. In answering paragraph 64, Kirk admits only that he received a letter from Plaintiffs' former counsel.
5. In answering paragraph 65, Kirk admits only that he responded to Plaintiffs through counsel.

II.

AFFIRMATIVE DEFENSES

Further answering and by way of affirmative defenses, Kirk alleges as follows:

FIRST DEFENSE

Kirk denies each and every allegation of the Amended Complaint not herein expressly and specifically admitted. Kirk further reserves the right to amend this or any other answer or denial stated herein once he has had the opportunity to complete discovery regarding any of the claims and allegations in the Amended Complaint.

SECOND DEFENSE

Plaintiffs have failed to mitigate their damages, if any. By asserting this defense, Kirk

does not admit that Plaintiffs have been damaged.

THIRD DEFENSE

Plaintiffs' action against Kirk is barred for lack of privity of contract.

FOURTH DEFENSE

The damages sustained by Plaintiffs, if any, were proximately caused by the negligence or fault of parties, persons, or entities other than Kirk whom Kirk does not control and over whom Kirk had no control. By asserting this defense, Kirk does not admit that Plaintiffs have been damaged.

FIFTH DEFENSE

Plaintiffs were guilty of negligent and careless misconduct, and misconduct and fault, at the time of and in connection with the matters and damages alleged, which misconduct on Plaintiffs' part proximately caused and contributed to said events and resultant damages, if any.

SIXTH DEFENSE

If Plaintiffs have sustained injuries or losses as alleged in the Amended Complaint, upon information and belief, such injuries or losses were caused in whole or in part through the operation of nature or other intervening cause or causes. By asserting this defense, Kirk does not admit that Plaintiffs have been damaged.

SEVENTH DEFENSE

Any and all conduct of Kirk with respect to the matters alleged was justifiable, reasonable, authorized by law, and performed in good faith or with the belief that such acts were proper, legal, and appropriate.

EIGHTH DEFENSE

There is no proximate causation or causation between any alleged act or alleged breach of

duty by Kirk and Plaintiffs' alleged damages, if any.

NINTH DEFENSE

If Plaintiffs have sustained injuries or losses as alleged in the Amended Complaint, upon information and belief, such injuries and losses were caused by the actions of persons not having real or apparent authority to take said actions on behalf of Kirk and over whom Kirk had no control and for whom Kirk may not be held accountable.

TENTH DEFENSE

Plaintiffs' claims are barred in whole or in part because Kirk's conduct was in compliance with industry custom and standard of practice.

ELEVENTH DEFENSE

In answering this Complaint, Kirk does not assume any burden of proof attributable to Plaintiffs as to any matter at issue in this litigation.

TWELFTH DEFENSE

With respect to each and every purported cause of action, the acts of Kirk were at all times done in good faith, through fair dealing, and without malice.

THIRTEENTH DEFENSE

Plaintiffs lack proper standing to assert some or all of the claims asserted against Kirk in the Amended Complaint.

FOURTEENTH DEFENSE

Some or all of Plaintiffs' claims are barred by waiver.

FIFTEENTH DEFENSE

Some or all of Plaintiffs' claims are barred by release.

SIXTEENTH DEFENSE

Some or all of the claims in Plaintiffs' Amended Complaint are barred by the doctrine of unclean hands.

SEVENTEENTH DEFENSE

With regard to the civil conspiracy claim, Plaintiffs failure to plead additional facts in furtherance of the alleged conspiracy preclude the cause of action for civil conspiracy.

EIGHTEENTH DEFENSE

Plaintiffs are barred from recovery for civil conspiracy because they have failed to allege special damages that are separate and distinct from damages alleged for other causes of action, and as a result, this cause of action must fail.

NINETEENTH DEFENSE

Kirk has not acted with malice, fraud, oppression, wantonness, outrageousness, or gross negligence, and therefore, Plaintiffs are not entitled to punitive damages.

TWENTIETH DEFENSE

The claim, and each cause of action alleged therein, fails to state facts sufficient to constitute a cause of action against Kirk.

TWENTY FIRST DEFENSE

Kirk contends that the sole and/or proximate cause of the damages claimed by Plaintiffs was and is due to the willful and intentional acts of persons other than Kirk.

TWENTY SECOND DEFENSE

Plaintiffs unreasonably delayed in providing notice and in commencing and prosecuting this action which caused unfair prejudice to Kirk barring any recovery against Kirk under the doctrine of laches.

III.

DEMAND FOR JURY TRIAL

Pursuant to Idaho Rules of Civil Procedure Rule 38(b), Kirk demands a trial by jury, composed of the number of persons allowed by law, on all issues, claims, and defenses so triable.

IV.

PRAYER FOR RELIEF

WHEREFORE, having fully answered the Amended Complaint, Kirk prays for judgment against Plaintiffs as follows:

1. That Plaintiffs take nothing by their Amended Complaint.
2. That Plaintiffs' Amended Complaint in this matter be dismissed with prejudice.
3. That Kirk be awarded costs and attorney's fees, under any applicable statute or rule, including, but not limited to Idaho Code §§ 12-120, 121 and 123; and Idaho Rule of Civil Procedure Rule 54.
4. For such other and further relief as the Court may deem just and equitable under the circumstances.

Respectfully Submitted,

DATED this 29th day of September, 2014.

ARKOOSH LAW OFFICES



C. Tom Arkoosh
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 29th day of September, 2014, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Courtesy copy:

Judge Thomas F. Neville
Ada County Courthouse
200 W. Front Street
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Overnight Courier
- Hand Delivered
- Facsimile (208) 287-6919
- E-mail dcnevilt@adaweb.net

Thomas A. Banducci
Jason J. Rudd
ANDERSEN BANDUCCI PLLC
101 S. Capitol Blvd., Suite 1600
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Overnight Courier
- Hand Delivered
- Facsimile (208) 342-4455
- E-mail tab@andersenbanducci.com
jjr@andersenbanducci.com



C. Tom Arkoosh

DOUGLAS A. MILLER, CLERK
By JMM Deputy

OCT 14 2014

Case No. _____ Inst. No. _____
Filed _____ A.M. 4:11 P.M.

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Attorneys for Defendant Nancy Gentry-Boyd

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

PETRUS FAMILY TRUST DATED
MAY 1, 1991, and EDMOND A.
PETRUS, JR., individually and as
Co-Trustee of the Petrus Family Trust
Dated May 1, 1991,

Plaintiffs,

v.

NANCY GENTRY-BOYD; CHRIS
KIRK d/b/a KIRK ENTERPRISES;
TODD MCKENNA d/b/a
HOMECRAFT HOME
INSPECTIONS; and DOES 1-4

Defendants.

CASE NO. CV-2014-71-C

NANCY GENTRY-BOYD'S ANSWER
TO AMENDED COMPLAINT

COMES NOW Nancy Gentry-Boyd (hereinafter "Boyd"), by and through her undersigned counsel, and for her Answer to the Amended Complaint alleges, avers and responds as follows:

RESPONSE COMMON TO ALL COUNTS

Boyd denies each and every allegation contained in the Complaint which is not specifically admitted herein.

PARTIES

1. Boyd admits that the Petrus Family Trust acquired her leasehold interest in a Payette lakefront lot on or about April 12, 2012.

2. Boyd is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 2, and Boyd therefore denies each and every such averment.

3. Boyd admits the allegations contained in Paragraph 3.

4. Boyd admits that she resides in La Jolla, California, that she was the lessee of the Property, and that she conveyed the improvements thereon and personal property therein to Plaintiff Petrus Family Trust on or about April 12, 2012. Boyd specifically denies that she was the “owner-builder” of the home.

5. Boyd admits that Defendant Chris Kirk (hereinafter “Kirk”) was the contractor and builder of the home.

6. Boyd admits that Defendant McKenna is a resident of Valley County. Boyd is without knowledge or information sufficient to form a belief as to the truth of the remainder of the averments in Paragraph 6, and Boyd therefore denies each and every such averment.

JURISDICTION AND VENUE

7. Boyd admits the allegations contained in Paragraph 7.

8. Boyd admits the allegations contained in Paragraph 8.

9. Boyd admits the allegations contained in Paragraph 9.

COUNT I

FAILURE TO DISCLOSE PURSUANT TO

I.C. §§ 55-2501 THROUGH 55-2518

(Against Defendant Gentry-Boyd)

10. Boyd incorporates all prior responses and averments.

11. Boyd admits that she and Plaintiff Petrus Family Trust entered into a Real Estate Purchase and Sale Agreement on or about April 12, 2012 for the purchase of the home.

12. Boyd admits the allegations contained in Paragraph 12.

13. Boyd denies the allegations contained in Paragraph 13.

14. Boyd is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 14, and Boyd therefore denies each and every such averment.

15. Boyd is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 15, and Boyd therefore denies each and every such averment.

16. Boyd is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 16, and Boyd therefore denies each and every such averment.

17. Boyd denies the allegations contained in Paragraph 17.

18. Boyd denies the allegations contained in Paragraph 18.

19. Boyd denies the allegations contained in Paragraph 19.

20. Boyd admits the allegations contained in Paragraph 20.

21. Boyd is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 21, and Boyd therefore denies each and every such averment.

22. Boyd admits the allegations contained in Paragraph 22.

COUNT II
VIOLATION OF CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant Gentry-Boyd)

23. Boyd incorporates all prior responses and averments.

24. Boyd admits the allegations contained in Paragraph 24.

25. Boyd denies the allegations contained in Paragraph 25.

26. Boyd denies the allegations contained in Paragraph 26.

27. Boyd denies the allegations contained in Paragraph 27.

28. Boyd denies the allegations contained in Paragraph 28.

29. Boyd denies the allegations contained in Paragraph 29.

30. Boyd denies the allegations contained in Paragraph 30.

31. Boyd denies the allegations contained in Paragraph 31.

32. Boyd denies the allegations contained in Paragraph 32.

COUNT III
FRAUD/MISREPRESENTATION
(Against Defendant Gentry-Boyd)

33. Boyd incorporates all prior responses and averments.

34. Boyd denies the allegations contained in Paragraph 34.

35. Boyd denies the allegations contained in Paragraph 35.
36. Boyd admits that she signed the Disclosures. Boyd denies the remaining allegations contained in Paragraph 36.
37. Boyd denies the allegations contained in Paragraph 37.
38. Boyd denies the allegations contained in Paragraph 38.
39. Boyd denies the allegations contained in Paragraph 39.
40. Boyd denies the allegations contained in Paragraph 40.
41. Boyd is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 41, and Boyd therefore denies each and every such averment.
42. Boyd denies the allegations contained in Paragraph 42.
43. Boyd denies the allegations contained in Paragraph 43.
44. Boyd denies the allegations contained in Paragraph 44.

COUNT IV
BREACH OF CONTRACT
(Against Defendant Gentry-Boyd)

45. Boyd incorporates all prior responses and averments.
46. Boyd admits the allegations contained in Paragraph 46.
47. Boyd denies the allegations contained in Paragraph 47.
48. Boyd denies the allegations contained in Paragraph 48.
49. Boyd denies the allegations contained in Paragraph 49.
50. Boyd denies the allegations contained in Paragraph 50.
51. Boyd denies the allegations contained in Paragraph 51.
52. Boyd denies the allegations contained in Paragraph 52.
53. Boyd denies the allegations contained in Paragraph 53.

COUNT V
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(Against Defendant Gentry-Boyd)

54. Boyd incorporates all prior responses and averments.
55. Boyd admits the allegations contained in Paragraph 55.
56. Boyd denies the allegations contained in Paragraph 56.
57. Boyd denies the allegations contained in Paragraph 57.
58. Boyd denies the allegations contained in Paragraph 58.

COUNT VI
BREACH OF IMPLIED WARRANTY OF HABITABILITY
(Against Defendant Gentry-Boyd and Defendant Kirk)

59. Boyd incorporates all prior responses and averments.
60. Boyd admits the allegations contained in Paragraph 60.
61. Boyd denies the allegations contained in Paragraph 61.
62. Boyd denies the allegations contained in Paragraph 62.
63. Boyd denies the allegations contained in Paragraph 63.
64. Boyd admits that Plaintiffs provided Defendant Kirk with a notice of some or all of Plaintiffs' claims. Boyd denies each and every remaining allegation contained in Paragraph 64.
65. Boyd is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 65, and Boyd therefore denies each and every such averment.
66. Boyd denies that she was given a reasonable or meaningful opportunity to inspect the home.
67. Boyd denies the allegations contained in Paragraph 67.
68. Boyd denies the allegations contained in Paragraph 68.

COUNT VII
CONSPIRACY TO COMMIT FRAUD
(Against Defendants Gentry-Boyd and Kirk)

69. Boyd incorporates all prior responses and averments.
70. Boyd denies the allegations contained in Paragraph 70.
71. Boyd denies the allegations contained in Paragraph 71.
72. Boyd denies the allegations contained in Paragraph 72.
73. Boyd denies the allegations contained in Paragraph 73.

COUNT VIII
NEGLIGENCE AND/OR GROSS NEGLIGENCE
(Against Defendant McKenna)

74. Count VIII does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 74.
75. Count VIII does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 75.

76. Count VIII does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 76.

77. Count VIII does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 77.

78. Count VIII does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 78.

79. Count VIII does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 79.

80. Count VIII does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 80.

81. Count VIII does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 81.

COUNT IX
FRAUD
(Against Defendant McKenna)

82. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 82.

83. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 83.

84. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 84.

85. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 85.

86. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 86.

87. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 87.

88. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 88.

89. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 89.

90. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 90.

91. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 91.

92. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 92.

93. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 93.

94. Count IX does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 94.

COUNT X
VIOLATION OF CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant McKenna)

95. Count X does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 95.

96. Count X does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 96.

97. Count X does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 97.

98. Count X does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 98.

99. Count X does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 99.

100. Count X does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 100.

101. Count X does not assert any claims against Boyd and she, therefore, neither admits nor denies Paragraph 101.

RESERVATION OF RIGHT-PUNITIVE DAMAGES

102. Boyd incorporates all prior responses and averments.

103. Boyd denies that there is any basis for Plaintiffs to plead Punitive Damages against Boyd.

ATTORNEYS FEES

Boyd denies that there is any basis in law or in fact for an award of attorney's fees to Plaintiffs.

FIRST AFFIRMATIVE DEFENSE

The Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims and the relief sought therefrom are barred by the doctrine of estoppel.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims and the relief sought therefrom are barred by the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims and the relief sought therefrom are barred by the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims and the relief sought therefrom are barred by the doctrine of waiver.

SIXTH AFFIRMATIVE DEFENSE

Some or all of Plaintiffs' claims are barred by the applicable statutes of limitation, including but not necessarily limited to Count VI.

SEVENTH AFFIRMATIVE DEFENSE

The damages alleged by Plaintiffs, to the extent that any such damages have been suffered by Plaintiffs, were caused by the negligence and/or willful and intentional acts of Plaintiffs and Plaintiffs' agents.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to allege specific facts or damages in support of Count VII as required by law.

NINTH AFFIRMATIVE DEFENSE

The claims which Plaintiffs have asserted against Boyd have been knowingly and intentionally pursued by Plaintiffs frivolously, unreasonably, without foundation, without any reasonable basis in fact or in law and solely for purposes of harassment.

BOYD'S ATTORNEYS FEES

Boyd is entitled to Judgment against Plaintiffs, jointly and severally, for her costs and attorneys fees incurred in defense of this Action pursuant to I.R.C.P. 54(d)(1), I.R.C.P. 54(e)(1),

I.C. §12-120, I.C. §12-121, I.C. §12-123, I.C. §48-608, and the terms of the Real Estate Purchase and Sale Agreement.

DEMAND FOR JURY TRIAL

Boyd demands a trial by a jury composed of not less than twelve (12) persons.

PRAYER FOR RELIEF

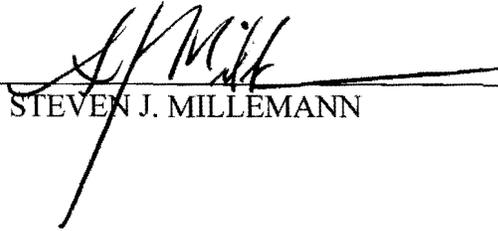
WHEREFORE, Boyd prays for the following relief:

1. That all Plaintiffs' claims and causes of action be dismissed with prejudice, with Plaintiff taking nothing therefrom;
2. For Judgment against Plaintiffs, jointly and severally, for Boyd's costs and attorneys fees incurred in defense of Plaintiffs' claims;
3. For such other relief as the Court deems just and equitable under the premises.

DATED this 10th day of October 2014.

MILLEMANN, PITTENGER, McMAHAN &
PEMBERTON, LLP, Attorneys for Defendant
Nancy Gentry-Boyd

BY: _____


STEVEN J. MILLEMANN

CERTIFICATE OF SERVICE

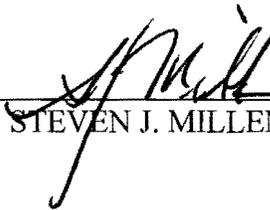
I HEREBY CERTIFY that on the 10th day of October, 2014, I caused to be served a true and correct copy of the foregoing *Nancy Gentry-Boyd's Answer to Amended Complaint* to be served on the following by electronic transmission and by regular mail, addressed as follows:

Thomas A. Banducci
Jason J. Rudd
Anderson Banducci PLLC
101 S. Capitol Blvd., Suite 1600
Boise, Idaho 83702
tab@andersonbanducci.com
jjr@andersonbanducci.com

C. Tom Arkoosh
Daniel A. Nevala
ARKOOSH LAW OFFICES
P.O. Box 2900
Boise, Idaho 83701
tom.arkoosh@arkoosh.com
dan.nevala@arkoosh.com

MILLEMANN, PITTENGER, McMAHAN &
PEMBERTON, LLP

BY: _____


STEVEN J. MILLEMANN

PARTIES

2. McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 1-5 of the amended complaint, and therefore denies the same.

3. In answer to paragraph 6, McKenna admits that he is a resident of Valley County, Idaho, and that he performed an inspection of the Home beginning on March 15, 2012, but does not have sufficient information to admit or deny the remainder of said paragraph. He therefore denies the same.

JURISDICTION AND VENUE

4. McKenna admits the allegations of paragraphs 7, 8 and 9.

COUNT I
FAILURE TO DISCLOSE PURSUANT TO
I.C. §§ 55-2501 THROUGH 55-2518
(Against Defendant Gentry-Boyd)

5. This Count does not assert any claim against McKenna, and McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 10-22 of the amended complaint, and therefore denies the same.

COUNT II
VIOLATION OF THE CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant Gentry-Boyd)

6. This Count does not assert any claim against McKenna, and McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 23-32 of the amended complaint, and therefore denies the same.

COUNT III
FRAUD/MISREPRESENTATION
(Against Defendant Gentry-Boyd)

7. This Count does not assert any claim against McKenna, and McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 33-44 of the amended complaint, and therefore denies the same.

COUNT IV
BREACH OF CONTRACT
(Against Defendant Gentry-Boyd)

8. This Count does not assert any claim against McKenna, and McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 45-53 of the amended complaint, and therefore denies the same.

COUNT V
BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(Against Defendant Gentry-Boyd)

9. This Count does not assert any claim against McKenna, and McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 54-58 of the amended complaint, and therefore denies the same.

COUNT VI
BREACH OF IMPLIED WARRANTY OF HABITABILITY
(Against Defendant Gentry-Boyd and Defendant Kirk)

10. This Count does not assert any claim against McKenna, and McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 59-68 of the amended complaint, and therefore denies the same.

COUNT VII
CONSPIRACY TO COMMIT FRAUD
(Against Defendant Gentry-Boyd and Defendant Kirk)

11. This Count does not assert any claim against McKenna, and McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 69-73 of the amended complaint, and therefore denies the same.

COUNT VIII
NEGLIGENCE AND/OR GROSS NEGLIGENCE
(Against Defendant McKenna)

12. McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 74 of the amended complaint, and therefore denies the same.

13. In answer to paragraph 75, McKenna admits that he performed an inspection of the Home beginning on March 15, 2012, but does not have sufficient information to admit or deny the remainder of said paragraph, and therefore denies the same.

14. In answer to paragraph 76, McKenna admits that he provided a written inspection report, but denies the remainder of the allegations in paragraph 76.

15. McKenna denies the allegations of paragraphs 77 and 78.

16. McKenna is without sufficient knowledge as to the currently applicable standard of care required under Idaho law for home inspectors, if any, and therefore denies the allegations of paragraph 79.

17. McKenna denies the allegations of paragraphs 80 and 81.

COUNT IX
FRAUD
(Against Defendant McKenna)

18. McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 82 of the amended complaint, and therefore denies the same.

19. McKenna denies the allegations of paragraphs 83, 84, and 85.

20. McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 86 of the amended complaint, and therefore denies the same.

21. McKenna denies the allegations of paragraph 87.

22. McKenna did not know to what extent, if any, the plaintiffs would rely upon the statements in the report, and therefore denies the allegations of paragraph 88.

23. McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 89 and 90 of the amended complaint, and therefore denies the same.

24. McKenna denies the allegations of paragraph 91.

25. McKenna is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 92 of the amended complaint, and therefore denies the same.

26. McKenna denies the allegations of paragraphs 93 and 94 of the complaint.

COUNT X
VIOLATION OF THE CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant McKenna)

27. McKenna denies the allegations of paragraphs 95-101 of the complaint.

RESERVATION OF RIGHT – PUNITIVE DAMAGES

28. McKenna denies that there is any basis to claim punitive damages against McKenna.

ATTORNEY FEES

29. McKenna denies that there is any basis to claim attorney fees against McKenna.

JURY DEMAND

McKenna demands a trial by jury on all counts against him.

AFFIRMATIVE DEFENSES

By pleading certain defenses as “affirmative defenses”, McKenna does so for the purpose of completeness and does not intend to suggest that he has the burden of proof for any such defense. Furthermore, as McKenna has not had the opportunity to complete discovery in this case, by failing to raise an affirmative defense, McKenna does not intend to waive any such defense and specifically reserves the right to amend his answer to include such additional and appropriate affirmative defenses as are justified by the pleadings and facts discovered.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs’ claims, especially in Count VIII, are barred by the applicable statute of limitations, including but not limited to I.C. § 5-219.

SECOND AFFIRMATIVE DEFENSE

Notice is hereby given that defendant intends to raise by motion the defense of failure to assert a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE

Any damages sustained by plaintiffs (and McKenna does not admit there are any such damages) were caused by the negligence and/or willful and intentional acts of plaintiffs and plaintiff's agents, whose negligence is greater than that of McKenna, if any, or by persons other than McKenna.

EIGHTH AFFIRMATIVE DEFENSE

There is no proximate causation between any alleged act or alleged breach of duty by McKenna and plaintiffs' alleged damages, if any.

NINTH AFFIRMATIVE DEFENSE

McKenna has not acted with malice, fraud, oppression, wantonness, outrageousness, or gross negligence, and therefore, plaintiffs are not entitled to punitive damages.

REQUEST FOR ATTORNEY FEES

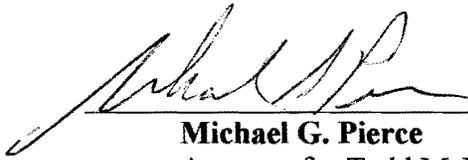
McKenna has been required to retain the undersigned attorney regarding this matter and requests that he be awarded his attorney fees and costs incurred herein pursuant to Idaho Code 12-120, 12-121, and Rule 54 of the Idaho Rules of Civil Procedure and any other applicable laws allowing for the recovery of attorney's fees in this action.

PRAYER FOR RELIEF

WHEREFORE, defendant McKenna prays for relief as follows:

1. That plaintiffs take nothing by their amended complaint, and that their claim be dismissed with prejudice.
2. That McKenna recover his attorneys fees and costs herein under any applicable statute or rule, including, but not limited to Idaho Code §§ 12-120, 121, and I.R.C.P. 54.

3. For such other and further relief as to the Court seems reasonable and just in the premises.



Michael G. Pierce
Attorney for Todd McKenna

October 29, 2014

Date

Certificate of Service

I hereby certify that on the 24 day of October, 2014, I served true and correct copies of the foregoing document upon the following persons, by the means indicated:

Thomas A. Banducci
Jason J. Rudd
ANDERSEN BANDUCCI PLLC
101 S. Capitol Blvd., Suite 1600
Boise, Idaho 83702-7720

U. S. Mail
 Fax to 208-342-4455
 Personal Service

C. Thomas Arkoosh
Daniel A. Nevala
Arkoosh Law Offices
802 W. Bannock, Suite 900
Boise, Idaho 83702

U. S. Mail
 Fax to 208-343-5456
 Personal Service

Steven J. Millemann
Millemann, Pittenger, McMahan & Pemberton
P. O. Box 1066
706 N. 1st Street
McCall, Idaho 83638

U. S. Mail
 Fax to 208-634-4516
 Personal Service

Courtesy Copy:
Hon. Thomas F. Neville
District Judge
Ada County Courthouse
200 W. Front Street
Boise, Idaho 83702

U.S. Mail
 Fax to 208-287-6919
 Personal Service



Michael G. Pierce

Kirk, d/b/a Kirk Enterprises (“Defendant Kirk”), Defendant Todd McKenna d/b/a Homecraft Home Inspections (“Defendant McKenna”), Defendant RE/MAX Resort Realty (“Defendant RE/MAX”) and Defendant Kevin Batchelor (“Defendant Batchelor”) (together, the “RE/MAX Defendants”), and Does 1-4 (all defendants collectively referred to as “Defendants”) by claiming, alleging, and on the basis of reasonable investigation and/or information and belief, pleading as follows:

PARTIES

1. Plaintiff the Petrus Family Trust is an irrevocable trust formed in the state of Illinois and domiciled in the state of California, which acquired the leasehold interest in a Payette Lake Cottage Site, title to the appurtenant improvements built thereon, and the personal property therein, in McCall, Idaho, in April 2012.

2. Plaintiff Edmond A. Petrus, Jr., is an individual residing in the State of California, is a co-trustee of the Petrus Family Trust, and is authorized to bring this action on his own behalf and on behalf of the Petrus Family Trust.

3. The Payette Lake Cottage Site is a tract of land leased from the Idaho Department of Lands, known as Lease Number R5067, and more particularly described as Lot 36, Amended Payette Lake Cottage Sites, located at 2130 Payette Drive, McCall, Idaho (the “Property”).

4. Defendant Gentry-Boyd is a resident of La Jolla, California, and was the previous lessee of the Property and transferred her leasehold interest in the Property and conveyed title to the improvements located thereon and the personal property located therein to the Petrus Family Trust in April 2012; Defendant Gentry-Boyd was also the owner-builder of the home located on the Property (the “Home”).

5. Defendant Kirk is a resident of Valley County, Idaho, and was the contractor and builder of the Home.

6. Defendant McKenna is a resident of Valley County, Idaho, and performed an inspection of the Home on or about March 15, 2012, as a condition of, and prior to the purchase of the Home by the Petrus Family Trust.

7. Defendant Batchelor is a resident of Valley County, Idaho, and the owner and designated broker of Defendant RE/MAX, an Idaho corporation, and acted as Plaintiffs' real estate broker in connection with their purchase of the Home.

JURISDICTION AND VENUE

8. This Court has original subject matter jurisdiction over this action pursuant to Idaho Code § 1-705.

9. Defendant Gentry-Boyd is subject to this Court's jurisdiction under Idaho's long arm statute, I.C. § 5-514(c), because she owned, used, or possessed real property within the state of Idaho, and all Defendants are subject to the personal jurisdiction of this Court pursuant to I.C. § 5-514(a) because they each transacted business in Idaho.

10. Venue is proper in Valley County pursuant to Idaho Code § 5-401, et seq. because Plaintiffs' causes of action arose in Valley County and the Property which is the subject of this litigation is located in Valley County.

COUNT I **FAILURE TO DISCLOSE PURSUANT TO** **I.C. §§ 55-2501 THROUGH 55-2518** **(Against Defendant Gentry-Boyd)**

11. Plaintiffs incorporate all proceeding paragraphs as if set forth fully herein.

12. Plaintiffs and Defendant Gentry-Boyd entered into a written Real Estate Purchase and Sale Agreement (the "PSA") in connection with the sale of the Home located on the Property in 2012, executing a final agreement on or about April 5, 2012.

13. Defendant Gentry-Boyd signed an RE-25 Seller's Property Condition Disclosure Form regarding the Property on February 7, 2011, and signed and delivered to Plaintiffs on March 8, 2012 an Amended Disclosure Form (collectively, the "Disclosures") upon which Plaintiffs relied.

14. The transaction closed on April 20, 2012.

15. Plaintiffs thereafter first occupied the Home in the summer of 2012.

16. Soon after occupying the Home, Plaintiffs encountered problems with the operation of the Home's exterior south-facing French doors leading to the outdoor deck area (the "Doors").

17. Upon further investigation, Plaintiffs discovered the extent of the problems with the Doors and other defects, including but not limited to significant water damage to the exterior walls, the Doors, and threshold, which caused the Doors to cease proper operation and let water and air into the Home; substandard and inferior construction of the exterior wall envelope which was insufficient to resist the weather and was installed in violation of the international building codes, state, county and local codes, ordinances, and similar statutes applicable to the building code; several windows and doors in the Home, including the Doors, were not sealed and/or painted on all six sides, vitiating their respective warranties and causing further damage; no final inspection was completed on the Home after completion of initial construction and prior to occupancy; no certificate of occupancy was issued for the Home; and the presence of mold in the

crawlspace and significant damage caused by the moisture related to the above-described water intrusion (all defects above collectively, the "Defects").

18. Upon information and belief, Defendant Gentry-Boyd had actual knowledge concerning the Defects at the time she executed the Disclosures.

19. The Disclosures failed to disclose the existence of the Defects.

20. Defendant Gentry-Boyd willfully or negligently failed to disclose the existing Defects as required by the Idaho Property Condition Disclosure Act, I.C. §§ 55-2501-2518.

21. In the portion of the Disclosures labeled "MOISTURE & DRAINAGE CONDITIONS SECTION," Defendant Gentry-Boyd checked the corresponding "No" column to the questions asking "[h]as there been any water intrusion or moisture related damage to any portion of the property" and "[a]re you aware of the existence of any mold-related claims," and in the portion labeled "ADDITIONAL REMARKS AND/OR EXPLANATIONS SECTION" of the Disclosures requiring Defendant Gentry-Boyd to "list any other existing problems that you know of concerning the property including legal, physical, product defects or others that are not already listed," Defendant Gentry-Boyd did not enter anything in the space provided.

22. Plaintiffs relied on the Disclosures in purchasing the Property and the Home.

23. As a direct result of Defendant Gentry-Boyd's failure to disclose the Defects and the true condition of the Property, Plaintiffs have suffered damages in an amount to be proven at trial.

COUNT II
VIOLATION OF THE CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant Gentry-Boyd)

24. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

25. Plaintiffs purchased the Property in Valley County, Idaho.

26. Defendant Gentry-Boyd represented to Plaintiffs that the Home was in great condition; that the Home was built with the finest materials and finishes selected personally by Defendant Gentry-Boyd; that construction costs for the Home were approximately \$1,300,000; that Plaintiffs would not find a better built home on Payette Lake or anywhere in McCall; that the Home did not have any problems; that Defendant Kirk was one of the best contractors in McCall; and that the Home was built so solidly that it could withstand any weather on Payette Lake.

27. Defendant Gentry-Boyd further falsely represented to Plaintiffs that there had not been any water intrusion or moisture related damage to any portion of the Property.

28. Defendant Gentry-Boyd concealed the true, defective condition of the Property.

29. Defendant Gentry-Boyd knew, or in the exercise of due care should have known, her actions described herein constituted representations that the Home had certain characteristics, uses and benefits that it did not in fact have.

30. Defendant Gentry-Boyd knew, or in the exercise of due care should have known, her actions described herein constituted representations that the Home was of a particular standard, quality, or grade when, in reality, it was of a much lower standard, quality, or grade as a result of the Defects.

31. Defendant Gentry-Boyd's representations were misleading, false, or deceptive to Plaintiffs.

32. Defendant Gentry-Boyd's representations and false affirmative statements regarding the Property and failure to disclose the true, defective condition of the Property violated the Idaho Consumer Protection Act, I.C. §§ 48-603(5), (7), (17) and 48-603C.

33. As a direct result of Defendant Gentry-Boyd's misrepresentation of the true, defective condition of the Property, Plaintiffs have suffered damages in an amount to be proven at trial.

COUNT III
FRAUD/MISREPRESENTATION
(Against Defendant Gentry-Boyd)

34. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

35. Defendant Gentry-Boyd was the owner-builder of the Home and was responsible for overseeing the construction of the Home and the selection of concealed building materials for the construction of the Home that did not meet applicable building codes.

36. Defendant Gentry-Boyd represented to Plaintiffs that the Home was in great condition; that the Home was built with the finest materials and finishes selected personally by Defendant Gentry-Boyd; that construction costs for the Home were approximately \$1,300,000; that Plaintiffs would not find a better built home on Payette Lake or anywhere in McCall; that the Home did not have any problems; that Defendant Kirk was one of the best contractors in McCall; and that the Home was built so solidly that it could withstand any weather on Payette Lake.

37. Defendant Gentry-Boyd signed the Disclosures representing to Plaintiffs that no problems existed with the Home, including but not limited to the Defects.

38. Defendant Gentry-Boyd's representations that the Home was of the highest quality of the homes on Payette Lake and the Disclosures' representation that there were no problems with the Home, including but not limited to the Defects, were and are false.

39. Defendant Gentry-Boyd's false representations regarding the Home were material to Plaintiffs' decision to purchase the Home.

40. Defendant Gentry-Boyd was aware of the Defects at the time the Disclosures were made.

41. Defendant Gentry-Boyd intended that her representations in the Disclosures and her representations concerning the construction costs, the “high quality” of the Home, and lack of existing problems with the Home would materially influence and convince Plaintiffs to purchase the Home.

42. Upon closing the purchase of the Home, Plaintiffs were not aware and could not have been aware of the Defects without destructive testing, due to the concealed and latent nature of the Defects which were not discoverable upon a reasonable inspection.

43. Plaintiffs relied on Defendant Gentry-Boyd’s false representations in determining to purchase the Home.

44. Plaintiffs were justified in relying on Defendant Gentry-Boyd’s representations in the Disclosures and her representations concerning the construction costs, the “high quality” of the Home, and lack of existing problems with the Home, including but not limited to the Defects, as true and accurate representations of the Home’s condition prior to purchase.

45. As a direct and proximate consequence of their reliance on Defendant Gentry-Boyd’s fraudulent Disclosures and representations, Plaintiffs have been damaged in an amount to be proven at trial.

COUNT IV
BREACH OF CONTRACT
(Against Defendant Gentry-Boyd)

46. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

47. Plaintiffs and Defendant Gentry-Boyd entered into the PSA.

48. Defendant Gentry-Boyd executed the Disclosures and represented to Plaintiffs that there existed no problems with Home, including but not limited to the Defects.

49. The Disclosures' representations that there were no problems with the Home, including but not limited to the Defects, were and are false.

50. The PSA and Disclosures obligated Defendant Gentry-Boyd to disclose all known issues with the Home, including but not limited to the Defects.

51. Defendant Gentry-Boyd breached the PSA by failing to disclose the Defects.

52. Disclosure of the Defects would have alerted Plaintiffs to the Defects and that these issues warranted further investigation.

53. Plaintiffs relied on the Disclosures and the information provided by Defendant Gentry-Boyd, which did not disclose the Defects.

54. As a direct and proximate result of Defendant Gentry-Boyd's above-described breach, Plaintiffs have been denied benefits that should have accrued to them under the PSA and have sustained damages in an amount to be proven at trial.

COUNT V
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(Against Defendant Gentry-Boyd)

55. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

56. Plaintiffs and Defendant Gentry-Boyd entered into the PSA.

57. Under Idaho law, every contract contains an implied duty of good faith and fair dealing.

58. Defendant Gentry-Boyd, by her conduct described hereinabove, breached the implied duty of good faith and fair dealing imposed by the PSA.

59. As a direct and proximate result of Defendant Gentry-Boyd's breach of the implied duty of good faith and fair dealing, Plaintiffs sustained damages in an amount to be proven at trial.

COUNT VI
BREACH OF IMPLIED WARRANTY OF HABITABILITY
(Against Defendant Gentry-Boyd and Defendant Kirk)

60. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

61. Upon information and belief, Defendant Kirk provided construction services, labor and/or materials on behalf of Defendant Gentry-Boyd to build the Home and served as the general contractor in the construction of the Home.

62. Defendant Gentry-Boyd was the owner-builder of the Home and was responsible for overseeing the construction of the Home and the selection of concealed building materials for the construction of the Home that did not meet applicable building codes.

63. The sale of the Home to Plaintiffs gave rise to an implied warranty of habitability.

64. The Defects and deficiencies in the Home as set forth herein, which were latent and concealed, made the Home unfit for use and habitation.

65. On August 7, 2013, Plaintiffs mailed via certified mail to Defendant Kirk the required written notice of claim pursuant to the Notice and Opportunity to Repair Act ("Notice"). Defendant Gentry-Boyd received a copy of the Notice and was also given an opportunity to repair the Home.

66. Subsequent to inspection of the Home by Defendant Kirk pursuant to I.C. § 6-2503(2)(a), Defendant Kirk disputed the claim by letter dated August 29, 2013.

67. Defendants Gentry-Boyd and Kirk were both given, and both took advantage of, an additional opportunity to inspect the damage to the Home.

68. By reason of the conduct alleged hereinabove, Defendants Gentry-Boyd and Kirk materially breached the implied warranty of habitability extended in favor of the Plaintiffs and are liable for the aforesaid wrongful conduct and are liable to Plaintiffs for the substantial damages they suffered in connection with Defendants' conduct in relation to the Property and the Home.

69. As a result of Defendant Gentry-Boyd's and Defendant Kirk's breach of the implied warranty of habitability, Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT VII
CONSPIRACY TO COMMIT FRAUD
(Against Defendants Gentry-Boyd and Kirk)

70. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

71. At all relevant times hereto, Defendant Gentry-Boyd as owner-builder and Defendant Kirk as contractor agreed and combined to engage in a conspiracy to use and install in a substandard manner an exterior envelope that did not meet the applicable building codes and standard of care, in a manner that would be concealed from a general inspection of the Home, to intentionally cut costs in the construction of the Home and defraud the subsequent purchaser.

72. In furtherance of the conspiracy, Defendants Gentry-Boyd and Kirk, and each of them, conspired and agreed among themselves, and combined to engage in a conspiracy to commit the wrongs alleged in this Complaint, to build the Home using materials and standards that did not meet the applicable building codes and standards of care, and to avoid a final inspection to obtain a certificate of occupancy, of which the principal element was to cut costs and inflict wrongs on the subsequent purchaser, and that these wrongful acts were committed pursuant to and in furtherance of such conspiracy and agreement, and with the consent, approval,

or ratification of Defendant Gentry-Boyd and Defendant Kirk, and each is liable as a direct participant, co-conspirator, or aider and abettor of the wrongful acts herein alleged.

73. As a result of these wrongful acts, Plaintiffs were unable to discover the use of materials that did not meet the applicable building codes and standards of code, and the substandard installation of same, prior to the purchase of the Home and have been required to employ contractors to repair and remediate the problems and violations of applicable building codes.

74. As a direct result of Defendant Gentry-Boyd's and Defendant Kirk's wrongful actions, Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT VIII
NEGLIGENCE AND/OR GROSS-NEGLIGENCE
(Against Defendant McKenna)

75. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

76. Defendant McKenna provided home inspection services to Plaintiffs for the Home located on the Property and conducted an inspection of the Home on March 15, 2012, prior to Plaintiffs' purchase of the Home.

77. Defendant McKenna provided a written inspection report (the "Inspection Report") to Plaintiffs representing that all exterior doors, which includes the Doors, were inspected and operated, and were functioning properly, and that there was no evidence of significant water intrusion and mold in the crawlspace, all in violation of applicable standards of care.

78. A proper and professional inspection of the Home would have discovered and disclosed the Defects, including by not limited to the fact that the Doors were not functioning properly and existence of significant water intrusion and mold.

79. Defendant McKenna failed to fully disclose the true results of his inspection and that further investigation was necessary to locate the cause and extent of water intrusion, which any competent and professional home inspector would have recommended. In fact, Defendant McKenna represented that what little water intrusion he found in the crawl space was completely normal for the time of the year.

80. In undertaking to provide professional home inspection services to Plaintiffs, Defendant McKenna had a duty to Plaintiffs to exercise the reasonable degree of care, skill and knowledge that is ordinarily employed by such home inspection professionals in performing home inspections.

81. By failing to thoroughly inspect the Home, including the Doors and the crawlspace, and by giving the Home a clean bill of health, Defendant McKenna breached his duty of care to Plaintiffs, which conduct is a departure from the ordinary conduct of care for a home inspector.

82. As a direct and proximate result of Defendant McKenna's above-described negligence and/or gross negligence Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT IX
FRAUD
(Against Defendant McKenna)

83. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

84. Defendant McKenna represented to Plaintiffs that he was a professional home inspector and that he held superior knowledge and abilities with respect to the construction of a home, such as the one at issue here; that he would completely and thoroughly inspect the Home and report all problems with the Home. Defendant McKenna also represented that all items in

his Inspection Report would be thoroughly and competently investigated and truthfully reported to Plaintiffs.

85. Defendant McKenna's written Inspection Report provided to Plaintiffs falsely represented that all doors in the Home were inspected and operated, and were functioning properly.

86. A proper and professional inspection of the Doors would have disclosed that the Doors were not functioning properly, and a proper and professional inspection of the crawlspace would have disclosed the existence of significant water intrusion and mold.

87. Defendant McKenna knew that the representations in the Inspection Report would be material to Plaintiffs in determining whether to purchase the Home.

88. Defendant McKenna knew that the material representations as related to the inspection of the proper operation of the Doors in his Inspection Report were false at the time he made them.

89. Defendant McKenna intended that all statements regarding the functionality of the exterior doors in the Inspection Report would be relied on by Plaintiffs.

90. Plaintiffs were not aware of and did not discover that the Doors were damaged and did not function properly.

91. The problems with the Doors materially affected the value of the Home.

92. By intentionally failing to thoroughly inspect the Doors, and by knowingly including false representations in his written Inspection Report, Defendant McKenna committed fraud, which conduct is an extreme departure from the ordinary conduct of care for a home inspector.

93. Plaintiffs relied on Defendant McKenna's representations contained in the Inspection Report for their consideration concerning the purchase of the Property and Home and were justified in relying on it as a professional's accurate representation of the operation of the Doors prior to their purchase of the Property and Home.

94. As a direct and proximate result of Defendant McKenna's above-described fraudulent representation of the operation of the Doors, Plaintiffs have been subjected to property damage and other losses because of the failure to report that the Doors did not function properly.

95. As a direct result of Defendant McKenna's fraudulent representation of the operation of the Doors, Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT X
VIOLATION OF THE CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant McKenna)

96. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

97. Defendant McKenna represented to the Plaintiffs in the Inspection Report that the Home had been inspected and that all doors were functioning properly and there were no signs of abnormal or harmful water penetration or condensation in the crawlspace.

98. Defendant McKenna's Inspection Report failed to disclose the true, defective condition of the Property.

99. Defendant McKenna's representations in the Inspection Report were misleading, false, or deceptive to Plaintiffs.

100. Defendant McKenna's failure to disclose the true, defective condition of the Property and the making of false affirmative statements violated the Idaho Consumer Protection Act, I.C. §§ 48-603(5), (7), (17) and 48-603C.

101. As a direct result of Defendant McKenna's misrepresentation of the true condition of the Property, Plaintiffs have suffered loss and damages in an amount to be proven at trial.

102. Plaintiffs are also entitled to additional costs and attorney's fees under I.C. § 48-608(5).

COUNT IX
NEGLIGENCE
(Against Defendant RE/MAX and Defendant Batchelor)

103. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

104. The RE/MAX Defendants were Plaintiffs' real estate brokers in connection with their purchase of the Home.

105. The RE/MAX Defendants selected, referred, and hired Defendant McKenna to perform an inspection of the Home prior to Plaintiffs' purchase of the Home.

106. The RE/MAX Defendants did not provide Plaintiffs with alternative home inspectors or seek Plaintiffs approval before selecting, referring, and hiring Defendant McKenna to perform the inspection of the Home.

107. Plaintiffs relied on the RE/MAX Defendants' local knowledge and claimed expertise to select a qualified, competent, and professional home inspector with adequate professional liability insurance.

108. In undertaking to select, refer, and hire Defendant McKenna's professional home inspection services to Plaintiffs in connection with his role as Plaintiffs' real estate broker, the RE/MAX Defendants had a duty to Plaintiffs to exercise the reasonable degree of care, skill and knowledge that is ordinarily employed by such real estate professionals.

109. Upon information and belief, the RE/MAX Defendants knew McKenna was incompetent and unqualified to perform a professional and thorough home inspection, and/or

failed to exercise reasonable care in selecting, referring, and hiring McKenna to perform the inspection.

110. Upon information and belief, the RE/MAX Defendants failed to perform a reasonable investigation into whether Defendant McKenna was qualified to inspect the Home, and failed to verify whether Defendant McKenna carried professional liability insurance.

111. Defendant McKenna failed to perform a professional and thorough home inspection, failed to disclose the true, defective condition of the Property, failed to thoroughly inspect the Doors, knowingly included false representations in his written Inspection Report, and upon information and belief, does not carry professional liability insurance in connection with his home inspection business.

112. The RE/MAX Defendants breached their duty to Plaintiffs when they failed to exercise reasonable care in selecting and referring McKenna to perform the home inspection.

113. As a direct and proximate result of the RE/MAX Defendants' above-described negligence, Plaintiffs have sustained damages in an amount to be proven at trial.

COUNT IX
VIOLATION OF THE CONSUMER PROTECTION ACT
I.C. §§ 48-601 THROUGH 48-619
(Against Defendant RE/MAX and Defendant Batchelor)

114. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

115. The RE/MAX Defendants selected, referred, and hired Defendant McKenna to perform an inspection of the Home prior to closing.

116. The RE/MAX Defendants represented to Plaintiffs that Defendant McKenna was qualified to perform a thorough and professional home inspection.

117. Defendant McKenna failed to perform a professional and thorough home inspection, failed to disclose the true, defective condition of the Property, failed to thoroughly inspect the Doors, and knowingly included false representations in his written Inspection Report.

118. The RE/MAX Defendants' representations to Plaintiffs were misleading, false, or deceptive.

119. The RE/MAX Defendants' selection, referral, and hiring of Defendant McKenna, and their false and misleading representations regarding Defendant McKenna, violated the Idaho Consumer Protection Act, I.C. §§ 48-603(5), (7), (17) and 48-603C.

120. As a direct result of the RE/MAX Defendants' selection, referral, and hiring of Defendant McKenna, and their misrepresentations concerning Defendant McKenna, Plaintiffs have suffered loss and damages in an amount to be proven at trial.

121. Plaintiffs are also entitled to additional costs and attorney's fees under I.C. § 48-608(5).

RESERVATION OF RIGHT – PUNITIVE DAMAGES

122. Plaintiffs incorporate all preceding paragraphs as if set forth fully herein.

123. Plaintiffs reserve the right to move to amend their pleadings according to Idaho Code §§ 6-1604 and 48-608(1) to include claims for punitive damages against Defendants.

ATTORNEY FEES

Plaintiffs have retained the law firm of Andersen Banducci PLLC to prosecute this action and have agreed to pay reasonable attorney fees for their services. Plaintiffs are entitled to recover their reasonable attorney fees in accordance with Idaho Code §§ 48-608, 12-120(3), 12-121, and the written PSA.

JURY DEMAND

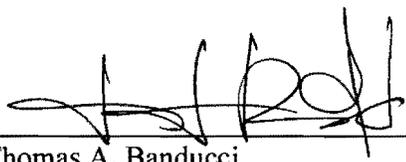
Plaintiffs demand a trial by jury as to all issues pursuant to I.R.C.P. 38(b).

NOW THEREFORE, Plaintiffs pray for judgment in their favor and against Defendants as follows:

1. For damages in an amount to be proven at trial;
2. For costs and reasonable attorney fees, which in the event of default should be \$10,000; and
3. For such other and further relief as the Court deems just and equitable in the premises.

DATED THIS 10th day of ~~July~~ ^{SEPTEMBER}, 2015.

ANDERSEN BANDUCCI PLLC

By 
Thomas A. Banducci
Jason J. Rudd
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of September 2015, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

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Daniel A. Nevala
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Boise, ID 83701
Attorneys for Chris Kirk d/b/a Kirk Enterprises

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Attorney for Todd McKenna d/b/a Homecraft Home Inspections

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Steven. J. Millemann
Gregory C. Pittenger
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& PEMBERTON LLP
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McCall, ID 83638
Attorneys for Defendant Nancy Gentry-Boyd

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Jason J. Rudd

DOUGLAS A. MILLER, CLERK
By Jedman Deputy

SEP 30 2015

Case No. _____ Inst. No. _____
Filed _____ A.M. 4:59 P.M.

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Attorneys for Chris Kirk d/b/a Kirk Enterprises

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

PETRUS FAMILY TRUST DATED)
MAY 1, 1991, and EDMOND A.)
PETRUS, JR., individually and as Co-)
Trustee of the Petrus Family Trust Dated)
May 1, 1991,)
Plaintiffs,)

Case No. CV-2014-71-C

**ANSWER TO SECOND AMENDED
COMPLAINT AND DEMAND FOR
JURY TRIAL**

v.)

NANCY GENTRY-BOYD; CHRIS)
KIRK d/b/a KIRK ENTERPRISES;)
TODD MCKENNA d/b/a HOMECRAFT)
HOME INSPECTIONS; RE/MAX)
RESORT REALTY; KEVIN)
BATCHELOR; and DOES 1-4,)
Defendants.)

COMES NOW, Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk"), by and through his
counsel of record, Arkoosh Law Offices, and without admitting any liability or damages to

Plaintiffs and without assuming the burden of proof as to any issue in this litigation, answers and files his *Answer to Plaintiffs' Second Amended Complaint and Demand for Jury Trial* (hereinafter, "Second Amended Complaint") as follows:

I.

RESPONSE TO ALL COUNTS

1. All matters not herein specifically admitted are denied.
2. Kirk admits the allegations contained in paragraph 5 of the Second Amended Complaint.
3. In answering paragraph 61, Kirk admits only that he built a home for Defendant Gentry-Boyd.
4. In answering paragraph 65, Kirk admits only that he received a letter from Plaintiffs' former counsel.
5. In answering paragraph 66, Kirk admits only that he responded to Plaintiffs through counsel.

II.

AFFIRMATIVE DEFENSES

Further answering and by way of affirmative defenses, Kirk alleges as follows:

FIRST DEFENSE

Kirk denies each and every allegation of the Second Amended Complaint not herein expressly and specifically admitted. Kirk further reserves the right to amend this or any other answer or denial stated herein once he has had the opportunity to complete discovery regarding any of the claims and allegations in the Amended Complaint.

SECOND DEFENSE

Plaintiffs have failed to mitigate their damages, if any. By asserting this defense, Kirk

does not admit that Plaintiffs have been damaged.

THIRD DEFENSE

Plaintiffs' action against Kirk is barred for lack of privity of contract.

FOURTH DEFENSE

The damages sustained by Plaintiffs, if any, were proximately caused by the negligence or fault of parties, persons, or entities other than Kirk whom Kirk does not control and over whom Kirk had no control. By asserting this defense, Kirk does not admit that Plaintiffs have been damaged.

FIFTH DEFENSE

Plaintiffs were guilty of negligent and careless misconduct, and misconduct and fault, at the time of and in connection with the matters and damages alleged, which misconduct on Plaintiffs' part proximately caused and contributed to said events and resultant damages, if any.

SIXTH DEFENSE

If Plaintiffs have sustained injuries or losses as alleged in the Second Amended Complaint, upon information and belief, such injuries or losses were caused in whole or in part through the operation of nature or other intervening cause or causes. By asserting this defense, Kirk does not admit that Plaintiffs have been damaged.

SEVENTH DEFENSE

Any and all conduct of Kirk with respect to the matters alleged was justifiable, reasonable, authorized by law, and performed in good faith or with the belief that such acts were proper, legal, and appropriate.

EIGHTH DEFENSE

There is no proximate causation or causation between any alleged act or alleged breach of

duty by Kirk and Plaintiffs' alleged damages, if any.

NINTH DEFENSE

If Plaintiffs have sustained injuries or losses as alleged in the Second Amended Complaint, upon information and belief, such injuries and losses were caused by the actions of persons not having real or apparent authority to take said actions on behalf of Kirk and over whom Kirk had no control and for whom Kirk may not be held accountable.

TENTH DEFENSE

Plaintiffs' claims are barred in whole or in part because Kirk's conduct was in compliance with industry custom and standard of practice.

ELEVENTH DEFENSE

In answering this Second Amended Complaint, Kirk does not assume any burden of proof attributable to Plaintiffs as to any matter at issue in this litigation.

TWELFTH DEFENSE

With respect to each and every purported cause of action, the acts of Kirk were at all times done in good faith, through fair dealing, and without malice.

THIRTEENTH DEFENSE

Plaintiffs lack proper standing to assert some or all of the claims asserted against Kirk in the Second Amended Complaint.

FOURTEENTH DEFENSE

Some or all of Plaintiffs' claims are barred by waiver.

FIFTEENTH DEFENSE

Some or all of Plaintiffs' claims are barred by release.

SIXTEENTH DEFENSE

Some or all of the claims in Plaintiffs' Second Amended Complaint are barred by the doctrine of unclean hands.

SEVENTEENTH DEFENSE

With regard to the civil conspiracy claim, Plaintiffs failure to plead additional facts in furtherance of the alleged conspiracy preclude the cause of action for civil conspiracy.

EIGHTEENTH DEFENSE

Plaintiffs are barred from recovery for civil conspiracy because they have failed to allege special damages that are separate and distinct from damages alleged for other causes of action, and as a result, this cause of action must fail.

NINETEENTH DEFENSE

Kirk has not acted with malice, fraud, oppression, wantonness, outrageousness, or gross negligence, and therefore, Plaintiffs are not entitled to punitive damages.

TWENTIETH DEFENSE

The Second Amended Complaint, and each cause of action alleged therein, fails to state facts sufficient to constitute a cause of action against Kirk.

TWENTY FIRST DEFENSE

Kirk contends that the sole and/or proximate cause of the damages claimed by Plaintiffs was and is due to the willful and intentional acts of persons other than Kirk.

TWENTY SECOND DEFENSE

Plaintiffs unreasonably delayed in providing notice and in commencing and prosecuting this action which caused unfair prejudice to Kirk barring any recovery against Kirk under the doctrine of laches.

TWENTY THIRD DEFENSE

Plaintiffs' claims against Kirk are barred by the applicable statutes of limitation under I.C. §§ 5-216, 5-218, 5-219, 5-241 and governing substantive laws of Idaho.

TWENTY FOURTH DEFENSE

Plaintiffs' claims against Kirk are barred, and should be dismissed, due to Plaintiffs' destruction and alteration of evidence, or Plaintiffs' failure to preserve the evidence.

TWENTY FIFTH DEFENSE

Through their actions, Plaintiffs prevented Kirk from completing a statutory inspection of the Property prior to initiation of this lawsuit and thus failed to meet the necessary statutory prerequisites to filing suit.

TWENTY SIXTH DEFENSE

~~Plaintiffs have failed to properly plead the necessary elements of fraud.~~

TWENTY SEVENTH DEFENSE

Kirk is an intended or incidental beneficiary of the purchase and sale agreement between Plaintiffs and Defendant Gentry-Boyd and any defenses therein.

III.**DEMAND FOR JURY TRIAL**

Pursuant to Idaho Rules of Civil Procedure Rule 38(b), Kirk demands a trial by jury, composed of the number of persons allowed by law, on all issues, claims, and defenses so triable.

IV.**PRAYER FOR RELIEF**

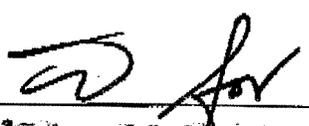
WHEREFORE, having fully answered the Amended Complaint, Kirk prays for judgment against Plaintiffs as follows:

1. That Plaintiffs take nothing by their Second Amended Complaint.
2. That Plaintiffs' Second Amended Complaint in this matter be dismissed with prejudice.
3. That Kirk be awarded costs and attorneys' fees, under any applicable statute or rule, including, but not limited to Idaho Code §§ 12-120, 121 and 123; and Idaho Rule of Civil Procedure Rule 54.
4. For such other and further relief as the Court may deem just and equitable under the circumstances.

Respectfully Submitted,

DATED this 30th day of September, 2015.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 30th day of September, 2015, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Courtesy copy:

The Honorable Jason D. Scott
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Boise, ID 83702

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Jason J. Rudd
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Attorney for Plaintiffs

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~~Michael G. Pierce~~
~~P.O. Box 1019~~
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Attorney for Defendant Todd
McKenna d/b/a Homecraft Home
Inspections

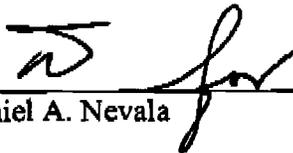
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DOUGLAS A. MILLER, CLERK
By K. Wilson Deputy

SEP 30 2015

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

Attorneys for Defendants, Re/Max Resort Realty and Kevin Batchelor

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and DOES
1-4,

Defendants.

Case No. CV-2014-71-C

**ANSWER AND DEMAND FOR
JURY TRIAL**

COMES NOW, the above-entitled defendants, Re/Max Resort Realty and Kevin Batchelor (these “answering defendants”), by and through their attorneys of record, Anderson, Julian & Hull LLP, and answers the Plaintiffs’ Second Amended Complaint and Demand for Jury Trial as follows:

ORIGINAL

FIRST DEFENSE

The plaintiffs' Second Amended Complaint fails to state a claim against these answering defendants upon which relief can be granted.

SECOND DEFENSE

I.

These answering defendants deny each and every allegation of the Second Amended Complaint not herein expressly and specifically admitted.

II.

Based on information and belief, these answering defendants admit the allegations contained in ¶¶3, 7, 14, 25, 42, 47, 56, and 76 of the plaintiffs' Second Amended Complaint as they relate to these defendants.

III.

With respect to the allegations contained in ¶1 of the Second Amended Complaint, these answering defendants admit the Petrus Family Trust acquired the lease hold interest in a Payette Lake cottage site and personal property therein in McCall, Idaho in April 2012. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in ¶1 and, therefore, deny the same.

IV.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶2 of the Second Amended Complaint and, therefore, deny the same.

V.

With respect to the allegations contained in ¶14 of the Second Amended Complaint, these answering defendants are without knowledge or information regarding whether Gentry-Boyd was the owner/builder of the home located on the property and, therefore, deny the same. Defendants admit the remaining allegations contained in ¶14.

VI.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶15 of the Second Amended Complaint and, therefore, deny the same.

VII.

With respect to the allegations contained in ¶16 of the Second Amended Complaint, these answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity regarding the residency of defendant McKenna. These answering defendants admit the remaining allegations contained in ¶16.

VIII.

These answering defendants state that the allegations contained in ¶¶8-10 of the Second Amended Complaint assert legal conclusions to which no response is required. To the extent ¶¶8-10 state facts, those facts are denied as to these answering defendants.

IX.

With respect to the allegations contained in ¶11 of the Second Amended Complaint, these answering defendants repeat and reallege their responses to ¶¶1-10 of the Second Amended Complaint as if fully set forth herein.

X.

These answering defendants state that the purchase and sale agreement referenced in ¶12 of the Second Amended Complaint speaks for itself and, deny all allegations in ¶12 which are inconsistent with the terms and conditions of the purchase and sale agreement referenced therein.

XI.

With respect to the allegations contained in ¶13 of the Second Amended Complaint, these answering defendants admit that defendant Gentry-Boyd signed an RE-25 Seller's Property Condition Disclosure and, an Amended Disclosure, copies of which were provided to plaintiffs. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in ¶13 and, therefore, deny the same.

XII.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶¶15-18 of the Second Amended Complaint and, therefore, deny the same.

XIII.

These answering defendants state that the disclosures identified in ¶19 of the Second Amended Complaint speak for themselves and, deny any allegations in ¶19 that are inconsistent with the contents of the disclosures referenced therein.

XIV.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶20 of the Second

Amended Complaint that are directed against other defendants and, therefore, deny the same.

XV.

These answering defendants state that the disclosures referenced in ¶21 of the Second Amended Complaint speak for themselves and, deny all allegations in ¶21 that are inconsistent with the terms and contents of the disclosures referenced therein.

XVI.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶¶22-23 of the Second Amended Complaint and, therefore, deny the same.

XVII.

With respect to the allegations contained in ¶24 of the Second Amended Complaint, these answering defendants repeat and reallege the responses to ¶¶1-23 as if fully set forth herein.

XVIII.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶¶26-41, 43-46, and 48-54 that are directed against other defendants and, therefore, deny the same.

XIX.

With respect to the factual allegations contained in ¶55 of the Second Amended Complaint, these answering defendants repeat and reallege their responses to ¶¶1-54 of the Second Amended Complaint as if fully set forth herein.

XX.

These answering defendants' state that the allegations contained in ¶57 of the Second Amended Complaint assert legal conclusions to which no response is required. To the extent ¶57 states facts, those facts are denied as to these answering defendants.

XXI.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶¶58 - 74 of the Second Amended Complaint that are directed against other defendants and, therefore, deny the same.

XXII.

With respect to the factual allegations contained in ¶75 of the Second Amended Complaint, these answering defendants repeat and reallege their responses to ¶¶1-74 of the Second Amended Complaint as if fully set forth herein.

XXIII.

These answering defendants admit that the written inspection report referenced in ¶77 of the Second Amended Complaint was authored by defendant McKenna and, was provided to the plaintiffs prior to closing. Defendants state that the written inspection report referenced in ¶77 speaks for itself and denies all allegations which are inconsistent with the terms and contents of the inspection report referenced therein.

XXIV.

These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in ¶¶78-102 that are directed against other defendants and, therefore, deny the same.

XXV.

With respect to the factual allegations contained in ¶103 of the Second Amended Complaint, these answering defendants repeat and reallege their responses to ¶¶1-102 of the Second Amended Complaint and incorporate them as if fully set forth herein.

XXVI.

With respect to the factual allegations contained in ¶104 of the Second Amended Complaint, these answering defendants admit they entered into a written representation agreement with the plaintiffs in connection with the purchase of the home described in the Second Amended Complaint. Defendants deny all other factual allegations or inferences contained in ¶104.

XXVII.

These answering defendants deny the allegations contained in ¶¶105-109 as they relate to these answering defendants.

XXVIII.

These answering defendants state that the allegations contained in ¶110 of the Second Amended Complaint assert legal conclusions to which no response is required. To the extent ¶110 states facts, those facts are denied as to these answering defendants.

XXIX.

With respect to the factual allegations contained in ¶111 of the Second Amended Complaint, these answering defendants admit that an inspection was performed by defendant McKenna and, that a written report was generated and provided to the

plaintiff. These answering defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in ¶111.

XXX.

These answering defendants state that the allegations contained in ¶¶112-113 of the Second Amended Complaint assert legal conclusions to which no response is required. To the extent ¶¶112-113 state facts, those facts are denied as to these answering defendants.

XXXI.

With respect to the factual allegations contained in ¶114 of the Second Amended Complaint, these answering defendants repeat and reallege their responses to ¶¶1-113 of the Second Amended Complaint as if fully set forth herein.

XXXII.

These answering defendants deny the allegations contained in ¶¶115-116 as they relate to these answering defendants.

XXXIII.

With respect to the factual allegations contained in ¶117 of the Second Amended Complaint, these answering defendants admit that defendant McKenna conducted a home inspection on the subject property and, issued a written report a copy of which was received by the plaintiffs prior to closing. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in ¶117 and, therefore, deny the same.

XXXIV.

These answering defendants deny the allegations contained in ¶¶118 of the Second Amended Complaint.

XXXV.

These answering defendants state that the allegations contained in ¶¶119-123 of the Second Amended Complaint assert legal conclusions to which no response is required. To the extent ¶¶119-123 state facts, those facts are denied as to these answering defendants.

THIRD DEFENSE

Plaintiffs were guilty of negligent and careless misconduct at the time of and in connection with the matters and damages alleged in the Second Amended Complaint, which misconduct on their part proximately caused and contributed to said events and resulting damages, if any.

FOURTH DEFENSE

Plaintiffs' losses or injuries, if any, were caused by the intervening acts and omissions of other third persons, for whom these answering defendants bear no responsibility.

FIFTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the doctrine of assumption of risk.

SIXTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the doctrines of waiver, estoppel and laches.

SEVENTH DEFENSE

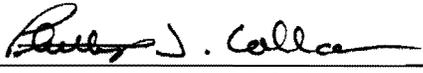
Plaintiffs have failed to mitigate their damages, if any, and, as a matter of law, are barred from recovery.

WHEREFORE, these answering defendants pray that plaintiffs take nothing by their Second Amended Complaint, that the same be dismissed, and that these answering defendants be awarded their costs of suit and attorney fees, and such other and further relief as the Court deems just.

THESE ANSWERING DEFENDANTS DEMAND A JURY TRIAL AS TO ALL ISSUES.

DATED this 30 day of September, 2015.

ANDERSON, JULIAN & HULL LLP

By 
Phillip J. Collaer, Of the Firm
Attorneys for Defendants,
Re/Max Resort Realty and Kevin
Batchelor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30 day of September, 2015, I served a true and correct copy of the foregoing **ANSWER AND DEMAND FOR JURY TRIAL** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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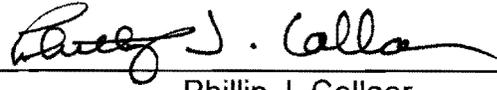
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DOUGLAS A. MILLER, CLERK
 By *John* Deputy
 MAY 20 2016

Case No. _____ Inst. No. _____
 Filed _____ A.M. 5:00 P.M.

Attorneys for Chris Kirk d/b/a Kirk Enterprises

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

PETRUS FAMILY TRUST DATED)
 MAY 1, 1991, and EDMOND A.)
 PETRUS, JR., individually and as Co-)
 Trustee of the Petrus Family Trust Dated)
 May 1, 1991,)
 Plaintiffs,)
 v.)
 NANCY GENTRY-BOYD; CHRIS)
 KIRK d/b/a KIRK ENTERPRISES;)
 TODD MCKENNA d/b/a HOMECRAFT)
 HOME INSPECTIONS; RE/MAX)
 RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
 Defendants.)

Case No. CV-2014-71-C

**AFFIDAVIT OF DANIEL NEVALA
 IN SUPPORT OF DEFENDANT
 CHRIS KIRK D/B/A KIRK
 ENTERPRISES' MOTION FOR
 SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
 County of Valley)

I, Daniel Nevala, being first duly sworn upon oath, deposes and hereby states as follows:

1. I am counsel for Chris Kirk in this action. I am an attorney duly licensed to practice

law in Idaho and am a member of Arkoosh Law Offices. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of a letter I prepared and mailed to Jason Mau, dated August 29, 2013.

3. Attached hereto as **Exhibit 2** is a true and correct copy of the deposition transcript of Chris Kirk.

4. Attached hereto as **Exhibit 3** is a true and correct copy of the deposition transcript of Nancy Gentry-Boyd.

5. Attached hereto as **Exhibit 4** is a true and correct copy of the deposition transcript of Edmond Petrus, Jr.

6. Attached hereto as **Exhibit 5** is a true and correct copy of the deposition transcript of Beau Value.

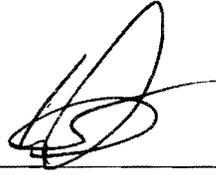
7. Attached hereto as **Exhibit 6** is a true and correct copy of the deposition transcript of Eric Waite.

8. Attached hereto as **Exhibit 7** is a true and correct copy of the document marked as Exhibit 5 at the deposition of Nancy Gentry-Boyd.

9. Attached hereto as **Exhibit 8** is a true and correct copy of the document marked as Exhibit 24 at the deposition of Edmond Petrus, Jr.

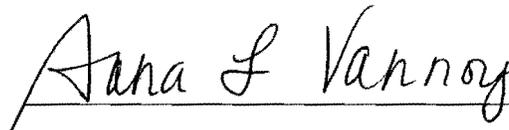
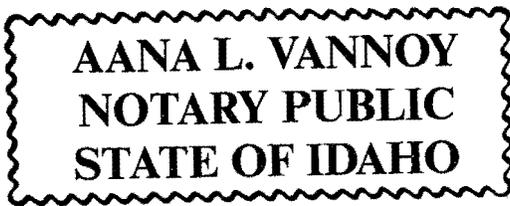
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 20th day of May, 2016.



Daniel Nevala

SUBSCRIBED AND SWORN to before me this 20th day of May, 2016.



Notary Public for State of Idaho

Residing at MCCALL

My Commission Expires: 7/10/18

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 20th day of May, 2016, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

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Resort Realty & Kevin Batchelor

Courtesy Copy:
Honorable Jason D. Scott

Via e-mail to gknapp@co.valley.id.us



Daniel A. Nevala

EXHIBIT 1

ARKOOSH LAW OFFICES

Daniel A. Nevala
dan.nevala@arkoosh.com

August 29, 2013

Jason Mau
950 W. Bannock Street, Ste. 950
Boise, ID 83702

Re: 2130 Payette Drive, McCall, ID 83638

Dear Jason:

It was nice talking to you on the phone. As I mentioned, my firm has been retained by Chris Kirk to respond to the Notice of Construction Defect you sent on behalf of your client, Ed Petrus, for a residential home located at 2130 Payette Drive in McCall.

I have reviewed the claim with Mr. Kirk. The claim alleges the following:

1. The presence of excessive water in the foam insulation on the stem wall under the south-facing French Doors.
2. Water damage to the lakeside load point next to the French Doors.
3. Damage to the floor sheeting.
4. Improper installation of an ice and water shield applied/flushed to the interior side of the rim joist instead of the exterior side that open out to the deck on the lake side of the home.

Mr. Kirk exercised his right to inspect the property on August 21, 2013 and was accompanied during the inspection by Mr. Petrus and Mr. Petrus' property caretaker, Mr. Longmire. During his cursory inspection of the property, and specifically the French Doors, Mr. Kirk discovered the following:

1. The locking mechanism on the operable door had been removed and reinstalled in an inappropriate manner.
2. The locking mechanism on the stationary door appeared to have been pried upon to the extent that it was not functional.
3. Markings on the overhead trim board indicated that the locking mechanism was engaged to lock when someone had tried to close the door.
4. Weather stripping on the astragal of the operable door had been completely removed.

5. Weather stripping on the bottom of the operable door had been trimmed and was not intact.
6. The weather stripping on the stationary door could not be verified or inspected because the door would not open.
7. Screws were installed into the threshold that were not factory and were not installed in the correct area.
8. Several screws had been added to the threshold, especially in the weep channel.
9. The ice and water shield installed in the crawl space had been altered and displaced.
10. Foam insulation had been removed.

The inspection revealed to Mr. Kirk that the property had been severely altered and damaged to a level that would cause the water damage referenced in the claim. Do Mr. Petrus or any of his agents have information about who may have caused this damage or performed these alterations to the doors?

In my visiting with Mr. Kirk about the construction of the home, I learned that he has intimate personal knowledge of how the home was constructed, how the doors were installed, and what products were used in the installation. He has over 24 years of experience building custom homes. Mr. Kirk also observed the condition of the doors since construction was completed during social events hosted by the home's prior owner in 2005, 2006, and 2007.

At the time construction of the home was completed, the doors were fully functional and properly installed, flashed, and weatherproofed. None of the damage revealed by the inspection existed at the completion of construction or during any of Mr. Kirk's subsequent visits. Based on this personal knowledge, coupled with what he witnessed during the property inspection, Mr. Kirk is confident that the problems Mr. Petrus complains of are not a construction defect, but are rather a combination of misuse, neglect, damage, and alteration. Mr. Kirk also believes that it is very possible that once the damage and alterations occurred, the elements could have quickly exacerbated the problems.

Based on this, Mr. Kirk respectfully disputes the claim and denies any liability for a construction defect. Mr. Kirk is fully prepared to defend this position if necessary but is hopeful that Mr. Petrus realizes that the problems are not the result of improper construction or a construction defect, but rather improper actions by a third party.

To that end, if Mr. Petrus and his construction advisors conclude that fault does not lie with Mr. Kirk, but rather some third party, Mr. Kirk would testify to the construction and condition of the property at the completion of construction, during the years he observed the property, and currently.

Given the above explanation, I am hopeful that you and Mr. Petrus will reconsider taking legal action against Mr. Kirk. Please call or email me if there are any questions that we can address, or if we can provide any further explanation to what Mr. Kirk discovered during his inspection of the property.

Page - 3
August 29, 2013

Sincerely,

ARKOOSH LAW OFFICES

Daniel A. Nevala

Daniel A. Nevala

DAN/emc
Cc: Client

EXHIBIT 2

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

PETRUS FAMILY TRUST DATED MAY 1,)
1991, and EDMOND A. PETRUS, JR.,) Case No.
individually and as Co-Trustee of) CV-2014-71-C
the Petrus Family Trust Dated May)
1, 1991,)

Plaintiffs,)

vs.)

NANCY GENTRY-BOYD, CHRIS KIRK d/b/a)
KIRK ENTERPRISES; TODD MCKENNA)
d/b/a HOMECRAFT HOME INSPECTIONS;)
RE/MAX RESORT REALTY; KEVIN)
BATCHELOR; and DOES 1-4,)

Defendants.)

30(b)(6) DEPOSITION OF KIRK ENTERPRISES, TESTIMONY OF
ROBERT CHRISTOPHER "CHRIS" KIRK and PERSONAL DEPOSITION

OF ROBERT CHRISTOPHER "CHRIS" KIRK

March 10, 2016

REPORTED BY:

COLLEEN P. ZEIMANTZ, CSR 345

Notary Public

Page 2

1 THE 30(b)(6) DEPOSITION OF KIRK ENTERPRISES,
 2 TESTIMONY OF ROBERT CHRISTOPHER "CHRIS" KIRK and
 3 PERSONAL DEPOSITION OF ROBERT CHRISTOPHER "CHRIS" KIRK,
 4 was taken on behalf of the Plaintiffs, at the offices of
 5 Millemann, Pittenger & Pemberton, LLP, located at 706
 6 North First Street, McCall, Idaho, commencing at 9:05
 7 a.m., on March 10, 2016, before Colleen P. Zeimantz,
 8 Certified Shorthand Reporter and Notary Public within
 9 and for the State of Idaho, in the above-entitled
 10 matter.

11 APPEARANCES:

12 For the Plaintiffs:
 13 ANDERSEN BANDUCCI PLLC
 14 BY MS. ALYSON A. FOSTER
 15 101 S. Capitol Blvd., Suite 1600
 16 Boise, Idaho 83702-7720
 17 aaf@andersenbanducci.com

18 For the Defendant Nancy Gentry-Boyd:
 19 MILLEMANN, PITTENGER, McMAHAN & PEMBERTON LLP
 20 BY MR. STEVEN J. MILLEMANN
 21 706 North First Street
 22 McCall, Idaho 83638
 23 sjm@mpmplaw.com
 24
 25

Page 3

1 APPEARANCES (Continued):
 2 For the Defendant Re/Max and Kevin Batchelor:
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 4 BY MR. PHILLIP J. COLLAER
 5 C.W. Moore Plaza
 6 250 South Fifth Street, Suite 700
 7 Boise, Idaho 83707-7426
 8 pcollaer@ajhlaw.com

9 For the Defendant Chris Kirk and Kirk Enterprises:
 10 ARKOOSH LAW OFFICES
 11 BY MR. DANIEL A. NEVALA
 12 802 W. Bannock Street, Suite 900
 13 Boise, Idaho 83701-2900
 14 dan.nevala@arkoosh.com

15 ALSO PRESENT: Nancy Gentry-Boyd
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

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I N D E X

2	TESTIMONY OF 30(b)(6) DEPOSITION OF KIRK	PAGE
3	ENTERPRISES, TESTIMONY OF ROBERT CHRISTOPHER	
4	"CHRIS" KIRK and PERSONAL DEPOSITION OF	
5	ROBERT CHRISTOPHER "CHRIS" KIRK	
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12	Chris Kirk, Re: GBSO File No. 19456-002,	
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1 ROBERT CHRISTOPHER "CHRIS" KIRK,
 2 first duly sworn to tell the truth relating to said
 3 cause, testified as follows:
 4 EXAMINATION
 5 QUESTIONS BY MS. FOSTER:
 6 Q. Good morning.
 7 A. Good morning.
 8 Q. My name is Alyson Foster. We've met briefly.
 9 I represent the plaintiffs in this case. And I'm here
 10 today to take your deposition. I'm taking your
 11 deposition, as you know, both in your personal and
 12 individual capacity, and as a corporate representative
 13 of Chris Kirk, dba. I guess the dba part is Kirk
 14 Enterprises; is that right?
 15 A. That's correct. It is not a corporation or an
 16 LLC. It's just a dba.
 17 Q. That's fine.
 18 MS. FOSTER: And I'll show you just to make
 19 sure that we're all on the same page, Exhibit 17.
 20 (Exhibit 17 marked.)
 21 Q. (BY MS. FOSTER) This is the Notice of
 22 Deposition we issued for you in your individual personal
 23 capacity for here today at 9:00. You may or may not
 24 have seen it, but that is the document that has hailed
 25 you here this morning.

1 A. Yes.
 2 MS. FOSTER: And now I'll show you Exhibit 18.
 3 (Exhibit 18 marked.)
 4 Q. (BY MS. FOSTER) This is the Notice of
 5 Deposition that we issued to you. Well, we issued it to
 6 Chris Kirk, dba, Kirk Enterprises, your company for
 7 which you are here as the representative; is that
 8 correct?
 9 A. That is correct.
 10 Q. And it's a long document, but if you could
 11 take a look at page 5. We have a page-and-a-half of 24
 12 topics. It may be a little redundant. Have you seen
 13 this list before?
 14 A. Yes, I have.
 15 Q. If you want to take a moment now, that's fine.
 16 But is there anything in here you feel you cannot
 17 testify about today?
 18 A. I have a question on item 20. What does the
 19 acronym "ESI" stand for?
 20 Q. Electronically stored information.
 21 A. Thank you. And could you repeat your
 22 question, please?
 23 Q. Yes. These are the topics that we've
 24 requested to have testimony on from a representative of
 25 Chris Kirk Enterprises. And my understanding is you are

1 here to provide that testimony. Is there anything in
 2 this list that you feel you cannot give testimony about
 3 today?
 4 A. As I understand this list, I believe I can.
 5 Yes, I can.
 6 Q. Okay. Fine. Thank you.
 7 You were here yesterday when I deposed Nancy
 8 Gentry-Boyd. So you may have heard some of the ground
 9 rules I went over in the beginning. I will go over them
 10 now to refresh both of us.
 11 First, what would you like me to call you
 12 today?
 13 A. Chris would be fine.
 14 Q. Okay. You can call me Alyson. The main rule
 15 that I try to follow in these depositions, and not
 16 always successfully, is that we don't speak over each
 17 other. Primarily, because that's very difficult for
 18 Colleen here, who is taking the testimony down.
 19 So if comes a time when for any reason we
 20 begin speaking quickly over each other, I might remind
 21 us to slow down so that we don't. And that is simply
 22 for her sake. Does that make sense?
 23 A. Yes.
 24 Q. Whenever I'm asking you questions about
 25 conversations you've had, I just want to reiterate, I'm

1 not asking for details of conversations you've had with
 2 your attorney. If you've had a conversation with your
 3 attorney, from my perspective, it's okay to say you've
 4 had one. But I'm not asking about privileged
 5 conversations. And presumably your lawyer will
 6 interject if it tends to go that way. But I just want
 7 you to understand, that is not what I'm asking. Does
 8 that make sense?
 9 A. Yes.
 10 Q. I will do my best to ask clear and
 11 understandable questions. Sometimes I don't. If I
 12 don't, please ask me to clarify, and I will do my best
 13 to do so. If you don't ask me to clarify, I'll assume
 14 you understood it, and we'll move forward. Is that
 15 fair?
 16 A. Yes.
 17 Q. And you may have seen yesterday that Nancy's
 18 counsel interjected some objections, and we still
 19 proceeded to talk. And in my experience, it's typical
 20 that the attorney who is representing you may provide
 21 objections. Unless he instructs you not to answer, I
 22 will still ask for your answer to the question. Does
 23 that make sense?
 24 A. Yes.
 25 Q. And are you under the influence of any

1 medication or other substance that would affect your
 2 ability to understand me or provide testimony today?
 3 A. No.
 4 Q. Any other reason you would have trouble with
 5 that today?
 6 A. No.
 7 Q. As we go along, if you give an answer to a
 8 question, and then later it occurs to you you have
 9 additional information to add, or you want to make a
 10 correction, please do so. I want to make sure that we
 11 get everything from you today that we can. And that
 12 everything that you provide is as clear and complete as
 13 possible. So if you need to interrupt me later and say,
 14 I just remembered something, do so. We'll probably
 15 finish where we're at. But I want to make sure we
 16 return to something if you need to correct it. Does
 17 that make sense?
 18 A. Yes, it does.
 19 Q. And finally, if you need a break, please let
 20 me know. If we're in the middle of a question pending,
 21 I'll ask you to finish the question first. But please
 22 let me know if you need a break, and we'll take one.
 23 Okay. Sir, have you ever been deposed before?
 24 A. I have not.
 25 Q. Have you ever been a party to litigation

1 before?
 2 A. I have not.
 3 Q. This is your first one?
 4 A. Yes.
 5 Q. Have you ever been the subject of a criminal
 6 investigation?
 7 A. No.
 8 Q. And have you ever, aside from traffic
 9 violations, have any criminal record at all?
 10 A. No.
 11 Q. And what did you do to prepare for today's
 12 deposition?
 13 A. I basically reviewed some of my documents that
 14 I submitted to your office.
 15 Q. 1,400 pages?
 16 A. Yeah. Well, a lot of them were just billings
 17 and invoices that wasn't really critical. I was mostly
 18 looking at some of the faxes that were exchanged between
 19 McCall Design & Planning and myself. And just trying to
 20 refresh some dates. This was a long time ago.
 21 Q. And did you speak with anyone, except for your
 22 attorney to prepare for today?
 23 A. No, I did not.
 24 Q. And you were here yesterday for yesterday's
 25 deposition; is that correct?

1 A. That is correct.
 2 MS. FOSTER: Okay. I'm going to hand you
 3 Exhibit 19.
 4 (Exhibit 19 marked.)
 5 Q. (BY MS. FOSTER) This is a 31-page document
 6 entitled "Response to Plaintiff's First Set
 7 Interrogatories and Requests for Production to Defendant
 8 Chris Kirk, D/B/A Kirk Enterprises"; is that correct?
 9 A. Yes.
 10 Q. Have you seen this before?
 11 A. This looks familiar. Without going through
 12 every word and comparing it to what I have, I would say,
 13 yes, this looks like it's a document that I have --
 14 Q. Okay.
 15 A. -- been served.
 16 Q. Were you asked to provide a signature
 17 verification for any discovery responses in this case?
 18 A. Not that I recall.
 19 Q. So these are documents that were served from
 20 you from your attorney, responding to discovery requests
 21 that we issued. And if you have not verified them,
 22 maybe we can get this done quickly.
 23 MS. FOSTER: Counsel, does he intend to, or do
 24 we need to go through every one of the interrogatory
 25 responses?

1 MR. NEVALA: I think he had.
 2 MS. FOSTER: Okay. Maybe I have it in a
 3 different file, and I just didn't see it.
 4 MR. NEVALA: No, I thought he had.
 5 MS. FOSTER: Then I won't go into that.
 6 MR. NEVALA: No, I think you are fine.
 7 Q. (BY MS. FOSTER) So my understanding, and we
 8 can deal with substantive answers as we go forward
 9 today, is that this is a response that was prepared on
 10 your behalf in response to discovery requests that we
 11 issued. And that you have verified, or that you will
 12 verify that the factual portion of the answers are true
 13 and correct. Does that comport with your understanding?
 14 A. Yes, it does.
 15 Q. Then we'll just keep these on the table if we
 16 need to refer to them as we go through today.
 17 You mentioned a moment ago that you produced,
 18 or produced on your behalf, 1,400 pages in this case,
 19 approximately?
 20 A. Give or take, yes. It was my file, yes.
 21 Q. What steps did you take to collect documents
 22 to produce in this case?
 23 A. I have all my construction files in a filing
 24 cabinet labeled according to my client. I just grabbed
 25 my file. And I assembled the facts portion into what I

1 thought was by dates, so it was easier to -- instead of
 2 having the scanning process go back and forth in dates,
 3 it would make sense for it to be largely in time
 4 sequence correctly.
 5 Q. Thank you. That was helpful.
 6 A. Good.
 7 Q. Did you go through your emails at all to find
 8 any emails that might be responsive to the requests that
 9 we issued?
 10 A. I looked at your emails. And then I conversed
 11 with my attorney, because they were quite -- I wouldn't
 12 say, confusing. I would say, they were -- the term, I
 13 guess, it was very over burdensome, and I needed some
 14 help to fill, or answer these questions. So I referred
 15 to my counsel to help me fill this out.
 16 Q. Okay. I understand. So to produce documents,
 17 you took your client file from your filing cabinet,
 18 organized it, and provided that; correct?
 19 A. I provided it to my counsel, yes.
 20 Q. And did you also then go into your email
 21 account to go back through history, to find emails with
 22 Nancy, or with anyone else that may have had anything to
 23 do with the case before me?
 24 A. Where I lived in 2004, I did not have email
 25 service. I did not have a computer that was

1 Q. 2130 Payette?
 2 A. Correct.
 3 Q. So you had some email, at least one, with
 4 Michael Wood?
 5 A. Yes.
 6 Q. And did you produce that in this case?
 7 MR. NEVALA: I believe so.
 8 THE WITNESS: I believe I did, yeah.
 9 Q. (BY MS. FOSTER) And what I'm trying to figure
 10 out is if you went back and looked through your emails
 11 to find anything that could be related to the case and
 12 give them to me, if you did that or not? That's the
 13 purpose of my question.
 14 So to that end, were there other emails,
 15 besides that with Mr. Wood, that you provided to your
 16 counsel to produce in this case?
 17 A. Not that I can recollect.
 18 Q. Did you look through your emails at all to
 19 find emails that were potentially responsive to our
 20 requests?
 21 A. Yes, I did.
 22 Q. Did you have any other documents or
 23 information stored on your computer that you would have
 24 provided to your counsel to produce to us?
 25 A. Yes.

1 electronically functional. It was -- basically, a
 2 high-priced typewriter was my computer. So I did not
 3 have any email contact with Nancy or the architect firm
 4 during the time I built her house. All communications
 5 were done over the phone or by fax.
 6 Q. Do you do your business out of your home?
 7 A. Yes, I do.
 8 Q. And did there come a time when you started
 9 using email?
 10 A. That was approximately 2009, when I started
 11 work with the bank.
 12 Q. Oh, we'll get to that.
 13 A. That's when I became email friendly. I had
 14 never been on the internet or used email, until I went
 15 into the bank.
 16 Q. Until you had to?
 17 A. Until I had to, correct.
 18 Q. Between 2009 and 2014, if you recall, did you
 19 have emails with Nancy about the issues that had arisen
 20 that we're here about today?
 21 A. Not directly with Nancy, no.
 22 Q. Did you have emails with anyone during that
 23 period?
 24 A. Mr. Michael Wood sent me, I guess, it was a
 25 bid to repair damage at your plaintiff's home.

1 Q. And did you do so?
 2 A. Yes.
 3 Q. And you just have one computer?
 4 A. Yes.
 5 Q. And you have one email address?
 6 A. I have two email addresses.
 7 Q. Did you check them both?
 8 A. Yes, I did.
 9 Q. And what are they?
 10 A. The email address that Frontier -- the phone
 11 company that provides my email service is the letter
 12 ckirk123@frontier.com.
 13 Q. And the other?
 14 A. The other address, which is my main address,
 15 it's the letter ckirk55ranch@frontier.com.
 16 Q. Thank you. Your file on 2130 Payette, would
 17 you have occasion to throw out any documents that may
 18 have been in that file in the last ten years?
 19 A. Never, no.
 20 Q. You tend to keep everything?
 21 A. Yes.
 22 Q. And emails, do you tend to delete your emails?
 23 A. Yes, I do.
 24 Q. After this litigation started, did you delete
 25 emails from prior to the litigation?

1 A. Concerning, what? Would you clarify your
 2 question, please?
 3 Q. Yes. After you knew there was a lawsuit in
 4 which you were a party, did you go back and delete any
 5 emails prior to that date concerning 2130 Payette?
 6 A. Not that I recollect.
 7 Q. And have you at any time since the beginning
 8 of the lawsuit done so?
 9 A. No, I have not.
 10 Q. Those are all my questions about your document
 11 production. Let me ask you some general background
 12 questions.
 13 Could you just describe briefly your
 14 educational background?
 15 A. I graduated from McCall-Donnelly High School
 16 in 1974. I attended the University of Idaho from 1974
 17 to 1978. That's my educational profile.
 18 Q. Can you describe your professional and work
 19 background?
 20 A. I graduated from U of I with a bachelor's in
 21 letters -- a bachelor's degree in letters and science,
 22 focused on accounting. After I graduated from college,
 23 I was employed by the Comptroller of the Currency as a
 24 national bank examiner. And through the course of being
 25 assistant national bank examiner, there were several

1 A. I'm sorry. I do construction inspections for
 2 Idaho First Bank. I am involved in advisory board for
 3 the bank. I am the secretary/treasurer for St. Luke's
 4 McCall Foundation. I help out on our family ranch south
 5 of Cascade, which is a cow/calf operation. I do some
 6 consulting work for people that are looking at buying a
 7 home. And those questions are mostly orientated to, we
 8 are looking at buying this house that we want to change
 9 some things. Can it be done? And I'll give them advice
 10 on that. And I still also do some odds and ends for
 11 people, replacing doors that get broken, cabinet doors
 12 that get torn off, just miscellaneous small things like
 13 that.
 14 Q. Okay. Let me go back to the beginning of your
 15 work history, and ask a few follow-up questions. When
 16 you first were hired by a local builder, this was in,
 17 approximately, 1981; is that right?
 18 A. That's correct.
 19 Q. And what did you do for him or her?
 20 A. His name is Mike Cohen. He was doing business
 21 as BOA Construction. I started off as basically a
 22 laborer. And in two years, I was running his projects
 23 for him. I was basically the lead carpenter,
 24 supervising the project for him.
 25 Q. What kind of work were you building?

1 educational courses in banking regulations. To the best
 2 of my knowledge, I resigned my commission with the
 3 Comptroller of the Currency in 1981. I moved back
 4 to -- I was living in Boise during that time, during my
 5 stint with the comptroller.
 6 After I resigned my commission, I moved back
 7 to McCall, and gained employment with a local builder.
 8 I worked for him for several years. He filed
 9 bankruptcy. The people that -- the house I was working
 10 on at the time, the owners asked me to finish building
 11 their home, which I did. And I kept building, or
 12 kept -- I was continually asked to keep building homes
 13 on the custom home market, which I did, until 2006.
 14 Q. Did you resign in 2006 -- excuse me -- retire
 15 in 2006?
 16 A. I never retire from building. I'm still asked
 17 to do several small projects, basically to keep my hands
 18 busy.
 19 Q. Did you make a decision in 2006 to cut back on
 20 work?
 21 A. Yes. That's when I was asked to come off the
 22 board of the directors from Idaho First Bank, and come
 23 in and work in the bank. Step off the board, and work
 24 in the bank as an employee.
 25 Q. And what do you do today?

1 A. Custom homes.
 2 Q. What's a non-custom home?
 3 A. A non-custom home would be if I buy a lot, I
 4 build it with a speculation to resell. I would call
 5 that a spec home. A custom home is where a client
 6 commissions me, or asks me to build their house with the
 7 plans they provide me.
 8 Q. Okay. So a custom home is something that you
 9 are building for someone for them to live in?
 10 A. Correct.
 11 Q. Or perhaps rent?
 12 A. They could.
 13 Q. But it's not what you call a spec home, which
 14 I guess is built to sell?
 15 A. Uh-huh. On the speculative market, like I
 16 could build a home, or flip it, and make money on the
 17 resale. I've never done that.
 18 Q. When did you begin Chris Kirk Enterprises?
 19 A. Approximately, July of 1984.
 20 Q. Did Mike Cohen continue working with you?
 21 A. No, he left town.
 22 Q. After his bankruptcy?
 23 A. Yes, he did.
 24 Q. Have you ever filed for bankruptcy?
 25 A. I have not.

1 Q. Has Kirk Enterprises filed for bankruptcy?
 2 A. No.
 3 Q. So is it fair to say, that since 1984 to 2006,
 4 your primary professional vocation was running Kirk
 5 Enterprises?
 6 A. That is fair to say.
 7 Q. Do you have any employees during this time?
 8 And by employees, I mean, not contractors. I mean,
 9 regular employees, either part-time, or full-time.
 10 A. Yes, I did.
 11 Q. What kind of employees did you have?
 12 A. Mostly carpenters.
 13 Q. And did you have any administrative or office
 14 employees during that period?
 15 A. Myself.
 16 Q. Just you?
 17 A. Myself.
 18 Q. When you filed taxes during that period, we do
 19 dba's on a Schedule A; is that right?
 20 A. Yes.
 21 Q. And have you done that for Kirk Enterprises
 22 since 2006?
 23 A. Since 2006?
 24 Q. Correct.
 25 A. Boy, without looking at my tax return, I

1 down your term "homes"?
 2 Q. I'm asking, just to be perfectly clear, I
 3 don't need a precise number.
 4 A. Okay.
 5 Q. I'm trying to figure out approximately how
 6 many, and we can start with new construction, how many
 7 custom homes you built, so 10, 50, 100, 1,000. I'm
 8 looking for a gross number.
 9 A. It's over 20, less than 30.
 10 Q. And one of those was 2130 Payette?
 11 A. Yes.
 12 Q. Was that the last home you built?
 13 A. No.
 14 Q. How many homes did you build after that?
 15 A. To answer your question, I built one home and
 16 remodeled another one.
 17 Q. And in the 1984 to 2006 period, approximately
 18 how many remodels did you do?
 19 A. More than five, less than ten. Some of that
 20 number may be included in that previous number range of
 21 homes that I've built. Sometimes the remodels are very
 22 big. And the remodel that's -- okay.
 23 Q. So is it fair to say that between 20 and 40
 24 homes, you either built from new or remodeled?
 25 A. Yes.

1 believe it is just Robert Christopher Kirk.
 2 Q. Okay. So from 1984 to 2006, is that 22 years?
 3 A. Close enough.
 4 Q. And about the year or so before that, you had
 5 already begun running projects for Mike Cohen; is that
 6 right?
 7 A. Could you clarify the answer, or your
 8 timeline?
 9 Q. Yes. I'll rephrase the question entirely.
 10 A. Thank you.
 11 Q. How many years would you say that you have
 12 been primarily employed by yourself as a builder?
 13 A. Since 1984.
 14 Q. And the primary work that you've done from
 15 1984 to 2006 was building custom homes?
 16 A. Yes.
 17 Q. It may be hard to estimate. But in that
 18 period of time, approximately, how many homes did you
 19 build?
 20 A. Can I ask you a question before I answer?
 21 Q. Yes.
 22 A. Are you considering new construction,
 23 remodels? Homes could be a studio apartment on the same
 24 property, a detached garage. So we could -- that would
 25 be my question to you is, how do you want me to break

1 Q. And then you mentioned doing garage additions
 2 or apartments. Does that fall under the category of
 3 remodels, or is that a different category for you?
 4 A. That would be just considered a structure
 5 within that first range of numbers I gave you of more
 6 than 20, less than 30 would also be included in that.
 7 Q. You know, I guess I could have asked you this
 8 completely differently. How many files do you have?
 9 How many projects do you have in your file cabinet?
 10 A. I have about two file cabinets about this tall
 11 (indicating), that are four or five drawers.
 12 Q. Okay.
 13 A. That are full.
 14 Q. Okay. And each 1,400 pages?
 15 A. Some less, some triple that.
 16 MS. FOSTER: I apologize. It's only 9:34, and
 17 I have to go to the ladies room. Can we take three
 18 minutes?
 19 MR. COLLAER: Absolutely.
 20 MR. MILLEMANN: Yes.
 21 (A recess was had.)
 22 MS. FOSTER: Let's go back on.
 23 Q. (BY MS. FOSTER) Chris, I keep teasing you
 24 about 1,400 pages. In all seriousness, I wouldn't mind
 25 spending a few minutes asking you what some of those

1 categories of documents you produce are. And I'll let
 2 you and your counsel know, I'm not inclined to make
 3 these exhibits. I just want to hand you folders that I
 4 have one copy of, and just ask you, what is this?
 5 A. Fine.
 6 Q. Is that fair?
 7 A. Yes.
 8 MR. NEVALA: That's fine.
 9 Q. (BY MS. FOSTER) So we printed out all the
 10 documents that we organized by category that you,
 11 hopefully, provided. The first one that I need to ask
 12 you about is called "takeoffs and bids." And I'm not
 13 going to mark it as an exhibit. But I am showing you a
 14 manila folder containing documents, Bates labeled Kirk
 15 1275 through Kirk -- it is not consecutive, but the last
 16 document in the folder is labeled Kirk 42.
 17 Can you please take a look at that folder,
 18 familiarize yourself with its contents, and then tell me
 19 what it is?
 20 A. Individually?
 21 Q. No, as a category, yes.
 22 A. These -- one second, please.
 23 Q. Yes, of course.
 24 A. These appear to be estimates, proposals on
 25 Nancy's home that I collected either before the house

1 A. If I have a set of plans, say, if I look
 2 through the framing plans. For instance, the first
 3 floor framing page, which the architect will call out
 4 what size of floor joists to use, rim joists, what
 5 framing members that are required to build, say, the
 6 first floor diaphragm.
 7 I will go in and takeoff the lengths, the
 8 number of. So that I could do takeoffs I could give to
 9 the lumber company to get an estimate on the price. And
 10 also it gave me -- the takeoffs would give me what to
 11 order in each task of building a home.
 12 Such as, the first floor framing, I know that
 13 I need so many truss joists, floor joists at certain
 14 lengths. So I could refer -- and there is a -- refer
 15 here from the estimate here from Lumbermen's.
 16 So my takeoffs would provide me with each type
 17 of material to use and order. It also provided me,
 18 basically, a count of the materials I needed to build a
 19 house. So I could get prices from before we built the
 20 house, or for me to order on as each task item came up.
 21 I break the packages down, like first floor
 22 framing, first floor wall framing, second floor framing,
 23 second floor wall framing, and the roof package. That's
 24 how I break down my takeoffs.
 25 Q. So if I'm understanding it, I'm going to

1 was built, in order to provide her with an estimate, or
 2 these are numbers that I collected after the architect
 3 gave me specifications, such as the plumbing fixtures.
 4 The original set of plans that I put together
 5 for an estimate would not have called out the individual
 6 plumbing fixtures, which is this document (indicating).
 7 That would have come later, which I would have
 8 readjusted my original budget.
 9 This is just basically a collection of numbers
 10 from tradesmen, from Nancy's decorator Joanne
 11 Hutchinson. That was after the fact. It was mostly
 12 concerning Joanne Hutchinson's. It was what she wanted
 13 the finish tile to look like as far as design, with all
 14 the trim pieces, what type of tile to order. I guess
 15 that's the best I can answer that. It's just basically
 16 a collection of numbers I could give Nancy to work off
 17 of to either order, or bid from.
 18 Q. So is it fair to say, these are not invoices,
 19 but rather they are bids by vendors, or subcontractors,
 20 or other individuals or entities who are providing you
 21 with an estimate for work that you would hire them to do
 22 for Nancy's home?
 23 A. That would be fair, yes.
 24 Q. And what does the word "takeoff" mean in this
 25 context?

1 reword it to see if I've understood it.
 2 A. Okay.
 3 Q. A takeoff is, you take plans you are provided,
 4 and you break it down into its components of parts or
 5 supplies in order to analyze the materials you need, and
 6 to obtain pricing on those materials. Is that a fair
 7 summary of what you just said?
 8 A. Yes, correct.
 9 Q. Thank you. That helps. I don't understand
 10 the reason for the word "takeoff," but I understand what
 11 you are telling me.
 12 A. Okay. I'll point to it here. Here
 13 (indicating) is a framing number from Lumbermen's, or a
 14 material number.
 15 Q. Okay.
 16 A. See how it's labeled "first floor package," or
 17 "floor package"?
 18 Q. Yes.
 19 A. And it lists all of the items that I need to
 20 do that particular task.
 21 Q. And we are currently discussing page Kirk
 22 1290?
 23 A. Yes. And then you come down to the next item,
 24 and it says, "first floor walls."
 25 Q. Okay.

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1 A. Here is my takeoffs to build those walls.
 2 Q. Okay.
 3 A. Case in point, I would need 100 two by six ten
 4 feet, and the grade would be a number two and better
 5 grade. "KD" stands for kiln and dried fir or large,
 6 which is the type of wood used in the framing.
 7 Q. The large?
 8 A. Yes.
 9 Q. And how did you learn about all this? Let me
 10 rephrase that. It was a terrible question.
 11 How did you gain the knowledge of, for
 12 example, the types of wood, and the types of -- I don't
 13 remember what that is, 2MBTR, is that grading?
 14 A. That's No. 2 and better. That's a grade of
 15 wood. There is several grades.
 16 Q. Is this all on-the-job learning that you've
 17 had, or were there classes that you took, or both?
 18 A. There are no classes. The plans issued by the
 19 architect will call out No. 2 and better, which is a
 20 higher priced. It's a higher grade than what we would
 21 call a utility stud. Usually a utility stud is not to
 22 be used in construction, other than for, say, in forming
 23 concrete, walls, footings, which you later remove from
 24 the project. They don't stay on the house.
 25 Then you get into a higher grade of -- there

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1 is lots of different grades. Especially for finish
 2 lumber you get Grade C, Grade B, A, and better. That
 3 all has to deal with this number, and the size of knots
 4 per lineal foot in a board. Like you take a one by 12
 5 piece of pine. They will grade that piece of one foot
 6 on the grain -- or excuse me -- not the grain, the size
 7 and the number of knots.
 8 Q. And how did you gain all this knowledge?
 9 A. A series of osmosis, and just being on the
 10 job.
 11 Q. And are there books that you used to learn
 12 this?
 13 A. I'm sure there are, but I've not -- I
 14 basically did it on the job osmosis to learning. Asking
 15 my superiors, or my bosses that I had for two years.
 16 Q. So two years of bosses?
 17 A. Yes.
 18 Q. And then you were the boss; right?
 19 A. Yeah, I think.
 20 Q. Are there certifications that you've obtained
 21 in connection with your construction profession?
 22 A. Such as being labeled a master builder?
 23 Q. Yes. What is a master builder?
 24 A. You go to a class. You are tested on it, and
 25 I think -- I really don't know the requirements of the

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1 master builder. I think there are a number of years
 2 required to be in the trades, and your knowledge of
 3 standard heights and measurements, like what is the
 4 height of a sawhorse.
 5 Q. I don't know.
 6 A. No, it's 34 inches.
 7 Q. Are you a master builder? Do you have that
 8 certification?
 9 A. I do not.
 10 Q. And is it, in your opinion, something you ever
 11 wanted to have?
 12 A. No.
 13 Q. Why not?
 14 A. It didn't mean that much to me, because it
 15 seems like you could just go to school and buy it, and
 16 not earn it.
 17 Q. How many other, approximately, construction
 18 companies are in McCall that you would consider
 19 competitors, or would have --
 20 A. Do I have a date range?
 21 Q. I was just about to amend that. Say in the
 22 last ten years of your practice, before your
 23 non-retirement in 2006. I'm looking for a gross number,
 24 not precise; five, ten, 20?
 25 A. More than five, less than ten. But I'm

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1 assuming that you meant were quality builders; was that
 2 the question?
 3 Q. What does a "quality builder" mean?
 4 A. Would you rephrase your first question that
 5 you asked me?
 6 Q. My original question was, approximately how
 7 many other construction companies are in McCall that you
 8 would consider competitors in the last ten years or so
 9 of your practice?
 10 A. Between five and ten.
 11 Q. And you just referred to a "quality builder."
 12 What did you mean by that?
 13 A. In the last couple of years with the economic
 14 boom that's in Valley County, in my opinion, there are a
 15 lot -- there was a fair number of people coming to town
 16 calling themselves "builders" that were, in my opinion,
 17 were not.
 18 Q. Do you know Beau Value?
 19 A. Personally, no.
 20 Q. Professionally?
 21 A. I have not had any business dealings with him.
 22 I would like to withdraw that. I have not had any
 23 dealings with him as far as building.
 24 Q. Have you had other dealings with him?
 25 A. Yes, I have.

1 Q. And what were they?

2 A. He was a client of the bank, and that's all I
3 think I can really say right now, because it's privy to
4 the bank.

5 Q. But the only way you've had dealings with him
6 is in your capacity as a -- what was your role at the
7 bank during the period in which you had dealings with
8 Beau Value?

9 A. I was a chief credit officer.

10 Q. What were your responsibilities as chief
11 credit officer?

12 A. It would be to provide assistance to all the
13 loan officers, provide documents to the credit policy
14 committee, make recommendations of whether we should
15 continue to work with a client to fund his request or
16 not. And it's a process. We tried to get a prospective
17 buyer a go/no go within a couple of days if we were
18 going to deal with them.

19 Q. How many years were you in that position?

20 A. From 2006 to, approximately, 2009 to 2010,
21 somewhere in there.

22 Q. Why, in 2006, did you non-retire from
23 building, and increase your bank-related
24 responsibilities?

25 A. I was looking for a new challenge.

1 been issued, and the guy working walked. Provident
2 Federal hired myself and another gentleman by the name
3 of Fred Kopke, K-o-p-k-e, to go down and finish the
4 project, build it out, and sell it.

5 My responsibility was to go down and finish
6 all the common area improvements; swimming pool,
7 convention area, sidewalks, streets. And I did that
8 from April to, roughly, October. I was back home in
9 October. And that year was, approximately, 1985.

10 Q. Okay.

11 A. Other than that, all my work has been done in
12 McCall.

13 Q. So other than 1985, the months that you were
14 in possibly, La Mesa, California.

15 A. Uh-huh.

16 Q. You've been building homes in McCall?

17 A. In Valley County.

18 Q. In Valley County. Are the homes you've built
19 primarily around the lake, or surrounding the lake, or
20 by the lake, or a combination?

21 A. The lion's share of the homes I've built are
22 on the lake.

23 Q. Do the lion's share of that lion's share have
24 decks?

25 A. Yes.

1 Q. Had you become disenchanted with the building
2 business?

3 A. "Disenchanted" would not be a word I would
4 use. I probably would say, more "bored." It was just a
5 matter of digging a hole, building a house. It just
6 wasn't challenging any more. Does that make sense?

7 Q. Yes, I understand.

8 A. I hope it does. After you do so many big
9 custom homes. I loved working with the people. It was
10 hard having -- I was getting bored. I was looking for
11 something else to do.

12 Q. Had you been building in McCall the whole
13 time?

14 A. Yes.

15 Q. Normally houses on the lake?

16 A. There is one stint that I did work out of
17 state. I forgot about this. I was hired by Provident
18 Federal Savings & Loan. The gentleman's name was Ron
19 Tooney. They provided funds to a real estate developer
20 in southern California, San Diego area. I believe the
21 town's name was La Mesa. All those towns run together
22 for me. I'm sorry.

23 He hired the builder. The developer -- the
24 real estate developer went broke. The project was
25 approximately 40 percent done. And all the funds had

1 Q. And do those decks usually have doors?

2 A. Yes.

3 Q. Are they usually french doors, or something
4 else?

5 A. They are usually, as I recollect, usually
6 sliding glass doors.

7 Q. If you recall, are there others, besides the
8 house at 2130 Payette, that had non-sliding swing doors
9 on the deck?

10 A. Yes, there are.

11 Q. And why would someone choose a sliding door
12 instead of a swing door?

13 A. I would say it would be a personal preference.
14 So with what the architect or the designer recommended
15 on how the outside of the house would look.

16 Q. Is the difference, in your mind, primarily
17 aesthetic?

18 A. Would you rephrase that?

19 Q. Is the difference between choosing a sliding
20 door as opposed to a swing door an aesthetic, or style
21 difference, as opposed to functional?

22 A. I do not pick out these doors. These doors
23 were basically specced on the plans. So it would
24 be -- I would assume there would be a client request.

25 Q. Is one type of door more resistant to outside

1 elements, such as wind and moisture than the other,
 2 because of its nature sliding versus swing, in your
 3 experience?
 4 A. That question can be a little bit vague in
 5 that you have different types of doors. You've got a
 6 pure wood door. You've got a metal clad door. You've
 7 got a metal door. You've got fiberglass doors that
 8 could be sliding glass doors or could be swing doors.
 9 So I guess I would ask you to rephrase that question
 10 with that information given.
 11 Q. What type of door is best to deal with the
 12 outside elements? And by "deal with," I mean, protect
 13 from?
 14 A. In my opinion, it would be a metal clad door.
 15 That provides you with moisture protection of the
 16 outside, and a wood interior, so that you could match
 17 the interior finish with either stain or paint.
 18 Q. Would it matter to you whether that door was
 19 swing or sliding?
 20 A. No.
 21 Q. So a metal clad door with moisture protection
 22 on the outside and a wood interior on the inside is the
 23 most effective, either as a sliding or a swing door; is
 24 that what you are saying?
 25 A. I'm saying a metal clad door offers more

1 became better as the years progressed.
 2 Q. And is there a difference, in your mind, in
 3 terms of effectiveness for protection against the
 4 outside elements, between a single door and a double
 5 door system that swings? Does that make sense?
 6 A. That was a long question. In my opinion, a
 7 double door does not perform as well as a single door.
 8 Q. And why is that?
 9 A. You have a double door. The center portion,
 10 which will not latch against the jamb, so it has a
 11 tendency not to be able to seal up as well against if
 12 you could close a door against a jamb on all four sides.
 13 A double door will only do it on three sides.
 14 Q. Okay. Thank you. We just went into a
 15 discussion of doors. And I intended to ask you more
 16 questions about Beau Value. Let me jump back to that
 17 for a moment.
 18 How long have you known of Beau Value?
 19 A. I'm assuming since when he moved up to the
 20 area in Donnelly to work at Tamarack, which I believe
 21 was 2007, 2008. I cannot remember the exact date.
 22 Q. And you described a few minutes ago categories
 23 of builder, who I think you were saying, were
 24 Johnny-come-lately types, who were not as good as other
 25 builders. I'm not using your exact phrase, but is that

1 resistance than, say, a regular solid wood door.
 2 Q. And that's true whether it's sliding or
 3 swinging?
 4 A. Yes.
 5 Q. With a swinging door, does it matter whether
 6 the door opens towards the outside or the inside, in
 7 terms of its effectiveness in protecting against outside
 8 elements?
 9 A. In my opinion, an in-swing door provides
 10 better protection than an out-swing door.
 11 Q. Why is that?
 12 A. Because the door closes against -- the hinges
 13 are not on the outside. So hinges will not have a
 14 tendency to rust. They are not subject to the weather.
 15 I believe you can seal the door against the weather
 16 stripping better.
 17 But I would like to kind of clarify that. In
 18 that, weather stripping, and the doors in general from
 19 1984 to 2006, have gotten better, I guess, as far as
 20 sealing against the weather, operating, locking. And
 21 I'm not sure what else you can do with a door, but just
 22 better systems came available.
 23 Q. In weather stripping?
 24 A. In weather stripping, locking mechanisms,
 25 types of material, rubber or foam for weather stripping

1 approximately what you were trying to describe?
 2 A. Yes.
 3 Q. And is he one of those, in your opinion?
 4 A. I would not put him in that category, not a
 5 Johnny-come-lately, because I had knowledge that he
 6 moved up from Boise. He had a construction company for
 7 a while. Johnny-come-latelies, I would refer to guys
 8 that showed up with a pickup, and a level. And said,
 9 I'm a builder.
 10 Q. So you don't put Beau in that category?
 11 A. No.
 12 Q. Would you have considered him a competitor?
 13 A. No.
 14 Q. And why is that?
 15 A. I don't think in my opinion, he had not done
 16 any quality, high-end custom homes, until he moved up to
 17 Valley County. That was just my opinion.
 18 Q. So he had less of a depth of experience in the
 19 area in which you were practicing?
 20 A. As I understood, yes, at the time.
 21 Q. And do you have any reason to believe he's not
 22 competent as a builder?
 23 A. I have not seen any of his -- well, I guess I
 24 have seen some of his work. I had seen better work from
 25 people I would consider a competitor, to answer your

1 question.
 2 Q. What work did you see from Beau Value?
 3 A. His personal residence in Tamarack.
 4 Q. And he built that himself?
 5 A. I would assume so. As I understand
 6 Mr. Value's business model, he is just a contractor,
 7 where he contracts all labor and trades out, and
 8 probably just hires administrative personnel.
 9 Q. Does that mean, he's not --
 10 A. And I would call myself a builder, where I
 11 wore my tool belt, and I was on the project as much as I
 12 could be every day. And not just a contractor, where
 13 you contract for the work.
 14 Q. And in your opinion, or knowledge of Beau
 15 Value, was not someone with a tool belt, who was on the
 16 project every day?
 17 A. That is my understanding.
 18 Q. And do you know other contractors who don't
 19 wear a tool belt on the project every day, who are
 20 better than Beau?
 21 A. Yes.
 22 Q. Who would that be?
 23 A. A gentleman named -- one gentleman that comes
 24 to mind is Mike Echart, E-c-h-a-r-t.
 25 Q. And there are others?

1 Q. I'm not --
 2 A. I don't know.
 3 Q. I can't answer that question.
 4 A. I can't either.
 5 Q. I'm --
 6 A. So I'm not really sure if he was really in the
 7 same market as the previous gentlemen that I mentioned.
 8 We were all custom home builders.
 9 Q. Okay. So you haven't known Beau Value a long
 10 time; is that right?
 11 A. That is correct.
 12 Q. And you have not seen a lot of his work?
 13 A. That's correct.
 14 Q. And you have not talked to people he's built
 15 for?
 16 A. I can recollect one person.
 17 Q. Who is that?
 18 A. The gentleman's name is Ray Alford,
 19 A-l-f-o-r-d.
 20 Q. And what did Ray say to you about Beau Value?
 21 A. He was unhappy with his work. He didn't
 22 finish what he said he was going to. And that's all I
 23 can recall at this moment.
 24 Q. And what was Beau building for Ray?
 25 A. His residence.

1 A. The next gentleman's name I'll give you, he
 2 wore his nail belt a little bit, not every day. His
 3 name was Kevin Muir, M-u-i-r.
 4 Q. And I don't need a full list.
 5 A. Steve Minor would be another one. I can give
 6 you more if you want.
 7 Q. No, I don't need any other names. That's
 8 fine.
 9 A. Okay.
 10 Q. What's the source of your opinion that Beau
 11 Value was not as good as these other gentlemen at being
 12 a contractor?
 13 A. I've just respected people that I've known a
 14 long time. I've seen a lot of their work. I have
 15 either talked to the people they've built for, which
 16 were happy with their product. And that would be a big
 17 source of my opinion. And I have not had that luxury
 18 with Mr. Beau Value, or any of his clients.
 19 Q. So for --
 20 A. But --
 21 Q. Go ahead.
 22 A. If I may ask you a question. Because I don't
 23 really know for sure, did Mr. Value build custom homes,
 24 or did he build homes on the speculation market, or
 25 build homes to resale?

1 Q. Is this in Tamarack?
 2 A. No, this is actually in the city limits of
 3 McCall.
 4 Q. When was this?
 5 A. I'll give you a range from either 2007 to
 6 maybe 2008, somewhere in there.
 7 Q. So six or seven years ago?
 8 A. Six years would be 2010.
 9 Q. Oh, yes. What year is it? Eight or nine
 10 years ago?
 11 A. Yes.
 12 Q. So almost ten years ago?
 13 A. Yeah, that would be close enough.
 14 Q. And have you ever spoke to anybody who was
 15 unhappy with Mike Echart's work?
 16 A. I have not.
 17 Q. Kevin Muir?
 18 A. I have not.
 19 Q. Steve Minor?
 20 A. I have not.
 21 Q. So you have only spoken to one person about
 22 Beau's work, and that person was unsatisfied; is that
 23 right?
 24 A. As I can recollect right now, yes.
 25 Q. About ten years ago?

1 A. Uh-huh.
 2 Q. And you, yourself, have not, besides his
 3 personal residence, seen Beau's work?
 4 A. Not that I know of.
 5 Q. Is it fair to say, that he may have work out
 6 there that you might approve of?
 7 A. That would be fair to say.
 8 Q. And you just don't know?
 9 A. That's correct.
 10 Q. And you haven't known him as long as these
 11 other guys?
 12 A. That is correct.
 13 Q. Do you know Eric Waite?
 14 A. I met Eric Waite once for approximately five
 15 minutes, and that is it.
 16 Q. When was this?
 17 A. Excuse me for a second. It was when Eric was
 18 at 2130 Payette Drive doing remediation work. I believe
 19 it was in April sometime.
 20 Q. It was --
 21 A. It was in a document I saw the exact date, and
 22 I can't recall the exact date right now. It was on a
 23 document issued or given to me by Greener Burke
 24 Shoemaker, had those dates on it.
 25 Q. Prior to that, whenever that may have been,

1 It keeps it from moving laterally.
 2 Q. Is it temporary or does it stay --
 3 A. It stays on. It's basically your sub-floor,
 4 or your wall sheathing would be a diaphragm, or your
 5 roof sheathing would be a diaphragm.
 6 Q. Got it. Thank you. I just wanted to
 7 understand that word.
 8 Going back to the documents you produced, I
 9 have three manila folders titled "Bill and Nancy Boyd,"
 10 1, 2, and 3. And I believe these were in a document
 11 produced within a folder named "Bill and Nancy Boyd."
 12 And I'm going to hand them to you. I am going
 13 to ask you to look briefly through them. And then
 14 describe why they are categorized in this manner.
 15 A. This folder represents monthly billings that I
 16 would give to Bill and Nancy. The billings would entail
 17 which materials were purchased that month, which
 18 subcontractors were paid that month, and what laborers
 19 or what labor was paid for that month.
 20 Q. Okay.
 21 A. That would be all three based on the same.
 22 Here is this folder.
 23 Q. I think they are.
 24 A. This folder here, this is all building
 25 invoices. I tried, or I made it a point, to provide my

1 have you met Eric Waite?
 2 A. No.
 3 Q. And have you talked with him or interacted
 4 with him since then?
 5 A. No.
 6 Q. Do you have any familiarity with his
 7 professional background?
 8 A. No.
 9 Q. Any familiarity with his work?
 10 A. No.
 11 Q. Any opinion of his competence?
 12 A. I have no basis to form an opinion.
 13 MS. FOSTER: Okay. I'm really sorry. I need
 14 to take a very brief break.
 15 THE WITNESS: I would like to stand up anyway.
 16 MS. FOSTER: Okay. Great.
 17 (A recess was had.)
 18 Q. (BY MS. FOSTER) Chris, at some point in the
 19 last half hour, you said the word "diaphragm."
 20 A. Uh-huh.
 21 Q. What does that mean in that context?
 22 A. "Diaphragm" is basically a structural term, in
 23 that you use a plywood panel to secure either floor
 24 joists, wall studs, roof rafters from movement. It's
 25 basically a diaphragm that holds everything together.

1 clients with every invoice that I paid on their project.
 2 That's where you get all this. There is an invoice that
 3 should be backed up by the amount on the cover page. I
 4 only saw one cover page there. As near as I can --
 5 Q. And you keep a --
 6 A. This would be a page that I refer to as a
 7 cover page.
 8 Q. He's referring to a document Bates labeled
 9 Kirk 536. Go ahead.
 10 A. It was a recap of all the materials that were
 11 purchased that month, subcontractor totals, and how much
 12 labor was for that month. And then the next page goes
 13 into detail, and this page is 537.
 14 Q. And these are documents that you keep for each
 15 file?
 16 A. Correct.
 17 Q. And provide to your clients?
 18 A. Yes.
 19 Q. Thank you. And so if --
 20 A. I believe -- excuse me. I'm done. Go ahead.
 21 Q. No, you can say what you were about to say, if
 22 you want to.
 23 A. I keep all the originals, and I photocopied
 24 the invoices, and provided them to my clients.
 25 Q. Great. Fine. Thank you.

1 A. Because a lot of times the invoices would have
2 more than one job on it.

3 Q. Right. It makes sense.

4 A. Okay.

5 Q. So if I wanted to ask you about a particular
6 subcontractor, and his or her bill, it would probably be
7 in these folders; is that right?

8 A. That would be correct. Here's this. I'm
9 looking. It just came out. It would be document 387.
10 This is a copy of my insurance binder that I had with
11 Western Community Insurance at that time. And that
12 would be -- would you like this?

13 Q. Yes, please.

14 A. (Witness complying.)

15 Q. This appears to be Kirk 8387, an invoice from
16 Western Community Insurance Company, dated February 7,
17 2005; is that right?

18 A. Yes.

19 Q. And is that an invoice that you would have
20 passed on to your client?

21 A. I am assuming that this would be as we started
22 on the house, I put under my umbrella, approximately,
23 \$500,000 to insure 2130 Payette Drive, and the amount to
24 do that was \$289. As the house progressed, and became
25 more valuable, I would have increased this insurance to

1 if anything can happen, it will happen. So I try and
2 guard myself, provide myself and my client with
3 insurance coverage.

4 Q. And does your policy provide coverage for
5 design defects?

6 A. I do not recollect that. I would have to
7 really read the fine print, which I have not done.

8 Q. Okay. And do you know --

9 A. Because that policy expired when I quit
10 building in 2008.

11 Q. Do you know whether it was an occurrence based
12 policy?

13 A. I do not know. I don't know that lingo.

14 Q. Okay. Do you have an insurance broker?

15 A. My brother, whose name is William David Kirk,
16 K-i-r-k.

17 Q. He would know that lingo; right, you would
18 assume?

19 A. Yeah, I would assume so.

20 Q. Have you ever filed a claim under your
21 commercial protector's policy, in connection with any
22 job you've had between 1984 and 2006?

23 A. No.

24 Q. Did you file a claim in connection with 2130
25 Payette?

1 keep the insurance in line with replacement value if
2 something happened to the house, such as burn down, or
3 wash out to the lake.

4 Q. And you would add her as an additional
5 insured -- excuse me -- the house as an additional
6 insured property?

7 A. I would add that specific property to my
8 umbrella policy.

9 Q. And would you add Nancy Gentry-Boyd as an
10 additional insured?

11 A. No, Nancy -- no, I would not. If so -- if I
12 did, it would say so on there or not.

13 Q. Okay.

14 A. I'm just insuring --

15 Q. It does not.

16 A. I'm just insuring the structure. Nancy, I
17 assume, would have her own hazard insurance.

18 Q. And what was the purpose of adding 2130
19 Payette to your insurance umbrella?

20 A. In case there was an incident, the house would
21 be specifically covered.

22 Q. What would an incident be?

23 A. Say if a fire, would be the biggest concern.

24 I mean, you have a lot of tradesmen, guys walking around
25 with flames, terrible electrical cords. It seems like

1 A. No.

2 Q. Did you file a claim in connection with this
3 lawsuit?

4 A. No. No, I did not file a claim.

5 Q. And I'll use a little bit of lingo, maybe you
6 don't know it. Did you file a notice of occurrence, to
7 your knowledge?

8 A. I contacted, per advice of my brother, Dave,
9 to contact Brian Trumble, T-r-u-m-b-l-e, at Western
10 Community, and he transferred me to the claims
11 department. I do not remember the gentleman's name. We
12 talked about whether my policy would cover this
13 incident, and the claims agent said he would respond
14 shortly. And I believe he -- that you should have that
15 response in your -- one of your 1,400 pages.

16 Q. And do you remember what the response was?

17 A. Exceeded their statute of limitations, and I
18 have no coverage.

19 Q. That's what they told you?

20 A. Yes.

21 Q. And you had a phone call with this person,
22 whose name you don't remember, and to whom you were
23 referred by Brian Trumble?

24 A. Yes.

25 Q. And what did you tell him, or her, in that

1 phone call?

2 A. I believe, as I recollect the phone call, I
3 informed him that I was in the process of being sued for
4 a construction defect. And would my insurance policy,
5 that I had in effect at the time, cover these claims?
6 And that's what he said, he would have to look at my
7 file, and he would get back to me, which he did via
8 email. And excuse me -- I can't remember if it was
9 email, or if it was a letter. And I think you should
10 have a copy of that letter in your -- in the documents
11 there.

12 Q. And you provided them with a copy of the
13 complaint?

14 A. I do not recollect if I did or did not.

15 Q. Did you tell them the claim was in connection
16 with alleged water damage?

17 A. I do not recollect what I told them exactly.

18 Q. Did you consult a lawyer about whether their
19 denial of your claim was correct?

20 A. The only counsel I have talked to about this
21 whole -- is Mr. Nevala here, counselor of law,
22 N-e-v-a-l-a.

23 Q. When did Nancy Gentry-Boyd first approach you
24 to build the home at 2130 Payette?

25 A. To the best of my recollection, it would have

1 A. And then I would take this job name under
2 Doorns, and do my monthly billing, which would entail
3 the cover sheet, the detail sheet, and copies of all the
4 invoices.

5 Q. And in these three manila folders, which are
6 labeled "Monthly Worksheets," are there also invoices in
7 there?

8 A. There are. And they are probably related to
9 other projects, or, say, personal stuff, like buying
10 tools. There is also time cards for each project in
11 here.

12 Q. So is it fair to say, these folders contain
13 your records of your monthly work, and not organized by
14 client, but rather simply by the business you've done?

15 A. Uh-huh, master invoices, master time cards.

16 Q. And are there invoices in there, in these
17 folders that might also be in the monthly --

18 A. They could have been.

19 Q. -- statement?

20 A. They could have been misfiled. But those, I
21 would hope that those would be as complete as possible.

22 Q. Oh, what I meant was, is it possible that a
23 particular invoice may be in both?

24 A. Yes.

25 Q. On purpose?

1 been around 2003.

2 Q. You know what. I am sorry. I just jumped the
3 gun on that. Let me rewind. And let me show you one
4 more final stack of documents.

5 A. Okay.

6 Q. I'm sorry. I apologize. I went forward too
7 quickly. That you produced in a folder called "monthly
8 worksheets." Again, I have three manila folders
9 containing a bunch of pages. And I just want to ask you
10 to look at it briefly, and describe what this is.

11 A. (Witness complying.) This would be a monthly
12 compilation of all my invoices, concerning all the
13 projects that I had going at the time. I would compile
14 them on this one master sheet, which then I would take,
15 I'll show you this, and it is labeled Kirk 945. This
16 would be for the month of June 2004. You see the date
17 at the top.

18 Q. Yes. Go ahead.

19 A. I had a project for some people named Doorn.
20 I had another project for Boyd. Another project for
21 Eldredges. Another project for Mullins. So if you
22 would look at -- I would look at the bills from
23 Lumbermen's that month, and May Hardwood, and transfer
24 them to the appropriate job. Does that make sense?

25 Q. Yes, I understand.

1 A. No.

2 Q. Okay.

3 A. Say if I was going to Lumbermen's, and I
4 needed to drop off some materials at the Doorns, and
5 something off at Eldredges, sometimes it accidentally
6 got on the same ticket. So I would make duplicates, and
7 put it in my master file, and also in the client's file.

8 Q. I see.

9 A. Does that make sense?

10 Q. Yes. But when it is an invoice for only one
11 client, then that would be put in your monthly statement
12 file?

13 A. Uh-huh.

14 Q. And would that amount also be reflected in the
15 worksheet you just showed me?

16 A. Yes.

17 Q. Fine. Thank you.

18 A. Sorry. I thought I saw a mathematical error,
19 but I was wrong.

20 Q. We'll move away from those documents. And
21 now, I want to ask you questions about the build job
22 that you did at 2130 Payette for Nancy Gentry-Boyd. And
23 a few moments ago I asked you when she first contacted
24 you. Let me ask a predicate question to that.

25 Who first contacted you to build 2130 Payette?

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1 A. I do not recollect if it was Nancy directly,
 2 or Andy Laidlaw at McCall Design & Planning.
 3 Q. And this is in approximately 2003?
 4 A. Yes.
 5 Q. And what was said?
 6 A. Most likely, and as I probably -- I don't
 7 really recollect what was said. The discussion would
 8 probably have pertained to, do you have time in your
 9 schedule to build Nancy and Bill's home.
 10 Q. And you said, yes?
 11 A. Obviously, I did say, yes.
 12 Q. And did you know Nancy and Bill before this?
 13 A. Yes, I did.
 14 Q. How?
 15 A. Mostly socially. We met through friends. To
 16 answer your next question, I probably met Bill and Nancy
 17 somewhere in 1985, '86, somewhere in there.
 18 Q. So you've known them almost 20 years at that
 19 point?
 20 A. That is correct.
 21 Q. And had you ever done any work for them
 22 before?
 23 A. Before which date?
 24 Q. Before 2130 Payette.
 25 A. I did some work for Nancy at Mountain Monkey

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1 Business.
 2 Q. What did you do there?
 3 A. Put a bathroom in, connected -- and remodeled
 4 the garage that was off to the side, and connected it to
 5 the main building for a coffeehouse.
 6 Q. Were there any problems that you encountered
 7 in that job?
 8 A. Not that I recollect.
 9 Q. And, obviously, no lawsuits arose from it?
 10 A. No, they -- no.
 11 Q. And when was that, approximately?
 12 A. It would have been 2003, 2002, approximately;
 13 2002, 2003.
 14 Q. So shortly before you were contacted about
 15 2130 Payette?
 16 A. That would be correct.
 17 Q. Had you built other homes in that specific
 18 area? Is it a subdivision?
 19 A. No, it's not.
 20 Q. What's it called; that area? How would I
 21 refer to that group of homes off those streets there?
 22 Is there --
 23 A. Downtown McCall, across from the marina.
 24 Q. Across from the marina. Okay. Had you built
 25 other homes across the marina before that?

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1 A. Personally, and as Kirk Enterprises, no. As
 2 an employee of BOA Construction, yes.
 3 Q. In the 1981 to 1984 period?
 4 A. Correct.
 5 Q. Are those houses still there, or that house?
 6 MR. MILLEMANN: Counsel, sorry to interrupt.
 7 I think the witness is referring to Mountain Monkey
 8 Business as being across from the marina, not the home
 9 in question.
 10 MS. FOSTER: Thank you. Just as an outsider,
 11 it is a non-local problem. Sorry. Thank you.
 12 THE WITNESS: I didn't understand your
 13 question. I apologize.
 14 Q. (BY MS. FOSTER) Let's back up. I've seen a
 15 map of the home on Payette Street -- Payette Drive.
 16 A. Okay.
 17 Q. Is that a subdivision of homes? Is that
 18 called a subdivision?
 19 A. You know, I've never seen -- I can't say,
 20 never. I don't recollect seeing any plot plan that
 21 would designate the area. I believe, as I recall, it's
 22 called Payette Lake Cottage Sites.
 23 Q. Oh, that's right; Payette Lake Cottage Sites.
 24 I have seen that.
 25 Have you built other homes in that area near

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1 the Payette Lake Cottage Sites?
 2 A. Define "area."
 3 Q. That's what --
 4 A. Within a mile or two miles?
 5 Q. Yes, within two miles of 2130 Payette.
 6 A. Yes.
 7 Q. How many?
 8 A. At least one, less than five.
 9 Q. How many of those were abutting the lake?
 10 A. They all had lake frontage.
 11 Q. That's a better way to put it. How many of
 12 those had lake frontage?
 13 A. All of them.
 14 Q. And do those houses still exist?
 15 A. Yes, they do.
 16 Q. Have you ever been called upon to repair any
 17 of those houses after their construction?
 18 A. To repair, no.
 19 Q. To remodel?
 20 A. To remodel, yes.
 21 Q. But never to repair or address any problems
 22 that arose?
 23 A. No.
 24 Q. Have you built other houses, not within two
 25 miles, but outside of the two mile radius of 2130

1 Payette around the lake?
 2 A. That would fall within that first range of
 3 houses that I gave you, between 20 and 30 homes on the
 4 lake -- structures on the lake.
 5 Q. And do you know whether all those houses still
 6 stand?
 7 A. To the best of my knowledge they all still
 8 stand.
 9 Q. And after you finished constructing them, were
 10 you called out to do any repair work for any of them?
 11 A. On one.
 12 Q. Which one?
 13 A. This would be on the east side of the lake.
 14 The owner's name was Judge Jerry Barry, and his wife,
 15 Natalie, and that was with B-a-r-r-y.
 16 Q. And what were you called out to fix?
 17 A. There were some log columns holding out a roof
 18 over a rock patio. After I had left, finished my work
 19 on the house -- I'm sorry.
 20 Q. No, you are doing fine. Go on.
 21 A. After I finished work on the house. Judge
 22 Barry and his wife, Natalie, hired a landscaper to come
 23 in, and put in a sprinkler system, so that moss would
 24 grow in between the stone. The sprinkler systems were
 25 set right at the base of the logs, and the logs have

1 Payette?
 2 A. To the best of my recollection, I started -- I
 3 think the building permit was issued in June of 2004.
 4 Q. Okay. Go ahead.
 5 A. And finished somewhere in July, August of
 6 2005.
 7 Q. So, roughly, a year?
 8 A. Yes.
 9 Q. Roughly?
 10 A. Yes.
 11 Q. Less than two years?
 12 A. Yes.
 13 Q. Okay. Was a certificate of occupancy issued
 14 for the house?
 15 A. I have no idea. I have no control over that.
 16 Q. Who does that?
 17 A. I would assume that it would have been the
 18 City of McCall building inspector. I would also assume,
 19 that the Department of Lands only deals in real
 20 property, and not the real property.
 21 Q. And how are they normally contacted, in your
 22 experience, to provide the building inspection, and
 23 result in certificate of occupancy?
 24 A. I would call the building inspector and
 25 arrange for a final inspection.

1 check splits in them. Have you seen -- which enables
 2 water to get in and set, and the bottoms rotted out on
 3 one of them. So I repaired that.
 4 Q. How did you know the bottom was rotted out?
 5 A. You could see the log column failing. It was
 6 failing, crumbling. And the good test would be to take
 7 a pen knife, and stick your blade into it, and see how
 8 easily it penetrated.
 9 Q. Into the log column?
 10 A. Uh-huh.
 11 Q. So one thing I forgot to say at the beginning
 12 of today is, when you say, "uh-huh," that doesn't
 13 translate well.
 14 A. I'm sorry.
 15 Q. No, it is okay. So we need to say, "yes" or
 16 "no." I do the same thing.
 17 Okay. Would putting the pen knife in the log
 18 column create an aesthetic blemish?
 19 A. No.
 20 Q. And that's the only instance in which you've
 21 been called out to repair a home that you built?
 22 A. That is what I recall, yes.
 23 Q. Putting aside 2130 Payette.
 24 A. Yes.
 25 Q. How long did it take you to build 2130

1 Q. So you normally do that?
 2 A. Absolutely.
 3 Q. And did you do it here?
 4 A. Yes, I did.
 5 Q. Who did you call?
 6 A. The building inspector, himself, Mr. Bill
 7 Housdorf.
 8 Q. Do you know if Mr. Bill Housdorf conducted a
 9 building inspection?
 10 A. Yes, he did.
 11 Q. When?
 12 A. 2005.
 13 Q. Does he generate a written report after he
 14 does a building inspection?
 15 A. Not that I've ever seen. He signs my building
 16 permit inspection card. Then it is up to him to go back
 17 to his office and fill out the COC, or the certificate
 18 of occupancy.
 19 Q. And do you normally follow-up to see if he
 20 does issue a certificate of occupancy?
 21 A. No.
 22 Q. Do you know whether anyone normally follows-up
 23 to see if he issues a certificate of occupancy?
 24 A. I don't know of anyone.
 25 Q. Were you present when he conducted the

1 inspection of 2130 Payette?
 2 A. Yes, I was.
 3 Q. How long did it last?
 4 A. Approximately, 40 minutes.
 5 Q. What did he say about the home at that time,
 6 if anything?
 7 A. Everything looked fine. He signs his card and
 8 left.
 9 Q. Had he looked at the plans for the house, or
 10 does he just inspect the physical result?
 11 A. That, I cannot answer. I mean, he's there to
 12 see the physical -- the result. Whether he looked at
 13 the plans before he showed up on the project, or after
 14 the project, I do not know.
 15 Q. You don't hand him the plans, normally?
 16 A. I have the set of plans available for him to
 17 look at.
 18 Q. Does he normally request them, from your
 19 experience?
 20 A. When he shows up for an inspection, I will
 21 take those plans to walk around with him to answer
 22 questions if he has some.
 23 Q. Does he, himself, look at the plans as he
 24 walks around with you?
 25 A. Yes, he does.

1 Q. And it is three pages long; is that right?
 2 A. Yes.
 3 Q. This appears to follow a template that has
 4 always the same rows and columns month to month; is that
 5 true?
 6 A. Yes.
 7 Q. And the first column lists the categories and
 8 the description of work being performed; is that right?
 9 A. Yes.
 10 Q. The next column is "Budget Amount"?
 11 A. Yes.
 12 Q. And how do you come up with the budget amount?
 13 A. During the process of doing my takeoffs and
 14 estimates on a preliminary set of plans, or the best set
 15 of plans available at the time for me to do that.
 16 Q. Okay.
 17 A. Which I try and do before we start
 18 construction.
 19 Q. And what was the total budget as of November
 20 2004 for this project?
 21 MR. COLLAER: Counsel, are we talking about
 22 estimated or actual cost?
 23 MS. FOSTER: I'm still in the second column
 24 called "Budget Amount."
 25 MR. COLLAER: Okay.

1 Q. Did he have questions about anything in the
 2 house at that time?
 3 A. No, he did not.
 4 Q. None?
 5 A. None. None that I recall.
 6 MS. FOSTER: Okay. I'm going to hand you what
 7 we're going to mark Exhibit 20.
 8 (Exhibit 20 marked.)
 9 Q. (BY MS. FOSTER) It is a document Bates
 10 labeled Kirk 00673 through Kirk 00711. There should not
 11 be any pages missing.
 12 Have you seen this before?
 13 A. Yes.
 14 Q. What is it?
 15 A. This is a document I provide my client at the
 16 end of each month, which shows the cost to date, what
 17 the current billing is, and how that reflects in my
 18 original budget amount.
 19 Q. So this is like a running tally of how much
 20 the spend is?
 21 A. Yes.
 22 Q. And on the first page of this document, this
 23 looks like it's titled "Boyd Budget November 2004"; is
 24 that right?
 25 A. Yes.

1 Q. (BY MS. FOSTER) So as of November 2004, what
 2 was the total budget as reflected in this document?
 3 A. There is 797,000 -- \$797,762.
 4 Q. And is November 2004 the first month in which
 5 you provided such a budget?
 6 A. I don't recollect.
 7 Q. If you had, would it have been in the
 8 documents you produced?
 9 A. Yes, it would.
 10 Q. Okay. So I'll represent this is the earliest
 11 one that we received, unless I missed something.
 12 A. That would be fair.
 13 Q. And then if you turn to the last three pages
 14 of this document, that appears to be the Boyd August
 15 budget for 2005; is that right?
 16 A. Yes.
 17 Q. And I can represent that this should be the
 18 last of the monthly budget spreadsheets that we received
 19 from you. Does that accord with your recollection of
 20 the project?
 21 A. Yes.
 22 Q. And what was the total budget amount as of
 23 August of 2005 as reflected on Kirk 711?
 24 A. \$1,061,628.
 25 Q. Go back to the first page, please. And the

1 third column says, "Current Billing"; right?
 2 A. Yes.
 3 Q. And what do you put in that column? What does
 4 that represent?
 5 A. That represents the amount that was billed for
 6 that month.
 7 Q. Okay. And in the next column is "Cost to
 8 Date." Is that a sum of everything billed to date for
 9 that row?
 10 A. For that task item, yes.
 11 Q. Okay. And then, obviously, the last column,
 12 "Remarks," is any remarks you may wish to add; is that
 13 correct?
 14 A. That's correct.
 15 Q. And then on the right, I see some handwriting
 16 under a handwritten column; is this your handwriting,
 17 sir?
 18 A. Yes, it is.
 19 Q. The column is Dec, December. What does this
 20 handwriting reflect?
 21 A. These are numbers that are transferred from my
 22 monthly summary to this task item. And due to my lack
 23 of computer skills, and using a 1984 Apple computer, I
 24 think is what I had, I would have to manually add these
 25 numbers up, and transfer them to the next month's

1 budget. Because I'm working off of November's budget,
 2 adding December's numbers in.
 3 Q. And December's numbers are budget items or
 4 billing items?
 5 A. Those would be the current bill, and added in
 6 to reflect the total cost to date, which I would have to
 7 manually input each month.
 8 Q. Okay. I see. I understand. Thank you.
 9 A. So if you take the item, where it says,
 10 "framing materials."
 11 Q. Yes.
 12 A. You see under my "December" column.
 13 Q. Yes.
 14 A. The total amount on the right-hand side is
 15 \$84,000 and some change.
 16 Q. Yes.
 17 A. It is reflected over on December, that amount,
 18 \$84,435.
 19 Q. Thank you. That's clear, and I understand it.
 20 So then if you go to the very last page of
 21 this document, again, Kirk 711. The fourth column,
 22 "Cost to Date," that number is 1,031,957; is that right?
 23 A. That's correct.
 24 Q. And that reflects the total cost to date of
 25 building the home; is that right?

1 A. Yes.
 2 Q. So you were under budget; is that right?
 3 A. At that time -- yes.
 4 Q. Would there have been any billings after that
 5 month?
 6 A. You would have to hand me my billing documents
 7 to see if there is a September billing.
 8 Q. Where would those documents be?
 9 A. Somewhere in that box (indicating).
 10 Q. Hold on, please. Would it be in --
 11 A. In my monthly billings.
 12 Q. Monthly billings.
 13 A. I don't think that's the --
 14 MS. FOSTER: I'm handing you a document we'll
 15 mark as Exhibit 21, labeled Kirk 637 through Kirk 639.
 16 I only have one copy.
 17 (Exhibit 21 marked.)
 18 MR. COLLAER: What's the Bates range on that
 19 again, Alyson?
 20 MS. FOSTER: Kirk 637 through 639.
 21 Q. (BY MS. FOSTER) And looking at your monthly
 22 billings in your production, that appears to be the last
 23 one?
 24 A. I'm sorry?
 25 MR. NEVALA: What do your notes say? Okay.

1 Q. (BY MS. FOSTER) Does that look right to you?
 2 A. Not without going through all the files, and
 3 make sure if September 2005 is not buried in there
 4 somewhere.
 5 MS. FOSTER: Well, I guess, you know what, I
 6 lied. There is September 2005. That is Kirk 662
 7 through Kirk 664. We'll mark that Exhibit 22.
 8 (Exhibit 22 marked.)
 9 Q. (BY MS. FOSTER) And this makes more sense.
 10 A. This has to do with the bank.
 11 MR. NEVALA: One of your invoices says,
 12 "Second."
 13 THE WITNESS: Would you happen to see an
 14 October billing in there?
 15 Q. (BY MS. FOSTER) I don't.
 16 A. Okay.
 17 Q. That doesn't mean it's not in here. I don't
 18 see it at the moment.
 19 Is it your understanding there was one more
 20 month after that?
 21 A. Boy, best of my recollection, I would say,
 22 probably September would have probably been my last
 23 billing.
 24 Q. Okay.
 25 A. Not without going through all those documents.

1 Q. Possibly September, perhaps October, if it's
2 in there. I don't see it at the moment.
3 A. If there was an October billing, it would have
4 been something that showed up late that the designer
5 sent, that I would have to install, like a picture.
6 Q. Or plumbing?
7 A. Or maybe something like plumbing fixtures
8 showed up.
9 Q. So is it fair to assume then, that if we
10 return for a moment to Exhibit 20, which is this budget.
11 Yes. And you go to the last page, under it says, Kirk
12 711 cost to date. Would it be fair for me to assume
13 that the total final amount billed to Nancy for building
14 this home is that amount, plus whatever amounts may have
15 come in in September or October --
16 A. That would be --
17 Q. -- for that?
18 A. That would be reasonable to assume, yes.
19 Q. And do you recollect off the top of your head,
20 what the total amount Nancy paid you for this house was?
21 A. It would have been really close to this amount
22 of money, this 1,031,000 figure, plus this 3,814.
23 Q. And I'm not trying to be nit picky, but for
24 the sake of completeness.
25 A. That's okay.

1 A. Yes.
2 Q. And do you know who did the landscaping for
3 her house?
4 A. To the best of my knowledge, it was Laidlaw &
5 Son.
6 Q. Do you know how much they charged?
7 A. Absolutely no idea.
8 Q. I'm going to ask you questions now about the
9 construction of the french doors and the deck -- in the
10 area around the deck that are at issue in this case. So
11 let me show you a picture so that I can make sure we're
12 on the same page. This is what's previously been marked
13 Exhibit No. 3. Do you recognize those doors?
14 A. Yes.
15 Q. And these are the doors that are primarily at
16 issue in this case?
17 A. Yes.
18 Q. These are the french doors on the south side
19 of the deck at 2130 Payette?
20 A. Yes. Yes.
21 Q. Or southwest corner?
22 A. It would be dining south.
23 Q. Dining south.
24 A. Yes.
25 MS. FOSTER: Okay. I'm going to show you

1 MS. FOSTER: I'm going to hand you document
2 Exhibit 23. It is one page, Bates labeled Kirk 668, an
3 invoice dated, 10-10, 2005 from Yensen plumbing.
4 (Exhibit 23 marked.)
5 Q. (BY MS. FOSTER) And that's another \$213 that
6 you would add to the total?
7 A. No, that's included in this bill.
8 Q. Is that right?
9 A. Yes, it is. There it is right there
10 (indicating).
11 Q. Look at that. Okay. Thank you for that
12 clarification. So roughly what she paid was 1,035,000;
13 is that approximately right?
14 A. That is incorrect.
15 Q. It's incorrect. Okay. What is correct?
16 A. You need to go to the summary of billing,
17 which I would add my profit and overhead. So it would
18 have been the 4,164 that you would add to the 1,031,000.
19 Q. Okay. So now, adding from Kirk 663 to Kirk
20 711.
21 A. The 1,035,000 and some --
22 Q. And something?
23 A. Yes.
24 Q. You know, I majored in math, but I still have
25 trouble. So thank you. So approximately \$1,000,000?

1 Exhibit 24.
2 (Exhibit 24 marked.)
3 Q. (BY MS. FOSTER) This is a two-page document,
4 Bates labeled RP 168 and 169. Do you recognize this?
5 A. It appears to be the floor layout, the first
6 floor layout for Nancy's home.
7 Q. Do you see where the fingers are pointing on
8 the first page?
9 A. I don't see any fingers.
10 Q. Well, you know, what mine are -- on the second
11 page of yours.
12 A. Okay. Yes, I see.
13 Q. And the fingers, are they pointing toward the
14 dining south door that we're discussing?
15 A. Yes.
16 Q. And at that time, it was a single door not a
17 double door?
18 A. Correct.
19 Q. And it was flush with the wall around it?
20 A. I don't understand your question.
21 Q. I'm probably not using the right language. It
22 is not set back from the surrounding walls? Does that
23 question make sense?
24 A. According to this diagram, the door would have
25 been flush with the interior wall surface.

1 Q. Was it flush with the exterior wall surface?
 2 A. Was it, what?
 3 Q. Was it flush with the exterior wall surface?
 4 A. This door?
 5 Q. Yes.
 6 A. That's shown on the plans?
 7 Q. Yes.
 8 A. No, you would have the depth of the jamb that
 9 comes inside. And the door would be -- I would have to
 10 draw you a picture or something. You have the depth of
 11 the jamb, that would make a difference whether the door
 12 was flush with the jamb on the inside.
 13 Q. Okay. Thank you.
 14 This is a broad question, but I want to ask
 15 you. Do you recall when that door was put in? If not,
 16 I'll ask a specific question. Do you know when that
 17 door was put in?
 18 MR. MILLEMANN: Are you referring to the
 19 french doors, Counsel?
 20 Q. (BY MS. FOSTER) I'm sorry. Yes. The french
 21 doors, yes, so plural.
 22 A. Not with -- because this door in Exhibit 24
 23 was not the door that was ultimately put in.
 24 Q. So the doors that were ultimately put in, do
 25 you have a memory in your mind of when that happened?

1 tar paper and impregnated sheathing, whatever you want
 2 to call it.
 3 Q. In general, do you use the same masonry
 4 contractor?
 5 A. In general, yes. On this project, my regular
 6 contractor was busy.
 7 Q. Who did you use this time?
 8 A. I believe it was Eagle Masonry from Boise, or
 9 Meridian, or Eagle, somewhere in the valley.
 10 Q. And you've never used them before on a house
 11 in McCall?
 12 A. No.
 13 Q. Do you know if they normally work on houses
 14 being built in McCall?
 15 A. I do not know.
 16 Q. How did they come to your attention?
 17 A. I do not recall exactly.
 18 Q. Were you generally satisfied with their work?
 19 A. Generally satisfied.
 20 Q. Any specific dissatisfaction you experienced
 21 with them on this home?
 22 A. Yes.
 23 Q. Tell me about that.
 24 A. They did not show up when they said they would
 25 show up. They would not do the amount of work that they

1 A. I can give you a range. Would a range be
 2 sufficient?
 3 Q. Yes.
 4 A. Between October of 2004 and January of
 5 2004 -- or '05. Excuse me.
 6 Q. And who worked on installing those doors?
 7 A. It would have been my crew that I hired; one
 8 of my carpenters or myself.
 9 Q. Do you remember; was it you?
 10 A. I really don't recollect. I mean, I don't
 11 recollect.
 12 Q. Were you generally there every day?
 13 A. Yes.
 14 Q. Who put in the moisture barrier around the
 15 door?
 16 A. It would be either an employee of mine, or
 17 myself.
 18 Q. Who installed the flashing at the bottom of
 19 the door?
 20 A. It would have been an employee of mine or
 21 myself. I don't recollect who.
 22 Q. Who installed tar paper underneath the stone
 23 veneers around the door?
 24 A. I do not recall if it was my crew or the
 25 masons. The masons may have wanted to install their own

1 promised that they would do when they did show up. And
 2 they left their work areas messy, cluttered.
 3 Q. Anything else?
 4 A. Not that I can recollect at this time.
 5 Q. And do you recall whether it was they who
 6 installed tar paper underneath the veneer?
 7 A. I don't recall.
 8 Q. The other masons you normally work with in
 9 town, do they normally do their own tar paper
 10 installation?
 11 A. Yes.
 12 Q. And do they do it under your supervision,
 13 normally?
 14 A. "Supervision" meaning, I stand over their
 15 shoulders and watch them?
 16 Q. Yes.
 17 A. No.
 18 Q. Do they seek your specific approval before
 19 installing the tar paper, in regards to what, and how
 20 much tar paper they are going to install?
 21 A. Would you re-ask that question?
 22 Q. Yes. Do you have any control over the type
 23 and amount of tar paper that your masons use?
 24 A. Yes, I do ask them to cover the whole area
 25 that they are going to apply veneer.

1 Q. Do you specify to them the type of tar paper
2 they should use, or the weight, or the number of layers?
3 A. I cannot recall if the felt paper is called
4 out on the plans or not, and I cannot remember what the
5 acceptable building practice at that time. There are
6 two grades of felt paper at that time, 30 and 90, which
7 have to deal with the weight of the paper, the thickness
8 of the paper.
9 Q. Is that governed by international building
10 codes?
11 A. I have no idea.
12 Q. You don't know what the international building
13 code says about the weight of the felt paper to be used
14 under veneer?
15 A. Not the international building code, I don't
16 know.
17 Q. Any local building codes you are aware of?
18 A. Not that I'm aware of.
19 Q. What is your practice if you are doing stone
20 veneer in the building area such as McCall, what weight
21 of felt paper is the normal practice to use?
22 A. You know, I really don't recall. I don't
23 recall.
24 Q. Did you know at one time, and you just don't
25 remember now, or is this something --

1 A. Yes, I did.
2 Q. And do you recall any problems you had with
3 the felt paper weight they were using?
4 A. I do not recall.
5 Q. But you do recall seeing it?
6 A. Yes, I do. Yes.
7 Q. And you recall seeing -- not thinking there
8 was a problem with it?
9 A. Correct.
10 Q. And who would have installed the flashing
11 around the wall underneath the veneer? You know what,
12 maybe -- maybe a little more clear.
13 If you could look, please, at Exhibit 24 on
14 the first page. And where I'm pointing is the wall
15 facing the lake on the deck.
16 A. Uh-huh.
17 Q. Do you see that?
18 A. Uh-huh.
19 Q. Who would have installed the flashing on that
20 area?
21 A. Are you pointing at the window sill, or are
22 you pointing at --
23 Q. Where the ground meets the wall, what's that
24 called, like --
25 A. The ground?

1 A. I don't think I ever really knew. I would
2 assume that the tradesmen or the mason would know what
3 weight of paper should be applied underneath their
4 veneer.
5 Q. When you say, "tradesmen," do you mean the
6 mason person or someone else?
7 A. I meant the mason.
8 Q. Or whoever is doing the veneer?
9 A. Precisely.
10 Q. So your practice is to specify where you want
11 felt, but it is the tradesmen's responsibility to choose
12 the weight of felt? Is that what you are saying; no,
13 yes?
14 A. I would say, no.
15 Q. Okay. Please correct me then.
16 A. I would expect the mason to know what weight
17 of paper to apply underneath the veneer. The mason
18 already should know what areas he's going to cover.
19 Q. And was it your experience with Eagle Masonry
20 that they knew what weight to use, and what areas to
21 cover in this instance?
22 A. I would assume they should have known, or
23 would know.
24 Q. And did you review their work while they were
25 doing it?

1 Q. -- on the floor.
2 A. The dirt?
3 Q. Yeah. So right by the deck joists where it
4 hits the wall.
5 A. Okay.
6 Q. I know I'm not using all the proper
7 terminology. But I mean on the ground, if I stub my toe
8 on the ground down there, on the outside of the
9 building, there is flashing there; is that right? Does
10 that make sense?
11 A. Ground, I'm assuming you are talking about
12 dirt?
13 Q. No. So on the deck.
14 A. Okay.
15 Q. Where the deck floor hits the wall.
16 A. Okay.
17 Q. There is a 90-degree angle.
18 A. Okay.
19 Q. And that's where flashing is; is that correct?
20 A. Yes.
21 Q. And who installs that flashing?
22 A. It would have been either myself or one of my
23 carpenters.
24 Q. And is that installed before or after the
25 mason tradesmen installs the felt?

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1 A. It would have been installed before.
 2 MR. MILLEMANN: Counsel, are you talking about
 3 the lake side of the house now?
 4 MS. FOSTER: Yes, the lake side.
 5 MR. NEVALA: And we're talking about where the
 6 deck meets the house?
 7 MS. FOSTER: Yes, correct.
 8 Q. (BY MS. FOSTER) And you just testified that
 9 the flashing on the lake side of the wall where the deck
 10 meets the house is installed by you or your carpenter,
 11 before the mason tradesmen installs the felt paper; is
 12 that right?
 13 A. That's correct.
 14 Q. And how is the felt paper layered with the
 15 flashing?
 16 A. The felt paper should overlap the flashing.
 17 Q. So going from the outside in, tell me if what
 18 I say is correct. The layers I would find are the
 19 veneer, the tar paper, or felt?
 20 A. No.
 21 Q. Go ahead.
 22 A. I would assume that you would see the veneer.
 23 Q. Correct.
 24 A. Mason's mesh.
 25 Q. Mason's mesh.

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1 A. And mixed with the mortar to apply the veneer.
 2 Q. Okay.
 3 A. Felt paper. If it's around the window area,
 4 there might or might not be Tyvek and/or window tape
 5 around the nailing fin of the window, and then your wall
 6 sheathing.
 7 Q. Okay. Was there Tyvek used against the wall
 8 sheathing on the lake side wall that you were
 9 discussing, on 2130 Payette?
 10 A. Around the window area there should have been
 11 Tyvek. The window nailing frame over the top of it,
 12 except for at the bottom, and then the window tape.
 13 Because I believe we had wood trim around these windows,
 14 which the veneer would have abutted up against. I would
 15 have to see an enlargement of this plan to really tell,
 16 or not, where the stone started and stopped.
 17 Q. But, in general, did you have Tyvek covering
 18 the entire face of the lake side facing wall?
 19 A. There should have been, yes.
 20 Q. Who installs Tyvek, normally?
 21 A. My workmen.
 22 Q. Do you do it yourself ever?
 23 A. Yes.
 24 Q. And do you know who installed it, if anyone,
 25 on this house?

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1 A. It would have been myself, or any of my
 2 workmen.
 3 Q. And do you recall whether you did install
 4 Tyvek on that entire wall?
 5 A. Not on the entire wall. Around the window
 6 openings, yes.
 7 Q. But not the rest of the wall?
 8 A. I don't recall that or not. I don't know.
 9 Q. Is it standard to do the entire wall and not
 10 just around openings?
 11 A. If there is a rock veneer involved or not, is
 12 that your question? I guess the question is a little
 13 vague to me.
 14 Q. So in standard practice, in your practice,
 15 when you have an entire wall that may or may not have a
 16 window exterior, does Tyvek cover the entire wall
 17 sheath?
 18 A. Yes.
 19 Q. And do you know whether it covered the entire
 20 wall sheath here?
 21 A. Where we had some veneer applied, I cannot
 22 recollect whether or not we had Tyvek going around the
 23 entire wall or not.
 24 Q. Why would you not have it going around the
 25 entire wall if there was veneer?

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1 A. I don't know. You asked if I recollect or
 2 not, and I don't recollect.
 3 Q. Would you expect there not to be Tyvek
 4 underneath a stone veneer exterior?
 5 A. Would you rephrase or re-ask your question
 6 again?
 7 Q. Yes. Is there any reason why a builder, such
 8 as you, would not install Tyvek on an entire wall facing
 9 underneath a stone veneer?
 10 A. Not that I could think of.
 11 Q. So I am going to repeat what we talked about
 12 so I can understand it. My understanding, in your
 13 practice, you, or your carpenter, or your crew install
 14 the Tyvek whenever you install Tyvek on a wall; is that
 15 right?
 16 A. Correct.
 17 Q. And then do you install the flashing after, or
 18 before you install the Tyvek?
 19 A. It should have been before the Tyvek, so the
 20 Tyvek would overlap the flashing.
 21 Q. So the Tyvek would go over the flashing?
 22 A. Yes.
 23 Q. And how far down underneath the flashing would
 24 the Tyvek normally go?
 25 A. The flashing would stop it from going down

1 past its bend. So you can only go down the depth of the
 2 flashing.
 3 Q. Okay. Do you recall the depth of the flashing
 4 you used on this project?
 5 A. I don't recall.
 6 Q. What's the standard size flashing that you
 7 use?
 8 A. Do you want standard size? You would want the
 9 flashing to extend past the deck ledger, and above the
 10 height of your finished deck.
 11 Q. And do you recall what size you used here?
 12 A. I do not recall.
 13 Q. And is there a standard size you use in
 14 general, when you have flashing around a deck?
 15 A. In general, it was what was available at the
 16 lumberyard. They stocked what they call "drip
 17 flashing."
 18 Q. What does that mean?
 19 A. That's just a nomenclature used for the
 20 product, a 90-degree flashing.
 21 Q. What size is that?
 22 A. It's generally around an inch-and-a-half by
 23 inch-and-a-half.
 24 Q. Do you ever use four-by-four flashing?
 25 A. At roof lines where they meet wall lines, just

1 what you mean?
 2 A. Yes, it is.
 3 Q. Do you recall whether these plans specified a
 4 specific size flashing?
 5 A. I do not recall.
 6 Q. Is it typical for plans to specify the size of
 7 flashing?
 8 A. Yes.
 9 Q. Did you keep a copy of the entire plans that
 10 you received in this case for building?
 11 A. I have my working copy of plans. I believe I
 12 would leave the approved set by the city with the
 13 homeowner.
 14 Q. And did you produce to me your working copy of
 15 the plans?
 16 A. I believe I failed to do that. They are a
 17 mess. Sorry.
 18 Q. What do you mean, "mess"?
 19 A. The working copy of a set of plans would be
 20 tossed around on the job site for roughly a year, lots
 21 of people looking at it, tearing pages, tearing pages
 22 off to make notes of. Sometimes they would cut out a
 23 detail to carryover up to the roof, or to look at the
 24 detail without having to get up and down ladders or
 25 scaffolding.

1 because I needed the extra height.
 2 Q. Why wouldn't you use four-by-four at the deck
 3 ledger?
 4 A. I don't know.
 5 Q. Do you have a standard practice when you are
 6 installing flashing around a deck ledger of using
 7 four-by-four, or one-and-a-half by one-and-a-half?
 8 A. The inch-and-a-half by inch-and-a-half was
 9 generally available in longer lengths, like ten feet or
 10 more; ten foot, I believe. The four-by-four flashing
 11 was available in -- it was called "step flashing," and
 12 it was basically anywhere from one to ten inches long.
 13 Q. And so do you have a standard practice when
 14 you are installing flashing around a deck ledger of
 15 using four-by-four, or one-and-a-half by one-and-a-half?
 16 A. I would probably use inch-and-a-half by
 17 inch-and-a-half because of the longer lengths.
 18 Q. And in your experience --
 19 A. And --
 20 Q. Go ahead.
 21 A. And may I qualify the answer? If there was a
 22 callout on the details of the plans, I would use the
 23 callout on the plans.
 24 Q. So if the plan specifically called for a
 25 different size flashing, you would follow that; is that

1 Q. Do you still have them?
 2 A. I believe I do.
 3 Q. So if I ask you to go back at some point and
 4 look at them, you could tell me whether or not they
 5 called out a specific flashing size?
 6 A. If that page had not been torn out or totally
 7 destroyed beyond being able to read it.
 8 Q. And would plans typically callout a weight of
 9 felt to use?
 10 A. I believe so.
 11 Q. And do you know whether they did in this case?
 12 A. I do not know.
 13 Q. And would they typically callout where to
 14 install Tyvek?
 15 A. Yes.
 16 Q. And would they callout how far underneath the
 17 deck ledger the Tyvek should run?
 18 A. I don't think you would want your Tyvek to run
 19 behind your deck ledger, because you are trying to get
 20 all the moisture out over the top of it.
 21 Q. So you have the Tyvek on the exterior side of
 22 the flashing, flush with the bottom V part of the
 23 flashing?
 24 A. In the 90-degree bend of the flashing, yes.
 25 Q. Yes. The 90-degree bend, thank you.

1 In your experience and in your practice, you
 2 do not install Tyvek behind flashing; is that correct?
 3 A. I try not to. I mean, there might be specific
 4 instances where you have to, but you try and have the
 5 Tyvek come over the top of your flashing.
 6 Q. And what specific instances would you
 7 anticipate doing Tyvek behind the flashing?
 8 A. I can't recall off the top of my head. But
 9 I'm sure I've experienced something like that.
 10 Q. But sitting here today --
 11 A. Maybe in the -- well, I can't recall at this
 12 time.
 13 Q. Sitting here today, you are not sure what
 14 circumstances that would be?
 15 A. I'm not sure.
 16 Q. Is there anything else you want to say to
 17 amend the answers you just gave?
 18 A. I can recollect maybe an instance where you
 19 would want the flashing to come over the top of the
 20 Tyvek. If there is an instance at the top, you have
 21 flashing, say, where you have a roof member coming in,
 22 you would want the flashing to come over the top of
 23 Tyvek so the flow of water keeps on the outside and
 24 doesn't get behind the Tyvek. That would be an
 25 instance.

1 A. Okay? It is supplied to the wall.
 2 Q. Right.
 3 A. That would support the deck joists, and also
 4 support the decking, the finished decking.
 5 Q. Okay. I think I'm no longer -- I'm going to
 6 have to show -- we're going to have to get some pictures
 7 up to talk about this more clearly. So give me a
 8 second, and I'll find some.
 9 MR. COLLAER: Alyson, are you planning to
 10 break for lunch, or what?
 11 MS. FOSTER: We could do a short break; is
 12 that okay?
 13 MR. COLLAER: Sure.
 14 MS. FOSTER: I want to make sure I don't
 15 impact Kevin's schedule.
 16 MR. COLLAER: Kevin is at 2:30, but we've got
 17 to wrap it up about 5:00.
 18 MS. FOSTER: Well, let's --
 19 MR. COLLAER: Okay. I understand.
 20 MS. FOSTER: Let me get through this issue.
 21 MR. COLLAER: Sure.
 22 MS. FOSTER: This is what I want to look at.
 23 Let's look at Exhibit 25.
 24 (Exhibit 25 marked.)
 25 Q. (BY MS. FOSTER) This is a document Bates

1 Q. And if you have a deck ledger of one inch, and
 2 you used one-and-a-half-inch flashing, and you put Tyvek
 3 on the outside of that flashing. Do you think that's
 4 sufficient to prevent moisture from coming in behind the
 5 Tyvek?
 6 A. Could you re-ask that question again, please?
 7 Q. If you have a one-inch deck ledger.
 8 A. A one-inch deck ledger.
 9 Q. And a one-and-a-half-inch flashing, and you
 10 put the Tyvek on the outside of the flashing in the
 11 manner you've described.
 12 A. The deck ledger is, basically, at an
 13 inch-and-a-half wide.
 14 Q. Inch. Is it normally an inch-and-a-half?
 15 A. It is generally a framing member. A deck
 16 ledger is a framing member that's applied to the side of
 17 the wall. The flashing would have come over an
 18 inch-and-a-half, and it has another quarter-inch bend to
 19 ensure the water gets out over the top of the board, and
 20 flows out away from the building.
 21 Q. So in your experience, the vertical side of
 22 the flashing extends an inch-and-a-half above the deck
 23 ledger? Is that what you just said?
 24 A. The deck ledger is a framing member.
 25 Q. Right.

1 labeled RP 1 through RP 24, "Report of Findings" issued
 2 by Rimkus Consulting Group, dated May 15, 2014. Does
 3 that look right to you?
 4 A. Yes.
 5 Q. Have you seen this before?
 6 A. I believe this was sent the day before
 7 depositions.
 8 Q. Yesterday?
 9 A. Yesterday was the start of the deposition. It
 10 would have been Tuesday.
 11 Q. Tuesday, you received it by Tuesday?
 12 A. I believe that would be your timely filing,
 13 yes.
 14 Q. We could bring that into the record, if you
 15 want?
 16 A. No. I'm sorry I brought it up.
 17 Q. Because where are your plans, sir?
 18 A. I don't know.
 19 Q. Okay. Let's move on.
 20 Let's go back to discussing flashing and deck
 21 ledger. Can you, please, turn to page RP 15, page 15?
 22 A. (Witness complying.)
 23 MR. MILLEMANN: Where are we in the exhibits?
 24 I don't have a copy of it.
 25 MR. NEVALA: Page 15.

1 MR. MILLEMANN: Page 15.
 2 Q. (BY MS. FOSTER) Okay. And do you see this
 3 top picture? It's called "Photograph 7," and it's
 4 titled "Existing flashing at the deck ledger board." Do
 5 you see that?
 6 A. Yes.
 7 Q. And you received this document on Tuesday of
 8 this week; is that correct?
 9 A. Monday or Tuesday. I think Counsel provided
 10 me with a copy of this.
 11 Q. And did you read it?
 12 A. I briefed through it. I didn't read 100
 13 percent of it, to answer your question, yes.
 14 Q. Okay. But you know this report was created
 15 for 2130 Payette, the house we're still talking about;
 16 correct?
 17 A. Yes.
 18 Q. On this photo, do you see the flashing?
 19 A. Yes.
 20 Q. And how tall is it?
 21 A. I would say it looks roughly, it is rather
 22 beat up, about an inch-and-a-half above the deck ledger.
 23 Q. So the deck ledger is the piece of wood
 24 underneath it?
 25 A. That is correct.

1 A. No, it would abut up to it.
 2 Q. Oh, okay. And how far above the spacer is the
 3 flashing coming here?
 4 A. It would appear to be about a half inch or so.
 5 Q. And is that typical?
 6 A. I would say that would be typical, yes. For a
 7 one-inch finish decking material, yes.
 8 Q. So for a one-inch finish decking material,
 9 it's your standard practice to use flashing that's about
 10 an inch-and-a-half?
 11 A. Yes.
 12 Q. And not four inches?
 13 A. That would be correct, yes.
 14 Q. And do you see any Tyvek here?
 15 A. If I go to Picture No. 5, I see Tyvek.
 16 Q. Picture No. 5 is around the door; correct?
 17 A. Uh-huh, it's right around the corner from
 18 where this deck ledger is, I believe. There is no
 19 reference or scale in this picture.
 20 Q. So you don't know where this picture is?
 21 A. It's similar on the west face of the house.
 22 Q. But not on the same side as the door; correct?
 23 A. It's not on the same face of the door, that's
 24 correct.
 25 Q. And on Photograph 7, do you see Tyvek?

1 Q. I see. I've been using the wrong phrase.
 2 If you look to the right of the flashing, you
 3 see a thinner board abutting it; do you see that?
 4 A. Yes, I do.
 5 Q. And what is that called?
 6 A. A spacer.
 7 Q. And are spacers present consistently against
 8 flashing on a deck?
 9 A. The purpose of the spacer is to elevate the
 10 veneer at the same height as my finish decking, the
 11 finished height of my decking, which I believe was a
 12 Trex composite plastic material that was roughly an inch
 13 in thickness.
 14 Q. So are you saying that the deck was --
 15 A. May I finish my question first, please?
 16 Q. Your answer?
 17 A. Yeah, let me finish my answer, please.
 18 Q. Yes, please.
 19 A. The spacer was put in to hold up the veneer,
 20 or space the veneer stone up. So when we put our finish
 21 decking in, it will slide under the stone to make it
 22 look like the veneer was sitting right -- either came
 23 through, or sitting on top of the deck.
 24 Q. And so the deck would be placed over the
 25 spacer?

1 A. It appears tar paper was applied directly to
 2 the wall sheathing.
 3 Q. So no Tyvek?
 4 A. Not in Photograph 7.
 5 Q. And in Photograph 8, do you see Tyvek there?
 6 A. In the white section of the picture, I cannot
 7 tell if that is mortar, or if that is Tyvek impregnated
 8 with mortar.
 9 Q. And would it surprise you to know that there
 10 was no Tyvek on this wall facing at all?
 11 A. Yes, it would surprise me.
 12 Q. You would expect there to be Tyvek?
 13 A. At least around the window and door, similar
 14 to what you see in Photograph 7 --
 15 Q. Right.
 16 A. -- where you have Tyvek coming around where
 17 the wood trim would meet the Tyvek.
 18 Q. This is a lake facing wall; correct?
 19 A. Yes, this would be -- I would assume, and this
 20 appears to be what you would call dining window facing
 21 east.
 22 Q. Facing the lake side?
 23 A. Yes.
 24 Q. And would you expect Tyvek to be over that
 25 whole wall, and not just a part of the window?

1 A. I cannot tell if it is just underneath the
 2 window there or not. But I would expect Tyvek to come
 3 out far enough from the window to overlap the tar paper.
 4 Q. And the flashing?
 5 A. Flashing at the deck level, not necessarily.
 6 Q. You don't bring Tyvek down to the deck level?
 7 A. In areas where we have veneer, possibly not.
 8 Q. Why not?
 9 A. It seems like a double effort. I don't know.
 10 Q. You think that Tyvek and tar paper is a double
 11 effort underneath veneer?
 12 A. That was maybe too quick of a response. I'm
 13 shocked that I'm not seeing Tyvek there, let me put it
 14 that way.
 15 Q. And do you see tar paper in Photograph 7?
 16 A. Yes, I do.
 17 Q. And can you tell what weight it is by looking
 18 at it?
 19 A. Not in this picture, I cannot really say
 20 whether it's 15 pound or 30 pound.
 21 Q. Can you tell from Photograph 8?
 22 A. I cannot.
 23 Q. And how many layers, if you can tell, of the
 24 tar paper or felt were there?
 25 A. It appears to be just one.

1 shield. To answer your question, yes, it could refer to
 2 Tyvek.
 3 Q. And you can't tell, based on Photograph 7,
 4 whether there was any moisture barrier between the deck
 5 ledger and the wall sheathing?
 6 A. I cannot.
 7 Q. Do you have any reason, looking at that photo,
 8 to think that it was?
 9 A. I cannot.
 10 Q. And would you expect it to be?
 11 A. It depends how neatly trimmed the membrane was
 12 cut from around the deck joist, the deck ledger board.
 13 I could expect to see it, or I could not expect to see
 14 it in this picture.
 15 Q. But would you have expected it to exist,
 16 whether or not it's reflected in the picture?
 17 A. Yes.
 18 Q. And would you expect it to go between the deck
 19 ledger and the wall sheathing, typically, a moisture
 20 barrier?
 21 A. Yes.
 22 Q. Can you please turn to page RP 18?
 23 A. (Witness complying.)
 24 Q. And you see Photographs 11 and 12.
 25 A. Yes.

1 Q. Okay. Could you please turn to page 4 of the
 2 report, which is Bates labeled RP 6?
 3 A. (Witness complying.) This page here
 4 (indicating)?
 5 Q. This page here (indicating).
 6 A. Oh, I was looking at page 4. Sorry.
 7 Q. That's okay. And you see bullet points on
 8 this page?
 9 A. Yes, I do.
 10 Q. If you go to the fourth bullet point, it says,
 11 "Existing flashing at the deck ledger consisted of a
 12 single metal angle covering the top of the ledger and
 13 extending approximately 1-1/4 inches up the wall. No
 14 moisture barrier was installed between the deck ledger
 15 and the wall sheathing in Photograph 7." Is that
 16 correct?
 17 A. That is correct.
 18 Q. And that is the photograph we were just
 19 looking at, Photograph 7?
 20 A. For the first couple sentences, yes. I don't
 21 know from this picture whether you can tell if there was
 22 a moisture barrier between the deck ledger and the wall
 23 sheathing.
 24 Q. And does the moisture barrier refer to Tyvek?
 25 A. It could be Tyvek. It could be ice and water

1 Q. And is it fair to say, these photographs are
 2 of the area around the french doors?
 3 A. Yes.
 4 Q. And do you see rot in both pictures?
 5 A. Yes.
 6 Q. What could have caused that rot, in your
 7 experience?
 8 A. Water wicking up from the porch, or water
 9 coming down from a leak in the roof.
 10 Q. Do you know whether there was a leak in the
 11 roof here?
 12 A. I do not. I was not allowed to get up and
 13 finish my inspection to see if there was any damage to
 14 the roof.
 15 Q. So you think it's possible there was a roof
 16 leak?
 17 A. In this country, there is always possibility
 18 for a roof leak.
 19 Q. On this house, do you think it's possible for
 20 a roof leak?
 21 A. Yes.
 22 Q. And what was the other reason you said; water
 23 wicking up from the ground?
 24 A. Off the deck.
 25 Q. Wouldn't the moisture barrier prevent that

1 from coming in?
 2 A. If there was enough snow on the deck in
 3 freezing temperatures, water melting off the roof, I
 4 could see a great puddle of water occurring in this
 5 area, which could push water up to however high it could
 6 go. It could be a foot. It could be two feet.
 7 Q. Of snow, you mean?
 8 A. No, of water, hydraulics pushing the water up
 9 the wall.
 10 Q. But doesn't the moisture barrier prevent that?
 11 A. If it can get above the moisture barrier, it
 12 will get above it. It will get behind it.
 13 Q. Isn't the layering of the moisture barrier and
 14 the flashing intended to prevent that?
 15 A. Yes.
 16 Q. And why didn't it prevent it here; do you
 17 know?
 18 A. I really don't know. There could have been
 19 penetrations by nails from the masons, penetrations from
 20 me and my men installing the deck, by just pushing the
 21 deck, the finished deck boards against the wall could
 22 penetrate that moisture barrier that overlaps the
 23 flashing. That would be my two areas that I could think
 24 of right now.
 25 Q. But in your --

1 would have repaired it before the finish work would have
 2 continued.
 3 Q. And if it were one of your men, would they
 4 know enough to tell you that this occurred?
 5 A. They would either tell me, or taken upon
 6 themselves to fix it.
 7 Q. Could this have happened because the Tyvek did
 8 not go behind the flashing?
 9 A. I would say, that is a possibility.
 10 Q. When you typically install decks in McCall, do
 11 you put Tyvek behind the flashing?
 12 A. Not on decking, no. The Tyvek has got to go
 13 over the top of the flashing.
 14 MS. FOSTER: I have more questions on this,
 15 but it's noon. Do you guys want to take a quick lunch?
 16 MR. COLLAER: Off the record.
 17 MS. FOSTER: Off the record.
 18 (A lunch recess was had.)
 19 MS. FOSTER: Back on the record.
 20 Q. (BY MS. FOSTER) Chris, before lunch, we were
 21 discussing Exhibit No. 25, which is the Rimkus report.
 22 A. Okay.
 23 Q. If you could turn to page 5 of the report, RP
 24 7?
 25 A. Okay.

1 A. That --
 2 Q. Go ahead.
 3 A. That would cause moisture to get up above and
 4 behind the moisture barrier.
 5 Q. So the only thing you can think of are
 6 penetrations by nails from the masons, or from your men
 7 installing the deck; is that right?
 8 A. The decking, or the masons installing their
 9 wallpaper -- or not wallpaper, but their felt paper.
 10 Q. Okay. But were you there, supervising?
 11 A. I was most likely on the project at some time,
 12 yes.
 13 Q. Did it ever come to your attention that there
 14 were penetrations made of the moisture barrier?
 15 A. It's really hard to supervise every nail that
 16 gets put into the building. There are -- would you
 17 re-ask your question?
 18 Q. Did it ever come to your attention that there
 19 were penetrations made of the moisture barrier?
 20 A. No.
 21 Q. If there had been, wouldn't that be a big
 22 problem?
 23 A. Yes.
 24 Q. And isn't that something --
 25 A. And if it would have been to my knowledge, I

1 Q. And if you could look to the second full
 2 paragraph, it says, "The observed conditions at the
 3 Petrus residence demonstrated that flashing installed at
 4 the deck ledger at the time of original construction was
 5 not adequate to protect the exterior wall envelope."
 6 Do you agree with that?
 7 A. With this person's statement?
 8 Q. With that sentence.
 9 A. Did this person observe it firsthand, or did
 10 he observe it after everything was torn apart, or did he
 11 assume -- take information from Mr. Value or Mr. Waite?
 12 Q. And so do you agree with this sentence or not?
 13 A. No.
 14 Q. Why not?
 15 A. I believe that the flashing as what I saw on
 16 that photograph, it appeared to be of sufficient height.
 17 And if that was what was called out on the plans, I
 18 would assume that it's this guy's opinion.
 19 Q. So in your opinion, the height of the flashing
 20 was adequate to protect the exterior wall envelope; is
 21 that correct?
 22 A. Yes.
 23 Q. And the next sentence, "The top of the
 24 flashing was at the same elevation as the top of the
 25 deck boards." Is that correct?

1 A. No, it's not.
 2 Q. Why not?
 3 A. According to your picture on page 7, or
 4 Photograph 7, it showed the flashing would be higher
 5 than my spacer. And the spacer would be probably taller
 6 or thicker than the finish deck board.
 7 Q. Okay. Let's take a look at that picture in
 8 closer detail on the computer, and I will call it up for
 9 you.
 10 A. You can see where the felt is torn on the end
 11 of my spacer board.
 12 Q. Correct.
 13 A. And the flashing, even though it's bent and
 14 beat up from the demolition, is still above my spacer.
 15 Q. By how much?
 16 A. I would venture to say, anywhere from a half
 17 inch, to three-quarters of an inch.
 18 Q. And is the deck board taller than the spacer?
 19 A. No, or else -- you put the spacer in so the
 20 finished deck can slide underneath the veneer.
 21 Q. So the spacer being what you think is half to
 22 three-quarters of an inch higher than the deck spacer is
 23 sufficient, in your opinion?
 24 A. Would you repeat that question?
 25 Q. I think you have two words confused. Yes,

1 MS. FOSTER: And, Steve, just to clarify this
 2 record, in case anybody reads it. I provided copies for
 3 the deponent and his counsel. Next time I am happy to
 4 bring five copies, instead of three, if that is more
 5 according to your --
 6 MR. MILLEMANN: I wasn't being critical. That
 7 is my practice, but, yeah.
 8 MS. FOSTER: No, that's fine.
 9 Q. (BY MS. FOSTER) Okay. Photograph 11 states
 10 at the top, "Rot and decay at the sill and side trims of
 11 the removed door frame." Is that right?
 12 A. Yes.
 13 Q. And in your professional opinion, what could
 14 have caused this rot and decay? What circumstances
 15 could cause this level of rot and decay?
 16 A. I would speculate that it would be moisture.
 17 Q. How would it get in?
 18 A. Next to the door frame, it could have -- I
 19 really hate to speculate.
 20 Q. Well, let's just be clear. You've been
 21 building homes for decades; correct?
 22 A. Yes.
 23 Q. So --
 24 A. Yes.
 25 Q. It --

1 just a second. I'm waiting for it to come up. So the
 2 flashing being half to three-quarters of an inch, is
 3 what you think that is, higher than the spacer.
 4 A. Uh-huh.
 5 Q. Is sufficient, in your opinion, to protect
 6 from moisture?
 7 A. Working in concert with the felt paper, yes.
 8 Flashing alone does not do that.
 9 Q. So if the flashing at that height with one
 10 layer of felt paper, you think those two things are
 11 enough to protect against moisture intrusion?
 12 A. Yes.
 13 Q. Even in the absence of Tyvek?
 14 A. Yes.
 15 Q. Can you, please, turn a couple of pages to RP
 16 18?
 17 A. (Witness complying.)
 18 Q. And looking at photograph 11.
 19 MR. MILLEMANN: Counsel, excuse me, I need to
 20 take a minute to get this, since copies weren't
 21 provided.
 22 MS. FOSTER: Sure. For the record, copies
 23 were provided for the deponent and his counsel. That's
 24 on the record, just to be accurate.
 25 MR. MILLEMANN: Thank you.

1 A. The water could channel -- I'll try and answer
 2 your question.
 3 Q. Go ahead.
 4 A. The water could channel down between the door
 5 and door jamb, if the weather stripping had been
 6 modified. Moisture could have gotten into the sill by
 7 improper screws being put into the drain channel of the
 8 door.
 9 Q. Okay. Anything else?
 10 A. Not that I can think of at this time.
 11 Q. And who installed the drain channel of the
 12 door?
 13 A. That would have come from the door
 14 manufacturer, that, all as one unit.
 15 Q. Do you inspect the door before it's installed
 16 when you are building a house?
 17 A. Yes.
 18 Q. And do you recall whether the doors here had
 19 improper screws put into the drain channel?
 20 A. They did not.
 21 Q. To cancel the double negative. They were put
 22 in properly on this door?
 23 A. There wouldn't be any screws put into the
 24 drain channel. They would, obviously, penetrate, let
 25 water get into the threshold, which is this item that

1 you see right here (indicating).
 2 Q. Okay. So on this door, on these two
 3 doors -- excuse me -- there were no screws in a drain
 4 channel; is that what you are saying?
 5 A. When we installed the door, there were no
 6 screws in the drain channel. When I inspected the doors
 7 on my first inspection, there were non-factory screws
 8 located in the drain channel.
 9 Q. When was your first inspection?
 10 A. It's on a piece of paper that, I believe, came
 11 from the other law firm.
 12 Q. Was it 2013, 2014?
 13 A. Yeah, it was '13, April of -- I think it was
 14 around April of 2013. It might have been August. I
 15 cannot remember those two dates.
 16 Q. All right. Let's take a quick detour, so that
 17 maybe we can get some of those dates locked down.
 18 A. Okay.
 19 MS. FOSTER: I'll hand you what we're going to
 20 mark Exhibit 26. It is a one-page document, Bates
 21 labeled Petrus 221.
 22 (Exhibit 26 marked.)
 23 Q. (BY MS. FOSTER) This is a letter to you, I
 24 believe, from Jason Mau from Greener, dated August 11,
 25 2013; is that correct?

1 not put back on correctly, some weather stripping was
 2 missing. There was evidence of the door not being
 3 operated correctly.
 4 Q. How was the door not operated correctly?
 5 A. In this particular door, it has a
 6 three-point -- it is what the manufacturer calls, a
 7 three-point locking mechanism. The three-point locking
 8 mechanism locks at the top, the middle, and the bottom.
 9 And you engage this by lifting up on the lever on the
 10 inside. It also locks the door.
 11 In the locking mechanism that goes through the
 12 top of the door, you could see where the mechanism that
 13 locks the door, call it a pin, was hitting the trim and
 14 the top of the door jamb. So the door was not
 15 being -- you could see -- was not being used correctly.
 16 Q. And in your opinion could --
 17 A. And that could damage the door.
 18 Q. Anything else?
 19 A. There was also evidence that it looked like
 20 somebody had tried to pry the door open with a crowbar.
 21 And that's all I can recall for right now, without
 22 looking at my responses to the requests for information,
 23 or my -- my right to not pursue to remedy the situation,
 24 whatever that is called. I don't --
 25 Q. Did you review that document in preparation

1 A. That is correct.
 2 Q. That's your signature?
 3 A. Yes, it is.
 4 Q. And this letter states, you would like to
 5 inspect the south facing door; correct?
 6 A. Yes.
 7 Q. So after this letter, did you then inspect it?
 8 A. Yes, I did.
 9 Q. Within a week or two of this letter,
 10 approximately?
 11 A. Yes. Yes, it was in August of 2013.
 12 Q. How long did you inspect it?
 13 A. I was there, approximately, between 30 and 40
 14 minutes.
 15 Q. And what did you look for?
 16 A. I looked for the condition of the door, looked
 17 at the condition of the crawlspace.
 18 Q. Anything else?
 19 A. I guess I was looking forward to see what
 20 might have happened to this door, and why. And it was
 21 evident that the -- I believe that was in my -- in a
 22 reply that was given after this report. There
 23 were -- in this, what I observed, was there was improper
 24 locations of screws that were non-factory. It was
 25 evident that the door hardware had been taken off and

1 for today's deposition?
 2 A. I did not.
 3 Q. Okay. In your opinion, is that level of
 4 rot -- could that level of rot have been caused from
 5 improper weather stripping?
 6 A. It could have been caused -- I hate to
 7 speculate -- but one way it could be caused is having
 8 the weather stripping removed. That's one of the
 9 problems with an out-swing door is you have the
 10 ability -- moisture has the ability to enter between the
 11 door and the jamb, run down and collect on top of the
 12 sill.
 13 Q. That's the top of the door, though; right?
 14 A. That is the bottom. That would be the
 15 left-hand side sill.
 16 Q. Is the door upside down?
 17 A. This -- no.
 18 Q. Is it the bottom of the door?
 19 A. Yes.
 20 Q. This is the removed door?
 21 A. Yes.
 22 Q. And in your opinion, that level of rot could
 23 have come from weather stripping that had been
 24 completely removed; is that what you just testified?
 25 A. Yes.

1 Q. And how long would that have taken to achieve
2 this level of rot?

3 A. I really can't speculate. The degrees of rot
4 can happen from temperatures, how much moisture is
5 there, whether it has the ability to dry out. So there
6 is several reasons. I would hate to speculate how long
7 that's happened.

8 Q. Okay. And if you look down to the next photo,
9 Photo 12.

10 A. Yes.

11 Q. Do you see the rot on the right-hand side?

12 A. I see a dark blemish spot, which would appear
13 to be rot.

14 Q. And in your professional opinion, what could
15 cause that?

16 A. I believe that was -- it could be -- I hate to
17 speculate. Either water coming down from the top, or
18 water wicking up from the bottom would be my
19 speculation.

20 Q. And what would cause that to occur?

21 A. There would -- if it was going to leak from
22 the roof, there would be a hole somewhere in the roof.

23 Q. And if it came from the bottom?

24 A. It would be some sort of hydraulic pressure
25 from a lot of snow and water on the deck. And that's an

1 15?

2 A. (Witness complying.) Yes.

3 Q. This states that this is a photograph showing
4 rotted floor joists. Do you agree with that assessment?

5 A. Yes.

6 Q. And in your professional opinion, what could
7 have caused these rotted floor joists?

8 A. In my professional opinion, this could have
9 been water leaking through the weep and drain channel of
10 the door above it that's been removed.

11 Q. That the channel had been removed?

12 A. No, from holes put into the channel through
13 improper screws.

14 Q. And how many of years of leaking from such
15 improper screws would have to occur to achieve this
16 level of rot, in your professional opinion and
17 experience?

18 A. I've never seen this much rot. I would really
19 care not to speculate. But I would say, it would be
20 more than one year.

21 Q. When you inspected the home in August of 2013,
22 you said that you found improper screws in the drain
23 channel; is that correct?

24 A. That is correct.

25 Q. And do you know how they got there?

1 assumption.

2 Q. But again, aren't flashings and moisture
3 barrier meant to protect from that?

4 A. Yes.

5 Q. And have you ever built a house where someone
6 called you, and said that they had experienced this
7 level of rot?

8 A. No.

9 Q. And the houses in McCall with decks,
10 typically, receive snow on them in the winter; correct?

11 A. Correct.

12 Q. But isn't it possible that here, there was a
13 problem with the flashing and the moisture barrier that
14 caused this?

15 A. There also could have been a problem with too
16 much snow on the deck, and too much water allowed to get
17 on the deck.

18 Q. So is the answer to my question; "yes," or
19 "no"?

20 A. Would you restate the question?

21 Q. Isn't it possible that here, that there was a
22 problem with the flashing and the moisture barrier that
23 caused this?

24 A. There is always a possibility, yes.

25 Q. And if you turn the page to RP 21, Photograph

1 A. I do not.

2 Q. Did there come a time prior to that, when
3 Nancy Gentry-Boyd called you to her house to help that
4 door stop sticking?

5 A. Did you say, was there, or would you rephrase?
6 Repeat the question again. I'm sorry.

7 Q. Yes. Did there come a time prior to August
8 2013, when Nancy Gentry-Boyd called you to her house to
9 help that door stop sticking?

10 A. Yes.

11 Q. And did you inspect the door at that time?

12 A. Yes.

13 Q. How many years prior was that; do you know?
14 A. That was approximately within a year after
15 they moved into their home.

16 Q. And what was your assessment of the door at
17 that time?

18 A. The doors needed to be adjusted.

19 Q. What does that mean?

20 A. These particular doors, they come with
21 adjustable hinges. Each hinge -- I can't remember how
22 many hinges per door. There are adjusting screws in the
23 hinge that you can raise the door, or you can throw the
24 door; throw away from the jamb, or lift it up, or lower
25 it down. Those screws with use, and new screws,

1 temperatures being outside, subject to moisture, can get
2 loose or moved.

3 Q. And so you --

4 A. And so I probably took less than ten minutes,
5 and I just adjusted the screws, and the door was working
6 fine.

7 Q. And did you contact the door manufacturer at
8 that time?

9 A. I did not.

10 Q. Did there come a time later when you did
11 contact the door manufacturer?

12 A. Not that I recall.

13 Q. Who was with you, if anyone, when you
14 inspected the door in August of 2013, following the
15 letter we just discussed?

16 A. A representative of the plaintiff, I believe
17 his name was Mike Longmire. And that's all I recall
18 that was there. Mr. Petrus was there, as well. I'm
19 sorry. He was there.

20 Q. And did you speak with Mike Longmire?

21 A. He escorted me to the crawlspace, and then he
22 observed me taking -- or looking at the door above the
23 crawlspace.

24 Q. And did you speak with him about the door?

25 A. I am sure there was some discussion, but I do

1 A. Not seeing that amount of rot before, I would
2 say it would take at least a year to generate that much
3 rot.

4 Q. Could it take only a year to generate that
5 much rot?

6 A. I would only be speculating.

7 Q. You don't know?

8 A. I do not know.

9 Q. Was anyone else present at the time of your
10 inspection in 2013?

11 A. I recall Mr. Longmire and Mr. Petrus.

12 Q. Did you speak with Mr. Petrus at the time?

13 A. I introduced myself. I commented on his three
14 dogs that he had in the house; three hunting dogs, and
15 that was it.

16 Q. And what did he say to you?

17 A. I don't recall.

18 Q. You don't recall?

19 A. Not really.

20 Q. Did he say anything to you?

21 A. Not that I recall, no. I don't recall any
22 comments.

23 Q. Was he rude to you at that time?

24 A. I guess that comes to your definition of being
25 rude. I would say, he was non-conversant, and basically

1 not recall what that was.

2 Q. Did you tell him that you saw screws put in
3 improperly?

4 A. I do not recall if I informed him of that or
5 not.

6 Q. Did you ask him if the door had been changed
7 at all since he took over caring for the property?

8 A. I may have asked him if he had taken off the
9 locking mechanisms.

10 Q. And what did he say?

11 A. I do not recall what he said. I don't recall
12 if I even asked that question. But if the locking
13 mechanisms are not installed, or on the door correctly,
14 the door will fail to work correctly, which could lead
15 to water intrusion.

16 Q. And could that level of water intrusion that
17 we've been looking at be caused by a door not being
18 locked properly?

19 A. Yes.

20 Q. And how long would that take?

21 A. I think that the question is a little vague.
22 Could you re-ask it, or --

23 Q. Sure. That level of rot, could that result
24 from one month of not locking the door properly, two
25 months, two years? Do you have an opinion on that?

1 just observed me looking at the doors, and leaving the
2 premises.

3 Q. And he didn't try to interfere with your
4 inspection?

5 A. On that inspection, no.

6 Q. Okay. One more question, or set of questions
7 on Exhibit 25, which you have in front of you. Could
8 you please turn to page 4 of the report, which is Bates
9 labeled RP 6?

10 A. (Witness complying.)

11 Q. And this is the page with all the bullet
12 points.

13 A. Yes.

14 Q. And if you look to the fifth bullet point, it
15 says, "The stone veneer had been installed over a single
16 layer of asphalt impregnated felt paper (Photograph 8)."
17 Is that right? I mean, does it say that? Do you agree
18 with that?

19 A. Yes, it does say that.

20 Q. And is that sentence true?

21 A. After looking at Photograph 7, I would say,
22 yes.

23 Q. And do you recall, is it consistent with your
24 memory of the installation process of the stone veneer
25 on the lake side facing wall?

1 A. There will be at the joints, the paper is only
 2 30-some inches wide. So there will be an overlap of
 3 paper at the joints.
 4 Q. Of how much?
 5 A. An inch-and-a-half to three inches.
 6 Q. And you recall that from the installation
 7 process?
 8 A. Yeah, I do. Well, I'm going to withdraw that.
 9 That is the generally accepted way of installing felt
 10 paper is you have an overlap. I did not physically see
 11 if that was done on this particular wall system.
 12 Q. And did you see on that particular wall system
 13 whether there was more than one layer of felt used?
 14 A. No, I would just assume there was only one
 15 layer.
 16 Q. And that's what you would have expected from
 17 Eagle Masonry when they did their work?
 18 A. Yes.
 19 Q. You mentioned earlier, you had a few items of
 20 displeasure with them, including not doing some of the
 21 work they said they were going to do. What work was
 22 that, or did I misunderstand you?
 23 A. When they would come up to do work, a lot of
 24 times they would come up during the week. They promised
 25 to do a certain amount of stonework, which they did not

1 Please take one more look at these bullet
 2 points on RP 6. And if you go to the ultimate bullet
 3 point, three up. "The moisture content of the existing
 4 floor joists measured 17 percent." Do you see that?
 5 A. Yes, I do.
 6 Q. And is that a high percentage? That's not a
 7 good question.
 8 What would you expect to see in new floor
 9 joists, in terms of moisture content, if you know?
 10 A. Depending on the time of year. Springtime,
 11 where it's wet up here, the floor joists, they would
 12 absorb a little more moisture than normal. I would say,
 13 seven percent is generally considered furniture grade
 14 lumber, which is very dry.
 15 Q. And 17 percent, what is that considered?
 16 A. I probably would have considered that about
 17 average.
 18 Q. In all seasons?
 19 A. I think the 17 percent can average through the
 20 seasons, yes, but...
 21 Q. So if we took a --
 22 A. That's --
 23 Q. Go ahead.
 24 A. I've never measured the moisture content of
 25 floor joists.

1 do. They would do half of it, and turn back to Boise.
 2 They did not do the amount of work they promised to get
 3 done.
 4 Q. Did you develop concerns about their
 5 competence during that period?
 6 A. I would have to say, yes.
 7 Q. Did your concerns develop before or after they
 8 installed the single layer of felt paper beneath the
 9 stone veneer?
 10 A. Having them install the paper as generally
 11 accepted building practices, I would not raise a
 12 concern.
 13 Q. Had you had concerns with their competence
 14 before they installed the paper, the felt paper at all?
 15 A. No.
 16 Q. Those concerns came later?
 17 A. As we moved through the project, their ability
 18 to do the amount of work they said they would do, yeah.
 19 I was trying to move the project forward.
 20 Q. And did you observe when they installed the
 21 single layer of felt, the existence of Tyvek paper on
 22 the lake side facing wall?
 23 A. I do not recall.
 24 Q. Okay. I'm going to show you a few more
 25 pictures to ask you your thoughts on them. I'm sorry.

1 Q. So if we went and did -- and I'm not going to,
 2 but if we did go do a moisture content measurement right
 3 now of the floor joists at 2130, and it measured 17
 4 percent, you would not be surprised?
 5 A. I would not.
 6 Q. Okay. I'm going to show you a few pictures on
 7 here. They are a little easier to see. We can blow
 8 them up. I will say them aloud, the Bates number, and
 9 then at the end of the day email them, the joint
 10 exhibit, to Colleen, and all of you.
 11 These are photos that were provided for
 12 production from Disaster Recovery. I also have a memory
 13 stick that I brought for that entire production for you
 14 guys to have, if you want, for use in your depositions.
 15 At this moment, I am showing Mr. Kirk a photo Bates
 16 labeled RP 279_012. Can you see that, sir?
 17 A. Yes, I can.
 18 Q. And does this appear -- I can represent to you
 19 this is the --
 20 A. That is the door opening.
 21 Q. Correct, for the french doors we're
 22 discussing?
 23 A. Yes.
 24 Q. And do you see -- what is this part called?
 25 A. That's just some wood framing.

1 Q. Okay. So you see the wood framing on the
2 south side of the --
3 A. Yes, I do.
4 Q. Okay. And then you see the door jamb here
5 (indicating), is that what that is, or am I wrong?
6 A. That is not a door jamb. I'm not sure what
7 that is. It might be something temporarily placed on
8 top of the deck joists while they do their work.
9 Q. And is this here (indicating), where the door
10 would have been?
11 A. That is correct.
12 Q. And about how many inches from the -- what did
13 you call this (indicating)? I'm sorry.
14 A. It's a framing wall.
15 Q. From the framing wall. How many inches from
16 the framing wall does this appear to be to you?
17 A. May I clarify the picture a little bit --
18 Q. Yes, please.
19 A. -- for you?
20 Q. Yes, please.
21 A. Can I use your pencil as a pointing stick
22 here?
23 Q. Yes.
24 A. Here (indicating) is your exterior wall
25 sheathing.

1 can see the difference. And there is a -- you
2 can't -- I'm not even sure where you got this set of
3 plans, or what it is off of. It doesn't really show the
4 actual door. This here (indicating) is showing a window
5 and a door, which is not what is there.
6 Q. Okay.
7 A. This window (indicating), and this door
8 (indicating) are correct.
9 Q. Okay. Go ahead.
10 A. If I may answer your question?
11 Q. Go ahead.
12 A. The architect used different hashmarks on
13 these two different walls. There is a different
14 hashmark inside this, denoting a structural wall. And
15 there is a different hashmark on this two-by-four wall,
16 denoting the two-by-four wall.
17 Q. Okay. So I think you've answered my question
18 when you said this isn't exactly what happened.
19 A. Okay.
20 Q. Which is fine.
21 A. Okay.
22 Q. Do you recall, did there come a time, when it
23 was requested of you to push the door back a bit in
24 order to accommodate a decorative truss at the top of
25 the door?

1 Q. Okay.
2 A. Here (indicating) is your structural wall,
3 which is a two-by-six wall. Okay? You really can't see
4 a lot of it, because you've got the insulation foam
5 there that was still left on the stud. This
6 (indicating) is your structural wall.
7 This wall here (indicating) is non-structural.
8 That wall was put in place to give the appearance that
9 the stone was six or eight inches deep, like you would
10 achieve with real stone. For the lack of a better name,
11 lick-and-stick rock veneer.
12 Q. I understand.
13 A. The veneer that was put on is generally
14 only -- as I recall, it's not very thick, an inch,
15 inch-and-a-half. So you furr out that wall to give the
16 appearance of a full depth --
17 Q. I understand.
18 A. -- rock wall, of a natural rock wall. So,
19 basically, all this here (indicating) is non-structural,
20 and it's just a furr out wall. And I believe that's the
21 way it would be called out on the plans.
22 Q. Okay. Well, let's look at the plans, then.
23 They are not -- oh, you have them, Exhibit 24. Is that
24 how it appears on the plans?
25 A. It doesn't have a specific callout. But you

1 A. I do not recall that.
2 Q. Does this door appear to be set back away from
3 the outside wall? Is there a pushback in order to
4 accommodate the design?
5 A. Not to accommodate the design. It is to
6 accommodate the door. I'm trying to find the right
7 picture to see if it has it. On your picture,
8 Photograph 12 on RP 18. The door manufacturer supplies
9 their doors with what they call a "nailing fin."
10 There is a metal extrusion that comes off the
11 side of the door jamb. You can see it here
12 (indicating), and you can see it's very faintly right
13 here (indicating) in this picture. It's a nailing fin
14 by which you can apply the door to the outside of the
15 wall, and that sets the depth of the wall. That
16 determines where that door is placed in, inside the
17 wall.
18 Q. So here the door was set back?
19 A. There you go.
20 Q. Is this my pen?
21 A. Yeah, I don't know.
22 Q. The door was set back to accommodate the
23 nailing fin?
24 A. No, the door was not set back at all.
25 Q. What is this gap right there (indicating)?

1 A. I don't know. That door should have been
2 flush with the edge of that plywood right there
3 (indicating). I see that as something that -- the
4 people doing the work, the demolition work, put
5 something on the deck to keep all this debris from
6 falling below the deck, because they had to go below the
7 deck to clean up.

8 Q. So if they testified that they didn't do that,
9 and this is how they found it, would you have an
10 explanation for that?

11 A. If I'm seeing what I'm seeing, this
12 (indicating) continues clear over here to pass where the
13 temporary wall is. Do you see what I'm seeing?

14 Q. I don't see a temporary wall.

15 A. Or a temporary floor, excuse me.

16 Q. I don't think that's connected to this; is it?

17 A. I don't know.

18 MR. NEVALA: It's the same color.

19 Q. (BY MS. FOSTER) So this is not what you
20 installed; is that what you are testifying?

21 A. I have no idea what that might be. Unless he
22 has another picture to reference what that is.

23 Q. Okay. So I'm adding to this exhibit, the
24 document Bates labeled RP 279_013.

25 MR. MILLEMANN: These don't have Bates

1 Q. Oh, you remember putting flashing underneath
2 the door sill?

3 A. I see it right there (indicating).

4 Q. And you remember doing it?

5 A. I do not remember doing it, but I can see that
6 it has been done.

7 Q. Okay. Go ahead.

8 A. That was furred out to support the edge of the
9 sill, so when you step on it, it doesn't flex and break.

10 And I believe I have a picture of that on the pictures I
11 supplied through the discovery process, before the door
12 was torn out.

13 Q. And this (indicating) is the flashing?

14 A. That is a combination of flashing and ice and
15 water shield.

16 Q. And is that what this is (indicating)?

17 A. It looks like it, but some of it has been
18 removed. I believe that could be it, yes.

19 Q. And --

20 A. Without any degree of certainty, I cannot say,
21 yes, or no.

22 Q. So you don't know whether this was the same
23 thing you saw in the previous picture?

24 A. It looks like it's been torn apart. I really
25 truly cannot tell.

1 numbers?

2 MS. FOSTER: We provided both, some with and
3 without. And we provided it in PDF, that does.

4 MR. MILLEMANN: You don't have the Bates
5 number?

6 MS. FOSTER: RP 00279_013. It is possible
7 that what you printed out doesn't have Bates numbers.

8 MR. MILLEMANN: It does.

9 MS. FOSTER: It does.

10 MR. MILLEMANN: 279 under score, what?

11 MS. FOSTER: 013.

12 MR. MILLEMANN: Okay. Thanks.

13 Q. (BY MS. FOSTER) Does this picture help you
14 understand --

15 A. Yes, it does.

16 Q. -- the prior?

17 A. Yes, it does.

18 Q. Please explain how.

19 A. Can I borrow your pen, again, for a pointing
20 instrument?

21 Q. Yes.

22 A. From this wall sheathing right here
23 (indicating), to the front of this (indicating), is
24 basically -- sorry -- flashing and support that I put
25 underneath the sill right here (indicating).

1 Q. Let's provide other data. Okay. This photo
2 was taken, according to the metadata on my screen, and
3 the native files you all have had, 4-15, 2014 at 2:05
4 p.m., and the Bates labeled ending 012, moving to the
5 photo Bates labeled 013. That photo was taken one
6 minute later on April 15th, 2014, 2:06 p.m.

7 So seeing now that this photo was taken one
8 minute later than the previous one. Does that help
9 clarify whether this gray bar on Photo 12 is the same
10 gray bar that we see from a different angle in Photo 13?

11 A. I don't think it is a gray bar. I think that
12 is a --

13 Q. A black?

14 A. It's a metal flashing.

15 Q. And is it the same in both pictures; can you
16 tell?

17 A. The next picture, ice and water shield was
18 removed exposing that flashing.

19 Q. In that one minute?

20 A. Yeah, it doesn't take very long to pull it up.

21 Q. So it would have been re-applied for this
22 photo, since this is the later in time photo? In one
23 minute they would have removed it, and then put it back
24 on?

25 A. No, I would say, it's the other way around.

1 Q. But this photo was taken a minute later.
 2 A. If that is the case -- if that's the case,
 3 that does not make any sense to me, whatsoever.
 4 Q. Okay. That's fine.
 5 A. That picture there shows further demolition
 6 than the previous picture.
 7 Q. And can you still tell what this gap -- you
 8 still don't know what this gap is from?
 9 A. I do not.
 10 Q. And was this piece here (indicating), with the
 11 big hole in it, was this a piece that your folks had
 12 installed?
 13 A. That's part of the sub-floor.
 14 Q. Part of the sub-floor?
 15 A. That the wood flooring would sit on, as well.
 16 Q. Okay.
 17 MR. MILLEMANN: Alyson?
 18 MS. FOSTER: Yes.
 19 MR. MILLEMANN: 30 seconds, please.
 20 MS. FOSTER: No problem.
 21 For the court reporter, I will state we're
 22 adding the photo for this exhibit that is Bates labeled
 23 RP 000279_002. And I'll repeat that for Steve.
 24 MR. MILLEMANN: Thank you.
 25 MR. COLLAER: Adding another photograph 002.

1 A. Yeah. And it's --
 2 Q. So you don't know why this was jogged over
 3 like that?
 4 A. I don't see the jog that you are talking
 5 about. That looks like part of the door sill. That
 6 black portion there (indicating), that is this part of
 7 the door right here (indicating).
 8 Q. Okay.
 9 A. In reverse. You are looking at the bottom
 10 side of this, but this is black anodized aluminum.
 11 Q. And where is this flashing, where has it been
 12 bent?
 13 A. If we can go back to one of your first, I
 14 believe, your first picture.
 15 Q. Let's see if that works.
 16 A. The second page then, if you would enhance
 17 where your browser is?
 18 MR. MILLEMANN: Where are you at, please; 12
 19 or 13?
 20 MS. FOSTER: 13.
 21 THE WITNESS: If you take -- this is a piece
 22 of 90-degree flashing that extends over the floor, and
 23 it comes down over the rim joist, or whatever. That
 24 section right there (indicating), has been bent up. You
 25 are seeing this section right here (indicating). Here

1 MS. FOSTER: Steve, if you could turn to --
 2 MR. COLLAER: 279_002.
 3 MR. MILLEMANN: Okay.
 4 Q. (BY MS. FOSTER) And this photo was taken the
 5 day before?
 6 A. Okay.
 7 Q. And does this appear to be the right side of
 8 the french doors?
 9 A. Yes.
 10 Q. And is this rot I see on the right side?
 11 A. I see a black blemish that appears to be rot.
 12 Q. Okay.
 13 A. Can you enlarge that a little?
 14 Q. Yes. That's fine.
 15 A. Can you go down just a little bit where you
 16 were going to ask your next question? May I turn it a
 17 little bit?
 18 Q. So looking at this photo, is this black bar
 19 here, the flashing that you had installed?
 20 A. That looks like some flashing that has been
 21 bent from a 90-degree position to -- it looks like it's
 22 just been bent up. This -- to me, this appears that
 23 this should have been 90 degrees down from the edge of
 24 this sill right here (indicating).
 25 Q. From there (indicating)?

1 (indicating) from here (indicating) to right there
 2 (indicating), bent up.
 3 Q. (BY MS. FOSTER) And why was it bent up; do
 4 you know?
 5 A. I was not there doing the demolition.
 6 Q. It's part of the demolition that's bent up?
 7 A. Yes.
 8 Q. Okay. That's not my question. I don't care
 9 about that.
 10 A. I'm sorry.
 11 Q. The other parts that were not bent up, is this
 12 what you installed?
 13 A. That appears to be some metal flashing that
 14 would come up underneath this flashing, and extend over
 15 the deck ledger.
 16 Q. And is it flashing that you installed?
 17 A. Either myself or some workmen.
 18 Q. Okay. And going back to Photo 2, do you see
 19 this -- again, my question was about this black area
 20 here (indicating).
 21 A. Yes.
 22 Q. And what could have caused that?
 23 A. That would be rot, moisture.
 24 Q. Caused from the things you mentioned earlier?
 25 A. That would be a possibility of the things I

1 mentioned earlier, yes.
 2 Q. But you don't think it was from improper
 3 installation of flashing or moisture barrier; is that
 4 your testimony?
 5 A. Yes.
 6 Q. And this white area up here, do you know what
 7 that is?
 8 A. That looks like Tyvek that has been ripped off
 9 of the wall sheathing, and it doesn't all come off.
 10 Q. Okay. I'm going to show you Picture RP
 11 279_10. And again, we are looking at the door frame,
 12 and the flashing that we've just been discussing; is
 13 that correct?
 14 A. Yes.
 15 Q. And is this the door sill where the door would
 16 come up against?
 17 A. Yes.
 18 Q. And this underneath here (indicating), is this
 19 more flashing, or is this something else?
 20 A. Yes, that's more flashing.
 21 Q. Okay. And this piece of wood stops there,
 22 away from where the door sill is. Do you see that; this
 23 gap right here (indicating)?
 24 A. I do. I see that gap.
 25 Q. And how could that gap have come to exist?

1 MS. FOSTER: It just popped up.
 2 Q. (BY MS. FOSTER) Right. Again, it is still
 3 this gap that I'm asking about that I'm not
 4 understanding where this came from.
 5 A. Right. I don't -- I can't explain that. I
 6 don't -- I can't explain that.
 7 Q. Is that where the door would hit?
 8 A. The only reference I have is where the door
 9 would sit, is the nailing fin would be attached to this
 10 exterior sheathing right here, which is shown -- you can
 11 see it right here (indicating). See the nailing fin on
 12 this structure, or part of the wall. And it looks like
 13 that would come out about an inch-and-a-quarter. And
 14 that would be about how far that door would stick out.
 15 That's basically to accommodate wood trim, so that the
 16 door extrusion would not -- would end nicely to the
 17 trim. It would all look like one piece.
 18 Q. I'll wrap this up.
 19 A. I cannot explain that.
 20 Q. Let's just make it clear. On this Photo No.
 21 12, you do not know what this gap is between the wood
 22 and the black line that I see here?
 23 A. I do not.
 24 Q. Okay. Thank you.
 25 When you inspected the doors in August of

1 A. That could have been removed during the course
 2 of demolition, because I'm missing the top part of the
 3 flashing that came over this flashing, and the ice and
 4 water shield.
 5 Q. So would this piece of wood here (indicating),
 6 normally about this line here (indicating)? I know this
 7 is going to look terrible in the transcript, but I want
 8 to understand it.
 9 A. I do not see the correlation of the line of
 10 this sub-flooring in relation to the exterior wall.
 11 Q. So you do not intend to make this sub-floor to
 12 about this exterior one?
 13 A. I cannot answer that question. I don't
 14 understand it. I cannot explain that gap right there
 15 (indicating).
 16 Q. Should this sub-floor about that line?
 17 A. Where is that line in relation to the exterior
 18 wall sheathing?
 19 Q. Can you tell from these photos, the line I'm
 20 talking about, or, no?
 21 MR. MILLEMANN: Are you looking at 12?
 22 MS. FOSTER: Oh, we're on a photo that maybe I
 23 haven't entered. Have we entered 9?
 24 MR. COLLAER: I don't think so.
 25 MR. MILLEMANN: You might want to look at 12.

1 2013, did you observe any irregularities with the
 2 hardwood floors?
 3 A. I did not. And I remember looking at them.
 4 And I believe I have some pictures taken, looking down
 5 the plane of the door towards the floor, and I did not.
 6 And those pictures should show no irregularities.
 7 Q. Okay. So you do not recall any?
 8 A. I do not recall any.
 9 Q. And I think you may have heard yesterday,
 10 Nancy Gentry-Boyd testify that some of this damage could
 11 have been caused by teenagers running out of a hot tub
 12 over a wood floor. Is this level of damage that I've
 13 shown you in these photos consistent with people taking
 14 water off their bodies out of a hot tub?
 15 A. I'd care not to speculate.
 16 Q. You don't know?
 17 A. I don't know.
 18 Q. You think, it's possible?
 19 A. If there was some floor damage from people
 20 running out, I guess, as Nancy testified with being wet,
 21 it could cause any floor damage.
 22 Q. Did you see any floor damage?
 23 A. Not when I inspected in August, I did not.
 24 Q. And when you came back in April of 2014, did
 25 you see any floor damage at that time?

1 A. I do not recall seeing any.
 2 Q. Is the level of rot you see around the door
 3 frame consistent with people bringing water in from the
 4 hot tub off their bodies?
 5 A. I really hate to speculate.
 6 Q. You don't know?
 7 A. I don't know. If you're doing it 24 hours a
 8 day, possibly.
 9 Q. 24 hours a day?
 10 A. That would be speculating; wouldn't it?
 11 Q. Okay.
 12 A. So I don't know. I'm not privy to that. No,
 13 I don't know.
 14 Q. You testified a few minutes ago, that you
 15 don't recall contacting the door manufacturer; is that
 16 correct?
 17 A. Not when I was doing the inspections, or doing
 18 the repair work. At the time the reference to me was, I
 19 did not call the door manufacturer when Nancy asked me
 20 to come repair the door, or fix the door, whatever.
 21 Q. I see. Did there come a time when you did
 22 contact the door manufacturer?
 23 A. I did.
 24 Q. When was that?
 25 A. It would have been after I did this

1 me an email, I believe --
 2 Q. Then I'm --
 3 A. -- saying such and such.
 4 Q. All right. Now, I'm going to interrupt you,
 5 and hand you -- we are going quicker now, because we're
 6 almost out of time. So I want to keep us on focus.
 7 A. Okay.
 8 MS. FOSTER: A document that we are going to
 9 put as Exhibit 27. It is two pages, Bates labeled Kirk
 10 43 and 44.
 11 (Exhibit 27 marked.)
 12 Q. (BY MS. FOSTER) The first page is simply an
 13 email?
 14 A. Yes.
 15 Q. And the second page is simply a logo. The
 16 first page contains an email string; is that correct?
 17 A. Yes.
 18 Q. And if you go to the bottom, you can see an
 19 email from Mark Birrer to Julie Judnic, on September
 20 30th, 2014. Do you see that?
 21 A. Yes, I do.
 22 Q. Who is Julie Judnic?
 23 A. I would assume she works for the person that
 24 has the logo on the back page.
 25 Q. Nu-Vu?

1 inspection.
 2 Q. In August of 2013?
 3 A. Yeah, I may have contacted him before, or he
 4 contacted me.
 5 Q. Why would he contact you?
 6 A. He would have just contacted me, asking me if
 7 I knew what the problem was out at 2130 Payette Drive.
 8 Q. So you talked to a person?
 9 A. I talked to the sales representative who sold
 10 me these doors in 2004.
 11 Q. And what was his name?
 12 A. Mark Birrer, B-i-r-r-e-r, I believe that's how
 13 it's spelled.
 14 Q. That's correct. And what did you say to him?
 15 A. I believe I just asked him if these doors were
 16 under warranty.
 17 Q. Is that all you asked him?
 18 A. I believe so. I -- without reading any
 19 correspondence we had, I can't really remember. And
 20 then --
 21 Q. I'm sorry. Let me interrupt you. Did you
 22 have written correspondence with him?
 23 A. When I asked him if he had any -- if he could
 24 show me -- this was later on. If he could show me
 25 whether the doors were sealed at the factory. He sent

1 A. No, probably Weather Shield. Mark works for
 2 Nu-Vu, and he was contacting -- the customer relation
 3 contact for Weather Shield Windows & Doors. There is
 4 her title right there above it.
 5 Q. Thank you. And the email from Mark says, "In
 6 visiting with a contractor on a project yesterday, he is
 7 telling me that my competition informs him their french
 8 swing doors are sealed on the top and edges etc. from
 9 the factory." Do you see that?
 10 A. Yes, I do.
 11 Q. Were you that contractor?
 12 A. No, I was not contracting at this time.
 13 Q. And if you go up to the second email from the
 14 top, an email from Mark Birrer to you, October 2nd,
 15 2014. "Here you go Chris. As we discussed, I did the
 16 research."
 17 Does that refresh your recollection of,
 18 perhaps, were you that contractor?
 19 A. I'm not on the contractor referred to on the
 20 bottom. He was -- let me re-read that bottom.
 21 Q. Sure.
 22 A. (Witness reading.) I'll correct it. He is
 23 talking about me on the bottom in that first email.
 24 Q. Okay. And why did you contact him?
 25 A. There was some contention whether the doors

1 were sealed or not. And it was my belief, going clear
2 back when I started using Weather Shield windows in the
3 '90s, that these doors were sealed at the factory.

4 Q. And who made the contention that they weren't
5 sealed, that you just referred to?

6 A. I believe that would be Mr. Longmire.

7 Q. Okay. And so you reached out to Mark, and
8 asked him, if they were?

9 A. Yes.

10 Q. And he said, yes, and that is what this email
11 string says?

12 A. Yes.

13 Q. Okay. Thank you.

14 I am jumping around a bit, because I want to
15 make sure we get done by 2:30. So please bear with me
16 as I jump around in time and space.

17 A. Yes.

18 MS. FOSTER: I'm going to hand you what we're
19 going to mark as Exhibit 28.

20 (Exhibit 28 marked.)

21 Q. (BY MS. FOSTER) This is the inspection report
22 from Homecraft Home Inspections, Todd McKenna,
23 dated -- the date does not appear at the top. But my
24 understanding, this was completed -- excuse me -- three
25 pages in, the date is March 15th, 2012. Do you see

1 this is. Does anyone else see it? So without knowing
2 where this is, you don't know what could have caused
3 this?

4 A. If you want me to know what the cause is, it
5 would help to know what side of the house. I'm assuming
6 you are asking about the water signs. Without knowing
7 which side of the house it is on, I cannot answer that.

8 Q. I see. Because different causes would occur
9 at different locations?

10 A. Yes. One could be a spring that has sprung up
11 in the crawlspace during the high runoff, water runoff.
12 It also could be on the west side of the house, where a
13 great deal of snow is accumulated against the house, and
14 water runoff off the roof got above, say, my stem wall
15 and sill plate, and it penetrated the house that way.

16 Q. Okay. So if you look at picture 5.0, Picture
17 5.

18 A. Yes.

19 Q. You see the water here?

20 A. Yes.

21 Q. And you think that could be from snow runoff?

22 A. Yes, coming in from the outside of the house.

23 Q. And would you expect to see that level of
24 moisture in any crawlspace in McCall?

25 A. Yes.

1 that?

2 A. Yes, I do.

3 Q. I have a question about a photo on page 14.
4 And I have a color version here if that would be
5 helpful. Okay. Let me show you the color version. It
6 might help. It helps me.

7 A. Okay.

8 Q. Okay. And I see here these are pictures
9 pointing to ant signs, and moisture signs, and water
10 signs. Do you see that?

11 A. Yes, I do.

12 Q. And to what do you attribute those things?
13 And what I mean by that is, what do you think caused
14 ants, and water, and moisture?

15 A. Can you tell me what location of the house
16 that these are in; north, south, east, west?

17 Q. It's in a crawlspace.

18 A. Yes.

19 Q. I don't see that it says where it is.

20 MR. COLLAER: It says there is a picture of
21 4.5 on the prior page.

22 MR. NEVALA: So, yes, I was confused.

23 MS. FOSTER: Oh, I can barely see it. I see
24 it.

25 Q. (BY MS. FOSTER) Okay. I don't know where

1 Q. You would? And would it cause you concern for
2 the moisture security of the home?

3 A. I would if I knew I had that -- some of the
4 homes I've seen, this is not very much moisture, because
5 most of the time it will disappear after the spring
6 runoff. So I would try to remedy the situation. Where
7 I'm assuming that this was caused from -- on the east
8 side of the house, if the landscaping is too high to
9 allow drainage to the manhole cover that is outside for
10 the moisture getting in there, and drain away from the
11 house.

12 Q. So if you saw that level of moisture, you
13 would want to take steps to remedy it; is that what you
14 are saying?

15 A. If that was more than three or four inches
16 deep, yes. It's hard to tell how deep -- how much water
17 is there.

18 Q. Okay. Can you please turn to page 18?

19 A. (Witness complying.)

20 Q. And I have a color version here if that helps
21 you. If you see the top photo, 6.4. This appears to be
22 a line for the outside gas barbecue laying in the
23 crawlspace that should be capped off properly; is that
24 right? Is that what that says?

25 A. That's what that says, yes.

1 Q. When you built the house, did you install or
 2 have installed an exterior gas line for the barbecue?
 3 A. I do not recall. Do you know if the other end
 4 of this line connected to the gas line, or has it just
 5 been roughed into the house and not connected? I
 6 don't --
 7 Q. Well, that's my question to you. Why would
 8 this gas line be lying in the crawlspace without a cap?
 9 Is that how you would have left it? Did you build it
 10 that way with the gas line?
 11 A. No. I don't know. I don't know why that is
 12 there, or -- why that is there.
 13 Q. But you know you wouldn't leave it that way?
 14 A. No.
 15 Q. And in the top, where the arrow is pointing,
 16 you can see there are a couple of inches at the end of
 17 the gas line. Isn't it true that those inches would
 18 typically would stick out from the deck, and that this
 19 circle would be approximately flush with the deck, so
 20 that this would be the hookup for the barbecue; is that
 21 right?
 22 A. It's hard telling from this picture whether
 23 that is going to be a deck mount shut off, or a wall
 24 mount shut off.
 25 Q. So I'll represent, this is a deck mount.

1 Q. And you have no understanding of why a gas
 2 line would be pulled out completely from under the deck
 3 if a barbecue was being removed?
 4 A. No.
 5 Q. You have no speculation of what would cause
 6 that?
 7 A. I have no speculation.
 8 Q. Do you know whether your folks did this when
 9 they installed it?
 10 A. I do not know. Knowing Mr. Yensen's work, he
 11 would not have left it that way.
 12 Q. Thank you. That's my question.
 13 A. Sorry. That's -- I was surprised -- off the
 14 record. I was really surprised when I saw that.
 15 Q. So everything you are saying is on the record.
 16 You are on the record, technically, and literally, we
 17 are on the record.
 18 But you were surprised to see it?
 19 A. Yeah. Yes.
 20 Q. And you don't know how that happened?
 21 A. No.
 22 Q. And isn't it true, normally working with gas
 23 lines like that, you need to have some sort of HVAC
 24 certification or something?
 25 A. I believe that would fall into the plumbing

1 A. If we assume that that is a deck mount, would
 2 you repeat your question, please?
 3 Q. This tip up to the circle would normally be
 4 sticking out from the deck, so that's where the hookup
 5 could be placed; is that correct? I'm not trying to
 6 trick you.
 7 A. I know. I'm just trying to assume if that was
 8 a quick connect coupler, or if it's a valve.
 9 Q. I don't care the type. Would that be sticking
 10 up over the deck, normally? Is that how it would be
 11 installed?
 12 A. Where you see the base unit, above, yes, that
 13 would be above the deck.
 14 Q. That's all my question is.
 15 A. Okay. I misunderstood your question. I'm
 16 sorry.
 17 Q. That's all my question is.
 18 A. Okay. Sorry.
 19 Q. And if you were to remove the barbecue, and
 20 unhook it, however -- whatever type of valve this is
 21 meant to be, unhook it. Would you then pull the gas
 22 line into the crawlspace; do you know?
 23 A. I don't know.
 24 Q. You've never done that?
 25 A. I've never done that.

1 bureau, not HVAC.
 2 Q. Okay. Thank you. That is all I have for you
 3 on that document.
 4 A. Okay.
 5 Q. Did there come a time in April of 2014, when
 6 you visited 2130 Payette, again, to inspect the doors?
 7 A. I believe I was out there twice on the 15th,
 8 and again, after the demolition was started.
 9 Q. The 15th of April, 2014?
 10 A. Well, 2014?
 11 Q. 2014.
 12 A. Yes, 2014, that's when I went out and did
 13 another inspection.
 14 Q. And that is the day that you have stated in
 15 your discovery responses, you were there for 20 minutes,
 16 and then Ed made you leave; is that correct?
 17 A. Yes.
 18 Q. Was it 20 minutes?
 19 A. It was at least 20 minutes, no more than 45.
 20 Q. 20 to 45 minutes?
 21 A. Yes.
 22 Q. Who else was there?
 23 A. My counsel, a representative from this law
 24 firm.
 25 Q. From Mr. Millemann's law firm?

1 A. Yes. Sorry.
 2 Q. That's okay. Anyone else?
 3 A. Mr. Petrus was there.
 4 Q. Anyone else?
 5 A. That's all I recall at the present.
 6 Q. Do you remember the name of the person who
 7 represented Mr. Millemann's law firm that day?
 8 A. To the best of my -- yes. Yes, I do.
 9 Q. Who was that?
 10 A. Steve Lacey, L-a-c-e-y.
 11 Q. And what did Steve Lacey do while he was
 12 there?
 13 A. He inspected the crawlspace, as with Counsel
 14 and myself. And then we went back up on the deck, and
 15 looked at the door.
 16 Q. And did you speak with him?
 17 A. Yes.
 18 Q. What was said?
 19 A. I believe I asked him how it was -- just
 20 social stuff.
 21 Q. No. What was said about the door, the
 22 crawlspace in the house?
 23 A. We were trying to analyze why we have a
 24 problem, why the door will not work. There is just
 25 speculation on both our parts.

1 Q. Were you ever with him inspecting the door?
 2 A. Not with Steve Minor.
 3 Q. Only with the individuals you just mentioned
 4 on that first time?
 5 A. Yes. Yes.
 6 Q. Was there a second time in April of 2014 you
 7 went to inspect?
 8 A. After the demolition started, I was extended
 9 the opportunity to go out and look what had been -- I
 10 think they had only been working on it for a day, maybe
 11 two days. They started doing dismantling the deck, and
 12 the wall system, and taking the veneer off the wall.
 13 Q. And who was that?
 14 A. Mr. Longmire, the gentleman, Mr. Waite, that
 15 was the first and only time I met him. I think I
 16 testified to that earlier, and a helper. And I would
 17 assume he works for -- the helper would be working for
 18 either Restoration Pro, or Disaster Response, whatever
 19 at that time was working on it.
 20 Q. How long were you there?
 21 A. Ten minutes.
 22 Q. What did you do?
 23 A. I took pictures and left.
 24 Q. Did you talk to Eric Waite?
 25 A. Other than being introduced to him, I do not

1 Q. What was your speculation that you said to
 2 him?
 3 A. That the door had been altered from its
 4 factory presence. That somebody has jimmed with the
 5 locks, used a crowbar, looked at all that stuff. That's
 6 the crux -- that's mostly what I recall.
 7 Q. Do you remember seeing on the door any signs
 8 of duct tape?
 9 A. I did not.
 10 Q. And what did Steve Minor say was his
 11 speculation?
 12 A. I don't know what Steve Minor said.
 13 Q. Oh, he didn't say anything to you?
 14 A. Not Steve Minor.
 15 Q. I'm sorry. Steve Lacey. What did Steve Lacey
 16 say? You said you were discussing your speculations.
 17 What was his?
 18 A. He didn't see why the door wouldn't work
 19 either. I do not recollect any speculation from him.
 20 Q. So he didn't have any theory as to the
 21 problem?
 22 A. No.
 23 Q. And have you ever talked to Steve Minor about
 24 this case?
 25 A. No, that I can recollect.

1 recollect.
 2 Q. Did you ask him what he thought was the cause
 3 of the problem?
 4 A. I do not recollect.
 5 Q. Would you have asked him that?
 6 A. I think I would have. Yes.
 7 Q. And you don't recall an answer?
 8 A. I do not recall an answer.
 9 Q. Were you out there at any other time since
 10 this lawsuit started?
 11 A. No.
 12 Q. Have you talked about this lawsuit with Nancy
 13 Gentry-Boyd?
 14 A. No.
 15 Q. Not at all?
 16 A. Well, just like, I'm sorry. Yeah, I know. I
 17 don't know what's going on. Nothing of great length, or
 18 any -- talking about who said what, and who talked to
 19 who, no, none of that.
 20 Q. Have you spoken with Kevin Batchelor about
 21 this lawsuit over 2130 Payette?
 22 A. One, I cannot remember the day. It might have
 23 been in '13, or even 2012. I was sitting at my desk in
 24 the bank. Kevin walked in, and he asked me if I had any
 25 knowledge, or what I knew about this door in question.

1 Q. And what did you say?
 2 A. I basically said, I went out there once at
 3 Nancy's request to look at the doors, because they were
 4 not -- because she felt that they were quote/unquote
 5 "sticky." I went out and fixed them.
 6 I had a second request by Ms. Jan Loff, who is
 7 Nancy's caretaker a year later, saying the doors were
 8 sticking again. I went out and looked at the doors.
 9 They were working fine. And that's all that I know of
 10 the doors.
 11 I also recollect at several social events at
 12 Nancy's home from 2005 to 2008, 2009, I was generally
 13 invited out there for dinner with friends. I would ask
 14 Nancy how the doors were working. And she said they
 15 were working fine.
 16 Q. I'm sorry. I'm focused on the conversations
 17 with Kevin Batchelor right now.
 18 A. I'm sorry.
 19 Q. Any other conversations with him?
 20 A. Oh, that's -- my conversation with Kevin, I
 21 went out once and fixed the doors. I was requested to
 22 go out the second time. I went out. They were working
 23 fine. That's all I know about the doors. That was
 24 basically the extent of my discussion with Kevin.
 25 Q. So just the one conversation?

1 A. Not that I recall. We may have asked for a
 2 home inspection through the bank. But I do not
 3 recall -- nothing from me, personally, no.
 4 Q. What kind of inspections do you do for the
 5 bank?
 6 A. I do inspections to make sure that the work is
 7 following the money. Such as, the contractor puts in
 8 for a draw to be paid for concrete, excavation, and
 9 backfill. I'll go out there and take pictures to make
 10 sure that the concrete was done, backfilled.
 11 Q. So you are ensuring that the contractors to
 12 whom your bank issues the loan are following through the
 13 asserted bases for your lines of credit or loans; is
 14 that right, approximately?
 15 A. Yes, right. Make sure that the money is
 16 following -- the work is following the money.
 17 Q. But you are not doing any construction work,
 18 yourself?
 19 A. No.
 20 Q. You are just confirming that they are doing
 21 what they said they are going to do?
 22 A. Yes.
 23 Q. And that it was done?
 24 A. Yes.
 25 Q. I understand. Thank you.

1 A. Yes.
 2 Q. And none since then?
 3 A. Nothing to any great extent, other than just
 4 like, geez, you know.
 5 Q. Your emotional feelings about the case?
 6 A. Correct, nothing of any substance.
 7 Q. And have you spoken with Todd McKenna about
 8 the litigation at 2130 Payette?
 9 A. Nothing about the doors that I recall.
 10 Q. And Todd said nothing substantive to you?
 11 A. Not that I recall.
 12 Q. Did you advise him to seek an attorney?
 13 A. Yes, I did.
 14 Q. Did you advise Kevin Batchelor to seek an
 15 attorney?
 16 A. No, I did not.
 17 Q. Why Todd and not Kevin?
 18 A. I don't think he knew well enough of what to
 19 do, or he asked me what he should do. So I suggested he
 20 should seek counsel.
 21 Q. And have you worked with Todd in the past?
 22 A. Todd worked for me back in the '80s for a
 23 summer, as a carpenter helper.
 24 Q. And have you had occasion to interact with him
 25 professionally in the last 10, 15 years?

1 Have you spoken with Mike Longmire about this
 2 lawsuit, or the doors, in addition to the conversations
 3 you've already relayed?
 4 A. No.
 5 MS. FOSTER: Let's do Exhibit 29 very briefly.
 6 I'm trying to bring various documents into one exhibit
 7 to make it quicker, and I may be failing.
 8 (Exhibit 29 marked.)
 9 Q. (BY MS. FOSTER) It is Exhibit 29. It is
 10 three faxes to you, dated August 3rd, 2004, September
 11 10th, 2004, September 13, 2004. And I'm showing them to
 12 you to ask whether these three faxes concerned changes
 13 made in connection with the french door during
 14 construction?
 15 MR. MILLEMANN: I'm sorry. Did these have RP
 16 numbers or Bates numbers?
 17 MS. FOSTER: They are 730, 731, 732, 759, 772,
 18 or 773.
 19 MR. MILLEMANN: Kirk, or --
 20 MS. FOSTER: 730, 731, 732, 759, 772 and 773.
 21 THE WITNESS: Would you repeat your question,
 22 please, since we were interrupted?
 23 Q. (BY MS. FOSTER) I am showing these to you to
 24 ask you whether these three faxes sent in August and
 25 September of 2004, were concerning changes being made in

1 connection with the french doors at issue? So if you
 2 could look at them, and tell me.
 3 A. Yes, they were changed from slider, to swing,
 4 to in-swing, to a slider, to the --
 5 Q. Let's go one at a time.
 6 A. Okay.
 7 Q. So the first one says, "Revised headers in
 8 area of dining atrium door. Revised detail for beam
 9 connection over atrium door." Is that correct?
 10 A. Yes.
 11 Q. And would those changes result from the door
 12 being pushed back from its original placement flush for
 13 the exterior wall?
 14 A. No.
 15 Q. On 731, I see a picture that I don't
 16 understand.
 17 A. 731, is that the --
 18 Q. It is the second page of the first fax.
 19 A. Okay. I was going by this number, looking at
 20 dates.
 21 Q. What am I looking at here?
 22 A. You are looking at structural headers that
 23 need to be put in, because we were changing from a
 24 window/door combination to a full 60 width. And you
 25 need to make a stronger header to support the roof and

1 header requirements that were given to me on 8-3.
 2 Q. Correct.
 3 A. On this (indicating).
 4 Q. I've seen it.
 5 A. It called for an increase header, heights and
 6 depths.
 7 Q. Right.
 8 A. Bigger timbers, which takes out more room in
 9 the head room for the rough opening of the door. And it
 10 was very, very, very tight.
 11 Q. What was the solution you found, if any?
 12 A. I do not recall. I do not remember.
 13 Q. And Mark Birrer, was he cc'd on this fax?
 14 A. According to the bottom, yes.
 15 Q. And do you recall any discussions with him
 16 about this issue?
 17 A. I do not recall anything.
 18 Q. Could it be that earlier when you described
 19 problems with the locking mechanisms, they were related
 20 to this clearance issue?
 21 A. I cannot answer, yes, or no, because it's -- I
 22 guess I need the question for the problem, what was the
 23 problem was with the clearance. And I do not recollect.
 24 And I'm assuming you do not have --
 25 Q. I have what you gave me.

1 snow level.
 2 Q. Thank you. No further questions on that
 3 document. On the next fax, dated September 10th, 2004,
 4 the last sentence in the fax says, "We will need to find
 5 a solution to lever/astagal clearance issue at living
 6 room french door."
 7 I don't understand what that means. What does
 8 that mean? And excuse me. Is this, first of all, the
 9 same french door, or is this a different one?
 10 A. This is the same french door.
 11 Q. Okay. Go ahead.
 12 A. We need to find a solution to -- this is out
 13 of context. I'm having a hard time understanding it,
 14 myself.
 15 Q. What does "astagal" mean?
 16 A. Astagal is you have a stationary door that
 17 you do not use very often. This is for a french door.
 18 You have a stationary door that is stationary most of
 19 the time, but you have the ability to open it. There
 20 are astragal locks at the bottom and the top of the
 21 door, you have to release to open the door.
 22 Q. So there were clearance issues on those locks?
 23 A. To the best of my recollection, we had a very,
 24 very tight tolerance from the requirement of the door
 25 opening, and trying to get the full depth of the new

1 A. Okay. I don't know.
 2 Q. Is it possible?
 3 A. For the astragal, I would say, no. Because
 4 for astragal to work, it only needs like a three-eighths
 5 of an inch hole. And it would go above into the jamb
 6 about probably the thickness of the jamb, which would
 7 have been around an inch. And that astragal pin needs
 8 to go up there, and catch that. I do
 9 not understand what that question means, the solution
 10 for the lever astragal clearance. I do not understand
 11 that question. I mean, not your question. I don't
 12 understand the --
 13 Q. The fax?
 14 A. This phrase, I do not.
 15 Q. All right. I'm done with that exhibit. I'm
 16 sorry. Just to confirm the third fax, dated September
 17 13, 2004, this is the fax where Claire Remsberg was
 18 changing the door from out-swing -- I'm sorry -- to an
 19 out-swing clad french door; is that correct?
 20 A. Yep. Yes.
 21 Q. And Mark Birrer was cc'd on this email;
 22 correct?
 23 A. Yes.
 24 Q. And is it typical for the door manufacturer to
 25 be cc'd during fax changes, during the construction

1 phase?
 2 A. Mark Birrer or his assistant, and I'm assuming
 3 his assistant, Marilyn, are the sales representatives.
 4 These are not the factory people. I believe since this
 5 door was -- as I recall, since this door was still in
 6 question, had not been ordered yet.
 7 Q. I see.
 8 A. It came in out of subsequent order. That's
 9 why he's being cc'd. What are we going to put in this
 10 hole?
 11 Q. It's 2:33. I want to have one exhibit
 12 authenticated by you. And I have one question for you
 13 on it, and then we will conclude. I think I could talk
 14 to you for another full day. But we are out of time.
 15 MS. FOSTER: So I will hand you Exhibit 30.
 16 (Exhibit 30 marked.)
 17 Q. (BY MS. FOSTER) This is a letter from your
 18 attorney, Daniel Nevala, to Jason Mau, who was Mr.
 19 Petrus' attorney. This is Bates labeled RP 85, 86, 87,
 20 dated August 29, 2013; is that correct?
 21 A. Yes.
 22 Q. And have you seen this letter before?
 23 A. Yes.
 24 Q. Have you reviewed it in preparation for today?
 25 A. No.

1 A. No.
 2 Q. This is it?
 3 A. From what I recall, and -- yes, this is it.
 4 Q. This is it. You think it was caused by the
 5 locking mechanism problems, the weather stripping, the
 6 screws, the shield, and the crawlspace, and the foam
 7 insulation being removed?
 8 A. Yes.
 9 MS. FOSTER: Okay. No further questions.
 10 Thank you for your time.
 11 (A recess was had.)
 12 MR. NEVALA: Let's go back on the record. Let
 13 me clean this up.
 14 EXAMINATION
 15 QUESTIONS BY MR. NEVALA:
 16 Q. One thing, Chris, you were shown Exhibit 24,
 17 which showed a set of plans showing a single door.
 18 Those were not the plans that you built. You didn't
 19 build a single door; did you?
 20 A. Did not.
 21 Q. And you were also shown Exhibit 29 that had a
 22 fax from Claire Remsberg, with an architectural
 23 rendering, and some handwritten notes with an arrow
 24 saying, "door changed."
 25 A. Yes.

1 Q. This letter lists a number of things that you
 2 state you discovered during your cursory inspection in
 3 August of 2013. It references the locking mechanism.
 4 It references the weather stripping. It references the
 5 screws, the ice and water shield, and the foam
 6 insulation; is that right?
 7 A. Yes.
 8 Q. And sitting here today, having seen the photos
 9 I've showed you, is it still your position that -- or is
 10 it your position that these observations listed here,
 11 caused the rot and the damage at issue?
 12 A. Yes.
 13 Q. And is it your position that there was no
 14 other cause of the damage at issue?
 15 A. I would speculate to say, that excessive snow,
 16 and water on the deck, and --
 17 Q. Let me rephrase the question.
 18 A. Okay.
 19 Q. Any other cause in the construction, not the
 20 weather.
 21 A. Okay.
 22 Q. Presuming the existence of moisture and snow
 23 in McCall, any other cause in the house, the
 24 construction, itself, that could have caused the damage
 25 at issue?

1 Q. And that's the door that's the subject of this
 2 lawsuit, and the subject of all this deposition?
 3 A. Yes.
 4 Q. Were there other faxes you think, or were
 5 there other conversations between you and, either Claire
 6 Remsberg or Andy Laidlaw, about changing this door from
 7 a single door to a double door?
 8 A. There were discussions of changing to a
 9 sliding glass door.
 10 Q. Were there discussions changing from a sliding
 11 glass door to an out-swinging, open swinging, do you
 12 believe, french doors?
 13 A. Between Andy and I, no, I just -- I believe I
 14 recommended a sliding glass door. It came back with
 15 this.
 16 Q. So Exhibit 24 with the photo of the single
 17 door is not correct? That's not what you built?
 18 A. Correct.
 19 MR. NEVALA: No further questions.
 20 MS. FOSTER: I'm sorry. I have a question.
 21 FURTHER EXAMINATION
 22 QUESTIONS BY MS. FOSTER:
 23 Q. Exhibit 24 did not have a photo of this
 24 potential door; did it?
 25 A. It's a plan.

1 Q. That looks like a photo of a single door.
 2 A. No, it's a plan.
 3 Q. No, that's a plan.
 4 MR. NEVALA: That's a plan. I'm sorry.
 5 Q. (BY MS. FOSTER) That's a plan.
 6 A. It's a photocopy of a plan.
 7 Q. And those plans were changed at some point;
 8 correct?
 9 A. Yes.
 10 MS. FOSTER: Fine. Thank you.
 11 MR. NEVALA: That's all I've got.
 12 (Exhibit 31 marked.)
 13 (Deposition concluded at 2:39 p.m.)
 14 (Signature requested.)

1 ERRATA SHEET FOR ROBERT CHRISTOPHER "CHRIS" KIRK
 2 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 3
 4 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 5
 6
 7 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 8
 9
 10 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 11
 12 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 13
 14 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 15
 16
 17 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 18
 19 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 20
 21
 22 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 23
 24 You may use another sheet if you need more room.
 25 WITNESS SIGNATURE _____

1 CERTIFICATE OF WITNESS
 2 I, ROBERT CHRISTOPHER "CHRIS" KIRK, being first
 3 duly sworn, depose and say:
 4 That I am the witness named in the foregoing
 5 deposition, Volume I, consisting of pages 1 through 174;
 6 that I have read said deposition and know the contents
 7 thereof; that the questions contained therein were
 8 propounded to me; and that the answers contained therein
 9 are true and correct, except for any changes that I may
 10 have listed on the Change Sheet attached hereto:
 11 DATED this ___ day of _____,
 12
 13
 14 ROBERT CHRISTOPHER "CHRIS" KIRK
 15
 16 SUBSCRIBED AND SWORN to before me this ___ day
 17 of _____, 20__.
 18
 19
 20 NAME OF NOTARY PUBLIC
 21
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

1 REPORTER'S CERTIFICATE
 2 I, COLLEEN P. ZEIMANTZ, CSR No. 345, Certified
 3 Shorthand Reporter, certify:
 4 That the foregoing proceedings were taken
 5 before me at the time and place therein set forth, at
 6 which time the witness was put under oath by me;
 7 That the testimony and all objections made were
 8 recorded stenographically by me and transcribed by me or
 9 under my direction;
 10 That the foregoing is a true and correct record
 11 of all testimony given, to the best of my ability;
 12 I further certify that I am not a relative or
 13 employee of any attorney or party, nor am I financially
 14 interested in the action.
 15 IN WITNESS WHEREOF, I set my hand and seal this
 16 24th day of March, 2016.
 17
 18
 19
 20
 21 COLLEEN P. ZEIMANTZ, CSR 345
 22 Notary Public
 23 P.O. Box 2636
 24 Boise, Idaho 83701-2636
 25 My commission expires September 7, 2017.

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EXHIBIT 3

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY
 PETRUS FAMILY TRUST DATED MAY 1,)
 1991, and EDMOND A. PETRUS, JR.,) Case No.
 individually and as Co-Trustee of) CV-2014-71-C
 the Petrus Family Trust Dated May)
 1, 1991,)
 Plaintiffs,)
 vs.)
 NANCY GENTRY-BOYD, CHRIS KIRK d/b/a)
 KIRK ENTERPRISES; TODD MCKENNA)
 d/b/a HOMECRAFT HOME INSPECTIONS;)
 RE/MAX RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
 Defendant.)
 _____)

DEPOSITION OF NANCY GENTRY-BOYD

March 9, 2016

REPORTED BY:

COLLEEN P. ZEIMANTZ, CSR 345

Notary Public

1 THE DEPOSITION OF NANCY GENTRY-BOYD was taken
2 on behalf of the Plaintiffs, at the offices of
3 Millemann, Pittenger, McMahan & Pemberton, LLP, located
4 at 706 North First Street, McCall, Idaho, commencing at
5 9:05 a.m., on March 9, 2016, before Colleen P. Zeimantz,
6 Certified Shorthand Reporter and Notary Public within
7 and for the State of Idaho, in the above-entitled
8 matter.

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21 ALSO PRESENT: Chris Kirk
22 Todd McKenna
23
24
25

1 I N D E X

2 TESTIMONY OF NANCY GENTRY-BOYD PAGE
3 Examination by Ms. Foster 7

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9 DESCRIPTION	PAGE
10 Exh 1 - Copy of Notice of Deposition of Nancy Gentry-Boyd	10
11 Exh 2 - Copy of fax to Chris Kirk from Claire Remsberg, 09/11/2004, Kirk 00760	39
12 Exh 3 - Copy of Photo of Sliding Door, Petrus 000318	51
13 Exh 4 - Copy of Defendant Nancy Gentry-Boyd's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents	61
14 Exh 5 - Copy of RE-21 Real Estate Purchase and Sale Agreement, 01/03/2012	99
15 Exh 6 - Copy of Email to Kevin Batchelor from Ed Petrus, Subject: Re: Door Installation/Water Intrusion, 04/04/2013, Batchelor 98-101	120

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2 E X H I B I T S (Continued)

3 DESCRIPTION	PAGE
4 Exh 7 - Copy of Email to Michael Wood from Ed Petrus, Subject: Re: Door Installation/Water Intrusion, 03/18/2013, Petrus 000191-193	138
5 Exh 8 - Copy of Email to Nancy Gentry-Boyd from Ed Petrus, Subject: Re: 2130 Payette Drive, 04/09/2013, Petrus 000194	140
6 Exh 9 - Copy of Letter to Mr. Kirk from Jason Mau, Re: Notice of Construction Defect, 08/07/2013, Petrus 000218-220	147
7 Exh 10 - Copy of Letter to Ms. Gentry-Boyd from Mr. Mau, Re: 2130 Payette Drive, 08/15/2013, Petrus 000222-223	148
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9 Exh 12 - Copy of Letter to Ms. Gentry-Boyd from Mr. Mau, Re: 2130 Payette Drive, 04/04/2014, Petrus 000234	157
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Exh 15 - Copy of Email to Nancy Gentry-Boyd from Jean Odmark, Subject: FW: Addendum #5, 03/19/2012, Gentry-Boyd First Responses 255-256	168
Exh 16 - Copy of Letter to Ms. Florence from Steven Millemann, Re: Your Insured: Nancy Gentry-Boyd, 08/25/2015, Gentry-Boyd First Responses 243-244	172

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1 me. If you do it, I will try to slow you down as well.

2 As we talk, and I ask questions, if you don't

3 understand my questions, please let me know. Please let

4 me know if you need me to clarify something. If you

5 don't ask me to, I'll assume you understood it.

6 A. All right.

7 Q. But always do let me know if I'm not being

8 clear.

9 When we give testimony in your shoes, please

10 say, "yes," or "no." A head nod, or a shake, or

11 "uh-huh," won't show up very well in the transcript.

12 I'll probably do it myself. But that's a general rule

13 that we both need to follow. Those are my basic ground

14 rules.

15 I do need to ask, are you under the influence

16 of any medication or other substance that might affect

17 your ability to understand my questions or give answers

18 today?

19 A. No, I am not.

20 Q. Is there any other reason you cannot provide

21 fair and accurate testimony today?

22 A. Not that I know of.

23 Q. You said you were deposed once before. You

24 don't quite remember it. Do you remember what the case

25 was about?

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1 NANCY GENTRY-BOYD,

2 first duly sworn to tell the truth relating to said

3 cause, testified as follows:

4 EXAMINATION

5 QUESTIONS BY MS. FOSTER:

6 Q. Good morning.

7 A. Good morning.

8 Q. My name is Alyson Foster. I am one of the

9 attorneys for the plaintiffs in this case, and I'm here

10 to take your deposition.

11 And what would you like me to call you?

12 A. Nancy.

13 Q. Nancy, you can call me Alyson.

14 A. Okay.

15 Q. Let me go over a few ground rules.

16 Have you ever been deposed before?

17 A. About 30 years ago, I was, but I don't really

18 remember.

19 Q. That's probably good. So let me go over some

20 ground rules that you might already know, but just to

21 refresh myself, as well. My first and favorite is that,

22 actually, she is probably the most important person in

23 the room. She's taking down everything we say. And

24 there may be times when we speak over each other. We

25 should try not to do that. If I do it, please correct

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1 A. It was after my divorce. And my first husband

2 was a developer. And one of his projects had some

3 settlement. And because I had co-signed on the project,

4 I was brought into it. But since I've never had

5 anything to do with that side of the business, I simply

6 was there.

7 Q. Were you a party named in the case?

8 A. No, I was not.

9 Q. Have you ever been a party to litigation?

10 A. No, I have not.

11 Q. I found a case on-line that you probably

12 forgot about. And I don't even know if it's you. It's

13 called Gladys Babcock. Does that sound --

14 A. Never heard of her.

15 Q. Versus State Board of Land Commissioners

16 versus Valley County?

17 A. Never heard of her.

18 Q. Weird. Well, that makes that easy.

19 To your knowledge have you ever been the

20 subject of a criminal investigation?

21 A. Never.

22 Q. And I guess that means, you've never had any

23 criminal history or --

24 A. Never been arrested.

25 Q. Congratulations.

1 Some of the questions I'm going to ask you,
2 and documents I'm going to show you, are formalities
3 that have to do with the process of taking a deposition.

4 MS. FOSTER: And I'm going to show you one
5 now. This can be Exhibit 1.
6 (Exhibit 1 marked.)

7 Q. (BY MS. FOSTER) This is called a Notice of
8 Deposition. This is simply what we issued to schedule
9 your deposition today. Have you seen it before? And
10 it's fine if you haven't.

11 A. Yes, I have.

12 Q. And you understand you are here pursuant to
13 this Notice today?

14 A. Yes, I do.

15 Q. That's all I have for that. I just wanted to
16 cross that T.

17 You just mentioned that you were in a prior
18 marriage where your husband was a developer. What was
19 your role? Were you involved in his developer company?

20 A. No.

21 Q. Do you have any prior professional or
22 education background in construction?

23 A. No.

24 Q. In real estate?

25 A. No.

1 McCall in 1979?

2 A. 209 Lake Street.

3 Q. Were the winters as bad then as they are now?

4 A. I would say they are quite typical.

5 Q. Similar?

6 A. Uh-huh.

7 Q. How many years did you own 209 Lake Street.

8 And excuse me. You know what? Let me back up.

9 I assumed something that I should not have
10 assumed. Were you the owner of 209 Lake Street?

11 A. Yes, I was.

12 Q. This is going to be a poorly worded question.

13 Did that house exist when you purchased it, or did you
14 have it built?

15 A. It existed.

16 Q. How long did you own it?

17 A. I don't remember what year I sold it. Let me
18 just think. I rented in McCall for about seven or eight
19 years before I built my house on Payette Drive.

20 Q. So let me work backwards. You had that house
21 built in, approximately, 2004; is that right?

22 A. No, it was 2006, I think; '06.

23 Q. 2006. Is that when you moved into 2130
24 Payette?

25 A. Yes, I think it was. I can't remember how

1 Q. In development?

2 A. No.

3 Q. I don't know if that's the right word for what
4 your ex-husband did; developing?

5 A. Uh-huh.

6 Q. Do you have a background in science?

7 A. No.

8 Q. Tell me a little bit about your educational
9 background.

10 A. Well, I was married at 19. I went back to
11 college. I taught physical education at the Bishop's
12 School for two years. And then I started my family.

13 Q. Where is the Bishop's School?

14 A. It's in La Jolla, California.

15 Q. Are you from La Jolla?

16 A. Yes, I am.

17 Q. Have you lived in La Jolla your whole life?

18 A. No, since I was 13 years old.

19 Q. When did you move to McCall?

20 A. 1979.

21 Q. Did you live here full-time as of 1979?

22 A. Never.

23 Q. Was it a winter home, a summer home?

24 A. It was a vacation home.

25 Q. 1979, where did you own your first home in

1 long it took to build. Maybe it was 2007. I didn't
2 keep records of all of this.

3 Q. And prior to that, you had been renting?

4 A. Yes.

5 Q. For how many years, did you say?

6 A. Well, while we were building it, I rented
7 something around the -- there is a little lake over
8 here. I don't know what you call that area. But
9 anyway, I rented a house during the construction of my
10 new house. And we rented over on the lake every summer,
11 until I built something.

12 Q. Had you sold the Lake Street house?

13 A. Yes, I did.

14 Q. Do you recall when, approximately?

15 A. Well, no, I don't. If I moved in in '79; '89,
16 '99. I probably had that house 20 years.

17 Q. Was that house on the lake?

18 A. Yes, it was.

19 Q. Do you know who built that house?

20 A. No, I do not know.

21 Q. In the 20 years that you owned it, did you
22 ever have repairs done to the house?

23 A. Yes, I did.

24 Q. What kind of repairs?

25 A. Well, I had a french drain put around the

1 entire house. So that the spring that sprang up when my
2 next-door neighbor's built their house, it changed the
3 water table, and I had to put a very expensive french
4 drain 14 feet down.

5 Q. And how did you know that you needed to put in
6 a french drain?

7 A. Because I had 12 inches of water in my
8 basement all the time.

9 Q. That would do it. Who did you hire, if you
10 recall, to put in the french drain?

11 A. I don't recall. I could find out for you, but
12 I don't recall. The people that I sold my house to met
13 him, and talked to the builder, but I can't remember his
14 name.

15 Q. How many years before you sold it was the
16 french drain put in?

17 A. About five.

18 Q. Did that solve the water problem?

19 A. It did for a time. But when I ran into the
20 people who bought it, I guess, it was last summer, the
21 spring came back. I don't know how badly it came back,
22 but it came back.

23 Q. Did this house have a deck overlooking the
24 lake?

25 A. The one on -- that first house?

1 conjunction with the house?

2 A. Well, when it's cold, and there is a lot of
3 snow around -- for instance, on my first house, I had an
4 icicle that would buildup every winter.

5 Q. This is the house on Lake Drive?

6 A. On Lake Street.

7 Q. Lake Street.

8 A. Uh-huh.

9 Q. It was one of those deadly icicles that --

10 A. Uh-huh, that we kept knocked down. And that
11 came with the house, and I just accepted it. I didn't
12 think of suing the previous owner. I just knocked the
13 icicle down.

14 Q. Did you think the icicle was a result of a
15 construction defect?

16 A. Probably, but I don't know. I'm not a
17 builder.

18 Q. What other winter problems did you mean when
19 you said, "winter problems"?

20 A. Just digging out of the snow, digging -- you
21 know, making your walkway clear, your driveway clear.

22 Q. And windows were sticking?

23 A. Yes, occasionally.

24 Q. And doors?

25 A. No, I don't remember the doors sticking, but

1 Q. Yes.

2 A. Well, it did -- yes, it had a deck, but it
3 didn't overlook the lake. It was set back. I had a
4 very large lawn that went up to the lake, a grassy lawn.
5 The deck was over the lawn.

6 Q. Some of my questions are going to sound
7 stupid, but I'm going to ask them anyway.

8 And did you get snow buildup on your deck --

9 A. Yes.

10 Q. -- every winter?

11 A. Yes.

12 Q. Did you ever have issues from water intrusion
13 from the snow buildup?

14 A. No.

15 Q. Did you ever have any water intrusion or
16 moisture issues in that house, besides the spring that
17 arose from your --

18 A. Well, it was an old house. It was not a brand
19 new house that I had built. And so, yes, the windows
20 would stick in the winter. And, you know, I wouldn't
21 say, there were serious problems, but winter problems,
22 when there was a lot of snow around.

23 Q. I will confess, I'm also from California. And
24 I don't have the same experience you have with winters.
25 What do you mean when you say, "winter problems" in

1 the windows did.

2 Q. Any other issues with that house, in terms of
3 construction or repairs, in the 20 years that you owned
4 it?

5 A. Well, I did some remodeling. I put a bathroom
6 in upstairs, and I put a bay window in. There was no
7 window in the master bedroom, because the house had been
8 built so long ago that they didn't put a window in
9 because of the wind that came that way. So I put
10 a -- whatever you would call it -- a bay window in the
11 master bedroom.

12 Q. So you said they didn't put a window in
13 because the wind was coming in. What direction?

14 A. Well, I mean, the way it was built perhaps.
15 As I recall, the house was moved there, and then they
16 added on. I had an apartment added on. I didn't add it
17 on. It was added on a separate -- it was attached to
18 the house, but it had a separate living room, bathroom
19 and kitchen. It was my guest apartment.

20 Q. Did you have that added on after you --

21 A. No, I didn't add it on. It was there when I
22 bought the house.

23 Q. And you had a window put in in the bedroom?

24 A. In my master bedroom, I did.

25 Q. And was there any wind problem with that

1 window?
 2 A. No.
 3 Q. No moisture problems?
 4 A. No.
 5 Q. Any other construction or remodeling that you
 6 did on that house?
 7 A. No.
 8 Q. Any other repairs or problems with it?
 9 A. Well, I added the deck, and I added a dock.
 10 That's all.
 11 Q. Anything else?
 12 A. No.
 13 Q. So 20 years, approximately, end of the '90s,
 14 beginning of the 2000s, did there come a time when you
 15 sold that house?
 16 A. Yes.
 17 Q. What brought that about?
 18 A. The fact that we were on Lake Street, which is
 19 Highway 55, and it was a very busy street and noisy.
 20 Q. Who was your realtor?
 21 A. Jean Odmark.
 22 Q. How long have you known Jean Odmark?
 23 A. Since 1978.
 24 Q. How do you know her?
 25 A. We went skiing together, a group of gals.

1 Q. Do you have a preferred season you come here?
 2 A. The summer.
 3 Q. How often do you come in the winter?
 4 A. Only when I have to.
 5 Q. Like now, you mean?
 6 A. That's right, yes.
 7 Q. Well, I offered to come to La Jolla. I would
 8 love a trip to southern California.
 9 A. Yeah, I heard that.
 10 Q. So I want to ask you some more questions about
 11 your sale of the house on Lake Street. Jean Odmark was
 12 your only realtor at the time?
 13 A. Yes, she was.
 14 Q. What was her company at that time?
 15 A. I don't know. She's changed companies. It
 16 might have been McCall Realty. I don't know. She's
 17 changed companies several times.
 18 Q. What was the process that you went through to
 19 sell that house?
 20 A. Frankly, it wasn't even on the market. Jean
 21 called me, and she had some people who wanted a house.
 22 And she said, you hate the traffic there. We'll find
 23 you something else. I didn't even have an amount of
 24 money I knew I wanted for it. She put me up to it.
 25 Q. And she helped you sell it?

1 Q. Here, in McCall?
 2 A. No, in Park City.
 3 Q. How did you come to want to have a vacation
 4 home in McCall?
 5 A. Well, I had just gotten a divorce. And my
 6 husband and I had a place in Sun Valley, and I didn't
 7 want to go back to Sun Valley.
 8 Q. That makes sense.
 9 Did there come a time when you remarried?
 10 A. Yes, there did.
 11 Q. When was that?
 12 A. Well, it was 25 years ago. I can't remember.
 13 I think it was 1990.
 14 Q. And what's your husband's name?
 15 A. William McGlochin Boyd.
 16 Q. Is he from Idaho?
 17 A. No.
 18 Q. From California?
 19 A. No.
 20 Q. Where was he from?
 21 A. He was from Princeton, New Jersey.
 22 Q. But you both now live in La Jolla?
 23 A. We do.
 24 Q. How often do you get up to McCall?
 25 A. Maybe three or four times a year.

1 A. She sold it, uh-huh. She sold it before I
 2 ever even got back to McCall.
 3 Q. Did you ever meet the buyer?
 4 A. Oh, yes.
 5 Q. Who was the buyer?
 6 A. I don't know their names. They just sold
 7 Boise Cascade in Boise. They owned a part of Boise
 8 Cascade.
 9 Q. What's Boise Cascade? Can you tell I'm new
 10 here?
 11 A. I think it's a lumber company or something. I
 12 don't know.
 13 Q. Did you meet with the buyers before it was
 14 sold?
 15 A. No, I did not. They met with the builder. I
 16 told them who had put the drain in. They met with all
 17 the people who had done the work on my house.
 18 Q. Who was the builder?
 19 A. I don't remember.
 20 Q. Okay.
 21 A. I'm sorry. I just don't.
 22 Q. That's okay.
 23 Was it just one builder, or were there several
 24 that you used?
 25 A. No, he had his own company. And they put the

1 drain in, I remember, in the winter, because they had to
 2 build a lot of stuff around while they were working. It
 3 was a very expensive process.
 4 Q. How close were you to the neighbors back then?
 5 And I don't mean your relationship, I mean, physically.
 6 A. Physically there was an A-frame next door.
 7 And then some friends of mine from La Jolla built on the
 8 other side. That's what changed the water table.
 9 Q. Okay.
 10 A. But we weren't -- we were not -- I mean, there
 11 were maybe 20 feet on either side.
 12 Q. Okay.
 13 A. I mean, we weren't cheek to jowl.
 14 Q. So tell me, when you sold that house, what was
 15 the process that you went through, if any, to disclose
 16 potential defects or problems with the house?
 17 A. Well, I certainly told them about the spring
 18 in the basement. But that was the only major problem
 19 with the house. It's a wonderful house. And I'm sorry
 20 I sold it now.
 21 Q. Why are you sorry you sold it?
 22 A. Because of this lawsuit.
 23 Q. You think that selling that house led to this
 24 lawsuit?
 25 A. Well, it certainly led to Mr. Petrus buying my

1 A. True.
 2 Q. That's true?
 3 A. Yes.
 4 Q. Did you have an inspection conducted on it
 5 before you sold it?
 6 A. I didn't, perhaps the buyers did. I can't
 7 remember. Truly it was an arm's length deal, because I
 8 was in California, and Jean was in Idaho, in McCall.
 9 Q. And she handled the transaction?
 10 A. She handled it.
 11 Q. And when did you have occasion to meet the
 12 buyers?
 13 A. Well, it was after they owned the house. I've
 14 seen them in the summer up here. And they have always
 15 said, please come over. See what we've done, and so
 16 forth. I did not meet them before it was sold.
 17 Q. So you did not meet them in the process of the
 18 sale?
 19 A. No, I did not.
 20 Q. Not before, or shortly thereafter?
 21 A. No.
 22 Q. Did you have communications with them by
 23 email?
 24 A. Oh, yes -- no, I don't. We talked on the
 25 phone.

1 last house.
 2 Q. Did you tell them anything else, if you
 3 recall, in your disclosures about the home when you sold
 4 it, in addition to the spring?
 5 A. I told them everything I knew. I don't know
 6 what it was at the time. I certainly have not hidden
 7 anything. I did not hide anything. I'm not that kind
 8 of person.
 9 Q. And did Jean Odmark help you to figure out
 10 what you needed to disclose at the time?
 11 A. I suppose she did. I can't remember.
 12 Q. Did anyone else help you sell that house --
 13 A. No.
 14 Q. -- besides Jean Odmark?
 15 A. No.
 16 Q. At this time you were married to William; is
 17 that correct?
 18 A. No, I was not. Was I married? Yes. Yes, we
 19 were married, true. We were married.
 20 Q. Did he own the house with you?
 21 A. No.
 22 Q. It was just yours?
 23 A. It was mine.
 24 Q. So it was approximately in early 2000, that
 25 you sold the house on Lake Street?

1 Q. What did you talk about?
 2 A. I told them everything I knew about the drain
 3 around the house.
 4 Q. Anything else you talked about with them?
 5 A. Not that I remember.
 6 Q. Just the drain?
 7 A. Just the drain.
 8 Q. How many times did you talk with them?
 9 A. I don't know.
 10 Q. Do you use email very often?
 11 A. Rarely.
 12 Q. How many email addresses do you have?
 13 A. I don't know.
 14 Q. At least one?
 15 A. At least one, uh-huh.
 16 Q. Possibly only one?
 17 A. Well, I think -- oh, you mean, I, personally?
 18 Q. Yes.
 19 A. Yes, I have one email address. That's true.
 20 Q. Tell me the process that you -- well, let me
 21 rephrase that slightly better.
 22 How did you come to own 2130 Payette?
 23 A. I had been looking for a piece of property on
 24 that side of the lake. And Jean called me, said this
 25 piece of property was going to be -- the lease would be

1 sold. And it was such a great piece of property that
2 she was going to put her money down for it, and hold it
3 until I got here. That's how it worked.
4 Q. You mean, got here to look at the property?
5 A. That's true.
6 Q. What was the time lapse on that?
7 A. About three days.
8 Q. Oh, fast.
9 A. Well, she said it was going to be sold. So I
10 got up here.
11 Q. And what did you think of it?
12 A. Well, I thought it was a very pretty piece of
13 property. That's why I bought it.
14 Q. So you bought it?
15 A. Uh-huh.
16 Q. Who did you buy it from?
17 A. The Department of Lands -- well, no. The name
18 of the people, I don't remember their names. I would
19 have to look it up. I don't know.
20 Q. Because it was leased land; right?
21 A. Yes, it was leased land.
22 Q. You purchased the lease?
23 A. Yes, through the Department of Lands.
24 Q. You took over the lease?
25 A. Yes, that's right.

1 Q. And you don't remember who it was?
2 A. I have their name someplace. I don't remember
3 their name was, offhand.
4 Q. And then there came a time when you had a
5 house built on that land; right?
6 A. Yes, there was.
7 Q. Tell me about that process.
8 A. Well, before I had plans drawn, I asked Chris
9 Kirk if he would build my house for me, since he's the
10 best builder in McCall, Idaho.
11 Q. Tell me about your conversation with Chris
12 Kirk in that regard.
13 A. Well, I think he probably mulled it over for a
14 little while. I don't remember. We talked about it,
15 and came to an agreement that he would build my house.
16 Q. Talked on the phone.
17 A. No, I think it was in person.
18 Q. And how did you know about Chris Kirk?
19 A. Well, I had met him socially in McCall. I
20 know several people in McCall.
21 Q. And you said he's the best builder in McCall?
22 A. To my knowledge, yes.
23 Q. And how did you gain that knowledge?
24 A. Through his reputation.
25 Q. Just things people said in the community?

1 A. Yes, that's true. Uh-huh.
2 Q. Had you worked with him before this house?
3 A. Never.
4 Q. But you had known him socially?
5 A. Yes, I had.
6 Q. How close were you with him socially?
7 A. Well, we were just friends.
8 Q. How many years have you known him?
9 A. Oh, I've known him probably, maybe 20 years.
10 Q. Who did you have the plans drawn with?
11 A. Andy Laidlaw.
12 Q. Is he the architect?
13 A. Yes.
14 Q. So what's the conversation that you had with
15 Chris Kirk to decide what type of house to build, if
16 any?
17 A. I don't think that Chris suggested what type
18 of house. I discussed it with Andy, and then we took
19 the plans to Chris.
20 Q. And what did you talk about with Andy? And
21 let me rephrase it.
22 What kind of house were you looking to have
23 built?
24 A. Just a comfortable house that I could
25 entertain my friends and family with.

1 Q. Did you have any particular concerns about how
2 to build the house to withstand all the snow?
3 A. Well, the first architect that I had was in
4 La Jolla. His name was Rod Youngson. And he had the
5 roof of the garage, the snow was falling in front of the
6 driveway. So that if you had a snowfall, you couldn't
7 get out of the driveway. That's why I decided to use an
8 architect in Idaho.
9 Q. So you --
10 A. Not one in California.
11 Q. So you talked to him first, and had him draw
12 up plans?
13 A. Well, I talked to him, and he sketched some
14 plans. And when he did that, I realized he was not the
15 architect for me.
16 Q. Because he doesn't build for the snow?
17 A. That's true.
18 Q. Or design for the snow, I should say?
19 A. That's true. He suggested I put a heater in
20 the cement to melt the snow that would fall off the
21 roof. And I didn't think that was practical.
22 Q. What would happen, if you know, if a heater
23 was put in the cement?
24 A. Well, I don't think it could melt the snow
25 fast enough if you had a foot of snow, and you wanted to

1 get out of your driveway.
 2 Q. Right. Californians.
 3 Had you known Andy -- would you say his name
 4 again for me one more time?
 5 A. Laidlaw, L-a-i-d-l-a-w.
 6 Q. Laidlaw. Had you known him before you
 7 contacted him about this house?
 8 A. Yes.
 9 Q. Socially?
 10 A. Socially.
 11 Q. Had he done any work for you before?
 12 A. Yes, he helped me with my little bay window
 13 that I put in my first house on Lake Street.
 14 Q. Anything else he had done for you?
 15 A. His wife was my landscape person, who did the
 16 gardening, and planted my bulbs for me, and so forth.
 17 Q. On Lake Street?
 18 A. Uh-huh.
 19 Q. Had Andy ever done any work for you, besides
 20 the bay window?
 21 A. No.
 22 Q. Had Chris Kirk ever done any work for you?
 23 A. No.
 24 Q. Did you ever have conversations with Andy,
 25 about how to design the house to be suitable for a snowy

1 am never trying to ask you about a privileged
 2 conversation you've had with your attorney.
 3 So I may ask if you have spoken with your
 4 attorney. And he can instruct you if he disagrees, yes,
 5 or, no, is fine. But I'm not trying to ask you about
 6 the details of those conversations, because those are
 7 privileged.
 8 A. Okay.
 9 Q. I just want to give that general caveat to
 10 anything I ask.
 11 A. Okay.
 12 Q. And in that vein, did there come a time in
 13 this case when you collected documents to produce to
 14 Mr. Petrus?
 15 A. I didn't really collect a lot of documents.
 16 Q. What did you collect?
 17 A. I don't remember really collecting anything,
 18 except what Jean Odmark and her associate had in their
 19 filing cabinet. I had since sold the house and packed
 20 everything away.
 21 Q. Did you search your email history to find any
 22 communications about the house?
 23 A. No, I would not have had any. I don't email
 24 like that.
 25 Q. Did you search for any emails that you may

1 environment?
 2 A. No.
 3 Q. Nothing specific about the snow?
 4 A. Never, no.
 5 Q. Did you tell him about your problems with the
 6 french drain in the previous house?
 7 A. Oh, probably. Everybody knew it. It was a
 8 giant effort to go 14 feet in a two-story house all the
 9 way around. It was a very expensive, big endeavor. And
 10 they were friends of mine, so I'm sure they knew about
 11 it. But I do not remember a conversation about it.
 12 Q. Approximately, how long did it take between
 13 the time you first met with Andy, and the day you moved
 14 into the house?
 15 A. I really cannot tell you. I was trying to
 16 remember when we actually broke ground. I don't know
 17 whether it was 2006 or 2007. I just don't remember. I
 18 have all of that in files packed away in storage, and I
 19 have not gotten it out. If it were that important, I
 20 would go dig for it.
 21 Q. Okay. We'll take a quick detour, and talk
 22 about documents you've produced in the case. And let me
 23 back up even more, and give one instruction I forgot to
 24 give at the beginning. Which is, when I ask you about
 25 conversations you've had, and people you've talked to, I

1 have had with Mr. Petrus?
 2 A. I don't think I've ever had any emails with
 3 Mr. Petrus. If I have, I don't remember.
 4 Q. So is it fair to say, the only document
 5 collection you did was to obtain documents from Jean
 6 Odmark's files?
 7 A. Yes.
 8 Q. Nothing else?
 9 A. That I can remember.
 10 Q. And this is after the complaint was filed in
 11 the litigation?
 12 A. Yes, it is. Yes.
 13 Q. Who is Michael Wood?
 14 A. He's Jean Odmark's associate.
 15 Q. How long have you known him?
 16 A. Since this lawsuit started.
 17 Q. Did you know --
 18 A. Well, actually, he helped her with the closing
 19 of the house. He kind of does the detailed work.
 20 Q. Was he one of your agents?
 21 A. No, he works for her.
 22 Q. She was your real estate agent?
 23 A. Yes.
 24 Q. But he was not an agent of yours?
 25 A. No. I did not pay him, no. She paid him.

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1 Q. But he worked on the sale of your house?
 2 A. Uh-huh. Yes, he did.
 3 Q. Did you ever email with him?
 4 A. I may have. I don't email much. It could be
 5 that my husband's secretary emailed with him. Because
 6 when I need to email, I have her do it. She's at my
 7 house three days a week, working for my husband. And so
 8 if emails have to be done, I ask her to do it.
 9 Q. What's her name?
 10 A. Her name is Maura, M-a-u-r-a, Healy,
 11 H-e-a-l-y.
 12 Q. When you ask her to send emails on your
 13 behalf, does she log into your email account to send
 14 them?
 15 A. I guess she does. She must.
 16 Q. So she has --
 17 A. Yes, she has access to my computer all the
 18 time.
 19 Q. So you'll tell her what to write, and she'll
 20 write it?
 21 A. That's correct. I would imagine that I do not
 22 send more than ten emails a year. I'm not an email
 23 person. I would rather be on the telephone.
 24 Q. Do you ever, yourself, type an email and hit
 25 "send"?

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1 A. No.
 2 Q. You always have Maura do it?
 3 A. Unless it's something very short.
 4 Q. So sometimes you'll send them if they are
 5 short?
 6 A. Yes.
 7 Q. Did you ask her to look through your emails,
 8 to collect emails for this case?
 9 A. No.
 10 Q. Did you ask anyone to look through your
 11 emails?
 12 A. No.
 13 Q. What documents did you obtain from Jean Odmark
 14 when you requested her files for this case?
 15 A. Whatever she had.
 16 Q. Did she send it to you?
 17 A. I think that she turned them over to my
 18 attorney.
 19 Q. Mr. Millemann?
 20 A. Yes.
 21 Q. Steve?
 22 A. Yes.
 23 Q. Did you speak to Michael Wood about collecting
 24 documents?
 25 A. No.

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1 Q. I don't know if you know. Of all the
 2 documents that have been produced for you in this case,
 3 did they all come from Jean Odmark?
 4 A. So far as I know, they did.
 5 Q. Are you aware of any other source for them, if
 6 you know?
 7 A. No, I'm not aware.
 8 Q. You mentioned you have files in storage
 9 related to the work you had done with Chris Kirk; is
 10 that right?
 11 A. Yes.
 12 Q. Is that in your basement? Is that what you
 13 mean by storage?
 14 A. No, I have a storage unit that I pay for that
 15 has a lot of documents in it.
 16 Q. Thank you. I'll return now to discussing 2130
 17 Payette.
 18 A. Okay.
 19 Q. Thank you for that detour.
 20 I can't remember if I've asked you this. On
 21 your house on Lake Street, did you tell me whether there
 22 were doors on the deck?
 23 A. Yes, there were doors on the deck.
 24 Q. Did you ever have any water intrusion issues
 25 with those doors?

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1 A. No, never.
 2 Q. And you had no mold issues in that house?
 3 A. No, not that I remember.
 4 Q. Any wind coming in through the deck?
 5 A. No.
 6 Q. Through the doors?
 7 A. No.
 8 Q. What role did you play, if any, in designing
 9 2130 Payette?
 10 A. Well, I worked with Andy, the layout of the
 11 floor plan. I also had a decorator, who helped me with
 12 the house.
 13 Q. Anything else that you can recall?
 14 A. No. There was another associate of Andy's
 15 that worked on the house with me, Claire. I don't know
 16 Claire's last name.
 17 MR. MILLEMANN: Remsberg, R-e-m-s-b-e-r-g.
 18 Q. (BY MS. FOSTER) Did you have any friends or
 19 your husband become involved in discussing designs for
 20 the house while it was being built?
 21 A. No.
 22 Q. Was it just you?
 23 A. Yes.
 24 Q. Did Jean Odmark play any role in helping you
 25 design the house?

1 A. No.
 2 Q. How much input did you have, if any, into the
 3 designs of the deck on the house?
 4 A. I didn't have any input. The architect took
 5 care of that.
 6 Q. What about the doors on the deck? Did you
 7 have any specific requests about those doors?
 8 A. No.
 9 Q. Or the windows?
 10 A. No.
 11 Q. Or any requests about the designs, I think
 12 it's called, a truss above the doors?
 13 A. No.
 14 Q. Did you have a preference as to whether the
 15 doors on the deck were sliders or swing?
 16 A. No, it was never discussed.
 17 Q. One of the things that's happened in this
 18 litigation as you may know is, we've served discovery
 19 requests on each party, and we've received responses.
 20 You may or may not have seen them. We did receive a
 21 response from the Chris Kirk defendants, saying that he
 22 discussed the design and installation of the doors on
 23 the deck with you. Do you recall any such
 24 conversations?
 25 A. I'm sure we had conversations about the house,

1 Q. This appears to be a fax from Claire Remsberg
 2 to Chris Kirk on September 11th, 2004. Does that look
 3 right to you?
 4 A. Let me finish reading it, please. (Witness
 5 reading.) I've never seen this, and I don't recall
 6 this. Perhaps I was concerned about the furniture
 7 layout, but I don't remember exactly.
 8 Q. It says here, "Mark Birrer." Who is Mark
 9 Birrer; do you know?
 10 A. I've never heard of him before.
 11 Q. It says, I'm quoting the first sentence, "In
 12 passing, Mark Birrer mentioned yesterday that south door
 13 at dining room was not going to be a slider, as per some
 14 discussion with Andy that he doesn't remember."
 15 Could it be that Mark Birrer was involved with
 16 providing doors?
 17 A. It could be, but I don't know. I don't ever
 18 remember seeing his name before.
 19 Q. Do you know who manufactured the doors that
 20 were used on the deck?
 21 A. I do not.
 22 Q. And if you go to the third sentence in the
 23 fax, it says, "Perhaps the slider is not possible, but
 24 it is my understanding that this is what Nancy is
 25 expecting, since she has concerns that a swing door will

1 but I do not remember that specific subject. But we
 2 were friends. We were talking about the house. I
 3 cannot remember every conversation we had. And I do not
 4 recall specifically talking about the doors or the
 5 window. I know that my decorator had a lot to do with
 6 the decisions that were made with many of the details
 7 that were beyond my control, or where to place lighting.
 8 I did pick out the wallpapers, and the things
 9 like that. But she is a professional, and she helped a
 10 lot. And many times Chris would talk to Joanne, rather
 11 than me, because Joanne was the expert, and I didn't
 12 have the answers. But we may have discussed it. I just
 13 do not recall that conversation.
 14 Q. And you don't recall a conversation about
 15 whether the doors on the deck should be swinging or
 16 sliding?
 17 A. I don't recall.
 18 Q. And Claire Remsberg was the assistant to Andy?
 19 A. Yes, she was.
 20 (Exhibit 2 marked.)
 21 Q. (BY MS. FOSTER) I'm going to hand you a
 22 document Bates Labeled Kirk 00760 being marked as
 23 Exhibit 2. I'm showing you this to see if it refreshes
 24 your recollection. Have you seen this document before?
 25 A. No, I have not.

1 interfere with her furniture in the nook."
 2 Does this sentence refresh your recollection
 3 as to whether you had concerns about whether the door
 4 would swing or be a slider?
 5 A. I don't remember anything about that. I know
 6 that that was an area where I was hoping to have a card
 7 table, or something equivalent to, where I would play
 8 bridge. I play a lot of bridge.
 9 Q. And this is a card table that would have been
 10 by the -- is it the south --
 11 A. In the nook. Yes, it would be the south part
 12 of the -- if you want to call it, the kitchen, family
 13 room, whatever.
 14 Q. And did you ultimately have a card table
 15 placed there?
 16 A. Yes. It wasn't a card table, but a table was
 17 placed there. And, yes, we played bridge at that nook.
 18 Q. And is there any other table in the house
 19 where you played bridge?
 20 A. Well, if we had two groups playing bridge,
 21 there was another table at the opposite end of the
 22 living room. There were two areas where one could play
 23 bridge.
 24 Q. And if there is only one group playing, which
 25 table would they use?

1 A. Probably the one in the nook.
 2 Q. The one we're discussing now?
 3 A. Yes.
 4 Q. Next to the south facing french door?
 5 A. Yes.
 6 Q. And do you know whether that door, I assume
 7 you do, was, in fact, a swing door, as opposed to a
 8 slider, once it was installed?
 9 A. Well, once it was installed, yes, they were
 10 swinging doors, because they opened outside.
 11 Q. Did you have any conversations with Andy, or
 12 Claire, or Chris, or anyone about whether the door
 13 should swing out or in?
 14 A. Not that I recall. I don't recall talking
 15 about a sliding door or a swinging door. So that's how
 16 poor my memory is.
 17 Q. Thank you. During the construction process,
 18 did anyone ever have any conversations with you? Did
 19 you have any conversations with anyone about any
 20 problems in the construction process?
 21 A. No.
 22 Q. Did anyone talk to you, or did you have any
 23 conversations with anyone about the subcontractors
 24 Mr. Kirk was hiring?
 25 A. No. I had complete confidence in Mr. Kirk.

1 known her since probably 1950.
 2 Q. Did you ever have any discussions with Joanne
 3 about steps that could be taken to mitigate the impact
 4 of snow?
 5 A. No.
 6 Q. Any discussions with Andy about that?
 7 A. No.
 8 Q. Anyone else?
 9 A. No.
 10 Q. And again, just so I understand, you don't
 11 recall sitting here today, whether you ever discussed
 12 with anyone, the doors being slider, or swing, or
 13 anything else about the doors --
 14 A. No.
 15 Q. -- on the south side?
 16 A. I do not remember a conversation about that at
 17 all; sliders or swing. I just simply don't remember.
 18 Q. And you don't recall having any concerns about
 19 those doors?
 20 A. No, not at the time of construction, no.
 21 Q. Did there come a time when you had concerns
 22 about --
 23 A. No.
 24 Q. -- those doors?
 25 A. No.

1 Q. And during the construction process, you were
 2 living in La Jolla?
 3 A. Yes.
 4 Q. Would you come to McCall and rent during the
 5 process?
 6 A. I did rent a house during that time. And we
 7 would come up perhaps every couple of months.
 8 Q. And --
 9 A. I was not living here during the construction.
 10 Q. But you would come up every couple of months
 11 and --
 12 A. To check on things, or to make decisions, or
 13 whatever.
 14 Q. What kind of decisions would you make?
 15 A. Well, wallpaper, that sort of thing. Trying
 16 to get an idea of what the light would be in the
 17 bathroom, that sort of thing, as things -- as the house
 18 developed.
 19 Q. And who would you meet with to discuss these
 20 decisions?
 21 A. My decorator.
 22 Q. What was her name?
 23 A. Joanne Hutchinson.
 24 Q. How long did you know Joanne before then?
 25 A. Well, I was in her wedding in 1955. So I've

1 Q. So do you know whether a certificate of
 2 occupancy was ever issued for the house?
 3 A. I have no idea. I've never even heard of a
 4 certificate of occupancy.
 5 Q. After construction was complete, did you or
 6 anyone have an inspection conducted of the house?
 7 A. You would have to ask my builder. I don't do
 8 that sort of thing. I wouldn't have an inspection of
 9 the house, personally.
 10 Q. So you didn't have it done?
 11 A. No, I did not, personally.
 12 Q. So you moved in, I think you said,
 13 approximately 2006 or 2007?
 14 A. Yes.
 15 Q. And you sold it in 2012 to Mr. Ed Petrus;
 16 correct?
 17 A. Yes.
 18 Q. And in those five or six years that you lived
 19 there, how many times during the year would you come to
 20 stay at the house?
 21 A. Probably about four times a year.
 22 Q. And what times of year was that?
 23 A. Well, we would always spend the month of
 24 August in McCall. And we came up very often at
 25 Christmas, and other vacation times. Summer was our

1 main time here. We spent usually about six weeks every
 2 summer in McCall. Those were the long periods of time.
 3 And then I would come up with my bridge group for a week
 4 at a time during the year, and so forth.
 5 Q. Is your bridge group in La Jolla with you?
 6 A. Yes.
 7 Q. Would they stay at the house with you?
 8 A. Yes.
 9 Q. How many people?
 10 A. There would be three other women, besides me.
 11 Q. And when you had a second table, was it folks
 12 from McCall?
 13 A. Sometimes.
 14 Q. In general, who would come with you for these
 15 trips to McCall?
 16 A. Various couples. I mean, if my husband was
 17 coming, we very often had couples come with us.
 18 Q. And do you have children who would come and
 19 visit in McCall?
 20 A. Yes, two.
 21 Q. Do you have grandchildren who would come
 22 visit?
 23 A. Yes. Yes.
 24 Q. Did there ever come a time when you noticed
 25 any problems, such as sticking with the doors on the

1 Q. And so for about four years, you experienced
 2 no problems, whatsoever, with the doors on the deck?
 3 A. I do not recall any problems with the doors.
 4 Q. So in those first four years, thinking in that
 5 time period before, that you called Chris to look at the
 6 doors, did you have any other issues with the house?
 7 A. No. I know that when -- after the house was
 8 built, and it settled. And I assume this is true with
 9 brand new houses, I've only lived in a couple of brand
 10 new houses. Chris came and filled in places where it
 11 had settled. He touched up paint. And there was some
 12 settlement where he would fill in some gaps around
 13 areas. It was very minor. But I didn't ask him to. He
 14 was just that good of a builder to come and repair
 15 everything. It was right after we had been in the house
 16 maybe a year.
 17 Q. And when you say, filled in -- filled things
 18 in, what do you mean? Do you mean in --
 19 A. Well, like if there were some logs, he filled
 20 in between the logs.
 21 Q. So are these logs on the outside of the house?
 22 A. No, these were on the inside. And I
 23 don't -- I can't remember where I had logs. I just
 24 remember that there was some settlement. There was a
 25 small space, and he spackled it, and painted it. And

1 deck?
 2 A. Yes, there became a time, and I cannot tell
 3 you when it was. It was in the winter, and the doors
 4 would stick. And I called Chris, and he came over, and
 5 he worked on them, and they stopped sticking. He
 6 adjusted them somehow. I don't know.
 7 Q. So there came a time when you did notice that
 8 the doors were sticking, and this was in the winter
 9 period?
 10 A. Yes, it was.
 11 Q. Did you know why they were sticking?
 12 A. No.
 13 Q. Did they normally stick in the summer?
 14 A. No. And I can remember telling Chris, don't
 15 worry about them. They don't stick any more.
 16 Q. And do you recall what year you had Chris come
 17 out?
 18 A. No, I don't. I don't.
 19 Q. How many years before you sold it, if you
 20 remember, that this happened?
 21 A. Oh, maybe two years.
 22 Q. So you had been living in it --
 23 A. Several years, uh-huh, and they didn't stick.
 24 Q. Perhaps four years?
 25 A. Uh-huh.

1 that was the end of it, and I never had a problem again.
 2 Q. So when you say, "logs," you mean, like walls?
 3 A. Yes.
 4 Q. Like a log --
 5 A. We're not talking about a huge thing. There
 6 were just some areas with settlement with a brand new
 7 house, and he took care of all of that, made it new
 8 again.
 9 Q. Okay. I'm just trying to understand --
 10 A. Right.
 11 Q. -- what you mean. That's all I'm trying to
 12 get to.
 13 A. Okay.
 14 Q. So just so I understand. You are referring to
 15 the inside of the house, like the inside walls?
 16 A. I'm talking about the inside. But I'm sure he
 17 did it on the outside if it needed it. I don't know
 18 that for a fact.
 19 Q. How did you notice there were settling issues?
 20 A. I didn't. I mean, that's how unobservant I
 21 am. I wasn't even aware that it needed this. And Chris
 22 is a perfectionist, and he thought it should be done.
 23 Q. So in the first four years, the only work you
 24 had done on the house was when Chris Kirk, unbidden,
 25 showed up to address settling issues; is that fair?

1 A. Yes, that's fair.
 2 Q. No other repairs required?
 3 A. Not that I recall.
 4 Q. No remodeling?
 5 A. No remodeling.
 6 Q. No construction of new areas?
 7 A. No.
 8 Q. When the house was first built, was there an
 9 apartment built on top?
 10 A. No.
 11 Q. An apartment built on the side?
 12 A. No.
 13 Q. Is there an apartment on it now?
 14 A. Not that I know of, but I haven't been over
 15 there. Not that I put on the house.
 16 Q. So approximately four years into your tenure
 17 of owning 2130, and you've said the first four years the
 18 only thing was the settling issues; right?
 19 A. Yes.
 20 Q. After that, there came a time in the winter
 21 where you observed that the doors on the deck were
 22 sticking; is that right?
 23 A. Yes.
 24 Q. Which doors?
 25 A. The ones facing the south.

1 started, that sometimes in the winter, winter problems
 2 include the sticking of doors and windows; is that fair
 3 to say?
 4 A. Yes, that's fair to say.
 5 Q. And is it fair to say, that these doors were
 6 sticking because of winter issues?
 7 A. I would assume so.
 8 Q. And when you say, "winter issues," is that a
 9 temperature issue, or is it a moisture issue, or both?
 10 A. Well, because of the snow, I would say, it's a
 11 moisture issue.
 12 Q. And do you have an understanding of how
 13 moisture causes doors to stick?
 14 A. Not really.
 15 Q. Does it ever happen in La Jolla?
 16 A. It certainly does.
 17 Q. From the --
 18 A. When it rains, or there is moisture.
 19 Q. Yes.
 20 A. Uh-huh.
 21 Q. So these were wood doors; correct?
 22 A. They were wood doors, but they were also, I
 23 think, steel. The frame was steel, I think.
 24 Q. Would moisture get into the wood and expand
 25 it?

1 Q. I wonder if I have a picture. Give me just a
 2 second.
 3 MS. FOSTER: I'll hand you a picture, which
 4 I'm marking Exhibit 3. It is Bates Petrus 000318.
 5 (Exhibit 3 marked.)
 6 Q. (BY MS. FOSTER) Please take a look. Is this
 7 a photo?
 8 A. Uh-huh.
 9 Q. What does it depict?
 10 A. It depicts the doors facing the south part of
 11 the lake.
 12 Q. Are these the doors that we were just
 13 discussing?
 14 A. Yes, they are.
 15 Q. And these are called french doors?
 16 A. Yes.
 17 Q. And they swing out?
 18 A. Yes.
 19 Q. When you say they were sticking in that
 20 winter, do you mean where the two doors meet in the
 21 middle, or do you mean around the edges?
 22 A. Where the two doors meet in the middle.
 23 Q. And did you know why they were sticking?
 24 A. No, I didn't know why they were sticking.
 25 Q. Okay. Because you mentioned when we first

1 A. I would think so, but I'm not a --
 2 Q. Not a scientist?
 3 A. That's true.
 4 Q. Not a construction expert?
 5 A. That's true.
 6 Q. But as a multiple homeowner, certainly when
 7 doors get wet, they expand?
 8 A. Expand, that's true.
 9 Q. And that was what was happening in the winter
 10 that you called Chris Kirk?
 11 A. I didn't analyze it. I just said, Chris, the
 12 doors are sticking. When you are out and about, could
 13 you look at them? And he came over, and looked at them,
 14 and repaired them, or fooled with them. I don't know
 15 what he did. I didn't stand over him. But he had some
 16 equipment, and he adjusted the handles, and so forth.
 17 Q. Okay. So when he came out, you were there at
 18 the home?
 19 A. I can't testify that I was. I don't remember.
 20 Q. But you recall that he brought some tools out
 21 and fiddled with it?
 22 A. I think he did.
 23 Q. So then you probably were there?
 24 A. I probably was there.
 25 Q. What was said in your conversations with him?

1 A. I don't remember.
2 Q. Was anyone else there?
3 A. I don't remember.
4 Q. How long was he there for?
5 A. I don't remember.
6 Q. And do you know what he did to the doors?
7 A. No, I don't.
8 Q. Do you recall whether he shaved the doors
9 down?
10 A. I have no idea what he did to the doors.
11 Q. How many people came out with him?
12 A. I don't know.
13 Q. Was it just him?
14 A. I think it would have been, yes.
15 Q. And that solved the problem?
16 A. It did.
17 Q. Did the doors ever stick again, during your
18 tenure at the home?
19 A. I don't know whether they did. I don't
20 remember. I just don't recall.
21 Q. Was this the only time you had him come out to
22 see those doors while you were owning the home?
23 A. We talked about the doors. I just remember
24 telling him, don't worry about them. They don't stick
25 any more.

1 A. Okay.
2 Q. So those were the only two conversations you
3 had with Chris Kirk, while you owned the home, about the
4 doors?
5 A. I can't swear to that. I don't know whether
6 we ever talked about them on other occasions or not. I
7 don't recall.
8 Q. How often would you see him while you were up
9 here?
10 A. Sometimes I wouldn't see him at all. And
11 sometimes I would bump into him in town. And sometimes
12 we would be at a dinner party together. So I can't tell
13 you. It was just happenstance.
14 Q. And it may be, or it may not be, that you
15 discussed the doors?
16 A. That's right.
17 Q. But you certainly did twice?
18 A. Yes.
19 Q. Did there come a time when you felt a draft
20 coming from those doors?
21 A. Yes.
22 Q. When was that?
23 A. It was one time when we were up here in the
24 winter with my bridge group. And we were sitting
25 playing bridge, and there was a draft coming. And I got

1 Q. When was that?
2 A. It was in the summer.
3 Q. Did he call you?
4 A. No, it was when we saw each other. And I just
5 said, don't worry about it, Chris. The doors are fine.
6 And they were.
7 Q. What did he say to elicit that?
8 A. I don't remember. That was just what I recall
9 saying, don't lose any sleep over it, because they are
10 fine now.
11 Q. And where was this conversation?
12 A. I don't know.
13 Q. But you remember having it?
14 A. I remember having it.
15 Q. And what did he say?
16 A. I don't recall.
17 Q. But you remember what you said?
18 A. Yes, I remember what I said.
19 Q. And why did you think to say it?
20 A. Well, because he had made an effort to fix
21 them. And I wanted him to know that it was okay, that
22 they were fine. If I had thought that they were not
23 fine, I would have put it on my disclosure.
24 Q. Okay. Well, I'm going to move to strike that
25 as nonresponsive, but we'll get back to that later.

1 up, and got some silver tape, and put it along to stop
2 the draft outside.
3 Q. Did you put the tape on the inside or the
4 outside?
5 A. I put it on the outside.
6 Q. How much tape did you use?
7 A. I have no idea. Let's say, two feet. I don't
8 know. I'm guessing. I have no idea.
9 Q. But you didn't go floor to ceiling?
10 A. No, not that I recall. I don't recall getting
11 a ladder or anything. I just remember stopping the air
12 coming in.
13 Q. And how many years in to your tenure at the
14 house, did you perceive this draft?
15 A. I can't remember. I was just up here playing
16 bridge. I just don't remember what year it was. I just
17 remember we were up here in the winter, and it was cool,
18 and there was a breeze coming through, and I did that.
19 But I would say -- well, it was -- well, I just don't
20 know. It was probably toward the end of my living
21 there.
22 Q. Was it before Chris Kirk came out and fixed
23 the doors that one winter?
24 A. No. No.
25 Q. It was after?

1 A. It was after.
 2 Q. So probably in the last few years?
 3 A. Yes.
 4 Q. At some point?
 5 A. Yes.
 6 Q. And that was the first time you ever perceived
 7 a draft through the door?
 8 A. Yes.
 9 Q. And did the tape fix it?
 10 A. It did for that time, yes, it did.
 11 Q. What did you attribute the draft to?
 12 A. The weather.
 13 Q. Well, it hadn't happened in previous years;
 14 right?
 15 A. Right. I didn't analyze it. There was just a
 16 draft, and I took care of it.
 17 Q. Was it the same winter that you had Mr. Kirk
 18 out to fix the doors?
 19 A. No.
 20 Q. It was a different winter?
 21 A. It was a different winter.
 22 Q. And you had no idea why it happened?
 23 A. No, I had no idea.
 24 Q. Did you call Chris Kirk about it?
 25 A. No, I did not.

1 Q. When you sold the house, was the tape still
 2 on?
 3 A. I don't know.
 4 Q. You don't know?
 5 A. I don't know.
 6 Q. You have no idea when the tape came off?
 7 A. No.
 8 Q. You never took it off?
 9 A. I never took it off.
 10 Q. Did your husband take it off?
 11 A. I can't imagine that he would. He is not very
 12 inclined to that sort of thing.
 13 Q. To construction?
 14 A. That's right.
 15 Q. And repair?
 16 A. That's right. He can barely turn light
 17 switches off and on.
 18 Q. He's a businessman?
 19 A. Yes, he is.
 20 Q. Do you recall whether, when you had Mr. Kirk
 21 out that one winter, whether he contacted the door
 22 installers?
 23 A. I have no idea.
 24 Q. Perhaps I can refresh your recollection.
 25 MS. FOSTER: I'm going to hand you what we're

1 Q. Did you call anyone about it?
 2 A. No.
 3 Q. How long did the tape stay up?
 4 A. I have no idea. It might still be up there
 5 now. I don't know.
 6 Q. You didn't take it down?
 7 A. No, I didn't.
 8 Q. Did you ever use those doors?
 9 A. Would I ever use those doors? Yes, I used
 10 them all the time.
 11 Q. Did you go in and out of them?
 12 A. Yes.
 13 Q. What happened to the tape?
 14 A. I don't know. I have no idea.
 15 Q. But you would use them even when the tape was
 16 on?
 17 A. I suppose we did. In the winter, we didn't
 18 use those doors. I had no reason. We didn't go
 19 outside. There was snow on the deck.
 20 Q. But in the summer, you would use them?
 21 A. Yes.
 22 Q. And do you know if anyone ever took the tape
 23 off?
 24 A. I have no idea if anyone did. I have no
 25 knowledge of that. I did not take the tape off.

1 marking Exhibit 4.
 2 (Exhibit 4 marked.)
 3 Q. (BY MS. FOSTER) It's a double-sided document.
 4 So it's 16 pages, eight physical pages. This is your
 5 Responses to Plaintiff's First Set of Interrogatories
 6 and Requests For Production of Documents in this case;
 7 is that right?
 8 A. Repeat that, please.
 9 Q. I just want to clarify for the transcript that
 10 this document is "Defendant Nancy Gentry-Boyd's
 11 Responses to Plaintiff's First Set of Interrogatories
 12 and Requests for Production of Documents"; is that
 13 correct? It's the title on the first page.
 14 A. Yes.
 15 Q. Take a moment to look through it, if you would
 16 like. My questions are specific. Have you seen this
 17 before?
 18 A. Not to my knowledge.
 19 Q. If you turn to the very last page, yes,
 20 exactly. If you flip it to the previous page.
 21 A. (Witness complying.)
 22 Q. Yes, that is the verification page; is that
 23 right?
 24 A. Yes.
 25 Q. And is that your signature?

1 A. Yes, it is.
 2 Q. And do you recall signing this?
 3 A. I don't recall signing it. But I must have,
 4 because that's my signature.
 5 Q. A side question, I want to make sure that I
 6 have your name right. I see you crossed out "Boyd." Is
 7 it Gentry, or is it Gentry-Boyd?
 8 A. Well, my married name is Boyd. And I think I
 9 bought the house, or the house probably was under Nancy
 10 Gentry. Gentry was my married name before I married
 11 Mr. Boyd. It's not my maiden name. My maiden name is
 12 McCandless.
 13 Q. I understand. So this verification says, "I,
 14 Nancy Gentry, being first duly sworn upon oath depose
 15 and say: That I am the Defendant in the above-entitled
 16 action; that I have read the foregoing Defendant's
 17 Responses to Plaintiff's First Set of Interrogatories
 18 and Requests For Production of Documents and acknowledge
 19 that the contents therein are true and correct to the
 20 best of my knowledge and belief." Is that right?
 21 A. That's what it says.
 22 Q. And you signed it?
 23 A. I signed it.
 24 Q. And by signing it, you are verifying that the
 25 factual contents of this document are true and correct

1 first sentence, "In the second year after the home was
 2 completed"; is that true?
 3 A. If that's what was stated. I can't tell you
 4 what year was what year. I really don't remember from
 5 one year to the next.
 6 Q. And in some year, defendant, you, noticed that
 7 some doors would stick in the winter; is that true?
 8 A. Yes.
 9 Q. And was it more than just those doors we
 10 looked at in Exhibit 3?
 11 A. The back door sometimes would also
 12 have -- would stick, but it would go away. I kept an
 13 electric -- I don't know what you would call it, but
 14 like a rug, to keep everything -- the ice from freezing.
 15 I kept that plugged in when I was there, too, so we
 16 could go in and out without ice forming.
 17 Q. Like an outdoor rug?
 18 A. Uh-huh, it was electric.
 19 Q. An electric outdoor rug?
 20 A. Uh-huh.
 21 Q. Which doors was that to?
 22 A. The back door that went into the laundry room.
 23 But it didn't stick always. I mean, sometimes because
 24 the house was not used all the time, I would come up in
 25 the winter, and maybe it was kind of frozen shut, you

1 to the best of your knowledge and belief; correct?
 2 A. I guess I did at the time. I would have to
 3 re-read it to tell you.
 4 Q. I'm actually not trying to trick you on this.
 5 I'm trying to establish with the document we're talking
 6 about. And I can be specific. If you could turn to
 7 page 9?
 8 A. (Witness complying.)
 9 Q. And you can see in the middle of the page, you
 10 can call Interrogatory No. 25.
 11 A. Uh-huh.
 12 Q. If you could read it briefly to yourself?
 13 A. (Witness complying.) Okay.
 14 Q. So this says, is it fair to say, this question
 15 is asking about any damage, defects, or other problems
 16 you've had with the home while you were in it, to
 17 summarize the question?
 18 A. Yes.
 19 Q. And the answer is, in the second year after
 20 the home was completed, defendant, which is you, noticed
 21 that some doors would stick in the winter. Chris Kirk
 22 contacted the door installers. Did I say that
 23 correctly?
 24 A. Yes.
 25 Q. So is this true? Let's go one by one. The

1 know. I don't know. I couldn't tell you, why. But
 2 sometimes just getting in the door, it would -- I would
 3 have to wrestle with it a little bit to open it. But it
 4 wasn't every time. And it doesn't stick out in my
 5 memory. It was winter in McCall.
 6 Q. Did you have someone taking care of the house
 7 while you were at --
 8 A. Yes, I did. And it's in here, Jan Loff was
 9 her name.
 10 Q. Jan Loff.
 11 A. And she took care of the house, and went over
 12 there periodically, watered my house plants, and took
 13 care of everything at the house.
 14 Q. And you know her name?
 15 A. Jan Loff. And Gusti Laidlaw did the
 16 landscaping, and took care of the outside.
 17 Q. And you know that their names are in this
 18 document?
 19 A. Yes.
 20 Q. So you do recall this document on some level?
 21 A. Well, yes, I'm sure I've read it, but I don't
 22 remember reading it. I'm sure I've read it. I am 79
 23 years old, and I don't remember everything.
 24 Q. But you remember that they are in there?
 25 A. Yeah, I just saw their names, uh-huh.

1 Q. Oh. Well, that would explain it.
 2 Well, staying on Interrogatory No. 25, the
 3 answer. The second sentence, "Chris Kirk contacted the
 4 door installers." Is that true?
 5 A. You'll have to ask Chris. But I think he
 6 would have done that. That would have been my
 7 understanding.
 8 Q. And at the time you verified this, that was
 9 your understanding?
 10 A. Yes.
 11 Q. But sitting here today, you don't recollect
 12 one way or the other?
 13 A. It's my understanding that he did.
 14 Q. Do you know what came of that contact?
 15 A. No, I do not.
 16 Q. Did you ever talk to the door installers?
 17 A. No, I did not.
 18 Q. Jan, did she ever contact you while you were
 19 in La Jolla, to report any problems with the house at
 20 any time?
 21 A. No, I don't think so. I cannot remember
 22 specifically, no.
 23 Q. In the third sentence, it says, and again, we
 24 are on page 9, the answer to Interrogatory No. 25. The
 25 third sentence says, "On one occasion, there was a draft

1 the page to page 10. And I guess we'll have to look at
 2 both the bottom of page 9, and the top of page 10, so we
 3 can look at Interrogatory No. 26. If you don't mind
 4 taking a look at that question?
 5 A. Okay. (Witness complying.) Okay.
 6 Q. Is it fair to say, this question generally
 7 asks, what repairs you ever had done to the house?
 8 A. It's fair to say, that I didn't have a lot of
 9 repairs done to the house. It didn't need it.
 10 Q. And your answer to that interrogatory was, I
 11 think what we were just talking about, "The draft from
 12 the door in the dining room was blocked with duct tape";
 13 correct?
 14 A. That's correct.
 15 Q. "Defendant believes the door installers
 16 remedied the sticking door problem." Is that true?
 17 A. That's true.
 18 Q. And when you say, "door installers" here, do
 19 you mean Mr. Kirk?
 20 A. I have no idea. I just can tell you, that
 21 when I came back, the doors did not stick.
 22 Q. So you are not quite sure what "door
 23 installers" here means?
 24 A. No.
 25 Q. And you have no documents or written

1 coming through and an exterior dining room door." And
 2 that was true?
 3 A. Yes.
 4 Q. And is that the door that we discussed in
 5 Exhibit 3?
 6 A. Yes.
 7 Q. Which led you to put duct tape on the door?
 8 A. That's true.
 9 Q. In the years after Mr. Kirk did whatever work
 10 he did on the french doors to address the sticking, did
 11 you ever experience those doors sticking again?
 12 A. Not that I recall.
 13 Q. Did you still use them in the following years?
 14 A. Yes, of course.
 15 Q. Were you able to use them even in the winter?
 16 A. We didn't use those doors, because there was
 17 snow on the deck unless -- if we ever went out on the
 18 deck, it would be through the living room just to look
 19 out, but we didn't -- we kept our barbecue off of that
 20 in the summer. That's where we would barbecue.
 21 Q. The barbecue was next to these french doors?
 22 A. Yes, it was.
 23 Q. In Exhibit 3?
 24 A. Uh-huh.
 25 Q. Staying on this document, if you could turn

1 communications about these repairs?
 2 A. That's true.
 3 Q. You know, I'm going to tell you, and I keep
 4 remembering things I forget to say at the beginning. If
 5 you need a break, I'm not saying that you do, but if you
 6 ever do, please let me know. I'm happy to take one. No
 7 problem.
 8 A. Okay.
 9 MR. MILLEMANN: I would think sometime in the
 10 next five, ten minutes would be a good morning break.
 11 MS. FOSTER: Sure.
 12 MR. MILLEMANN: Or whenever works for you.
 13 Q. (BY MS. FOSTER) Yeah, I can try, and see if I
 14 can't finish up questions about the duct tape.
 15 Did it not bother you that you had to put duct
 16 tape on your doors?
 17 A. No, it did not bother me.
 18 Q. Why not?
 19 A. I don't know. I just thought I was very
 20 clever having stopped the draft coming through.
 21 Q. And you think it was maybe two feet, maybe a
 22 foot?
 23 A. I haven't the foggiest.
 24 Q. But it was not top to bottom?
 25 A. I didn't have to get a ladder out.

1 Q. How much did you pay for this house when you
2 purchased it?

3 A. I built it. And it cost nearly \$2,000,000 to
4 build it.

5 Q. Nearly 2,000,000?

6 A. That's right. Including the landscaping. And
7 Mr. Petrus paid a lot less for it.

8 Q. And it didn't bother you that a \$2,000,000
9 house required duct tape for the exterior doors?

10 A. Absolutely not.

11 Q. Did you ever tell Chris Kirk about the duct
12 tape?

13 A. Not to my knowledge. I don't think I told
14 anybody about it. I just -- my bridge group was there.
15 I thought I was very clever taking care of the draft.

16 Q. And I guess I just don't understand, and maybe
17 you just don't know the answer. But after you put the
18 duct tape on, you are saying, it solved the draft
19 problem; right?

20 A. Yes, it did.

21 Q. And you, yourself, never took the duct tape
22 off?

23 A. That's true.

24 Q. Did you ever have the doors replaced while you
25 owned the home?

1 to the point that I would call Chris about.

2 Q. So it may be that you experienced it sticking
3 on more than one occasion?

4 A. Yes, it could have been.

5 Q. Could it have been sticking in the winters
6 prior to the winter in which you called Chris Kirk?

7 A. It could have. But not to the degree that I
8 felt I needed to call Chris.

9 Q. But then when you did call Chris, your
10 testimony was that he fixed the problem; is that right?

11 A. That's correct.

12 Q. And you don't what he did?

13 A. No, I do not.

14 Q. But you believe he may have called the door
15 installers?

16 A. Yes, I guess so. Uh-huh.

17 Q. And the only other conversation you had with
18 him is when you told him the following summer, the doors
19 are great; is that right?

20 A. Well, we've had lots of conversations. But,
21 yes, I said, don't worry about the doors. They are
22 fine.

23 Q. So when you say, "lots of conversations," do
24 you mean, lots of conversations about the doors?

25 A. No, lots of conversations, in general.

1 A. No.

2 Q. But you continued to go in and out of those
3 doors in the summer?

4 A. Yes, I did.

5 Q. How did that work with the duct tape being on
6 it?

7 A. I don't know. Maybe the duct tape had been
8 removed. I never thought about the duct tape after
9 that.

10 MS. FOSTER: If you want to take a break, we
11 can.

12 MR. MILLEMANN: Yes.

13 MS. FOSTER: It's up to you.

14 MR. MILLEMANN: Let's do it.

15 (A recess was had.)

16 MS. FOSTER: Let's go back on the record.

17 Q. (BY MS. FOSTER) Let me just make sure, before
18 we move forward, that I'm on the same page as you are as
19 to your prior answers. Is it fair to say that the
20 testimony you've just given, is that during the period
21 of time you owned the home at 2130 Payette, you only had
22 two instances where you experienced problems with the
23 french doors on the southwest side; is that correct?

24 A. I wouldn't, under oath, say, that only two
25 times. Maybe when it stuck in other times. But nothing

1 Q. Right. But about the doors --

2 A. Yes.

3 Q. -- it was just that --

4 A. Yes.

5 Q. -- one follow-up --

6 A. Yes.

7 Q. -- on the --

8 A. Uh-huh.

9 Q. We are starting to speak over each other.
10 This is normal in a deposition. I will try to finish my
11 question before you speak. And I will try not to speak
12 before you finish. And that's for Colleen's sake.

13 A. Okay.

14 Q. And it's also fair to say, that the sum of
15 your testimony that you've given so far, is that you
16 experienced at some point, a draft coming through those
17 doors while you were playing bridge; is that correct?

18 A. That's correct.

19 Q. You fixed it by putting duct tape on the
20 doors?

21 A. That's correct.

22 Q. Didn't feel the draft, again, after that?

23 A. That's correct.

24 Q. You don't remember when the duct came off?

25 A. No.

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1 Q. I asked you at one point, whether you know
2 whether after 2130 was finished being constructed,
3 whether there was an inspection done of it; do you
4 recall that?
5 A. I have no idea.
6 Q. And you don't know whether there was an
7 inspector?
8 A. No, I do not.
9 Q. Do you know the name Bill Housdorf?
10 A. No, I do not.
11 Q. Housdorf?
12 A. I have no idea.
13 Q. And you testified that it was \$2,000,000 to
14 have the house built?
15 A. Well, counting the landscaping.
16 Q. With landscaping?
17 A. With landscaping.
18 Q. Do you know, approximately, and I'm not
19 looking for a specific dollar figure, approximately, how
20 much it costs without the landscaping to have the house
21 built?
22 A. My builder could tell you better than I could.
23 Q. You don't remember that?
24 A. Well, it was over a million dollars.
25 Q. Over one, less than two?

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1 A. Yes.
2 Q. And how much did you pay to take over the
3 lease?
4 A. 600,000.
5 Q. Did there come a time when you
6 purchased -- I'm not going to ask this right.
7 Did there come a time when you converted the
8 lease to ownership? Did you purchase the land from the
9 state?
10 A. No, I did not. I tried to in the beginning.
11 I tried to. And I was told by a gentleman at the
12 Department of Lands, why would they let me buy the
13 property when they were getting so much money from me
14 for the lease?
15 My lease started out at \$7,000 a year, and it
16 went up to 49,000 within a period of five years. That's
17 not counting the taxes. That was counting the lease
18 with the Department of Lands.
19 Q. So this is a very expensive piece of property?
20 A. Yes, it was.
21 Q. So you paid 600 just to take over the lease?
22 A. Yes, that's correct.
23 Q. And then seven a year?
24 A. Yes.
25 Q. And then 49 a year?

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1 A. Yes.
2 Q. And then property taxes?
3 A. Yes.
4 Q. And 2,000,000 to build the home?
5 A. Yes.
6 Q. And you never successfully purchased the land
7 from the state?
8 A. No, I did not. It was not available at the
9 time.
10 Q. When did you decide to sell the house?
11 A. When my husband was diagnosed with
12 Parkinson's.
13 Q. I'm sorry to hear that. Was this in 2012?
14 A. I think it was before that. It was probably
15 2010 that we talked about it. We didn't put it -- well,
16 it was marketed for a while, perhaps, in 2011. And then
17 I got serious about it, because the Department of Lands
18 kept increasing the lease on me.
19 Q. So when you decided to sell the house, it had
20 nothing to do with any problems with the house, itself?
21 A. Absolutely not. I loved the house.
22 Q. How did you choose Jean Odmark for your
23 realtor?
24 A. I think she chose me. She's a friend. And if
25 she was your friend, she would be selling your house,

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1 too.
2 Q. Fair enough. Do you know how long she's been
3 in the business?
4 A. Well, I don't know exactly. But when I moved
5 here in 1979, she was not a realtor.
6 Q. How many houses have you sold in your
7 lifetime?
8 A. Very few. My first husband and I had -- we
9 lived in three houses together. And our third house, I
10 lived in for 49 years. And I just sold that two years
11 ago. That's in La Jolla. And my houses in McCall, I
12 had two, one on Lake Street, and one on Payette Drive.
13 Q. So, approximately, five houses?
14 A. Approximately, yes.
15 Q. Prior to this transaction, have you ever had a
16 disagreement with a buyer about the sale process?
17 A. Never.
18 Q. Never?
19 A. Never.
20 Q. Never had any lawsuits about selling a house?
21 A. Never.
22 Q. Have you ever, prior to this lawsuit, been
23 contacted by the buyer after the sale of the house?
24 A. Never.
25 Q. And Jean has sold two of the five houses?

1 A. Yes, she has.
 2 Q. Do you own any --
 3 A. And --
 4 Q. Go ahead.
 5 A. That's it. She's sold both of them, uh-huh.
 6 Q. And you don't own any property in McCall right
 7 now?
 8 A. Yes, I do.
 9 Q. What do you own right now?
 10 A. Mountain Monkey Business and Mountain Java.
 11 They are both on the same lot.
 12 Q. Where is that?
 13 A. Across from the marina.
 14 Q. I think I've been to Mountain Java. And you
 15 own the buildings?
 16 A. I own the property and the buildings.
 17 Q. And you own the businesses?
 18 A. I own 51 percent of Mountain Monkey Business
 19 business. I've given my partner, John Watkins, 49
 20 percent as staying as my manager for 30 years.
 21 Q. Do you own Mountain Java?
 22 A. No, I do not. I lease it.
 23 Q. What kind of business is Mountain Monkey
 24 Business?
 25 A. It's a boutique that carries clothing,

1 time. And so I put a kitchen and a bathroom into the
 2 coffee shop.
 3 Q. When was that?
 4 A. That was about 2006. Chris Kirk did the work
 5 on it.
 6 Q. So to make sure I understand you correctly.
 7 The property that currently houses both Monkey Business
 8 and Mountain Java, you purchased 31 years ago?
 9 A. 31 years ago. It took me a year. Chris did
 10 not do the original construction on making it into a
 11 boutique.
 12 Q. Who did?
 13 A. I don't remember. I have no idea. And at the
 14 time, we left the garage as kind of a garage for a
 15 while. Gusty Laidlaw, the landscape gal, sold plants,
 16 and accessories, and things out of the garage, before I
 17 made it into a coffee shop for John's wife.
 18 Q. And that was in 2006?
 19 A. No, she had been using it as a coffee shop,
 20 but it had no running water. It had no bathroom, no
 21 kitchen.
 22 Q. I see. And you used Mr. Kirk --
 23 A. Yes, I did.
 24 Q. -- for that construction in 2006?
 25 A. Yes.

1 jewelry, odds and ends, lamps, accessories, shoes, a
 2 little bit of everything.
 3 Q. How long have you owned the property for
 4 Monkey Business?
 5 A. Well, I've been in business 30 years this
 6 summer. And I owned the property a year before that.
 7 So you do the math. I don't know what year I bought it.
 8 I was having breakfast with Jean Odmark, and I walked
 9 across the street, and that property was for sale, and I
 10 bought it.
 11 Q. Did she represent you in that transaction?
 12 A. Yes, she did.
 13 Q. Did she represent you when you purchased the
 14 Lake Street property?
 15 A. Yes, she did.
 16 Q. When you purchased the property for the Monkey
 17 Business, was it the same property sale for the Mountain
 18 Java?
 19 A. It was then -- it was an old -- I don't know
 20 what. I have forgotten. It was a building that had
 21 been part of the City of McCall, and I have forgotten
 22 what it was used for. But anyway, it had a separate
 23 garage. And I remodeled that, and connected it to
 24 Mountain Monkey Business and Mountain Java. My partner
 25 John Watkins' wife was running Mountain Java at the

1 Q. Was this before or after he built your house
 2 on 2130 Payette?
 3 A. I think it was after. I'm not sure. I
 4 haven't kept track of all of this.
 5 Q. Are those the only two times you've hired
 6 Mr. Kirk?
 7 A. Yes.
 8 Q. So I did the math. It did take me a second.
 9 31 years ago was, approximately, 1985.
 10 A. Okay.
 11 Q. Does that sound about right --
 12 A. Yes.
 13 Q. -- for when you purchased that property?
 14 A. Yes.
 15 Q. And you still own it?
 16 A. I do.
 17 Q. Do you own any other property in McCall?
 18 A. No, I do not.
 19 Q. And do you own it in your name or through
 20 another company?
 21 A. I own it in my name.
 22 Q. And what is Nancy --
 23 A. Nancy Gentry Trust, it's in my trust.
 24 Q. What is Nancy Gentry Investments? Is that
 25 something?

1 A. Well, it's properties I used to own.
 2 Q. And what kind of property?
 3 A. Well, I still own Jared's Jewelers in Tampa,
 4 Florida, for instance.
 5 Q. Did you ever live in Tampa?
 6 A. As a child I did.
 7 Q. How did you own Jared's Jewelers?
 8 A. Well, I invested in it through a broker.
 9 Q. Do you own the company or the property?
 10 A. I own the property. It is leased to me. I
 11 mean, I get a sum of money. They lease the property
 12 from me. I own the building and the property. And
 13 Jared's Jewelers just did a big remodel on it at their
 14 own expense.
 15 Q. Were you involved in the remodel?
 16 A. No.
 17 Q. When did you purchase Jared's Jewelers in
 18 Tampa, Florida?
 19 A. I think, probably 2005. I don't know.
 20 Q. When did you first create Nancy Gentry
 21 Investments, LLC?
 22 A. Probably about 2004, 2005.
 23 Q. Why did you make that?
 24 A. Well, I sold an apartment complex in San Diego
 25 that I had in a partnership with someone, and invested

1 connection with those four properties?
 2 A. No.
 3 Q. Who managed them?
 4 A. Well, they were all managed by their own -- I
 5 just had a lease, and I just received my money from the
 6 leases.
 7 Q. Do you know whether any of those four
 8 properties underwent any construction or remodeling
 9 during your ownership period?
 10 A. Not to my knowledge.
 11 Q. How about Jared's?
 12 A. Jared's did their own remodel, and put in
 13 about \$3,000,000 into there. They are in a shopping
 14 center in Tampa, Florida.
 15 Q. Do you have any sort of review authority over
 16 the --
 17 A. No, I do not. I just own the project.
 18 Q. Let me finish the question first for her.
 19 A. I'm sorry.
 20 Q. That's okay. Just to clarify for the record,
 21 you were not involved, or have any role in the
 22 construction or remodeling of any of your commercial
 23 properties; is that right?
 24 A. Yes.
 25 Q. Except for the ones you've already described

1 in various properties. And that's when I formed Nancy
 2 Gentry-Boyd Investments.
 3 Q. How many commercial properties do you have an
 4 ownership interest in?
 5 A. About six.
 6 Q. How many do you currently have an investment
 7 ownership in?
 8 A. Just Jared's Jewelers.
 9 Q. And the property here?
 10 A. Yes.
 11 Q. Just two?
 12 A. Yes.
 13 Q. And there were four others that you've owned
 14 in your lifetime?
 15 A. Yes.
 16 Q. So I know that one is in McCall, one is in
 17 Florida. You had an apartment complex in San Diego.
 18 Where were the other three located?
 19 A. Well, I'm not including the apartment complex
 20 in San Diego. I had a Starbucks in Virginia Beach,
 21 Virginia. I had a Tires Plus, and I can't -- that was
 22 in Philadelphia. I had Denny's in Phoenix, Arizona.
 23 And I had US Bank in Bremerton, Washington. I have sold
 24 all of those.
 25 Q. Did you have any management roles in

1 in McCall?
 2 A. Correct.
 3 Q. You mentioned an apartment complex in
 4 San Diego. And you don't consider that a commercial
 5 property?
 6 A. Well, I guess it was a commercial property. I
 7 mean, it was housing for -- it was housing for people
 8 who could not afford -- it had to do with the city. We
 9 had an agreement with the city, and underprivileged
 10 people lived in that at the time.
 11 Q. Low income housing?
 12 A. Yes.
 13 Q. Did you own any other such properties?
 14 A. No.
 15 Q. So you've owned, approximately, five
 16 residential homes; correct?
 17 A. Correct.
 18 Q. One apartment complex in San Diego?
 19 A. Correct.
 20 Q. And six commercial properties; is that
 21 correct?
 22 A. Correct.
 23 Q. And you've sold most of them?
 24 A. Yes.
 25 Q. So you are very familiar with the process for

1 selling property?
 2 A. Yes, I am.
 3 Q. You've been through it many times?
 4 A. Yes.
 5 Q. And you've always had a realtor who
 6 represented you?
 7 A. Yes, I have.
 8 Q. And in all of these sales, did you always do
 9 some sort of property disclosure form?
 10 A. Not really, no, because I didn't have access
 11 to the properties. I mean, I did this through a broker.
 12 I visited the properties all before I bought them. But
 13 when I sell them, I've never seen them since then.
 14 Q. Did you ever have any complaints about any of
 15 the six commercial properties?
 16 A. Never.
 17 Q. What about the apartment complex?
 18 A. Never.
 19 Q. Mountain Java?
 20 A. No.
 21 Q. Monkey Business?
 22 A. No.
 23 Q. Has the property that currently houses Monkey
 24 Business ever had any mold issues?
 25 A. Not to my knowledge.

1 Q. So like a spring under the ground water?
 2 A. That's correct, uh-huh, ground water.
 3 Q. I guess you probably couldn't do a french
 4 drain around a commercial property?
 5 A. Well, I wouldn't want to have to.
 6 Q. Any moisture in the wood problems at the
 7 Mountain Monkey Business store?
 8 A. We have replaced some of the wood. It's a
 9 very old building. I think it was built in the 1920s.
 10 Q. What sort of wood did you replace? And what I
 11 mean is not the type of wood. What part of the building
 12 did you have replaced?
 13 A. What would be facing the lake, which would be
 14 facing west.
 15 Q. Was it moldy?
 16 A. Not to my knowledge. It was just rotten.
 17 Q. From moisture?
 18 A. From moisture.
 19 Q. Who did the repairs?
 20 A. I don't know.
 21 Q. Was it under your ownership when the repairs
 22 occurred?
 23 A. It was under my ownership, and I would have to
 24 ask my manager. He managed everything, and still does.
 25 Q. And that's John --

1 Q. Any water intrusion issues?
 2 A. Yes.
 3 Q. Tell me about those.
 4 A. We have a spring in our basement. I've had it
 5 since I've owned the property.
 6 Q. What does a spring in the basement mean?
 7 A. During certain times of the year, there is
 8 water in the basement.
 9 Q. How does that come in?
 10 A. I don't know. It just comes in through the
 11 basement. I don't know how it comes in. I've never
 12 inspected it.
 13 Q. Have you ever called anyone, any construction
 14 company to take a look at it?
 15 A. No, I have not.
 16 Q. Has anyone asked you to ever make a repair on
 17 that?
 18 A. No.
 19 Q. Has it ever caused any damage to inventory?
 20 A. No.
 21 Q. Or property?
 22 A. No.
 23 Q. And you don't know what causes it?
 24 A. Well, it's a spring. There are a lot of
 25 springs around the lake.

1 A. Watkins.
 2 Q. How do you know John Watkins?
 3 A. Well, I met him when I moved to McCall in
 4 1979. And he was working in a sporting goods store, and
 5 I hired him to come and be my manager. And we did the
 6 remodel of the building together. And he's been with me
 7 30 years.
 8 Q. Have you ever talked to John Watkins about
 9 this lawsuit?
 10 A. No, other than complaining.
 11 Q. Have you ever talked to John Watkins about Ed
 12 Petrus?
 13 A. Perhaps I have, but not in length. I probably
 14 have mentioned his name to him.
 15 Q. Did you talk with John Watkins about the sale
 16 process of 2130?
 17 A. No.
 18 Q. How many people in McCall have you talked to
 19 about this lawsuit?
 20 A. Oh, I have absolutely no idea.
 21 Q. More than two?
 22 A. Oh, sure, uh-huh. My friends ask me what's
 23 going on. They have met him. I've never met
 24 Mr. Petrus.
 25 Q. What do you tell your friends?

1 A. That I've never met him, and I don't
2 understand why he's coming after me. I just can't
3 imagine.
4 Q. What do they say?
5 A. They don't think very highly of him.
6 Q. Do they know him?
7 A. Yes, they do.
8 Q. Do you know anyone who thinks highly of
9 Mr. Petrus?
10 A. Not one person.
11 Q. So everyone you know doesn't like him?
12 A. That is correct.
13 Q. Why did you sell to him?
14 A. Because I was trying to get out of the house
15 while my husband's health was deteriorating, and the
16 lease was going up. It was like pouring water -- money
17 pouring water down the drain. It was ridiculous what I
18 was paying the Department of Lands.
19 Q. Did you have any other offers on the house?
20 A. No.
21 Q. Do you know Todd McKenna?
22 A. No.
23 Q. Do you know Kevin Batchelor?
24 A. No. I met him the day that we signed the
25 papers.

1 A. No.
2 Q. Did you ever feel that he did not represent
3 you?
4 A. I felt that Michael and Jean did not represent
5 my issues, as far as the furnishings in the house. I
6 only asked for two items, and I was told by Jean and
7 Michael Wood that it would be a deal breaker if I asked
8 for that; my dining room table and the outdoor
9 furniture.
10 Q. And is that the only issue with which you
11 disagreed with Jean and Michael?
12 A. Well, it was the biggest issue.
13 Q. What other issues did you have disagreements
14 about?
15 A. We didn't have any other disagreements, other
16 than I wasn't very happy with the price that they got
17 me.
18 Q. So your unhappiness with them is the price
19 that they got you, and their representation of you with
20 respect to those two pieces of furniture; is that fair
21 to say?
22 A. That's fair to say.
23 Q. Was there anything else they did, that you
24 thought did not adequately represent your best
25 interests?

1 Q. And remind me, when did you first meet Michael
2 Wood?
3 A. I have absolutely no idea. He came along with
4 Jean Odmark one day. I don't remember what year, and
5 under what circumstances, but it had to do with the sale
6 of the house. I've never met him before. He's never
7 been at any of the other sales that I've done with Jean.
8 Q. And what's your opinion with Michael Wood?
9 A. I don't know him well enough to form an
10 opinion.
11 Q. Does he still work with Jean?
12 A. Yes.
13 Q. Do you trust Jean?
14 A. Yes.
15 Q. Do you think she's good at picking people to
16 hire?
17 A. I have no idea.
18 Q. Would you have any reason to think she's bad
19 at it?
20 A. No, I would have no reason to think that.
21 Q. If she brought Michael Wood along, would you
22 think, I can trust him?
23 A. I would assume so.
24 Q. Did you ever experience any problems with
25 Michael Wood in this transaction?

1 A. No, I guess not.
2 Q. In general, did you feel that Ms. Odmark
3 represented your best interests?
4 A. It's hard to say. I guess she did in her own
5 mind. It put a real breach in our relationship for a
6 while, but I've gotten over it.
7 Q. From the price and the furniture issues?
8 A. That's correct.
9 Q. The same with Mr. Wood?
10 A. Yes.
11 Q. Had you had such problems with Ms. Odmark in
12 the past?
13 A. No.
14 Q. In the past, you felt she had represented your
15 best interests?
16 A. That's correct.
17 Q. And are you currently on reasonable terms with
18 her?
19 A. Yes.
20 Q. Are you currently on reasonable terms with
21 Mr. Wood?
22 A. I haven't seen him, or ever talked to him.
23 Q. So he's not in your social circle?
24 A. No, he's not.
25 Q. Does he live here?

1 A. I believe so.
 2 Q. Did you ever think that Jean was ever
 3 dishonest in her representation of you?
 4 A. No.
 5 Q. Did you ever think Mr. Wood was dishonest in
 6 his representation of you?
 7 A. No.
 8 Q. Did you ever have reason to believe that
 9 either of them would have lied on your behalf?
 10 A. No.
 11 Q. Have you ever known anyone in McCall who had
 12 problems with -- this is a silly question, because it's
 13 going to be, yes, but who had problems with water
 14 intrusion in their homes?
 15 A. No, I haven't.
 16 Q. And do you know anyone else who's ever hired
 17 Chris Kirk to work on construction for them?
 18 A. Yes, I do.
 19 Q. Has anyone ever reported to you that they had
 20 a complaint about him or his work?
 21 A. Never.
 22 Q. His reputation is very solid?
 23 A. Yes, it is.
 24 Q. You are not aware of any complaints people
 25 have had about him?

1 telling me that he is a trust fund baby. I need to know
 2 more than that. So I found out he lived in Rancho
 3 Santa Fe, and his name was Edmond Petrus. And I put
 4 49.95 on my credit card, and went on the internet, and
 5 it spit out 19 pages.
 6 Q. Of what?
 7 A. Of his filing for bankruptcy, his DUIs,
 8 his unbelievable things. And I was so upset. And I
 9 called up Jean. And I said, how could you have gotten
 10 me tied for so many months with someone who can't even
 11 afford to buy my house?
 12 Q. At what point did you run this search?
 13 A. Before he had any money put up. He had tied
 14 up my property for about four months. I had signed
 15 papers that he was going to buy the property. And then
 16 I realized, he didn't have any money to buy the
 17 property.
 18 Q. Have you never received money for that
 19 property?
 20 A. Yes, I have. But his -- in the meantime, the
 21 property was bought by his trust fund.
 22 Q. So eventually --
 23 A. So they changed it from Edmond Petrus to the
 24 trust.
 25 Q. And then you were paid?

1 A. No, never. Never.
 2 Q. All right. When did you first meet Ed Petrus?
 3 A. I've never met him.
 4 Q. Have you ever spoken to him on the phone?
 5 A. Never.
 6 Q. Have you ever emailed with him?
 7 A. I don't recall.
 8 Q. Tell me about the sales process of selling the
 9 house to Ed.
 10 A. Oh, it was a nightmare, a complete nightmare.
 11 If you've looked at the papers, you saw how many back
 12 and forth the various negotiations were going.
 13 Q. At some point, did you have Mr. Millemann
 14 assist you in the process?
 15 A. No, I did not.
 16 Q. When did you first receive an offer, if you
 17 recall, from Mr. Petrus on the house?
 18 A. I don't recall. I just -- Jean told me about
 19 him. And he had said he was going to buy another house
 20 from her. And then at the last minute, he didn't. And
 21 so she thought he was a likely prospect.
 22 And he had me tied up for many months without
 23 any money down. And I didn't know where he was from, or
 24 anything about him. And finally, I asked Jean, I had
 25 said, I have to know more than E. Petrus, and you are

1 A. That's correct.
 2 Q. So at the end of the day, you received money
 3 for the house?
 4 A. Yes, I did.
 5 Q. Did you provide to your lawyer that -- how
 6 many pages -- 19 pages?
 7 A. No, I did not.
 8 Q. Why not?
 9 A. Well, I just didn't. But it makes fascinating
 10 reading. He did buy himself out of the bankruptcy,
 11 which I didn't know you could do. But he bought himself
 12 out of the bankruptcy, I assume, when he received his
 13 money from his mother. He was an only child.
 14 Q. What does it mean to buy yourself out of
 15 bankruptcy?
 16 A. I don't know. That's just what the papers
 17 stated. After -- he was getting a divorce at the time.
 18 And so after his divorce was final, he bought himself
 19 out of bankruptcy. I don't know what that means, but
 20 that's what he did.
 21 Q. I don't know what it means either. I don't
 22 know.
 23 A. Well, if you put 49.95 down and run a search
 24 on the internet, you'll get 19 pages, I imagine. I got
 25 19 pages.

1 Q. Do you still have those?
 2 A. I do not. You know, I put things behind me.
 3 I never dreamed I would be in a lawsuit with this man,
 4 or I might just put another 49.95 on the computer again.
 5 Q. And you remember that very clearly?
 6 A. I do, because I was so horrified that I was
 7 involved with the kind of person he is.
 8 Q. Have you ever filed for bankruptcy?
 9 A. No, I have not.
 10 Q. Do you know anyone who has?
 11 A. Yes.
 12 Q. Who?
 13 A. My daughter.
 14 Q. And is she still in bankruptcy?
 15 A. I think it lasts seven years. She had back
 16 surgery that was very expensive, and she did not have
 17 insurance. She was living in New York, and was in an
 18 automobile accident. And her hospital bills were over
 19 300,000, and she filed for bankruptcy. She's now living
 20 in La Jolla.
 21 Q. So in general, you don't think it's a bad
 22 thing to file for bankruptcy?
 23 A. No, I think it's a terrible thing.
 24 Q. Is it a reflection of poor character?
 25 A. No. I guess it's poor judgment, I would say.

1 A. This was our goings back and forth over
 2 different problems.
 3 Q. Is this the Real Estate Purchase and Sale
 4 Agreement for 2130 Payette Drive?
 5 A. I believe it is.
 6 Q. When you sold the property to Ed Petrus?
 7 A. That's correct.
 8 Q. If you could turn, please, to the last four
 9 pages. And tell me when you are there. It starts at
 10 Re/Max 49.
 11 A. Okay.
 12 Q. This is the "Seller's Property Condition
 13 Disclosure Form"; is that correct?
 14 A. That's correct.
 15 Q. It has your name as the seller, Nancy
 16 Gentry-Boyd.
 17 A. Right.
 18 Q. And the date, February 2nd, 2011?
 19 A. Correct.
 20 Q. Why does it say 2011?
 21 A. I don't know.
 22 Q. Were you trying to sell the house in February
 23 of 2011?
 24 A. I think that's probably when our negotiations
 25 started.

1 Q. And if someone pays their debts to get out of
 2 bankruptcy, what does that mean to you?
 3 A. Well, it would depend. I don't know how
 4 bankruptcy works. I saw all of his -- all of the people
 5 that he owed money to; his children's tutors, his
 6 children's doctors appointments, and things. And it
 7 seemed terrible to me, that he left them hanging. And
 8 he had a Porsche and a Mercedes, and his wife was
 9 driving a Honda. It just seemed funny he was doing this
 10 from his divorce.
 11 Q. This was all from the 19 pages that you
 12 downloaded?
 13 A. Uh-huh, it was.
 14 Q. Did you show those to Jean Odmark?
 15 A. No, I told her about them.
 16 Q. Did you tell Michael Wood about them?
 17 A. No, I never talked to Michael. Jean might
 18 have told him, but I didn't.
 19 MS. FOSTER: Let's do Exhibit No. 5.
 20 (Exhibit 5 marked.)
 21 Q. (BY MS. FOSTER) Exhibit 5 is a 52-page
 22 document, Bates labeled Re/Max 1 through Re/Max 52. Do
 23 you recognize this document?
 24 A. Yes, I do.
 25 Q. What is it?

1 Q. Did your negotiations with Mr. Petrus last
 2 over a year?
 3 A. Well, I don't know why it would say that if it
 4 hadn't been when our negotiations had started.
 5 Q. Do you recall your negotiations lasting over a
 6 year?
 7 A. I don't recall.
 8 Q. So maybe it's a typo?
 9 A. Maybe.
 10 Q. That's fine. Do you recall completing this
 11 form?
 12 A. Yes.
 13 Q. What were the circumstances in which you
 14 completed it?
 15 A. I think Jean brought them over to the house,
 16 and I sat down with her and completed it.
 17 Q. Was this before or after you printed out the
 18 19 page report with Mr. Petrus?
 19 A. Oh, it was before. I would have never gotten
 20 into this mess had I read the 19 pages.
 21 Q. And at the bottom of the first page on the
 22 left are seller's initials. And are those your
 23 initials?
 24 A. Yes, they are my initials.
 25 Q. And the date is 2/7/11; is that right?

1 A. It looks like it, uh-huh. So perhaps I didn't
 2 know what year it was.
 3 Q. So did you fill this out -- let's see if I can
 4 figure this out. Let's back up.
 5 You said that your husband was diagnosed in
 6 2010?
 7 A. About that.
 8 Q. And how soon after he was diagnosed did you
 9 talk with Jean Odmark about selling the house in McCall?
 10 A. I think I had been talking to her as my lease
 11 went up each year with the Department of Lands. I said
 12 I either have to buy the property or get out. And they
 13 would not sell it to me at that time.
 14 Q. It must be a typo. Did you sit down with her
 15 and do paperwork in early 2011, for the selling of the
 16 house?
 17 A. I don't remember what year it was. I truly
 18 can't remember one year from the next.
 19 Q. From the time you first sat down with her to
 20 start paperwork for selling the house, and the time you
 21 sold the house, was that all in the same year?
 22 A. I think it was, but it was a long year. It
 23 was a long year.
 24 Q. It was a 12-month year; right?
 25 A. Well, the negotiations went on a long time.

1 over a year?
 2 A. I guess we did.
 3 Q. You don't recall --
 4 A. I can't tell you for sure. I know -- that's
 5 why I got so upset, because I was being hung out to dry
 6 by my realtor, Jean, without any money put down, without
 7 knowing anything about this man.
 8 Q. For over a year?
 9 A. Uh-huh, for a long time. I wouldn't say it
 10 was a year. I don't know whether it was a year. I
 11 can't tell you. It was a long time.
 12 Q. Is it not possible that this form was
 13 initially completed by you in February of 2011, but then
 14 you didn't start the sale process until 2012?
 15 A. That's very possible.
 16 Q. Was the house on the market for a year before
 17 you had an offer?
 18 A. No, it was not.
 19 Q. How long was it --
 20 A. I don't know how long it was on the market.
 21 This was the only offer I had on it.
 22 Q. All right. So let me --
 23 A. People were not buying leaseholds.
 24 Q. Let's just, I'm going to back up, because we
 25 were speaking over each other a little bit.

1 Q. I understand your position. My question,
 2 though, is, the negotiations lasted less than a year;
 3 correct?
 4 A. I guess. I don't know whether 2011 is correct
 5 or not. I truly don't.
 6 Q. I see.
 7 A. I have it on several documents, so I must have
 8 thought at the time, it was 2011. I can't guarantee.
 9 Maybe I just made a mistake. Up here, at the top, it
 10 says, date 2-2, 2011. Do you see that typed in?
 11 Q. Yes, ma'am.
 12 A. I didn't type that in.
 13 Q. Who typed that in there?
 14 A. I don't know, but I didn't type that in there.
 15 So perhaps Jean's real estate company typed it in there.
 16 Q. And I guess on the top letter, is that a fax
 17 header, I see?
 18 A. Yes.
 19 Q. And it says, 2011?
 20 A. Yeah.
 21 Q. So you started this process in February of
 22 2011?
 23 A. Apparently so. And he didn't bother to sign
 24 it, or have it brought to him until March of '12.
 25 Q. Is it your understanding that he had this for

1 A. Okay.
 2 Q. You don't know how long the house was on the
 3 market before it sold?
 4 A. No, I do not.
 5 Q. And you don't remember when you first put it
 6 on the market?
 7 A. No, I do not.
 8 Q. How much did you ask Jean to list it for when
 9 you first put it on the market?
 10 A. 3,500,000.
 11 Q. And did she list it at that amount?
 12 A. Yes, she did.
 13 Q. And no offers?
 14 A. That's correct.
 15 Q. And how long was it listed at 3,500,000?
 16 A. I don't know. You would have to find out from
 17 the real estate company. I have absolutely no idea.
 18 Q. Well, you still have the documents in your
 19 storage facility; correct?
 20 A. Probably, yes.
 21 Q. So I could ask you for them?
 22 A. Yes, you could.
 23 Q. Okay. And I did; right?
 24 A. Well, perhaps you did. A lot has gone on in
 25 my life since this lawsuit started.

1 Q. Yes. And you collected no documents for this?
 2 A. That's correct.
 3 Q. You didn't check your email; did you?
 4 A. Yes, I checked my email. I was moving. I had
 5 to move from one house to the other.
 6 Q. In the last year?
 7 A. I've moved twice in the last year.
 8 Q. Where do you live now? I'm sorry. Let me
 9 rephrase that. I know your address.
 10 Did you move within La Jolla twice?
 11 A. Yes. Yes.
 12 Q. How did that come about?
 13 A. Well, it came about, because as my husband's
 14 health is deteriorated, he could not handle stairs.
 15 That's how --
 16 Q. So you've purchased a new house?
 17 A. No, we're renting right now.
 18 Q. We can go back to the property disclosure
 19 form.
 20 A. Okay.
 21 Q. I'm not trying to delve into your husband's
 22 situation. I'm happy to hear about it -- I mean, I'm
 23 not happy to hear about it.
 24 A. Okay.
 25 Q. I'm sad to hear about it, but that's not where

1 THE WITNESS: Thank you.
 2 Q. (BY MS. FOSTER) Okay. Thank you.
 3 A. Thank you.
 4 Q. So the top full paragraph that starts with
 5 "Section 55-2501."
 6 A. Uh-huh.
 7 Q. I know that the writing is small, for me, too.
 8 If you go down five lines, where it says in all
 9 capitals, "The Purpose of the Statement." Do you see
 10 that?
 11 A. Yes, I do.
 12 Q. And after that it says, "This is a statement
 13 made by the Seller of the conditions and information
 14 concerning the property known by the Seller"; is that
 15 correct?
 16 A. Yes.
 17 Q. And is that what you understand the purpose of
 18 this form to be?
 19 A. Yes.
 20 Q. And do you believe that you filled out this
 21 form correctly?
 22 A. Yes.
 23 Q. And completely?
 24 A. Yes.
 25 Q. And you left nothing out?

1 I'm trying to go.
 2 A. Okay.
 3 Q. All right. Let's go back to the property
 4 disclosure form. You initialed it on the bottom left,
 5 February 7th, 2011; is that correct?
 6 A. Correct.
 7 Q. And does that mean that you filled it out
 8 around that time?
 9 A. I would think so, yes.
 10 Q. And if you go up to the top paragraph, where
 11 it starts with, "Section 55-2501." Do you see that?
 12 I'm on the first page of the disclosure form. At the
 13 top it says, your name, the date, and the property
 14 address. And right underneath that --
 15 A. No.
 16 Q. Go to --
 17 A. Page --
 18 Q. Go to the previous page before that.
 19 A. Okay.
 20 Q. Let's see.
 21 A. Is that it?
 22 Q. No, that's not it either. The bottom Bates
 23 label is Re/Max 49. What number are you on?
 24 MR. MILLEMANN: Do you want her on page 49?
 25 MS. FOSTER: Yes, please. That's a good idea.

1 A. To my knowledge, I left nothing out.
 2 Q. And you filled it out in February of 2011?
 3 A. Yes.
 4 Q. After you had experienced the doors sticking
 5 that one winter; correct?
 6 A. Yes.
 7 Q. And Mr. Kirk had come out and fixed it; right?
 8 A. That's correct.
 9 Q. And another winter you had a draft?
 10 A. Correct.
 11 Q. And you put duct tape on it?
 12 A. Correct.
 13 Q. Did you ever tell Jean Odmark anything about
 14 those things?
 15 A. Not to my knowledge. I certainly didn't tell
 16 her about the duct tape. She might have gotten a hint
 17 from me, that's the way to get rid of drafts. But, no,
 18 I don't think I discussed the duct tape. And I'm not
 19 sure whether I discussed this door sticking to -- with
 20 her.
 21 Q. You just said, she may have gotten a hint from
 22 you. What do you mean? I just didn't understand what
 23 you mean.
 24 A. I'm just saying, I could have helped her. She
 25 has a house. Some of her doors stick, maybe she could

1 use duct tape. That's all.
 2 Q. Okay.
 3 A. Maybe I'm just being facetious.
 4 Q. That's okay. I just wanted to understand.
 5 And did you tell Michael Wood anything about
 6 the doors having stuck that one winter, or had a draft
 7 another winter?
 8 A. Not that I recall.
 9 Q. And do you recall putting any of that
 10 information in the Seller's Property Condition
 11 Disclosure Form?
 12 A. No, I did not.
 13 Q. And if you turn to the second page, the second
 14 section is called "Moisture & Drainage Conditions
 15 Section." Do you see that?
 16 A. Yes, I do.
 17 Q. And we were on Bates label Re/Max 51; is that
 18 right?
 19 A. Yes.
 20 Q. And the third question says, "Has there been
 21 any water intrusion or moisture related damage to any
 22 portion of the property"; right?
 23 A. Correct.
 24 Q. And you said, "No"; correct?
 25 A. Correct.

1 Q. But you told me a little while ago, that a
 2 sticking door is from moisture; didn't you?
 3 MR. MILLEMANN: Object to the question. I
 4 don't think that characterizes the witness' answer.
 5 But answer it, if you are able to.
 6 Q. (BY MS. FOSTER) Did you understand my
 7 question?
 8 A. Repeat it, please.
 9 Q. Earlier, when I asked you about your french
 10 doors sticking in the winter.
 11 A. Uh-huh.
 12 Q. We discussed whether it could have been caused
 13 by moisture or temperature. And you said, "moisture";
 14 didn't you?
 15 A. Yes, I did.
 16 Q. Is that not a moisture-related problem?
 17 A. Yes, it probably is. But it would be that way
 18 with every house in McCall, Idaho as far as I know.
 19 Q. Did every door in your house stick with
 20 moisture?
 21 A. No.
 22 Q. Just one; right?
 23 A. Well, maybe two, I don't know. There were
 24 occasions where moisture would stick windows and doors
 25 in all my houses in McCall, Idaho. And even my houses

1 in La Jolla, when it rains, and there is moisture.
 2 Q. But for this one, you actually called Chris
 3 Kirk to come fix it; right?
 4 A. Yes, I did.
 5 Q. Do you call builders every time you have a
 6 sticking door?
 7 A. No.
 8 Q. Why this time?
 9 A. Well, he fixed it.
 10 Q. Well, why didn't you call him for other doors?
 11 A. Well, because they -- I didn't have any
 12 problems with it. I'm not that picky.
 13 Q. But you consider it moisture-related damage;
 14 do you?
 15 A. No, I didn't consider it. I figured it was
 16 something that occurred at the time. And when
 17 it -- there wasn't moisture, it didn't stick.
 18 Q. But you told me he repaired it; right?
 19 A. Well, I think he did. It didn't stick any
 20 more.
 21 Q. So why isn't an answer to this, yes?
 22 A. Well, because it did not seem important to me.
 23 I wasn't trying to hide anything.
 24 Q. It did not seem important to you?
 25 A. That's correct.

1 Q. And if you go to the next page, which is Bates
 2 labeled Re/Max 50.
 3 A. Okay.
 4 Q. And the top half of the page is a square with
 5 lines in it. The bottom portion says, "Additional
 6 Remarks."
 7 A. Okay.
 8 Q. Do you --
 9 A. Okay. Yes. Yeah.
 10 Q. And this is a space where it says, "Additional
 11 Remarks and/or Explanations Section: Please list any
 12 other existing problems that you know of concerning the
 13 property including legal, physical, product defects or
 14 others that are not already listed." Do you see that?
 15 A. Yes, I do.
 16 Q. And there are several blank lines after that?
 17 A. Yes.
 18 Q. You didn't put anything down?
 19 A. No, I did not.
 20 Q. You didn't put down that you had the builder
 21 fix sticking doors?
 22 A. No, I did not.
 23 Q. Or that you had used duct tape to fix the
 24 draft?
 25 A. That's correct.

1 Q. And you don't recall whether you told Jean
2 Odmark about those two things?
3 A. I do not recall talking to her about either
4 one of those things.
5 Q. Did you talk to anyone during the sale of the
6 home about those two events?
7 A. Not to my knowledge.
8 Q. And this page also at the bottom has your
9 initials; right?
10 A. Yes. Yes.
11 Q. February 17, 2011?
12 A. Correct.
13 Q. Do you recall whether you ever went back and
14 looked at this form after the first time you filled it
15 out? Does my question make sense?
16 A. It does. And I do not recall having gone back
17 to look at it.
18 Q. And then on the very final page, which is
19 Bates labeled Re/Max 52. It looks like you -- so one,
20 two -- three signatures down, it says, your signature,
21 Nancy Gentry-Boyd, March 8, 2012; is that right?
22 A. Yes.
23 Q. So you did give it a final signature one year
24 and two months --
25 A. Correct, I did.

1 Q. I'm sorry. You know what; I do have one more
2 question. Let me make sure I've covered everything.
3 You don't remember filling out the form at
4 all; is that what you are telling me?
5 A. Well, I must have filled it out, but I do not
6 specifically remember where I was, or when, whether I
7 was in Jean's office, or at my house, or at Mountain
8 Monkey Business. I do not recall.
9 Q. And so do you recall whether Jean gave you any
10 instructions about the form?
11 A. I don't recall.
12 Q. Have you filled out similar forms in all the
13 times you've sold property?
14 A. Yes, I have.
15 Q. And what do you understand your responsibility
16 is with respect to filling out this form?
17 A. To answer as honestly as I possibly can.
18 Q. Is it to answer as completely as you can?
19 A. Yes, it is.
20 Q. And is it to answer in good faith?
21 A. Yes, it is. Well, it is my character. And I
22 have a pretty fine character. I'm not a liar. I'm not
23 a cheater. I do -- I answer things from the hip. I
24 shoot from the hip. And I did not deliberately lie or
25 try to deceive anyone.

1 Q. Excuse me -- one year and one month after you
2 initially signed it?
3 A. Uh-huh, I did.
4 Q. Do you recall why?
5 A. I guess I was asked to. I don't know.
6 Q. By whom?
7 A. I have no idea. I don't recall signing this.
8 I did sign it. But I don't remember these details. I'm
9 sorry. My memory is not that good.
10 Q. Well, it's not bad. You remember 19 pages;
11 right?
12 A. You bet I do.
13 Q. So some things you remember?
14 A. Some things that are out of the ordinary, I
15 remember.
16 Q. Right. And you remember Chris Kirk calling
17 door installers to fix the door that one winter?
18 A. I guess he did.
19 Q. And that --
20 A. I just know he came over.
21 Q. I'm sorry. I interrupted you. Go ahead.
22 A. No -- yes.
23 Q. Okay. I don't have any other questions on
24 this document. Thank you.
25 A. Okay.

1 Q. And "from the hip" means? Does that mean,
2 honestly?
3 A. Honestly. It means, honestly.
4 Q. Not haphazardly?
5 A. That's correct. I'm an honest person.
6 Q. And you understand that your obligation when
7 you are selling property is to disclose conditions of
8 the property that are out of the ordinary?
9 A. Yes, I do.
10 Q. And again, you did not disclose the problems
11 that you had experienced with the french doors in
12 question; did you?
13 A. That's correct.
14 Q. Now, I'm done with that form. Thank you.
15 A. Okay.
16 Q. When did you first learn that Mr. Petrus was
17 alleging water damage to the home?
18 A. I don't recall.
19 Q. Who first told you about it?
20 A. I think it was when I got a letter in the
21 mail, asking for \$20,000, from Mr. Petrus.
22 Q. A letter asking for \$20,000?
23 A. Yes.
24 Q. Do you still have this letter?
25 A. I believe my attorney has it.

1 Q. What did the letter say?
 2 A. Well, it absolutely flabbergasted me. It said
 3 that he wanted 20,000 to repair damage to the floors.
 4 And there was nothing wrong with the floors when I
 5 signed the final papers. He had a list of items that he
 6 wanted to be reimbursed for.
 7 Q. Anything else in the letter?
 8 A. I don't recall. I -- it was just so out of
 9 the ordinary, and it was written right before -- I think
 10 the day before the time limit where you can get, you
 11 know, money for your grievances. And Mr. Petrus sent it
 12 to me. And I flew up to McCall and met with Steve
 13 Millemann. It was my first time to talk to Steve about
 14 this problem.
 15 Q. Okay.
 16 A. And I gave Chris a copy of the letter. And he
 17 took the grievances in the letter, and figured out what
 18 it would cost to repair the floors, and repair
 19 everything that Mr. Petrus listed in the letter. And it
 20 didn't come close to \$20,000. It was a joke that
 21 Mr. Petrus wanted \$20,000 for these grievances.
 22 Q. How much did Mr. Kirk think it would cost to
 23 repair these grievances?
 24 A. I can't remember.
 25 Q. But it was less than 20?

1 Q. Did you throw it away?
 2 A. No, I gave it to Steve Millemann.
 3 Q. Okay. Fine. And you don't recall how long
 4 after you closed, that you received that letter?
 5 A. It was at least six months.
 6 Q. Within the six months?
 7 A. About six months, perhaps.
 8 MS. FOSTER: Let's do Exhibit 6.
 9 (Exhibit 6 marked.)
 10 Q. (BY MS. FOSTER) I'm handing you what's a
 11 four-page document. It's an email string. It is Bates
 12 labeled Batchelor 98 through Batchelor 101. Batchelor
 13 is B-a-t-c-h-e-l-o-r.
 14 You've testified that you don't email very
 15 often. Are you familiar, though, with how email strings
 16 look?
 17 A. Yes, I am.
 18 Q. So then they are in reverse chronological
 19 order; and therefore, please turn to page 2.
 20 A. (Witness complying.)
 21 Q. And look at about halfway through, there is an
 22 email from Ed Petrus. And it says, August 2nd, 2012 at
 23 1:07 p.m. Do you see that?
 24 A. Yes, I do.
 25 Q. This email is from Ed Petrus to Michael Wood;

1 A. Way less.
 2 Q. How long after you closed the house, did you
 3 receive this letter from Mr. Petrus?
 4 A. I can only tell you what the time limit was.
 5 And it was the day before the time limit would have been
 6 up.
 7 Q. And what is this time limit?
 8 A. I don't know. I think you have six months, or
 9 a year, or something, after you sell a house, that you
 10 can go back and ask for --
 11 Q. I see.
 12 A. I don't know. I just -- it so shocked me,
 13 because he got such a great deal with a furnished house,
 14 with the landscaping, and all of the nice things that he
 15 got for the small amount of money that he paid, that I
 16 could not believe that he was petty enough to come after
 17 me.
 18 Q. So sitting here today, you recall that you
 19 received a letter from Mr. Petrus asking for about
 20 \$20,000; is that right?
 21 A. That's correct.
 22 Q. Well, give me a second.
 23 Do you still have that letter in your
 24 possession?
 25 A. I do not.

1 is that correct?
 2 A. It seems to be.
 3 Q. It says, "Michael: We are moving forward and
 4 it is apparent the doors will have to totally
 5 be reinstalled." Do you see that?
 6 A. Yes, I do.
 7 Q. And this is, let's see, August 2nd. And
 8 that's less than four months after you closed; is that
 9 right?
 10 A. I guess so.
 11 Q. And this is an email talking about having the
 12 doors reinstalled; correct?
 13 A. Yes, it is.
 14 Q. And the second sentence says, "Have you spoken
 15 to your client Nancy Boyd about the matters we
 16 discussed?" Do you see that?
 17 A. Yes, I do.
 18 Q. Did Michael Wood ever talk to you about this
 19 in August of 2012?
 20 A. Not that I recall.
 21 Q. You have no recollection, whatsoever?
 22 A. No, I have no recollection.
 23 Q. The next sentence, "In addition to matters we
 24 discussed." And again, just focusing on that phrase.
 25 You don't know that Michael Wood spoke with Ed Petrus in

1 August of 2012?
 2 A. I do not know that.
 3 Q. "It is apparent that CTR was contacted by your
 4 client about the problem with the doors but was never
 5 contracted to fix or repair it"; is that true?
 6 A. I don't recall that. I don't even know what
 7 CTR is.
 8 Q. Then there is some talk about lawyers in the
 9 next two sentences. The next sentence says, "This is a
 10 pretty straight forward case of non-disclosure. Those
 11 doors have clearly been a problem for Nancy for years
 12 and the duct tape she used would not fix true problem."
 13 Do you see that?
 14 A. Yes, I see that.
 15 Q. And is that true?
 16 A. I don't know that's it's true. That's what he
 17 says.
 18 Q. And then you go up, and then at 11:35 a.m.,
 19 the next day, August 3rd, Michael Wood responds;
 20 correct?
 21 A. Yes.
 22 Q. And he says, "Ed, the seller," you, "will be
 23 contacting the builder to obtain cost information on the
 24 repair you are requesting." "She will get back to me as
 25 soon as she has consulted with Chris Kirk."

1 builder to obtain cost information on the repair you are
 2 requesting." And you don't recall this?
 3 A. No, I don't.
 4 Q. But this looks like in less than four months
 5 after closing, Mr. Petrus contacted Mr. Wood, and said,
 6 we have a problem with the doors; right?
 7 A. Now, may I ask you something? You knew
 8 nothing about the letter that was sent to me asking for
 9 \$20,000; is that correct?
 10 Q. I don't have -- I can't --
 11 MR. MILLEMANN: If she wants to ask you about
 12 that, she can, but...
 13 THE WITNESS: All right.
 14 Q. (BY MS. FOSTER) Yes, I don't want to be rude,
 15 but this is the time for me to ask you questions.
 16 A. I'm trying to figure out whether the letter
 17 came before this or not.
 18 MR. MILLEMANN: She's not going to tell you.
 19 Q. (BY MS. FOSTER) I mean, I will be blunt with
 20 you -- I mean, I will. If I see the letter in here, I
 21 will show it to you.
 22 A. Okay.
 23 Q. If I missed it, I missed it. But you think
 24 that I have it.
 25 A. No, I don't know. I don't know whether you

1 Do you see that?
 2 A. I see that.
 3 Q. And is that true?
 4 A. I guess it is. I can't believe Michael would
 5 make that up.
 6 Q. Okay.
 7 A. I don't remember any of this conversation.
 8 Q. And when we look at Michael's email, nowhere
 9 does he dispute that those doors have clearly been a
 10 problem for Nancy for years; does he?
 11 A. No, he doesn't.
 12 Q. And he doesn't dispute that the duct tape you
 13 used would not fix the true problem; did he?
 14 A. True.
 15 Q. But you've also said that you don't believe he
 16 ever would have -- what -- I can't remember your
 17 words -- that he was not dishonest?
 18 A. I hardly know Michael Wood. I assume he's not
 19 dishonest, because Jean continues to work with him, and
 20 I respect Jean. But I don't know Michael Wood from a
 21 hole in the ground.
 22 Q. So why wouldn't he have disputed these
 23 accusations?
 24 A. I don't know.
 25 Q. He says, "The seller will be contacting the

1 have it. I'm just saying, I'm very aware of the letter
 2 coming to me. But I don't remember any of this
 3 (indicating).
 4 Q. But you don't remember any of this. Okay.
 5 A. So I don't remember if this was after the
 6 letter, or before the letter. I really don't.
 7 Q. Well, let's piece it together a little bit.
 8 You did say that after you received the letter, you
 9 talked to Chris Kirk?
 10 A. Yes, I did.
 11 Q. And that he was going to figure out the cost
 12 of repair?
 13 A. Yes.
 14 Q. Based on the letter from Mr. Petrus?
 15 A. Uh-huh.
 16 Q. Could this email from Michael Wood, of August
 17 3rd, 2012, be referring to that conversation, if you
 18 know?
 19 A. I don't know. I have no idea.
 20 Q. Okay.
 21 A. By this time, August of 2012, do you know how
 22 long Mr. Petrus had been in the house?
 23 Q. I will answer that question by referring you
 24 back, if you don't mind, to Exhibit 5. This is the Real
 25 Estate Purchase and Sale Agreement. And without going

1 through it now, I can represent to you, that the house
 2 closed on April 20th of 2012.
 3 A. Of that year?
 4 Q. Yes.
 5 A. Okay. Because the months that
 6 he -- Mr. Petrus was in the house with his three
 7 teenagers, and his girlfriend's two teenagers, they had
 8 put a hot tub on the deck. And when he was saying that
 9 the floors needed to be refinished, the floors were in
 10 perfect order when I closed the house.
 11 I can only assume that five teenagers in and
 12 out of the hot tub into the house would hurt my wooden
 13 floors. I can only assume that five teenagers in and
 14 out of the house would hurt the doors. So I think those
 15 were circumstances that brought to light the problem
 16 with the doors, and the problem with the floor.
 17 Q. So you think these problems were caused by a
 18 hot tub?
 19 A. I think they were caused by the people living
 20 in the house.
 21 Q. Do you know when the hot tub was installed?
 22 A. It was installed immediately after he bought
 23 the house.
 24 Q. And how do you know this?
 25 A. Because I was told.

1 I don't quite understand this -- "that will mean we will
 2 be forking on they this winter" -- I think it means
 3 working on this. I'm not sure -- "which will increase
 4 the cost for your client. Doing repairs of this nature
 5 in the winter always increases the costs. Please advise
 6 what if anything your client wants to do about replacing
 7 the doors."
 8 Did Mr. Wood tell you about that email?
 9 A. I don't remember it, but I'm sure I was aware
 10 of it. I just do not remember, per se, any of these
 11 emails.
 12 Q. And then back to the very first page of this
 13 exhibit. The next email up from Mr. Wood, that same
 14 day, August 13th, 2012. There must be a time
 15 difference, 1:57 p.m. "Former owner," and that's you;
 16 right, Nancy?
 17 A. Yes, it is.
 18 Q. "Is working with the builder Chris Kirk to
 19 facilitate this." Was that true?
 20 A. I guess so. I don't know why he would write
 21 it if it wasn't true. But I don't know that it was
 22 true. How would I know?
 23 Q. Were you working with Chris Kirk at the time?
 24 A. I do not recall. "Former owner is working
 25 with the builder Chris Kirk to facilitate this. I have

1 Q. By whom?
 2 A. I can't tell you. I don't even remember.
 3 Q. And how do you know his teenagers were at the
 4 house that summer?
 5 A. They were there all summer, five of them.
 6 Q. How do you know that?
 7 A. Because neighbors complained.
 8 Q. To you?
 9 A. No, to friends of mine; hearsay.
 10 Q. So rumors?
 11 A. Rumors, uh-huh.
 12 Q. And they told you that the kids went in
 13 through the south facing french doors?
 14 A. They didn't tell me what doors they went in
 15 and out of. I just have to assume.
 16 Q. And if you go up on that page, and actually to
 17 see the time, if you flip to the previous page,
 18 Batchelor 98, in the very last line. The very last line
 19 says, the date August 13, 2012 at 2:46 p.m., Ed Petrus
 20 wrote.
 21 A. Uh-huh.
 22 Q. And then the top of the next page, Batchelor
 23 99, "Michael: We are running out of time. The doors
 24 must be reinstalled and it takes six weeks to get the
 25 parts and new doors. That will mean we will be" -- and

1 given Chris the info he requested. Am waiting for
 2 marching orders."
 3 I don't know.
 4 Q. And again, in this email, he still doesn't
 5 dispute that Ed said, that the doors have clearly been a
 6 problem for Nancy for years; does he?
 7 A. No. He's saying that.
 8 Q. I'm sorry?
 9 A. He was saying that, yes.
 10 Q. Mr. Petrus was saying that?
 11 A. Yes, he was. Uh-huh.
 12 Q. And Mr. Wood did not disagree with that?
 13 A. Well, apparently not.
 14 Q. And then you go up to the next email, and it
 15 is April 3rd, 2013, approximately nine months later; is
 16 that right? Do you see that?
 17 A. Yes, I do.
 18 Q. That says, at 1:16, Kevin Batchelor wrote:
 19 "Michael: Ed wanted me to pass this email onto you from
 20 August 13, 2012. Ed wants a decision made ASAP as this
 21 has been going on too long. Hopefully Nancy will get
 22 back to you ASAP before legal action is incurred, which
 23 will cost a lot more money."
 24 Do you see that?
 25 A. I see that.

1 Q. Do you know why nine months passed?
 2 A. Well, I know this much. When I got the
 3 original letter asking for 20,000, and having found out
 4 through 19 pages of history from Mr. Petrus, I figured
 5 this would only be the beginning of him coming after me
 6 if I wrote out the check for \$20,000. I figured he's
 7 the kind of man that would keep coming after me.
 8 And that is why we're here today. Because I
 9 did nothing wrong, and I wasn't about to write out a
 10 check for \$20,000. I was not aware of water damage in
 11 the house. And I was aware of putting tape on a draft
 12 coming through while I was playing bridge. But I did
 13 not do anything dishonest. And to receive a letter,
 14 from this man, whose character I have big questions
 15 about, asking me for a check for \$20,000 when I have
 16 done nothing wrong, is why I have an attorney here, and
 17 we're at this point. Because I think the man is very
 18 questionable.
 19 Q. And you think his claim that the doors have
 20 clearly been a problem for Nancy for years is also
 21 questionable?
 22 A. Yes, I did.
 23 Q. Then why didn't Michael Wood disagree?
 24 A. I don't know. I don't know. Ask Michael
 25 Wood.

1 Do you see that?
 2 A. Yes, I do.
 3 Q. And is that true?
 4 A. I don't know.
 5 Q. Did Chris Kirk explain to you that the cost
 6 repair was inflated?
 7 A. Yes, he did.
 8 Q. And did he say why he thought that?
 9 A. Well, because he knows the businesses. He's
 10 built many houses. So he would know whether they were
 11 or not.
 12 Q. Yes. But what did he say to you?
 13 A. He said they were greatly inflated.
 14 Q. Did he give you advice as to whether you
 15 should or should not pay the money?
 16 A. No, he did not.
 17 Q. And do you know Mike Longmire?
 18 A. No, I do not.
 19 Q. And you don't know what CTR is?
 20 A. No, I do not.
 21 Q. Let me ask you a hypothetical question.
 22 A. Okay.
 23 Q. Which is always tricky. But I'm going to ask,
 24 if you were in Mr. Petrus' shoes, and you received this
 25 email from Michael Wood on August 3rd, "Ed, the seller

1 Q. And did you tell Mr. Petrus in August of 2012,
 2 I have 19 pages questioning your character, so I'm not
 3 going to give you any money?
 4 A. No, I did not.
 5 Q. And was that the only reason you didn't want
 6 to cut the check?
 7 A. Is that stated someplace?
 8 Q. No, I'm asking you.
 9 A. No, I didn't tell him that. I told Jean
 10 Odmark that, how could she have put me in touch with
 11 such an inscrutable, horrible person.
 12 Q. And then if you go up, it says -- so going
 13 back to the document, Batchelor 98. If you go up to the
 14 very next email, it is Thursday, April 4th, 2013, 11:52
 15 a.m. from Michael Wood to Kevin Batchelor. "Kevin,
 16 Nancy contacted me and assured me she will respond to
 17 Mr. Petrus by the end of next week. Thanks." Is that
 18 true?
 19 A. I guess it is. I do not remember it.
 20 Q. Then if you go up to the very top, on April
 21 4th, Ed emails Kevin Batchelor. "Kevin, I spoke to Mike
 22 Longmire about Chris Kirk's argument that cost repair
 23 inflated - he says, good luck - everything at rock
 24 bottom prices and door quote is what every contractor
 25 would get."

1 will be contacting the builder to obtain cost
 2 information on the repair you are requesting." And he
 3 didn't dispute that those doors have clearly been a
 4 problem for Nancy. What would you think?
 5 MR. MILLEMANN: Excuse me.
 6 MS. FOSTER: It's a hypothetical.
 7 MR. MILLEMANN: That is not a hypothetical.
 8 That's asking the witness to speculate as to what
 9 Mr. Petrus' mindset was on a series of emails that this
 10 witness was copied with.
 11 I don't want you to speculate. If you can
 12 answer the question, answer it.
 13 Q. (BY MS. FOSTER) So I'm actually not asking
 14 you what Mr. Petrus would have thought. I'm asking what
 15 you would have thought, if you would have received this
 16 email.
 17 A. Well, in dealing with Mr. Petrus, I didn't see
 18 any of these emails. So this is the first I'd ever seen
 19 of any of these emails.
 20 Q. Right. So I guess what I'm asking is,
 21 Mr. Petrus sends an email to Michael, stating those
 22 doors have clearly been a problem for Nancy for years;
 23 right?
 24 A. Yes.
 25 Q. And Michael doesn't dispute it; does he?

1 A. Well, he should have.
 2 Q. But he didn't?
 3 A. Well, I'm sorry. I can't answer for Michael.
 4 Q. No. But wouldn't it be fair to say, that if
 5 that was not true, Michael would have disputed it?
 6 A. No.
 7 MR. MILLEMANN: Object to the form of the
 8 question.
 9 Go ahead and answer it, if you can.
 10 THE WITNESS: No.
 11 Q. (BY MS. FOSTER) Why not?
 12 A. I just don't -- in dealing with Mr. Petrus,
 13 there is a fine line between truth and fiction. I
 14 just -- nothing the man says, do I respect. And I
 15 just -- I'm sorry. I don't -- I never saw these things.
 16 If, whatever his name is -- Michael, is in Mr. Petrus'
 17 pocket, I don't have any idea. I don't know what goes
 18 on around in here. I don't come up to McCall any more.
 19 And I don't know Michael that well.
 20 So maybe Michael is hoping to do business with
 21 Mr. Petrus in the future. I have no idea. But don't
 22 ask me to comment on this, because I don't know what
 23 went on between Mr. Petrus and Michael.
 24 Q. Mr. Wood was working with your real estate
 25 agent, though; wasn't he?

1 A. I can't remember. I don't have any idea. She
 2 may have, or she may not have.
 3 Q. Did you show her the letter that you say you
 4 received requesting \$20,000?
 5 A. Not to my knowledge, but I may have. I can't
 6 honestly answer that. I don't remember. I can only
 7 tell you, I saw red when I got that letter. I was
 8 absolutely so disgusted, and still am.
 9 Q. And you thought there was no truth to it?
 10 A. That's true.
 11 Q. And you said you've told many people in McCall
 12 about this lawsuit; right?
 13 A. No, I haven't had to tell them. People talk
 14 about Mr. Petrus all the time. I get phone calls from
 15 out of nowhere of things he's done, throwing things at
 16 people at the Shore Lodge, and various and sundry
 17 behaviors at dinner parties, and so forth, and his
 18 drinking.
 19 Q. So you don't recall one way or the other,
 20 whether you talked to Jean Odmark about this?
 21 A. No, I do not recall.
 22 Q. Is it fair to assume you would have?
 23 A. It -- sure, it's fair to -- if you want to
 24 think it is. I truly have no memory of it.
 25 Q. You don't know?

1 A. Well, he should have been, yes.
 2 Q. And she represented you; right?
 3 A. Yes, she did.
 4 Q. So is it your testimony, you think he might
 5 have been switching sides at this point?
 6 A. I have no idea.
 7 Q. Do you have any basis to think that?
 8 A. No. He did call me and say, Mr. Petrus is
 9 getting rid of your master bedroom bedspread, and so
 10 forth. Would you like that? And I said, yes. And that
 11 was the end of it. I never got another thing. He had a
 12 garage sale after he bought my house, and sold
 13 everything that he didn't want that he took from my
 14 furnished house, that he bought.
 15 Q. And in the summer of 2012, after you closed on
 16 the house, did you talk to Jean -- is it odd-mark or
 17 ode-mark?
 18 A. Ode-mark.
 19 Q. Did you talk to Jean Odmark about Ed Petrus'
 20 allegation that the doors had been a problem for years?
 21 A. No.
 22 Q. Did she talk to you about it?
 23 A. No.
 24 Q. Did she know that you were talking to Chris
 25 Kirk about obtaining cost information on the repair?

1 A. No, I don't.
 2 Q. At any time after the sell of the house, have
 3 you talked with Jean Odmark about Ed's complaint that
 4 you knew about the doors having problems, and didn't
 5 disclose it?
 6 A. No, I haven't talked to her about it.
 7 Frankly, Jean and I didn't really communicate for about
 8 six months after the sell of the house. She wrote me an
 9 8 page letter that I never read. I destroyed it.
 10 Explaining why she had done what she did. I never read
 11 it.
 12 She was trying to get me back in her favor. I
 13 didn't appreciate the fact that she hadn't represented
 14 me more fairly. And the two things I asked for out of
 15 the house, she didn't go to bat for me. She was wanting
 16 to make a sale. And I told her that, in no uncertain
 17 terms that I felt she had not been fair with me by not
 18 representing what I wanted out of the house.
 19 Q. And have you discussed this lawsuit with her?
 20 A. She knows I'm here. I'm staying in her house.
 21 Q. Did you discuss today's deposition with her?
 22 A. No, I did not. She's in Borrego, and I'm in
 23 her house with my husband, and my son, who came up to
 24 take care of my husband.
 25 Q. So going back to the timeline of events.

1 Between August of 2012 and April of 2013, did you have
 2 any communications with Michael Wood or Jean Odmark
 3 about Ed's complaint about the doors?
 4 A. I probably did, but I do not remember.
 5 MS. FOSTER: Let me grab something else to ask
 6 you questions about.
 7 (Exhibit 7 marked.)
 8 Q. (BY MS. FOSTER) This is a three-page document
 9 that's being marked Exhibit 7. And it's Bates labeled
 10 Petrus 191 through Petrus 193. This is another email
 11 stream that includes some of the emails we just
 12 discussed. Does that look right to you?
 13 A. I guess. I don't remember seeing this. I
 14 probably have seen it, but I do not remember.
 15 Q. Well, I'm not saying you have. So just to
 16 orient. If you go down to the bottom of the first page.
 17 A. Uh-huh.
 18 Q. You can see the email from Michael Wood to
 19 Mr. Petrus.
 20 A. Yes.
 21 Q. August 3rd, 2012, and this is an email we just
 22 discussed. "Ed, the seller will be contacting the
 23 builder to obtain cost information."
 24 A. Yes.
 25 Q. And then you go up to March 18th, 2013. I'll

1 Q. So you don't know whether that happened or
 2 not?
 3 A. No.
 4 MS. FOSTER: Do you need to take a break?
 5 MR. MILLEMANN: Counsel, we are at the lunch
 6 hour.
 7 MS. FOSTER: I have another 45 minutes.
 8 MR. MILLEMANN: If it's 45, and not an
 9 hour-and-45.
 10 MS. FOSTER: I don't think it is an
 11 hour-and-45.
 12 MR. MILLEMANN: I don't know what your
 13 situation is with, Bill.
 14 THE WITNESS: Well, they don't have a car.
 15 MS. FOSTER: Let's take a ten-minute break at
 16 a minimum.
 17 (A recess was had.)
 18 MS. FOSTER: Back on the record.
 19 (Exhibit 8 marked.)
 20 Q. (BY MS. FOSTER) Nancy, I've handed you what's
 21 been marked Exhibit 8. It's a one-page document, Bates
 22 labeled Petrus 194. And this is another email chain.
 23 It has two emails on it. And the first one is from you,
 24 April 9th, 2013, at 12:02 p.m., from your email address
 25 gentryboyd.nancy@gmail.com. Is this your email address?

1 wait. It's on the first page.
 2 A. All right.
 3 Q. We're going in reverse chronological order.
 4 A. Okay.
 5 Q. Well, I guess it is chronological order. It
 6 is reversed on the page.
 7 A. Okay.
 8 Q. August 3rd, 2012, and then the next email in
 9 this chain is March 18th, 2013. When Ed Petrus wrote,
 10 "Michael: Kevin or someone in his office will be
 11 dropping off for you and your client a copy of the
 12 estimate to replace the defective doors. Please provide
 13 a copy to Nancy at your earliest convenience."
 14 Do you see that?
 15 A. Yes, I do.
 16 Q. Did you receive a copy of the estimate to
 17 replace the defective doors?
 18 A. I do not remember seeing it. Do you know? Is
 19 there --
 20 Q. That's what I'm asking.
 21 A. I don't know. I don't remember seeing it. So
 22 I have no idea what the estimate was.
 23 Q. Okay. Michael Wood says right after that, "I
 24 will forward to seller once bid is delivered. Thanks!"
 25 A. Okay.

1 A. Yes, it is.
 2 Q. And is this the email address that you asked
 3 your husband's secretary -- I apologize, I don't
 4 remember her name -- to use for you?
 5 A. Yes.
 6 Q. This email states, "Dear Mr. Petrus: Your due
 7 diligence was completed prior to the closing of escrow.
 8 You closed escrow. I have no further responsibilities.
 9 Sincerely, Nancy Gentry-Boyd."
 10 A. Correct.
 11 Q. Did you type it out?
 12 A. No, I did not.
 13 Q. You had your -- can you remind me of her name?
 14 A. Maura Healy.
 15 Q. Thank you. You had Maura write it?
 16 A. Yes.
 17 Q. Did you dictate?
 18 A. Yes.
 19 Q. And why did you send this email?
 20 A. Because that's the way I felt.
 21 Q. How did you feel?
 22 A. I feel that I have no more responsibility to
 23 Mr. Petrus.
 24 Q. What does "your due diligence was completed
 25 prior to the closing of escrow" mean?

1 A. Well, he had an inspector that he paid to come
 2 in and inspect the house. And I assume that he agreed
 3 to the inspection.
 4 Q. Anything else that meant?
 5 A. No.
 6 Q. How many days were provided for due diligence;
 7 do you recall?
 8 A. I believe a week. I wouldn't swear to that.
 9 I don't know. It was whatever.
 10 Q. And is it your understanding that after you
 11 closed escrow, you have no further responsibilities?
 12 A. That was my understanding.
 13 Q. If, for example, you had withheld some
 14 information about an adverse condition, is it your
 15 belief that if you had withheld it, and they didn't find
 16 it in inspection, you would have no responsibilities
 17 after closing?
 18 A. No, that is not what I'm saying. It's just I
 19 did not feel that I had any responsibility left. I
 20 declared everything that I could remember and knew. And
 21 that was the end of my responsibility. And I was hoping
 22 that it would just put Mr. Petrus at rest.
 23 Q. So let me just break down your answer. If you
 24 had withheld some adverse condition like that you had
 25 termites in previous years, and you didn't disclose it,

1 A. Uh-huh.
 2 Q. If you had withheld information about an
 3 adverse condition, and it wasn't found at inspection,
 4 couldn't have been found at inspection, but you withheld
 5 it, would you have responsibility later?
 6 A. Yes --
 7 MR. MILLEMANN: Excuse me. I'll just object
 8 to the form of the question as far as an adverse
 9 condition. And it calls for this witness to have an
 10 understanding of the law beyond her expertise.
 11 If you understand the question, go ahead.
 12 Q. (BY MS. FOSTER) Did you understand the
 13 question?
 14 A. Yes. I am an honorable person. So I would
 15 have stood by whatever I thought I should do to correct
 16 the problem.
 17 Q. Okay. My question is a little more specific.
 18 And you've sold many properties in your life; right?
 19 A. Yes, I have.
 20 Q. And you know that as a seller, you have an
 21 obligation to disclose adverse conditions; right?
 22 A. Correct.
 23 Q. And if you ever didn't disclose it, you would
 24 be responsible after closing; is that right?
 25 A. Correct.

1 and you closed. Would you feel you were responsible
 2 after closing for any damages that arose from that?
 3 A. No.
 4 Q. Why not?
 5 A. Because the inspection was done that,
 6 obviously, they saw that there were termites, if there
 7 were termites existing. And so I wouldn't have to tell
 8 them there were termites. In California, you have to
 9 have a termite inspection.
 10 Q. Maybe I used a bad example. If you were aware
 11 of a problem with the house, that you knew about, and
 12 they didn't find at inspection, and then you closed,
 13 would you still have any responsibilities after that?
 14 A. I would if I had withheld anything that I knew
 15 about the house, yes.
 16 Q. Even if there was an inspection period --
 17 A. Yes.
 18 Q. -- and they didn't find it?
 19 A. But to my knowledge, it was nothing that you
 20 can find.
 21 Q. So if it's something you knew about, but
 22 couldn't be found at inspection, and you withheld it,
 23 would you be responsible?
 24 A. Well, I didn't purposefully withhold it.
 25 Q. Yeah, this is a hypothetical.

1 Q. Even if it was not discovered in inspection?
 2 A. Yes.
 3 Q. Okay. That's my question. Thank you.
 4 And if you look down at Exhibit 8, and you
 5 look at Mr. Petrus' email back to you on April 9th, at
 6 12:20. He says, "Due diligence does not apply to things
 7 that you had a duty to disclose." Do you agree with
 8 that?
 9 MR. MILLEMANN: The same objection.
 10 Answer it, if you are able to.
 11 THE WITNESS: I disclosed everything that I
 12 thought that was important. And I was not aware of
 13 withholding anything.
 14 Q. (BY MS. FOSTER) Do you agree with this
 15 sentence, though?
 16 A. Yes.
 17 Q. Okay. No further questions on that exhibit.
 18 Or, actually, just for timeline purposes, could you
 19 compare Exhibit 7 to Exhibit 8? I'm sorry. Hold on.
 20 Give me just a moment to get my bearings.
 21 Does Exhibit 6 contain an email saying, that
 22 you will get back to him by the end of the week from
 23 Michael Wood?
 24 A. Yes, it does.
 25 Q. And that was April 4th?

1 A. Yes.
 2 Q. And April 9th you got back to him?
 3 A. Apparently, yes.
 4 Q. So is it easy to assume that Michael Wood knew
 5 you were going to email him by the end of the week?
 6 A. It's safe to assume that.
 7 Q. And did you tell him you were going to?
 8 A. If he said I did, I imagine I did. I don't
 9 remember.
 10 Q. Thank you. What happened between April 4th
 11 and April 9th of that week, if you remember? And, I
 12 mean, specifically with regarding to the doors at issue
 13 in the complaint.
 14 A. I do not remember.
 15 Q. Did you talk to anyone before writing this
 16 email on the 9th?
 17 A. I do not remember.
 18 Q. For example, a lawyer?
 19 A. I do not remember.
 20 Q. A real estate agent, Jean?
 21 A. No.
 22 Q. You didn't consult with any legal counsel
 23 before writing that response, about your obligations and
 24 responsibilities?
 25 A. Not that I recall.

1 me the time they said they would give me. I had a
 2 window of a couple of days. But they started repairing
 3 the work before I arrived.
 4 (Exhibit 10 marked.)
 5 Q. (BY MS. FOSTER) Here is Exhibit 10.
 6 A. I'm still reading Exhibit 9.
 7 Q. That's fine. Go ahead.
 8 A. (Witness reading.) Okay. That's the first
 9 time I've seen that here.
 10 Q. If you look at Exhibit 10, it's a two-page
 11 document, Bates labeled Petrus 222 and 223.
 12 A. Okay.
 13 Q. This is a letter from Jason Mau, attorney, to
 14 you, dated August 15, 2013; is that correct?
 15 A. Is it this letter?
 16 Q. No, have you seen this letter?
 17 A. This letter?
 18 Q. Exhibit 10.
 19 A. You know, I do not remember having ever seen
 20 this letter. I must have seen it, but I don't remember
 21 ever seeing it. I'm not so sure that I was at this
 22 address.
 23 Q. 2325 Avenida De la Playa?
 24 A. Yes. We sold our house before that day. So I
 25 don't know if this ever reached me --

1 Q. You wrote that based on your own understanding
 2 of your responsibilities?
 3 A. Yes, I did.
 4 Q. Okay. Thank you. No more questions on that
 5 document.
 6 MS. FOSTER: I'm going to mark this Exhibit 9.
 7 (Exhibit 9 marked.)
 8 Q. (BY MS. FOSTER) I'm going to hand you what's
 9 been marked as Exhibit 9. And it's a three-page
 10 document, Bates labeled Petrus 218 to Petrus 220.
 11 Do you recognize this letter?
 12 A. No, I do not.
 13 Q. Do you know Jason Mau?
 14 A. No, I do not.
 15 Q. Were you aware that Mr. Kirk received this
 16 letter?
 17 A. No, I was not aware of it.
 18 Q. If you go down to the fourth paragraph, the
 19 first sentence says, "A detailed inspection of the doors
 20 disclosed the presence of excessive water in the foam
 21 insulation on the stem wall under the doors."
 22 Did you know that?
 23 A. Well, I flew up here -- yes, I flew up here
 24 with my husband to see what they had torn apart. They
 25 had already begun to fix everything. They did not give

1 Q. Do you know who Martha Munoz is?
 2 A. No, I do not. I have no idea who signed for
 3 it.
 4 Q. Okay.
 5 A. But believe me, I did not. I've never seen
 6 that letter before.
 7 Q. And that means, you've never seen the August
 8 7th letter to Mr. Kirk either?
 9 A. That's right.
 10 Q. So this letter is dated August of 2013, about
 11 four months after your email, that we just looked at, to
 12 Mr. Petrus?
 13 A. Uh-huh.
 14 Q. Did you have communications with Mr. Petrus
 15 after that email of April 9th, 2013?
 16 A. I don't think so.
 17 Q. What happened that summer with regard to
 18 Mr. Petrus' complaints about the door?
 19 A. I have no idea.
 20 Q. Did you ever --
 21 A. I have no idea.
 22 Q. Did you have conversations with anyone about
 23 it?
 24 A. No.
 25 Q. You received that email from Mr. Petrus,

1 saying he was going to serve a lawsuit; right?

2 A. Yes.

3 Q. And what was the next thing you heard?

4 A. I don't recall what was next. We came up here
5 when they said that they were tearing the house apart.
6 We flew up as soon as we could get on a plane to see
7 what was happening. And they had already started
8 putting everything back together. And Michael Wood went
9 with us.

10 And the gentleman who was in charge of the
11 project, said there is no way anybody could have known
12 there was water damage in here, unless we had torn this
13 apart. Michael Wood can testify to that, because I
14 thought it was quite a telltale sign that it was
15 impossible to know there was water damage, unless you
16 tore the siding off, and took everything apart. I
17 certainly didn't know there was water damage there.

18 Q. So after you received Mr. Petrus' email
19 response that he was going to file a complaint, what did
20 you think was going to happen?

21 A. I didn't -- I had no idea. And I can tell
22 you, I don't know who this person is who signed for
23 this, but we were not living -- I was in that house for
24 49 years, but I was not there on this day. I've never
25 seen any of these letters.

1 A. I don't know whether I was or not. I think we
2 moved in May, but I wouldn't swear to it.

3 Q. Well, the previous letter we just looked at
4 was from August of 2013, so about nine months previous.

5 A. I was not at that address.

6 Q. Right. So this is nine months later.

7 A. So I was not at that address. I don't know
8 how it reached me.

9 Q. But you have seen it?

10 A. I think I have seen it. Isn't that why we
11 came up here, to arrange for the inspection? So I don't
12 know how it got to me, but we came up here to see the
13 house.

14 Q. So what caused you to come up here to see the
15 house?

16 A. This lawsuit, because I couldn't imagine that
17 I had water damage in the wall, because it wasn't
18 visible, and there was nothing to explain that I had
19 water damage in the wall.

20 Q. So you had already retained Mr. Millemann at
21 the time you received this letter?

22 A. Yes. Well, when I received the letter asking
23 for the \$20,000 check is when I retained Mr. Millemann.
24 The letter I guess you haven't seen.

25 Q. And as far as you know, you gave that letter

1 Q. When did you move?

2 A. I can't tell you the date. It was, I think,
3 May of that year. It may have been 2012. I don't know.
4 The years kind of run together these days.

5 Q. Did you move the same year you sold the
6 Payette house?

7 A. No, I did not.

8 Q. The next year?

9 A. Yes, the next year.

10 Q. Okay.

11 A. I sold the Payette house in what year; '12?

12 Q. Yes.

13 A. So I think it was May of '13 that we moved.

14 Q. Well, that might make some things quicker.
15 (Exhibit 11 marked.)

16 Q. (BY MS. FOSTER) Exhibit 11, this is a
17 one-page document, Exhibit 11, Bates labeled Petrus 227.
18 It's a letter from Jason Mau to you, dated April 3rd,
19 2014 to Nancy Gentry-Boyd at 2325 Avenida De la Playa.

20 Did you receive this letter?

21 A. Yes, I did.

22 Q. How?

23 A. I don't know. I have no idea how I got it.

24 Q. You were not at that address on April 3rd,
25 2014?

1 to Mr. Millemann?

2 A. I did.

3 Q. And it was a letter, not a complaint?

4 A. It was a letter.

5 Q. Signed by?

6 A. Mr. Petrus.

7 Q. To you?

8 A. To me. And -- that's it.

9 Q. Tell me about your trip to visit the house,
10 please.

11 A. Well, I went over to the house with Michael
12 Wood. And we met with whoever the caretaker, or whoever
13 was mentioned in one of these letters. I had never seen
14 him before or since. And they had torn the deck up on
15 that -- off the doors. And torn the siding off. And
16 they were beginning to repair it.

17 Q. Who is "they"?

18 A. This gentleman who was in charge. Let's see,
19 Mr. Petrus' maintenance man/property caretaker, and so
20 forth was there. I don't know whether his name is
21 mentioned in here or not.

22 Q. Is it Mike Longmire?

23 A. Yes, that's who it was.

24 Q. Is that the only time you've met Mike?

25 A. Yes, it is.

1 Q. Did you speak with him?
 2 A. Yes.
 3 Q. What did he say?
 4 A. He said, no one could possibly have known
 5 there was water damage, unless you tore the siding off
 6 and ripped this all out.
 7 Q. And what did you say?
 8 A. And Mike Wood said to me, make a note of that,
 9 Nancy, because he said, no one could have known. He was
 10 in charge of this operation. And until they tore the
 11 siding and everything off, it was impossible to know
 12 that there was any water damage there.
 13 Q. And this is what you are testifying Mike
 14 Longmire said?
 15 A. I am indeed.
 16 Q. To your knowledge, is he a construction
 17 expert?
 18 A. I have no idea what he does. He is,
 19 obviously, a maintenance man.
 20 Q. And what did you say to him?
 21 A. I said, that's my whole point. I didn't know
 22 there was water damage.
 23 Q. Anything else you said to him?
 24 A. No.
 25 Q. Did you discuss the due diligence period at

1 went with me, Jean wasn't here, it seems to me. I can't
 2 remember.
 3 Q. So you did speak to Mike Wood on that day?
 4 A. Yes, I did. And he was witness to the fact
 5 that this gentleman said, there's no way you would have
 6 known there was water damage. It would be impossible to
 7 know, unless you tore the siding off.
 8 Q. What did you perceive your relationship with
 9 Michael Wood to be at that time?
 10 A. He was representing Jean.
 11 Q. And was she representing you?
 12 A. She was not present.
 13 Q. So he was there on behalf of the broker?
 14 A. Yes, he was.
 15 Q. He was not there on your behalf?
 16 A. Well, I never felt like they represented me
 17 very well.
 18 Q. Did you feel like he was speaking in your best
 19 interest that day?
 20 A. Yes, I did. He made a note of it. We both
 21 did. We both went home, and I wrote it down.
 22 Q. Where did you write it?
 23 A. In my date book.
 24 Q. Did you give that to your attorney in this
 25 case?

1 all with him?
 2 A. Discuss what?
 3 Q. Excuse me. The due diligence period?
 4 A. No, I don't think I did.
 5 Q. Who else was there?
 6 A. Several men working on the house.
 7 Q. Did you know any of them?
 8 A. No, I did not.
 9 Q. How long were you there?
 10 A. 20 minutes.
 11 Q. And what was your purpose in going there?
 12 A. To see whether there was really any damage, or
 13 this was a figment of someone's imagination.
 14 Q. And what was your conclusion?
 15 A. I saw that there had been water damage. I
 16 have no way of knowing whether the water damage happened
 17 after I sold the house. I have no time frame. I don't
 18 know. I have no idea, because I didn't know there was
 19 water damage.
 20 Q. And was Chris Kirk there that day with you?
 21 A. No, he was not.
 22 Q. Did you meet with Chris Kirk in that trip?
 23 A. No, I did not.
 24 Q. Did you meet with Jean Odmark?
 25 A. No, I did not -- well, I think the reason Mike

1 A. No, I didn't, but I did talk to Steve while I
 2 was here.
 3 Q. Did you give any of your handwritten notes to
 4 your attorney in this case?
 5 A. No, I did not.
 6 Q. So what did you do after that inspection that
 7 you conducted? I'll rephrase it.
 8 What did you do after that day you visited the
 9 house? What happened next?
 10 A. I went home.
 11 Q. Did you talk to Mr. Petrus?
 12 A. No, I did not.
 13 Q. What happened next in terms of this dispute?
 14 A. I was just waiting to see what was going to
 15 happen.
 16 Q. Who did you talk to about what you had seen?
 17 A. My husband.
 18 Q. Who else?
 19 A. I can't remember anyone else.
 20 MS. FOSTER: Let's quickly go through Exhibit
 21 12.
 22 (Exhibit 12 marked.)
 23 Q. (BY MS. FOSTER) It is a one-page document,
 24 Bates labeled Petrus 234, a document to you, still to
 25 Avenida De La Playa, but also emailed at that time,

1 dated April 4th, 2014; is that right?
 2 A. Yes, I got all of these by email. I never did
 3 get any of them by mail.
 4 Q. And this letter says, "I have spoken to my
 5 client and he is willing to allow you to inspect the
 6 doors on April 15th."
 7 A. Yes, I believe we arrived on the 15th.
 8 Q. And you were there for 20 minutes?
 9 A. Yes.
 10 Q. With Mr. Wood?
 11 A. Yes.
 12 Q. And Mr. Longmire?
 13 A. Yes, and several other men that were working.
 14 Q. Did you take photos?
 15 A. I did.
 16 Q. What did you do with the photos?
 17 A. Not much. They were not very good photos.
 18 MS. FOSTER: Off the record.
 19 (Discussion held off the record.)
 20 MS. FOSTER: Back on the record.
 21 THE WITNESS: You can see my photos were about
 22 like that.
 23 Q. (BY MS. FOSTER) Okay. Very briefly I'm going
 24 to hand you Exhibit 13.
 25 (Exhibit 13 marked.)

1 A. Yes. I mean, I saw that there had been water
 2 damage. I don't know when it occurred, but I saw that
 3 there was. And I would have had no way of knowing.
 4 Q. Have you ever owned a piece of property with
 5 water damage that looked like that?
 6 A. No, I never have.
 7 Q. The work you had done on --
 8 A. Lake Street.
 9 Q. No, your store.
 10 A. Mountain Monkey Business.
 11 Q. Thank you. Yes, Mountain Monkey Business.
 12 You said there was some wood at the front that had water
 13 damage; is that right?
 14 A. Yes.
 15 Q. Did it look like this?
 16 A. You know, I wasn't present when they were
 17 repairing it, so I don't know. My manager did that.
 18 Q. Okay. Do you know whether Mr. Kirk inspected
 19 the doors around this time, as well?
 20 A. I have no knowledge of that.
 21 Q. Do you know who Steve Minor is?
 22 A. No, I don't.
 23 Q. Do you know who Steve Lacey is?
 24 A. No, I don't.
 25 Q. Have you ever had, to your knowledge, Steve

1 Q. (BY MS. FOSTER) These are documents Bates
 2 labeled Gentry-Boyd first responses 57 through 71. They
 3 are black and white. I apologize for that. I just
 4 wanted to confirm, are these the photos you just
 5 referenced?
 6 A. Yes, they are. I hadn't seen these photos,
 7 but mine were somewhat like this.
 8 Q. These are the photos you took; right?
 9 A. No, they are not my photos. These are not my
 10 photos. I don't know who took these photos.
 11 Q. Just to clarify the record, let's go back
 12 briefly to your discovery responses, which is Exhibit 2.
 13 MR. MILLEMANN: 4.
 14 Q. (BY MS. FOSTER) If you just go to Exhibit 4,
 15 and look briefly at page 11.
 16 A. (Witness complying.) Okay.
 17 Q. And you see "Request for Production No. 3."
 18 A. Uh-huh.
 19 Q. "Please produce any photographs." "Response:
 20 Photographs of home taken by defendant," which is you,
 21 "on or about April 15, 2014, Bates No. 057 to 071."
 22 Does that refresh your recollection that these
 23 are the photos that you took?
 24 A. I guess they are, uh-huh.
 25 Q. And were you surprised at what you saw?

1 Minor or Steve Lacey inspect the doors?
 2 A. Not to my knowledge.
 3 Q. Could you please turn back for a moment to
 4 Exhibit 4. These, again, are your discovery responses.
 5 A. (Witness complying.)
 6 Q. And if you would -- I'm sorry. Exhibit 4.
 7 MR. MILLEMANN: Here they are.
 8 THE WITNESS: Okay.
 9 Q. (BY MS. FOSTER) So these are your discovery
 10 responses.
 11 A. Yes.
 12 Q. Please turn to page 11.
 13 A. (Witness complying.) Okay.
 14 Q. And if you look at the top at Interrogatory
 15 No. 30.
 16 A. Okay.
 17 Q. And you look at the answer. It says,
 18 "Defendant was provided a total of ten calendar days to
 19 arrange for and conduct an inspection of the home." And
 20 defendant is you?
 21 A. I guess so.
 22 Q. And does this refer to the time in April 2014,
 23 that we just discussed, when you visited the home?
 24 A. I don't know. How would I know that?
 25 Q. You verified the responses as true and

1 accurate.
 2 A. Well, I mean, I don't know what time this is
 3 dated. So tell me again, how would I know?
 4 Q. We just discussed a visit you made to
 5 conduct --
 6 A. Yes, on the 15th of April.
 7 Q. Correct, 2014, almost two years ago now. And
 8 I'm looking at your interrogatory answer, and I'm just
 9 trying to understand it. And it says you were provided
 10 a total of ten calendar days. And I just want to know
 11 if that provision of ten days refers to the time period
 12 in which you went to see the house in April of 2014?
 13 A. I don't think so.
 14 Q. Was there a second time when you were provided
 15 days to arrange for and conduct an inspection of the
 16 home?
 17 A. No, the only time was when one of these
 18 letters stated to come up there on the 15th.
 19 Q. The next sentence says, "Plaintiff was
 20 unexpectedly present."
 21 Was Mr. Petrus there that day?
 22 A. No.
 23 MR. MILLEMANN: Could you read the whole
 24 sentence, please?
 25 Q. (BY MS. FOSTER) Yes, I will. I'm doing it on

1 Q. So sitting here today, you don't know what
 2 this is referencing?
 3 A. No, I have no idea.
 4 Q. And as far as you know, you, or people acting
 5 for you, have only conducted an inspection of the home
 6 that day that you went?
 7 A. That's correct.
 8 Q. Okay. Have you ever seen any photos taken by
 9 Mr. Kirk of the damage?
 10 A. No, I have not.
 11 Q. Have you seen any photos taken by anyone else,
 12 other than you, of the work that was being --
 13 A. No, I have not. I haven't seen the finished
 14 product. I have seen nothing else.
 15 Q. Okay.
 16 A. I have not been back to the house since that
 17 day.
 18 Q. And I'm just going to go over it just for the
 19 record. You are testifying that you haven't seen
 20 photos, other than yours, that were taken of the
 21 repairs, or work done on the doors --
 22 A. Never.
 23 Q. -- in 2014?
 24 A. No.
 25 Q. We are almost done. My last line of

1 purpose. Mr. Petrus was not there --
 2 A. I've never met Mr. Petrus. If he was there,
 3 he didn't introduce himself. I don't know what he looks
 4 like.
 5 Q. And as your lawyer wants me to ask, and I
 6 intend to. It says, "Plaintiff was unexpectedly present
 7 when defendant's agent arrived for the inspection."
 8 Who was your agent?
 9 A. I imagine Michael Wood. I don't know.
 10 Q. Did --
 11 A. Where are you reading that from?
 12 Q. It is in your interrogatory answer, right
 13 there.
 14 A. Defendant's agent arrived, and otherwise
 15 uncooperative. Well, that's news to me. I don't know.
 16 Q. You are not aware of a time when Mr. Petrus
 17 was there, and belligerent, and uncooperative, in
 18 connection with the inspection of the doors?
 19 A. No, I'm not.
 20 Q. Is it possible that defendant's agent refers
 21 to someone that your lawyer may have hired to conduct an
 22 inspection?
 23 A. I don't think so.
 24 Q. Could it have been Mr. Kirk?
 25 A. I don't think so.

1 questions.
 2 Did you file a claim with your homeowner's
 3 insurance company for this lawsuit, to your knowledge?
 4 A. I don't know. My homeowners? I -- well, I
 5 had an insurance policy on the house. So I probably did
 6 ask my insurance man about it, if it would be covered.
 7 Q. Who is your insurance man?
 8 A. Chris Kirk's brother, Mr. Kirk, Kirk
 9 Insurance.
 10 Q. What's Chris Kirk's brother's first name; do
 11 you know?
 12 A. William.
 13 Q. Okay. William. And do you know him,
 14 personally?
 15 A. No.
 16 Q. How did you --
 17 A. He's always carried my insurance. And he
 18 carries Mountain Monkey Business' insurance. And he's
 19 carried insurance on the other houses in McCall.
 20 Q. Including the one on Lake Street?
 21 A. Yes. Yes.
 22 Q. Have you spoken with him about this lawsuit?
 23 A. No.
 24 Q. Outside an insurance claim discussion?
 25 A. Uh-huh, right.

1 Q. Has he spoken with you about his experiences
2 with Mr. Petrus, if any?
3 A. No, he has not.
4 Q. Has Mr. Kirk spoken with you about his
5 experiences with Mr. Petrus?
6 A. No.
7 Q. Has Mr. Wood spoken with you about Mr. Petrus?
8 A. No.
9 Q. Jean Odmark?
10 A. No. All she has spoken to me is she can't
11 understand why she wasn't sued, also. She has said that
12 much.
13 Q. Well, why would she be sued?
14 A. He was suing everybody else he could think of.
15 She thought --
16 Q. I see.
17 (Exhibit 14 marked.)
18 Q. (BY MS. FOSTER) I only have two copies. It's
19 a one-page document from Financial Insurance Group,
20 called a "Claim Acknowledgment." Have you seen this
21 before?
22 A. No, I have not.
23 Q. It looks like some sort of email to Dave Kirk.
24 Who is Dave Kirk?
25 A. I don't know.

1 will be jumping around in time as I try to do a little
2 cleanup.
3 A. Okay.
4 Q. So I'll hand you what's been marked Exhibit
5 15.
6 (Exhibit 15 marked.)
7 Q. (BY MS. FOSTER) It's a two-page document,
8 Bates labeled Gentry-Boyd First Responses 255 to 256.
9 This is an email from Jean Odmark to you cc'ing Michael
10 Wood, on March 19, 2012. And there are some
11 underlining, which is mine. But I don't have any
12 questions about that.
13 Have you seen this email before?
14 A. No, I haven't.
15 Q. You received it?
16 A. I must have received it, but I don't remember
17 it.
18 Q. When you receive emails, does Maura print them
19 out for you?
20 A. Sometimes.
21 Q. How often do you go on and check your email?
22 A. Maybe once or twice a week.
23 Q. I want to --
24 A. I just need to read this, if you don't mind?
25 Q. Go ahead. Not at all.

1 Q. And the date of this is September 20th, 2014;
2 correct?
3 A. Correct.
4 Q. And you are listed as the insured?
5 A. Yes.
6 Q. Or you are identified as the insured, and it
7 is at 2325 Avenida De la Playa?
8 A. Yes.
9 Q. But you didn't live at that address any more?
10 A. I did not, no. I haven't seen this.
11 Q. So you have never seen this document before?
12 A. No, I have not.
13 Q. And do you know whether, either Dave or
14 William submitted an insurance claim on your behalf?
15 A. No, I do not.
16 Q. So then you don't know whether there was a
17 response?
18 A. No, I do not.
19 MS. FOSTER: Okay. Can we take a five-minute
20 break just for me to collect my thoughts, and see if we
21 can close it out. I think I am just about done.
22 (A recess was had.)
23 MS. FOSTER: Back on the record.
24 Q. (BY MS. FOSTER) Nancy, we are nearing the
25 end. I did have a couple of quick questions. And I

1 A. This is 2012. Okay. (Witness reading.)
2 Q. This is one month before closing.
3 A. Okay. (Witness reading.) Okay.
4 Q. If you'll look at the second paragraph, I have
5 circled the sentence that says, "The ants, water
6 intrusion to be taken care of by buyer." Do you see
7 that?
8 A. Yes, I do.
9 Q. What is that talking about?
10 A. I gather there were ants and water intrusion,
11 and the buyer took care of it.
12 Q. And this email is about the sale of your home
13 at 2130 Payette to Mr. Petrus; correct?
14 A. Yes, it is.
15 Q. And the "buyer" is Mr. Petrus?
16 A. That's correct.
17 Q. And what ants is this referring to?
18 A. I have no idea, because I never saw any ants
19 in the house. It must have been hidden in a crawl space
20 or something. I was never aware of an ant problem in
21 the house.
22 Q. And what does "water intrusion" refer to?
23 A. I have no idea. He must have went up -- he
24 crawled up in crawl spaces. He spent a lot of time
25 inspecting the house, and took pictures and everything.

1 And I remember seeing the pictures. And there were some
2 ants someplace. I don't know where. It could have been
3 outside. Outside the front door, I had a place where
4 my -- I believe, the water heaters were, or something
5 was outside. It was a step down, and I kept some
6 fold-up chairs in there. And that could have been where
7 the ants were. I don't know. I didn't have any ants in
8 the house.

9 Q. And do you know what "water intrusion"
10 references?

11 A. No, I do not know. But when he crawled in the
12 crawl spaces, maybe he saw where a skylight was leaking.
13 I don't know. I wasn't there when he inspected it.

14 Q. What did you think when you read that?

15 A. I didn't think anything. I thought he was
16 going to take care of it, fine. People have ants.
17 People have water problems. Doesn't it say, he's going
18 to take care of it?

19 Q. Were you surprised to see a reference to water
20 intrusion?

21 A. No, I was not.

22 Q. Why not?

23 A. Because you live in the snow in McCall, and
24 there are water -- I'm sure if you lived here, you would
25 have water intrusion in your house at some time.

1 wants your house." That means Mr. Petrus; right?

2 A. I think so.

3 Q. He's getting money from someplace. What is
4 that referencing?

5 A. I don't know, because it showed that he had
6 filed bankruptcy.

7 Q. So is this --

8 A. So she said, don't panic. He's still going to
9 buy your house. I don't know how, but he's still going
10 to buy your house. Is what she was telling me. Because
11 I was ready to put the house back on the market.

12 Q. And then in the next sentence she says, "In
13 our area, we have several people who have organized
14 their financial holdings so that they can go bankrupt
15 and still buy property."

16 Is that true?

17 A. I don't know. I'm certainly not aware of it.

18 Q. You don't know anyone who has done that?

19 A. No, I don't.

20 Q. And you never have?

21 A. No, I never have.

22 Q. Okay. This is the last document. And this
23 may solve my question.

24 (Exhibit 16 marked.)

25 Q. (BY MS. FOSTER) This is Exhibit 16. It's two

1 Q. Did you have water intrusion in your house at
2 2130 Payette?

3 A. Not that I was aware of.

4 Q. So this doesn't surprise you, though?

5 A. No, it doesn't. You live up here in this
6 climate. And in the winter, especially, I'm sure.
7 There are icicles up here. It is just, I think, if you
8 are a logical person, you would expect it in this
9 climate.

10 Q. No, I understand that. I guess what I'm
11 confused about is on the one hand, you've testified that
12 you were never aware of any water intrusion in your
13 home, whatsoever. But now you are testifying, that when
14 you see a reference to water intrusion, you are not
15 surprised at all. And I'm trying to understand why you
16 weren't surprised?

17 A. I was not surprised, because I imagine if I
18 got up into a crawl space somewhere, there might be
19 water that has leaked in someplace. I don't know. I
20 had a lot of crawl spaces in my house.

21 Q. So you thought that this meant the water
22 intrusion was in a crawl space or something?

23 A. Yes, I did. Not visible, certainly.

24 Q. And if you go down to the place I did
25 underline on this first page, it says, "This guy really

1 pages. And it's Bates labeled Gentry-Boyd First
2 Responses 243 and 244. It is a letter from your
3 attorney, Steve Millemann, to Financial Insurance Group;
4 is that correct?

5 A. Uh-huh.

6 Q. Say "yes" or "no" for the record.

7 MR. MILLEMANN: You have to say, "yes."

8 THE WITNESS: Yes. Sorry. Yes.

9 Q. (BY MS. FOSTER) Have you seen this before?

10 A. No, I have not.

11 Q. Let me know when you are done reading it.

12 A. (Witness complying.) Okay.

13 Q. Does this refresh your recollection as to
14 whether you have had an insurance claim filed on your
15 behalf in connection with this lawsuit?

16 A. I had forgotten that we had filed it. But now
17 I can see that we did.

18 Q. Do you know what the response from the
19 insurance company was?

20 A. I would assume that it was not favorable, that
21 they were not going to represent me.

22 Q. Have you seen that response?

23 A. No, I have not.

24 Q. And do you know whether the insurance company,
25 Financial Insurance Group, had an inspection conducted

1 of the house?
 2 A. I have no idea.
 3 MS. FOSTER: Thank you. No further questions.
 4 THE WITNESS: Okay.
 5 MS. FOSTER: Thank you for your time.
 6 MR. NEVALA: I have no questions.
 7 MR. MILLEMANN: I have no questions. We'll
 8 read and sign. And want a copy of the transcript as
 9 well to include exhibits.
 10 (Deposition concluded at 1:16 p.m.)
 11 (Signature requested.)

1 ERRATA SHEET FOR NANCY GENTRY-BOYD
 2 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 3
 4 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
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 14 Page ___ Line ___ Reason for Change ___
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 17 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
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 20 Page ___ Line ___ Reason for Change ___
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 Should Read ___
 21
 22 Page ___ Line ___ Reason for Change ___
 Reads ___
 Should Read ___
 23
 24 You may use another sheet if you need more room.
 25 WITNESS SIGNATURE _____

1 CERTIFICATE OF WITNESS
 2 I, NANCY GENTRY-BOYD, being first duly sworn,
 3 depose and say:
 4 That I am the witness named in the foregoing
 5 deposition, Volume I, consisting of pages 1 through 174;
 6 that I have read said deposition and know the contents
 7 thereof; that the questions contained therein were
 8 propounded to me; and that the answers contained therein
 9 are true and correct, except for any changes that I may
 10 have listed on the Change Sheet attached hereto:
 11 DATED this ___ day of _____, _____.
 12
 13 _____
 14 NANCY GENTRY-BOYD
 15
 16 SUBSCRIBED AND SWORN to before me this ___ day
 17 of _____, 20___.
 18
 19 _____
 20 NAME OF NOTARY PUBLIC
 21
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

1 REPORTER'S CERTIFICATE
 2 I, COLLEEN P. ZEIMANTZ, CSR No. 345, Certified
 3 Shorthand Reporter, certify:
 4 That the foregoing proceedings were taken
 5 before me at the time and place therein set forth, at
 6 which time the witness was put under oath by me;
 7 That the testimony and all objections made were
 8 recorded stenographically by me and transcribed by me or
 9 under my direction;
 10 That the foregoing is a true and correct record
 11 of all testimony given, to the best of my ability;
 12 I further certify that I am not a relative or
 13 employee of any attorney or party, nor am I financially
 14 interested in the action.
 15 IN WITNESS WHEREOF, I set my hand and seal this
 16 22nd day of March, 2016.
 17
 18
 19 
 20
 21 COLLEEN P. ZEIMANTZ, CSR 345
 22 Notary Public
 23 P.O. Box 2636
 24 Boise, Idaho 83701-2636
 25 My commission expires September 7, 2017.

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EXHIBIT 4

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

PETRUS FAMILY TRUST DATED MAY 1,)
1991, and EDMOND A. PETRUS, JR.,) Case No.
individually and as Co-Trustee of) CV-2014-71-C
the Petrus Family Trust Dated May)
1, 1991,)
 Plaintiffs,)
 vs.)
NANCY GENTRY-BOYD, CHRIS KIRK d/b/a)
KIRK ENTERPRISES; TODD MCKENNA)
d/b/a HOMECRAFT HOME INSPECTIONS;)
RE/MAX RESORT REALTY; KEVIN)
BATCHELOR; and DOES 1-4,)
 Defendants.)
_____)

DEPOSITION OF EDMOND A. PETRUS

March 15, 2016

REPORTED BY:

COLLEEN P. ZEIMANTZ, CSR 345

Notary Public

1 THE DEPOSITION OF EDMOND A. PETRUS was taken on
2 behalf of the Defendants, at the offices of Millemann,
3 Pittenger, McMahan & Pemberton, LLP, located at 706
4 North First Street, McCall, Idaho, commencing at 9:03
5 a.m., on March 15, 2016, before Colleen P. Zeimantz,
6 Certified Shorthand Reporter and Notary Public within
7 and for the State of Idaho, in the above-entitled
8 matter.

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21 ALSO PRESENT: Chris Kirk
22 Nancy Gentry-Boyd
23
24
25

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Exh 18 - Copy of C&S Construction Invoice, 02/25/2013, Petrus 000195	8	
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Exh 20 - Copy of Email to Michael Wood from Ed Petrus, 08/02/2012, Petrus 000192	8	
Exh 21 - Copy of Email to Kevin Batchelor from Ed Petrus, Subject: Re: Boyd, 04/09/2012, Petrus 000068-69	8	
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(Exhibits 1-25 marked.)

EDMOND A. PETRUS,
first duly sworn to tell the truth relating to said
cause, testified as follows:

EXAMINATION

QUESTIONS BY MR. MILLEMANN:

Q. Good morning, Mr. Petrus. I'm Steve
Millemann. I represent Nancy in this lawsuit.
Am I pronouncing your name correctly?

A. Yes, you are. You are doing a good job.

Q. How would you like to be addressed in this
deposition?

A. You can call me Ed, if you like.

Q. That's all right?

A. That's perfect.

Q. Ed, have you had your deposition taken before?

A. Yes.

Q. Approximately, how many times?

A. Several; I would say, more than 20.

Q. And any of those depositions, were you a party
to the underlying lawsuit?

A. Yeah, I would say, maybe four or five.

Q. Can you very, very briefly give me a quick
summary of those cases in which you were the party?

A. Well, there is my divorce. There were some

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automobile accidents. That's pretty much all I can
recall right now. There have been a couple automobile
accidents.

Q. So I'm not going to go through the drill on
depositions. You are familiar with how depositions are
conducted?

A. Yeah.

Q. I'll do my best not to talk over you, even
though I will probably do it, and I will have to remind
myself. And if you do the same, that will make life
easier for Colleen.

I have one goal today, and one goal only, and
that is just to learn what you know, and what your
opinions are about this lawsuit. So I'll try to ask
clear questions. And if I haven't, let me know, and
I'll try to do a better job.

A. Fair enough.

Q. Have you been involved in any lawsuits
involving the dissolution of a business entity, an LLC,
or a partnership, or a corporation?

A. Not really.

Q. Other than the four or five lawsuits you
mentioned you were a party to, have you been involved in
any lawsuits in your capacity as a trustee of a trust?

A. Not that I can recall.

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1 Q. And have you been involved in any lawsuits,
2 not individually, but as a member, or has any LLC or
3 partnership of which you've been a member, been in a
4 lawsuit that you know of?
5 A. There was a -- once, there was a long time
6 ago, there was a -- we did a spec house, a friend of
7 mine and I did, and there was some -- I think some
8 litigation over that. And it was so long ago, I can't
9 remember.
10 Q. Is that in San Diego?
11 A. Yeah. Yes.
12 Q. Any idea, roughly, of when that was?
13 A. '80s maybe. Yeah, early '80s, I think.
14 Q. And were you, or an entity in which you were a
15 member, were the defendants in the case?
16 A. No, I think we were the plaintiffs.
17 Q. Do you remember what the issue was?
18 A. Yeah, we were just breaking up our -- what do
19 you call it -- our agreement, or our --
20 Q. So any other lawsuits you recall in which
21 you've either been individually involved, or as a
22 trustee, or in which an LLC, or a partnership, of which
23 you were a member of was involved as a party, other than
24 these four or five that you've referenced to me?
25 A. Well, I don't know if I was a member of a

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1 trustee -- I don't remember ever being a trustee, per
2 se, being a party to a litigation, other than the one we
3 are -- before us.
4 Q. Right.
5 A. But I just don't recall. I don't think I have
6 been.
7 Q. So best recollection today is a total of four
8 or five, that you recall, lawsuits?
9 A. Where I've been deposed, yes.
10 Q. Okay. And I wasn't clear. Sorry. My last
11 string of questions, I didn't intend to limit to where
12 you've been deposed. I was just trying to discover
13 lawsuits that you've been involved in.
14 A. Right.
15 Q. Do you need to go back and clarify?
16 A. Not really, it's the same answer.
17 Q. And have you ever been a party to a bankruptcy
18 proceeding?
19 A. I filed for Chapter -- was it Chapter 11, but
20 it never went through.
21 Q. About when was that, Ed?
22 A. Reorganization was filed in, I think,
23 somewhere, I want to say, 2010, or something.
24 Q. And what became of that?
25 A. It was dismissed. And we never even filed

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1 schedules. It lasted maybe two or three months.
2 Q. So there was no discharge of debt, or
3 reorganization of debt that actually came about?
4 A. None. As I said before, we didn't even file
5 schedules.
6 Q. What's your current residence address, Ed?
7 A. P.O. Box 942, Rancho Santa Fe, California
8 92067.
9 Q. And does that residence have a physical
10 address?
11 A. Yes, but that's the mailing address I just
12 gave you. It's like here, you have to deliver to a P.O.
13 Box, your mail. It's 11644, three words, the first word
14 is Via, second word is Del, third word is, Alba,
15 A-l-b-a.
16 Q. Do you own that residence individually, or in
17 some other capacity?
18 A. I think the trust might own it. It's pretty
19 much my trust.
20 Q. And I've seen a couple of different trusts
21 mentioned in some of the materials I've reviewed. Do
22 you know what trust owns that property?
23 A. The Petrus Family Trust.
24 Q. And that would be the same trust that is a
25 plaintiff here?

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1 A. Yes.
2 Q. How long have you or your trust owned that
3 residence in Rancho Santa Fe?
4 A. On and off since '06, '07.
5 Q. And when you say, "on and off," can you
6 explain to me --
7 A. Different capacities, individual, were
8 married. My wife and I owned it. We might have had a
9 different title for it, you know, something like that.
10 Q. I get it. So the ownership entity has
11 changed, but that's been your residence?
12 A. Right.
13 Q. Thanks. Okay.
14 A. And by "my wife," I mean, my ex-wife, that
15 sort of thing.
16 Q. Got you. I assumed that, but thanks for
17 clarifying it.
18 A. Yes.
19 Q. Are you currently married?
20 A. I'm not officially married, but I'm engaged,
21 so...
22 Q. And that's to Ms. Nakamura?
23 A. Right.
24 Q. Am I getting that right?
25 A. Yes.

1 Q. Can you give me a brief summary of -- let's
2 start with residences of yours that you owned prior to
3 the current residence?

4 A. Okay. That I individually owned, or owned in
5 some capacity.

6 Q. Thank you. In some capacity, either
7 individually, or in the capacity of a trust, or some
8 other entity.

9 A. Beryl Street was the first home I ever owned,
10 and that's in San Diego, the Pacific Beach area. And
11 then there was two homes on Savoy, in Point Loma, again,
12 in the San Diego area. Then there was a home on -- I
13 can't remember the street -- but it was in Carlsbad,
14 south Carlsbad, again, San Diego area. And then there
15 was a home on Alivenay (phonetic).

16 Q. Can you spell that?

17 A. You would ask me to do that this morning.

18 Q. I certainly can't. I don't even need the
19 street. What was the community?

20 A. That was the community. Well, actually,
21 technically it is Encinitas. And the community is
22 called Alivenay. But the legal description is
23 Encinitas.

24 Q. Okay.

25 A. Then there was -- I don't know. I don't know

1 A. Yes, I did.

2 Q. And did you use a broker when you sold it?

3 A. Yes.

4 Q. Then you said two homes in Savoy, Pointe Loma?

5 A. On Savoy Street in Pointe Loma.

6 Q. And were those kind of in succession?

7 A. Yes.

8 Q. And those would have been after the Beryl
9 Street home?

10 A. Correct.

11 Q. Did you build either of those?

12 A. We built -- well, not necessarily, me. Steve
13 Anderson built the first one.

14 Q. And who is Mr. Anderson?

15 A. He's a friend of mine.

16 Q. Is he a contractor?

17 A. Yes.

18 Q. Okay.

19 A. And that was the spec home I was talking
20 about, we had a little --

21 Q. When I use the term "spec home," tell me if
22 it's the same way you use it. It's a home that you are
23 building pursuant to a set of plans that somebody had
24 prepared, but that you intend to build, and then sell,
25 rather than to reside in long term?

1 if I owned it or not. There was a smaller unit in
2 Rancho Santa Fe. I can't remember if we leased it or
3 owned it. And then there is the home I'm in now.

4 Q. Thank you. The home on Beryl is that Bur- --

5 A. B-e-r-y-l.

6 Q. In Pacific Beach, approximately, what was your
7 period of ownership of that?

8 A. Boy.

9 Q. And I'm not holding you to exact dates.

10 A. Yeah. It's been so long ago, I can't really
11 give you a guess. I'm sorry.

12 Q. That's all right. Did you give me these in
13 any particular order as you were thinking about them?

14 A. Those were in order of ownership.

15 Q. Oldest to the newest?

16 A. Yes.

17 Q. That helps. The Beryl Street home, did you
18 have that constructed for you, or was it constructed
19 when you bought it?

20 A. It was already built.

21 Q. And if you remember, about how many years did
22 you reside in that home?

23 A. A long time. I can't tell you more than a
24 long time.

25 Q. And then did you sell that home?

1 A. Correct.

2 Q. And was Mr. Anderson your partner in that
3 venture?

4 A. Correct.

5 Q. And did you use an architect in that case?

6 A. I really didn't have much to do with the
7 building at all. I was kind of like a silent partner.

8 Q. Did you sell the home?

9 A. Eventually, yes.

10 Q. And then the second home in Pointe Loma, Savoy
11 Street, did you build that, or did you buy it?

12 A. We bought it already built.

13 Q. And you subsequently sold that home?

14 A. Correct.

15 Q. Was that through a broker?

16 A. Correct.

17 Q. Over the period of time that you owned these
18 homes and sold these homes, did you use different
19 brokers, or did you have a particular broker that you
20 typically used?

21 A. I --

22 Q. Go ahead.

23 A. I think we used pretty much different brokers.

24 Q. Have you ever been involved as a party, or as
25 a trustee, or have an LLC, or a partnership in which you

1 were a member, involved in any litigation, involving
 2 allegations of any construction defects or home defects?
 3 A. There might have been some of that in that
 4 Anderson deal.
 5 Q. Tell me the best you remember about that.
 6 A. It was kind of more like a dissolution, rather
 7 than anything else. There might have been some
 8 allegations of construction defects or something. But I
 9 don't really recall.
 10 Q. Do you remember whether the buyer of that home
 11 was a party to any of that?
 12 A. No, it was just -- it was Steve and I.
 13 Q. You and Mr. Anderson?
 14 A. There was no other party.
 15 Q. So the two parties were Mr. Anderson and you,
 16 individually?
 17 A. Right. We were kind of getting out of our
 18 partnership, or whatever you want to call it.
 19 Q. And can you give me any time frame on that at
 20 all?
 21 A. Early '80s, I would say.
 22 Q. And the potential as you've said, that there
 23 were issues inside of that litigation involving
 24 construction defects, were those issues you were
 25 asserting, or that he was asserting, if you remember?

1 partnership, in which you remember, have occasion to,
 2 other than in this case, to assert either inside of
 3 litigation or out, a claim regarding construction
 4 defects?
 5 A. Not that I can recall, other than possibly the
 6 one I identified.
 7 Q. With Mr. Anderson?
 8 A. Right. And I'm not so sure about that either.
 9 Q. I understand, yes.
 10 And then the Carlsbad home, did you have that
 11 built, or was it already built?
 12 A. It was one of these homes where you can make
 13 modifications. You know, the basic models that, you
 14 know, you essentially buy, and they build for you. And
 15 you can -- you know, you only have a few limited amounts
 16 of what you can change, that sort of thing.
 17 Q. Was that in a developer builder development?
 18 A. Yeah, it was -- Centex was the developer.
 19 Q. And if I understand you correctly, they
 20 offered perhaps a variety of floor plans, which you
 21 could make some adaptations to?
 22 A. Correct.
 23 Q. And I assume that was when you were married to
 24 your prior wife?
 25 A. Correct.

1 A. I think I was asserting. I think we were
 2 getting insurance money to fix some issues that needed
 3 to be fixed with the house. So we could fix it, and
 4 sell it.
 5 Q. So this was pre-sale?
 6 A. Correct.
 7 Q. Did you and Mr. Anderson have any other joint
 8 ventures after that?
 9 A. No, we just had the one.
 10 Q. And was that the only occasion you recall in
 11 which you were as individually, or a trustee, or any
 12 LLC, or partnership, of which you were a member were
 13 involved in any litigation involving any kind of
 14 construction defects?
 15 A. Yes. And I'm not so sure that there were any
 16 construction defects. This was more -- the case was
 17 more styled as a dissolution of a partnership, rather
 18 than anything else. There might have been some, you
 19 know, in the back of my head, I thought there might have
 20 been something about that, but I'm not absolutely sure.
 21 Q. Do you happen to recall what the name of that
 22 partnership was?
 23 A. No, I don't.
 24 Q. Have you ever had occasion, Ed, either
 25 individually, or as a trustee, or as an LLC, or a

1 Q. And did you then exercise your right to make
 2 some adaptations before the home was built?
 3 A. Yeah, we take one of the homes that they
 4 offered.
 5 Q. And any recollection about when that was
 6 acquired?
 7 A. That would have to be after '87, early '90s, I
 8 would say, somewhere in there. I'm sorry about these
 9 dates, but...
 10 Q. That's fine. And then did you subsequently
 11 sell that home?
 12 A. I did, or we did.
 13 Q. Did you use a broker on that sale?
 14 A. I think my wife acted as a broker.
 15 Q. And then the home in the Encinitas area, did
 16 you have that built, or was it already built?
 17 A. It was already built.
 18 Q. And we're getting closer now. Do you have any
 19 recollection about when you acquired that home?
 20 A. No, not really.
 21 Q. Did you subsequently sell it?
 22 A. Yes.
 23 Q. Any recollection of when you sold it?
 24 A. No, I'm sorry.
 25 Q. It would have been after Carlsbad and before

1 your current home?
 2 A. Correct.
 3 Q. And then your current home, did you have that
 4 built, or was it already built?
 5 A. It was already built.
 6 Q. Have you ever, other than the spec home that
 7 you referenced with Mr. Anderson, have you ever had a
 8 home constructed for you?
 9 A. No.
 10 Q. Have you ever had a buyer of a property, which
 11 had been yours, assert any claim inside or outside of
 12 litigation against you, regarding the sale, or the
 13 condition of the home?
 14 A. No.
 15 Q. When you bought these homes, if you remember,
 16 did you obtain inspections of those homes before you
 17 purchased them?
 18 A. Yes.
 19 Q. Is that a standard protocol in the San Diego
 20 area?
 21 A. I really wouldn't know.
 22 Q. That's your protocol anyway?
 23 A. Well, I can remember on couple of occasions, I
 24 had a home inspector.
 25 Q. On the current home in Rancho Santa Fe, did

1 you have a home inspector look at it before you bought
 2 it?
 3 A. As I recall, I think I did.
 4 Q. Were any problems discovered?
 5 A. No. I think it's a requirement for some
 6 loans, that you do have a home inspector.
 7 Q. And subsequent to your purchase of your
 8 current home, did you encounter any problems with the
 9 home?
 10 A. Yes, we've had a couple problems with the
 11 home.
 12 Q. Were they of the nature that required or
 13 caused you to seek compensation from anyone?
 14 A. No.
 15 Q. On any of the homes you've purchased, and if
 16 you wouldn't mind, to not have to repeat myself over and
 17 over, when I say, "you," could we agree, I mean, you,
 18 individually?
 19 A. Understood.
 20 Q. Or you, as a trustee, or LLC partnership,
 21 which you remember; does that work?
 22 A. That works.
 23 Q. Have you ever had a purchaser of any of the
 24 homes you've mentioned, come back to you with concerns
 25 or claims about the residence?

1 A. That I sold to them?
 2 Q. Yes, sir.
 3 A. No, not that I recall.
 4 Q. So those are all the residences that you can
 5 recall having purchased and sold, starting with the
 6 Beryl Street, and concluding with your current address?
 7 A. Yes, as I recall.
 8 Q. Have you owned, again, using the "you," any
 9 residential properties that were not your residence,
 10 other than your current in McCall?
 11 A. I've inherited property.
 12 Q. Did some of that include residential
 13 properties?
 14 A. Yes.
 15 Q. Can you just give me a brief overview of
 16 those? And I guess start with inherited, Ed, from whom?
 17 A. My parents.
 18 Q. About when?
 19 A. Around the time my mother passed.
 20 Q. And can you --
 21 A. I would say, probably 2010, somewhere around
 22 there, maybe a little bit before that. I'm trying to
 23 remember whether my mother gave me Indiana before she
 24 passed or not. I can't recall.
 25 Q. Can you just briefly identify the properties

1 that you received in your inheritance, or prior to, from
 2 your mother?
 3 A. Yeah, there was -- there was a home, a town
 4 home in Park Ridge, Illinois, and then there is a home
 5 in Long Beach, Indiana.
 6 Q. Do you own either of those properties today?
 7 A. Technically, no.
 8 Q. Help me with that answer.
 9 A. Yes, but technically, no, it's still in my
 10 mother's trust.
 11 Q. I see. So she had a trust in which these
 12 properties were held, which survived her death?
 13 A. Correct. We just haven't gotten around to
 14 dissolving it, but we will at some point.
 15 Q. So do you rent these properties?
 16 A. No.
 17 Q. They sit vacant?
 18 A. One of them, I sold. Okay? Relatively, right
 19 after she passed on. As a matter of fact, if I recall
 20 correctly, my mother had it for sale before she even
 21 passed.
 22 Q. Was that the property in Indiana?
 23 A. Park Ridge. And I'm not absolutely sure, but
 24 it was -- I think it was. I think we're -- my mother
 25 had it for sale before she passed, but I'm

1 not -- don't -- you know, I'm not absolutely sure on
 2 that, but pretty close to it. And it sold pretty
 3 quickly.
 4 Q. Was your mother's trust different than the
 5 trust at which you currently have, which is a party to
 6 this lawsuit?
 7 A. That's a very difficult question to answer. I
 8 don't know if I can answer it.
 9 Q. Maybe I didn't ask it very clearly. It sounds
 10 like one of the properties that was in your mother's
 11 trust is still in it?
 12 A. Correct.
 13 Q. And is that the property in Indiana?
 14 A. Correct.
 15 Q. Are you a trustee of that trust?
 16 A. Yes.
 17 Q. What is the name of that trust?
 18 A. Mary Jean Petrus Trust, I believe.
 19 Q. So in name, it's different than the name of
 20 the trust in this lawsuit?
 21 A. Correct.
 22 Q. And are there any other properties held in the
 23 Mary Jane Petrus Trust?
 24 A. Jean.
 25 Q. I'm sorry.

1 Q. So you owned a property at Tamarack?
 2 A. Correct.
 3 Q. What type of property was that?
 4 A. It was a freestanding -- well, it was one of
 5 their -- one of their units, their homes.
 6 Q. I think they had cottages, chalets?
 7 A. It was a chalet.
 8 Q. Okay. Have you sold that property?
 9 A. Yes.
 10 Q. Generally, during what period, did you own it?
 11 A. Oh, God. I sold it just before I got into
 12 this one. Well, I think two years before I got into
 13 this one.
 14 Q. So about 2010?
 15 A. Yeah.
 16 Q. How long did you own that property?
 17 A. One or two years.
 18 Q. And did you buy that directly from Tamarack?
 19 A. Correct.
 20 Q. And during your period of ownership, did you
 21 assert any claims to Tamarack regarding condition of the
 22 chalet, or construction defects?
 23 A. No.
 24 Q. Any other properties, besides the ones you've
 25 identified for me that you own or did own?

1 A. That's all right. Mary Jean Petrus, no, there
 2 is nothing else, other than the home in Long Beach,
 3 Indiana.
 4 Q. Other than these two properties you've
 5 identified as being in your mother's trust, have you
 6 owned any residential properties, other than the
 7 residences that you've identified for me?
 8 A. Can I take that back? I'm not so sure that
 9 Park Ridge was in my mother's trust. I think it was,
 10 but I'm not sure. I know for a fact that Indiana is.
 11 It might have -- I don't know what Park Ridge was,
 12 actually.
 13 I'm sorry. Can you repeat the question?
 14 Q. Sure. And I appreciate the clarification. In
 15 any event, Park Ridge has been sold?
 16 A. Correct.
 17 Q. My question was, other than those properties
 18 that may have been in your mother's trust, and your
 19 personal residences, which you've identified for me,
 20 have you owned any other residential properties?
 21 A. Other than the one up here, and the one -- I
 22 owned something at Tamarack for a while.
 23 Q. Okay. Why don't you tell me about that?
 24 Other than the one here?
 25 A. Yeah.

1 A. Not that I can recall.
 2 Q. And do you currently own any commercial
 3 properties? And I'll define "commercial," as anything
 4 other than a single-family residence.
 5 A. No.
 6 Q. Have you, at any time in the past?
 7 A. Well, not really. I mean, I might have
 8 had -- my father had some limited partnerships that I
 9 inherited that owned interests in office buildings, or
 10 something like that. But I had no management. I had no
 11 knowledge of it. It was just kind of a share of stock
 12 pretty much. And I inherited that, too, as well. I'm
 13 just being hyper-technical.
 14 Q. No, I appreciate that very much.
 15 When did your father die?
 16 A. About five years before my mother died.
 17 Q. So about 2005?
 18 A. Yes, maybe a little bit later.
 19 Q. When he died, did he either individually, or
 20 through these limited partnerships, have an interest in
 21 commercial properties?
 22 A. I don't really recall what they were for sure.
 23 I assume they were, but I'm guessing.
 24 Q. And what, if any, after his death has been
 25 your involvement in any of those limited partnerships or

1 properties?
 2 A. None, zero. Like I said, they are just like
 3 shares of stocks.
 4 Q. Did those pass to you from him?
 5 A. Yes, pretty much so, or they were in the
 6 trust, and they came to me through the trust.
 7 Q. Do you or does the trust still have some of
 8 those interests?
 9 A. I don't think so. I don't manage the trust
 10 either.
 11 Q. And when you say, the trust, which family are
 12 you talking about?
 13 A. Petrus Family Trust.
 14 Q. The trust that is one of the trusts?
 15 A. Gofen & Glossberg; Jim Borovsky at Gofen &
 16 Glossberg.
 17 Q. He's an attorney?
 18 A. No, he's an investment counselor.
 19 Q. So I am not an estates expert. So I may not
 20 be able to artfully ask this question. If you don't
 21 manage that trust, is that an irrevocable trust?
 22 A. I manage certain portions of it. I don't
 23 manage the stock portion of it, if that makes sense to
 24 you.
 25 Q. The stock portion being some of the interests

1 A. Yes.
 2 Q. When did you acquire fee ownership?
 3 A. Within last year, I believe.
 4 Q. Has there been any change in the ownership
 5 entity of that property since you purchased it in 2012
 6 from Nancy Gentry?
 7 A. Not that I recall.
 8 Q. And is the property owned free and clear by
 9 the trust, or is it subject to some debt security?
 10 A. It's owned free and clear by the trust.
 11 Q. And, Ed, you mentioned to me before we went on
 12 the record, that you have some neck and back issues.
 13 A. Right.
 14 Q. So any time you need to stand up and stretch,
 15 just let me know.
 16 A. Thank you. I appreciate that.
 17 Q. Can you give me a summary of your educational
 18 background?
 19 A. Yes. I graduated from Culver Military Academy
 20 in June of 1973. And then I went to college, and I
 21 graduated from the University of San Diego in 1977, '78.
 22 And then I went back to law school, and I graduated from
 23 law school in 1987.
 24 Q. Was that also from the University of
 25 San Diego?

1 that passed from your father?
 2 A. Correct.
 3 Q. And so in some form or another, did your
 4 father's trust survive his death?
 5 A. No, I don't think so. My father's trust went
 6 away.
 7 Q. The property at 2130 Payette Drive, which is
 8 the subject of this lawsuit, how is that property
 9 currently titled?
 10 A. I think it's in the name of the Petrus Family
 11 Trust.
 12 Q. Do you individually have any interest in that
 13 property, that you know of?
 14 A. Well, the trust is basically mine. I'm the
 15 sole beneficiary to the trust right now.
 16 Q. Now, your initial purchase of that from Nancy
 17 Gentry, as I understand it, was the acquisition of the
 18 home and the improvements, and then the acquisition of
 19 her leasehold interest on to her state lease; is that
 20 correct?
 21 A. Yes, I think so.
 22 Q. And subsequently, if I understand it
 23 correctly, you were able to acquire fee property
 24 ownership in the auction that the Department of Lands
 25 conducted?

1 A. Correct.
 2 Q. Are you currently a practicing attorney?
 3 A. No.
 4 Q. Congratulations. When did you retire, Ed?
 5 A. I didn't retire. I'm disabled. But that
 6 would be in the '06, '07. Well, I started -- I guess I
 7 started in '06. It took a couple years to wind down.
 8 Q. Does that disability relate to the same
 9 conditions that you mentioned?
 10 A. Yes. I'm sorry. Yes, sir.
 11 Q. Did you go directly from the Culver Military
 12 Academy into college, or was there an intervening
 13 period?
 14 A. I went directly into college.
 15 Q. And then there was a period of not quite ten
 16 years between your graduation from the University of San
 17 Diego and your entry into law school. What did you do
 18 during that ten-year period?
 19 A. I was a stock broker/bartender/restaurant
 20 manager. I had been a restaurant manager and bartender
 21 through college, and kind of kept it on while I went
 22 into being a stock broker for Dean Witter.
 23 Q. Were all those in the San Diego area?
 24 A. Correct.
 25 Q. Was that where you were born and raised?

1 A. No, I was born in Chicago.
 2 Q. Why did you go to the San Diego area?
 3 A. For college, it got too dang cold.
 4 Q. Yes. And you've been in that area ever since?
 5 A. Yeah. And you had to march to ranks at 6:00
 6 in the morning. And it got too cold for me.
 7 Q. Got you?
 8 A. So I swore to God, if I ever got out alive, I
 9 would go to California.
 10 Q. So a stock broker/restaurant manager/bartender
 11 during that -- if I got my dates right, I was a little
 12 bit wrong on -- it wasn't ten years. Did you say you
 13 graduated from law school in 1987?
 14 A. Correct.
 15 Q. So you started in '84, or something like that,
 16 I guess.
 17 A. '85, I think.
 18 Q. Okay. So then upon graduation from law
 19 school, were you able to secure professional employment
 20 then?
 21 A. I was.
 22 Q. And can you give me that chronology from then
 23 until 2006, 2007?
 24 A. Yeah, I went to went to work for a law firm
 25 called Thorsnes, Bartolotta, McGuire & Padilla. That's

1 Q. Did you try any cases during that period of
 2 time?
 3 A. I don't think so.
 4 Q. Did the firm, or the person you were working
 5 with, have any particular area of concentration in terms
 6 of their practice?
 7 A. Business litigation. Doug Manchester was one
 8 of our good clients.
 9 Q. Me, too.
 10 Okay. And then Greco & Traficante?
 11 A. Correct.
 12 Q. How long were you with them?
 13 A. I would say, five, six years.
 14 Q. And what was your status with them?
 15 A. Associate.
 16 Q. And did that firm, or the person with whom you
 17 worked, have any area of concentration?
 18 A. Business litigation, insurance litigation.
 19 Now, when I say insurance, I mean, bad faith and
 20 coverage. We had several defense contractors, like
 21 Cubic, and SAIC, as our clients. I worked on some
 22 shareholder derivative lawsuits brought by Bill Lorack.
 23 I did some work on those. So I did some insurance work
 24 on those.
 25 Q. The bad faith insurance litigation, did that

1 a mouthful.
 2 Q. Yes.
 3 A. Mike Thorsnes. And then I went with a law
 4 firm, Greco & Traficante. And then I went on my own,
 5 and I was of counsel to a firm and ran their San Diego
 6 office Kelly, Hurley & Baine, while I was on my own. If
 7 you understand what I'm saying.
 8 Q. I do.
 9 A. Okay. So after I left Greco & Traficante, I
 10 did two things: I put out my own shingle, plus I was of
 11 a counsel to a firm, and ran their San Diego office, of
 12 Kelly, Hurley & Baine.
 13 Q. Was that your status when you started to wind
 14 down in 2006?
 15 A. No, at that time, I probably left Kelly,
 16 Hurley & Baine, and I was pretty much just by myself. I
 17 did a lot of work with Jack Denove, Shawn Denove of
 18 Los Angeles, so we co-tried a lot of cases together.
 19 Q. Does that cover it?
 20 A. That pretty much does, yes.
 21 Q. The Thorsnes, et al, firm, how long were you
 22 with them, Ed?
 23 A. Oh, boy, three years.
 24 Q. And you were an associate at that time?
 25 A. Law clerk associate.

1 tend to be more on the plaintiff's side, or exclusively
 2 on the plaintiff's side?
 3 A. Well, what happened was we represent clients,
 4 for example, why we came up with kind of a novel idea
 5 for the lawsuit against -- with Lorack, we tendered
 6 the -- Cubic had a \$1,000,000 self-retention on their
 7 defense. And we tendered to Cubic's general liability
 8 carriers, the defense and shareholder lawsuit, under the
 9 argument that it was advertising liability, and so we
 10 were, in effect, plaintiffs. You know, we're
 11 representing our client against the insurance company.
 12 Q. So you are representing the insured?
 13 A. Yeah.
 14 Q. And then you entered a period of
 15 self-employment in which you were also of counsel with
 16 Kelly and Hurley; have I got that?
 17 A. Kelly, Hurley & Baine.
 18 Q. Kelly, Hurley & Baine. Okay.
 19 Generally, what period did that cover?
 20 A. I want to say, '92, '93 on -- now, Kelly,
 21 Hurley & Baine was almost completely insurance coverage
 22 from the defense side. So that was bad faith defense,
 23 insurance coverage from the carrier's perspective.
 24 Q. How long did you do that kind of work?
 25 A. On and off. I mean, they were still calling

1 me to come in and help them in many respects.

2 Q. Did that kind of become the focus of your
3 practice then, the insurance defense?

4 A. No. No. No. Bad faith.

5 Q. Bad faith insurance defense?

6 A. Not insurance defense, just bad faith. So
7 mainly, I became on both sides. But mainly, I became
8 plaintiffs.

9 Q. And so when you say, you became plaintiffs, my
10 understanding would be then, you were representing folks
11 who were claiming that their insured had wrongfully
12 denied them coverage or defense?

13 A. Correct.

14 Q. And was that the focus of your practice as you
15 moved forward?

16 A. Correct.

17 Q. And then you mentioned you continued to be
18 self-employed, but you worked with an attorney in
19 Los Angeles, Denove. Do I have that right?

20 A. Denove, D-e-n-o-v-e, Jack Denove.

21 Q. And were those also bad faith insurance cases?

22 A. A lot of them were, yeah. A lot of them were
23 personal injury.

24 Q. Over the course of your career, ballpark, can
25 you give me an idea of how many cases you have tried or

1 took up the cause, and got a verdict on his behalf;
2 simply put or not?

3 A. No, a little more involved than that. It was
4 an apartment building, kind of a large apartment
5 building. They provided a defense. And then in about
6 30 to 60 days before trial, they withdrew the defense.

7 And my three clients were all driven into bankruptcy.

8 Q. I see. And that's where the bad faith claim,
9 obviously, arose?

10 A. Correct.

11 Q. Any others like that where in the context of
12 your bad faith litigation, you were dealing with
13 construction defects?

14 A. There might have been one or two. But, I
15 mean, you've got to realize that we don't really get
16 into the nitty gritty. That's one thing that we make
17 sure, we don't retry the case. We just try the
18 insurance issues. We don't want to get mucked down into
19 retrying the underlying case.

20 The defendants win if they get that. They can
21 confuse the jury. So that's what we try to do. And
22 that's what we've been successful with most of the time.

23 Q. In your bad faith litigation practice?

24 A. Yes, any that have anything to do with
25 construction defect. I don't really have much to do

1 co-tried?

2 A. No. I'm sorry. I don't want to be flippant,
3 but there has been --

4 Q. More than 50?

5 A. Pretty close, if you're including
6 arbitrations, and things of that nature, yeah, close to
7 or -- yeah.

8 Q. At any point in the career which you have just
9 described to me, did you have any involvement in any
10 litigation involving alleged construction defects?

11 A. Not construction defect, per se. If you are
12 saying, did I get involved in construction defect
13 litigation? No. Were there insurance issues around
14 construction defect? Yes. In fact, one of my biggest
15 jury verdicts was -- the underlying case was a failure
16 to defend on a construction defect case.

17 Q. And your client in that situation, was your
18 client the owner of the property, or the builder of the
19 property, or somebody else?

20 A. The developer.

21 Q. So this was a developer/builder-type project?

22 A. He was not the contractor. He was the
23 developer.

24 Q. And there were some problems with the home.

25 He tendered a claim. The claim was denied. And you

1 with the defects at all. It's the coverage.

2 Q. Did you not find it necessary in presenting
3 the coverage issue, to be able to identify with some
4 specificity the nature of the defect, or had that part
5 of the case already been tried?

6 A. No, it had been tried. In that one particular
7 instance, it was just did a claim arose during the
8 policy period.

9 Q. Got you.

10 A. That's it, very basic.

11 Q. Have you, Ed, ever been involved in any
12 capacity as a partner, a principal, a shareholder, or
13 otherwise, in any real estate development?

14 A. Other than that spec home that I told you with
15 Anderson, not really, no.

16 Q. When you bought the chalet at Tamarack, did
17 you obtain an inspection prior to purchase?

18 A. I can't recall.

19 I'm going to stand up for a minute.

20 Q. Go right ahead.

21 A. You can ask me questions if you don't mind me
22 standing up.

23 Q. That's what I was going to ask you, if you
24 want to proceed, I'm happy to.

25 So believe it or not, I want to talk to you

1 about the purchase of the home at 2130 Payette Drive
 2 from Nancy Gentry. The records will reflect, I think,
 3 that you closed on that purchase in, approximately,
 4 April of 2012; does that sound right?
 5 A. Yeah. Off the top of my head, yes.
 6 Q. How did you learn of that property?
 7 A. Well, we had been looking for quite some time.
 8 Q. And you had been looking for property,
 9 specifically in the McCall area?
 10 A. On the lake, yes.
 11 Q. Had you secured the assistance of any broker
 12 in helping you look?
 13 A. Yes, Kevin Batchelor. And as I said before,
 14 we had -- you know, we had we had been looking for some
 15 time on the lake.
 16 Q. How long had you been looking?
 17 A. I want to say, two years, maybe longer.
 18 Q. How did you --
 19 A. We --
 20 Q. I'm sorry. Go ahead.
 21 A. We actually had a house that I thought we
 22 almost had a deal on.
 23 Q. And in this context, when you refer to "we,"
 24 is that you and your fiance?
 25 A. Yes. But a lot of times it's not my writing

1 \$200,000 more than they actually sold it for.
 2 And so it was one of these things where I was
 3 in Europe, and I had -- they sold it like overnight.
 4 And had they waited another day, I would have been back.
 5 But they knew where we were.
 6 Q. Did you ever have the opportunity to view the
 7 property, or inspect the property?
 8 A. Yes.
 9 Q. Did you do that with Kevin?
 10 A. Yes.
 11 Q. Once, or more than once?
 12 A. Several times.
 13 Q. Did you have the opportunity to obtain any
 14 inspection of that property?
 15 A. No, we didn't get that far.
 16 Q. I take it, correct me if I'm wrong, you didn't
 17 get to the point of an accepted offer on that property?
 18 A. That's correct. There wasn't even a counter.
 19 There was not even a counteroffer. They rejected it,
 20 and that was it. But we --
 21 Q. So -- I'm sorry. Go ahead.
 22 A. I'm sorry. I don't want to talk over you.
 23 But there was no counteroffer. They just said, we're
 24 going to stay on our asking price. And we came back,
 25 and said, this is where we're at. If you are

1 style. I don't mean it by -- I just write that way.
 2 Q. So what was the home that you thought you had
 3 a deal on?
 4 A. Oh, God. I don't know how I can identify it.
 5 Q. Was it owned by Charlie Wilson?
 6 A. Yeah, I think so.
 7 Q. Where was it on the lake?
 8 A. It was further down from where my house is
 9 now.
 10 Q. Closer to town?
 11 A. No, the other way.
 12 Q. Farther out?
 13 A. Yeah.
 14 Q. Farther north?
 15 A. Yeah, a bigger home.
 16 Q. But on the west side of the lake?
 17 A. Yeah, on the same side, west side.
 18 Q. And it was a lakefront property?
 19 A. Yes.
 20 Q. How far did you get on the purchase process of
 21 that before the deal went south?
 22 A. Well, it was kind of one of these things where
 23 we didn't -- you know, we didn't get to where we got to
 24 a point -- we had indicated an interest. Okay? Of
 25 where we would have gone, which turned out to be about

1 interested, call us back up.
 2 Q. So you actually presented an offer through
 3 Mr. Batchelor?
 4 A. Correct.
 5 Q. And it was rejected?
 6 A. Correct.
 7 Q. And that was the end of that deal?
 8 A. Right.
 9 Q. Did you have a chance to look at any other
 10 lakefront properties prior to the home at 2130 Payette?
 11 A. Yes.
 12 Q. What do you remember about those?
 13 A. A lot of them.
 14 Q. Really?
 15 A. Yeah.
 16 Q. Can you give me a ballpark of how many
 17 properties you looked at?
 18 A. I mean, there were a lot. There was 15 -- 10,
 19 15, or maybe more. I don't recall.
 20 Q. Over that, roughly, two-year period?
 21 A. Yeah.
 22 Q. And did you look at all of those using
 23 Mr. Batchelor as your representative?
 24 A. Pretty much so. Susan sometimes would step
 25 in.

1 Q. And that would be Susan Ulrich?
2 A. Yes. If Kevin wasn't available, Susan would
3 step in.
4 Q. Did you windup making offers on any of those
5 10 or 15 properties?
6 A. I don't recall. I don't think so.
7 Q. Were those all lakefront properties?
8 A. Yes -- not all of them, most of them.
9 Q. Okay. So it's fair to say, some of them you
10 looked at, and decided not to make any offer; correct?
11 A. Correct.
12 Q. Some of them perhaps you looked at, and made
13 an offer, but it didn't lead to anything?
14 A. I don't think we made an offer on anything.
15 Q. Was there any reason that stands out in your
16 mind on those other properties, that you didn't make an
17 offer on any of them?
18 A. We didn't like the house that much. We
19 weren't crazy about the house.
20 Q. So this all started with my question about,
21 how did you learn about Nancy Gentry's property? And I
22 appreciate your telling me about the context on that.
23 So then did Kevin contact you about Nancy Gentry's
24 property?
25 A. Yes.

1 A. Yes, excuse me, seven figures. I misspoke.
2 Q. At the time was the house listed for sale?
3 A. Yes, I believe so.
4 Q. Do you recall what the list price was?
5 A. At one point, like I said, it was like in the
6 millions. Yeah.
7 Q. Any recollection of where in the millions the
8 list price was?
9 A. No. But again, I got this -- that it cost
10 them \$2,000,000 or something to build, 2.3, or 2.4,
11 something like that.
12 Q. So all this information you received was Kevin
13 Batchelor?
14 A. Correct. But there was a flier produced by
15 Jean Odmark that had some of this information, as well.
16 Q. So then what did you do next?
17 A. We went to take a look at the house.
18 Q. And if we're correct that the house closed
19 around April 20, 2012, can you back me up to how much
20 before -- how long before that you first looked at the
21 house?
22 A. Oh, God. I wish I had the dates of this. No,
23 I can't really. I can't recall exactly when was the
24 first time we saw the house.
25 Q. Was it after Christmas of 2011?

1 Q. And what did he tell you about it?
2 A. He told me it was a really good deal. That
3 they had a lot of money in construction costs into the
4 house. The house was really well built. And that there
5 were, I wouldn't say, fire sale but -- that's not the
6 right term -- but something like that. Something that
7 was being offered far below, what their construction
8 costs were in the home.
9 It was a very good deal. I think you ought to
10 take a look at it. He kept coming up with numbers as to
11 the construction costs, and how much the house was
12 worth, that sort of thing that was, you know -- well
13 built, extremely well built. All this, you know, 2.3,
14 2.4 million dollars cost them to build the house. That
15 sort of thing. And it went on, and on, and on like
16 that.
17 Q. Did Kevin send you any written materials on
18 the house?
19 A. Yes, I believe he did. There was a flier with
20 some of that information. There was a flier with a
21 previous offer, I believe, and that was a six figure
22 offer that they were offering for sale in six figures.
23 Q. Six figures not seven?
24 A. Pardon?
25 Q. Six figures not seven?

1 A. I thought we -- well, I'm trying to remember.
2 There was -- he brought it up to me, initially, I think,
3 around Christmas.
4 Q. When you went to look at the house, was there
5 snow on the ground?
6 A. One -- the one time there was, not much, but a
7 little bit.
8 Q. Okay.
9 A. And we had seen the house several times.
10 Q. Before?
11 A. Yeah.
12 Q. How have you seen it before?
13 A. No, I mean, not before this time. I mean, we
14 went and looked at it a couple of times.
15 Q. So let's deal with the first time you looked
16 at it. The very first time you saw the house, was that
17 with Kevin?
18 A. I think Kevin drove us by the house around
19 Christmastime.
20 Q. Okay.
21 A. And then he got us into it. And I can't
22 recall when exactly he got us into it.
23 Q. And got us into it as in, you were actually
24 able to get in the house and look around?
25 A. Correct.

1 Q. And on that occasion, whenever it might have
2 been, who was present?
3 A. It was Kevin, and Ellen, and myself.
4 Q. And Ellen is your fiancée?
5 A. Correct.
6 Q. And what was your impression of the home?
7 A. I just want to make sure. I think at some
8 point, there might have been -- Cathy Batchelor might
9 have come in at some other time.
10 Q. Okay.
11 A. I'm just trying to give you the universe of
12 people that I saw the house with.
13 Q. Fair enough. I appreciate that.
14 A. I just don't remember when she came in.
15 Q. Okay. Got it.
16 A. My initial impression about the house was, it
17 was a very nice house.
18 Q. So relative to the other properties that you
19 had looked at, and elected to not make an offer on, were
20 you favorably inclined on this home?
21 A. Yes, but it wasn't exactly -- you know, I
22 didn't have everything I want in a home. But you are
23 never going to get that when you buy something that
24 somebody else built. You know, I mean, I would have
25 liked several other things. But out of everything I

1 that you got inside Nancy's house to take a look at it.
2 And you've told me it was you, and Ellen, and Kevin, and
3 possibly at one point in time, Cathy. And I asked what
4 you had seen on that trip. And I had asked whether you
5 were able to go out on any of the decks that are around
6 the house?
7 A. At some point, we got out on the deck. I
8 don't recall if it was the first time or the second
9 time.
10 Q. Okay. And we'll move on to the second time.
11 But on the first time, from what you remember -- well,
12 strike that.
13 Let me show you a document that may help us a
14 little bit here. This was Exhibit 1 in Beau Value's
15 deposition. You know Beau Value, obviously; correct?
16 A. Yes.
17 Q. And he and his company did all of the repair
18 and restoration work on the house for you?
19 A. Except for the painting, yes.
20 Q. Okay. And Beau testified this is an
21 approximate floor plan of the main level of the home,
22 and he's put some directions on there. Does that look
23 generally accurate to you?
24 A. Yes.
25 Q. So on the first occasion that you were able to

1 have seen for the price, I thought it was something I
2 was very interested in. Yes.
3 Q. And on that first time that you looked at the
4 home, did you have a chance to walk throughout the home?
5 A. Yes, I think we did. Yes.
6 Q. Did you have any opportunity to go out on any
7 of the decking around the home?
8 A. I can't recall if it was this time, or the
9 second time.
10 THE WITNESS: I do need to take a bathroom
11 break when we get a minute.
12 MR. MILLEMANN: Absolutely, let's do just
13 that.
14 (A recess was had.)
15 Q. (BY MR. MILLEMANN) Ed, I was negligent.
16 Despite you telling me about your back and neck issues,
17 I didn't ask. Do you have to take medication to manage
18 the pain on that?
19 A. Occasionally, yeah.
20 Q. And don't take any offense to this. But are
21 you taking any today that would in any way affect your
22 ability to answer the questions?
23 A. No.
24 Q. Thank you.
25 So we were talking about the very first time

1 look at the home, did you have access then to areas like
2 the kitchen, which is labeled on 1, and the dining room,
3 and the family room?
4 A. Yes.
5 Q. And you've testified that you are not sure if
6 it was that visit, or the subsequent visit, that you
7 were able to go on the deck that is on the east and
8 north side of the home?
9 A. Correct.
10 Q. On that first visit, if you have any
11 recollection, did you see anything at all on that visit
12 that caused you any concern about the home, itself?
13 A. Not that I recall, no.
14 Q. If you recall, did you see any evidence
15 anywhere of water intrusion, or water staining, or
16 anything that caused you to think, boy, I wonder if the
17 water is a problem with this home?
18 A. At one point I did, but not initially.
19 Q. Do you remember anything else about that first
20 visit to the home, in terms of what you saw, and what
21 your impressions were?
22 A. Just that it was a nice home. I was very
23 impressed with it. It was something that I would like
24 to look into, and follow-up on, and, you know...
25 Q. Did you have occasion to look at the home

1 again, before you made your offer?
 2 A. I can't be sure.
 3 Q. Well, fair enough. Let's then draw the line
 4 at when you closed on the deal. Okay? Before you
 5 closed on the purchase from Nancy Gentry, on April 20,
 6 2012, did you have any further occasion to view the home
 7 and be inside the home?
 8 A. Yeah.
 9 Q. Tell me about the next one you remember.
 10 You've told me what you remember about the first one.
 11 The next one, who was present, if you remember?
 12 A. Kevin, Ellen, and myself; and again, at some
 13 point, I can't remember when, Cathy came. She came at
 14 least once. But I don't remember when, and which one.
 15 As I recall, we saw the house maybe at least twice,
 16 maybe a third time.
 17 Q. Before closing?
 18 A. Yes.
 19 Q. And on this second occasion, do you remember
 20 whether there was snow on the ground?
 21 A. There was a little bit of snow.
 22 Q. And what, if anything, stands out to you about
 23 the second occasion when you, and Kevin, and Ellen, and
 24 maybe Cathy, looked at the home?
 25 A. Nothing -- nothing of any import.

1 a double door going off the area between the dining room
 2 and the family room?
 3 A. Yes.
 4 Q. That's the door you used to get on the deck?
 5 A. Yes, this one right in the middle
 6 (indicating).
 7 Q. Did you at any time prior to closing, have
 8 occasion to open or close the double door that is on the
 9 south side of the dining room?
 10 A. No.
 11 Q. And was there any particular reason, or you
 12 just didn't have occasion to do it?
 13 A. Well, most of the time, it was closed up.
 14 Meaning, there was shades over it. And we were being
 15 directed out this way (indicating).
 16 Q. Okay.
 17 A. And by "that way," I mean, the center house,
 18 when we went through.
 19 Q. The door that you've referred to?
 20 A. Right in the center.
 21 Q. So on the occasion in which you were able to
 22 get out on the deck, did you see anything on the deck,
 23 or on the exterior walls, or windows, or door that
 24 caused you any concern about the possibility that, boy,
 25 there might be some moisture intrusion here?

1 Q. Was there any particular reason that you
 2 wanted to go back and look at the home, or just, you
 3 know, I want to get another look at it before we
 4 proceed?
 5 A. I want to get another look at it before we
 6 proceed. I wanted to take a look at the house all over.
 7 You know, it's a fairly large home.
 8 Q. And were you able to get out on any of the
 9 deck on the east or north side, on that occasion?
 10 A. You mean, over here (indicating)?
 11 Q. Yes.
 12 A. Yes. On one or two occasions, we were on that
 13 deck. I can't remember if it was twice, or at least
 14 once.
 15 Q. Do you remember, looking at Exhibit 1, on the
 16 one or two occasions prior to closing, on which you were
 17 on that deck, how you accessed the deck?
 18 A. Yes, we went through the back door
 19 (indicating).
 20 Q. And by the "back door," you are pointing at
 21 what appears to be a double door off the family room?
 22 A. Yeah, if that's what you want to -- it's kind
 23 of the center of the house.
 24 Q. And I am just trying to identify it for the
 25 record, as you know. On Exhibit 1, there appears to be

1 A. No.
 2 Q. At any time on either of these visits, did you
 3 see anything, inside or outside about the house, that
 4 caused you any concern or suspicion, that there might be
 5 any moisture or water problems with the house?
 6 A. No, other than the photographs from
 7 Mr. McKenna. I had some questions about that.
 8 Q. And those were, I believe, all photographs of
 9 the crawlspace; weren't they?
 10 A. Correct.
 11 Q. And thank you. We're going to get to that.
 12 A. But that answers your question.
 13 Q. Yeah. And we'll get to Mr. McKenna's report.
 14 You got an inspection report from Mr. McKenna; correct?
 15 A. Correct.
 16 Q. And I've heard testimony that after you got
 17 that report, you had occasion to meet Mr. McKenna at the
 18 property. Do you recall that?
 19 A. I don't recall that. I recall having
 20 questions about the photographs in the report, or the
 21 photographs that eventually got into the report. Okay?
 22 But, you know, whether it was like you said, I don't
 23 recall.
 24 Q. And we'll get to that.
 25 So prior to closing the purchase from Nancy

1 Gentry, did you have any conversations with Nancy
 2 Gentry?
 3 A. No.
 4 Q. How about Jean Odmark?
 5 A. Yes.
 6 Q. Tell me what you recall. Did you talk with
 7 Jean once, or more than once prior to closing?
 8 A. More than once.
 9 Q. Tell me what you remember about those
 10 conversations. And I guess, just starting with, the
 11 earliest one you remember. Let me, I guess, put some
 12 context on it.
 13 Were any of these in person?
 14 A. Yes.
 15 Q. Were some of them on the phone?
 16 A. No.
 17 Q. They were all in person?
 18 A. Yes. As I recall, yes.
 19 Q. What's the first such conversation you
 20 remember? And I don't mean by date. Where was it, and
 21 who was there?
 22 A. I think it was -- I don't recall talking to
 23 her on the phone. I may have. I'm not absolutely sure.
 24 I don't think so. But we were just talking about the
 25 condition of the home, and particulars about the home,

1 heat pumps.
 2 Q. And if I recall, those became quite an issue
 3 in the purchase for at least a period of time?
 4 A. Correct.
 5 Q. And these were heat pumps on the north side of
 6 the house; is that correct?
 7 A. Let's see. Where does it say? No, it
 8 wouldn't be. It would be on the south side of the
 9 house.
 10 Q. The south side of the house. Okay. The south
 11 side of the property is the --
 12 A. South side of the house, right here
 13 (indicating).
 14 Q. Is the Graves' property on the south?
 15 A. Yes.
 16 Q. And so there was an issue about the pumps, and
 17 them having been covered, and then uncovered, and
 18 whether the Graves had some rights in that regard?
 19 A. Yes.
 20 Q. So you had some conversations with Jean about
 21 that?
 22 A. Correct. Mainly Michael, but to a certain
 23 degree, Jean.
 24 Q. Was Michael present at the property for any of
 25 your pre-closing visits?

1 you know, things of that nature.
 2 Q. Where, if you recall, would have that first
 3 conversation have occurred? Was it in Jean's office, or
 4 at the property?
 5 A. It would have been at the property.
 6 Q. At the property. So on one of the times that
 7 you viewed the property before closing, Jean Odmark was
 8 present?
 9 A. Correct.
 10 Q. And who else was present on the occasion Jean
 11 was present?
 12 A. Kevin and Ellen.
 13 Q. And this would have been before closing?
 14 A. Correct.
 15 Q. Do you have any specific recollection of any
 16 of the statements you made to Jean, or that she made to
 17 you?
 18 A. Just, you know, the house was in excellent
 19 condition. There had never been any problems with the
 20 house. That there was -- you know, again, this -- you
 21 know, the value of the house is much higher, than the
 22 asking price, that sort of thing.
 23 Q. Did you have any questions for Jean that you
 24 recall in that conversation?
 25 A. At some point, we had discussions about the

1 A. Most of the time.
 2 Q. Okay.
 3 A. He was -- Jean was there maybe once. And then
 4 Michael pretty much took over.
 5 Q. So I guess to not get too confused here.
 6 Let's stay with Jean. I believe you told me, that you
 7 had more than one conversation with her before closing.
 8 Were they all at the property, or did you have any other
 9 conversations with her that weren't at the property?
 10 A. No, I don't recall having any other
 11 conversations, other than what were at the property.
 12 Q. And you've told me what you recall her saying
 13 about the condition of the home, and there not being
 14 problems, and that it's worth more than was being asked.
 15 Anything else you remember, specifically,
 16 about what Jean told you?
 17 A. No. The house was in excellent shape. There
 18 was never any problems with the house, that sort of
 19 thing. Well built, you know, very well built. You
 20 know, worth -- you know, worth more than what the asking
 21 price. At one time, I think she mentioned, that there
 22 had been an asking price much higher, in the seven
 23 figures, things to that nature.
 24 Q. Now, at any time, have you had occasion to
 25 obtain, or examine an appraisal of the property at 2130

1 Payette?
 2 A. I'm not sure. I'm not really sure.
 3 Q. As part of your purchase at auction from the
 4 State of Idaho of the ground, if you will, were you
 5 provided with any kind of appraisal of the property?
 6 A. Yeah, there was an appraisal there. They made
 7 an appraised -- they appraised both of them, the ground,
 8 as well as the house, then.
 9 Q. Do you remember what value the State of Idaho
 10 placed on it for purposes of the auction?
 11 A. No, but I didn't think it was very accurate,
 12 you know. They were just trying to get the thing -- you
 13 know, get it done.
 14 Q. Do you remember what you paid the State of
 15 Idaho for the property when you purchased it?
 16 A. We did have to go back, I think. We had some
 17 discussions about them undervaluing the property -- I
 18 mean, not the property, but the improvements. And
 19 I'm -- that's -- I do recall that. That we had
 20 discussions with the appraiser about that.
 21 Q. And I should provide some context here. If I
 22 understand correctly, since at the time of the auction,
 23 you already owned the home. You were buying only the
 24 ground; is that correct?
 25 A. Correct.

1 Q. And I think you've told me, at no time prior
 2 to closing, did you ever open or close the french doors
 3 off of the dining room?
 4 A. Correct.
 5 Q. Okay.
 6 A. There was -- well, this wouldn't be -- this
 7 was hearsay, so I won't go into it. I got a call from
 8 Bob Hallock, and he indicated that Jean had called him.
 9 And that's about me buying the house.
 10 Q. Who is Bob Hallock?
 11 A. He's a gentleman who lives in McCall.
 12 Q. And this was before you closed, Ed?
 13 A. Correct.
 14 Q. And what did Bob tell you? I understand it's
 15 hearsay. But what did Bob tell you?
 16 A. He said that Jean had asked him whether he
 17 thought that I had enough money to do the -- to do the
 18 deal.
 19 Q. Okay. Anything else you remember Bob telling
 20 you?
 21 A. Yeah, was very offended by it.
 22 Q. He was offended that he got the call, and the
 23 question?
 24 A. Yeah. Yes.
 25 Q. Anything else Bob told you about his

1 Q. Do you recall what you paid for the ground,
 2 when you bought it from the State of Idaho?
 3 A. Not down to the penny, no.
 4 Q. Can you give me your best recollection?
 5 A. \$950,000, something like that.
 6 Q. Something in that range?
 7 A. Yeah. 900,000, something like that.
 8 Q. And do you recall what value the State of
 9 Idaho had placed on the home, the improvements?
 10 A. On the improvements, no. But we had an issue
 11 about that, I think.
 12 Q. And your issue was, you thought they were
 13 undervaluing the home, and overvaluing the dirt?
 14 A. Yeah, I think that was it.
 15 Q. Do you have any of the documents related to
 16 that purchase from the State still in your possession,
 17 or accessible to you?
 18 A. I don't recall. I don't know if I do or not.
 19 Q. Back to the conversations with Jean Odmark,
 20 and you've narrowed it down to tell me, you think those
 21 would have been only at the property. And you've
 22 generally relayed what statements she made to you.
 23 Anything else you recall about your conversations with
 24 Jean?
 25 A. No, not really. Not that I can recall.

1 conversation with Jean?
 2 A. No, other than that.
 3 Q. So the best of your recollection, for the
 4 period prior to your closing, you've told me everything
 5 you can remember about your conversations with Jean?
 6 A. Yes. They were mainly about, what a great
 7 deal this was, what a great condition the house was.
 8 You know, salesman, you know, talking about the
 9 condition of the home, talking about what a good deal it
 10 was, how well it was built. There were many
 11 conversations along those lines.
 12 Q. So when you say, "many conversations," were
 13 there successive times at the property that you --
 14 A. No, it was maybe twice that she was there.
 15 But that was -- you know, there was more than one
 16 statement. That's what I'm getting at.
 17 Q. So within the context of one visit to the
 18 home, you are saying that Jean --
 19 A. Made several statements.
 20 Q. Made several statements?
 21 A. Yeah.
 22 Q. Those being --
 23 A. And those were the topics that she was
 24 discussing. Okay?
 25 Q. Okay. Did Kevin express any opinion to you on

1 those same topics?
 2 A. Yeah, I think he agreed. He pretty much
 3 agreed.
 4 Q. And so let's stay with the period prior to
 5 closing. It sounds like you've also had some
 6 conversations with Michael Wood?
 7 A. Correct.
 8 Q. Would those also have been at the property?
 9 A. This is prior to closing?
 10 Q. Yes, sir.
 11 A. I think so. I may have talked to him on the
 12 phone. I know for a fact that post closing, I had a lot
 13 of conversations with him on the phone. But I think I
 14 had a conversation, one or two, about certain things
 15 about the house.
 16 Q. Do you have any specific recollection of your
 17 conversations with Michael Wood before closing?
 18 A. We were talking about the issue with the
 19 Gaines, the heat --
 20 Q. The Graves?
 21 A. The Graves, I mean, the Graves. The heat
 22 pumps.
 23 Q. If I understand correctly, just not to waste
 24 time on that. My reading of the pleadings is, that's
 25 not an issue in this lawsuit?

1 A. No, he went over the photographs with me. We
 2 went over the photographs, but we didn't go down the
 3 crawlspace.
 4 Q. And was that at the property?
 5 A. That we went over the photographs?
 6 Q. Yes.
 7 A. Yes, sir.
 8 Q. And that was pre-close?
 9 A. As I recall, yes, sir.
 10 Q. Okay. We'll get there.
 11 So at any time prior to closing, did you,
 12 yourself, see any signs of water staining on the
 13 interior walls of the house?
 14 A. Other than the pictures I saw from
 15 Mr. McKenna, that was it.
 16 Q. And for purposes of my questions here, to save
 17 time, let's set the pictures aside. Okay? Other than
 18 those photos, you never saw any evidence of water
 19 staining; correct?
 20 A. Other than the pictures, no.
 21 Q. And I understand that. And I'm putting those
 22 aside.
 23 At any time prior to close, did you ever
 24 observe any signs of water staining on any of the
 25 floors?

1 A. No. But you are asking me what we discussed.
 2 Q. No, I appreciate that. I just want to make
 3 sure that I don't need to spend your time going too far
 4 into that topic.
 5 So you would have talked to Michael about the
 6 heat pump issue that involved the Graves. Do you have
 7 any other specific recollection of conversations with
 8 Michael?
 9 A. Before?
 10 Q. Before closing.
 11 A. Just more about the condition of the home.
 12 And maybe some -- I think we might have had some
 13 discussions about a dryer, and a vent, something like
 14 that. But nothing of any real import.
 15 Q. Prior to closing, did you ever have occasion
 16 to get in the crawlspace of the home?
 17 A. No. To this day, I've never been in the
 18 crawlspace.
 19 Q. So if I understood Mr. McKenna's testimony to
 20 be, that after you received his report, he met you at
 21 the property, and the two of you went down into the
 22 crawlspace. Your testimony would be, that's not
 23 accurate testimony?
 24 A. That's correct.
 25 Q. Okay.

1 A. Not that I recall.
 2 Q. Did you, prior to closing, ever observe any
 3 signs of moisture penetration, or moisture damage to any
 4 doors of the home?
 5 A. Not that I recall.
 6 Q. And prior to closing, did you ever observe any
 7 signs of moisture damage, or moisture penetration on the
 8 surface of any of the decking?
 9 A. Well, there was moisture on the decking.
 10 Q. Sitting on the decking?
 11 A. Yeah.
 12 Q. Did you see any signs of deterioration or rot?
 13 A. No. No dry rot, if that's what you meant.
 14 Q. Any kind of rot?
 15 A. No.
 16 Q. And then prior to closing, did you see any
 17 signs anywhere on the exterior walls, or windows of the
 18 home, of water intrusion, or rot, or moisture damage?
 19 A. Not that I recall.
 20 Q. Setting aside Mr. McKenna's report. Prior to
 21 closing, did anybody report to you that they had seen
 22 evidence of any water intrusion, or rot, or damage to
 23 the home?
 24 A. Prior to closing, no.
 25 Q. You've told me, you didn't have any

1 conversations with Nancy Gentry prior to closing. Did
 2 you have any written communications with Nancy Gentry
 3 prior to closing?
 4 A. We might have -- we might have exchanged
 5 emails. I don't recall, but we may have.
 6 Q. And in the process of working with your
 7 counsel on responding to the discovery requests that we
 8 have propounding, did you endeavor to go look at your
 9 emails to see if you had saved any that would have
 10 related to --
 11 A. Yes, of course.
 12 Q. Did you find any?
 13 A. Not that I recall.
 14 Q. What you did find in emails that might be
 15 related to this property, did you provide to Counsel?
 16 A. Yes.
 17 Q. I want to show you, Ed, what's been marked as
 18 Exhibit I in this deposition. I can tell you, those are
 19 documents that were provided by your counsel in response
 20 to discovery, which I believe from my independent
 21 examination, to represent the progression of documents
 22 leading from your offer to the final addendum in the
 23 transaction.
 24 A. They --
 25 Q. Go ahead.

1 A. It may be, I --
 2 Q. No, I understand. I will also tell you, in
 3 interest of the record, the Bates numbering system on
 4 these did not correspond with the actual chronology of
 5 the documents. So just to avoid confusion, I have
 6 reordered them. But whether I've done so correctly or
 7 not remains to be seen. But you will see the Bates
 8 numbering at the bottom begins at 163 and goes up to
 9 188.
 10 MS. FOSTER: I can represent, we didn't
 11 shuffle them. We just produced them as they were --
 12 MR. MILLEMANN: There is no suggestion that
 13 you did.
 14 MS. FOSTER: I know.
 15 MR. PIERCE: Steve, do you have an extra set
 16 of those?
 17 THE WITNESS: 188.
 18 Q. (BY MR. MILLEMANN) And then the next starts
 19 at 157 and goes to 163. Do you see that? I'm sorry.
 20 It goes to 162. So together these represents Bates
 21 numbers 157 to 188, and that's just more for the record,
 22 Ed, than anything. It would otherwise be confusing why
 23 I shuffled them, but I endeavored to put them in
 24 chronological order.
 25 If I could direct your attention to page 4

1 of --
 2 A. Which would be Bates Stamp No. what?
 3 Q. Bates Stamp No. 166.
 4 A. Uh-huh.
 5 MS. FOSTER: Counsel, I'll state for the
 6 record, we're relying on your presentation that this is
 7 the whole PSA. We don't have an opinion without going
 8 through everything to make sure. But I have no
 9 objection to you using this exhibit.
 10 MR. MILLEMANN: Okay. Thank you. I
 11 appreciate that.
 12 MS. FOSTER: Just to clarify the record.
 13 MR. MILLEMANN: No. And I will tell you, this
 14 exhibit is all of the documents in the purchase and sale
 15 chain that I could find, that you provided. But I
 16 understand your position.
 17 Q. (BY MR. MILLEMANN) So if we look at page 4 of
 18 the document, Bates No. 166. At item 17, Ed, the title
 19 is "Home Warranty Plan." Do you see that?
 20 A. Yes.
 21 Q. And I will represent, that what I understand
 22 we're looking at, would have been your initial offer on
 23 the property. And at paragraph 17, you are proposing
 24 that you will obtain a home warranty plan, and the
 25 seller will pay for that. Do you see that?

1 A. That would appear what the document --
 2 Q. And we can go through this step by step. I
 3 will tell you, that as I review the documents, what I
 4 understand happened, is in the final deal, you did
 5 acquire a home warranty plan, but you paid for it, not
 6 the seller. Do you have any recollection of that?
 7 A. I don't have any recollection. Sorry, Steve.
 8 Q. No, that's all right. And on this point, I
 9 want to show you Exhibit 24, which is a two-page
 10 document, Bates Nos. 275 and 276, or actually more
 11 appropriately stated, two documents. The first is
 12 titled, "Buyer's Final Closing Statement." And the
 13 second, Bates No. 276, is "Buyer's Estimated Closing
 14 Statement." Of the two documents, it appears to me that
 15 you signed Bates No. 276. Does that look like your
 16 signature?
 17 A. It does.
 18 Q. And in this closing statement, I note, not all
 19 the way to the bottom, but close to the bottom, you are
 20 being charged \$940 as a premium for a "Home Warranty of
 21 America." Do you see that?
 22 A. It says, charged. It doesn't say who it's
 23 charged by.
 24 Q. If you look to the top it --
 25 A. By closing.

1 Q. Your closing statement. So I understand this
 2 statement to be representing that you are being charged
 3 for that. Did you acquire a home warranty plan on this
 4 property?
 5 A. I believe I did. I don't recall anything
 6 about it.
 7 Q. Do you have anywhere in your records, a copy
 8 of that plan?
 9 A. No.
 10 Q. Or that warranty?
 11 A. No.
 12 Q. Do you have any idea where, if you were to
 13 look and try to find it, you would find it?
 14 A. You are asking me to speculate as to where
 15 it's at.
 16 Q. Well, just based on your own records. If you
 17 did have it in your records.
 18 A. I don't think I have it in my records. I
 19 don't recall ever having it. But I would imagine, if
 20 you want me to guess, maybe Kevin Batchelor would have a
 21 copy in the file having to do with this purchase.
 22 Q. Have you ever had occasion, as part of your
 23 pursuit of compensation for the defects that were
 24 discovered in the home that your complaint raises, have
 25 you ever had occasion to review the home warranty plan,

1 A. I believe so.
 2 Q. And just for the record, if you flip over to
 3 Bates No. 187. It appears to me that that is another
 4 copy of the same Addendum No. 4, except it has been
 5 signed not only by you, but by Nancy Gentry-Boyd. Does
 6 that appear to you to be a correct statement?
 7 A. It seems like she signed twice.
 8 Q. Correct.
 9 MS. FOSTER: Counsel, for the record, we're
 10 observing that there is an additional sentence typed in
 11 here that is different than the previous document. But
 12 it appears to be otherwise similar.
 13 MR. MILLEMANN: Okay. Appreciate that.
 14 Q. (BY MR. MILLEMANN) Condition 3(d), does it
 15 carry forward in both of these documents, Bates 185 and
 16 187?
 17 MS. FOSTER: Counsel, objection to the
 18 question, or clarification. That 5(d) appears to be
 19 amended somewhat by the sentence that was added.
 20 MR. MILLEMANN: You mean, 3(d).
 21 MS. FOSTER: Correct. What did I say?
 22 MR. MILLEMANN: 5(d).
 23 THE WITNESS: Correct. The sentence at the
 24 bottom purports to amend line 3(d).
 25 Q. (BY MR. MILLEMANN) Okay. I appreciate that

1 and to determine whether there was any coverage
 2 available for those?
 3 A. Generally I know a little bit about
 4 warranties.
 5 Q. Tell me what you know.
 6 A. What I know, they are basically about
 7 appliances.
 8 Q. And I appreciate that. In this case, did you
 9 ever have occasion to look at the plan?
 10 A. No.
 11 Q. If we could go back to Exhibit No. 1, and move
 12 on to Bates No. 185.
 13 A. (Witness complying.)
 14 Q. Which is titled "Addendum No. 4, RE-11
 15 Addendum."
 16 A. Yes.
 17 Q. If I look at item 3(d), as in dog, under Bates
 18 No. 185. The following is one of the terms of this
 19 addendum. And I quote, "Buyer or buyers agent to
 20 conduct a final post-closing walk-thru of the home five
 21 days after closing and provide written acceptance within
 22 one business day of the condition of the home and
 23 confirmation of the removal of all excluded items agreed
 24 upon by all parties."
 25 Have I correctly read that?

1 clarification.
 2 My question is, did you conduct a post-closing
 3 walk through of the home?
 4 A. I believe Kevin Batchelor did.
 5 Q. You did not yourself, Ed?
 6 A. No, I wasn't in town, as I recall. I think
 7 I -- well, that's -- Kevin did that, yes.
 8 Q. Did he provide you with any report about his
 9 inspection?
 10 A. He said everything was fine. I think he was
 11 dealing mainly with the items that were on the list.
 12 The items on the list, I think, having to do with the, I
 13 think, furniture, or something. That's all I think he
 14 discussed with me.
 15 Q. That's all that you recall in there?
 16 A. That's all I recall.
 17 Q. Did he provide you, if you recall, any written
 18 report, email, or otherwise, on his walk through?
 19 A. Not that I recall. He may have.
 20 Q. And if we move forward to Bates -- can I see
 21 this document for just a second?
 22 A. Uh-huh. (Witness complying.)
 23 Q. Thank you.
 24 MS. FOSTER: Are you okay?
 25 THE WITNESS: Yeah. I'm going to need a break

1 whenever he's done with his line of questioning.
2 Q. (BY MR. MILLEMANN) Okay. Drawing your
3 attention to Bates No. 157, which is labeled "Addendum
4 No. 5, RE-11 Addendum." And I apologize for the
5 somewhat challenging legibility of some of these
6 documents. They are the best we could do with what we
7 had available to us.

8 Is that your signature on this document, Ed?

9 A. I believe so. I'm trying to see if I can find
10 my glasses. I don't know if I left them in the car or
11 not, but go ahead. I must have left them in the car.

12 Q. Do you want to take a break and grab them?

13 A. That wouldn't be too troublesome?

14 Q. Not at all.

15 A. I hope I brought them. I think I brought
16 them.

17 MR. MILLEMANN: You were ready for one anyway.

18 MS. FOSTER: It is ten to 11:00; is that
19 right?

20 MR. MILLEMANN: Let's take a quick break. And
21 you can see if you have your glasses, and we'll resume.

22 MS. FOSTER: Thank you.

23 (A recess was had.)

24 MR. MILLEMANN: Okay. We're ready to resume.

25 Q. (BY MR. MILLEMANN) I want to back up, Ed,

1 there, there were a series of counteroffers, and a
2 series of addenda. Finally, at some point, reaching
3 agreement on the terms of the transaction. Does that
4 generally appear to you to be an accurate statement?

5 A. I would say probably, yes.

6 Q. Okay.

7 MS. FOSTER: Are you going to go through his
8 signatures, Steve?

9 MR. MILLEMANN: I probably will, or Phil will.

10 Q. (BY MR. MILLEMANN) Okay. I want to back up
11 to Bates No. 165, which is page 3 of 7 of the initial
12 RE-21. That's Bates 165. Do you have that in front of
13 you, Ed?

14 A. I do.

15 Q. Could you take a moment and review numbered
16 paragraph 12, on Bates No. 165, page 3 of 7 of the
17 RE-21?

18 A. (Witness complying.) Yes.

19 Q. To your knowledge, did any of the
20 counteroffers or addenda modify any of the provisions of
21 paragraph No. 12?

22 A. The documents speak for themselves.

23 MS. FOSTER: That would be my objection.

24 Q. (BY MR. MILLEMANN) Okay. Let's look at them,
25 then. Bates No. 170 is titled "RE-13 Counteroffer

1 from where we just were. And Exhibit No. 1, as I
2 understand it, and tell me if you understand it
3 differently, it starts with the RE-21 Real Estate
4 Purchase and Sale Agreement. Which, for the record, if
5 I look at Exhibit No. 1, it appears to me, that you
6 signed that RE-21 at Bates page 169. Does that appear
7 to you to be a correct statement?

8 A. Are you asking me, is that my signature?

9 Q. Yes, sir.

10 A. It appears to be my signature, but this
11 wasn't --

12 MS. FOSTER: Counsel, just to clarify, are you
13 looking at the signature from January 3rd of 2012?

14 Q. (BY MR. MILLEMANN) Yes, at Bates No. 169,
15 buyer's signature, which is page 7 of 7 of the RE-21.

16 And then it also appears to me, that you initialed each
17 page, and dated each page, as part of your presentation
18 of the document. Does that appear to be a correct
19 statement?

20 A. It appears to be initialed.

21 Q. And dated?

22 A. And dated.

23 Q. Okay. And then it appears to me, what went
24 on, which I believe to be standard in real estate
25 transactions, but you tell me if you disagree, from

1 No. 1." And it is signed by Nancy Gentry-Boyd. It
2 appears to be her counteroffer to your offer.

3 Do you see in Bates No. 170 any proposed terms
4 that would modify paragraph 12 of the initial contract?

5 A. The document speaks for itself.

6 Q. Okay. So if it's there, it's there, and if
7 it's not there, it's not?

8 A. Argumentative.

9 Q. Are you representing yourself now, Ed?

10 A. It sounds like it.

11 Q. Let's move to Bates No. 171, which is page 1
12 of 1, titled "RE-13 Counteroffer No. 2." Is that your
13 signature at the bottom of the document?

14 A. Yes, it appears to be. Yes.

15 Q. And in this counteroffer that you were
16 proposing as part of this transaction, did you propose
17 to modify any of the terms of paragraph No. 12 of the
18 contract?

19 A. Other than what's set forth in the document.

20 Q. Okay. And then moving on to Bates No. 172,
21 which is titled "RE-13 Counteroffer No. 3," signed by
22 Nancy Gentry-Boyd. Do you observe, or did you observe
23 any terms of that counteroffer that addressed paragraph
24 12 of the contract?

25 A. Again, the document speaks for itself.

1 Q. So if it's not there, it wasn't proposed as
 2 part of this counteroffer?
 3 A. The document speaks for itself.
 4 Q. Well, was there some counteroffer made, other
 5 than the counteroffers in writing, that are reflected in
 6 this document? Were there verbal counteroffers made?
 7 MS. FOSTER: I'll object to that question as
 8 compound.
 9 You can answer were there any verbal
 10 counteroffers made.
 11 THE WITNESS: I don't recall any verbal
 12 counteroffers.
 13 Q. (BY MR. MILLEMANN) So if we move on to Bates
 14 No. 173, which is "RE-13 Counteroffer No. 4." Do you
 15 have that in front of you?
 16 A. I do.
 17 Q. Is that your signature at the bottom?
 18 A. It appears to be, yes.
 19 Q. And then if we move on to Bates No. 175, which
 20 is titled "RE-13 Counteroffer No. 5," which appears to
 21 be signed by Nancy Gentry-Boyd. Do you have Bates No.
 22 175 in front of you?
 23 A. Yes.
 24 Q. Do you have any reason to doubt you received
 25 that counteroffer?

1 Q. And are those your initials above your
 2 signature after the word "buyer," and above the date,
 3 March 5, 2012?
 4 MS. FOSTER: On Petrus 184.
 5 THE WITNESS: That's not my initials. Those
 6 are not my initials. Those aren't my initials.
 7 Q. (BY MR. MILLEMANN) So it's your testimony
 8 that you signed Addendum No. 4, Bates No. 184, but these
 9 are not your initials?
 10 A. These are not my initials, no.
 11 Q. Do you have any idea whose initials those are?
 12 A. No.
 13 Q. And then if we go over to Bates No. 188, which
 14 is page 1 of 1, titled "Addendum No. 5, RE-11 Addendum."
 15 Is that your signature at the bottom of that document?
 16 A. It appears to be.
 17 MS. FOSTER: Is that yours?
 18 THE WITNESS: That is, but that may be
 19 somebody else signing it for me.
 20 Q. (BY MR. MILLEMANN) To your recollection, did
 21 you have anybody else sign any of the documents in the
 22 Nancy Gentry transaction for you?
 23 A. You know, it could have been Kevin Batchelor
 24 signed some of the documents for me. That's why I'm
 25 saying, for example, that does not appear to be my

1 A. I don't understand the question.
 2 Q. Did you receive Counteroffer No. 5, Bates No.
 3 175?
 4 A. I don't recall.
 5 Q. So then we move on to Bates No. 176, page 1 of
 6 1, titled "RE-13 Counteroffer No. 6." Is that your
 7 signature at the bottom?
 8 A. It appears to be.
 9 Q. And then we move on to Bates No. 177, which is
 10 titled "RE-13 Counteroffer No. 7." Does that appear to
 11 be your signature at the bottom of that document?
 12 A. Yes, it does.
 13 Q. And then if we proceed to Bates No. 181, which
 14 is page 1 of 1, titled "Addendum No. 2, RE-11 Addendum."
 15 Is that your signature at the bottom of that document?
 16 A. Yes.
 17 Q. And if we proceed to Bates No. -- well, let's
 18 go all the way to 184. And actually, this is one of the
 19 documents we were looking at earlier. There are
 20 multiple pages of this document, duplicates of this
 21 document, some of which have signatures, some don't,
 22 which includes Bates No. 185, 186, 187. Does that
 23 appear to be your signature at the bottom of Bates No.
 24 184?
 25 A. Yes, one of those signatures are mine.

1 signature.
 2 MS. FOSTER: On Petrus 188.
 3 THE WITNESS: But the other ones do. I'm not
 4 disputing that. I'm just saying, just on the signature,
 5 somebody might have signed my name.
 6 Q. (BY MR. MILLEMANN) You don't have specific
 7 recollection on that?
 8 A. No, I don't.
 9 Q. If you move to Bates 162, which I think is the
 10 last page in this packet of documents, titled "Addendum
 11 No. 6, RE-10 Inspection Contingency Release." Does that
 12 appear to be your signature at the bottom of the
 13 document?
 14 A. Yes, this was faxed to me, and I signed it.
 15 Q. We have gone now sequentially through the
 16 RE-21 Purchase and Sale Agreement, and Counteroffers 1
 17 through 7. Okay. We've gone through the contract,
 18 Counteroffers 1 through 7, and Addenda 1 through 6.
 19 As you sit here today, do you know whether
 20 there were any other written counteroffers or addenda
 21 that formed part of your agreement with Ms. Gentry?
 22 A. Not that I recall.
 23 Q. And as you sit here today, do you recall any
 24 counteroffers or addenda that formed part of the
 25 agreement with Ms. Gentry, being verbal counteroffers or

1 addenda?

2 A. Not that I recall.

3 MS. FOSTER: And I'll clarify to reserve the
4 right to look through productions to make sure this is
5 the whole document. But as Mr. Petrus stated, we don't
6 have any reason to believe it is not at this time.

7 Q. (BY MR. MILLEMANN) And to the best of your
8 recollection, if there were any agreement between you
9 and Ms. Gentry to modify the terms of paragraph 12, of
10 the purchase and sale agreement, which you reviewed at
11 Bates No. 165, would they be contained in one of the
12 counteroffers or addenda?

13 A. I would assume so.

14 Q. If we could return to Bates No. Petrus 188.
15 And what we have here is 188 appears to me to be
16 identical to Bates No. 157, the next page. Except that
17 Nancy Gentry-Boyd has signed this Addendum No. 5 on
18 Bates No. 157. I include them both, because Bates No.
19 188 is, from my old eyes, a much more legible copy.

20 It appears to me that at the time Addendum No.
21 5 was signed, you had received Mr. McKenna's inspection
22 report. Would that appear to you to be a correct
23 statement?

24 A. I don't know. Where is it?

25 MS. FOSTER: I don't know.

1 A. Correct.

2 Q. Do you have any recollection of that
3 conversation with Mr. McKenna?

4 A. I do.

5 Q. Can you tell me what you recall you said, and
6 he said?

7 A. Yeah, I was concerned about the photographs of
8 the water seeping through the crawlspace.

9 Q. And did you express that concern to him?

10 A. Yes, I did.

11 Q. And how did he respond?

12 A. He said this is normal seepage for this type
13 of property, this type of area, this type of house, this
14 type of -- you know, this is normal, nothing unusual.

15 Q. Anything else you remember about that
16 exchange?

17 A. Yeah, I kept asking him about it. Don't you
18 think that's a little high? You know, if it is water
19 seepage wouldn't it become lower? And he said, no, this
20 is how it happens. This is normal seepage. And are you
21 sure there is no issues of any mold, or anything of that
22 nature? He said, no, none. And I said, what about the
23 ants? Does that say anything? He said, no. He said,
24 don't worry about that. Just get your, you know, your
25 ant killer, your --

1 Q. (BY MR. MILLEMANN) And I direct your
2 attention to item 3.

3 A. Okay. It would appear so.

4 Q. If you know, between the time you received
5 Mr. McKenna's inspection report, and the time that
6 Addendum No. 5 was executed, have you had occasion to
7 discuss Mr. McKenna's report with him?

8 A. Yes.

9 Q. And I apologize. I don't --

10 A. Excuse me.

11 Q. Yes. Go ahead.

12 A. Was your question as of 3-18, 2012, that I had
13 occasion to discuss Mr. McKenna's report with him?

14 Q. Exactly.

15 A. Yes.

16 Q. And I don't remember what you told me as to
17 whether that discussion occurred at the property, or
18 otherwise?

19 A. It was at the property.

20 Q. And who else was present, if you remember?

21 A. I believe Kevin Batchelor was present and
22 Ellen Nakamura.

23 Q. Okay. And I believe you told me, you did not
24 then, or at any time go down into the crawlspace with
25 Mr. McKenna?

1 Q. Exterminator?

2 A. Your exterminator to come in and kill them.
3 It's nothing to be concerned about at all. The house is
4 in excellent shape. Everything is fine.

5 Q. So was that the only conversation you had with
6 Mr. McKenna after receiving his report, and prior to
7 closing?

8 A. I think I went through some other portions of
9 his report, but that's the one that really sticks out.

10 Q. And I didn't ask the question very well. I
11 didn't mean to say, that's the only thing you talked
12 with him about. But was that the only occasion you had
13 to discuss Mr. McKenna's report with him prior to
14 closing?

15 A. I believe so, yes.

16 Q. What else do you remember talking with
17 Mr. McKenna about relative to the report and the
18 property?

19 A. Just whether this report was thorough, and
20 whether he went through the house completely, and was
21 sure about everything he put down there, because he gave
22 it a pretty glowing report. And I just wanted to make
23 sure he was confident in what he put down.

24 Q. And how did he respond?

25 A. He said, yes, it's a very well constructed

1 house. You know, that's pretty much how it goes, you
 2 know.
 3 Q. And was there any discussion that you recall
 4 with Mr. McKenna, about any of the doors in the house?
 5 A. Later there was.
 6 Q. Okay. But at this conversation?
 7 A. Not that I recall.
 8 Q. Okay.
 9 A. Just that made sure that everything was
 10 accurate on his report.
 11 Q. And this would have been one of your
 12 pre-closing visits to the property that you've talked
 13 about earlier this morning?
 14 A. I was there, I think, before closing, yes.
 15 Q. It sounds like at least twice. Because you
 16 told me you were there with Ellen and Kevin, and maybe
 17 Cathy, at least once. I don't want to put words in your
 18 mouth. Here's my understanding, you tell me if I'm
 19 wrong. Is that you were there with Ellen, and Kevin,
 20 and maybe Cathy, on at least one occasion. There was an
 21 occasion you were there, that also included Jean Odmark.
 22 And then there was an occasion you were there that
 23 included Mr. McKenna. Were those different visits?
 24 A. Yeah, let me -- let me say this, so we can get
 25 this clarified.

1 the house before we had a deal.
 2 Q. Okay. And then between the time you had the
 3 deal, and the time you closed the deal, were you back
 4 into the house?
 5 A. I can't -- I don't recall making a -- I don't
 6 think I did the closing.
 7 Q. Okay.
 8 A. I'm almost positive I didn't. I was out of
 9 town. I think Kevin did the closing.
 10 Q. So to the best of your recollection, the
 11 answer is, no?
 12 A. Correct.
 13 Q. So directing your attention to Bates Nos. 161
 14 and 162.
 15 A. 161 and 162.
 16 Q. 161 appears to me to be an unsigned version of
 17 "Addendum No. 6, RE-10 Inspection Contingency Release."
 18 162 appears to me to be the signed version of that same
 19 document.
 20 Would you take a moment, and tell me if you
 21 concur with that assessment?
 22 A. The document speaks for itself.
 23 Q. Let's look at 162. Do you have that?
 24 A. Yes.
 25 Q. Does that appear to be your signature?

1 Q. Yes.
 2 A. Before there was a deal, okay, I was on the
 3 property two, maybe three times. Okay? And there were
 4 varying people there. Okay? Kevin was always there.
 5 Ellen pretty much was always there. There might have
 6 been one time when she wasn't, but I'm not sure. I
 7 think she was there pretty much all the time. Cathy may
 8 have been there once. Jean Odmark may have been there
 9 once or twice. Michael Wood was there. You know,
 10 those -- and then, of course, McKenna was there at least
 11 once, one time, that I recall me being there. That's my
 12 recollection of before we had a deal.
 13 Q. Thank you. And when you say, "before we had a
 14 deal," you mean, before closing?
 15 A. No, before we had acceptance.
 16 Q. Before you had a final purchase and sale
 17 agreement signed with Nancy?
 18 A. Well, with an agreement.
 19 Q. And so the best of your --
 20 A. But that's not including the walk throughs or
 21 anything like that.
 22 Q. So the best of your recollection, how many
 23 visits did that comprise; what you've just described to
 24 me?
 25 A. I said two to three times that I had been in

1 A. It appears to be my signature.
 2 Q. Did you read that document before you signed
 3 it?
 4 A. I did. It looks like it's been faxed to me.
 5 Q. Did you read all the counteroffers and addenda
 6 before you signed them?
 7 A. Yes.
 8 Q. Showing you, Ed, what's been marked as Exhibit
 9 No. 3.
 10 MR. MILLEMANN: And I'm finished with that
 11 exhibit, Alyson.
 12 Q. (BY MR. MILLEMANN) Can you take a moment and
 13 review that, and tell me if you recognize the document?
 14 A. (Witness complying.)
 15 MS. FOSTER: Before any questions come. There
 16 have been objections from other parties that this
 17 document is illegible. I just want to clarify with my
 18 client, can you read this document?
 19 THE WITNESS: It's very difficult, but I can
 20 piece through it, I guess.
 21 MR. MILLEMANN: I'm sorry. I didn't hear
 22 those objections. What other parties have objected to
 23 the document?
 24 THE WITNESS: It's very difficult to read.
 25 MS. FOSTER: Mr. Batchelor.

1 MR. MILLEMANN: I don't know if in Mr.
2 Batchelor. It was not the document that was placed in
3 front of Mr. Batchelor. But I understand.

4 And if anybody has a more legible copy, I
5 would be happy to substitute it.

6 MR. COLLAER: I think I might. If you take a
7 look at these, I think they are more legible.

8 MS. FOSTER: I don't see a difference, but
9 maybe you do. I don't mean that badly.

10 THE WITNESS: Oh, it is a little bit better.
11 Yes, it's much better.

12 (Exhibit 26 marked.)

13 MR. COLLAER: I don't think there is any sense
14 in marking it different. So we're going to take away 3
15 and use 26. I was going to substitute it.

16 Q. (BY MR. MILLEMANN) So Exhibit 3 and Exhibit
17 26 are titled "RE-25 Seller's Property Condition
18 Disclosure Form," and it's Petrus Bates Nos. 153, 156.

19 Have you seen this document before?

20 A. Yes.

21 Q. And are those your initials on Bates Nos.
22 1- -- it's interesting. It seems to be out of
23 order -- on Bates Nos. 153, 155, and 154, they are out
24 of order. Are those your initials at the bottom?

25 A. It appears to be. 153, 154, and 155, it

1 me if you recognize this document.

2 A. (Witness complying.)

3 MS. FOSTER: I'll look at it, too. Steve,
4 I'll just state that as of Bates No. RP 68, there appear
5 to be some repetition, or straggler pages that probably
6 shouldn't be in there. Did you notice that?

7 MR. MILLEMANN: I have. I elected to produce
8 the entirety of what you produced to me.

9 MS. FOSTER: This is Restoration Pro.

10 MR. MILLEMANN: These are the
11 documents -- these were included in the documents
12 included in March 8th.

13 MS. FOSTER: In response to Disaster Response?

14 MR. MILLEMANN: Right. And there are
15 duplicates.

16 MS. FOSTER: Okay. That's fine.

17 MR. MILLEMANN: And rather than remove them
18 and have missing RP numbers, I produced them all.

19 And I apologize. Here are your copies, what
20 we've looked at to date, at this point in time.

21 Q. (BY MR. MILLEMANN) So Exhibit No. 4 is a
22 document called "Inspection Company, Inspection Report,
23 Ed Petrus Property." It has RP numbers 37 through, and
24 including 84. Does that appear to be accurate, Ed?

25 A. Give me a minute. Mine goes to 67.

1 appears to be, yes.

2 Q. And is that your signature at page 156?

3 A. It appears to be.

4 MS. FOSTER: Two places.

5 Q. (BY MR. MILLEMANN) Did you read Exhibit 3 and
6 Exhibit 26 before you initialed and signed it?

7 A. I did.

8 Q. Did you have any discussions with Nancy Gentry
9 about this property condition disclosure form?

10 A. No.

11 Q. Did you have any discussions with Jean Odmark
12 about the form?

13 A. No.

14 Q. How about Michael Wood?

15 A. About the specific document? About the
16 specific document?

17 Q. Yes, sir.

18 A. Prior to me signing it?

19 Q. Yes, sir.

20 A. No.

21 Q. Did you have discussions with anyone about
22 this document prior to signing it?

23 A. No.

24 Q. Showing you what's been marked as Exhibit
25 No. 4. If you take a moment and review that, and tell

1 MS. FOSTER: I pulled back the stragglers.

2 THE WITNESS: You want to include those, too?

3 MS. FOSTER: He does.

4 THE WITNESS: Okay. Sure enough.

5 Q. (BY MR. MILLEMANN) As Counsel pointed out,
6 there are a few pages. I would like to include all of
7 the pages that I received.

8 Is this the property inspection report that
9 you received from Mr. McKenna?

10 A. Well, with the caveat, there may be
11 duplication, yes.

12 Q. Are you able to tell me when you received the
13 report?

14 A. No, not off the top of my head right now.

15 Q. The only date I find on the report is at the
16 bottom of the document, it says, 3/18/2012.

17 A. I see that.

18 Q. Does that place any time frame on it?

19 A. Not really. I'm sorry.

20 Q. If we go back to Exhibit 1, Bates No. 188, or
21 actually more appropriately, 157.

22 A. 157?

23 Q. Yes, please.

24 A. 157. Okay.

25 MS. FOSTER: There you go.

1 THE WITNESS: Okay.
 2 Q. (BY MR. MILLEMANN) This is the signed version
 3 of Addendum No. 5. And the prior page, Ed, 188, is a
 4 more legible version of that. I just have a question
 5 for context. It appears to me from looking at --
 6 A. I can't read this. I'm sorry.
 7 Q. If you look at the prior page.
 8 A. 157?
 9 Q. If you look at the prior page, which is Bates
 10 188. It's a considerable more legible version.
 11 A. Oh, I see. I'm sorry. Thank you.
 12 Q. It appears to me that at the time this
 13 addendum was presented, that you had received
 14 Mr. McKenna's report. And I'm concluding that from item
 15 3. Would that appear to you to be a correct assumption?
 16 A. Yeah, I would say around about the same time.
 17 Q. Okay. And I just wanted to provide some
 18 context.
 19 MS. FOSTER: If you recall.
 20 THE WITNESS: Yeah, I really can't tell for
 21 sure. It's the same date?
 22 Q. (BY MR. MILLEMANN) All I'm saying is, in that
 23 addendum, you are referring to the report. So would it
 24 be correct to assume, that at the time that addendum was
 25 presented, you had received the report?

1 the box "RR," which in the key of this report, is keyed
 2 to repair or replace. Now, to not try to be cute about
 3 this, I understand Mr. McKenna also made some comments
 4 on this topic.
 5 But my question is, you've told me, Ed, about
 6 your conversation with Mr. McKenna at the property about
 7 this report, and you asking him about the crawlspace?
 8 A. Uh-huh.
 9 Q. Besides that conversation, and the responses
 10 you received from him. Did you do anything to follow-up
 11 independently on the conditions that Mr. McKenna says he
 12 observed in the crawlspace?
 13 A. Well, the only thing, if you can see the other
 14 portions of the crawlspace, he's giving them glowing
 15 walls, columns, floors, giving them glowing
 16 recommendations. So he's really only talking about the
 17 water and the ants.
 18 And as I said before, we've got an
 19 exterminator for that. And he told me that was normal
 20 seepage of the water. And I said, do I need to do
 21 anything further on this? Is there anything that we
 22 need to do to stop this, clean it up, or anything? And
 23 he said, no, this is normal. This is what's happened
 24 this time of year, that sort of thing.
 25 Q. And did that conclude that matter to your

1 MS. FOSTER: Object to the extent, I don't
 2 think he drafted this. But he said, it's his signature.
 3 MR. MILLEMANN: He testified that he signed it
 4 and read it. So if this is a problematic area, I
 5 guess -- it seems to me to be a fairly straight point,
 6 but Ed can testify how he wants about it.
 7 THE WITNESS: Yes, it would appear around the
 8 same time. I mean, I don't know how many days ahead of
 9 time, or it may be the same day.
 10 Q. (BY MR. MILLEMANN) I am not asking you
 11 that --
 12 A. Yeah.
 13 Q. -- by that date, in any event?
 14 A. Yeah. It could be the same day is what I'm
 15 saying.
 16 Q. I understand. So if we go back to
 17 Mr. McKenna's report, Exhibit 4. If I could draw your
 18 attention to pages 13 and 14 of that report, the pages
 19 are at the top. Those would be RP Nos. 49 and 50.
 20 A. 13 and 14?
 21 Q. Yes, sir.
 22 A. Yes.
 23 Q. And this is the portion of the report, if I
 24 understand it, where Mr. McKenna reported on some things
 25 he observed in the crawlspace. And item 5.0, he has X'd

1 satisfaction?
 2 A. Yes. I mean, I asked him, do I need to be
 3 concerned? Do I need to do anything, other than get an
 4 exterminator for the ants? And he said, no, it's normal
 5 seepage. Go ahead. I'm sorry.
 6 Q. No, problem.
 7 A. I'm sorry.
 8 Q. That's fine.
 9 So that conversation, and the responses you
 10 received from Mr. McKenna, concluded that matter to your
 11 satisfaction?
 12 A. Yeah, as far as -- yeah.
 13 Q. Okay. So you have testified about your visits
 14 to the property before you made the deal, which you've
 15 described as when you had a final signed agreement with
 16 Nancy. And I forgot to ask you one question about those
 17 visits.
 18 On any of those visits, did you observe any
 19 duct tape on any of the doors, or evidence that there
 20 had been duct tape on any of the doors?
 21 A. Not on those visits, no.
 22 Q. At any time prior to closing, did you observe
 23 any duct tape, or evidence of duct tape on the exterior
 24 of any doors?
 25 A. No.

1 Q. Prior to closing, did anyone report to you
2 that they had observed any duct tape or evidence of duct
3 tape?

4 A. Prior to closing, no.

5 MS. FOSTER: Are you done with this, Steve?

6 MR. MILLEMANN: I am, thank you.

7 I'm about to enter into a new area. Happy to
8 proceed. Happy to take an early lunch if anyone wants
9 to. What's the preference of the group?

10 MR. COLLAER: I would defer to the witness.

11 MS. FOSTER: I don't care.

12 THE WITNESS: We're going to definitely take a
13 lunch; right? So we might as well do it now.

14 MR. MILLEMANN: It is a good breaking point.

15 THE WITNESS: Okay.

16 MR. MILLEMANN: So let's do that, and try to
17 resume at 12:30. It's 11:40 now.

18 (A lunch recess was had.)

19 Q. (BY MR. MILLEMANN) I want to show you what's
20 been marked as Exhibit No. 6, which is the "Second
21 Amended Complaint and Demand for Jury Trial," which was
22 filed in this action.

23 MS. FOSTER: Which exhibit number?

24 MR. MILLEMANN: 6.

25 Q. (BY MR. MILLEMANN) Did you have a chance, Ed,

1 Q. I'm not interested in what your attorney told
2 you. This is your second amended complaint. So I'm
3 interested only in whether you, yourself, independent of
4 what your attorney has told you, or what you have
5 discussed with your attorney, have any understanding of
6 what the term "owner-builder" means?

7 A. You would have to refer to my attorney.

8 Q. So the answer is, "no"?

9 A. You have to refer to my attorney.

10 Q. My question is, you are party to the lawsuit.

11 You are sitting here today. You have filed the lawsuit.

12 You have filed this complaint.

13 A. I have not filed this complaint. My attorneys
14 have filed this complaint on my behalf.

15 Q. Do you disavow this complaint?

16 A. No.

17 Q. Is this complaint true and accurate, to the
18 best of your knowledge?

19 A. To the best of my knowledge, it is.

20 Q. Okay. So I'm asking you independent of
21 anything your attorney has advised you, or any
22 conversations you've had with your attorney, and I
23 believe this is an appropriate question. Do you,
24 yourself, have an understanding of what the term
25 "owner-builder" means?

1 to review this --

2 A. No.

3 Q. -- complaint before it was filed?

4 A. I reviewed it at some point. I don't remember
5 exactly when it was I reviewed it.

6 Q. So you have reviewed it before today?

7 A. At some point, yeah.

8 Q. I would like to start by drawing your
9 attention to page 2 of the complaint, paragraph 4. In
10 paragraph 4, the allegation is made that "Defendant
11 Gentry-Boyd was also the owner-builder of the home
12 located on the property."

13 As you sit here today, do you have any
14 understanding of what the term "owner-builder" is as
15 used in this complaint?

16 A. You are asking me for a legal conclusion. I
17 think it's an improper question. Don't we have
18 contention rogs?

19 Q. Excuse me?

20 A. I think you are asking me for a legal
21 contention, which is an improper deposition question.
22 Don't we have contention rogs? I don't know. This is
23 something my lawyer drew up for me. And you would be
24 invading the attorney/client work product privileges if
25 you ask me what my attorney told me about it.

1 A. Not in this context, I don't.

2 Q. Okay.

3 A. I know what "owner-builder" means, but not in
4 this context.

5 Q. What do you think "owner-builder" means?

6 A. It means --

7 MS. FOSTER: I am going to object to the
8 extent that you are asking for an understanding of the
9 law, which he is not the lawyer.

10 THE WITNESS: Yeah.

11 MS. FOSTER: But go ahead, you may answer.

12 THE WITNESS: Yeah, it's a contention
13 interrogatory question, which is improper.

14 An owner-builder is an owner that is involved
15 in the building of a building.

16 Q. (BY MR. MILLEMANN) What's the source of your
17 understanding of that term; the answer you just gave me?
18 Is that based on your experience, or based on some
19 external source?

20 A. Just my experience.

21 Q. So an owner, who is involved in the
22 construction, is that what you --

23 A. Yeah, who finances it themselves. There is
24 no -- there is no -- like there is no fund control.

25 There is nobody supervising the way this -- you know,

1 where there is a loan on it, where a bank gets involved,
 2 you know, things like that nature.
 3 Q. And under your definition, would that be the
 4 case whether or not the owner has a general contractor?
 5 A. Yeah, it doesn't -- it doesn't
 6 necessarily -- they can work in concert with each other.
 7 Q. And would your definition apply, regardless of
 8 whether the owner has an architect?
 9 A. Yes.
 10 Q. And regardless of whether the owner has an
 11 interior decorator?
 12 A. Yes.
 13 Q. So does your definition -- is the simple fact
 14 that the owner finances the construction, under your
 15 definition, that makes them an owner-builder?
 16 A. It's one of indicia. There is many other
 17 indicia.
 18 Q. What are the others?
 19 A. The other indicia --
 20 MS. FOSTER: I would object to the extent he
 21 is asking for your legal opinion.
 22 THE WITNESS: Well, I don't think he's asking
 23 for my legal opinion.
 24 MS. FOSTER: Well, you can answer to the
 25 extent it's not something privileged, to the extent it

1 is not opining of the law, which you are not here in
 2 your capacity of a lawyer. You can answer to the extent
 3 you are just reflecting your own personal,
 4 non-professional understanding of the term.
 5 THE WITNESS: Yeah. Okay.
 6 MS. FOSTER: Go ahead.
 7 THE WITNESS: Well, it is other indicia, like
 8 involved in, you know, saying, the design, you know,
 9 giving her opinions as to how things should be built,
 10 things of that nature.
 11 Q. (BY MR. MILLEMANN) Anything else?
 12 A. There is probably a ton more. I can't think
 13 of anything right now.
 14 Q. As you sit here today, can you cite me any
 15 facts that you are aware of, which would support the
 16 allegation in paragraph 4, that Nancy Gentry-Boyd was
 17 the owner-builder of the home?
 18 MS. FOSTER: The same objection.
 19 THE WITNESS: Other than what we put in our
 20 interrogatory responses.
 21 Q. (BY MR. MILLEMANN) So it would be limited to
 22 that?
 23 A. I don't know. I don't have those in front of
 24 me. So I don't know what we've said. But other than
 25 what was said on my interrogatory responses, I don't

1 know.
 2 Q. Fair enough. And we'll get to those. So
 3 other than what you might have said in your responses to
 4 interrogatories?
 5 A. It might have covered it. I don't know.
 6 Q. Okay. Showing you what's been marked as
 7 Exhibit No. 8. Exhibit No. 8 is "Plaintiffs' First
 8 Supplemented Responses to Defendant Gentry-Boyd's First
 9 Interrogatories and Requests for Production."
 10 Draw your attention to the next to the last
 11 page of Exhibit No. 8.
 12 A. What page would that be?
 13 Q. They are not numbered, at least that one
 14 isn't.
 15 A. There is numbers on the bottom.
 16 MS. FOSTER: Is this the one?
 17 MR. MILLEMANN: Yes. Thank you.
 18 THE WITNESS: Yes.
 19 Q. (BY MR. MILLEMANN) Is that your signature?
 20 A. No.
 21 Q. So you deny that you verified these answers as
 22 accurate?
 23 MS. FOSTER: Counsel, look at the previous
 24 page, please.
 25 Q. (BY MR. MILLEMANN) My mistake. It's the

1 notary's signature. On the previous page, page 13, is
 2 that your signature?
 3 A. Yes.
 4 Q. And that's the verification that states that
 5 to the best of your knowledge, the responses are true
 6 and correct.
 7 So let's go back to the body of the answers,
 8 and let's look at that. If I could draw your attention
 9 to page 5 of the document, Ed.
 10 A. (Witness complying.)
 11 Q. At page 5 contains Interrogatory No. 16, and a
 12 supplemented answer. Can you take a moment, if you need
 13 to, and review Interrogatory No. 16 and your
 14 supplemented answer?
 15 A. (Witness complying.)
 16 Q. Have you had a chance to review those?
 17 A. Yes.
 18 Q. So as you sit here today, are you aware of any
 19 facts, other than those contained in your Supplemented
 20 Answer to Interrogatory No. 16, which would support the
 21 allegation, which is actually throughout your amended
 22 complaint, that Nancy Gentry was an owner-builder of
 23 this home?
 24 MS. FOSTER: And objection to the extent you
 25 are asking him to verify decision analysis made by

1 counsel as to what facts supports a legal allegation,
 2 that's a decision and work product. To the extent he's
 3 familiar with facts regarding her, he can testify.
 4 THE WITNESS: Also, there is discovery going
 5 on, and I don't know what was said in depositions,
 6 what's been going on as far as independent discovery has
 7 been going on. The only way I would know that, would be
 8 through my counsel. Other than what's here, and what I
 9 mentioned before, I don't have anything else to add.
 10 Q. (BY MR. MILLEMANN) So in part, your
 11 supplemented answer, if you go down to, I think, the
 12 third to the last sentence says, and I quote,
 13 "Plaintiff's have previously produced to Defendant
 14 Gentry-Boyd the documents in their possession related to
 15 these allegations, including but not limited to those
 16 labeled Petrus 267 to 285."
 17 And "these allegations" are referring to the
 18 allegations that Nancy Gentry-Boyd was the owner-builder
 19 of this home. Do you see that sentence?
 20 A. Yes.
 21 Q. I want to show you what's been marked as
 22 Exhibit 25.
 23 A. Uh-huh.
 24 MS. FOSTER: In today's numbering?
 25 MR. MILLEMANN: Yes.

1 didn't label these documents. These are documents
 2 determined by my attorney to be responsive.
 3 Q. And so what I'm entitled to know today, is any
 4 facts that you are aware of to support your allegations,
 5 not including anything your attorney has told you. And
 6 if you don't have any, that's fine. But I am entitled
 7 to know what they are, and to not hear them at the first
 8 time at trial.
 9 Your supplemented answer to Interrogatory No.
 10 16, you have told me, which you verified, contains the
 11 facts that support that allegation, as well as
 12 potentially some other things. Okay. One of those
 13 answers referred me to these documents.
 14 I'm asking you, subject to your attorney's
 15 previously stated objection, are you, yourself, able to
 16 point me to anything in any of these documents that
 17 bears on the issue of owner-builder?
 18 A. They all bear on owner-builder.
 19 Q. How so?
 20 A. I'm not going to give you my opinion. You are
 21 asking for attorney/client privilege opinion.
 22 Q. Are you refusing to answer that question?
 23 A. Yes, on that objection.
 24 MS. FOSTER: The objection is, that I have
 25 instructed him not to answer to the extent, you are

1 Q. (BY MR. MILLEMANN) Exhibit 25 is comprised of
 2 documents labeled Petrus 267 to 285. Does your Exhibit
 3 have those pages?
 4 A. It appears to.
 5 Q. These are the pages that were referred to in
 6 your supplemented answer. Are you able to refer me to
 7 any part of these documents, which you believe supports
 8 the allegation that Nancy Gentry-Boyd was the
 9 owner-builder on this house?
 10 MS. FOSTER: The same objection.
 11 And do you have a copy that I could look at,
 12 please?
 13 MR. COLLAER: Here.
 14 MS. FOSTER: Thank you.
 15 THE WITNESS: Yes, I would say, attorney work
 16 product, and attorney/client privilege on top of it.
 17 These are decisions made by my attorney.
 18 Q. (BY MR. MILLEMANN) Are you refusing to answer
 19 the question?
 20 MS. FOSTER: Objection. He's not refusing to
 21 answer. He is answering within the instruction that
 22 I've given.
 23 Q. (BY MR. MILLEMANN) So your answer is attorney
 24 work --
 25 A. Attorney work product, and attorney/client. I

1 asking him to testify what facts support a particular
 2 legal allegation. That's a decision that the attorney
 3 makes. If you are asking him for facts about his
 4 knowledge of Nancy, and her experience, or her role,
 5 that's fair game.
 6 THE WITNESS: I have already answered that
 7 question. Now, he's asking me about these documents.
 8 MR. MILLEMANN: I'm asking about these
 9 documents, because what your client told me, Counsel, is
 10 when I asked him this question about facts, not about
 11 legal theories, he said, where are our answers to
 12 interrogatories. And then we looked at the answers to
 13 interrogatories, which he verified.
 14 THE WITNESS: Why don't we read back my
 15 answer.
 16 MS. FOSTER: Hold on. Hold on.
 17 MR. MILLEMANN: And in the verified answers,
 18 we have reference made to these documents. My question
 19 has nothing to do with your legal opinion. It has to do
 20 simply with whether Mr. Petrus is aware of any facts in
 21 these documents, that in his opinion support the
 22 owner-builder allegation?
 23 MS. FOSTER: Well, the objection stands.
 24 Identifying facts, which support a legal theory, is a
 25 lawyer's job. His response was not that the

1 interrogatories do contain the answer. He wasn't aware
 2 of any beyond them that he could remember. There may be
 3 others. If you check the record, that is closer to what
 4 he said.
 5 I don't have an objection to him answering
 6 facts about Nancy as an owner, or Nancy as a builder.
 7 But again, to the extent you are asking, what facts
 8 we've identified a legal theory, I would assert work
 9 product and attorney/client privilege.
 10 THE WITNESS: You are also asking for my
 11 opinion.
 12 MR. MILLEMANN: I'm not asking for facts that
 13 you've identified. I'm asking for facts the witness is
 14 aware of. If there aren't any, other than what your
 15 attorney has identified, that's all you have tell me.
 16 THE WITNESS: I testified to that. You read
 17 those facts. And I said those things, I'm going to
 18 testify to.
 19 Q. (BY MR. MILLEMANN) And these are in part,
 20 Exhibit 25 is in part, the documents to which your
 21 answer refers me. Do you have anything to add, now that
 22 I've shown you these documents, to your prior testimony?
 23 A. I have already answered your question. I have
 24 nothing else to add.
 25 Q. Let's go back to Exhibit 6, the "Second

1 Amended Complaint and Demand For Jury Trial." And Count
 2 I of the complaint, as asserted against my client, as a
 3 failure to disclose pursuant to Idaho Code 55-2501
 4 through 55-2518.
 5 A. What paragraph?
 6 MS. FOSTER: He's on page 3.
 7 MR. MILLEMANN: On page 3.
 8 MS. FOSTER: Right there (indicating).
 9 Q. (BY MR. MILLEMANN) If we move to paragraph
 10 16, paragraph 16 states that, "Soon after occupying the
 11 Home, Plaintiffs encountered problems with the operation
 12 of the Home's exterior south-facing french doors leading
 13 to the outdoor deck area," define term, "(the 'Doors')."
 14 Do you see that statement?
 15 A. Yes.
 16 Q. Is that statement true?
 17 A. Yes.
 18 Q. Just to make sure we're talking about the same
 19 thing. In Beau Value Exhibit No. 1, are you able to
 20 point out the doors you are referring to in paragraph
 21 16?
 22 A. (Witness complying.)
 23 Q. And you are pointing to the doors that appear
 24 to be on the south wall of the dining room?
 25 A. Yes.

1 Q. What is the first problem that you encountered
 2 with those doors to which you are referring in paragraph
 3 16?
 4 A. Essentially, the doors did not open properly,
 5 did not close properly, would not lock.
 6 Q. When did you first discover any problem with
 7 the doors?
 8 A. The day we moved in pretty much.
 9 Q. What day did you move in?
 10 A. I can't remember, exactly, the day. But if
 11 you leave a space for my deposition, I will be happy to
 12 put it in.
 13 Q. Can you reference at all to the closing date
 14 as to how many days more or less after?
 15 A. Not really. I don't want to misspeak. If you
 16 leave a space, I'll fill it in.
 17 Q. But it's important, in terms of some of my
 18 other questions, if we're able to put any brackets on
 19 it, to do so. Did you move into the house within a
 20 month after you closed?
 21 MS. FOSTER: Reminding you, the closing was
 22 April 20th, 2012.
 23 THE WITNESS: I would have to see some other
 24 documents to refresh my recollection.
 25 Q. (BY MR. MILLEMANN) At the time that you hired

1 Mr. Longmire, had you moved into the home?
 2 A. Yeah, I had moved into the home. I hired
 3 Mr. Longmire after that.
 4 Q. Okay. So --
 5 A. Shortly after, but I moved in.
 6 Q. Okay. So the day you moved in, was the first
 7 day you observed a problem with the doors in question.
 8 What was the problem?
 9 A. Maybe the second day, within the first couple
 10 of days.
 11 Q. Fair enough.
 12 A. Yeah.
 13 Q. Within the first few days, how is that?
 14 A. Yes, that's fine.
 15 Q. What did you observe?
 16 A. Like I said, specifically, the doors would not
 17 open. Some of them wouldn't open. Some they wouldn't
 18 close. They wouldn't lock.
 19 Q. Was there a problem with more than the two
 20 doors you've pointed out on Exhibit 1, or just those two
 21 french doors?
 22 A. Just those two french doors, initially.
 23 Q. And --
 24 A. Initially.
 25 Q. And did you have difficulty opening both of

1 the doors, or one of the doors?
 2 A. Difficulty opening both of the doors.
 3 Q. Were you able to open either of the doors?
 4 A. One of the doors, we could open.
 5 Q. Do you remember, as you faced out of the
 6 house, whether it was the right or the left door?
 7 A. I think it was the left door, but I'm not for
 8 certain.
 9 MS. FOSTER: Can you point out on Exhibit 1?
 10 Would that help him?
 11 MR. MILLEMANN: Having shown --
 12 THE WITNESS: It's as you face the doors.
 13 MS. FOSTER: From inside?
 14 THE WITNESS: From inside.
 15 Q. (BY MR. MILLEMANN) Okay. The door that you
 16 could open was the left of the two doors?
 17 A. I believe so.
 18 Q. The right of the two doors, to the best of
 19 your recollection, you were unable to open?
 20 A. Yeah, there was one of the doors that I don't
 21 think I could open at all, or with great difficulty.
 22 Q. Okay.
 23 A. Yeah. I don't recall. I don't think I could
 24 open the one on the right at all. And the one on the
 25 left was difficult, as well.

1 Q. And if I understand your prior testimony, this
 2 would have been the first time ever that you tried to
 3 open either of those doors?
 4 A. That's true.
 5 Q. So what did you do next when you encountered
 6 this difficulty? Did you do anything, in particular, in
 7 response to it?
 8 A. Well, I looked at them. And then eventually,
 9 I talked to Mike Longmire about it. I think I called
 10 Kevin Batchelor about it. And then eventually, I
 11 started corresponding with Michael Wood about it.
 12 Actually, had Michael Wood come over, take a look.
 13 Q. Do you remember the first correspondence as a
 14 point in time, or an approximate point in time that you
 15 had with Michael Wood about those doors?
 16 A. Not offhand, no. No. And then I think
 17 we -- I think we did some more investigation, meaning
 18 Mike looked at it a little bit closer. I don't know
 19 exactly in connection with all of this, when Michael was
 20 actually contacted, exactly. But there should be an
 21 email to Mike, Michael Wood, sometime after I first
 22 contacted him. Because he came out -- a lot of it was
 23 verbal. A lot of it was over the phone. A lot of it,
 24 he came out, and looked at it himself. So that preceded
 25 writing the email.

1 Q. I understand. So you had some verbal
 2 interactions with Michael Wood before you had email
 3 interactions with him?
 4 A. Correct.
 5 Q. Any ability to place in time, how quickly, or
 6 soon after encountering the problems, you contacted
 7 Michael as in, a day, a month, a week, two months?
 8 A. I would say, within a month, within 30 days of
 9 the first.
 10 Q. And then your testimony is, Michael responded
 11 by coming out to the property?
 12 A. I asked him to come out, to take a look at a
 13 couple of things.
 14 Q. And who was present when Michael came?
 15 A. I can't recall. I think Ellen might have
 16 been.
 17 Q. Did Michael bring anyone with him?
 18 A. No.
 19 Q. And do you remember any of the conversation,
 20 or statements made by you or Michael?
 21 A. Yeah, I do.
 22 Q. Tell me what you recall of that conversation.
 23 A. He was well aware of the trouble with the
 24 door. He said that he and -- he wasn't aware of the
 25 duct tape stains, but he was well aware of the trouble

1 with the door, not closing, not locking. He said he had
 2 discussed that with Nancy, having trouble getting that
 3 door locked.
 4 And at that time, I had asked him for a key to
 5 that door, because we had not presented to that door.
 6 And he said, he'll look for it, but he didn't know
 7 whether a key existed to that door. And then he said
 8 that he would ask about the duct tape, and get back to
 9 me.
 10 Q. Was that the first time that you
 11 observed -- did you actually observe duct tape, or
 12 evidence that there had been duct tape?
 13 A. Evidence there had been duct tape. The stains
 14 were actually on the door.
 15 Q. Where had the duct tape been, from the
 16 evidence you saw?
 17 A. On the outside of the door.
 18 Q. Vertically going down the seams, or across the
 19 bottom?
 20 A. Just what you said.
 21 Q. Vertically going down the seams?
 22 A. Yes.
 23 Q. So I want to back up to, as best you can
 24 recall -- and you've summarized it for me. And if
 25 that's the best you can recall, that's fine. You say

1 Michael told you he was well aware of the trouble with
2 the door, and had talked with Nancy about it. Is that a
3 fair --

4 A. Correct, yeah.

5 Q. Can you remember any detail -- did he express
6 it in that way, or did he actually express it in any
7 specific way you remember?

8 A. He did it that way, in respect to the door
9 locking. Because they had difficulty locking the door
10 when they showed the house, and things of that nature.

11 Q. And when he said, he had talked with Nancy
12 about it. Did he go any further to say, what her
13 response had been, or what the resolution of that
14 conversation had been?

15 A. No, he just said that we had trouble with the
16 door locking. And, you know, we had trouble locking it
17 when we had to show the house. And I guess I gathered
18 from that, that sometimes they had to keep the door
19 opened, unlocked, meaning, unlocked. Not open, but
20 rather unlocked.

21 Q. So Michael said, when they had showed the
22 house, they had had trouble locking that particular
23 door?

24 A. Correct.

25 Q. The testimony yesterday from Mike Longmire was

1 correct?

2 A. Yes. He said when they closed up the house,
3 you know, they had difficulty locking it, and unlocking
4 it.

5 Q. Did he tell you they had had any other
6 difficulty with the door besides that?

7 A. No, other than locking and unlocking the door,
8 that's all he said.

9 Q. Okay.

10 A. And I asked him about the duct tape, what is
11 that for. And he said, I don't know. I'll ask Nancy,
12 and I'll get back to you.

13 Q. Okay. And did he?

14 A. Yes.

15 Q. And when he got back to you, was that over the
16 phone, or email, or by person?

17 A. That was by phone. I believe that was by
18 phone.

19 Q. And what did he report to you about the duct
20 tape?

21 A. He had said that they had trouble with
22 moisture and wind coming in the door. That it
23 interrupted their bridge game. And I said -- I
24 responded to Michael about that. I questioned him about
25 that. I do remember that.

1 that, unlike my french doors, where I can pop the head
2 bolt, and pop the toe bolt, that door was controlled
3 exclusively by the handle; is that your recollection?

4 A. There is also a -- there is a thing on top,
5 you can -- right inside of it, you could mess with.

6 Q. Did you have to have the door open to do that?

7 A. Open -- I couldn't open that door.

8 Q. So was there anything, to your recollection
9 about that door, that you could manually adjust to pull
10 the head bolt down, or the toe bolt up, or was that all
11 controlled by the handle, if you know?

12 A. I couldn't -- I tried with the handle. I
13 couldn't open the door no matter what I did.

14 Q. Mr. Longmire's testimony is, that that
15 particular door, that's the only way that you could pull
16 down the head bolt, or up the toe bolt?

17 A. Understood.

18 Q. Would you concur with that?

19 A. Yeah, but I think there is also a way to do
20 something on top. There is also a little nidget inside
21 that tells you when it's locked. But, yes, as far as
22 the operating it, yes. You turn it, that locks the
23 door.

24 Q. And Michael Wood told you they had difficulty
25 locking the door when they were showing the house;

1 Q. What did you ask him?

2 A. Well, he had said that they had difficulty
3 with moisture and air getting through the door that was
4 bothering their bridge game. And I said, well, that
5 table there was a two top. And I don't know anybody who
6 plays bridge with two people. And he said, no, he was
7 referring to the card table on the other side of the
8 room. And I said it was that bad, that the moisture in
9 the air would affect across the room? He said,
10 apparently, so.

11 Q. So there was some degree of speculation
12 underway, in that conversation, about where bridge was
13 played, and at what table; correct?

14 A. No, I asked him, specifically. I said, that
15 was a two top there. There wasn't a card table there.
16 He said, I know they played bridge on the other side of
17 the room, where the other card table --

18 Q. So Mr. Wood told you where Nancy and her
19 friends played bridge in the house?

20 A. Yeah, there is a card table over there.

21 Q. I realize there is a card table over there
22 when you were having that conversation. But I
23 understand you to be saying, is Michael Wood told you
24 that was the configuration of the furniture when Nancy
25 owned the house, and that's where she played bridge. I

1 want to be understanding. Is what you are telling me?
 2 A. Yes. We have pictures of it.
 3 Q. You have pictures of, what?
 4 A. The configuration of the house when Nancy
 5 lived there.
 6 Q. And who took those photos?
 7 A. My wife -- my fiancée.
 8 Q. And have you provided those photos to
 9 Ms. Foster?
 10 A. Yes.
 11 Q. In your claims made in this lawsuit, Ed, about
 12 the damage to the home, and the repair of the damage to
 13 the home. Do you have an opinion as to what caused that
 14 damage, the rot, and the other things that were
 15 discovered, independent of Mr. Value or Mr. Waite, or
 16 are you relying on their opinion for that?
 17 A. I'm pretty much relying on their opinions.
 18 Q. Okay. That saves us some time.
 19 So you moved in. Within a few days, you are
 20 unable to open one of the doors, and the other one
 21 doesn't open very well.
 22 A. Couldn't lock the door.
 23 Q. And you couldn't lock it. And could you close
 24 it?
 25 A. I could close it, but not all the way.

1 A. Correct.
 2 Q. And when Michael said he had talked with Nancy
 3 about this, or he had talked with Nancy. Did he say
 4 specifically when, or what he had told Nancy?
 5 A. No, it was just in reference to the fact that
 6 they are showing the house, and they had difficulty
 7 locking the doors sometimes. You know, and that was
 8 what he was telling me.
 9 Q. So then Mr. Wood, he's come and gone. And you
 10 asked him about tape. And then he provided you an
 11 answer about tape. What did you do next about those
 12 doors?
 13 A. Well, we -- you know, I kind of made a claim
 14 through him. If you look at the emails, he was going to
 15 discuss with Nancy what they wanted to do about it. You
 16 know, and -- you know, and then it dragged on, and on.
 17 And he said, you know, he was going to go back to
 18 Mr. Kirk, the contractor. And he was going to find out,
 19 you know, more about it. And I waited, and waited, and
 20 waited for an answer from him.
 21 Q. While you waited, were you able to close the
 22 doors?
 23 A. No, I mean, we could close them, but we
 24 couldn't lock it. The door was always unlocked.
 25 Q. So in my feeble mind, having listened to

1 Q. Okay. And when you closed it, could you tell,
 2 was either the head pin or the --
 3 A. I couldn't tell. It wouldn't lock.
 4 Q. Okay. You couldn't tell what was going on?
 5 A. I couldn't lock it.
 6 Q. And are you aware -- again, I'm basing this on
 7 Mr. Longmire's testimony. But the way that hardware was
 8 supposed to work, in order to close the door, you would
 9 also have to turn the handle to pull up the toe bolt,
 10 and pull down the head bolt so the door would close.
 11 And then when the handle was released, those two would
 12 engage. Have you ever heard of that?
 13 A. No, and I have another door like that.
 14 Q. Okay. So my question is, could you tell when
 15 you were unable to close the door, whether the head bolt
 16 or the toe bolt were protruding?
 17 A. I couldn't tell. I think they were already
 18 locked in place. The handle wouldn't work.
 19 Q. Okay.
 20 A. But I'm not in any way an expert.
 21 Q. No, you are telling me what you know, and
 22 that's fine.
 23 A. I'm not --
 24 Q. The best you could tell, the handle was not
 25 properly operating those pins?

1 Mr. Value, Mr. Waite, and Mr. Longmire, that means to
 2 me, the head bolt was not engaging, and the toe bolt was
 3 not engaging. Wasn't that what was --
 4 A. No, it was more than that. It was the other
 5 side, too. It was also bulging, too. It was swollen,
 6 and you couldn't get the whole lock in, for both doors.
 7 Q. Where did you observe swelling?
 8 A. I saw swelling on the right side in the bottom
 9 of the doors. But I didn't see that until after we
 10 started experimenting with the doors, trying to open
 11 them, and close them, and all that other sort.
 12 Q. Got you. So --
 13 A. And that's why we -- you know, we had
 14 difficulties closing the door all the way, because it
 15 was swollen.
 16 Q. Or at least, that was your diagnosis; right?
 17 A. Yeah.
 18 Q. And I don't mean that derogatorily.
 19 A. I mean, we could close it somewhat, but not
 20 all the way, and we couldn't lock it.
 21 Q. And my question is, I know from the documents
 22 that -- well, really, from that time, which would have
 23 been no later than sometime later in May anyway, of
 24 2012, until Mr. Value's company removed the doors -- I
 25 guess I shouldn't say, I know. In that intervening

1 time, which was two years, did you have someone do
 2 anything on the doors?
 3 A. We had people look at them, but we didn't have
 4 any work on the doors.
 5 Q. So for that two-year period of time, were
 6 those doors open?
 7 A. They were unlocked. They weren't open. They
 8 weren't closed all the way. In other words, they
 9 wouldn't go all the way in, but they were closed.
 10 Q. So they weren't fully closed?
 11 A. They were closed, but the bolt didn't go into
 12 the socket all the way.
 13 Q. And that was the condition of those doors for
 14 the better part of two years?
 15 A. Yes.
 16 Q. Did you use those doors at all?
 17 A. No.
 18 Q. What did you use the dining area alcove for?
 19 A. We used that for a breakfast table.
 20 Q. Okay.
 21 A. And we walked around. And we used our
 22 barbecue to block the door.
 23 Q. And you accessed your barbecue out of --
 24 A. We walked around, and couldn't go around
 25 there. And we used it, as I said, as a barricade.

1 A. I mean, we had other people come and look at
 2 it. But I wasn't privy to the actual, what they had to
 3 say.
 4 Q. If I could have you look at paragraph 17 of
 5 Exhibit 6, we're still on, which is the second amended
 6 complaint.
 7 A. (Witness complying.)
 8 Q. So in paragraph 17, Ed, your second amended
 9 complaint states that, "Upon further investigation,
 10 Plaintiffs discovered the extent of the problems with
 11 the doors and other defects, including but not limited
 12 to significant water damage to the exterior walls, the
 13 doors, and threshold, which caused the doors to cease
 14 proper operation and let water and air into the home."
 15 I just want to focus for a moment on the
 16 allegation that it was the water damage to the walls and
 17 threshold, which caused the doors to cease proper
 18 operation. Are you relying on Mr. Value and Mr. Waite's
 19 opinion as to that, or do you have an opinion
 20 independent of them?
 21 MS. FOSTER: Objection to the extent that's
 22 not precisely what his discovery here is, which says it
 23 is including, but not limited to the water damage.
 24 But with that proviso, please go ahead and
 25 answer the question.

1 Q. And you had a breakfast table in there; is
 2 that right?
 3 A. Yes.
 4 Q. Did you experience any draft coming through
 5 the vertical seam of those doors?
 6 A. Not too bad.
 7 Q. Some, but not anything you had to do anything
 8 about?
 9 A. Nothing like I had to do anything about.
 10 Q. Okay. Between when you moved into the house,
 11 and when Mr. Value's company started doing their work,
 12 which I think was about April 2014, did you use the
 13 house during the winter months?
 14 A. Yes.
 15 Q. So you did not limit your use to summer
 16 months?
 17 A. No.
 18 Q. Okay.
 19 A. But to be honest with you, we didn't use it
 20 too often in the winter.
 21 Q. Besides Mr. Value and Mr. Waite, has anyone
 22 offered you an opinion, specifically as to why you were
 23 unable to lock, or fully close those french doors?
 24 A. No, not really.
 25 Q. Okay.

1 THE WITNESS: Yes, I'm relying on them for --
 2 Q. (BY MR. MILLEMANN) For that conclusion?
 3 A. For -- yes.
 4 Q. And there are a number of conditions recited
 5 in paragraph 17. The first being, significant water
 6 damage to the exterior walls. And Mr. Value and
 7 Mr. Waite, both, I thought, did a good and thorough job
 8 of describing to me where they encountered damage. And
 9 they described it as being in the area of the french
 10 doors, and then at three more corners of the home along
 11 the east wall. Is that consistent with your
 12 understanding?
 13 A. Yeah, but when I was -- I wasn't there the
 14 whole time. I saw most of the damage there on that
 15 corner (indicating).
 16 Q. The corner by the french doors?
 17 A. Yes. And I'm not disagreeing. I am just
 18 saying, I wasn't around, like over here (indicating), I
 19 didn't see that. I did see part of this (indicating).
 20 Q. And you are pointing to the two northern most
 21 corners; right, when you say, you weren't around for
 22 this?
 23 A. The east corners.
 24 MS. FOSTER: Northeast.
 25 THE WITNESS: Yes, northeast. I don't think I

1 was around when they did this corner (indicating).
 2 Q. (BY MR. MILLEMANN) Okay. And you are
 3 pointing to a corner that is circled, that is the
 4 farthest north on that east wall; correct?
 5 A. Correct. I don't think I was around when they
 6 did this corner (indicating). But I did see damage
 7 here. And I did see a lot of damage here (indicating).
 8 Q. Back to paragraph 17, the third allegation of
 9 what you discovered was, "substandard and inferior
 10 construction of the exterior wall envelope which was
 11 insufficient to resist the weather and was installed in
 12 violation of the international building codes, state,
 13 county and local codes, ordinances, and similar statutes
 14 applicable to the building code."
 15 Ed, do you have any opinion as to that
 16 allegation, or the basis for that allegation,
 17 independent of what Mr. Value and Mr. Waite will
 18 provide?
 19 A. And what Mr. Longmire would provide?
 20 Q. Yes, sir.
 21 A. Probably not. Nothing more in addition to
 22 what they would have to say.
 23 Q. And you understand, I'm just simply trying to
 24 find out what you know. That's why I ask it that way.
 25 If what you are telling me is, no, for that allegation,

1 Q. Is that okay?
 2 A. Yes.
 3 MS. FOSTER: Just to clarify, "probably" is
 4 based on your lack of knowledge about what they
 5 specifically testified to?
 6 THE WITNESS: Right.
 7 MS. FOSTER: Because you weren't here for the
 8 depositions.
 9 THE WITNESS: Right.
 10 Q. (BY MR. MILLEMANN) But you haven't formulated
 11 any opinion on this, independent of what those gentlemen
 12 have told you and advised you?
 13 A. No, not -- no.
 14 Q. Then the fourth allegation of what was
 15 discovered was that, "several windows and doors in the
 16 home, including the Doors," which is a defined term,
 17 which refers to the french doors, "were not sealed
 18 and/or painted on all six sides, vitiating their
 19 respective warranties and causing further damage."
 20 The same question as to that allegation. Do
 21 you have an opinion on that, independent of what
 22 Mr. Value, Mr. Waite, or what Mr. Longmire might
 23 testify?
 24 A. Probably not, other than I did observe warning
 25 signs in some of these windows and doors, saying they

1 I would rely on those three guys, that's fine.
 2 A. Pretty much. The thing I would say is, the
 3 code is one thing, and the standard of care is another
 4 thing.
 5 Q. Sure. But as to whether a code was violated,
 6 and if so, what code? And as to what the standard of
 7 care was, and whether it was violated. Am I correct in
 8 understanding, you would defer to those gentlemen?
 9 A. Yes, probably.
 10 Q. Well --
 11 A. I concur with what they -- I don't know what
 12 they testified, but I concur with what I think they
 13 would have said. The International Building Code is the
 14 minimum. That's the same code used in San Diego. But
 15 you wouldn't use what's used in San Diego, here, in
 16 McCall. So the standard of care would require something
 17 more here, than, let's say, they use in San Diego. Does
 18 that make sense?
 19 Q. That does make sense. And what I'm really
 20 trying to understand here is whether you intend to offer
 21 testimony at trial, independent of Mr. Value and
 22 Mr. Waite?
 23 A. Probably not.
 24 Q. I'm going to take "probably" as a "no"?
 25 A. Yes.

1 must be painted, or else, essentially, what this says.
 2 Q. You saw warning signs on the windows and --
 3 A. On the windows, on the doors somewhere on the
 4 house that said that, that these need to be painted.
 5 Q. So I'm assuming that wasn't the glass, the
 6 framing --
 7 A. Around the glass framing, yes.
 8 Q. Anything else?
 9 A. No.
 10 Q. The next allegation is that, no final
 11 inspection was completed on the home after completion of
 12 initial construction and prior to occupancy.
 13 Do you have any basis, yourself, separate from
 14 Mr. Value, or Mr. Waite, or Mr. Longmire for that
 15 statement?
 16 A. Other than I think I checked myself when I
 17 asked what -- I forget her name -- at the building
 18 department whether the -- you know, whether something
 19 was filed. And she basically said, no, there was no
 20 final certificate of occupancy filed for this house.
 21 Q. Was that a telephone conversation?
 22 A. Yes.
 23 Q. That you made to the City of McCall?
 24 A. Yes.
 25 Q. And spoke --

1 A. In the building department. I forget her
 2 name.
 3 Q. Spoke to somebody from the building
 4 department?
 5 A. Yes. She's been there for years. I forget
 6 her name.
 7 Q. Is it by any chance, Delta James?
 8 A. It might have been, yes.
 9 Q. And you asked her to check. Did she do so
 10 right on the phone, or did she call you back?
 11 A. I think she called me back.
 12 Q. And tell me what she told you.
 13 A. She said that there was no certificate, final
 14 certificate of occupancy.
 15 Q. For that home?
 16 A. Yes.
 17 Q. What about final inspection, did she tell
 18 you --
 19 A. She said it didn't even go through a final
 20 inspection as far as what she could find out, as far as
 21 she could tell.
 22 Q. And then the next allegation of what was
 23 discovered was the presence of mold in the crawlspace.
 24 And let's stop right there. When was mold discovered in
 25 the crawlspace?

1 "defects" is a defined term. And it is defined to
 2 include all the things that were provided in paragraph
 3 17. And "disclosure" is a defined term, and refers to
 4 her RE-25, I think it was, the property disclosure
 5 agreement.
 6 Can you tell me, if you know, if you have any
 7 facts to offer me, that would support the allegation
 8 that Nancy Gentry-Boyd had actual knowledge of the
 9 defects?
 10 MS. FOSTER: The same objection from earlier,
 11 to the extent you are asking for anything beyond his
 12 knowledge of facts, as opposed to facts identified by
 13 counsel to support a legal allegation.
 14 THE WITNESS: Yes. To the extent that Michael
 15 Wood informed me that Nancy knew about the door, trouble
 16 with the door not opening and closing properly, and
 17 locking. The fact that moisture and wind were coming
 18 through the door. And that's why they used the duct
 19 tape to tape up the seams. Other than that, I've got
 20 nothing else to add.
 21 Q. (BY MR. MILLEMANN) Fair enough. And those
 22 things you just mentioned were all learned from your
 23 conversation with Michael Wood?
 24 A. Pretty much, yeah.
 25 Q. And that would be the basis, at least, Ed, for

1 A. Beau discovered that. And I would have to
 2 defer to him.
 3 Q. That's exactly my question. So as to that
 4 allegation, what was discovered, and when it was
 5 discovered, I would have to look to Beau Value for that?
 6 A. Yes.
 7 Q. All right. Thank you.
 8 MS. FOSTER: Or Eric Waite; right?
 9 THE WITNESS: Yeah, Eric, too. They worked
 10 together. I'm sorry.
 11 Q. (BY MR. MILLEMANN) Understood. That's fine.
 12 If I wanted to know the basis for these allegations
 13 we've just gone through in paragraph 17, is there anyone
 14 else, besides Beau Value, Eric Waite, possibly others
 15 that worked for them, and Mr. Longmire, that you would
 16 be aware of, that could provide me with the basis for
 17 those allegations?
 18 A. Pretty much that's it.
 19 Q. Okay.
 20 A. To my knowledge.
 21 Q. Okay. And then if we move on to paragraph 18
 22 at page 5 of Exhibit 6. Paragraph 18 states, "Upon
 23 information and belief, Defendant Gentry-Boyd had actual
 24 knowledge concerning the defects at the time she
 25 executed the disclosures." And in this complaint,

1 what you know, for the allegation that Nancy Gentry had
 2 knowledge of these defects?
 3 A. Correct.
 4 Q. And in paragraph 21, Ed, paragraph 21 relates
 5 to the disclosure that was provided by Nancy on the
 6 property. And when I say, "disclosure," you know what
 7 I'm talking about?
 8 A. Yes. This, the RE; right?
 9 Q. Yes.
 10 A. That you are pointing to?
 11 Q. That's exactly right.
 12 MS. FOSTER: Exhibit 3.
 13 Q. (BY MR. MILLEMANN) Thank you. Exhibit 3.
 14 What is it, if anything, or how is it that you claim
 15 that that disclosure, Exhibit 3, was deficient, if you
 16 have an opinion on that?
 17 MS. FOSTER: Let me get it for you, if you
 18 need it.
 19 THE WITNESS: What?
 20 MS. FOSTER: If you need it, it's right here.
 21 It's Exhibit 3.
 22 THE WITNESS: Yes, I mean, there was -- I
 23 think that the door should have been disclosed. They
 24 had moisture and air were coming through the doors. The
 25 doors wouldn't lock, wouldn't close. That there was

1 mold forming in the crawlspace. Those are essentially
 2 them.
 3 Q. (BY MR. MILLEMANN) If you know, did
 4 Mr. McKenna in any of his examination of the crawlspace,
 5 or photographs, report the presence of mold?
 6 A. No, except he did -- as you can see all the
 7 moisture coming in the pictures.
 8 Q. But as to mold, specifically, he did not?
 9 A. No.
 10 Q. Moving on to Count II of your Seconded Amended
 11 Complaint and Demand for Jury Trial, which is a claim of
 12 violation of the Consumer Protection Act. At paragraph
 13 26, do you have that in front of you, Ed?
 14 A. I do.
 15 Q. And that's at page 6 of the complaint. It is
 16 alleged that Nancy Gentry-Boyd made a number of
 17 representations to the plaintiffs, that would be you.
 18 And by my count, there are at least seven
 19 representations accounted for in that paragraph 26.
 20 I guess, let's just start with the obvious.
 21 Have you ever had a conversation with Nancy Gentry-Boyd?
 22 A. No.
 23 Q. What is, from your perspective, the basis for
 24 this allegation that Nancy Gentry-Boyd made these
 25 representations to you?

1 you want.
 2 THE WITNESS: Thank you.
 3 (A recess was had.)
 4 Q. (BY MR. MILLEMANN) We're still looking at
 5 Exhibit 6, the Second Amended Complaint, Ed. And you've
 6 told me about paragraphs 26 and 27.
 7 Paragraph 28 alleges that, "Defendant
 8 Gentry-Boyd concealed the true, defective condition of
 9 the property." Are you aware of any facts, in addition
 10 to what you've already told me, that you believe would
 11 support that allegation?
 12 A. Not really, no.
 13 Q. And as to paragraph 29, are you aware of any
 14 facts, additional to what you've told me, that would
 15 support the allegations in paragraph 29?
 16 MS. FOSTER: Objection to the extent the
 17 allegations are legal.
 18 But go ahead.
 19 THE WITNESS: Yes, I mean, other than what I
 20 basically talked about, the door not working, the water
 21 in the crawlspace, that sort of thing. You know, did
 22 you go into the barbecue line?
 23 Q. (BY MR. MILLEMANN) I haven't asked you
 24 anything about that.
 25 A. Okay.

1 A. Because her agents made those representations
 2 to me.
 3 Q. And so what you are relying on in paragraph
 4 26, is what Ms. Odmark, and/or Mr. Wood told you before
 5 you bought the property?
 6 A. Correct. Or was in that flier, or, yeah.
 7 Yes, sir.
 8 Q. That would be the universe of things?
 9 A. Yes. And these are the things that I kind of
 10 discussed the first time before, and touched on before,
 11 yes.
 12 Q. So if I want to know who, or what contains
 13 these representations, or is responsible, I would look
 14 to Mr. Wood, Ms. Odmark, or potentially the material in
 15 the flier?
 16 A. Correct.
 17 Q. And is the same true, Ed, as to paragraph 27?
 18 A. Well, basically, no, on the disclosure
 19 problem.
 20 Q. So as to paragraph 27, you are also relying on
 21 what was, or was not disclosed in the real estate
 22 property disclosure?
 23 A. Correct.
 24 Can we take a break in a minute?
 25 MR. MILLEMANN: We can take one right now if

1 Q. But you are free to tell me if you think it's
 2 responsive to this question.
 3 A. Sure.
 4 Q. Does that have something to do with it?
 5 A. Yeah, the owner should have known. Yes.
 6 Q. Should have known, what, Ed?
 7 A. You know, that there was water building below
 8 the doors in the walls.
 9 Q. For the reasons you've already told me?
 10 A. Yes.
 11 Q. You've mentioned water in the crawlspace. Is
 12 it your allegation that Nancy Gentry knew that at times
 13 there was water in the crawlspace?
 14 A. Or should have known, yes.
 15 Q. And should have known, why?
 16 A. Because it's her house. She should know
 17 what's in her house.
 18 Q. And yet, in the four years plus you've owned
 19 the house, you've never gone in the crawlspace?
 20 A. No, but I've had people go in for me.
 21 Q. Just so I understand --
 22 A. And remediated the mold.
 23 Q. Since then have you had anybody go in the
 24 crawlspace to check it out for you?
 25 A. Since when?

1 Q. Since Mr. Value's company finished the mold
2 remediation.
3 A. That was about a year ago. Yes, I have had
4 people down there, yes.
5 Q. For what purpose?
6 A. To inspect it, and A-1 goes down there all the
7 time.
8 Q. And why is A-1 down there?
9 A. They are down there inspecting the heaters.
10 Q. To your knowledge, based on what anyone has
11 told you, have you had any water in that crawlspace
12 since you purchased the property?
13 A. Not after we did mold remediation, no.
14 Q. Okay. Is it your understanding the mold
15 remediations also solved the problem of water coming
16 into the crawlspace?
17 A. Yeah.
18 Q. Would you defer to Beau Value on that issue,
19 as far as what work he did down there?
20 A. Yes. Or Eric, yes.
21 Q. When I say that, I mean, Beau, or his company,
22 yeah.
23 A. Yeah.
24 Q. Thank you for clarifying.
25 A. Yeah.

1 doors. We didn't know to what extent it was going
2 around the side.
3 Q. That's what I'm saying. But at the time, to
4 the best of your knowledge, at the time that Chris Kirk
5 was there, that you remember being there, had the doors
6 been taken out?
7 A. No.
8 Q. Was the area under the doors exposed?
9 A. No.
10 Q. So could you see any of the rot in the floor
11 joists or the sub-floor?
12 A. You could, yes.
13 Q. From outside the house, or from the
14 crawlspace?
15 A. From the crawlspace.
16 Q. And did Chris, if you know, go down in the
17 crawlspace and look at that?
18 A. I don't know what Chris did.
19 Q. So Chris said something to the effect of,
20 we're going to take care of this for you?
21 A. Yeah.
22 Q. And did you have a response to that?
23 A. Good. Thank you.
24 Q. And did you ever follow up on that statement
25 of intention by him to take care of it?

1 Q. Since closing the transaction -- I think this
2 one we've covered. Have you ever had a conversation
3 with Nancy Gentry?
4 A. No.
5 Q. And have you ever had a conversation with
6 Chris Kirk?
7 A. Yes.
8 Q. Before closing or after?
9 A. After.
10 Q. Briefly, tell me the circumstances of that.
11 A. He came to inspect the house in response to
12 one of our lawyer's letters.
13 Q. And you were there, I take it, at the time?
14 A. I was.
15 Q. Do you remember the substance of the
16 conversation?
17 A. Yeah.
18 Q. What do you remember?
19 A. What he said.
20 Q. What did he say?
21 A. He said we're going to take care of this for
22 you.
23 Q. At that point had the condition underneath the
24 french doors been exposed?
25 A. We know there was rot underneath the french

1 A. No.
2 Q. Did you ever make demand on him that he repair
3 the condition?
4 A. I believe my lawyers did, yes.
5 Q. Okay. So I would find that if it exists in
6 the letters either from Mr. Mau, or your lawyers at the
7 time?
8 A. Yes.
9 Q. And I'm distinguishing that from the letters,
10 inviting Chris to inspect. And your understanding, and
11 it's just your understanding, that the offer was
12 extended to him to come and repair it?
13 A. That's my understanding, yeah.
14 Q. Okay. Anything else you remember about the
15 conversation with Chris on that occasion?
16 A. Un-huh. No. I'm sorry.
17 Q. Is that the only conversation you've ever had
18 with Chris Kirk?
19 A. There was another conversation, I think, the
20 same day. I think it was the same day. There was
21 another conversation with him. I think it was the same
22 day. I'm not absolutely sure.
23 Q. At the property?
24 A. Yeah.
25 Q. What do you remember about that conversation?

1 A. Just that he had said that he had advised
 2 Nancy that he didn't like the opening -- the out-opening
 3 doors. He advised Nancy against it.
 4 Q. And did he tell you any more about that
 5 conversation?
 6 A. No. He just -- it was kind of like a takeoff
 7 the cuff-type thing. I don't like these out-opening
 8 doors. I told her not to do this, or something like
 9 that.
 10 Q. And then since closing the transaction, have
 11 you had any conversations with Jean Odmark?
 12 A. Since closing?
 13 Q. Yes.
 14 A. Yes.
 15 Q. Tell me what you remember about those.
 16 A. You meant, about this house?
 17 Q. Yes.
 18 A. No, I don't think I've had any conversations
 19 about the house after closing.
 20 Q. So to the extent you've had conversations with
 21 Jean, it's been other topics?
 22 A. I think I've run into her socially, but not
 23 other than, "hi," you know, just social.
 24 Q. Fair enough. And then you described to me a
 25 conversation that you had with Michael Wood at the

1 A. Other than what I've testified to, and other
 2 than what, let's say, the other experts have testified
 3 to.
 4 Q. Mr. Value, Mr. Waite?
 5 A. Yes.
 6 Q. And Mr. Longmire?
 7 A. Yes.
 8 Q. And then what you've told me today?
 9 A. Yes.
 10 Q. Okay. And then --
 11 A. I think there was her maid had indicated the
 12 door. They had trouble with the door.
 13 Q. Jan Loff?
 14 A. Yes.
 15 Q. You are relating a conversation that she had
 16 with Mike Longmire?
 17 A. Yes.
 18 Q. Thank you. If we could move on to Count III
 19 of the complaint, "Fraud/Misrepresentation (Against
 20 Defendant Gentry-Boyd." That starts at page 7, Ed, page
 21 35?
 22 MS. FOSTER: Paragraph?
 23 Q. (BY MR. MILLEMANN) Sorry. Paragraph 35,
 24 again repeats, the owner-builder allegation, which
 25 you've already told me about. And then goes on to say,

1 property after closing, in which you showed him what was
 2 going on with the doors?
 3 A. Uh-huh.
 4 Q. And you told me about that. And it sounds
 5 like at least one more, when he then followed up with
 6 you, in answer to your question, as to why the door had
 7 been taped; correct?
 8 A. Yeah, they moved the duct tape.
 9 Q. Yes.
 10 A. There was several communications on the phone.
 11 There was one where he came out. I think just one where
 12 he came out. A couple of them on the phone, and then
 13 there was a lot of email.
 14 Q. And to the extent that you retained copies of
 15 those emails, have you provided them to Ms. Foster?
 16 A. Yes.
 17 Q. Have you searched for all emails you might
 18 have had during that time frame with these people?
 19 A. Yes.
 20 Q. Have you produced them?
 21 A. I produced them to Ms. Foster.
 22 Q. Has anyone else, besides what you have told
 23 me, suggested to you that Nancy Gentry knew about, or
 24 should have known about the defects in the home, not
 25 including your attorney?

1 that Nancy Gentry-Boyd was responsible for overseeing
 2 the construction of the home. And let's stop there. Do
 3 you see what I'm referring to?
 4 A. Yes.
 5 Q. As you sit here, besides what you've already
 6 told me, are you aware of any facts, or evidence that
 7 supports that allegation that Nancy Gentry was
 8 responsible for overseeing the construction of the home?
 9 A. Well, other than what I was told, that the
 10 contractor had advised against the door opening out.
 11 Q. Okay.
 12 A. And Nancy insisted that the door be opening
 13 out.
 14 Q. And that was based on the conversation you
 15 just told me about with Chris Kirk?
 16 A. Correct.
 17 Q. Anything else come to mind?
 18 A. Not offhand.
 19 Q. And then in paragraph 35, you go on to refer
 20 to "the selection of concealed building materials for
 21 the construction of the home that did not meet
 22 applicable building codes."
 23 To the extent that you are claiming that the
 24 materials, themselves, used in the home, as opposed to
 25 the construction techniques did not meet code, or did

1 not meet standard of care. Again, do you have an
2 independent opinion, independent of Mr. Value,
3 Mr. Waite, or Mr. Longmire?

4 A. No. It would be the same thing about the
5 weight of the paper, and not going down far enough, and
6 things of that nature.

7 Q. And you are relying on --

8 A. I wasn't here for their depositions, but I'm
9 assuming that's what they testified to.

10 Q. They did, indeed.

11 A. Okay. So we're on the same page.

12 Q. They testified -- grossly summarizing, they
13 testified about moisture wrap, or the absence thereof;
14 tar paper/felt, the amount thereof, the weight thereof,
15 or the absence thereof.

16 A. Okay.

17 Q. Flashing, the adequacy. I'm not indicating
18 that's the sum total.

19 A. I understand.

20 Q. But they did testify about those three things.

21 A. Yeah.

22 Q. Over to page 8, please, Ed. And I think we
23 can move pretty quickly here.

24 Paragraph 40, again, this asserts that Nancy
25 Gentry-Boyd was aware of the defects at the time the

1 occasions you have talked about, which would have
2 reasonably put you on any notice that -- the problems
3 that were later discovered existed?

4 MS. FOSTER: Objection, again, to the extent
5 you are asking about attorney/client information.

6 THE WITNESS: Not exactly.

7 Q. (BY MR. MILLEMANN) Tell me what you meant by
8 the allegation --

9 A. I'm talking about the specific extent of the
10 damage, and the specific cause of the damage. There was
11 a red flag there. That door was the red flag. And had
12 that door been fully investigated, had some of the other
13 things been more fully investigated, that would have led
14 to, just like we did. We found the water coming
15 through. We found the water underneath the door. We
16 found the water everywhere.

17 So as far as the specific cause, and the
18 extent of the damage, correct. But there was still a
19 red flag.

20 Q. Okay.

21 A. That could have been when the trained eye
22 had -- cannot open that door, and start playing with
23 that door. And said, hey, this door doesn't work. This
24 requires more investigation. Let's see why it's -- oh,
25 it's full of water. It's swelling. Oh, let's go.

1 disclosures were made. Have you told me everything that
2 you know about that?

3 A. Yes.

4 Q. And you don't have to repeat it every time.
5 That's, just, what I'm just trying to find out.

6 A. Yes.

7 Q. Because a number of these allegations are
8 repeated.

9 A. Understood, yeah.

10 Q. Okay. And in paragraph 41, which refers to
11 Nancy Gentry's representations. Have you told me
12 everything that --

13 A. Yeah.

14 Q. -- you know about that?

15 A. Right.

16 Q. Okay. And paragraph 42 states that,
17 plaintiffs, which would include you, were not aware of
18 and could not have been aware of the defects when you
19 closed the purchase without destructive testing due to
20 the concealed and latent nature of the defect which were
21 not discoverable upon a reasonable inspection.

22 My takeaway from that allegation, and you tell
23 me if you intend something else from it, is that there
24 was nothing visible in the home when you examined it,
25 when you were in it, when you were there on the multiple

1 Let's look a little deeper into this. Then that would
2 have -- a trained eye would have been able to discern,
3 like we slowly discerned the problem.

4 Q. I think you may be misreading paragraph 42.
5 And you may want to reconsider your answer. Paragraph
6 42 says, you weren't aware before closing of the
7 problems, nor could you have been aware without
8 destructive testing of the problems, because they were
9 latent. It's not talking about what Nancy knew. It's
10 talking about what you knew.

11 A. Right.

12 Q. So based on your prior testimony, I thought
13 you were telling me, you didn't see any red flags when
14 you looked at them?

15 A. No, I didn't, but I'm not a trained eye.

16 Q. No. No. No. I'm only talking about you.

17 A. Right.

18 Q. I'm not talking about you, or Mr. McKenna, or
19 anyone else.

20 A. Right.

21 Q. This talks about the plaintiffs.

22 A. Right.

23 Q. So my takeaway from this paragraph, saying you
24 weren't aware of these defects, nor could you have been
25 expected to be aware of them, because they weren't

1 visible. They were latent. They were concealed.
 2 A. The specific cause and extent of damage, yes.
 3 Q. So are you telling me, there were red flags
 4 that you saw that --
 5 A. No. No, but a trained eye could have.
 6 Q. And that would be --
 7 A. That wouldn't be me.
 8 Q. -- Mr. McKenna; right?
 9 A. Correct.
 10 Q. I don't want to leave this point --
 11 A. No.
 12 Q. -- without being very clear.
 13 A. No.
 14 Q. Did you see anything?
 15 A. No.
 16 Q. Forget the trained eye. At any time --
 17 A. No.
 18 Q. Let me finish -- before closing, anything that
 19 caused you even a sliver of concern or suspicion, other
 20 than what Mr. McKenna pointed out to you about the
 21 crawlspace, that there would be problems with this house
 22 of the nature you discovered?
 23 A. No.
 24 Q. So let's look at Count IV, starting on page 8.
 25 A. (Witness complying.)

1 mean anything to you one way or the other?
 2 A. No, not -- it's a legal term.
 3 Q. Okay. How about "concealed defect," does that
 4 have any meaning to you, or is that also, a legal term?
 5 A. I would say in this context, it's a legal
 6 term.
 7 Q. So you have nothing to add to what you've
 8 already told me that would bear on the allegations
 9 contained in paragraph 64?
 10 A. None, other than what I've already testified
 11 to.
 12 Q. So let's move on to Count VII at page 11.
 13 Paragraph 71 states, and I'm paraphrasing, not quoting,
 14 but you have it in front of you. That Nancy Gentry-Boyd
 15 as the owner-builder and Defendant Kirk as the
 16 contractor, agreed and combined to engage in a
 17 conspiracy.
 18 And as I read it, it's alleging a conspiracy
 19 to, essentially, construct a substandard home that
 20 didn't comply with building codes, didn't comply with
 21 standard of care, and the defects in which would be
 22 concealed. Is that what you are alleging in paragraph
 23 71?
 24 A. That would --
 25 MS. FOSTER: The same objection.

1 Q. Actually, I don't think I have any questions
 2 on Count IV. I think we've already covered them.
 3 "Count V, Breach of the Implied Covenant of
 4 Good Faith and Fair Dealing." Paragraph 58, "Defendant
 5 Nancy Gentry-Boyd, by her conduct described hereinabove,
 6 breached the implied duty of good faith and fair dealing
 7 imposed by the PSA," meaning the purchase and sale
 8 agreement.
 9 Independent of anything your attorneys have
 10 told you or discovered, besides what you've already told
 11 me today, is there anything else that I should know, in
 12 your opinion, factually that would support the
 13 allegations in paragraph 58?
 14 A. Not that I haven't already told you, no.
 15 Q. Moving on to Count VI. Again, and I should
 16 have asked it earlier. But in paragraph 64, the term
 17 "latent defect" is used. And I just want to make sure I
 18 understand, from your perspective, when you use the term
 19 "latent defect," if you have an understanding, what does
 20 that mean to you?
 21 MS. FOSTER: Objection to the extent he did
 22 not write this complaint.
 23 THE WITNESS: Yeah, I don't have an
 24 understanding of legally what it means.
 25 Q. (BY MR. MILLEMANN) So "latent defect" doesn't

1 THE WITNESS: That would appear to be
 2 what -- the document speaks for itself.
 3 Q. (BY MR. MILLEMANN) So as you sit here today,
 4 do you have any facts, additional to what you've already
 5 told me, to support the allegation that Nancy and Kirk
 6 had an agreement to do that which was claimed in
 7 paragraph 71?
 8 MS. FOSTER: The same objection, as well as
 9 the discovery is still ongoing. And he doesn't know
 10 everything about what is in the discovery depositions so
 11 far.
 12 THE WITNESS: Yeah, and in addition to what
 13 Beau Value's, and everybody else has testified to.
 14 Q. (BY MR. MILLEMANN) So separate and apart from
 15 what everybody testified to, and what you've told me
 16 already today. Are there any facts, that you are aware
 17 of, that would support the allegation that Chris Kirk
 18 and Nancy Gentry got together, and agreed to do that
 19 which is alleged in paragraph 71?
 20 MS. FOSTER: The same objection.
 21 THE WITNESS: Not that I have already not
 22 testified to.
 23 Q. (BY MR. MILLEMANN) Okay. And would the same
 24 be true of the allegations in paragraph 72? And take a
 25 moment to review them if you need to.

1 MS. FOSTER: And the same objection.
 2 THE WITNESS: (Witness complying.) Yeah. But
 3 other than what others have testified to, and what I
 4 have testified to today, I have nothing further.
 5 Q. (BY MR. MILLEMANN) Do you have any opinion,
 6 not as a lawyer, as an owner of this home, and as a
 7 plaintiff in this lawsuit, because you are not a
 8 practicing lawyer, correct, now, are you, Ed?
 9 A. Correct.
 10 Q. Do you have any opinion or theory yourself, as
 11 to why Nancy Gentry and Chris Kirk would get together
 12 and conspire to build a substandard home?
 13 MS. FOSTER: Objection to the extent it calls
 14 for speculation.
 15 THE WITNESS: It calls for speculation, right.
 16 It costs them less money.
 17 Q. (BY MR. MILLEMANN) Okay. Anything else?
 18 A. They can -- well, based on Idaho's law, you
 19 could probably sell to a subsequent purchaser, conceal
 20 it.
 21 Q. And make some money in the process?
 22 A. Yeah.
 23 Q. Do you know if Nancy Gentry made any money in
 24 the process?
 25 A. I don't know.

1 Q. Well, the document says, that they got
 2 together, and entered into an agreement to build a home,
 3 which didn't comply with code, which didn't comply with
 4 the standard of care at the time. And that also agreed
 5 to avoid a final inspection, and avoid a certificate of
 6 occupancy. That's what your pleading says.
 7 My question is, do you have any theory,
 8 sitting here in your as capacity as plaintiff, as to why
 9 they would have done it?
 10 MS. FOSTER: Counsel, he has offered you more
 11 than one theory.
 12 THE WITNESS: Yes. And now you are getting
 13 argumentative.
 14 Q. (BY MR. MILLEMANN) So you have nothing else
 15 to add to your answer?
 16 A. Asked and answered.
 17 Q. Are you refusing to answer my question?
 18 A. Asked and answered.
 19 MS. FOSTER: He's not refused.
 20 THE WITNESS: I already answered it three
 21 times.
 22 MS. FOSTER: Counsel, he's answered the
 23 question. He's speculated with his theories. And he
 24 said he doesn't have any others. If he has any others,
 25 he can give them to you.

1 Q. Any other theory as to why they would do such
 2 a thing?
 3 MS. FOSTER: The same objection.
 4 THE WITNESS: I think the document speaks for
 5 itself.
 6 Q. (BY MR. MILLEMANN) No, it doesn't.
 7 A. It does say that, I'm afraid.
 8 Q. Well, it doesn't tell me why. My question is,
 9 do you have any theory as to why they would enter into
 10 such an agreement?
 11 MS. FOSTER: Objection. It calls for
 12 speculation.
 13 THE WITNESS: It calls for speculation.
 14 Q. (BY MR. MILLEMANN) Are you able to answer the
 15 question? Do you have any other such theory, other than
 16 what you've told me, and you gave me a partial answer,
 17 as to why in the world Nancy Gentry and Chris Kirk would
 18 get together, and enter into the kind of agreement
 19 that's alleged here?
 20 MS. FOSTER: The same objection.
 21 THE WITNESS: You are asking me for my
 22 opinion. And I think the document speaks for itself.
 23 Q. (BY MR. MILLEMANN) So you have no answer?
 24 A. No. What I said, the document speaks for
 25 itself, that's --

1 Q. (BY MR. MILLEMANN) That is all I'm asking.
 2 Do you have anything to add?
 3 A. Nothing more than I've already added.
 4 Q. Okay. Thanks.
 5 Ed, I want to show you Exhibit No. 7. Exhibit
 6 No. 7 is your Response to Defendant Gentry-Boyd's First
 7 Interrogatories and Requests For Production to
 8 Plaintiffs. If you go to page 33 of that Exhibit?
 9 A. (Witness complying.) Yeah.
 10 Q. Is that your signature?
 11 A. Yes.
 12 Q. So would I be correct in assuming, that you
 13 reviewed these answers before you signed?
 14 A. Yes.
 15 Q. If I could draw your attention to page 10,
 16 Interrogatory No. 8. And it asks for identification of
 17 every meeting or conversation you may have had with
 18 named people, who include Nancy Gentry-Boyd, Chris Kirk,
 19 and Todd McKenna.
 20 I have what I think is a pretty simple
 21 question. To the best of your recollection today, are
 22 there any conversations that you have had, or meetings
 23 that you have had with any of those three people, that
 24 you haven't told me about today?
 25 A. Yes.

1 Q. Okay. Thank you.
 2 Would you tell me what I haven't asked you,
 3 that would respond to that question?
 4 A. Well, I had a meeting and a discussion with
 5 Todd McKenna.
 6 Q. Okay. Where did that take place?
 7 A. It took place at the house.
 8 Q. Can you locate that, approximately, in time
 9 for me? Let's start with kind of bracketing it. Was it
 10 after you received his report?
 11 A. Yes. And this was after we discovered the
 12 problem with the door.
 13 Q. And if you know, had the door been removed,
 14 and the area exposed yet when you met with Todd McKenna?
 15 A. I don't believe so, no, sir.
 16 Q. And do you remember who was present for your
 17 meeting with Todd McKenna?
 18 A. I think Ellen may have been, maybe not. Maybe
 19 Kevin, but I think Kevin kind of was there, and then
 20 left. I'm just speculating, you know, again. It was
 21 just mainly, just McKenna and I.
 22 Q. What do you remember being said?
 23 A. I said, how did you miss this door?
 24 Q. What did he say?
 25 A. He said, I didn't inspect all the doors. And

1 A. Snow.
 2 Q. Snow on the deck outside the doors?
 3 A. Yes.
 4 Q. Do you remember anything else about the
 5 conversation?
 6 A. No. Other than, Todd, had you even touched
 7 those doors, you would have found something wrong with
 8 them. Yeah, but I didn't. Because I didn't think I
 9 needed to, because they wouldn't open. And I said,
 10 well, even if you didn't need to open it. But I said,
 11 Todd, there is no snow there. And he kind of hemmed and
 12 hawed. So I disputed his allegation that there was snow
 13 against the door.
 14 Q. At the time he did his inspection?
 15 A. No, this is afterwards.
 16 Q. But I mean, when you say there was no snow
 17 there, you were saying, Todd, when you did your
 18 inspection, there was no snow there?
 19 A. Yes, I said that to him.
 20 Q. And what was your basis for saying that?
 21 A. Several. The overhang, the fact the radiant
 22 heat in the house would melt snow against the door,
 23 pictures.
 24 Q. Photographs?
 25 A. Yes.

1 I said, your report says that you did. Yeah, but I
 2 didn't. I don't -- I don't -- and this is something you
 3 can also discuss with Mr. Longmire here, probably. He
 4 said something to Mr. Longmire about his report, as
 5 well, about him putting something down that he didn't
 6 inspect in his report. But I asked him, specifically,
 7 about the doors.
 8 Q. And did he say, I didn't inspect the doors, or
 9 I didn't open and close the doors?
 10 A. I didn't even look at the doors, he said.
 11 Q. So he said he didn't even look at the doors,
 12 period?
 13 A. That door.
 14 Q. So doors, it's french doors, so two doors, I
 15 understand.
 16 A. Yes.
 17 Q. So his response was, I didn't inspect these
 18 doors?
 19 A. Correct.
 20 Q. Do you remember anything else about the
 21 conversation?
 22 A. Yes.
 23 Q. Tell me what you remember.
 24 A. He gave an excuse.
 25 Q. What was that?

1 Q. So you looked at photographs from the time
 2 period around the time that Todd took the --
 3 A. From his report.
 4 Q. From his inspection?
 5 A. Yes.
 6 Q. Were those his photographs?
 7 A. They were Ellen's pictures.
 8 Q. And again, you've provided everything to
 9 Ms. Foster?
 10 A. Correct.
 11 Q. And thank you for that.
 12 Are there any other meetings or conversations
 13 you had with those three persons there that --
 14 A. Not that I haven't already testified to.
 15 MS. FOSTER: Sorry. I just want to clarify.
 16 Conversations, do you mean oral, or do you mean written?
 17 MR. MILLEMANN: I mean, Interrogatory 8 seeks
 18 the identity of meetings or conversations.
 19 Conversations to me means verbal.
 20 MS. FOSTER: Okay. Thank you.
 21 Q. (BY MR. MILLEMANN) Have you been deprived of
 22 the use of the home as a result of the defect you
 23 identify in your complaint?
 24 A. Yes.
 25 Q. Tell me, to what extent, and if there is a

1 specific period of time, during what period of time were
 2 you deprived of the use of the home?
 3 A. It was when Beau and Eric were doing their
 4 repairs.
 5 Q. Any other time?
 6 A. No.
 7 Q. And would it have been your intention, but for
 8 the need to do the repairs to have used the home during
 9 that period of April and May of 2014?
 10 A. It was even further into the summer, as well.
 11 Q. Do you remember when they concluded? When you
 12 were able to re-occupy the home?
 13 A. No, not exactly. I don't.
 14 Q. And let's, for purposes of my discussion, and
 15 my question. Let's just assume, it may not be correct,
 16 but that it was April, May, and June that they were
 17 working on the property of 2014. Had you occupied the
 18 property during that same time frame in 2013?
 19 A. Yes.
 20 Q. For how long?
 21 A. We come for the whole summer.
 22 Q. So about when does that start for you?
 23 A. Actually, it comes from me being retired, or
 24 disabled, or whatever, I come in May.
 25 Q. Okay.

1 A. And sometimes in April.
 2 Q. In 2013, do you remember when you came to the
 3 home?
 4 A. I don't remember exactly, no. I do remember
 5 there was an issue with the appraisal, because I wanted
 6 to get the appraisal done. I wanted to get the repairs
 7 done before they do the appraisal for the property.
 8 That was important. And that kind of slowed things
 9 down. But luckily, they were slow anyway, you know.
 10 But they were -- I got the last house. I guess mine was
 11 the last one done.
 12 Q. So at any time since you acquired the home
 13 from Nancy Gentry to date, have you ever had a water
 14 intrusion event, a particular event, where you had water
 15 either come into the home, or come into the crawlspace,
 16 that you know of?
 17 A. No.
 18 Q. So other than the time that the repairs were
 19 going on, did the defects in question deprive you of the
 20 use of the home?
 21 A. Other than when the repairs were being done,
 22 no. But they took out all the furniture, and they had
 23 to -- I think, they had to seal it with plastic for
 24 mold.
 25 Q. I think I saw that in their documents.

1 A. Yeah, I think there was some Stachybotrys in
 2 there, so they had to do that.
 3 Q. One of my new favorite terms.
 4 A. Stachybotrys?
 5 Q. Manipulation of contents. That means move
 6 stuff, I think. Let's move on. We're making good
 7 progress.
 8 If we could go back to, you have it in front
 9 of you, Exhibit 7, still, Ed.
 10 A. Yes.
 11 Q. If you go to page 16.
 12 A. (Witness complying.)
 13 Q. And at 16, Interrogatory No. 19, I asked that
 14 you identify each building code and standard of the care
 15 which you allege were not met. And explain in what
 16 manner they weren't met.
 17 Do you have an opinion on that subject,
 18 independent of what you would rely on from Mr. Value,
 19 Mr. Waite, or Mr. Longmire?
 20 A. I assume --
 21 MS. FOSTER: Or, Counsel, that's the
 22 objection.
 23 Go ahead.
 24 THE WITNESS: I'm assuming they testified to
 25 the code, request for the weight of the paper, and the

1 Tyvek, or some other type of water shield.
 2 Q. (BY MR. MILLEMANN) I believe Mr. Longmire
 3 testified, he believed there was a code provision that
 4 related to the weight of the paper?
 5 A. Yeah.
 6 Q. I believe Mr. Value testified that he believed
 7 there was a code provision that required an adequate
 8 moisture barrier, and further testified what he thought
 9 the standard was for that?
 10 A. What did he say the standard was?
 11 Q. His standard was to wrap the house.
 12 A. With what?
 13 Q. Tyvek.
 14 A. Yes.
 15 Q. And again, I don't mean to suggest that's all
 16 they testified to, but they did testify to that.
 17 A. I would agree to that.
 18 MS. FOSTER: And object to the extent there is
 19 anything else that they testified to, which you are not
 20 summarizing, which you may or may not agree with.
 21 THE WITNESS: Yes.
 22 Q. (BY MR. MILLEMANN) My question is, do you
 23 have any opinion on any codes that were violated,
 24 independent of what, either Beau, or Eric, or Mike have
 25 told you?

1 A. No.
 2 THE WITNESS: I've got to run to the little
 3 boys room. This water is going through me. If you
 4 don't mind?
 5 MR. MILLEMANN: Yes. Actually, we're getting
 6 really close.
 7 THE WITNESS: Okay.
 8 (A recess was had.)
 9 MR. MILLEMANN: Are we ready to proceed?
 10 THE WITNESS: Go a way. Have at it.
 11 Q. (BY MR. MILLEMANN) Here's Exhibits 13 to 19.
 12 And I think we can move through these, hopefully, pretty
 13 quickly. Starting with Exhibit 13, which is Petrus
 14 Bates No. 289.
 15 A. Okay.
 16 Q. It appears to be an invoice from Valley County
 17 A-1 Heating, dated May 17, 2012. Do you recognize this
 18 document, Ed?
 19 A. To tell you the truth, Steve, yes, kind of.
 20 I'm not absolutely sure, but I think this is the -- who
 21 put the barbecue line in.
 22 Q. And do I understand, that would be to run the
 23 line from the crawlspace up to the deck, so you could
 24 connect your barbecue to it?
 25 A. Correct. From the gas line, right.

1 A. Yes.
 2 Q. And Exhibit 14, which is Petrus 290. It
 3 appears to be an invoice from Sean McConnor, who is a
 4 local painter, dated June 21, 2012.
 5 A. Uh-huh.
 6 Q. Did you have Mr. McConnor do some painting in
 7 the house?
 8 A. This was the painting around the windows and
 9 the doors, you know, all six sides is what it's called.
 10 Q. So your understanding is this was painting to
 11 effectuate the sealing that hadn't been done, as you
 12 allege in your complaint?
 13 A. Correct.
 14 Q. And Exhibit 15, it appears to be an invoice
 15 from EnergySeal, Invoice No. 1702553, Petrus 291. And
 16 it seems self-explanatory. It appears to be an invoice
 17 for removing damaged foam on the crawlspace rim joist at
 18 the southeast corner. Is that the insulation that was
 19 discovered when the --
 20 A. Yeah. I'm sorry.
 21 Q. Go ahead.
 22 A. I think there was a couple times they did
 23 this.
 24 Q. I think you have more EnergySeal invoices.
 25 A. Yes, I think they did this more than once.

1 Q. So do I understand correctly, this is not part
 2 of the repairs or remediation that was done to the home?
 3 A. No. But this is instrumental in that that's
 4 when we found water, big time.
 5 Q. And I've heard that testimony. If I
 6 understand, tell me if you have a different
 7 understanding, that in order to do this work, A-1 had to
 8 penetrate the insulation in the crawlspace; and thereby
 9 obtain visual access to some of the area underneath the
 10 door; is that correct?
 11 A. Correct. Correct. That's right. But that's
 12 only partly correct. Because what happened also, was
 13 water just started spewing out. And that's when we knew
 14 we had a major problem. Because potentially, we thought
 15 it was just the door deal, and then we saw all this
 16 water coming out.
 17 Q. And that was through the hole that A-1
 18 created?
 19 A. Yes.
 20 Q. And if I understand correctly, the hole they
 21 created, in order to run the line, accessed the area
 22 generally underneath those french doors?
 23 A. Correct.
 24 Q. And that's where the water was perched, is
 25 what you are saying?

1 Q. And then if we move on to Exhibit 16. This is
 2 another invoice from EnergySeal, dated September 7,
 3 2012, Petrus 292. I'm sorry. I keep mispronouncing
 4 your name. I apologize.
 5 A. Peat-trus. You did so well when you started.
 6 Q. It was only a couple days ago that I heard how
 7 it should be pronounced. I apologize for that. That is
 8 not intentional on my part.
 9 A. You did so well for so long.
 10 Q. It must be age. It must be age. I don't know
 11 what to tell you.
 12 Petrus 292, a more substantial bill, \$1,087.
 13 And the items indicated are insulate the dryer vent, add
 14 additional insulation to the flat truss. And then it
 15 references, edge of floors at rim joist, flexible
 16 FoamCore.
 17 What I need to know, if you know, is which, if
 18 any, of these apply to the repairs to, or remediation of
 19 the home that you had to do, because of the condition
 20 that you discovered?
 21 A. I hate to say this, you should have asked Mike
 22 Longmire on that. If you would like to, maybe we could
 23 offer to ask Mike for you, or something.
 24 Q. So you don't know, independent of what Mike
 25 would tell you?

1 A. Pretty much, yes.
 2 Q. Okay. Fair enough.
 3 And then Exhibit 17, I've just noticed, would
 4 appear to me to be just EnergySeal's confirmation that
 5 you paid the prior invoice.
 6 A. Yes.
 7 Q. And then Exhibit 18, I have an understanding
 8 of Exhibit 18 now, as a result of Mike Longmire's
 9 testimony. Tell me if it's the same as yours. And my
 10 understanding is that C&S Construction is Chuck Thielst.
 11 And he was the first contractor asked to provide an
 12 estimate for the cost to repair the conditions that, at
 13 least at that time, had been discovered. And
 14 ultimately, you did not proceed with Mr. Thielst to do
 15 the work?
 16 A. Correct. But some of these things, I think we
 17 had to pay for, like the door, and the EnergySeal that
 18 are listed on his subcontract. I'm not sure. Mike
 19 would know better than I would. But some of these, I
 20 think we had to pay for.
 21 Q. Okay.
 22 A. I don't think, the masonry. I don't think,
 23 the hardwood floors. But I think we had to pay for the
 24 door, and we had to the pay for the EnergySeal, I think.
 25 I'm not 100 percent sure, but Mike would know.

1 Q. It's interesting you mentioned that. I think
 2 Mike testified that the door was delivered to Chuck.
 3 And he had to bring it to the site after he decided not
 4 to do the work.
 5 A. Right.
 6 Q. So that would substantiate what you are
 7 saying.
 8 A. Right. I think here's the invoice, though,
 9 too.
 10 Q. That's the invoice.
 11 A. Yes.
 12 Q. And it's not an exact match to the number, but
 13 it is pretty close to the number. And you are referring
 14 to Exhibit No. 19.
 15 A. Actually it is identical, as far as the
 16 subtotal is 4,976.52.
 17 Q. Yes, it is.
 18 A. Without tax.
 19 Q. Nu-Vu Glass. Okay. That's the door.
 20 A. Yeah. Now, I thought for some reason, we had
 21 to pay EnergySeal again for more, because they -- we had
 22 to remove that several times.
 23 Q. So if we back up to Exhibit No. 18, Ed.
 24 A. I'm sorry.
 25 Q. I want to make sure I understand your

1 testimony. If I understand you, you are saying, the two
 2 items in there -- well, one item that you are pretty
 3 sure you did pay for, was for the Nu-Vu Glass, which was
 4 the door; right?
 5 A. Right.
 6 Q. The other item you are not sure, but you think
 7 you paid for was the EnergySeal?
 8 A. Right. We had to pay EnergySeal several times
 9 for removing and replacing the insulation, because it
 10 kept getting wet.
 11 Q. So --
 12 A. And I'm sure EnergySeal could run that down
 13 for us.
 14 Q. Understanding that discovery is continuing, I
 15 want to get the best understanding we can today of the
 16 monetary damages that you have suffered as a result of
 17 the matters that you allege in your complaint. Okay?
 18 We've just gone through some Exhibits 13 to
 19 19, that contain some of the monies you expended;
 20 correct?
 21 A. Yeah.
 22 Q. Beau Value testified, after we went through
 23 his invoices and his final statement, that Restoration
 24 Pro was paid a total of \$57,337.16, and his invoices
 25 matched his final statement on that number.

1 A. Uh-huh.
 2 Q. Does that sound roughly correct to you, or
 3 would you have any idea?
 4 A. Right as we sit here, no.
 5 Q. Okay.
 6 A. But I could check it for you.
 7 Q. Let's assume that, at least we know you paid
 8 Restoration Pro, and we know that Beau said that's how
 9 much you paid him. So we have items in Exhibits 13 to
 10 19. And we have got what you paid Restoration Pro. And
 11 the items in Exhibits 13 to 19 included the door and
 12 some other expenditures.
 13 As you sit here today, are there other
 14 monetary damages, which you claim to have incurred as a
 15 result of the matters that you complained about in your
 16 complaint?
 17 A. Yeah, I think there is some work that Mike
 18 Longmire did. And there is some -- I had to come up a
 19 couple of times to, you know, meet with people and do
 20 some things. So there was -- you know, I had to come
 21 up, and meet with Beau, and give him directions, and get
 22 things going, and give him -- sign the contract, and
 23 give him the down payment, and all that other stuff.
 24 Q. And these would be additional monetary damages
 25 that you've incurred in the case?

1 A. Right.
 2 Q. Mike Longmire provided what he testified were
 3 all his invoices, starting in May of 2012, and through
 4 the conclusion of the repairs. To the extent that he
 5 did work that was necessary as part of the repair or
 6 restoration, would you expect me to find it in those
 7 invoices?
 8 A. I would think so. I'll double-check to make
 9 sure Mike gave you what you need, but, yes.
 10 Q. And then your travel, have you given any
 11 thought to how you would quantify that? Are you talking
 12 about your actual costs, your cost plus time, or have
 13 you thought about it?
 14 A. I'm not going to charge my time, just travel
 15 costs. My airplane ticket, and my rental car, something
 16 like that.
 17 Q. Anything else, as you sit here today, that
 18 would be included as part of your monetary damages?
 19 A. Nothing that I can think of, other than what
 20 we've gone over.
 21 Q. Okay. I need to have you return to Exhibit 7.
 22 Exhibit 7, again, is your responses to Nancy
 23 Gentry-Boyd's first interrogatory and requests for
 24 production of documents. And if you could turn to page
 25 18.

1 MS. FOSTER: I'll object to the extent it's
 2 work product.
 3 Without waiving any objection, you can answer.
 4 THE WITNESS: Yeah, I don't think it's going
 5 to be a tremendously big number, so I don't think I'm
 6 going to the pursue it.
 7 MR. MILLEMANN: So as you sit here today, you
 8 believe you are not going to pursue it. I guess at a
 9 minimum, Counsel, I would like an agreement that if that
 10 position changes, there will be a supplemental answer to
 11 this interrogatory?
 12 MS. FOSTER: Agreed.
 13 Q. (BY MR. MILLEMANN) And then you also, Ed,
 14 mention damages for loss of use. Have you made any
 15 effort to quantify whether -- you've testified that you
 16 weren't able to use the property during that, call it
 17 three-month period.
 18 A. Yeah.
 19 Q. Have you made any effort to qualify those?
 20 A. I could. I haven't done it yet. I could.
 21 Get a very similar rental, find out what the rental
 22 value was per month during the summer, during those
 23 months, and take it that way.
 24 Q. Is that how you would go about trying to
 25 figure it out?

1 A. (Witness complying.)
 2 Q. And specifically, your answer to Interrogatory
 3 22. Interrogatory 22 asks you to itemize the amount of
 4 damages that you have incurred at least as of the time
 5 that you did this answer, or that you approved this
 6 answer.
 7 Since this is probably my only chance to talk
 8 with you between now and trial. I just want to make
 9 sure that I have the benefit of your best and current
 10 thinking. In your recitation in answer to Interrogatory
 11 22 of your possible damages. You include diminution in
 12 value.
 13 As you sit here today, are you claiming that
 14 in addition to the cost of repair, that these conditions
 15 that you had to fix have resulted in a permanent
 16 diminution in the value of the home?
 17 A. I can't rule it out, but it's unlikely.
 18 Q. Have you asked anyone to evaluate that
 19 question for you?
 20 A. Yeah, I've looked into it, but I don't know if
 21 I'm going to pursue it.
 22 Q. When you say, you've looked into it. Have you
 23 retained any expert to look into it?
 24 A. I have had somebody look at it. And to tell
 25 you the truth, I don't think it's --

1 A. Probably.
 2 MS. FOSTER: Without waiving the work product
 3 objection, you may ask these questions. I'm not trying
 4 to interfere. But if I'm doing the math, he's not going
 5 to tell you about it.
 6 THE WITNESS: No.
 7 MR. MILLEMANN: Anything else?
 8 MS. FOSTER: No.
 9 Q. (BY MR. MILLEMANN) Do you rent the house?
 10 A. Do I rent the house?
 11 Q. Yes, sir.
 12 A. We have rented the house.
 13 Q. On approximately how many occasions since you
 14 purchased the home, have you rented it?
 15 A. Twice.
 16 Q. And for what length of time?
 17 A. Two weeks each.
 18 Q. And when was that generally, if you recall?
 19 A. I think it was last summer; August, September.
 20 Q. Of 2015?
 21 A. Yes, sir.
 22 Q. And did you rent it yourself, or through an
 23 agent of some sort?
 24 A. I rented it ourselves.
 25 Q. Two separate people, Ed?

1 A. Yes.
 2 Q. And do you remember what rent you received for
 3 the house for those two occasions?
 4 A. I'm sorry. I don't recall.
 5 Q. I don't remember receiving any documents
 6 related to that. And that's not casting an aspersion on
 7 anyone. But to the extent that you intend to pursue a
 8 loss of use claim.
 9 MR. MILLEMANN: Counsel, do you have any
 10 objection to obtaining documents from Ed, pertaining to
 11 his rental of the property, and providing them?
 12 I have no problem with that, if that's the way
 13 we're going to use it. You know, I think I -- subject
 14 to objection, you know, there might be the other way of
 15 doing it by just getting a comparable rental, and doing
 16 it how much that way. Do you understand what I'm
 17 saying?
 18 Q. (BY MR. MILLEMANN) I understand what you are
 19 saying. I guess what I would ask, and if I need to make
 20 a separate request for production of interrogatory, I
 21 will. I think the fact that if you pursue a loss of use
 22 claim, and that's ultimately got to be your choice.
 23 A. Right.
 24 Q. The fact you rented the house would be a
 25 discoverable fact in discovery. So I would like the

1 Q. Well, so you are the only person who complied
 2 with that restriction.
 3 A. Yeah. My neighbor doesn't do it to well.
 4 Q. And then back to your answer to Interrogatory
 5 No. 22. You also mentioned, whoever prepared this, the
 6 answer you verified mentions other consequential
 7 damages.
 8 As you sit here today, are you aware of any
 9 other?
 10 A. No, sir.
 11 MR. MILLEMANN: If we could take a few
 12 minutes, I think I'm finished.
 13 THE WITNESS: That's fine.
 14 (A recess was had.)
 15 MR. MILLEMANN: I don't have any further
 16 questions. Thank you, Ed.
 17 THE WITNESS: Thank you.
 18 EXAMINATION
 19 QUESTIONS BY MR. COLLAER:
 20 Q. Good afternoon. Mr. Petrus, we met briefly.
 21 I'm representing Kevin Batchelor and Re/Max in this
 22 matter. I'm going to try very hard not to re-plow
 23 ground that you've already been asked. So that we are
 24 not wasting your time here this afternoon.
 25 The question I had was, on Exhibit No. 13

1 information on that, unless your counsel thinks for some
 2 reason it's privileged?
 3 MS. FOSTER: Steve, you are probably right on
 4 that. Can I just get down the road with you on getting
 5 that? I am sure you are right. I want to double-check
 6 it.
 7 MR. MILLEMANN: Let me know; yes or no.
 8 MS. FOSTER: Yes.
 9 MR. MILLEMANN: If I need to make a
 10 supplemental request, I will.
 11 MS. FOSTER: Yes, will do.
 12 Q. (BY MR. MILLEMANN) Had you made any
 13 commitments to anyone to rent the house for any part of
 14 April, May, or June of 2014?
 15 A. No.
 16 Q. So you didn't have any commitments that you
 17 had to break because of the repairs?
 18 A. No, because I knew we were going to do the
 19 work.
 20 Q. And other than the two occasions you've told
 21 me, last August and September. Any other times you
 22 recall renting the house?
 23 A. I don't think I was permitted.
 24 Q. Until you acquired fee simple?
 25 A. Yes, sir.

1 there was a bill about when the barbecue line was
 2 installed after you owned the property.
 3 A. Yeah.
 4 Q. Do you remember that?
 5 A. Uh-huh.
 6 Q. My question is, when was that work done in
 7 relation to the closing?
 8 A. If I recall, this was done after the closing.
 9 Q. Now, because in the inspection report, the
 10 McKenna inspection report, it would suggest the line was
 11 found in the crawlspace uncapped, and it was recommended
 12 to be capped.
 13 A. A different issue.
 14 Q. But that was actually done prior to closing;
 15 correct?
 16 A. Correct.
 17 Q. And that was paid for, or accounted for in the
 18 closing documents, or the closing statements, on who was
 19 paying for that?
 20 A. Correct.
 21 Q. Okay. As I recall, that was paid for by the
 22 seller?
 23 A. As I recall, yes.
 24 Q. I understand you've known Mr. Batchelor for a
 25 number of years; correct?

1 A. Yes.
 2 Q. Did you know him prior to moving up here to
 3 McCall?
 4 A. Yes.
 5 Q. How long had you known him down in San Diego?
 6 A. Several years.
 7 Q. What was the context of the two of you
 8 meeting?
 9 A. Indian Princess.
 10 Q. As I recall, it was through your kids?
 11 A. Yeah, Indian Princesses.
 12 Q. So both your daughters were involved in that
 13 program, so the parents got to know each other?
 14 A. Pretty much. He was a neighbor, kind of.
 15 Q. Right. And you also represented Mr. Batchelor
 16 when he sold a home, and he wanted to get his earnest
 17 money, and somebody didn't pay the earnest money. Do
 18 you recall that?
 19 A. It was a little bit more than that, but, yes.
 20 Q. But you were his attorney in that regard?
 21 A. Yes.
 22 Q. Was a lawsuit actually filed?
 23 A. Yes.
 24 Q. And did it go to trial?
 25 A. Yes.

1 Q. Actually, had to go to court, put on evidence,
 2 in fact, to a jury, or to a court?
 3 A. To a judge.
 4 Q. What was the outcome? What was the judgment
 5 rendered?
 6 A. I don't recall the judgment. We won. We
 7 ended up being successful.
 8 Q. Okay.
 9 A. I would have to look. I would have to get my
 10 files out. But it was -- Kevin did very well on that
 11 case.
 12 Q. So you collected the earnest money, and
 13 anything over and above the earnest money that was owed
 14 to him?
 15 A. Oh, yes, much more.
 16 Q. Such as?
 17 A. Loss of use, loss of the sale.
 18 Q. Okay.
 19 A. He named some real estate brokers, as well.
 20 This guy who started this was a really bad character.
 21 He had three bankruptcies, and he had spent several
 22 years in the federal penitentiary for fraud. He was one
 23 of these -- what do you call them? The guys that don't
 24 believe they have to pay their taxes. They are the -- I
 25 forget the name. They are infamous now. They are all

1 over on television. They do 60 -- 20/20 exposés on
 2 these people.
 3 Q. Sure. They are involved in some kind of
 4 mortgage fraud, those kinds of things?
 5 A. Yes.
 6 Q. Tell me, focusing on when you were looking for
 7 property up here in Valley County, did you work with
 8 anybody, other than Mr. Batchelor in your search?
 9 A. No.
 10 Q. And you described all the properties that you
 11 looked at, and made offers on. Was there any other
 12 properties that you left out, that we haven't talked
 13 about today?
 14 A. That we made offers on, or that we looked at?
 15 Q. Let's talk about any offers. As I understand,
 16 you made an offer. Thought you may have had a deal, and
 17 then it didn't work out.
 18 A. Well, not so much that it was rejected off the
 19 very beginning. They weren't going to come off their
 20 asking price.
 21 Q. Sure.
 22 A. But we had indicated to them what we would be
 23 willing to pay for the property. Which turns out to be
 24 much more than they actually got for the property.
 25 Q. Right. Okay.

1 A. And I think that was the Wilson house, owned
 2 by the Wilson's. We looked at a bunch of other houses.
 3 I don't think we ever made any other offers.
 4 Q. Okay. Was there houses that you looked at,
 5 but didn't make offers on? I presume there was just
 6 nothing that you saw that you wanted to pay for, or that
 7 you wanted to purchase?
 8 A. That's correct. I mean, we mainly looked on
 9 the lakefront. There were a couple of Whitetail houses
 10 that Kevin sent me over to look at. They were nice
 11 houses, but they weren't on the lake.
 12 Q. You were focusing on, you wanted property on
 13 the lake?
 14 A. Yes, sir.
 15 Q. Were you going to seriously consider anything
 16 other than lakefront?
 17 A. Yes, I probably would have for the right
 18 house.
 19 Q. Okay.
 20 A. But you're right, my primary purpose was the
 21 lake.
 22 Q. Okay. And the house in Tamarack that you
 23 sold, was that a short sale, or how did it work out?
 24 A. That was a short sale. It was one of these
 25 things, the lender gave me one of these offers I

1 couldn't refuse. He actually gave me cash to get out of
 2 the deal.
 3 Q. Did you end up losing money on that property,
 4 or come out even?
 5 A. You know, I really don't recall.
 6 Q. Okay.
 7 A. I really don't recall how I came out on that
 8 property.
 9 Q. And then it took you almost two years after
 10 that to locate a property that you actually purchased;
 11 correct?
 12 A. I would say, at least two years. Yes, sir.
 13 Q. All right. Tell me, when you were working
 14 with Mr. Batchelor, did the two of you enter into any
 15 kind of written representation agreement?
 16 A. I thought we did, yes.
 17 MR. MILLEMANN: Okay. What exhibit is next?
 18 THE REPORTER: Exhibit 27.
 19 (Exhibit 27 marked.)
 20 Q. (BY MR. COLLAER) Could you identify Exhibit
 21 No. 27 for me, please?
 22 A. This says, "Buyer Representation Agreement."
 23 Q. You see at the first page, paragraph No. 1,
 24 where it says, "Buyer." Do you see that?
 25 A. Yes.

1 Q. Were you were asked to produce documents to us
 2 in response to our discovery?
 3 A. I would imagine so.
 4 Q. Okay. And what did you do to gather
 5 responsive documents about the transaction, and whether
 6 it be in contracts, letters, emails, stuff like that,
 7 what did you do to gather those materials?
 8 A. Well, in your particular -- we asked
 9 Mr. Batchelor for his file on this matter. I didn't
 10 have a copy of this. This came out of Kevin's file.
 11 Q. My question is, when you responded to our
 12 discovery requests, what did you do to gather documents
 13 together to produce?
 14 A. Well, you would have to ask my lawyer -- my
 15 attorney, as far as what they did. But as far as I was
 16 concerned, I looked for responsive documents that I
 17 had --
 18 Q. Sure.
 19 A. -- on my computer, and that I had in my
 20 possession.
 21 Q. Okay.
 22 A. And then I turned them over to my attorney.
 23 Q. Did you have emails or letters on your
 24 computer that you gave to your attorney; you gathered
 25 and gave to your attorney?

1 Q. That references yourself; does it not?
 2 A. That's what it says, yes.
 3 Q. You look down at the bottom of page 1, under
 4 "Buyer's Initials."
 5 A. Yeah.
 6 Q. Do you recognize the initials there?
 7 A. No, not really.
 8 Q. Are those your initials?
 9 A. Those do not look like my initials, and it
 10 does not look like my signature either.
 11 Q. On page 3?
 12 A. Yes.
 13 Q. Is it your testimony, that you did not sign
 14 this document?
 15 A. I don't recall signing this document. And
 16 then, as I said, it does not appear to be my signature.
 17 Q. Is it possible that you did sign it, and you
 18 don't remember it?
 19 A. Anything is possible.
 20 Q. But my question, Mr. Petrus, is it your
 21 testimony, that you did not enter into a Buyer's
 22 Representation Agreement with Mr. Batchelor?
 23 A. I don't recall if I did or didn't.
 24 Q. You can't say one way or the other?
 25 A. No, this just does not look like my signature.

1 A. I think I gave them a couple of emails.
 2 Q. Any letters?
 3 A. I don't recall any letters, just emails.
 4 Q. Did you recall any correspondence or emails
 5 between yourself and Mr. Batchelor, dealing with what he
 6 was going to do as far as representing yourself?
 7 A. No, there was nothing like that.
 8 MR. COLLAER: Handing you what I'm going to
 9 mark as Exhibit No. 28.
 10 (Exhibit 28 marked.)
 11 Q. (BY MR. COLLAER) Would you identify No. 28
 12 for me?
 13 A. It says, "Right Now You Are a Customer."
 14 Q. Could you look down at the signature line in
 15 the lower left-hand corner?
 16 A. Yes.
 17 Q. Do you recognize that signature?
 18 A. That could be my signature.
 19 Q. Does your handwriting on the date look to be
 20 your own?
 21 A. It doesn't -- it doesn't look like my
 22 signature. I can't say with -- I can tell you, this is
 23 not my signature. But this -- I can't tell for -- one
 24 way or another whether this was my signature or not.
 25 Q. So No. 28 --

1 A. I do recall getting one of these in connection
 2 with Tamarack.
 3 Q. Do you recall getting a new brochure from
 4 Mr. Batchelor in any other setting?
 5 A. No. I recall getting something like this
 6 (indicating) in connection with Tamarack.
 7 Q. When you purchased, or when you sold?
 8 A. When I sold Tamarack. He didn't buy Tamarack
 9 for me.
 10 Q. Who was representing you when you sold
 11 Tamarack?
 12 A. Mr. Batchelor.
 13 Q. Tell me, when you told Mr. Batchelor, when he
 14 was looking for properties for you, other than lakefront
 15 properties, was there any other specific details or
 16 amenities you told him that you were looking for?
 17 A. Not really.
 18 Q. Was there any characteristics that you told
 19 him that you did not want?
 20 A. I can't recall.
 21 Q. These houses that you looked at that you
 22 rejected, was the issue floor plan, or price, or --
 23 A. Well, there was a couple of houses -- there
 24 was one house, in particular, that I was somewhat
 25 interested in, but the master bedroom -- the floor

1 when you found the Payette Drive property, and the first
 2 time you toured it, you and Mr. Batchelor walked through
 3 the property, was it three times, before you made a
 4 written offer to purchase, or am I wrong? Correct me if
 5 I'm wrong about that.
 6 A. I think what I said is that we actually walked
 7 through it twice.
 8 Q. Okay.
 9 A. And we may have driven up -- we may have
 10 driven up to it.
 11 Q. And, Mr. Petrus, to be clear, what my question
 12 was, is in the time frame prior to making a written
 13 offer to purchase the property, how many times were you
 14 and Mr. Batchelor at 2130 Payette Drive?
 15 A. Inside the house at least twice.
 16 Q. Okay.
 17 A. We may have been there on the third occasion,
 18 but not have gone inside.
 19 Q. The first time you were there, was with
 20 yourself, Mr. Batchelor, and your fiancée, Ellen, and
 21 the three of you walked through the various rooms in the
 22 house; correct?
 23 A. Correct.
 24 Q. How did you gain access?
 25 A. Kevin was able to get us into the house.

1 plan -- I would say, the floor plan was not -- was not
 2 appropriate. The master bedroom was too small. The
 3 kitchen was -- they were all just melted together.
 4 Q. And, Mr. Petrus, returning again, just briefly
 5 to Exhibit No. 27. Is it your testimony that you did
 6 not at any time enter into a written representation
 7 agreement with Mr. Batchelor?
 8 MS. FOSTER: Objection; asked and answered.
 9 THE WITNESS: Yeah, I don't recall entering
 10 into a written representation agreement with respect to
 11 the purchase of the home on Payette Drive.
 12 Q. (BY MR. COLLAER) Well, if you look at No.
 13 27, this is not limited to Payette Drive. So my
 14 question is, with respect to your search for properties
 15 to purchase in Valley County, did you, or did you not,
 16 enter into a written representation agreement with
 17 Mr. Batchelor and Re/Max Resort Realty?
 18 A. I can't recall. This is not my signature. So
 19 I can't -- as far as this agreement is concerned, I
 20 would have to say, no.
 21 Q. Do you ever recall signing a representation
 22 agreement that looked like Exhibit 27, with
 23 Mr. Batchelor and Re/Max Realty?
 24 A. Not that I recall.
 25 Q. Now, as I understand your prior testimony,

1 Q. Did he have a key? Was there a lockbox?
 2 A. I don't recall.
 3 Q. Okay.
 4 A. I think Michael Wood met us there one time.
 5 Q. Is that the first time, or the second time you
 6 were through?
 7 A. I can't recall.
 8 Q. Okay.
 9 A. And I could be wrong on that, too.
 10 Q. Understood. The first time that you were with
 11 Mr. Batchelor, the first time you walked through the
 12 home, how long were the three of you there?
 13 A. Quite a considerable amount of time. I just
 14 don't remember offhand exactly how much, less than an
 15 hour.
 16 Q. When you first walked into the home, was there
 17 something that you saw that just caught your eye that
 18 you either liked or disliked?
 19 A. I think the view, more than anything, was
 20 probably the biggest selling point of the house.
 21 Q. That would be something you liked?
 22 A. Yes.
 23 Q. I presume. I've seen pictures of it. It is
 24 spectacular.
 25 A. Yeah.

1 Q. As you walked through the home, you could see
 2 just how the rooms were configured, and what its
 3 condition, that type of a thing, was there anything that
 4 you saw that you didn't like?
 5 A. Well, there is nothing that I didn't -- let me
 6 put it this way. There were things that if I had my way
 7 of doing, I would have changed. Okay?
 8 Q. Understood.
 9 A. But there is nothing that I just was ready to
 10 throw up on.
 11 Q. Sure.
 12 A. Does that answer your question?
 13 Q. I think it does. Maybe the better way to
 14 characterize it is, if it had been your custom home, the
 15 layout would be a little different?
 16 A. Correct.
 17 Q. But as it was built, there was nothing about
 18 the layout that made you decide, I'm not interested in
 19 the home?
 20 A. That's very well put.
 21 Q. When you went inside, was the house clean?
 22 A. Yes.
 23 Q. The areas of the dining room and the kitchen,
 24 was it hardwood floor?
 25 A. Yes.

1 walked through the property, what was your understanding
 2 of whether Ms. Gentry was still living there on a
 3 regular basis, or did you have an understanding one way
 4 or another?
 5 A. It looked lived in.
 6 Q. Do you know if she was living there at the
 7 time?
 8 A. I was told that she was not there 24/7, but
 9 that she lived there quite often.
 10 Q. So after your first visit, could you describe
 11 for me the conversations between yourself and
 12 Mr. Batchelor about 2130 Payette Drive, from the time of
 13 your first visit, until you went back for your second
 14 visit?
 15 A. No, just that we liked -- you know, he was
 16 very -- very positive on the home. He thought that it
 17 would be a good match for me. You know, he was
 18 very -- you know, he used the same -- basically, the
 19 same selling points that Jean Odmark and Michael Wood
 20 were. You know, he was bringing out the fact that, I
 21 guess, the cost of construction was something like 1.3
 22 million or something. And it was a bargain at 800,000.
 23 You know, it was a very well built home. It
 24 was -- Chris Kirk was the contractor, a wonderful
 25 reputation. The house was extremely solid. And, you

1 Q. Was it finished hardware? I mean, did it have
 2 a shine on it?
 3 A. I don't know if it had a shine, per se. But
 4 it was kind of a -- it was a very nice hardwood. I
 5 wouldn't call it very shiny, no.
 6 Q. Okay. Did you detect any kind of staining or
 7 anything, on the hardwood in the kitchen or the dining
 8 room?
 9 A. I don't recall.
 10 Q. Specifically in the area of these french doors
 11 we've been talking about, did you see any staining, or
 12 discoloration on the hardwood floor in that area?
 13 A. No.
 14 Q. As you walked around on the hardwood floor in
 15 that area, did the floor appear solid?
 16 A. I didn't walk over there.
 17 Q. At any part of the house when you were
 18 walking, did the floor appear to be solid to you?
 19 A. Wherever I was, it appeared to be solid.
 20 Q. Was there any room, or any rooms while you
 21 were there that first visit, that you did not walk
 22 through?
 23 A. No. No. There were no rooms I didn't walk
 24 through, or let's -- stuck my head in.
 25 Q. Okay. Tell me, at the time that you first

1 know, it was -- it was a very good deal.
 2 Q. Okay.
 3 A. Basically.
 4 Q. Tell me --
 5 A. Well, and let me -- we also went into, to a
 6 certain extent about, I wasn't too happy about the fact
 7 that it was a leased property.
 8 Q. Sure.
 9 A. And that was something that we had to discuss
 10 over quite extensively and overcome.
 11 Q. Certainly. You would have preferred deeded
 12 property. But I don't know how many opportunities for
 13 deeded property on the lake existed at that time, or do
 14 you know of any?
 15 A. Well, some of the other houses we looked at,
 16 the one Wilson house that we looked at, that was deeded.
 17 Q. Okay.
 18 A. And there were some other houses deeded. But
 19 all in all, he thought that given everything, I could
 20 line up to buy the property at some point.
 21 Q. And the fact that you might be able to buy the
 22 property at some point, that turned out to be true;
 23 correct?
 24 A. Yeah, it wasn't easy though.
 25 Q. Understood.

1 A. Yeah.
 2 Q. And do you have any reason to believe that his
 3 estimate of the construction costs of the property of
 4 the home of 1.3 million, was anything inaccurate about
 5 that?
 6 A. No, I have no reason to doubt.
 7 Q. Okay.
 8 A. That that was -- because, I mean, I heard it
 9 so many times I --
 10 Q. Sure.
 11 A. Yeah, I --
 12 Q. Did you have any reason to believe that the
 13 reputation of Mr. Kirk at that time as a contractor in
 14 the community was good?
 15 A. Did I have any reason to doubt --
 16 Q. Yes.
 17 A. -- Mr. Batchelor's reputation of Mr. Kirk at
 18 the time?
 19 Q. Yes.
 20 A. No.
 21 Q. Do you have any information suggesting
 22 Mr. Batchelor was aware of anything that he should have
 23 told you about, that Mr. Kirk was anything, but a
 24 reputable, well thought of builder?
 25 A. At the time, no.

1 Q. But suffice it to say, some period of time
 2 lapsed between the two visits?
 3 A. Correct.
 4 Q. And at the time of the second visit, had you
 5 and Mr. Batchelor been having any conversations about
 6 whether or not you wanted to write an offer?
 7 A. I don't think so. Not at that juncture.
 8 Q. Had you made a decision that you wanted to
 9 make an offer yet?
 10 A. No. And I pressed Kevin on other -- on other
 11 availabilities.
 12 Q. Okay. And did he give you other properties
 13 that were available?
 14 A. Just that one house that I talked about, you
 15 know, with the master being too small, and all that.
 16 That was the only thing that came up around that time --
 17 Q. Okay.
 18 A. -- that was even in the ballpark. And there
 19 was one -- can I add some more?
 20 Q. Absolutely.
 21 A. And there was one at -- I was attracted to a
 22 house over at -- what is it? Whitetail. It was a very
 23 nice house. But again, no lakefront, and there were
 24 some other issues about it that I can't recall.
 25 Q. Tell me, the second tour of the home, again,

1 Q. So the impression I'm getting is what
 2 Mr. Batchelor was telling you about the home of why he
 3 thought it would be a good fit for you. As far as you
 4 knew, he was telling you accurate information?
 5 A. I wouldn't disagree with that at all.
 6 Q. Now, the second tour. How much time elapsed
 7 from your first tour to the second time you went through
 8 the home?
 9 A. You know, I'm sorry. I should be better on
 10 dates, but I just --
 11 Q. Approximates is fine. A couple of days, a
 12 couple of weeks?
 13 A. No. God. I really can't recall.
 14 Q. Was it over a month?
 15 A. I would have to go back and look at the
 16 pictures, I would think. That would --
 17 Q. That's fair.
 18 A. That would give me -- we took pictures both
 19 times we were there.
 20 Q. Okay.
 21 A. And there might be some date stamps on those
 22 pictures.
 23 Q. Sure. And you took pictures each time you
 24 walked through?
 25 A. The two times we walked through.

1 you and Mr. Batchelor were there. How about Ellen?
 2 A. Ellen was there.
 3 Q. Other than the three of you, and you said
 4 perhaps Mike Wood may have been there, too?
 5 A. Mike Wood had let us in at one time, and I
 6 think, Cathy Batchelor one time, as well.
 7 Q. Prior to making the offer?
 8 A. Yes.
 9 Q. Now, the second tour of the home, when you got
 10 there, how long were you in the home during that visit?
 11 A. I would say about the same time.
 12 Q. So a little less than an hour?
 13 A. Yes.
 14 Q. What were you doing while you were there?
 15 A. The same thing as we always did, look at
 16 house, take pictures, look around, take measurements.
 17 Q. Is there a reason you wanted to look and see
 18 at the house after the first visit?
 19 A. Yes.
 20 Q. What were you looking for?
 21 A. I was looking at a house that I could like,
 22 and I could live in.
 23 Q. You were looking at the layout to see if this
 24 was something I could live in?
 25 A. Right.

1 Q. Understood. Was there anything when you got
2 there that caused you any -- that you didn't like?
3 A. Again, I don't think so.
4 Q. Other than what we've talked about earlier?
5 A. No. No. No. Like I said, there were things
6 that if I had to do it my way, it would have been done
7 differently.
8 Q. Certainly.
9 A. Nothing is perfect, but it was a very nice
10 house.
11 Q. Understood. I understand if it was a custom
12 home, and you were working with the architect.
13 A. Yes, right.
14 Q. The floor plan would be a little different.
15 A. Right.
16 Q. Because it would be to fit your desire, what
17 you want?
18 A. Right.
19 Q. But there was nothing about the floor plan of
20 this house that made you think, I can't stand this, and
21 I can't live here?
22 A. No.
23 Q. This is too weird for me?
24 A. No.
25 Q. Nothing of that nature?

1 A. You know, he had thought that we could -- you
2 know, he had come -- you know, Kevin is notorious for
3 suggesting lower, you know, lower offers. And I think
4 that he thought we could get the house for a lot less
5 than we eventually did buy it for.
6 Q. Okay.
7 A. And there is nothing wrong with that. But I'm
8 just saying, he's notorious for coming in low.
9 Q. But that's him representing you; correct?
10 A. Right.
11 Q. So during this tour, did the two of you talk
12 about potential prices to offer?
13 A. I think we did.
14 Q. So am I correct in assuming, that at least at
15 the time of this second walk through, you were
16 interested enough that you were considering making an
17 offer to purchase?
18 A. I think so, yes.
19 Q. How soon after the second tour, was the first
20 offer actually written?
21 A. Not too -- maybe a few days.
22 Q. Okay.
23 A. You know, this may have been the third one. I
24 just want to make sure.
25 Q. Understood. And when the offer was written,

1 A. No. If it was, I wouldn't have bought the
2 house.
3 Q. I would assume that.
4 A. Right.
5 Q. As far as physical condition of the house, was
6 it in the same condition as it was during your first
7 visit?
8 A. As I recall, yes.
9 Q. You didn't see any kind of water staining, or
10 discoloration on the wood floors, or anything like that?
11 A. No.
12 Q. Did you open and close any of the doors
13 leading to and from the deck?
14 A. The one -- we did go out on the deck through
15 the center doors.
16 Q. But not the french doors that we've been
17 talking about?
18 A. No.
19 Q. Tell me, during the time that you did this
20 second tour, can you describe for me the conversations
21 you've had with Mr. Batchelor about the home while you
22 were at the house?
23 A. The same basic sort of thing, you know, Kevin
24 was pushing me to buy it, to make an offer.
25 Q. Sure.

1 were you with Mr. Batchelor when the RE-21 was being
2 filled out?
3 A. I don't believe so, no. We did it back in his
4 office.
5 Q. Were you at the office with him while he was
6 doing it?
7 A. No, not the entire time.
8 Q. Okay. I'm assuming that because you've
9 already identified it, and your initials and signature's
10 on it; correct?
11 A. I believe so, yes.
12 Q. I'm presuming you read that entire contract
13 before you signed it?
14 A. Yes.
15 Q. And, obviously, having been a practicing
16 attorney, you know more about contracts than
17 Mr. Batchelor does; would you agree with that?
18 MS. FOSTER: Objection.
19 THE WITNESS: I don't necessarily know if
20 that's true or not. Not to be a contract lawyer, but I
21 don't know.
22 Q. (BY MR. COLLAER) You, obviously, have legal
23 training?
24 A. Yeah, but in what? I'm a litigator.
25 Q. Tell me, did you consider having the contract

1 drafted by an attorney, or drafting it yourself?
 2 A. No, but I had gotten the -- excuse me. I had
 3 gotten the understanding that you have to use forms in
 4 the state of Idaho.
 5 Q. Where did you get that understanding?
 6 A. Kevin Batchelor.
 7 Q. Tell me, any of the terms on that RE-21, did
 8 you ask him to line any of the preprinted terms out?
 9 A. No, I don't think so. I thought -- you know,
 10 I thought that he had told me that these are pretty
 11 standard, and they had to be used. You
 12 couldn't -- except for maybe there was the little places
 13 that add things. I don't think you were supposed to,
 14 you know, screw with them.
 15 Q. Okay. The purchase price that you offered
 16 this 755, who came up with that number?
 17 A. I think Kevin did.
 18 Q. And you agreed?
 19 A. Yeah.
 20 Q. You started with --
 21 A. Yeah, we kind of did it jointly, to be
 22 completely honest with you.
 23 Q. So it was a discussion back and forth?
 24 A. Right.
 25 Q. Between the two of you?

1 San Diego, and what had -- and, you know, we're not in
 2 San Diego any more. We're actually in a much more foul
 3 weather climate.
 4 Q. Tell me, did you want a local inspector,
 5 considering the fact that you were concerned about the
 6 weather up here, and how it affected homes?
 7 A. Not so much that. I mean, I could have got
 8 somebody from Boise. You know, any kind of cold weather
 9 person, I guess, would have been fine.
 10 Q. Are you aware of inspection companies from
 11 Boise that were doing work up here at that time?
 12 A. No, not that I was aware of. I didn't know
 13 anything about who was available. Other than I had
 14 been -- from time to time, I've seen a lot of
 15 advertisements, and people's vehicles, you know, home
 16 inspector. Not too long ago, I was at Rite Aid over in
 17 McCall, and there was a home inspector.
 18 Q. Do you know how many home inspecting companies
 19 were operating in Valley County at the time you
 20 purchased the Payette Drive property?
 21 A. No, I didn't.
 22 Q. Would it surprise you, there were only two?
 23 A. No, I wasn't told that.
 24 Q. Have you had any contact with the other home
 25 inspector home inspection company at all?

1 A. Yes.
 2 Q. When you got to the portion of the RE-21
 3 dealing with home inspections, did the two of you talk
 4 about having an inspection done?
 5 A. Yes, I insisted on having a home inspector
 6 inspect the home.
 7 Q. Why don't you tell me as much as you recollect
 8 about your discussions with Mr. Batchelor of having a
 9 home inspector?
 10 A. I told him that I wanted it mainly, because
 11 I'm from San Diego. And mainly because we've got a poor
 12 reputation in San Diego. I wanted to have a Cracker
 13 Jack home inspector that I could rely on, that could do
 14 a really good job to make sure that the house was sound.
 15 And given the fact that, you know, the weather here is
 16 not conducive to -- you know, stucco, let's say, or, you
 17 know, it's not conducive to -- the weather, it takes a
 18 beating on things.
 19 Q. Sure.
 20 A. And so I wanted to have a very good, excellent
 21 home inspector to do a great job. That was bonded.
 22 That was insured. That was going to stand behind it,
 23 and inspect everything, and to make sure the house was
 24 sound. Because I was investing a lot of money, and
 25 because of general reputation of what had gone on in

1 A. No.
 2 Q. Do you know who he is?
 3 A. No. I was never informed of it. And I would
 4 assume that you could use a general contractor, if you
 5 wanted to.
 6 Q. Okay. Do you know of any general contractors
 7 here that are doing home inspections?
 8 A. Not, in particular. But I know in San Diego,
 9 you could probably hire somebody to do a home
 10 inspection.
 11 Q. Tell me, did Mr. Batchelor give you the names
 12 of potential home inspectors?
 13 A. No, he just told me the one person, who would
 14 be the inspector.
 15 Q. Who?
 16 A. Mr. McKenna.
 17 Q. Did he tell you there were other home
 18 inspectors available?
 19 A. At one point, later on, he insisted that he
 20 sent me a letter with three home inspectors in it.
 21 Q. Okay.
 22 A. And I told him, Kevin, that wasn't true. You
 23 sent me a letter. You appointed it. You hired the
 24 inspector. You --
 25 Q. All right. Tell me. Go ahead and finish.

1 A. I mean, yeah, you were the one that picked
 2 McKenna. You insisted on McKenna. You never sent me a
 3 letter with three names on it.
 4 Q. Tell me, are you aware of whether any other
 5 home inspection service here in town has errors and
 6 omissions insurance?
 7 A. I don't know.
 8 Q. Would it surprise you, he does not?
 9 A. No one disclosed one way or the other.
 10 Q. Are you aware of any home inspection services
 11 in Boise who carry errors and omissions insurance?
 12 A. Not that I'm aware of.
 13 Q. And I understand there is a difference of
 14 recollection between yourself and Mr. Batchelor about
 15 providing other home inspectors names, and that type of
 16 stuff. I understand that.
 17 When accepting your version of him suggesting
 18 Mr. McKenna, did you ask Mr. Batchelor any questions
 19 about Mr. McKenna, personally?
 20 A. Yes, I asked about his qualifications, whether
 21 he was insured, what were his qualifications, what was
 22 his reputation.
 23 Q. Okay.
 24 A. All of that.
 25 Q. What were you told?

1 Q. And where did you get that information?
 2 A. I got that from asking other people in his
 3 office.
 4 Q. And who, specifically?
 5 A. Susan -- I forget her last name.
 6 Q. Okay.
 7 A. And I also -- oh, God. I can't remember their
 8 names. If I had a list of the people that work in that
 9 office, I could tell you.
 10 Q. Mr. Petrus, my question to you was: Do you
 11 have any reason to believe that the information that
 12 Mr. Batchelor may have received from Mr. McKenna
 13 concerning his qualifications, his background, whether
 14 or not he had any insurance, was any different from the
 15 information that Mr. McKenna relayed to yourself,
 16 personally?
 17 A. You are asking me to speculate what he told
 18 Kevin. I don't know what he told Kevin.
 19 Q. All right. Tell me --
 20 A. Just that, you know, that I've since heard
 21 that McKenna's reputation is not very good in town.
 22 Q. And again, you've never spoken with Joe Riches
 23 of Mountain Valley Inspections?
 24 A. No.
 25 Q. Do you know what his reputation is?

1 A. Told me he was excellent, told me he was
 2 insured, and he was the best person for the job.
 3 Q. Tell me, did you ever talk to Mr. McKenna
 4 prior to the inspection?
 5 A. Yes, I did.
 6 Q. And why don't you tell me about that
 7 conversation?
 8 A. I just asked him, are you insured? Are you
 9 prepared to do this? You know, how long have you been
 10 doing this? That sort of thing.
 11 Q. And what did Mr. McKenna tell you?
 12 A. He said he had been doing it for a long time,
 13 and that he was a former general contractor, and built
 14 many homes. He was very familiar with construction in
 15 McCall, having done it for many years. Felt very
 16 confident being able to do this home. You know, he said
 17 he was insured and bonded, and, you know, that was it.
 18 Q. Do you have any reason to believe that any
 19 information Mr. McKenna gave you when you talked to him,
 20 was different from the information Mr. McKenna may have
 21 provided Kevin Batchelor about his qualifications,
 22 background, insurance, that type of thing?
 23 A. My understanding -- and maybe this is not
 24 answering your question. My understanding was later on
 25 I found that Kevin's office used McKenna quite often.

1 A. There were a couple of contractors that I
 2 asked about home inspectors. That said that McKenna was
 3 somebody you used if you wanted the sale to go through.
 4 And the other people that were available in town were
 5 more discerning, and much more thorough in their
 6 approach.
 7 Q. Did they tell you any other home inspectors
 8 available in town that were in town, other than
 9 Mr. McKenna and Mr. Riches?
 10 A. They had mentioned several. I just can't
 11 remember them at the time.
 12 Q. Are these home inspection companies, or just
 13 individuals?
 14 A. They are home inspectors.
 15 Q. Tell me, when you spoke with Mr. McKenna, how
 16 soon did you speak with him before the inspection was
 17 actually done?
 18 A. I think I -- after I got the letter from
 19 Kevin, telling me who the inspector was, I called him
 20 within 24 hours, or within a few hours of getting that
 21 letter.
 22 Q. And when you talked to Mr. McKenna, is there
 23 any information he gave you that caused you any concern
 24 that this wasn't the person that you wanted to do your
 25 inspection?

1 A. No.
 2 Q. Prior to the inspection being done, did you
 3 receive any written documentation, or anything from
 4 Mr. McKenna?
 5 A. I can't recall.
 6 Q. Did you sign any kind of an agreement or
 7 contract with him about the inspection?
 8 A. I can't recall. He's not produced anything,
 9 and I don't recall him signing anything.
 10 Q. Tell me, focusing on the home inspection,
 11 itself, what kind of an inspection did you expect that
 12 he would do? And what I'm focusing on, was it going to
 13 be a visual inspection, or was he going to do
 14 destructive testing, that type of thing? What was your
 15 expectation?
 16 A. I expected him to do a thorough investigation
 17 of the construction of the home, and inspect everything
 18 that he says he would inspect, and give me an accurate
 19 depiction of the condition of the home.
 20 Q. Well, my question was, did you expect him to
 21 do a visual inspection of the home, or did you expect
 22 that he would do any kind of destructive testing?
 23 MS. FOSTER: Objection. That wasn't quite
 24 your question.
 25 But you can answer.

1 THE WITNESS: Yes, I expected a different one.
 2 I expected visual plus he would operate -- he would
 3 operate all the doors. He would turn on the faucet to
 4 see if the hot water was running. He would see if the
 5 washer and dryers were working properly. See if all the
 6 lights would go on when you flick on the light switch.
 7 I expected him to not just do a visual, but I
 8 wanted him to check out everything. Now, did I expect
 9 him to drill holes in the wall? Well, of course, not.
 10 But do I expect him to check to make sure that
 11 everything was operable in the house? Yes, sir.
 12 Q. (BY MR. COLLAER) I think I understand. I
 13 think we're talking about the same thing. I think we
 14 are.
 15 Tell me, I understand that you've testified
 16 that he did not open and close all the doors?
 17 A. Correct.
 18 Q. And that's --
 19 A. He admitted so.
 20 Q. And that's what you are critical of the
 21 inspection he did?
 22 A. Correct.
 23 Q. And did you have any -- when you got his
 24 report --
 25 A. Well, I'm critical of other things, too. But

1 THE WITNESS: I don't know what you mean by
 2 destructive testing, but --
 3 Q. (BY MR. COLLAER) I'll be happy to explain it.
 4 A. Let me finish my answer. When he put in his
 5 report that he inspected six doors --
 6 Q. Sure.
 7 A. -- I expected him to inspect every single
 8 door.
 9 Q. Okay. When I talk about a visual inspection,
 10 what I'm talking about is, they are in the area, or they
 11 walk through. They visually, eyes on, look at it, and
 12 they observe whatever they observe.
 13 A destructive testing would be they remove
 14 paneling. They take things apart. Maybe drill holes to
 15 look behind walls, that type of thing.
 16 A. No, I expect him to --
 17 Q. Let me ask the question.
 18 A. No, let me finish.
 19 Q. Let me ask the question. With that
 20 explanation, did you anticipate he was going to do a
 21 visual inspection, or was it to include destructive
 22 testing?
 23 MS. FOSTER: And I'll object to the extent you
 24 are implying that those are the only two methods that
 25 could be expected.

1 go ahead.
 2 Q. When you got his report, by looking at it, was
 3 there any way for you, or anybody who read the report,
 4 could have told you that he did not open and close all
 5 the doors?
 6 A. No.
 7 Q. Do you contend that Mr. Batchelor had any
 8 knowledge that Mr. McKenna had not opened and closed all
 9 the doors?
 10 A. I think there had been complaints to Kevin and
 11 Re/Max about the viability, or the competence of
 12 Mr. McKenna before. And the answer to your question,
 13 maybe he should have questioned McKenna a little closely
 14 given those complaints.
 15 Q. But you have no information suggesting that
 16 Mr. Batchelor actually knew, after the inspection was
 17 done, that Mr. McKenna had not opened and closed all the
 18 doors?
 19 A. No.
 20 Q. Okay. Tell me, is there any condition that
 21 was available through, by turning on the faucets, or
 22 something to make sure that a system is working, turning
 23 on a light switch, or through a visual inspection, that
 24 you contend that Mr. McKenna saw, that he omitted from
 25 his report?

1 A. I'm sorry, what?
 2 Q. That was a bad question.
 3 A. I'm sorry.
 4 Q. Maybe break it into two. Is there any
 5 condition that you contend that Mr. McKenna saw in that
 6 house, that he did not document in his report?
 7 A. Yes.
 8 Q. What?
 9 A. I think the existence of the water in the
 10 place where it was coming out of the crawlspace, and the
 11 amount of water, and the position of how high up the
 12 wall it was, together with the presence of ants,
 13 indicates water intrusion.
 14 And that Mr. McKenna should have, at that
 15 time, indicated a red flag and say, there may be water
 16 coming in here. And there may be water intrusion
 17 somewhere. And you need to further investigate the
 18 issue of water intrusion.
 19 Q. Okay. Well, maybe a better way to ask this
 20 is. Is there any water intrusion which you contend
 21 existed in this house, that Mr. McKenna actually saw,
 22 and actually knew was there, but he did not include it
 23 in his report?
 24 A. I don't think he emphasized it correctly. I
 25 think he saw it, but I don't think he gave it the

1 to and indicated that. And he had indicated to
 2 Mr. Longmire, and to me, that he doesn't always do
 3 everything that he says he does in his report.
 4 Q. And Mr. Longmire told, or relayed to you that
 5 Mr. McKenna made that admission to him?
 6 A. He made that admission to me, too.
 7 Q. Okay. That was after you talked to him after
 8 the inspection report?
 9 A. Right after the door.
 10 Q. Okay. And you've talked about when you talked
 11 to him about the door?
 12 A. Right.
 13 Q. Tell me -- he described the photograph that he
 14 gave of the water in the crawlspace. And his opinion
 15 that it was likely spring runoff, monitor it. Maybe
 16 consider a sump pump.
 17 Is there anything about that description that
 18 you contend is inaccurate?
 19 A. Yes.
 20 Q. What?
 21 A. It's because the amount of water, and the
 22 place that far up the wall is not spring runoff. It's
 23 coming from above. Not below, not from the ground
 24 water, but from above.
 25 Q. Okay.

1 importance. And, in fact, he misled the reader to
 2 believe it was normal seepage, when it wasn't.
 3 Q. Well, I understand what his report says. But
 4 my question was, was other than what he actually saw,
 5 and I understand that you contend as he wrote it up, and
 6 told you what he saw, and given you the picture of what
 7 he's seen, that he should have described it as more of a
 8 concern than he did? Correct me if I'm
 9 mischaracterizing your view of it.
 10 I understand that. But my question is, that
 11 other than that water that he's described in his report,
 12 and he took photographs of, and documented, are you
 13 contending there was any water intrusion, other than
 14 that existed, that he saw, and then just chose not to
 15 include it in his report?
 16 MS. FOSTER: Object to the mischaracterization
 17 of the report.
 18 But you can answer the question.
 19 THE WITNESS: Other than what I've testified
 20 to, no.
 21 Q. (BY MR. COLLAER) Okay.
 22 A. But there are other areas that I since found
 23 out that he said he inspected, that he didn't inspect.
 24 Q. Why don't you tell me about that?
 25 A. There is one that Mr. Longmire had testified

1 A. That, together with the ants, indicate a
 2 presence of water intrusion, that should have been red
 3 flagged.
 4 Q. Okay. Tell me, do the photographs that were
 5 on the inspection report, they show -- let me ask you
 6 this.
 7 Do you contend that there is a better
 8 depiction or view of that water that Mr. McKenna saw,
 9 and the ant intrusion that he saw that he took
 10 photographs of, that was a better view, that should have
 11 been used, other than the one he did?
 12 A. I don't know what -- you are asking me for
 13 speculation. I don't know what pictures he took.
 14 Q. You've seen the inspection report with the
 15 photographs he took of the water on the wall, and of the
 16 ants; correct?
 17 A. I've seen the pictures in his report.
 18 Q. Okay. Do those pictures from the report on
 19 the water, does that show it further up the wall, how
 20 you are describing, that it indicates it's coming from a
 21 source, other than spring runoff?
 22 A. According to experts that I have talked to,
 23 yes.
 24 Q. Just looking at the report, it's the
 25 photographs, itself?

1 A. Yes.
 2 Q. But those photographs you had, and you saw
 3 yourself; correct?
 4 A. Correct, but I'm not an expert.
 5 Q. Understood. Did you discuss the water, or
 6 anything of that, that was in the crawlspace, with Kevin
 7 Batchelor after you got the report?
 8 A. No, Kevin and I and Mr. McKenna discussed it
 9 together.
 10 Q. And did Mr. Batchelor ask Mr. McKenna any
 11 questions about the water that he had found in the
 12 crawlspace?
 13 A. No, he didn't ask any questions. I was the
 14 one asking the questions.
 15 Q. All right. And since you've been in the
 16 house, has the water in this area where these pictures
 17 were taken, reappeared?
 18 A. No.
 19 Q. And what do you attribute that to?
 20 A. I think Beau Value did what a -- well, number
 21 one, the reason why, we've taken care of the water
 22 intrusion.
 23 Q. And what do you contend was the source of that
 24 water?
 25 A. That water was coming from upstairs.

1 understand you were signing, when you signed this
 2 addendum?
 3 A. The document speaks for itself.
 4 Q. Okay. Well, before you signed it, you read it
 5 before you signed it; did you not?
 6 A. Yes.
 7 Q. Okay. Did you have any questions about any of
 8 the materials of Addendum No. 6 before you signed it?
 9 A. No.
 10 Q. Did you ask that any of the language in
 11 Addendum No. 6 be changed?
 12 A. I didn't need to.
 13 Q. As part of the addendum, I think, it's
 14 Addendum No. 5, where there were certain repairs that
 15 were going to be done. Do you remember that?
 16 A. I don't have it in front of me.
 17 Q. Here (indicating). And the second page,
 18 Petrus 157, is the signed version, but it's not real
 19 legible, because it's been faxed back and forth a bunch
 20 of times.
 21 My question to you, Mr. Petrus, is the repair
 22 items that are on paragraph No. 3.
 23 A. Paragraph No. 3?
 24 Q. Yes. Inspection report, and there is a
 25 paragraph A through D. Do you see that?

1 Q. And that's by the french doors?
 2 A. Correct.
 3 THE WITNESS: Before you ask your next
 4 question, do you mind if I run to the rest room?
 5 MR. COLLAER: Absolutely.
 6 (A recess was had.)
 7 Q. (BY MR. COLLAER) Mr. Petrus, in your
 8 inspection contingency addendum, I think, it's Addendum
 9 No. 6. Yes, it's Addendum No. 6, the inspection
 10 contingency release, and that's --
 11 MS. FOSTER: Is it this (indicating)?
 12 MR. COLLAER: No, that's the counteroffer.
 13 MS. FOSTER: Thank you.
 14 Q. (BY MR. COLLAER) I'll show you this, just to
 15 help you. It's part of Exhibit No. 1. It's at the back
 16 of it. Do you see that's got the second page to that,
 17 also? It has --
 18 MR. MILLEMANN: 162 is the signed.
 19 Q. (BY MR. COLLAER) Yes, 162 is the signed
 20 version. Okay?
 21 A. Uh-huh.
 22 MS. FOSTER: I'm sorry. Just give me two
 23 seconds.
 24 Q. (BY MR. COLLAER) When you signed Exhibit
 25 No. 6, the addendum contingency release, what did you

1 A. Yeah.
 2 Q. Were the repairs identified on Addendum No. 5
 3 performed prior to closing?
 4 A. I don't know.
 5 Q. Since you moved into the house, have you found
 6 that any of those repairs were not done?
 7 A. I haven't really taken a look at it in light
 8 of this.
 9 Q. So you can't say one way or another --
 10 A. No, I need --
 11 Q. -- as you are sitting here, today?
 12 A. No, I didn't do a final walk through.
 13 MR. COLLAER: I have nothing.
 14 MR. NEVALA: I just have a few questions.
 15 EXAMINATION
 16 QUESTIONS BY MR. NEVALA:
 17 Q. Mr. Petrus, Dan Nevala. I represent Mr. Kirk.
 18 I just want to ask you a few questions about Mr. Kirk.
 19 Do you remember who first told you that
 20 Mr. Kirk built the house?
 21 A. It would have been one of two people, or it
 22 would have been one of two sources. It would have been
 23 either Kevin Batchelor, or it might have been on the
 24 sales material for the house, the flier.
 25 Q. That would have come from Ms. Odmark's office?

1 A. Something like that, yes.
 2 Q. So it was one of the two real estate agents?
 3 A. Yes.
 4 Q. Do you remember if you knew that prior to
 5 making an offer on the house?
 6 A. Oh, yes, I knew.
 7 Q. Did you visit with anybody outside of the real
 8 estate agents of Mr. Kirk, and his reputation as a
 9 builder?
 10 A. No, not really.
 11 Q. Did you know the house had been designed by an
 12 architect before you made an offer?
 13 A. Yes.
 14 Q. Did you know who the architect was?
 15 A. Yes.
 16 Q. Did you ask anybody about the architect's
 17 reputation?
 18 A. I think I knew the architect.
 19 Q. How did you know the architect?
 20 A. Socially.
 21 Q. Did you know there was an interior designer
 22 involved with the house?
 23 A. No.
 24 Q. So do you remember any conversations with
 25 either of the real estate agents, I guess, it would have

1 A. No, not really.
 2 Q. Have you ever said anything derogatory about
 3 Mr. Kirk's ability to build a house?
 4 A. No.
 5 Q. Do you remember Mr. Kirk coming out for a
 6 second inspection of the house?
 7 A. No, not really.
 8 Q. Do you remember a guy named Steve Lacey coming
 9 out to inspect the house?
 10 A. I don't recall.
 11 Q. I think you testified earlier, that you only
 12 remember having one conversation with Mr. Kirk; is that
 13 right?
 14 A. It was the first inspection.
 15 Q. But you don't remember him ever coming out for
 16 a second inspection?
 17 A. He might have been. I just don't recall.
 18 Q. Do you remember asking him to leave the
 19 property during a second inspection?
 20 A. No.
 21 Q. Do you remember him asking to look at the
 22 gutters in the roof?
 23 A. Yes. I think it was the first time he asked
 24 to get on the roof.
 25 Q. Did you let him?

1 been -- let me rephrase.
 2 Do you remember having any conversations with
 3 Kevin Batchelor about Mr. Kirk, or his reputation as a
 4 builder?
 5 A. I wouldn't call them conversations. I would
 6 call them statements made by Kevin.
 7 Q. Do you remember what he said to you?
 8 A. Yeah, that Mr. Kirk was an excellent builder.
 9 Q. Anything more specific?
 10 A. No.
 11 Q. Did you ever ask him how many houses on the
 12 lake he built?
 13 A. I think Kevin volunteered that he built a lot
 14 of houses on the lake.
 15 Q. Do you feel you were misled by statements
 16 prior to making -- you know, buying this house, about
 17 Mr. Kirk's reputation as a builder?
 18 A. Yeah, about competency, yes.
 19 Q. So you have an opinion now as to Mr. Kirk's
 20 reputation or ability as a builder?
 21 A. Anybody that builds something below code, or
 22 below the standard of care is not someone I would
 23 particularly have a good opinion about.
 24 Q. Have you had conversations with folks after
 25 you bought the house?

1 A. Not the first time, no.
 2 Q. And you don't remember a second time?
 3 A. No.
 4 Q. Do you remember having conversations with
 5 anyone about Nancy and Chris' relationship in building
 6 this house?
 7 MS. FOSTER: Do you have a time frame on that?
 8 Q. (BY MR. NEVALA) After any time, I guess,
 9 either prior to closing or after closing?
 10 A. Prior to closing or after closing? I'm sorry.
 11 I don't understand your question.
 12 Q. Let's break it down. After closing?
 13 A. What was your question? I'm sorry.
 14 Q. Did you talk with anyone about the
 15 relationship between Nancy and Chris prior to closing,
 16 in relation to the construction of this house?
 17 A. Not really, not that I can recall.
 18 Q. Anything since then? Anything post closing?
 19 A. Other than a couple of discussions, yes.
 20 Like, for example, Chris advising not to have a door
 21 that opens out.
 22 Q. Okay.
 23 A. Things of that nature.
 24 Q. And you've testified to that already today. I
 25 remember that.

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1 A. Yeah, that's kind of -- and that Nancy
2 insisted on it. And Chris advised against it. That's
3 what I had heard, things of that nature.
4 Q. At any time prior to closing, did it cross
5 your mind to want to talk to Mr. Kirk about the
6 construction of the house?
7 A. I don't think Mr. Kirk was around at the time.
8 Q. When you discovered the problem with the
9 doors, did it cross your mind to call Mr. Kirk out, and
10 just ask him about these doors?
11 A. I think we did do that.
12 Q. Other than making a demand to fix, or to
13 demand to inspect?
14 A. I think we did do that.
15 MR. NEVALA: Okay. I don't have anything
16 further. Thank you.
17 EXAMINATION
18 QUESTIONS BY MR. PIERCE:
19 Q. I'm Mike Pierce, representing Todd McKenna. I
20 have a few questions. You indicated that after Kevin
21 identified Mr. McKenna to you, that you called him. You
22 called Todd to ask him about his qualifications; is that
23 correct?
24 A. Correct.
25 Q. Do you remember what day that may have taken

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1 place?
2 A. It was after I got a letter from
3 work -- excuse me -- I don't know whether they call them
4 faxes, or emails, or letters now. It was an email or a
5 fax from Mr. Batchelor, from Kevin, saying who the home
6 inspector would be.
7 Q. Okay. And did you call him from -- where were
8 you when you received that communication from Kevin?
9 A. I think I was at home.
10 Q. In California?
11 A. I believe so.
12 Q. And did you call him on your cell phone, or is
13 your home landline?
14 A. I probably use my home phone. Cell service in
15 my home is not very good.
16 Q. Do you have access to records from your
17 landline that you could produce for us, to see when that
18 call was made?
19 A. I don't know if we do or not.
20 Q. Who is your carrier for your cell service?
21 A. AT&T.
22 Q. And was anyone else a party to that call?
23 A. I think Ellen might have been around.
24 Q. Was that the first time you had any contact
25 with Mr. McKenna?

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1 A. Oh, yes.
2 Q. And do you know when it was, in relation to
3 his inspection of the home?
4 A. No, I can only tell you that there is a
5 letter, or an email that we produced from Kevin
6 Batchelor, indicating that Mr. McKenna would be the home
7 inspector. And it was within days that I -- once I got
8 that, that I called Todd.
9 Q. And when was the first time that you actually
10 met Mr. McKenna, personally?
11 A. To go over the report, as I recall.
12 Q. So he had actually done the report before you,
13 personally, met with him?
14 A. Correct.
15 Q. Okay.
16 A. The best that I can recall.
17 Q. Do you recall whether, when you met with him
18 then? If his report was done on March 15th, was that
19 the same day that you met with him, or did you meet with
20 him another day?
21 A. I can't recall. I just know that his report
22 was finished, and we discussed it.
23 Q. Did you meet with him then at the home to go
24 over the report?
25 A. We did meet at the house. And we did go over

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1 the report there.
2 Q. And who was present at that time?
3 A. I want to say -- I think that was asked and
4 answered. But I think it was Kevin Batchelor was there,
5 and I think Ellen may have been there.
6 Q. Okay. And, of course, Mr. McKenna?
7 A. Yes.
8 Q. All right.
9 A. You know, I'm almost positive the report was
10 there. We were going over the pictures. That I
11 distinctly recall, the pictures that were in his report.
12 Q. Okay.
13 A. That's why I assume the report was done,
14 because we were going over the pictures that were in the
15 report.
16 Q. And do you recall, did you go through the
17 whole house with him at that time --
18 A. No, we --
19 Q. -- to look at things?
20 A. No, we had already done his --
21 Q. Okay. So did you just meet with him in the
22 dining room or somewhere, and go over the things?
23 A. I think he met me in the mud room, and he was
24 in a hurry. And he didn't have much time. And I wanted
25 to go over some things with him. And I think it

1 was -- you know, I'm trying to remember whether he
2 dropped the report off, and then I called him later to
3 go over it, or whether we went over it right then and
4 there. I just remember that he was in a hurry that day,
5 and didn't have much time. But he gave me the report,
6 and the pictures. And I did want to -- I did want to go
7 over some things with him.

8 Q. Okay. This may sound like I'm diverging, but
9 I'm trying to get to the issues of timing here.

10 Before you purchased this home, when you would
11 come to McCall, did you stay in motels?

12 A. Well, I owned the house in Tamarack for a
13 while. That's where we stayed when I owned the house in
14 Tamarack.

15 Q. Okay. How did you travel when you came to
16 McCall? Did you fly, and rent a car?

17 A. Usually.

18 Q. Okay.

19 A. Or I would drive up here.

20 Q. Do you recall whether you drove up on this
21 occasion when you met with Mr. McKenna, or if you flew,
22 or rented a car?

23 A. I can't recall.

24 Q. Would you have, like, credit card receipts to
25 maybe help pin those times down for plane fare, car

1 paperless. So I don't know what they keep.

2 Q. Yes, I understand.

3 A. Yeah.

4 Q. Now, when we were off the record, you and your
5 attorney indicated that Ellen had taken some photographs
6 of the home in that same time frame at least, of when
7 you were going through Kevin's inspection; is that
8 correct?

9 A. Todd's inspection.

10 Q. You are correct. I'm sorry. I misspoke.
11 Todd's inspection?

12 A. Yeah. Yeah. We had some pictures.

13 Q. Do you know what date those photographs were
14 taken?

15 A. They were taken at both the -- both the two
16 main inspections that we did. That I was with Ellen,
17 and Kevin, and I don't remember what the dates were.

18 Q. And one of those was prior to your offer, if I
19 understand; correct?

20 A. They were both to -- well, I think they were
21 both prior to a deal being struck.

22 Q. Okay. Did Ellen take any photographs on the
23 day that you met Mr. McKenna at the house to go over his
24 report?

25 A. She may have. I don't recall.

1 rentals, that sort of thing?

2 A. Yeah, I suppose. Yeah.

3 Q. Would you be willing to produce those?

4 MS. FOSTER: We'll reserve possible
5 objections. We can talk about that later.

6 MR. PIERCE: Okay.

7 Q. (BY MR. PIERCE) Now, you indicated earlier
8 that Kevin actually hired Mr. McKenna; is that your
9 understanding?

10 A. Yes.

11 Q. Okay. And did you pay him?

12 A. Yes.

13 MS. FOSTER: Paid?

14 Q. (BY MR. PIERCE) Paid Mr. McKenna. Sorry.

15 A. Yes.

16 Q. When did you pay him?

17 A. Kevin told me to bring a checkbook, and told
18 me when to write the check, and for how much, and when
19 to give it to him.

20 Q. And so you did pay him by check?

21 A. Yes.

22 Q. And would you have a copy of that check that
23 would indicate the date?

24 A. To tell you the truth, I don't know what the
25 banks are doing these days. They are going to

1 Q. And if I understood your testimony correctly,
2 you met with Todd on one occasion to go over his report
3 when it was first made. And then a month or two later,
4 when the defects in the door were apparent to you, he
5 came out for a second visit; is that correct?

6 A. Right.

7 Q. And were those the only two times that you met
8 with Mr. McKenna, personally?

9 A. Yes. He wanted to do it -- he wanted to
10 make -- he wanted to meet over the phone. And I
11 insisted that he come and take a look at the door.

12 Q. Okay. And do you recall, at any time, asking
13 him to change something in his report?

14 A. I never asked him to change anything in his
15 report.

16 Q. Okay.

17 A. The report was only for me. It wasn't for any
18 loan, or any bank, or anything like that. I bought the
19 house for cash.

20 Q. In your earlier testimony, you indicated that
21 you had heard that Mr. McKenna's reputation was not very
22 good in town. Can you tell me where you heard that?

23 A. Several contractors.

24 Q. Do you remember their names?

25 A. I would prefer not to. I don't remember all

1 their names. But he told me that in confidence, and I
 2 would not --
 3 Q. And when did you have those conversations,
 4 roughly?
 5 A. Around the time when the repairs were being
 6 made.
 7 Q. So a year or two later. All right. Okay.
 8 MR. PIERCE: And, Counsel, you are going to
 9 provide copies of those photographs; correct?
 10 MS. FOSTER: Yes. I think we already have,
 11 and I will double-check. If we haven't, I will
 12 supplement.
 13 MR. PIERCE: Okay. I think that's all the
 14 questions I have.
 15 MS. FOSTER: I have a few questions. Do you
 16 need a quick break before we start?
 17 THE WITNESS: No, let's get it over with.
 18 EXAMINATION
 19 QUESTIONS BY MS. FOSTER:
 20 Q. I just want to clear up a few things. You
 21 testified that you've never been in a crawlspace at 2130
 22 Payette; is that right?
 23 A. The one downstairs, yes.
 24 Q. Correct, the downstairs crawlspace?
 25 A. Yes, never been down there.

1 the summer of 2012 about the door, did he ever tell you
 2 that he had -- and if you've testified to this, I'm not
 3 trying to be repetitive. I just want clarified. Did he
 4 tell you, he had any trouble opening and closing the
 5 door?
 6 A. Opening, and closing, and locking.
 7 Q. And he told you that Nancy had had the same
 8 trouble?
 9 A. He told me that Nancy knew about it. Because
 10 they had to tell Nancy, disclose to Nancy, that they had
 11 to leave the door open sometimes.
 12 Q. And did he tell you whether she had any
 13 response to that?
 14 A. That she knew about it being a problem.
 15 Q. And that's the extent of what he said?
 16 A. Yeah, pretty much.
 17 MS. FOSTER: Steve, could you hand me my
 18 exhibits?
 19 Is that's them over there, Colleen; the
 20 exhibits?
 21 THE REPORTER: Yes.
 22 MS. FOSTER: Thank you.
 23 Q. (BY MS. FOSTER) Okay. I'm going to show you
 24 what's previously been marked Plaintiffs' Exhibit 38.
 25 This is the email that he's testified about today. And

1 Q. Would you have trouble getting in and out of
 2 it?
 3 A. I probably would.
 4 Q. Because of the disabilities you've testified
 5 about?
 6 A. Yes, because of my foot, my neck, and my back.
 7 Q. This may or may not have been cleared up. But
 8 at one point, you've testified that you asked Todd
 9 whether the water was a little high in one of the
 10 photos. And at that time, you didn't have a picture in
 11 front of you. Was it, from Exhibit 4, the bottom
 12 picture, 5.0 Picture 5 on RP 60?
 13 A. I believe so.
 14 Q. Is that what you meant by a little high?
 15 A. Yeah.
 16 Q. And is that a wall?
 17 A. Yes.
 18 Q. And is that footing underneath the wall?
 19 A. You know, I believe so. It's been so long
 20 ago.
 21 Q. This is the picture you --
 22 A. That's what I recall.
 23 Q. These were the photos you were talking about?
 24 A. Yes. Yes.
 25 Q. In your conversations with Michael Wood, in

1 it's your clients.
 2 MR. COLLAER: Yeah.
 3 MR. MILLEMANN: Fine.
 4 Q. (BY MS. FOSTER) Can you take a look at that
 5 email for me, please?
 6 A. Yes.
 7 Q. And is this the email that you reference in
 8 your testimony earlier, when Mr. Batchelor informed you,
 9 that Mr. McKenna would be the inspector?
 10 A. I believe so, yes.
 11 Q. And was this the first time that you ever
 12 learned of Mr. McKenna's name?
 13 A. I think so, yes.
 14 Q. This is the first correspondence you received
 15 from Kevin Batchelor about Todd McKenna?
 16 A. Yes. Yes.
 17 Q. So when you said, letter, fax, you may have
 18 meant this email?
 19 A. Yes, that's what I said. I don't know what
 20 they call them, emails, faxes, or letters.
 21 Q. Did you have any conversations on the phone,
 22 or in person with Kevin Batchelor, about Todd McKenna,
 23 prior to this email?
 24 A. At or about -- you know, he called me -- I
 25 can't remember which came first, the email, or me

1 talking to Kevin. But we did have discussions about
 2 Todd.
 3 Q. Right, the ones you testified about today?
 4 A. Right. I don't know whether they came right
 5 before that email, or right after. I think it came
 6 right after.
 7 Q. Okay. And then I also will show you Exhibit
 8 39, which is the second email.
 9 Do you know the one?
 10 MR. COLLAER: Yes.
 11 Q. (BY MS. FOSTER) Okay. Just take a look at
 12 that.
 13 A. (Witness complying.) Yes.
 14 Q. And do you remember receiving this email?
 15 A. I do.
 16 Q. And were you there the day that Kevin
 17 Batchelor conducted his inspection? Let me ask it this
 18 way.
 19 Do you know where you were when you received
 20 that email?
 21 A. No, I don't. I think I was in California.
 22 Q. So you weren't there?
 23 A. I don't -- wait. Hold on a second.
 24 Q. Okay.
 25 A. No, this is -- I think this is a different

1 plaintiffs' exhibit. These are the french doors we've
 2 been discussing; is that right?
 3 A. Yes.
 4 Q. And do you know who took this photo? This
 5 photo was produced, Petrus 318. So that's your
 6 production.
 7 A. Uh-huh.
 8 Q. Do you know who took that photo?
 9 A. Ellen.
 10 Q. And do you know when she took that photo?
 11 A. One of the two inspections we made.
 12 Q. And when you say, "inspections," when you went
 13 out there to walk the home?
 14 A. Right, we looked at the home. I don't know
 15 why I call them inspections. Ellen and I, there were
 16 two times we looked at the house, I testified to. There
 17 were two major times when we took photos.
 18 Q. And is it possible she took photos after
 19 Mr. McKenna did his inspection?
 20 A. Yes. Yes, very, very possible.
 21 Q. And you remember those photos showed an
 22 absence of snow built up?
 23 A. Right. We have one photo outside the door,
 24 showing hardly any snow at all.
 25 Q. Okay. I had a technical failure this morning.

1 day.
 2 Q. A different day that --
 3 A. I think he's talking about Saturday for us to
 4 meet.
 5 Q. Right. So this email says, you were going to
 6 meet the following Saturday?
 7 A. Right.
 8 Q. And is that when you met him --
 9 A. Right.
 10 Q. -- with Mr. Batchelor?
 11 A. Right. That's when -- I don't know if Kevin
 12 was --
 13 Q. Was there or not?
 14 A. Was there, right then and there. But I met
 15 with Todd.
 16 Q. And asked the questions you testified about?
 17 A. Right.
 18 Q. Okay.
 19 A. But then I think Kevin showed up, yeah.
 20 Q. And do you know whether this states from
 21 Kevin, "I am going out to meet him," Todd, "to discuss
 22 the dog run fence." Do you know whether he went out
 23 that day?
 24 A. I don't know if he did or not.
 25 Q. Okay. And I'll show you Exhibit No. 3,

1 I apologize for this. I'm going to show you an Exhibit
 2 on my phone. I'll pass it around first. And I'll make
 3 sure everyone gets it. Pass it around, please.
 4 MS. FOSTER: The only date on there is the
 5 email.
 6 MR. KIRK: Okay. Got it.
 7 MS. FOSTER: But there is native data
 8 associated with that photo, which you have, or will be
 9 provided.
 10 MR. PIERCE: That will identify when it was
 11 taken? Is that a language that I will understand?
 12 MS. FOSTER: Yes, and I will explain to you
 13 how to find it.
 14 Let's mark this as next in line.
 15 THE REPORTER: Exhibit 29.
 16 (Exhibit 29 marked.)
 17 Q. (BY MS. FOSTER) Exhibit 29, do you recognize
 18 that photo?
 19 A. Yes.
 20 Q. Did you know when that photo was taken?
 21 A. Within the day or two of probably the
 22 inspection.
 23 Q. And Ellen took that photo?
 24 A. Yes.
 25 Q. And does that accurately represent what you

1 recall from that time of year?
 2 A. Yes, there was hardly any snow.
 3 Q. And those are the french doors at issue?
 4 A. Yes.
 5 Q. So to round it up. Is it your belief that
 6 Todd McKenna could, in fact, have opened the doors had
 7 he tried; the french doors?
 8 A. Well, he would have trouble getting them
 9 closed again. But he would have been able to open them,
 10 I would think, or he would discover there was problems
 11 with them.
 12 Q. So let me rephrase. He would not have been
 13 prevented by snow --
 14 A. No.
 15 Q. -- from opening the doors?
 16 A. No. As a matter of fact, even if snow had
 17 been up against the door, he could still have tried to
 18 work them to see if they worked properly. And he would
 19 see they didn't work.
 20 MR. MILLEMANN: Counsel, did that photo have a
 21 Bates number on it?
 22 MS. FOSTER: I don't know. If it doesn't,
 23 I'll get it one. But I'm not sure. I'm sorry. This
 24 is --
 25 MR. MILLEMANN: So you don't know if it has

1 A. Yeah. And Kevin was involved at some point,
 2 too.
 3 Q. Okay. If you go to the oldest one, which is
 4 the last one that appears.
 5 A. Okay. They are not done individually. I'm
 6 confused.
 7 Q. It's on the document Bates labeled Batchelor
 8 99. This is an email from you to Michael Wood on August
 9 2nd; is that right?
 10 A. Hold on a second. I'm still having trouble
 11 figuring out how those go.
 12 Q. Everything on those pages are signature lines
 13 that contain no message.
 14 A. All right.
 15 Q. Have you read the email?
 16 A. Yes.
 17 Q. Okay. And you state here, the second sentence
 18 says, "Have you spoken to your client, Nancy Boyd, about
 19 the matters we discussed?"
 20 What does that mean, what matters we
 21 discussed? What does that mean?
 22 A. The doors, getting the doors fixed.
 23 Q. And he told you he was going to talk to Nancy?
 24 A. Yes.
 25 Q. What was he going to talk to her about?

1 been produced?
 2 MS. FOSTER: I think it has been. But my copy
 3 that I have on my phone right now, does not. I'm not
 4 able to get into my phone at work for technical reasons.
 5 And I'll follow-up on it, and see. I believe it's been
 6 produced, yes.
 7 MR. PIERCE: Did you say when it was produced?
 8 MS. FOSTER: You know, let me double check.
 9 It should have been our first production, I think, it
 10 would have been a year ago. But I don't know.
 11 THE WITNESS: Jason would have produced.
 12 MR. MILLEMANN: Jason.
 13 MS. FOSTER: Jason Rudd.
 14 MR. MILLEMANN: Not Mau?
 15 MS. FOSTER: No.
 16 Q. (BY MS. FOSTER) I'm going to show you
 17 now -- we're going to turn to your conversations with
 18 Michael Wood. Show you what was previously marked as
 19 Plaintiffs' Exhibit 6. Can you please take a look at
 20 that? And it's an email string, as you know was reverse
 21 order in timing.
 22 A. (Witness complying.)
 23 Q. And if you look down, you see some
 24 communications between you, and Michael Wood, emails; is
 25 that right?

1 A. The fact that the doors were a problem. They
 2 weren't operational.
 3 Q. And then it says, "In addition to the matters
 4 we discussed, it was apparent that CTR was contacted by
 5 your client about the problem with the doors, but was
 6 never contracted to fix the repair."
 7 What were you talking about there?
 8 A. We found a business card from CTR from the
 9 Nancy business card file.
 10 Q. What is CTR; do you know?
 11 A. It's a restoration, water intrusion
 12 restoration company. They have an office in McCall,
 13 right outside of McCall.
 14 Q. Where was Nancy's business file? Was this in
 15 the house?
 16 A. Yes, it was in her desk. It was in the desk.
 17 Q. Could you tell, were there any other documents
 18 with it --
 19 A. No.
 20 Q. -- about CTR?
 21 A. No, just a business card from CTR.
 22 Q. Was there a date on it?
 23 A. No, it was in the guy's name. I can't
 24 remember.
 25 Q. But that made you think that Nancy had

1 contacted them about the problem with the doors?
 2 A. Well, I would think that it's a water
 3 intrusion company. You don't contact them, unless
 4 you've got a major water intrusion issue.
 5 Q. And a couple of sentences later, it says,
 6 "Those doors have clearly been a problem for Nancy for
 7 years. And the duct tape she used would not fix true
 8 problem."
 9 What were you basing that sentence on?
 10 A. Kind of the discussion we had had. Michael
 11 and I had -- it was kind of confirming that Nancy knew
 12 about it. And that the duct tape is not going to fix
 13 the problem.
 14 Q. Okay. And did Michael ever say to you in
 15 email, or orally, that Nancy did not know about the
 16 doors, or the problem?
 17 A. No. No.
 18 Q. And did you at this time, in August of 2012,
 19 think that Nancy was going to fix the problem?
 20 A. Yes.
 21 Q. Why did you think that?
 22 A. Originally, we thought this was going to
 23 be -- you know, because the way Michael put it. Michael
 24 said this was -- you know, this was basically a known
 25 problem for many years. And that it was -- you know, it

1 A. She said her due diligence was completed prior
 2 to the closing of escrow. You closed escrow. I have no
 3 further responsibilities.
 4 Q. And what do you think that she meant by the
 5 due diligence period, if anything?
 6 A. That we didn't catch it within the five days,
 7 or whatever days we had to do our due diligence. And
 8 tough luck. Got you.
 9 Q. Is that the period when you do a walk through,
 10 the final walk through?
 11 A. I believe so.
 12 Q. And who conducted the final walk through?
 13 A. I don't believe it was Kevin. I wasn't around
 14 for that.
 15 Q. You weren't present for the final walk
 16 through?
 17 A. I don't think so, no.
 18 Q. And did he report for you, the results?
 19 A. We had a list of everything that had to be
 20 done. And he said everything had been done. And he
 21 looked at everything, and said everything was
 22 appropriate, and so we went through with it.
 23 Q. And he didn't say anything about the doors?
 24 A. No.
 25 Q. Okay. Almost done.

1 was relatively inexpensive at the time just to repair
 2 the doors. We thought it was just the doors. You know,
 3 we didn't know the rot had gone on underneath. It
 4 hadn't gotten to the point where we found out all the
 5 problems that needed to be done. So I thought at that
 6 time, all it was, was a replace, and reinstall the
 7 doors.
 8 Q. And did there come a time when you realized
 9 that Nancy was not going to have the problem fixed?
 10 A. Yes.
 11 Q. When was that?
 12 A. Well, there is another email from somebody
 13 that said, go take a hike.
 14 Q. Was the email from Nancy?
 15 A. I don't recall who it was.
 16 Q. I'll show you what was previously marked
 17 Plaintiffs' Exhibit 8, showing two emails in reverse
 18 time order. The bottom one, please take a look at it.
 19 A. (Witness complying.)
 20 Q. What's the date on that email?
 21 A. April 9th, 2013.
 22 Q. 2013?
 23 A. Yeah.
 24 Q. And that's from Nancy, saying that she didn't
 25 feel she had any obligations to fix the doors?

1 A. Okay.
 2 Q. You were asked earlier by Mr. Millemann, about
 3 invoices for work you've had done. Did you receive
 4 invoices in connection for painting you had done by
 5 Herman Hernandez?
 6 A. I did.
 7 Q. Why did you hire Herman to do painting? Well,
 8 let me ask you this. Did you hire Herman Hernandez to
 9 do the painting?
 10 A. No, actually, Beau did the hiring. And we
 11 wanted to use Sean. Sean wasn't available. And Beau
 12 got Herman, I believe.
 13 Q. And why was the painting to be done by Herman
 14 Hernandez?
 15 A. Because all the -- we had to refinish all the
 16 floors. You know, all the floors needed to be
 17 refinished. They took out, you know, a lot of the
 18 stucco inside the house was taken out, and a lot of the
 19 walls were taken out.
 20 Q. During Beau Value's repair?
 21 A. Yeah, during Beau Value's repair. And there
 22 was filth everywhere. There was crap everywhere. And
 23 then there had to have been -- you know, there was
 24 issues with mold. There was Stachybotrys mold on the
 25 two by fours, and all of that. And then they had to

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1 refinish all the floors. And that created a lot of dust
 2 and dirt all over the house. And then, you know, we had
 3 to paint some of it. And then they suggested we repaint
 4 the whole first floor, just in the living room.
 5 Q. Do you know who suggested that?
 6 A. I think it was Beau. No, it was Eric. He
 7 suggested that we did all -- the whole thing. Also,
 8 Herman said that. Herman said, you can't match this.
 9 Q. Because of the paint?
 10 A. Right. It's going to look different.
 11 Q. So was it your understanding that you had to
 12 have the first floor repainted as a result of the
 13 repairs that Beau Value's folks had done?
 14 A. Yes. Yes.
 15 Q. Was there any portion of the painting that you
 16 understood was not to be done as a result of Beau
 17 Value's repair work?
 18 A. No.
 19 Q. That's all I had on that issue. Just a quick
 20 follow-up.
 21 MS. FOSTER: Is it, Mr. Collaer?
 22 MR. COLLAER: Collaer, close enough.
 23 MS. FOSTER: That's not it?
 24 MR. COLLAER: Go ahead.
 25 Q. (BY MS. FOSTER) Mr. Collaer asked you some

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1 questions about your familiarity with home inspectors in
 2 the Boise and McCall area. At the time you purchased
 3 2130 Payette Drive, did you have any background or
 4 familiarity with home inspection business practices in
 5 the Boise area?
 6 A. No.
 7 Q. Or any familiarity with home inspection
 8 business practices in the McCall area?
 9 A. No.
 10 Q. Did you know whether it was common in either
 11 area for home inspectors to have insurance?
 12 A. No. It was in California, though.
 13 Q. In California, it's common?
 14 A. Yeah.
 15 Q. Do you know what kind of insurance?
 16 A. I would assume, E & O.
 17 Q. Okay. But you had no knowledge of McCall, or
 18 Boise, or --
 19 A. No.
 20 Q. -- any Idaho home inspectors --
 21 A. No.
 22 Q. -- practices in that regard; right?
 23 A. No.
 24 Q. And it's 10 to 5:00. This is the day of your
 25 deposition. It's been a long day. Are there any

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1 answers you gave today, that you wish at this time to
 2 amend, or correct, or add to?
 3 A. No.
 4 MS. FOSTER: I have no further questions.
 5 FURTHER EXAMINATION
 6 QUESTIONS BY MR. MILLEMANN:
 7 Q. Ed, did you, or anybody acting on your behalf,
 8 contact CTR to ask them if they had ever done any work
 9 at Nancy's house?
 10 A. I think we did.
 11 Q. Who did, to your knowledge?
 12 A. Mike Longmire, I believe.
 13 Q. And did you have a conversation with Mike
 14 Longmire about that?
 15 A. Yes.
 16 Q. And what did Mike tell you?
 17 A. The -- excuse me, if I could stand up?
 18 Q. Sure.
 19 A. The time that they keep documents, and keep
 20 records had expired. So they didn't have any records of
 21 it. And there was also the guy that who had -- whose
 22 name was on the card is no longer with the company.
 23 Q. So other than the business card, do you have
 24 any basis for the statement that was made in the exhibit
 25 your counsel showed you, that it appeared CTR had been

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1 to the house?
 2 A. Other than the business card, no.
 3 Q. It's your testimony, that it was necessary to
 4 paint the entire main floor interior of the house as
 5 part of the repairs?
 6 A. Not where the mud room is. Okay? Just where
 7 the main room is. You with me there?
 8 Q. Yes.
 9 A. Do you understand what I'm saying? Just not
 10 the mud room, but just the area where the great room is.
 11 Where is that -- if you want that --
 12 MS. FOSTER: Exhibit 1.
 13 THE WITNESS: Yes. Just the area that was
 14 open. Okay? Not the master bedroom, I don't believe,
 15 and not the mud room.
 16 Q. (BY MR. MILLEMANN) Okay.
 17 A. But just the foyer, and the family room, and
 18 the kitchen, and the dining room, that area.
 19 Q. Did Beau Value pay Mr. Hernandez?
 20 A. I think I paid half, and then Beau paid half.
 21 Q. Do you have any receipt, document, or invoice
 22 from Mr. Hernandez to confirm that you paid him?
 23 A. Yes.
 24 Q. Have you provided that to Counsel?
 25 A. I believe so, yes.

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1 MR. MILLEMANN: Perhaps you provided it,
2 Alyson.
3 MS. FOSTER: We did.
4 MR. MILLEMANN: You did?
5 MS. FOSTER: Yes.
6 MR. MILLEMANN: An invoice from Hernandez?
7 MS. FOSTER: Yeah.
8 MR. MILLEMANN: There was certainly one from
9 McConnor, but...
10 MS. FOSTER: No, Hernandez.
11 MR. MILLEMANN: Okay.
12 Q. (BY MR. MILLEMANN) If Mr. Value were to
13 testify, or has testified, that in his opinion, the
14 painting that was done by Mr. Hernandez of the interior
15 of the main floor was not a necessary part of the
16 repairs, would you disagree with that?
17 A. Yes.
18 Q. Have you at any time prepared any notes, or
19 memos to memorialize any of your conversations that
20 you've talked about today?
21 A. Just what you've seen.
22 Q. I haven't seen any.
23 A. Well, like the ones I wrote to Michael Wood.
24 Q. Okay.
25 A. Kind of --

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1 Q. Email transmissions?
2 A. Yes.
3 Q. So other than that. So, for example, the
4 conversation with Mr. Wood after closing, about the door
5 that you testified to, do you have any notes, or --
6 A. I thought that email was kind of part of it.
7 Q. Okay. Other than that, no diary, or memo of
8 any kind, by which you memorialized that conversation,
9 and what Mr. Wood said?
10 A. Other than the email, no.
11 Q. And that would be the email to him?
12 A. Yes.
13 Q. And is that one of the emails that you just
14 looked at?
15 MS. FOSTER: Yeah.
16 THE WITNESS: It's a chain. It's kind of
17 confusing.
18 MS. FOSTER: That's where Exhibits 6 and 7
19 were from, when I was deposing Ms. Gentry. Do you want
20 them?
21 MR. MILLEMANN: Yes, please.
22 Q. (BY MR. MILLEMANN) So, Ed, just so there is
23 no confusion. The emails that you just referred to
24 Mr. Wood, when I asked you, if you had written anything
25 to confirm your conversation with him. Are those

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1 Plaintiffs' Exhibit 6 and 7?
2 A. Yeah, the one, August 2nd. That one, in
3 particular. Yes. Yes.
4 Q. And which exhibit is that part of?
5 A. It's part of 6. And, yeah, it is. 6 and 7
6 are part of the things we're talking about.
7 Q. Other than Exhibits 6 and 7, to your
8 knowledge, did you prepare any notes, memo, or diary
9 entry to confirm the conversation you had with Mr. Wood
10 after the problem with -- after the closing?
11 A. No, these were -- these were part of
12 the -- these were memorializing some of the discussions
13 I had with Mr. Wood.
14 Q. And that's all there is, Exhibits 6 and 7?
15 A. As far as writings concerned, yes.
16 Q. And did you at any time record any
17 conversations you had with anyone that you talked about
18 today?
19 A. What, on tape?
20 MS. FOSTER: Audio record?
21 Q. (BY MR. MILLEMANN) Yes.
22 A. No, it's illegal. At least in the state of
23 California, it's illegal.
24 Q. I think in Idaho, it's legal, and you can pack
25 a gun while you do it, too.

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1 MS. FOSTER: All true.
2 MR. MILLEMANN: I have nothing further.
3 Thanks.
4 MR. COLLAER: Nothing further.
5 MR. NEVALA: Nothing for me.
6 MR. PIERCE: I have a couple follow up.
7 FURTHER EXAMINATION
8 QUESTIONS BY MR. PIERCE:
9 Q. On the phone conversation you had with
10 Mr. McKenna, you indicated that he told you in that
11 conversation, that he was insured; correct?
12 A. The best I recall, yes.
13 Q. And bonded?
14 A. Yes.
15 Q. Did he say anything about being licensed?
16 A. Yes.
17 Q. What did he say?
18 A. He was licensed, bonded, and insured.
19 Q. Okay. And also, that he told you he had been
20 a general contractor formerly?
21 A. I believe that's what he said. He said he had
22 been a contractor. And I thought he said, general
23 contractor.
24 Q. Okay. And you indicated that he built many
25 homes. Do you remember, did he give you a number about

1 how many homes he may have built?
 2 A. Several. I don't remember the exact number.
 3 Q. Okay. And then just for clarification. When
 4 you went through the home with him, after his report was
 5 done, I believe you indicated that tour could have taken
 6 place up to several days after the report was written;
 7 is that correct?
 8 A. As I recall there were -- as I recall -- I
 9 recall the pictures, going over the pictures with him,
 10 and the report. And it would have been right within two
 11 days of it being -- it wasn't -- there wasn't much time
 12 at all. It was the day that it was issued, or within
 13 two days it was being issued, as I recall.
 14 Q. Okay.
 15 A. It wasn't much time since it was issued, until
 16 the time we entered discussion.
 17 MR. PIERCE: All right. That's all the
 18 questions I have. Thank you.
 19 THE WITNESS: You bet.
 20 MS. FOSTER: I have none.
 21 (Deposition concluded at 5:06 p.m.)
 22 (Signature requested.)
 23
 24
 25

1 CERTIFICATE OF WITNESS
 2 I, EDMOND A. PETRUS, being first duly sworn,
 3 depose and say:
 4 That I am the witness named in the foregoing
 5 deposition, Volume I, consisting of pages 1 through 270;
 6 that I have read said deposition and know the contents
 7 thereof; that the questions contained therein were
 8 propounded to me; and that the answers contained therein
 9 are true and correct, except for any changes that I may
 10 have listed on the Change Sheet attached hereto:
 11 DATED this ____ day of _____, _____.
 12
 13 _____
 14 EDMOND A. PETRUS
 15
 16 SUBSCRIBED AND SWORN to before me this ____ day
 17 of _____, 20____.
 18
 19 _____
 20 NAME OF NOTARY PUBLIC
 21
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

1 ERRATA SHEET FOR EDMOND A. PETRUS
 2 Page ____ Line ____ Reason for Change _____
 3 Reads _____
 4 Should Read _____
 5
 6 Page ____ Line ____ Reason for Change _____
 7 Reads _____
 8 Should Read _____
 9
 10 Page ____ Line ____ Reason for Change _____
 11 Reads _____
 12 Should Read _____
 13
 14 Page ____ Line ____ Reason for Change _____
 15 Reads _____
 16 Should Read _____
 17
 18 Page ____ Line ____ Reason for Change _____
 19 Reads _____
 20 Should Read _____
 21
 22 Page ____ Line ____ Reason for Change _____
 23 Reads _____
 24 Should Read _____
 25 You may use another sheet if you need more room.
 WITNESS SIGNATURE _____

1 REPORTER'S CERTIFICATE
 2 I, COLLEEN P. ZEIMANTZ, CSR No. 345, Certified
 3 Shorthand Reporter, certify:
 4 That the foregoing proceedings were taken
 5 before me at the time and place therein set forth, at
 6 which time the witness was put under oath by me;
 7 That the testimony and all objections made were
 8 recorded stenographically by me and transcribed by me or
 9 under my direction;
 10 That the foregoing is a true and correct record
 11 of all testimony given, to the best of my ability;
 12 I further certify that I am not a relative or
 13 employee of any attorney or party, nor am I financially
 14 interested in the action.
 15 IN WITNESS WHEREOF, I set my hand and seal this
 16 31st day of March, 2016.
 17
 18
 19 
 20 _____
 21 COLLEEN P. ZEIMANTZ, CSR 345
 22 Notary Public
 23 P.O. Box 2636
 24 Boise, Idaho 83701-2636
 25 My commission expires September 7, 2017.

	142:19;189:17		105:11;107:6;132:24;144:18; 172:23;176:21;217:25;225:1; 262:24
\$	accurate (10) 52:23;62:11;67:23;80:4; 90:10;96:24;104:17;108:22; 207:4;222:18	adequacy (1) 154:17	Aid (1) 216:16
\$1,000,000 (1) 37:6	accurately (1) 253:25	adequate (1) 173:7	air (4) 125:3,9;132:14;141:24
\$1,087 (1) 177:12	acquire (4) 31:23;32:2;73:5;74:3	adjust (1) 123:9	airplane (1) 182:15
\$2,000,000 (1) 48:10	acquired (4) 21:6,19;171:12;187:24	admission (2) 228:5,6	al (1) 35:21
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\$57,337.16 (1) 180:24	across (2) 121:18;125:9	advertisements (1) 216:15	A-l-b-a (1) 12:15
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EXHIBIT 5

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY
 PETRUS FAMILY TRUST DATED MAY 1,)
 1991, and EDMOND A. PETRUS, JR.,) Case No.
 individually and as Co-Trustee of) CV-2014-71-C
 the Petrus Family Trust Dated May)
 1, 1991,)
) Plaintiffs,)
) vs.)
 NANCY GENTRY-BOYD, CHRIS KIRK d/b/a)
 KIRK ENTERPRISES; TODD MCKENNA)
 d/b/a HOMECRAFT HOME INSPECTIONS;)
 RE/MAX RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
) Defendants.)
 _____)

30(b)(6) DEPOSITION OF DISASTER RESPONSE, LLC, TESTIMONY
 OF BEAU VALUE and PERSONAL DEPOSITION OF BEAU VALUE
 MARCH 11, 2016

REPORTED BY:
 COLLEEN P. ZEIMANTZ, CSR 345
 Notary Public

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1 30(b)(6) DEPOSITION OF DISASTER RESPONSE, LLC,
 2 TESTIMONY OF BEAU VALUE and PERSONAL DEPOSITION OF BEAU
 3 VALUE was taken on behalf of the Defendant, Ms.
 4 Gentry-Boyd, at the offices of Millemann, Pittenger &
 5 Pemberton, LLP, located at 706 North First Street,
 6 McCall, Idaho, commencing at 9:20 a.m., on March 10,
 7 2016, before Colleen P. Zeimantz, Certified Shorthand
 8 Reporter and Notary Public within and for the State of
 9 Idaho, in the above-entitled matter.

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21 ALSO PRESENT: Chris Kirk
 22 Todd McKenna
 23 Nancy Gentry-Boyd
 24
 25

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1 (Exhibits 1 through 60 marked.)
 2 BEAU VALUE,
 3 first duly sworn to tell the truth relating to said
 4 cause, testified as follows:
 5 EXAMINATION
 6 QUESTIONS BY MR. MILLEMANN:
 7 Q. Good morning. Can you state your full name
 8 for the record, please.
 9 A. Beau Value.
 10 Q. And, Beau, we've met before.
 11 A. Yep.
 12 Q. Have you had your deposition taken before,
 13 Beau?
 14 A. No.
 15 Q. I wanted to offer you a couple of ground rules
 16 that I'll also try to remind myself to follow that will
 17 make it easier for Colleen, the court reporter, to get
 18 an accurate transcript of today's questions and answers.
 19 One is head nods, and "uh-huhs" don't work for
 20 her. She has to have a "yes," or a "no," or an audible
 21 answer. So if at any point we kind of bug you about
 22 that, it's only because we're trying to get a record.
 23 A. Yes.
 24 Q. And then I will do my very best not to speak
 25 over the top of your answers. And if you can try to do

1 do my job in asking them clearly.
 2 A. Okay. Perfect. So is it just you asking me
 3 questions, and nobody else?
 4 Q. The format will be that I will be asking you
 5 questions. Your attorney has the right at any time to
 6 render an objection if she thinks there is anything
 7 inappropriate about my questions.
 8 What's a little bit different here, than in
 9 the courtroom, is that unless she instructs you not to
 10 answer the question, then you go ahead and answer it
 11 subject to her objection.
 12 And at any time if I'm asking you about
 13 conversations, and it might appear to you that I'm
 14 asking you about a conversation that you've had with
 15 Ms. Foster, or Mr. Rudd, or anybody with the law firm,
 16 I'm not. Those are privileged conversations, because
 17 you've been designated as an expert.
 18 A. Okay.
 19 Q. And I'm sure she would prevent you from
 20 answering as to the substance of any such conversations.
 21 When I'm done with my questions, then if
 22 Mr. Nevala, who represents Chris Kirk, has questions, he
 23 is entitled to ask them. If Mr. Pierce, who represents
 24 Mr. McKenna -- he can ask you questions.
 25 A. Okay.

1 the same, try to let me finish my question. And again,
 2 it just makes her job easier.
 3 A. Okay.
 4 Q. Does that make sense?
 5 A. Sounds good.
 6 Q. How would you like to be addressed in the
 7 deposition? Is Beau all right?
 8 A. Yes.
 9 Q. And you may address me as Steve. We've known
 10 each other since, I think we met during the Tamarack
 11 days; right?
 12 A. Yeah. Yes.
 13 Q. And if at any point you don't understand a
 14 question I've asked you, then feel free to tell me, and
 15 I'll try to do a better job of asking it more clearly.
 16 A. Okay. Sounds good.
 17 Q. My singular goal here today is to find out
 18 what you know about the 2130 Payette Drive house, what
 19 work your company did there, what opinions you might
 20 have about the problems you encountered. That's what my
 21 singular goal is.
 22 Hopefully, if I do my job, by the end of the
 23 day, and the end of your deposition, I will understand
 24 what you know, and what your opinions are. Okay? So
 25 that's the intent as I ask questions. And I'll try to

1 Q. But we won't tag team.
 2 A. Okay.
 3 Q. I will finish. And then if they have
 4 questions, then they will ask them in succession. And
 5 then, of course, your attorney, if she chooses to -- or
 6 I should say, Mr. Petrus' attorney, if she chooses to,
 7 can ask you clarifying questions of her own then. Okay?
 8 A. Sounds good.
 9 Q. Okay. The last thing, if at any time you need
 10 a break, just tell me. The only qualifier on that is
 11 I'd prefer we not take a break while a question is on
 12 the table. But otherwise, feel free, if you need a
 13 break for any reason, just tell me, and we will take
 14 one.
 15 A. No problem.
 16 Q. I'm going to hand you, Beau, and we don't need
 17 to mark it, it is a pleading. This is a pleading
 18 entitled "Amended 30(b 6) Notice of taking Deposition of
 19 Disaster Response, LLC, formerly Disaster Pro, LLC."
 20 And I'd ask you if you've seen this document
 21 before?
 22 A. I have.
 23 Q. And did you review the document, and provide
 24 to Ms. Foster the documents in your company's possession
 25 that you believe to be responsive to the requests made

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1 in this Amended Rule 30(b)(6) Notice?
 2 A. Yes, I did.
 3 Q. The Notice indicates at page 2, that there are
 4 three general areas, that are indicated, that my client
 5 desires to question your company about. And you are the
 6 designee of your company.
 7 Could you just take a moment and review those
 8 items 1, 2 and 3, and just tell me when you've read
 9 them?
 10 A. (Witness complying.) Okay.
 11 Q. Okay. So as you sit here today, are you
 12 prepared to answer questions on those topics?
 13 A. Yes, I am.
 14 Q. And would you be the appropriate person in
 15 your company to do so?
 16 A. For most of these, I mean, when you say,
 17 "supervision," I was not the supervisor on the job. You
 18 know, I did the original inspection. I worked with my
 19 project manager, who was -- did supervision of the job.
 20 So there may be questions that I don't know the correct
 21 answer to, but...
 22 Q. Fair enough. And your project manager was
 23 Mr. Waite?
 24 A. Yes.
 25 Q. Is he an owner in the business?

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1 A. No, he's not.
 2 Q. Are you the sole owner in the business?
 3 A. Yes.
 4 Q. And you are aware, you have been designated as
 5 an expert witness by Mr. Petrus?
 6 A. Yes.
 7 Q. And then as you read on, if you could take a
 8 moment, and you may not need to, if you are familiar
 9 with this document, but take whatever time you need to
 10 review the documents that this Notice requests that be
 11 provided. And those are starting on the bottom of page
 12 2, at item 1, and they go through to item 4, on page 3,
 13 and then there are some definitions.
 14 A. (Witness complying.) Okay.
 15 Q. Reading items 1 through 4 on the Amended
 16 Notice, have you provided all documents as defined in
 17 that document to Ms. Foster, that you believe to be
 18 responsive to those requests?
 19 A. Yes, I have.
 20 Q. Are there any documents of any kind that you
 21 are aware of, that your company, or you, or Mr. Waite
 22 have, that have not been provided to Ms. Foster?
 23 A. No. I mean, I have -- we have four
 24 subcontractor bids that I didn't submit with the other
 25 documents. But everything else has been submitted.

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1 Q. And were those subcontractors ultimately
 2 selected to do work on the project?
 3 A. Yes.
 4 Q. And when I say, the "project," I mean, the
 5 work you did for Mr. Petrus at 2130 Payette Drive.
 6 A. Yes.
 7 Q. So if I use the term "project," can we just
 8 agree that's what I'm referring to?
 9 A. Yes.
 10 Q. So you told me the subcontractor bids were for
 11 subcontractors here that actually did work on the
 12 project?
 13 A. Correct.
 14 Q. Do you remember who those were?
 15 A. One was Baumgartner & Masonry, and I think two
 16 of the bids were his. And I'm not sure on the other
 17 one.
 18 Q. So there would have been two more?
 19 A. Yes.
 20 Q. Did Sean McConnor Painting do work for you on
 21 that project?
 22 A. I don't know that.
 23 Q. Do you have any other documents from those
 24 subcontractors, such as invoices, or receipts, that
 25 would have backed up their billings on the job?

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1 A. I do have invoices, yes, and those were
 2 not -- those are in a different file. So, no, I did not
 3 submit any of those.
 4 Q. What would that file be called?
 5 A. We put those in a payables file for that job.
 6 So we would have to look all those up. But those are
 7 not included in any of these, no.
 8 Q. And I appreciate you telling me that. So are
 9 there any other documents you know of, that would relate
 10 to the project, that you did not provide to Ms. Foster?
 11 A. No.
 12 Q. Did you search through emails to see if there
 13 were any communications between you and Mr. Petrus, or
 14 Mr. Waite and Mr. Petrus, or anyone about this project?
 15 A. I did not.
 16 Q. Do you have emails saved?
 17 A. I do.
 18 Q. And so you would be able to search and
 19 discover whether there are emails that would pertain to
 20 this project?
 21 A. Uh-huh.
 22 Q. That's a "yes"?
 23 A. Yes. Yes.
 24 Q. And I know that part of the documents produced
 25 included invoices. Would there be any backup material

1 to those invoices, that your company invoiced, that have
 2 not been provided to Ms. Foster?
 3 A. No.
 4 Q. And there also was a batch of daily reports,
 5 and we are going to look at those.
 6 A. Okay.
 7 Q. To the best of your knowledge, have all the
 8 daily reports on the job been produced?
 9 A. Yes, they are.
 10 Q. Did you have any electronic audio or video
 11 daily reports that weren't reduced to writing?
 12 A. No.
 13 Q. And would you have any correspondence related
 14 to this project, other than with Ms. Foster's firm,
 15 other than emails?
 16 A. No, I mean, on-site meetings with them, but,
 17 no.
 18 Q. And in the case of on-site meetings, did you
 19 have a practice of trying to memorialize those at all
 20 through any kind of a memo, or diary, or note?
 21 A. We did not.
 22 Q. So it sounds like the only other documents
 23 that you are aware of, that relate to the project, that
 24 were not produced would be this payables file that would
 25 have all the subcontractor info in it, and potentially

1 some emails?
 2 A. Correct.
 3 MR. MILLEMANN: Would you have any objection
 4 to having Mr. Value search for, and provide those to
 5 you, and provide them to us?
 6 MS. FOSTER: Not at all. I'll review the
 7 emails first for privilege, but other than that, no
 8 problem.
 9 Q. (BY MR. MILLEMANN) And, Beau, so that you
 10 know, Ms. Foster will get a transcript of this
 11 deposition. So it's fine with me if you want to take
 12 notes of this, but you will also have an opportunity to
 13 review it, and so you know exactly what you've agreed to
 14 do and not do. Okay?
 15 A. While I'm doing that, do you want me to have
 16 Mr. Waite put together his emails, also?
 17 Q. Yes, please.
 18 A. Company stuff.
 19 Q. Thanks for reminding me. This deposition is a
 20 joint deposition. It's kind of a strange breed. One is
 21 called a 30(b)(6), which is a deposition of a company,
 22 and you've appeared as the representative of the
 23 company. And it's also a deposition of you,
 24 individually. So everything I'm talking about here, in
 25 terms of documents, would be anything that the company,

1 or any of its employees or agents has.
 2 A. Okay.
 3 Q. Does that make sense?
 4 A. Understood.
 5 Q. Okay.
 6 MS. FOSTER: I'm going to interrupt and say,
 7 you are starting to talk over him a little bit, Beau.
 8 You are too fast. Slow down a little bit, and let him
 9 finish talking before you do.
 10 THE WITNESS: Thank you.
 11 MR. MILLEMANN: I'm probably going to get
 12 chastised for being too fast before you will. But thank
 13 you, Alyson, I appreciate that.
 14 I have a flash drive which Ms. Foster provided
 15 me. And I just want to confirm, Alyson, that this, as I
 16 understand it, contains all of the documents that were
 17 provided on March 8 in response to the 30(b)(6)
 18 subpoena?
 19 MS. FOSTER: Yes, in native format and PDF
 20 with Bates stamps.
 21 MR. MILLEMANN: So what I would like to do,
 22 with your permission, is mark the flash drive as Exhibit
 23 60, and then we'll substitute electronic data, or you
 24 can take the electronic data.
 25 Does that work for you, Colleen?

1 THE REPORTER: Yes.
 2 MR. MILLEMANN: So we had a brief
 3 off-the-record conversation about that production. And
 4 I want to make an on-the-record record of that.
 5 On Tuesday, I received, as attorney for
 6 Ms. Gentry, the documents that are on Exhibit 60, which
 7 are somewhere in the neighborhood of about a thousand
 8 pages of documents, about 700 of which are photographs.
 9 Very few of which had been previously produced,
 10 including a report from an engineering firm in Utah,
 11 that we were unaware of until we got it.
 12 I cast no aspersions on Ms. Foster about this.
 13 But I want to make a record that it was my conclusion
 14 that everything -- first, I want to make a record that I
 15 appreciate the production being in advance, rather than
 16 this morning, because it's saved us a tremendous amount
 17 of time. It is my position that everything that was
 18 produced would have been responsive to our
 19 interrogatories and requests for production. And while
 20 I appreciate having it, we have in no way had time to go
 21 through all the documents.
 22 And on behalf of Ms. Gentry, when we conclude
 23 today, it will be my intention to adjourn the deposition
 24 with reserved right after we reviewed the documents, if
 25 we have to, call Mr. Value back. That's more by notice

1 than anything else.

2 MR. NEVALA: I would join everything Steve
3 said on behalf of Mr. Kirk. I need the opportunity to
4 have time to sit down with Mr. Kirk, and review the
5 photos in detail, so I can understand them. And it
6 would have been nice to have more time.

7 And I share his sentiment, we have time to
8 complete discovery. We have until June. So I would
9 say, Mr. Value is here today under Steve's Notice. And
10 if I need to visit with him about these photos, I
11 reserve the right to do that at some point between now
12 and June.

13 MS. FOSTER: I understand the position. At
14 this time, I'm reserving all rights and potential
15 objections.

16 Q. (BY MR. MILLEMANN) Beau, what's your current
17 address?

18 A. Personal?

19 Q. Yes.

20 A. 13009 Leland Drive, Donnelly, Idaho?

21 Q. How long have you lived at that address?

22 A. Five years.

23 Q. And then, if I remember correctly, you lived
24 in Valley County previously?

25 A. Yes.

1 Q. And give me the years, generally, during which
2 you were a general contractor in Valley County?

3 A. From 2003 to 2010.

4 Q. So in your current occupation, do you do any
5 general contracting of residential construction?

6 A. Yes, I do.

7 Q. You still do?

8 A. Yes.

9 Q. Do you have any projects underway today?

10 A. Yes.

11 Q. Do you have any residential projects underway
12 today?

13 A. Yes.

14 Q. Very briefly, how many and where?

15 A. We have -- let's see. The job list, we have
16 probably over 40 projects going, everywhere from
17 Cascade, to Riggins, and to Fruitland, Parma, and I also
18 have an operation in Spokane.

19 Q. How many of those 40 projects are new home
20 construction?

21 A. None.

22 Q. None. Okay. So generally, those are either
23 restoration projects, or are they all restoration
24 projects?

25 A. Not all. Some of them are some remodels.

1 Q. And during what period was that?

2 A. I've lived in Valley County for over 11 years.

3 Q. And the previous period was, when? Is it a
4 continuous period?

5 A. Continuous, yes.

6 Q. And when did you first come to Valley County?

7 A. In 2003.

8 Q. And what's your current occupation?

9 A. I'm a contractor specializing in the
10 restoration industry.

11 Q. How long have you been engaged in that
12 activity?

13 A. Five years for the restoration industry. I've
14 been a contractor for over 12.

15 Q. And briefly explain to me, when you say,
16 specializing in the restoration industry, what does that
17 mean?

18 A. So insurance work, repairs, remodels, fire,
19 water, mold, things like that.

20 Q. And I believe you said that previous to that,
21 you were a builder?

22 A. Yes.

23 Q. So would it be fair to say, previous to that
24 you were a general contractor?

25 A. Correct.

1 Q. Some remodels. Is there any particular reason
2 that you appear to have moved from the general
3 contracting business into more the restoration
4 specializing?

5 A. Yes. I mean, the change in the market, as
6 everybody knows in 2008 to '10, and came across this
7 industry, and liked the opportunity that it had.

8 Q. Prior to 2003, did you work as a general
9 contractor?

10 A. Yes, in the Boise area.

11 Q. During what period of time?

12 A. So I got into construction, started my own
13 business in 1995.

14 Q. Was that in Boise?

15 A. In Boise, as a framing contractor, that's what
16 I specialized in. And then as far as general
17 contracting, I built my own home, and a couple friends'
18 homes. So in that time frame from 2000 -- or 1995 until
19 2003, I probably built eight homes.

20 Q. And did you have a company you operated
21 through in those days?

22 A. Yes, I did.

23 Q. What was the name of that company?

24 A. Value Building.

25 Q. And today the name of your company is?

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1 A. Disaster Response.
 2 Q. And was that previously known as Restoration
 3 Pro?
 4 A. Yes, just the name change.
 5 Q. When you did the work at 2130 Payette, which
 6 name did the company have?
 7 A. Restoration Pro.
 8 Q. And then prior to 1995, did you have
 9 experience in the construction business?
 10 A. Grew up in it. My dad was a contractor. So,
 11 yes, I mean, just working underneath him, that's how I
 12 learned what I knew.
 13 Q. Has your general contracting business been
 14 exclusively residential?
 15 A. Not exclusively. Having a large majority,
 16 I've done a couple small commercial projects.
 17 Q. And the residential, is it primarily or
 18 exclusively single-family residential?
 19 A. Yes.
 20 Q. And during your period in Valley County since
 21 2003, has that also been the case?
 22 A. Yes.
 23 Q. Do you hold any licenses or certifications?
 24 A. An Idaho contractor's license, a Washington
 25 contractor's license. Those are the main things.

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1 Several certifications. I'm certified in water damage
 2 restoration, mold remediation.
 3 Q. From whom did you receive certification for
 4 water damage restoration, and mold remediation?
 5 A. IICRC.
 6 Q. And what does that stand for?
 7 A. Institute --
 8 MS. FOSTER: If you know.
 9 THE WITNESS: I don't know it off the --
 10 Q. (BY MR. MILLEMANN) IICRC?
 11 A. Yeah.
 12 Q. And what was involved in obtaining those
 13 certifications?
 14 A. Three days of school and a test.
 15 Q. And are those together, one certification or
 16 two?
 17 A. Two.
 18 Q. And so they each required the three days and a
 19 test, or you --
 20 A. The water one was three days and a test, and
 21 that was through IICRC. The mold one was through IRI,
 22 and that was just an on-line class, a 40-hour class, and
 23 a test.
 24 Q. Any specific education or certification
 25 regarding interpretation and application of building,

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1 and life safety codes?
 2 A. No particular certification, you know,
 3 training, and OSHA courses, miscellaneous things. As we
 4 went on, we would also host for the employees of the
 5 company.
 6 Q. Would it be fair to say then, that your
 7 knowledge of applicable building and life safety codes
 8 is principally learned on the job and from experience?
 9 A. Correct.
 10 Q. What's your educational background, Beau?
 11 A. High school.
 12 Q. Where did you graduate high school?
 13 A. Garden Valley.
 14 Q. So you are born and raised in Idaho, then?
 15 A. No, born in Hawaii.
 16 Q. How old were you when you left Hawaii?
 17 A. One.
 18 Q. So you didn't acquire much building experience
 19 while you were in Hawaii?
 20 A. No.
 21 Q. Okay.
 22 A. Or surfing.
 23 Q. Or surfing. That's too bad.
 24 So over the period that you've been in Valley
 25 County, can you give me a range, and I'm not looking for

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1 an exact number, of how many single-family residences,
 2 new construction you have constructed, or your company
 3 has constructed?
 4 A. I would say around 40.
 5 Q. Okay.
 6 A. With the majority of them being million
 7 dollars plus.
 8 Q. Did you build your own home in Valley County?
 9 A. I did. But being a builder, I put it on the
 10 market as soon as it was built, and it sold within a
 11 couple months, so...
 12 Q. Was that in Tamarack, or outside of Tamarack?
 13 A. Outside of Tamarack.
 14 Q. And of the ballpark 40 homes, were those all
 15 built for owners who were going to occupy them, or were
 16 any of those what I would call "spec homes"?
 17 A. Some of them were spec homes.
 18 Q. Can you give me a rough breakdown?
 19 A. Three. Actually, can I take that back?
 20 Q. Absolutely.
 21 A. I would say more like six. Because when I
 22 first started building in Valley County, I started with
 23 some specs, and they were selling quickly, before I got
 24 involved in Tamarack. So probably more like six.
 25 Q. Were those specs in the Tamarack project, or

1 in Valley County?

2 A. One was in the Tamarack project.

3 Q. And when I use the term "spec," just to make
4 sure I haven't confused you. In my world, that's a home
5 that you construct with the plans that you obtain from
6 the architect of your choice, with the intent that when
7 it is completed, you are going to turn around and sell
8 it; is that correct? Is that the term you use?

9 A. Yes.

10 Q. As opposed to a home, where I come to you, and
11 say, Beau, I have an architect. Here are my plans. Can
12 you build me my house?

13 A. Correct. That would be a design-build.

14 Q. Design-build, or a custom home, or something
15 like that.

16 So in your experience in Valley County, which
17 is, obviously, substantial with single-family homes, and
18 with your own home, have you had any experience
19 with -- this may sound like a stupid question, but it
20 won't be the last one I ask -- with sticky doors, or
21 sticky windows, particularly in the winter and spring?

22 A. Yes.

23 Q. Given your experience, and as a builder, are
24 you able to conclude, without investigation, what the
25 cause of a sticky door, for example, might be?

1 There are wood doors and clad doors, and so on. And I'm
2 being very general here. Can that also occur from the
3 ambient moisture, the external ambient moisture, can
4 that ever cause a door to swell at all and be sticky?

5 A. Yes. Especially with a wood, you have a clad
6 wood door. You have wood in there that can swell. You
7 have a wood frame. It's going to swell. So, yes, we do
8 see that.

9 Q. So as a builder with your experience, if
10 someone were to say, hey, Beau, I've got a sticky door.
11 If I'm understanding, correct me if I'm wrong, in order
12 to determine why that door is sticking, or what it might
13 be indicative of, you would need to go and check it out?

14 A. Correct.

15 Q. During the period of 2004, 2005, did you have
16 occasion to construct any homes using rock veneer?

17 A. Yes.

18 Q. When I use the term "rock veneer," as I
19 understand it, as opposed to actual rocks, it's a veneer
20 that is made to look like actual rocks. Am I correct
21 about that?

22 A. Correct.

23 Q. And does it come in sheets?

24 A. No.

25 Q. What form does it come in?

1 A. That would depend on the situation.

2 Some -- do you want me to --

3 Q. Yes, go ahead.

4 A. So some calls, you know, you get a call from a
5 homeowner. You go out. They've got a sticky door.
6 Some can be addressed by adjusting hinges. Some can be
7 made on the door structure, the adjustments that are in
8 the hinges, or the trim around it, where you can adjust
9 the door.

10 Some you'll go out there and work on for an
11 hour and more, and not be able to get anything resolved,
12 because, you know, weather, climate, things have
13 shifted. You know, sometimes at that point, we would
14 call our supplier, and have their specialist come out,
15 and see if they can do anything further.

16 Q. So you can at least have two possible causes
17 of a sticky door. One could simply be the hardware
18 needs to be adjusted?

19 A. Yes.

20 Q. Hinges, as you said?

21 A. Yes.

22 Q. Or some could be some settling of some kind
23 when the home was constructed?

24 A. Correct.

25 Q. And I realize there are many types of doors.

1 A. Basically, like a real stone, you know, small
2 stones, depending on the type of stone. You have a
3 fieldstone, or a ledge stone that you buy. And they
4 stack it just like you would a natural stone. But you
5 don't have to have the bearing at the bottom. You are
6 just adhering everything to the wall.

7 Q. And is that because it's not real stone?

8 A. Correct.

9 Q. So it's not as heavy?

10 A. Correct.

11 Q. Is it flat backed?

12 A. Yes.

13 Q. Would I be correct in assuming that building
14 standards, and building practices have changed and
15 evolved over the period since you came to Valley County
16 to today?

17 A. Yes, they have.

18 Q. So I want you, if you can, to kind of focus on
19 the period of 2004 to 2005, that range, not those exact
20 years. If you were placing rock veneer on a home, can
21 you give me what your protocol would be, or what you
22 believe the standard in the industry was, as far as from
23 that veneer in, what would I find?

24 A. You would have -- so can I start at the wall
25 and come out?

1 Q. Absolutely. So the wall would be the studs?
 2 A. You would have your studs. Then you would
 3 have your wall sheathing, normally a half-inch OSB
 4 material. Then you would have a Tyvek wrap or a
 5 moisture barrier around the house. And then you would
 6 have like a felt paper that would be adhered to over the
 7 Tyvek, and then a chicken wire, and then your mortar and
 8 stone.
 9 Q. And if you were placing siding on a house,
 10 rather than rock veneer, would there be any change in
 11 that sequential profile you just described to me?
 12 A. Yes.
 13 Q. How would it be different?
 14 A. You start with your studs, your OSB sheathing,
 15 and then your moisture barrier, and then your siding.
 16 Q. So in case of siding, you would not use felt
 17 paper?
 18 A. No.
 19 Q. Now, in the case of rock veneer, would it have
 20 been your practice to always, regardless of the surface,
 21 use Tyvek and felt?
 22 A. Yes, we did.
 23 Q. And explain to me your thinking on that.
 24 A. That's the way we were taught by the
 25 Tyvek -- we had somebody come out from Tyvek to our

1 your own building practice, and tell me if you are able
 2 to tell me what you think would have been considered the
 3 prevailing standard, or if there was one prevailing
 4 standard in the trade, for how you handle moisture
 5 barrier inside of rock veneer. I think you answered my
 6 question. But if you want to add anything to it, feel
 7 free.
 8 A. No.
 9 Q. Was that issue in 2004, 2005, driven by any
 10 code, or was it more of a standard of practice?
 11 A. Code said we had to have a moisture barrier.
 12 There are several different products that you can use to
 13 create a moisture barrier.
 14 Q. Is felt paper one of them?
 15 A. Yes.
 16 Q. And so in the case of felt paper, then you
 17 have mesh and masonry on top of that, before the rock
 18 veneer went on; right?
 19 A. Correct.
 20 Q. Does the mesh and masonry also provide a
 21 moisture barrier of sorts?
 22 A. I would -- I mean, this is just a matter of
 23 opinion. I don't know, professionally. I would say,
 24 no, because the mortar is actually going to soak up
 25 water. So it's not necessarily a barrier, no.

1 company, did a training on-site for a day, and learned
 2 how to tape it right, wrap the windows right,
 3 everything. They suggested wrapping it on there.
 4 Honestly, we did it, because that's what we were told to
 5 do.
 6 Q. And that was your practice?
 7 A. Correct.
 8 Q. Are you able to tell me with confidence, what
 9 you would consider to be the prevailing standard in the
 10 building industry in 2004 and 2005 on that subject?
 11 That subject being, when using rock veneer, would you
 12 use Tyvek and felt, or just felt?
 13 MS. FOSTER: Is there a geographic location in
 14 that question?
 15 MR. MILLEMANN: In Valley County.
 16 MS. FOSTER: Thank you.
 17 THE WITNESS: I think that's, you know, more a
 18 matter of opinion and per builder, to tell you the
 19 truth. I mean, at that time, things were very busy in
 20 Valley County, and there were probably several different
 21 things practiced, I mean, I guess --
 22 Sorry -- to get back to -- sorry. Would you
 23 say your question again?
 24 Q. (BY MR. MILLEMANN) No, fair enough. I said
 25 as you are able to. I'm asking you now to go outside

1 Q. So if I understand your answer, the code
 2 requirement was that you have a moisture barrier?
 3 A. Correct.
 4 Q. And then it was the builder's decision of how
 5 you satisfied that requirement?
 6 A. Correct. And to add on to that, there was a
 7 transition, and I don't know what the timing of this
 8 was. Where we just used to put a moisture barrier on
 9 the house. You know, your framing contractor, siding
 10 contractor would wrap the house with your moisture
 11 barrier for you. And would not tape the seams. The
 12 windows weren't sealed as much as they are now, and is
 13 code now.
 14 And then again, I don't know the date. But
 15 there was a time where we, as a company, and I believe
 16 it started going with everybody, all seams started being
 17 taped, you know, on all your moisture barrier and stuff,
 18 and flashed properly around your windows. So we were
 19 educated. And then I think eventually that became code,
 20 so...
 21 Q. Understand. So it may not have been code in
 22 2004, 2005, but the evolution might have led to a code
 23 provision on that?
 24 A. Correct.
 25 Q. And would it be fair to say in general, the

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1 issue of moisture, moisture protection, moisture
 2 intrusion, water intrusion is a big issue in Valley
 3 County?
 4 A. Very much so.
 5 Q. And would it be fair to say, that's been an
 6 evolving science, if you will?
 7 A. Correct.
 8 Q. I assume in many of the homes that you
 9 constructed, Beau, they had decks?
 10 A. Yes.
 11 Q. And they had doors going out on to those
 12 decks?
 13 A. Yes.
 14 Q. What was your standard, particularly if you
 15 can kind of think back to 2004, 2005, what was your
 16 standard practice as far as you described to me what a
 17 rock veneer profile would look like. In the case in
 18 which you had deck coming up against house, would you
 19 employ flashing as part of that? And explain to me how,
 20 and in what respect?
 21 A. Yes, you would put flashing. You would have
 22 your moisture barrier that would go down the wall. This
 23 was a time frame where we transitioned from normally, a
 24 lot of times the framers would put up the deck. And
 25 then you would run your moisture barrier. And then you

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1 would put a four-inch flashing. So it would go up the
 2 wall four inches, and down out onto the deck four
 3 inches. Your moisture barrier would come over the top
 4 of that flashing. So anything that came down your
 5 moisture barrier would then drain out.
 6 Then there was a time where we transitioned,
 7 and started putting the moisture barrier clear down
 8 behind your rim board, basically, that was on the wall.
 9 So that actually sealed the whole house all the way down
 10 to the bottom. And then your deck ledger went over the
 11 top of that.
 12 Q. That evolution you described, you would have
 13 had moisture barrier all the way down the wall below the
 14 deck level; correct?
 15 A. Correct.
 16 Q. Is that an evolution that occurred after 2004?
 17 A. Probably.
 18 MS. FOSTER: If you know, he's not asking you
 19 to speculate.
 20 THE WITNESS: Yeah. If -- yes, I would say,
 21 we transitioned that after 2004.
 22 Q. (BY MR. MILLEMANN) So on the flashing, the
 23 issue of flashing, in the context I'm describing, the
 24 intersection of a deck with the wall of the house.
 25 Again, was that a code requirement? And if so, can you

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1 tell me what the code was, and what the requirement was?
 2 A. To tell you the truth, I'm not sure if it was
 3 a code requirement.
 4 Q. Okay.
 5 A. It was more for us, it was a standard of
 6 practice, you know, just something we did no matter
 7 what. I would guess that it was code, but honestly, I
 8 don't know that for a fact.
 9 Q. Fair enough. I appreciate that. I don't want
 10 you to guess, so...
 11 So your practice that you learned, was to use
 12 the four-inch flashing. And when you say, "four inch,"
 13 I assume it's a 90-degree angle, four inches up, four
 14 inches out?
 15 A. That's correct.
 16 Q. And that was your practice?
 17 A. Yes.
 18 Q. Again, the same type of question. Are you
 19 able to tell me whether that was the prevailing standard
 20 in the building industry in Valley County in 2004 and
 21 2005, or not?
 22 A. I would say, it was the prevailing standard,
 23 yes.
 24 Q. To use flashing, or to use four-inch flashing?
 25 A. To use four-inch flashing.

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1 Q. Okay.
 2 A. Because even, you know, you call your lumber
 3 supplier, which many of us use the same supplier, or
 4 salesman. They are a lot of the ones that help you do
 5 your takeoff. And they would even know, hey, this is
 6 the flashing I'm going to send you for your deck. So it
 7 was a common practice, I would say.
 8 Q. Thank you.
 9 Does the term "drip flashing" make any sense
 10 to you?
 11 A. Yes, it does.
 12 Q. Tell me what that means.
 13 A. Normally used on roofs, or the edge of decks,
 14 or something has a small lip, where it kicks the water
 15 away from the surface area that's below it. So it has a
 16 little angle at the bottom to make that drip away from
 17 the structure.
 18 Q. What were the dimensions of drip flashing
 19 during that period of time in 2004, 2005?
 20 A. A guess, an inch, inch-and-a-half by two
 21 inches, two-and-a-quarter.
 22 Q. So what would have been the application of
 23 drip flashing, in your experience, as opposed to the
 24 four-inch flashing you described to me?
 25 A. Normally that would be something used above

1 door headers or windows, the drip flashing that you are
 2 speaking of.
 3 Q. And everything we've talked about regarding
 4 flashing, tell me if I'm wrong, and I'm understanding
 5 from you, this would be the practice you learned. You
 6 don't know whether, and to what extent that was a
 7 specific code requirement?
 8 A. Correct.
 9 Q. Okay.
 10 A. And there was many different -- I'll just --
 11 Q. No. Go ahead.
 12 A. Standards of practice used. And that was -- I
 13 mean, honestly, that was a sales point for us to our
 14 customers. And say, here's the things we do, and try
 15 and be better than our competition.
 16 Q. Got you.
 17 And so the other issue I wanted to ask you
 18 about is, in that profile that you described to me that
 19 would come from the wall studs to the rock veneer,
 20 inside the masonry mesh was felt paper; correct?
 21 A. Right.
 22 Q. I gather from yesterday's depositions, there
 23 are different weights of felt paper?
 24 A. There are.
 25 Q. Again, focusing on the 2004, 2005 period. If

1 A. I knew that he was a high-end home builder.
 2 Q. And when you say "high-end," is that kind of
 3 the same category that you were in as far as the
 4 million-dollar-plus homes?
 5 A. Yes.
 6 Q. And did Chris enjoy any reputation that you
 7 were aware of, from the people you talked to, as far as
 8 the quality of his building?
 9 A. I believe that he did.
 10 Q. And what was his reputation?
 11 A. A good reputation, and known for good
 12 products, and high-end customers and homes.
 13 Q. So there came a point in time when you were
 14 employed by Ed Petrus; is that correct?
 15 A. Yes.
 16 Q. I've seen a lot of documents that would
 17 suggest to me maybe that was 2013, but you tell me.
 18 A. Okay. Timeline?
 19 Q. Yes.
 20 A. Okay. So I was contacted by Michael Longmire.
 21 It was the fall of 2013. And he told me that he had a
 22 house with some issues in the crawlspace, and a door,
 23 and asked if I would be interested. Also told me that
 24 it could be a long process, because there could be
 25 possible litigation and stuff involved. So he warned me

1 you were doing the application we're talking about, rock
 2 veneer on the side of the house, was there a particular
 3 weight that you used for that application?
 4 A. I don't know exactly what that was. Our
 5 masonry contractor would have been, you know, the one
 6 doing it. So I know most of the times we would double
 7 layer it, and sometimes you would triple layer it. It,
 8 honestly, depends on our subcontractor.
 9 Q. So that's an area where you would look to your
 10 masonry contractor to know what the standards were, and
 11 to actually construct that profile?
 12 A. Correct.
 13 Q. So in the period 2004, 2005, in the course of
 14 living in Valley County, and being a builder, did you
 15 know Chris Kirk?
 16 A. I knew of Chris Kirk, but not personally, no.
 17 Q. So when you say, you knew of Chris Kirk, would
 18 it be fair to say, what you knew of him was what you had
 19 essentially heard from others?
 20 A. Yes.
 21 Q. And so did you know at that time that Chris
 22 Kirk was a builder?
 23 A. Yes.
 24 Q. And did you have any understanding of the type
 25 of construction he did?

1 upfront. And said, is this something you would be
 2 interested in looking at? And I said, sure, I'll come
 3 out and take a look at it.
 4 So I met him on-site at the home. I don't
 5 know the exact date. I believe it was around October of
 6 2013. And inspected it with them, looked at the door
 7 area. Went down into the crawlspace, and looked at the
 8 area underneath the door, where they removed the foam.
 9 And you could see the rotted rim board and stuff.
 10 Inspected the rest of the crawlspace for mold. Looked
 11 at the ventilation system that they had installed in the
 12 crawlspace. And, yeah, done an inspection.
 13 So then he asked --
 14 Q. I'm sorry. Go ahead.
 15 A. Then he asked us to prepare -- make sure that
 16 we were interested in the project. And I said, yes. So
 17 he asked us to prepare an estimate for Mr. Petrus for
 18 repairs to that area around the door. So that's what we
 19 did. That's what I did next.
 20 Q. So I want to stop you there, if I can?
 21 A. Yes.
 22 Q. That October inspection, was that just you and
 23 Mr. Longmire?
 24 A. Yes, I believe -- so there were several times
 25 out there. And I believe the first inspection was just

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1 me and Mr. Longmire. And then a later inspection, I
 2 also had Eric come along, which was the project manager.
 3 Q. And you had mentioned looking at a rim board
 4 that had been exposed. I missed where you said that
 5 was.
 6 A. That was in the crawlspace, underneath the
 7 door that had issues.
 8 Q. So down in the crawlspace, but you would be
 9 looking at the area underneath the door?
 10 A. Correct.
 11 Q. So in that first inspection, did you have an
 12 opportunity to examine the interior of the house on the
 13 main floor?
 14 A. Yes.
 15 Q. In the area of the door?
 16 A. Uh-huh.
 17 Q. And outside?
 18 A. Yes.
 19 Q. Independent of what you saw in the crawlspace,
 20 did you see any evidence in the interior of water
 21 intrusion?
 22 A. No.
 23 Q. And looking at that same door from the
 24 exterior, did you see any evidence of water intrusion,
 25 not including what you saw in the crawlspace?

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1 A. No.
 2 Q. So would I be correct in saying, that it
 3 wasn't until materials were taken off in the area of the
 4 door, that you first discovered the dry rot, or wet rot
 5 that is in large part the subject of this lawsuit?
 6 A. Yes.
 7 Q. And would I be correct in saying, that none of
 8 that would have been visible without removing trim, or
 9 veneer, or the door, itself?
 10 A. For the most part, yes, there was some water
 11 stains on the insulation in the crawlspace underneath
 12 that door, but...
 13 Q. But if we set the crawlspace aside, as far as
 14 being on the inside of the house, or out on the deck
 15 looking back at the door, you didn't observe anything
 16 that would have indicated water intrusion?
 17 A. No.
 18 Q. And the wood floor, there was wood flooring,
 19 was there not, Beau, in the area of that door that we're
 20 talking about?
 21 A. Yes.
 22 Q. And to orient, I want to show you what's been
 23 marked as Exhibit No. 1. Can you identify that?
 24 A. The location?
 25 Q. Can you identify the actual document?

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1 A. Yes, that's the main floor plan and deck of
 2 the home.
 3 Q. Did you prepare Exhibit 1, Beau?
 4 A. No.
 5 Q. Do you know who did?
 6 A. It looks like something from the architect or
 7 homeowner.
 8 Q. From your recollection, and your experience on
 9 the job, does Exhibit 1 accurately depict the floor plan
 10 of the main floor?
 11 A. Yes, it does.
 12 Q. So I want to make sure I understand. The
 13 doors we're talking about, would those have been the
 14 doors, the two doors that are indicated as departing
 15 from the dining room out on to the deck on what has been
 16 known as the southwest corner of the house?
 17 A. Yes.
 18 Q. Can you actually take a pen and indicate
 19 north, south, east, west, on this floor plan, if you are
 20 able to?
 21 A. Okay.
 22 Q. And you can just do it in the corner if you
 23 want?
 24 A. So just writing which way would be north?
 25 Q. Yes, just arrows would be fine.

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1 A. (Witness complying.)
 2 Q. Can I take a quick look at that?
 3 A. Yes.
 4 Q. So the two doors in question were french doors
 5 that accessed from the dining room to the deck on
 6 basically the south -- or south -- I guess I would say,
 7 the south portion of the home; is that right?
 8 A. Yes.
 9 Q. And inside those french doors in the dining
 10 room was there a hardwood floor?
 11 A. Yes.
 12 Q. And when you inspected the home that first
 13 time, did you see any evidence of water staining on that
 14 hardwood floor?
 15 A. No.
 16 Q. And outside the french doors on the deck, on
 17 the surface of the deck, before you removed anything,
 18 did you see any evidence of water staining or rot?
 19 A. No.
 20 Q. And looking at the door from the inside, did
 21 you see any evidence of water staining or water
 22 intrusion or rot?
 23 A. No.
 24 Q. And looking at the door from the outside, did
 25 you see any evidence of water staining, water intrusion,

1 or rot?

2 A. No.

3 Q. On that occasion did you open and close those
4 doors, if you remember? When I say, "those doors," I
5 mean, the french doors that we're talking about here
6 from the dining room to the deck.

7 A. Yes. I don't recall 100 percent. I know
8 Michael Longmire was the one that had opened and closed
9 the doors. I don't think they were working properly,
10 but we did go out the door to inspect the outside.

11 Q. So you mentioned that you were there, because
12 Mike Longmire said -- using my words -- we've got some
13 issues in the crawlspace. Did he describe to you before
14 you went and looked, what those issues were?

15 A. Yes.

16 Q. What did he explain to you?

17 A. He explained to me they went to have a propane
18 line installed. The installer of that line pulled out
19 the insulation. The insulation was wet. And then as
20 they drilled through, they discovered that the rim board
21 was rotted. So that contractor -- I'm not sure what
22 contractor that was -- told Michael about it. That's
23 how they found the issue. So Michael went down there
24 and pulled back some insulation, and found out that that
25 rim board was rotted.

1 mechanism. That the doors weren't operating right. I
2 believe he mentioned something about duct tape on the
3 doors. And that they wanted the door replaced.

4 Q. I see. Okay. So your initial scope, if you
5 will, that you went home to try to eventually put some
6 numbers together on, were to do some remediation in the
7 crawlspace, and to replace the door?

8 A. Yes. So remediate the crawlspace, replace the
9 rim board that we knew was rotted, and replace the door,
10 which required some stone removal, you know, so it
11 involved masonry. So it was an extensive -- for just
12 replacing the door, it got extensive.

13 Q. And when we're talking about the door here,
14 this is a manufactured two door french door; right?

15 A. Yes.

16 Q. And it would be necessary to remove rock
17 because there was rock veneer around that door?

18 A. Yes. And can I add in?

19 Q. Sure.

20 A. And the hardwood floor had to be refinished,
21 also. Because during inspection, we inspected the
22 sub-floor, found that the sub-floor was rotted coming
23 out from there. Once we removed that insulation,
24 because the insulation was six to eight inches thick in
25 the area, once you pulled that back, you could see the

1 Q. So this would have been October-ish of 2013?

2 A. Correct.

3 Q. When you went back to the crawlspace, was
4 there an issue in the crawlspace?

5 A. Not that I remember. I believe in my pictures
6 that I took, there was no water.

7 Q. And to see the rim joist -- is that the right
8 term, Beau?

9 A. Yes.

10 Q. -- that you are talking about, you had to
11 pull back insulation to see what you were talking about?

12 A. Yes.

13 Q. Did Mr. Longmire mention anything about the
14 crawlspace having been identified in a home inspection
15 before Mr. Petrus bought the property, as having any
16 potential issues?

17 A. No.

18 Q. Has he ever mentioned that to you?

19 A. No.

20 Q. So that was part of what he told you. And
21 then he told you something, that they had some kind of
22 problem with the doors. Did he tell you what the
23 problem with the doors was?

24 A. He told me they were -- I don't recall
25 exactly. I know there was issues with the locking

1 sub-floor was rotted. So we knew we'd have to remove
2 that.

3 We want to figure worst case scenario. We
4 were hoping we could try and slip something underneath
5 there. But Ed wanted worst case scenario. So we said,
6 well, worst case, we would have to replace the hardwood,
7 replace the sub-floor. And to make it look right, we
8 are going to have to refinish all of the hard wood.

9 Q. All of which became visible to you when you
10 got in the crawlspace and pulled the insulation off?

11 A. Correct.

12 Q. None of which was visible to you inside the
13 house, or outside on the deck?

14 A. No.

15 Q. So then that was the first inspection. And
16 then you were about to tell me, you went off to maybe
17 try to put some numbers together?

18 A. Yes. So I put an estimate together, got that
19 to Michael.

20 Q. And then at some point, you came back with
21 Eric; is that correct? Was that before you did the
22 estimate or after?

23 A. After. So I got done, the original estimate.

24 Sent that to -- I think, Michael gave that to Ed. Ed
25 came into town -- was coming into town, and wanted to

1 schedule a meeting. So we went out, and met Michael
 2 Longmire, Ed, myself, and Eric, and discussed the
 3 project.
 4 Q. And for the record, when you refer to "Ed,"
 5 you are referring to Mr. Petrus?
 6 A. Yes.
 7 Q. And Ed is fine. I just want to make sure we
 8 know who we're talking about.
 9 So would it have still been in October when
 10 Mr. Petrus came into town and the four of you met?
 11 A. I don't think so. I think November, December,
 12 somewhere in there. Some time had passed.
 13 Q. And by then you had given some kind of an
 14 initial estimate?
 15 A. Yes.
 16 Q. And I have seen some estimates in here, dated
 17 November 5. Does that sound about right; 2013?
 18 A. Yes.
 19 Q. Does that sound about right?
 20 A. Yes, it does.
 21 Q. And at that point you still had not pulled
 22 anything, any material off of the door, or around the
 23 door. You were still at that point, relying on what you
 24 had seen from the crawlspace; correct?
 25 A. Correct.

1 just --
 2 Q. And -- I'm sorry.
 3 A. He was very vague on it. But just wanted to
 4 make sure that we, as a company, would be willing to do
 5 that. And I said, my words to him, as long as I'm not
 6 taking a side. I'm here as a professional. You know,
 7 and to voice my opinion on what I've seen, and we do,
 8 was my words to Ed.
 9 Q. Okay. So in that, you reviewed the estimate,
 10 fought off the attempt to have you lower your number.
 11 And agreed that, at least, if you needed to be a witness
 12 in litigation, you would be available to be that. Is
 13 that about right?
 14 A. Very correct.
 15 Q. So did you reach agreement at that point,
 16 let's go on this, or --
 17 A. No. I believe -- and I don't recall why, to
 18 tell you the truth, but there was a modification to the
 19 estimate. And I apologize that I don't remember why.
 20 But I know -- because there was a second version. We
 21 went back. We modified it. And the price actually went
 22 up. And gave him that revised one.
 23 And then at that point, he had accepted it.
 24 And said, you know, let's schedule it for spring. He
 25 gave us a time frame when he wouldn't be using the home,

1 Q. So tell me about the meeting. Did the meeting
 2 happen at the house?
 3 A. Yes.
 4 Q. And you told me who was present, the four
 5 people who were there. Tell me what was said, to the
 6 best of your recollection, and what was discussed?
 7 A. We, yeah, basically talked about the estimate.
 8 He asked why we were higher than he had another estimate
 9 done by somebody else. We were higher. He wanted to
 10 know why. He wanted to see if I could lower the number.
 11 I told him, no. You know, you want me to do the
 12 project, this is my number.
 13 And, you know, discussed start dates, and so
 14 forth. He wanted -- he also made us very aware that,
 15 you know, there could be possible litigation in it, and
 16 if we were willing to participate in that.
 17 Q. Participate in the litigation?
 18 A. In being deposed, whatever.
 19 Q. You got it.
 20 A. As a witness.
 21 Q. And winding up where you are today?
 22 A. Exactly.
 23 Q. And did he tell you who he thought this
 24 litigation was going to be with?
 25 A. No, I mean, not that I recall. I just -- he

1 but he wanted it done before he wanted to use the home,
 2 I believe, it was in June.
 3 Q. And the second estimate, Beau, was that also
 4 before you had gone in and torn anything apart?
 5 A. Correct.
 6 Q. So at that point you were still relying on
 7 what you could see from the crawlspace with the pulled
 8 insulation back, and just the assumption that you are
 9 going to have to take that door out, and what you told
 10 me, you have to fix the rim joists, and floor joists;
 11 correct?
 12 A. Correct.
 13 Q. I've seen in the documents that were provided,
 14 an initial estimate in the range -- and I'll show you
 15 these -- in the range 20, 21,000. And a revised
 16 estimate that appeared to me to be prior to the time you
 17 started any work, more in the range of the \$27,000
 18 range?
 19 A. Yes.
 20 Q. Does any of that ring a bell?
 21 A. Yes.
 22 Q. Does that sound right?
 23 A. Yes.
 24 Q. So Mr. Petrus wanted you to -- and by the way,
 25 is it pea-trus or pet-trus? Well, I already know what

1 Alyson thinks it is.

2 A. Yes.

3 Q. We're going to find out on Tuesday.

4 So he said that he wanted you to do the work
5 within a certain window when he wouldn't plan to be
6 there otherwise? Do I got that right?

7 A. Yes.

8 Q. What was that window, if you remember?

9 A. April, start in April, you know, when snow
10 was -- got off, was getting off, had better days for
11 masonry and stuff, and then be done before June.

12 Q. And if I understand you, is that because
13 that's a period where he didn't plan to use the house?

14 A. Correct.

15 Q. When you inspected the home in October or in
16 that range, and it sounds like it was at least a couple
17 of times; is that a fair statement?

18 A. Yes.

19 Q. Did you prepare any notes, or recordings, or
20 did you in any way memorialize what you saw in those
21 inspections?

22 A. No. I mean, when I do an inspection, I take,
23 you know, a sketch of the home. In this case, Michael
24 had plans there. So I photographed the plans. And took
25 photos. You know, with my inspection, took photos in

1 managing it. So I think we did -- our company produced
2 this, because I recognize the labeling and stuff, just
3 so you know.

4 Q. And you are referring to Exhibit 1?

5 A. Yes, I'm referring to Exhibit 1.

6 Q. Thanks. And I appreciate that. And feel free
7 to clarify at any time you need to.

8 I want to show you what have been marked as
9 Exhibits 53, 54 and 55. And in general, they appear to
10 me to be contracts that were either proposed, or entered
11 into between your company and Mr. Petrus. Would you, in
12 general, concur with that?

13 A. Yes.

14 Q. So let's start with Exhibit 53. And my
15 version of Exhibit 53, have an agreement that is RP 250
16 to 254, with an Exhibit A, which is RP 255 to 257. And
17 I'm sorry, Beau. The RP numbers are at the bottom of
18 the page.

19 A. Yes.

20 Q. So explain to me what Exhibit 53 is.

21 A. A "Construction Repair Contract." So a
22 contract that we had originally put together with
23 Mr. Petrus, Pet-trus. Now, I'm going to say, Ed.

24 Q. Ed, that seems to be the safe haven here.
25 And if you could turn to the second page of

1 the crawlspace, photos of the affected areas, photos
2 outside the door, basically, those are my notes.

3 Q. And you've produced all the photos that you've
4 took?

5 A. Yes.

6 Q. So as a builder of high-end homes. When you
7 walked into the home, what was your impression of the
8 home?

9 A. It was a nice home.

10 Q. And had you not gone in the crawlspace, and
11 not pulled the insulation away, if you could have
12 blocked that in your mind, would you have any reason
13 based on the appearance of the interior, and the
14 exterior, and the area of the deck, to anticipate what
15 you found when you began pulling material off that
16 house?

17 A. No. I mean, the operation of the door, but,
18 no.

19 Q. Okay.

20 A. Can I clarify something, too?

21 Q. Please.

22 A. Just looking at this document here, it is
23 something that our company did. I didn't realize that,
24 but I think it's probably a floor plan that Eric drew.
25 Because you look at the date, and that's when he was

1 the contract, Exhibit 53, which is RP 251. Article 4.2
2 appears to me to have a fixed price for the work. Do
3 you see that?

4 A. Yes.

5 Q. And what was that price?

6 A. \$21,963.01.

7 Q. And then attached to Exhibit 53, as Exhibit A,
8 appears to me to be an estimate that, again, appears to
9 me to be prepared by your company, itemizing the work
10 that would comprise that \$21,963.01?

11 A. Correct.

12 Q. Did you or someone working on your behalf
13 prepare the contract and that exhibit?

14 A. Yes.

15 Q. To your knowledge, was Exhibit 53 ever signed
16 as a contract between you and Mr. Petrus?

17 A. I believe it was not.

18 Q. So let's look at Exhibit 54. And take a
19 minute. I will tell you, my version of 54 is, once
20 again, in this case, a five-page contract, RP Nos. 235
21 through 239, with an Exhibit A and an Exhibit B,
22 comprising 240 to 244. Does yours have the same
23 documents?

24 A. Yes.

25 Q. And can you tell me what Exhibit 54 is?

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1 A. "Construction Repair Contract."
 2 Q. Now, as we look to the second page, again, to
 3 Article 4.2. It appears to me that the price for the
 4 work is now \$27,699.40. Do you see that?
 5 A. Yes.
 6 Q. And if I look at the exhibits, it appears to
 7 me, Beau, but you correct me if I'm wrong, the principal
 8 difference between Exhibit 54 and Exhibit 53, is that in
 9 Exhibit B, you have now added a scope of work for mold
 10 remediation?
 11 A. That is correct.
 12 Q. Does that look to you like the basic
 13 difference between the two contracts? And take a minute
 14 if you need to.
 15 A. Yes, that looks correct.
 16 Q. So, essentially, somewhere along the way, you
 17 had the opportunity to maybe focus a little bit more on
 18 the crawlspace, and determine that you were going to
 19 have to do some mold remediation work, and that led to
 20 the increase in the price?
 21 MS. FOSTER: I'm just going to object to the
 22 form of the question as compound.
 23 MR. MILLEMANN: Yes. Fair enough.
 24 Q. (BY MR. MILLEMANN) Tell me, what led to the
 25 addition of Exhibit B to the contract that we see in

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1 Exhibit 54?
 2 A. When I originally did the estimates, when we,
 3 as a company, did the estimates, we did both estimates,
 4 Exhibit A and B. When we prepared the first contract,
 5 he just -- which is Exhibit 53 -- he just wanted the
 6 repairs done.
 7 Now, it helps me recall our meeting on-site.
 8 He said, hey, I want a contract with everything. I want
 9 mold remediation, everything. We had already done that
 10 estimate. We then revised the estimate to include that
 11 other portion of work.
 12 Q. "He," being, Mr. Petrus?
 13 A. Yes, Ed.
 14 Q. And then if you could take a look at Exhibit
 15 55?
 16 A. (Witness complying.)
 17 Q. It is, again, a contract. And the contract
 18 does not contain exhibits, but references to exhibits,
 19 and is RP 261 to 265. It appears to me, Beau, that
 20 Exhibit 55 is actually a signed version of Exhibit 54
 21 without the exhibits. Could you take a look and tell me
 22 if I'm correct on that?
 23 A. You are correct.
 24 Q. So is Exhibit 55 then the first -- that
 25 contract you entered into with Mr. Petrus?

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1 A. Yes, it was.
 2 Q. Putting aside change orders, did you enter
 3 into any other contracts with Mr. Petrus of the nature
 4 that we see in Exhibit 55?
 5 A. Putting aside change orders?
 6 Q. Yes, sir.
 7 A. No.
 8 Q. So then if we go to Exhibit 56. I'm sorry.
 9 Did I give you that?
 10 MS. FOSTER: Not yet.
 11 Q. (BY MR. MILLEMANN) Okay. Showing you Exhibit
 12 56, which is titled "Restoration Pro Contract/Change
 13 Order No. 1, Ed Petrus Project: 2130 Payette Drive,
 14 McCall, Idaho 83638," and is RP 267, 268, and 269.
 15 Can you tell me what Exhibit 56 is?
 16 A. A change order.
 17 Q. And I don't know that I found -- maybe I
 18 missed it -- a date on the change order. If I missed
 19 it, can you point it out to me? Otherwise, can you look
 20 at the change order, and tell me if you are able to give
 21 me any idea of when this change order would have been
 22 entered into, if it was entered into?
 23 MR. MILLEMANN: Just, Counsel, for the record,
 24 did you just mark on the --
 25 MS. FOSTER: Yes, I did.

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1 MR. MILLEMANN: Okay. I just wanted to know
 2 where these came from. So that is fine.
 3 MS. FOSTER: I hand marked dates I saw for
 4 that testimony only.
 5 MR. MILLEMANN: No complaint.
 6 THE WITNESS: I don't see a date either. I do
 7 see a date on the bottom of the last page of 5-7, 2014,
 8 which came out of our software when we printed this
 9 "extras" document. So I guess it was around that time.
 10 But there was no specific date on there, on the change
 11 order contract.
 12 Q. (BY MR. MILLEMANN) Do you know, was this
 13 change order agreed to by Mr. Petrus?
 14 A. Yes.
 15 Q. This is an unsigned version. Do you have a
 16 signed version that you know of?
 17 A. I don't know that answer. I would think we
 18 do. But we gave you our entire file, except for our
 19 payables file, so...
 20 Q. So the file that it would have likely have
 21 been in, you have already given me?
 22 A. Yes.
 23 Q. And would I be correct then in understanding,
 24 that Exhibit 56, Change Order No. 1 was proposed and
 25 accepted after you had commenced your work and started

1 the demo of the exterior of the building?
 2 A. Yes, it would. Because if you look on this,
 3 it shows that he's already given us a payment and the
 4 original payment. We do have that date of 4-18.
 5 Q. On the change order. Thank you.
 6 A. Yes. It shows that we got a deposit, check
 7 number and everything of 8,309. So it was after that
 8 date that this document was produced.
 9 Q. And something you could just help me with that
 10 was a bit of a source of confusion for me. If we look
 11 at the estimate that's attached to Exhibit 56 to the
 12 change order.
 13 A. Yes.
 14 Q. And if you look at date entered, it's November
 15 5, 2013. And I see this occurring in estimates, that
 16 appears to me, clearly done later. Did your system just
 17 kind of default to the original date on this; do you
 18 know?
 19 A. Yes. So when -- what -- and we've since
 20 changed this within our company, because when you create
 21 an estimate, what we do is we copy that original one.
 22 It has all the customer's information. We got lazy,
 23 missed putting in the current updated date. And now, we
 24 know the importance of that.
 25 Q. Yes. So in any event, the November 5, 2013

1 get a higher number. So would I be correct in assuming
 2 that you did more work than is reflected in the contract
 3 and the change order?
 4 A. Yes. And may I make a statement?
 5 Q. Yes.
 6 A. I don't know for a fact that this change order
 7 was signed. Again, Eric would know more on that,
 8 because I know there was some going back and forth. I
 9 think we produced one. And so I don't know that this
 10 was signed. We may have, he said, hey, let's open
 11 up -- I know at some point -- I don't know if I'm
 12 getting too far in a different direction?
 13 Q. No. Go ahead.
 14 A. He had us do further inspection around the
 15 rest of the front of the home on the corners that had
 16 these issues behind the masonry. And then we produced,
 17 maybe it was a revised change order to this. So maybe.
 18 But I don't know exactly how that went.
 19 Q. And would it have been your practice to
 20 memorialize? And when I say, "memorialize," I mean,
 21 reduce to writing of some sort, change orders?
 22 A. Yes.
 23 Q. And that might just be an email confirmation?
 24 A. Yes.
 25 Q. Because as I understand, looking at as many of

1 date has no relevance to when the change order was done?
 2 A. It does not.
 3 Q. Were there any other change orders that you
 4 are aware of?
 5 A. I believe there was.
 6 Q. I have not seen them. If so, they have not
 7 been produced. Do you have recollection of what they
 8 were, or when they were?
 9 A. I don't.
 10 Q. Okay.
 11 A. That would be a question for Eric Waite.
 12 Q. Did Eric Waite maintain files on this job
 13 separately from the files you looked at to respond to
 14 the notice duces tecum?
 15 A. No.
 16 Q. So do I understand you to be saying, Mr. Waite
 17 might have recollection of it, but we would not expect
 18 him to have an actual physical copy of change orders?
 19 A. Correct. And your request for emails may
 20 produce some of those documents.
 21 Q. Thanks. I appreciate that.
 22 And I'm not surprised by your answer, because
 23 I tell you, when I total up the contract in 55 with the
 24 change order in 56, I get a number of \$39,021.15. And
 25 yet, when I go to your invoices which were produced, I

1 the photographs as I've been able to look at, although
 2 your work started -- and I'm pointing to Exhibit No. 1,
 3 it started in the area of the french doors, off of the
 4 dining room, it didn't stop there. That you actually
 5 wound up around on the lake side of the house, as well;
 6 am I correct in that?
 7 A. Yes, you are correct.
 8 Q. And I'm going to have you walk me through
 9 that; what you did, and where you did it.
 10 MR. MILLEMANN: Does anyone need a quick
 11 break?
 12 MS. FOSTER: I would like one.
 13 (A recess was had.)
 14 Q. (BY MR. MILLEMANN) Beau, we're back on the
 15 record. I want to hand you what have been marked as
 16 Exhibits 45 through 52, which I will represent to you,
 17 are documents that I received on Tuesday in the document
 18 production that we referred to earlier.
 19 Can you take a minute, and just
 20 without -- we're going to go through them individually,
 21 but just overall, tell me what Exhibits 45 through 52
 22 are.
 23 A. So it looks like they are progress invoices
 24 for the work done at Ed's home.
 25 Q. To your knowledge, are these all of your

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1 invoices for work performed at 2130 Payette Drive, at
 2 least as relevant to this lawsuit? That is, I don't
 3 know if you did any other work for Ed?
 4 A. I can't answer that exactly. I mean, I would
 5 assume they are, but I would need to see a statement on
 6 the job.
 7 Q. Oh, a statement?
 8 A. Yeah, and I don't know if we've produced one
 9 for the documents or not.
 10 Q. Tell me what that would be; a statement?
 11 A. That would be for Ed, as a customer, we can
 12 produce a statement out of our accounting, that says,
 13 here's everything we invoiced him, and every check that
 14 he paid us. And I'm assuming these are everything. But
 15 to answer your question exactly, I can't guarantee they
 16 are.
 17 Q. And would the statement, would that have been
 18 in the files you produced?
 19 A. No, we don't put them in the job files.
 20 Q. You don't?
 21 A. That would be in our accounting software.
 22 Q. Accounting software. Okay.
 23 A. I think we just -- can I talk; is that okay?
 24 MS. FOSTER: Can we confer for a moment?
 25 MR. MILLEMANN: Sure.

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1 (Discussion held off the record.)
 2 MS. FOSTER: If it is something we can get for
 3 them, then we should.
 4 THE WITNESS: Okay.
 5 Q. (BY MR. MILLEMANN) I'm going to show you
 6 what's been marked as Exhibit 58. And that is document
 7 labeled Petrus 293. Is that what you were referring to?
 8 A. Yes, it is.
 9 Q. So if I were to total the payments shown in
 10 Exhibit 58, and find that it matches the payments
 11 reflected in Exhibits 45 to 52, would I be correct in
 12 reaching the conclusion that 45 to 52 are all the
 13 invoices on the job?
 14 A. Yes.
 15 Q. And I will tell you, I've done that. And with
 16 my own addition, they do match. That is that, Exhibit
 17 58, and the total amounts billed and paid in Exhibits 45
 18 to 52, do match exactly. And that number that I find,
 19 and we can go through this if you would like,
 20 \$57,337.16.
 21 Does that sound right to you as the amount of
 22 money that you were paid for your work at 2130 Payette?
 23 A. Yes.
 24 Q. And let me tell you how I did that, so I make
 25 sure that I've done that correctly. If we start with

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1 Exhibit 45, do you have that in front of you?
 2 A. Yes, I do.
 3 Q. So on that one, I took the total number of
 4 6,588, \$96,588.90.
 5 A. Okay.
 6 Q. And then Exhibit 46, I took the total number
 7 of \$1,720.92; would that be correct?
 8 A. Yes.
 9 Q. And then Exhibit 47, I took the total of
 10 \$9,237.38; would that appear to be correct?
 11 A. Correct.
 12 Q. And then Exhibit 48, I took the total number
 13 \$11,254.11?
 14 A. Correct.
 15 Q. Okay. And then Exhibit 49, took me a minute,
 16 but it appears to me the \$11,254.11 from the prior
 17 invoice has been carried forward. So all I took off of
 18 Exhibit 49 was the number 3,578.78; would that be
 19 correct?
 20 A. Yes, that is correct.
 21 Q. And then Exhibit 50, I took the number
 22 4,015.47?
 23 A. Correct.
 24 Q. And Exhibit 51, I took the number \$16,621.62?
 25 A. Correct.

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1 Q. And then Exhibit 52, I took the number \$4,120?
 2 A. Correct.
 3 Q. And I will tell you, and if you would like to,
 4 I have a calculator if you want to double-check. When I
 5 total those, and then when I go to Exhibit 58, the
 6 statement, and I totaled the payments reflected. I get
 7 the same number, which is \$57,337.16. And you've told
 8 me you think that sounds right, as far as what you were
 9 paid for your work?
 10 A. Yes.
 11 Q. If you could take a look at Exhibit 48.
 12 Unlike Exhibits 45 and 46 and 47, all of those exhibits
 13 have an estimate attached. Exhibit 48 doesn't. And I
 14 just wondered, do you know if there was detail for
 15 Exhibit 48? And if so, where it might be?
 16 A. Yes. So if you look at, for example, Exhibit
 17 45.
 18 Q. Got it.
 19 A. That is, if you look at the estimate amount,
 20 \$21,963.01, they have the same. So we just attached the
 21 detail to the first one, and the rest of these are
 22 progress invoices.
 23 Q. So you are still working off of that same
 24 estimate?
 25 A. Yes. And basically, if you look, we built in

1 30 percent, and then additional percentages as we went
2 along.

3 Q. Got it. That makes sense.

4 And then if we go to 49, if we go to Exhibit
5 49, that is, which is an invoice June 9, 2014. Again,
6 there is no detail attached to that, but I think your
7 answer would be the same; right?

8 A. It would be the same, except I would add in,
9 as you see on Exhibit 49, where we wrote the wording,
10 "additional painting performed by Hernandez Painting."
11 So instead of producing an actual attachment estimate,
12 we just wrote it right there, because it was something
13 that Ed had asked us to do for him.

14 Q. Do you have any recollection of where that
15 additional painting was done?

16 A. I have a recollection. But to be firm, you
17 would have to ask Eric. But I believe we repainted the
18 whole first level of the house.

19 Q. Interior or exterior?

20 A. Interior.

21 Q. Beau, would I expect in the payables file that
22 you are going to provide, to find Hernandez Painting's
23 invoices or bids?

24 A. Yes.

25 Q. And then if we move on to Exhibit 50, I don't

1 here -- Exhibit B would have been probably the original
2 estimate, scope of work by not being completed.

3 If you look at the front page of Exhibit 51,
4 we show a credit there of 4,732.25. And I would imagine
5 if we take Exhibit A, and subtract the total amount of
6 Exhibit A from Exhibit B, that would be the work that we
7 didn't complete. So we revised this. Took out
8 whichever line items it was that we didn't do, to give
9 him that credit for what we didn't do.

10 Q. And reflected that in Exhibit A?

11 A. Correct.

12 Q. That makes complete sense. Thank you.

13 So we've already covered the fact that
14 Exhibits 45 to 52, accepting my statement that the
15 totals in those match the total in Exhibit 58, the
16 statement, those would appear to be all of your invoices
17 for the work you performed at 2130 Payette. Let me back
18 up.

19 You mentioned additional painting, and I think
20 that was -- if I can find that -- that was in Exhibit
21 49. And you told me that you painted the interior, or
22 you had that interior of the house painted at
23 Mr. Petrus' request?

24 A. Yes.

25 Q. In your opinion was that required as a repair

1 see a detail attached to Exhibit 50, which is an
2 invoice, dated June 9, 2014. The amount appears to be
3 for hazardous materials remediation. Do you know where
4 I would find the detail or the estimate for that?

5 A. Exhibit 46, that was the original.

6 Q. So you are just, as you explained, you are
7 billing against that original estimate?

8 A. Correct. So if you look at Exhibit 46, we
9 required 30 percent down. And then Exhibit 50, we show
10 a prior billing of 30 percent, and then a current
11 billing of 70 percent, so the remaining balance due.

12 Q. Thank you. And then Exhibit 51, which is an
13 invoice, dated August 15, 2014. It has two exhibits
14 attached to it, an A and a B.

15 And the question I have is, it appears to me
16 that Exhibit B is inclusive of Exhibit A. And I'm
17 talking about the exhibits to the invoice, which itself
18 is Exhibit 51. And I just wanted to have you tell me,
19 if I'm correct about that?

20 What I'm saying is, it appears to me that
21 Exhibit B includes everything that is in Exhibit A. And
22 the number in Exhibit B would match the number in your
23 invoice. But tell me if I'm right about that?

24 A. Okay. So it appears that -- I mean, yes, they
25 are exhibit -- let's see -- get myself straight

1 or remediation for the condition that you found when you
2 exposed the door and the rock veneer on the outside of
3 the house?

4 A. No.

5 Q. Is there any other work, that you know of,
6 referenced in these invoices, that was not required as
7 part of the repair or remediation of the condition that
8 you discovered when you removed the door and the veneer
9 on the house?

10 A. Not that I'm aware of.

11 Q. And as I go through the detail that's attached
12 to these, I see reference to crawlspace. And it appears
13 you tried to separate the account for work that you did
14 in the crawlspace; is that correct?

15 A. No -- yes and no. Do you want me to expand?

16 Q. Please, yes.

17 A. There is a separate estimate invoice for
18 the -- like Exhibit 50 reflects that for the total
19 amount of \$5,736.39 for mold remediation performed in
20 the crawlspace. So that was basically just, there was
21 some mold growth in the crawlspace that we remediated.

22 There was other work performed in the
23 crawlspace that was part of the scope included in
24 Exhibit 45, joists, rim board, those are actually part
25 of the components of the crawlspace, and then

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1 re-insulating in there was included in Exhibit 45. Two
 2 separate things: one remediation, and one repair work
 3 of the damaged area.
 4 Q. The former being related to mold in the
 5 crawlspace. The latter being related to work that
 6 needed to be done once you had pulled the insulation and
 7 saw what the condition of the rim joist and floor joist
 8 was?
 9 A. Correct.
 10 Q. Showing you a document that's been marked as
 11 Exhibit 44, and it consists of RP Nos. 180 through 195.
 12 It appears to be an estimate from Restoration Pro, dated
 13 June 10, 2014. Wait a minute. Let me make sure I have
 14 the right one here. Yes.
 15 Now, when did you complete your work on the
 16 project; do you know?
 17 A. I don't know that date. It's probably in the
 18 daily job report.
 19 Q. And I think the last daily job report I have,
 20 I think is June -- we'll get to it, but I think it's
 21 June 13, something like that. I couldn't figure out
 22 what this estimate is. It appears to be for a bunch
 23 more work than what was done, but you tell me. What is
 24 Exhibit 44?
 25 A. Exhibit 44 is a quote -- is an estimate

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1 prepared for the insurance company.
 2 Q. I see.
 3 A. When we wrote our original -- because if you
 4 look through Exhibit 44, you see that it is 16 pages
 5 long, very detailed per lineal foot of rim, square foot
 6 of decking, all that stuff. This is a document that we
 7 produced for insurance companies on all insurance
 8 performed work.
 9 The previous estimates, Exhibit 45, we
 10 simplified, basically highlighted out, you know, groups
 11 of areas to come up with that estimate, versus the
 12 detailed estimate. And so I was asked -- we were -- not
 13 particularly me, I think, Eric -- we, as a company, were
 14 asked to write an estimate if this was an insurance job
 15 put together a full scope of work.
 16 Q. So if I'm trying to get the accurate picture
 17 of what you were paid, I should look to Exhibits 45 to
 18 52 and Exhibit 58, not to Exhibit 44?
 19 A. Correct.
 20 Q. And you were paid the totals that are
 21 reflected in invoices Exhibits 45 to 52; correct?
 22 A. Yes.
 23 Q. By whom?
 24 A. Ed Petrus.
 25 Q. So you were not paid by an insurance company?

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1 A. No.
 2 Q. And do you know whether a claim was filed with
 3 an insurance company?
 4 A. Yes.
 5 Q. What do you know about that?
 6 A. So Ed filed a claim. I don't remember who his
 7 carrier -- it was, to be honest. And I know that at one
 8 point, I met on-site with an adjuster from Intermountain
 9 Claims. He was out of Lewiston. I don't remember his
 10 name. And then he also brought an engineer with him.
 11 We were there on the site for a couple of
 12 hours. We went over in detail the work that was done.
 13 We gave him a copy of all of our pictures, from the time
 14 we started, through all the work that we had performed
 15 at that time. We were not done at the time he came. It
 16 was during the process.
 17 And his engineer was very thorough, went
 18 through the house. And then requested the pictures. He
 19 ended up calling Eric, going over pictures with him,
 20 scope with him, and so forth. And then I'm not sure how
 21 long it was, a week or two later, he produced the report
 22 for the insurance company. So that engineer was hired
 23 by the insurance company to protect themselves, whether
 24 they were going to cover the claim or not, not by Ed.
 25 Q. Or you?

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1 A. Or me.
 2 Q. And then do you know what ultimately became of
 3 the claim?
 4 A. There was -- I recall, it may be in our
 5 records. I don't know. I remember seeing a denial
 6 letter from an insurance company. If not, we have it in
 7 an email.
 8 Q. And to your knowledge, has any litigation
 9 ensued between Mr. Petrus and the insurance company?
 10 A. I do not know.
 11 Q. You are not aware of any?
 12 A. I am not aware of any.
 13 Q. And one of the documents we received on
 14 Tuesday past was a report from, I think, it's called
 15 Rimkus, R-i-m-k-u-s, Associates. If you know, is that
 16 the firm that sent the engineer with the adjuster?
 17 A. I believe it is.
 18 Q. Did you, yourself, do work on the project?
 19 A. No.
 20 Q. What was your involvement in the project once
 21 the work started and until it was completed?
 22 A. I met with that engineer and adjuster. I
 23 personally visited the site probably only two or three
 24 times during the course of all our work. My involvement
 25 was with Eric, you know, if he had questions, I would

1 discuss those. We have weekly meetings, management
2 meetings. So this job was brought up during the course
3 of repair. We discussed it weekly, you know, what's the
4 status, what's going on, whether there was work being
5 done, or whether the job was on hold, because we were
6 waiting for Ed's answers on things.

7 Q. So did you feel you kept yourself current with
8 the status of the project, and what was being
9 discovered, and the work being done?

10 A. For my position in the company, yes. For the
11 job as a manager, no.

12 Q. So you've been designated in this case as an
13 expert witness for Mr. Petrus, not just a witness of
14 fact, but an expert witness, purportedly having
15 opinions, which would include opinions as to the cause
16 of the condition that your company discovered once you
17 started removing materials from the house. Have you
18 formed opinions as to what the cause of those conditions
19 were?

20 A. Yes. I mean, opinions, yes.

21 Q. All right. And we'll get to that. I just
22 wanted to make sure I understand.

23 So Mr. Waite worked on the project; correct?

24 A. Yes.

25 Q. And worked as in "tool belt" worked?

1 Q. And did you rely on them to determine the
2 techniques of that replacement, or is that something
3 that you would have specified?

4 A. That was not specified by me. It was
5 discussed between Eric and Rocky Baumgartner.

6 Q. Where in your files would you find those time
7 cards? Are they organized by job?

8 A. No, they are organized by dates. So we have
9 electronically stored everything. So we could go back
10 and pull all the time cards for dates of work, and see
11 which employees were there. And, yeah, I don't know,
12 maybe -- I haven't looked at the daily job logs
13 thoroughly. So I don't know if Eric listed what
14 employees were on there. I don't think he did.

15 Q. I don't think I saw them. I don't remember
16 seeing them, but I might have missed it.

17 A. Okay.

18 Q. So from the time cards, you would be able to
19 tell the project that they worked on, as well?

20 A. Yeah.

21 MR. MILLEMANN: Counsel, any objection to
22 producing the time cards specific to this project?

23 MS. FOSTER: I would have to look at them, but
24 none that I can think of at the time.

25 MR. MILLEMANN: Yes.

1 A. No, as in a project manager, was on the site
2 daily, making sure that the foreman and everyone else
3 were doing the appropriate things.

4 Q. So starting with employees of Restoration Pro,
5 who actually worked on that project?

6 A. I would have to pull our time cards and see
7 the actual employees that were on the project.

8 Q. Okay.

9 A. I know that Tony Thayer.

10 Q. How do you spell the last name?

11 A. T-h-a-y-e-r. Was our foreman during demo
12 process in exposing everything. That's just one of the
13 employee's names. I could give you -- I know there was
14 multiple, but he was the main guy, foreman as we started
15 the process on the demo. He took a lot of pictures on
16 the demo process.

17 Q. Did you have a different foreman during the
18 restoration process?

19 A. Likely, I don't know the honest answer to
20 that. But normally Tony does not do structural repair
21 type stuff. So it would have been one of our other
22 carpenters.

23 Q. And did you then rely on Baumgartner to do the
24 replacement of the rock veneer?

25 A. Yes, we did.

1 THE WITNESS: Do I get paid for the time to
2 find this information?

3 MR. MILLEMANN: Yes, the way you get paid on
4 that is you go look in the mirror. No, that's something
5 you can talk with Ms. Foster about.

6 THE WITNESS: Thank you.

7 MR. MILLEMANN: Yes.

8 Q. (BY MR. MILLEMANN) Okay. So besides
9 Mr. Thayer, you don't have independent recollection of
10 any employees who worked on the project?

11 A. No.

12 Q. And then you've told me, I think, what you
13 recall about subcontractors. But I'll be able to find
14 that out from your payables file; right?

15 A. Correct.

16 Q. Did the work require a building permit?

17 A. No.

18 Q. And why is that?

19 A. I'm trying to think. It would require a
20 permit. Normally if it's, you know, larger structural
21 stuff, you know, you are making changes. That's about
22 as good as I've got for you.

23 Q. And other than you, and Eric, and your
24 company, were there any inspections done of the work by
25 anyone else?

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1 A. Michael Longmire was there almost daily.
 2 Q. Was he?
 3 A. Yes.
 4 Q. Do you know whether he was keeping any records
 5 or written notes about what was going on in that job?
 6 A. I wouldn't know that.
 7 Q. Fair enough. And so other than Mr. Longmire,
 8 there weren't any other inspections being done that you
 9 were aware of?
 10 A. No.
 11 Q. And other than you've already told me the
 12 adjuster came, and, obviously, the engineer he brought
 13 did an inspection of his own; right?
 14 A. Correct.
 15 Q. So as I noted, Beau, you've been designated as
 16 an expert witness in this case. Have you ever
 17 previously served as an expert witness?
 18 A. No.
 19 Q. And other than the documents that you've
 20 provided, have you prepared any kind of a report for
 21 Mr. Petrus about the project, or your opinions, or
 22 conclusions?
 23 A. No.
 24 Q. Nothing in writing?
 25 A. No. And we were not asked to produce anything

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1 like that.
 2 Q. And would I expect to find in any email
 3 exchanges, that kind of material; your opinions, your
 4 conclusions about this project?
 5 MS. FOSTER: And this is putting aside emails
 6 with Counsel?
 7 MR. MILLEMANN: Yes. Thank you.
 8 MS. FOSTER: So not any emails with me, if we
 9 had any.
 10 THE WITNESS: I don't know.
 11 Q. (BY MR. MILLEMANN) But when you look through
 12 your emails --
 13 A. Because my -- sorry.
 14 Q. No. Go ahead.
 15 A. My emails, no. Eric Waite, possibly, but I
 16 don't know exactly their conversations back and forth.
 17 So I can say, me, no, I did never write anything
 18 determining my thoughts. And again -- well, I don't
 19 think --
 20 MR. MILLEMANN: So, Counsel, you've previously
 21 been gracious to agree that, subject to your review of
 22 them for any privilege, that you will produce emails
 23 from Mr. Value, or that Mr. Value referred to. Can we
 24 agree that those will include any emails that Mr. Waite
 25 has?

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1 MS. FOSTER: Yes.
 2 MR. MILLEMANN: Okay.
 3 Q. (BY MR. MILLEMANN) So in a nutshell, Beau, if
 4 I want to know your opinions or conclusions about this
 5 case, where I'm going to find them today, is you telling
 6 me, not in any other document anywhere else?
 7 A. Correct.
 8 Q. Save and except anything that you might have
 9 communicated with Ms. Foster.
 10 Independent of your work on the project, are
 11 you being compensated to serve as an expert witness?
 12 A. I don't know. It was discussed during one of
 13 our meetings with Ed, and it has not been discussed
 14 since then.
 15 Q. Can you tell me what -- let's start with
 16 building codes. What building code or codes would have
 17 applied to the construction of this home at 2130 Payette
 18 in 2004, 2005?
 19 A. So it would be the IRC, I believe it was the
 20 '97 Edition we were still working off of. I am guessing
 21 on the year of that.
 22 Q. And what does "IRC" stand for?
 23 A. Good question.
 24 Q. There was reference in some answers to
 25 discovery, not from you, but answers to our discovery

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1 from Mr. Petrus to an International Building Code. Do
 2 you know anything about an international building code
 3 as applicable to a project like this?
 4 A. Yes.
 5 Q. Tell me what you know about it.
 6 A. That the international building code is what
 7 then the city or county that we perform work in, adopts
 8 as the code that they use.
 9 Q. Okay.
 10 A. They also make some modifications for region,
 11 I would say, for their area.
 12 Q. Representing to you that I believe this
 13 property is within what's known as the area of city
 14 impact, the impact area.
 15 A. Okay.
 16 Q. And would have, therefore, when I say, this
 17 project, I don't mean your project. I mean, the
 18 original construction of the home.
 19 A. Okay.
 20 Q. And therefore, would have been under the
 21 jurisdiction of the City of McCall's Building
 22 Department. If I understand you, what you are saying is
 23 that the City would have adopted the International
 24 Building Code. Is that one and the same with this IRC?
 25 A. Yes.

1 Q. And then there would have been versions that
 2 come out, and they would eventually adopt those or some
 3 part of those?
 4 A. Yes.
 5 Q. Correct?
 6 A. Yes.
 7 Q. And so your testimony is that the IRC, which I
 8 am assuming is the same as the International Building
 9 Code, would have been applicable when this house was
 10 constructed in 2004, 2005, your uncertainty is which
 11 version of that code would apply at that time?
 12 A. Yes.
 13 Q. And I would tell you that, I use the 2004,
 14 2005, because that is what Mr. Kirk testified was the
 15 time frame of the construction.
 16 A. Okay.
 17 Q. Besides the IRC, would there be any other
 18 building codes that you think would have been applicable
 19 to the construction of that home in 2004, 2005?
 20 A. No, unless what I specified before, the city
 21 had adopted some other practice.
 22 Q. And do you know whether they had or hadn't?
 23 A. I do not.
 24 Q. In 2004, 2005, did you have any construction
 25 projects going on in the city of McCall?

1 Q. And the City of McCall's building department?
 2 A. Yes.
 3 Q. And does that refresh your memory at all as to
 4 which IRC was applicable at that time?
 5 A. No.
 6 Q. Does it refresh your memory as to whether the
 7 City of McCall had any specific iterations of that, or
 8 different codes than that?
 9 A. No.
 10 Q. And it might help if you have Exhibit 1 back
 11 in front of you here, your company's floor plan. I
 12 would like you to walk me through the chronology of your
 13 company's work on the project. You've told me how it is
 14 you wound up out there. That Mr. Longmire said, we have
 15 some issues in the crawlspace, and the door doesn't
 16 work. Obviously, the project evolved to something
 17 substantially more than that.
 18 Can you just walk me through the chronology
 19 from the time you started work on the project, to the
 20 time you finished, what portions of the home you worked
 21 on, and generally what you did?
 22 A. Okay. I will give you what I know.
 23 Q. Yes.
 24 A. Which Eric will be able to provide much more
 25 exact details on. We started on right at the area of

1 A. Yes.
 2 Q. Where was the project? What was the project?
 3 A. In Spring Mountain Ranch.
 4 Q. A single-family residence?
 5 A. Yes.
 6 Q. Spec or built for an owner?
 7 A. Built for an owner.
 8 Q. Who was the owner?
 9 A. I don't remember. And let me clarify that.
 10 Q. Go ahead.
 11 A. Actually, one was a spec. And then I'm trying
 12 to think of time frame, because Whitetail would be in
 13 the city.
 14 Q. Yes.
 15 A. I believe.
 16 Q. That's correct.
 17 A. We went through city code.
 18 Q. That's correct.
 19 A. I think it was '05, we started a large project
 20 in there.
 21 Q. Do you remember which one that was for?
 22 A. Travis Higgins.
 23 Q. And that was under the supervision of the City
 24 of McCall?
 25 A. Yes.

1 the door. Pulled the stone off around the door, and
 2 then flashings around the door, removed -- well, first
 3 of all, we had to remove the decking also in the area,
 4 so we could get access down below. And you want exact
 5 detail, detail? I mean, kind of a roundabout --
 6 Q. No, you are doing fine. That would have been
 7 April 2014?
 8 A. Yes.
 9 Q. And the door, of course, you are referring to
 10 are the french doors off the dining room?
 11 A. Correct.
 12 Q. When did you do the mold remediation in the
 13 crawlspace; later or before?
 14 A. I'm not sure. But I believe it was done after
 15 we had repaired the floor area, and enclosed the
 16 crawlspace back up. Then I believe we did the mold
 17 remediation in the crawl. But it would be in our daily
 18 job reports by Eric.
 19 Q. And the daily job reports, I will tell you
 20 that I've received, cover a period generally April 14,
 21 2014 to June 13, 2014. Does that sound about right to
 22 you, about the span of the project?
 23 A. Yes.
 24 Q. So was it necessary for your workers to be in
 25 that crawlspace as the work progressed, independent of

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1 mold remediation?
 2 A. Yes.
 3 Q. And that would be to access floor joists, and
 4 rim joists, and things like that?
 5 A. Correct.
 6 Q. Do you know whether they encountered water in
 7 there?
 8 A. I do not know that.
 9 Q. So sorry. Go ahead. You told me you started
 10 with french doors, and started pulling stuff off.
 11 A. Yes, we pulled the stone off around the french
 12 door, removed the french door. And again, I'm giving
 13 you more summarization. Eric can give you more detail.
 14 We had to remove the deck joists right in that
 15 area, decking and deck joists in that area, so we could
 16 access the rim board area, replace that, replace the
 17 joists. Had to pull up some hardwood in front of the
 18 french doors, so that we could replace the sub-floor
 19 there.
 20 And then put the new door in that Ed had
 21 purchased, or got as a warranty. I do not know. But we
 22 did not buy that door. We just installed it. So we got
 23 the new door in. Then on the interior of the home, had
 24 the hardwood contractor, subcontractor come in. So we
 25 could get the hardwood put back down up to the door, and

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1 start the refinishing process on the inside.
 2 Then on the exterior, we had exposed the
 3 corner, would be the southeast corner by the door there,
 4 when we removed the stone. And as we exposed that, we
 5 found wood rot, and structural rot up two to
 6 three-and-a-half feet in that area. And that was the
 7 extent of our scope of work in the original contract was
 8 to stop right there.
 9 So at that time, you know, it was brought up.
 10 Michael Longmire is our communication point, showing him
 11 what's going on. He says, well, let's talk with Ed
 12 about this. Because, really, literally what we've
 13 exposed, there is still rot going further.
 14 Q. And when you say, "going further," it would be
 15 going --
 16 A. East, and then north across the face of the
 17 dining room.
 18 Q. Okay. Go ahead.
 19 A. And so then I don't know the downtime. But,
 20 basically, the project was stopped, as far as the
 21 exterior work. We had the door installed, sealed up,
 22 waterproofed. Interior hardwood stuff is going on. And
 23 then we are doing -- working with Ed to determine what
 24 he wanted to do further on the exterior, how far he
 25 wanted to go.

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1 And I believe that's when the first estimate
 2 for the 11,000 -- approximately, \$11,000 was produced to
 3 go across the front of this face in the east side of the
 4 dining room, and that returning wall there.
 5 Q. That's the Change Order No. 1, we looked at?
 6 A. Correct.
 7 Q. And is that the lake side then, that you are
 8 into?
 9 A. Yes, it is.
 10 Q. Okay. Continue.
 11 A. And then, honestly, you'll have to -- I don't
 12 know exactly how it was, if we started on that work, and
 13 then Ed said, hey, let's check all the corners, if there
 14 is rot here. Let's check the other corners. I'm not
 15 sure of the timeline of events. We would have to ask
 16 Eric on that.
 17 But at some point, it was discussed, well, if
 18 there is rot on both these corners (indicating), what
 19 about further as we go along the rest of the house
 20 (indicating)? Let's inspect that.
 21 Q. When you say, "these corners," these are the
 22 two corners of the dining room?
 23 A. Yes, dining room.
 24 Q. And then you are gesturing down to the family
 25 room; right?

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1 A. Yes.
 2 Q. Which is farther north?
 3 A. Farther north, but still on the lake side.
 4 Q. Still on the lake side. Okay. Go ahead.
 5 A. And so then we inspected those areas, found
 6 additional damages down in the corners of each of those
 7 areas.
 8 Q. Was it just in the corners?
 9 A. I don't know, to be honest.
 10 Q. Okay. And --
 11 A. I know that was the majority of it.
 12 Q. To inspect those, and I assume you pulled rock
 13 veneer off?
 14 A. Yes.
 15 Q. Was there rock veneer all the way around the
 16 house?
 17 A. Not all the way. I believe it comes out
 18 around the dining room, and then returns to this
 19 wall -- this inset wall (indicating). And then I
 20 believe that's sided. And then there is stone out
 21 around the family room.
 22 Q. Okay.
 23 A. And then there is some stone around the north
 24 wall of the family room. I'm not sure exactly which
 25 areas.

1 Q. Okay. So continue.

2 A. So we did those further inspections. Ed asked
3 us, okay, produce an estimate to do all this. What is
4 it going to take to fix all this? We've got it torn
5 apart. I want it fixed right, so I don't have -- we
6 don't have to come in later, and have further issues,
7 and tear these apart.

8 That's when I believe we produced that \$30,000
9 estimate, and submitted that to him. Again, it's a
10 process of waiting for Ed. It wasn't -- we didn't get
11 responses immediately on those things.

12 Q. Sure.

13 A. So then we waited for his approval. Then we
14 went forward with that work. Then as we did the work,
15 because we didn't open up all of it, he asked us to
16 produce, what's worst case? And then as we go along, do
17 what's necessary. So that's when we completed -- when
18 we found -- when we got to the north side, there wasn't
19 issues on some of the areas that were in our estimate.
20 That's why you saw that \$4,700 credit, because we didn't
21 have to do any work there.

22 Q. Was there deck all the way around?

23 A. Yes.

24 Q. Okay. Go ahead.

25 A. So, yeah, we opened everything up, and did the

1 repairs on it. And, yeah, wrapped things up. I guess
2 that was -- you know, I don't know -- yeah, finished up.

3 Q. That's fine. And all that work is reflected
4 in the invoices, and the statement that we've reviewed
5 already?

6 A. Yes, it is.

7 Q. So that involved, as I understand it, taking
8 rock veneer off. And I'm assuming, removing areas where
9 you had rot, and then replacing and restoring those
10 areas?

11 A. Yes.

12 Q. Okay.

13 A. So we would remove the stone, expose the area.
14 If there is any rotted materials, we would remove, and
15 replace those materials. And then treat the affected
16 area with an antimicrobial to prevent any further growth
17 of wood rot and mold.

18 Q. So in those areas that were problematic, you
19 would be at least down to the OSB, I assume; correct?

20 A. Correct.

21 Q. And so veneer would have to come off. Masonry
22 and mesh would have to come off. Felt would have to
23 come off. And if there was Tyvek, it would have to come
24 off, too?

25 A. Correct.

1 Q. Do you know what portions of the exterior that
2 your company worked on, were or were not Tyveked?

3 A. I do not know that.

4 Q. Okay.

5 A. Can I add to that?

6 Q. You bet.

7 A. In reviewing these pictures the other day with
8 Eric, myself, and Alyson, you know, looking at the
9 pictures, it did not appear that there was Tyvek on the
10 front of the dining room area, that it was just the
11 felt. But again, that's just from looking at pictures
12 the other day, so...

13 Q. Did it appear that there was Tyvek around the
14 windows and on the corners?

15 A. Yes.

16 MS. FOSTER: Can you clarify "the corners"?

17 Q. (BY MR. MILLEMANN) Well, you can clarify it.

18 A. To clarify, in response, I guess where I saw
19 pictures of the Tyvek was around the double french door
20 in the dining room.

21 Q. Okay.

22 A. Starting with the inside wall, coming out
23 around that door to the corner of the house, I saw that
24 there was Tyvek at those points.

25 Q. And as you proceeded then north along the

1 dining room wall, and the family room wall, did you
2 observe any more Tyvek?

3 A. In the pictures it showed a small strip of
4 Tyvek that came over, like in the middle section. But
5 down at the bottom and the top, no.

6 Q. And if you are able to tell me, how far north
7 on the house did your work stop? That is, how far did
8 you disturb what's the northern extreme of the areas
9 that you disturbed and repaired?

10 A. So I believe it would be the northeast corner
11 of the family room.

12 Q. And that was because, beyond that, you didn't
13 find any problem?

14 A. Right. I believe there is stone right on the
15 very north side of the family room around the fireplace
16 or something. I think that was part of our scope of
17 work, but we inspected that, and there was no issues
18 there.

19 Q. Real stone or stone veneer?

20 A. Stone veneer.

21 Q. Just give me a minute here.

22 A. Okay.

23 Q. You mentioned, Beau, that your company did not
24 purchase the replacement door?

25 A. Correct.

1 Q. Was that a similar door, or was there a
 2 different door used?
 3 A. It was a similar door.
 4 Q. Double french?
 5 A. Yes.
 6 Q. Opening out?
 7 A. I'm not sure.
 8 Q. Did you observe that door after it was
 9 installed?
 10 A. Yes.
 11 Q. Do you have any idea what a door like that
 12 would cost?
 13 A. It depends on the manufacturer. But I would
 14 say, you know, \$4,000.
 15 Q. So you've exposed areas. You have eliminated
 16 areas of rot, treated those, replaced the wood, treated
 17 those. In my world, where you are at that point, is you
 18 have clean OSB; does that make sense?
 19 A. Correct.
 20 Q. Now, you are going to build back out from
 21 there?
 22 A. Correct.
 23 Q. Now, substantial portions of that, it sounds
 24 like, were replacement of the rock veneer?
 25 A. Yes.

1 years and been relied on more than, say, in 2003 and
 2 '04?
 3 A. Absolutely.
 4 Q. Is that because it was a product that was
 5 developed after those years, or just didn't start to be
 6 used up here, if you know?
 7 A. I honestly don't know. I think for us, it
 8 just became more common practice, issues, ice dams.
 9 Q. Did you have occasion when you were building
 10 at the beginning of your time here, 2003 and 2004, to
 11 use ice and water shield on walls in homes?
 12 A. No.
 13 Q. If you used it, it would have been used in the
 14 roofs and valleys, that sort of thing?
 15 A. Yes.
 16 Q. So the ice and water shield goes right on the
 17 OSB?
 18 A. Yep.
 19 Q. And does the masonry mesh and the masonry go
 20 right on that?
 21 A. Correct.
 22 Q. And then the rock veneer?
 23 A. Yes.
 24 Q. Do you know what sort of flashing, if any, was
 25 used at the confluence of the deck and the house?

1 Q. And that was Baumgartner?
 2 A. Yes.
 3 Q. Do you know the elements of the construction
 4 technique they used when they replaced that veneer?
 5 A. They used ice and water shield going back on
 6 the house. Because it was decided between Eric and
 7 Rocky, that with the weather that hit that side of the
 8 house, and the previous issues that had been addressed,
 9 we wanted to ensure that we didn't have issues there.
 10 So we put ice and water shield up that entire area.
 11 Q. Can you just briefly describe the ice and
 12 water shield product?
 13 A. It's normally a product used on roofs. It's
 14 required in Valley County on roofs, and it adheres to,
 15 basically, your sheeting, and it sticks to itself. It's
 16 one of the best products for waterproofing things in
 17 Valley County. It's a similar product that we use
 18 smaller six-inch rolls to waterproof around your windows
 19 and doors.
 20 Q. Over the course in your experience in building
 21 in Valley County from back then to today, have you seen
 22 more use of ice and water shield, less, or just about
 23 the same?
 24 A. More.
 25 Q. Is that a product that has come on over the

1 A. We used -- so I believe, and I don't know for
 2 certain on this, but I believe in discussions with Eric,
 3 that we pulled the deck rim board, a two by ten, or two
 4 by 12, attached to the house, off around the house. Ran
 5 Tyvek, or ice and water shield, I'm not certain of what
 6 it was that we put behind that, because we felt still
 7 concerning if we had water penetrate below the stone,
 8 that there was exposed OSB. So we wanted to prevent any
 9 future issues, so that I didn't sit in this courtroom at
 10 a future date -- or not courtroom.
 11 Q. Yes.
 12 A. And so we pulled all that rim board, ran it
 13 clear down to the bottom of the OSB, top of the
 14 foundation. And then we put a four-by-four inch by
 15 four-inch flashing at the deck, and then did another
 16 small layer over the top of that, so that everything
 17 came down and shed water.
 18 Q. So the rim board, am I correct in
 19 understanding, that's a board that winds up being flush
 20 against the side of the house, and then your deck joists
 21 are attached to that?
 22 A. Yes.
 23 Q. And it is more curiosity than anything. With
 24 ice and water shield, when you then attach the rim
 25 boards back, I assume you've got to screw through that?

1 Does this seal right back over those screws?
 2 A. It normally does a very good job of that, yes.
 3 That's why it's used on roofs and stuff, because it
 4 seals around those.
 5 Q. And where there was not veneer, but siding, I
 6 think you thought maybe, some of the -- as we
 7 transitioned from the dining room into the family room,
 8 that you moved from veneer into siding?
 9 A. Uh-huh.
 10 Q. Also ice and water shield?
 11 A. I don't believe we removed any of that.
 12 Q. Oh, you didn't. You didn't have problems
 13 there?
 14 A. No. I believe there was an overhang there,
 15 not sure, from my knowledge, and there was not issues in
 16 that area.
 17 Q. And that area would be the -- I'm referring to
 18 the recessed area here, on the east side of the house,
 19 that is the transition from the dining room to family
 20 room?
 21 A. Yes.
 22 Q. And so you think there was more of an overhang
 23 over that that what; possibly did a better job of
 24 preventing water from getting back up against that wall?
 25 A. Correct.

1 weren't any problems over there?
 2 A. Yeah. I mean, I believe that, you know, some
 3 of the valleys coming down off these gables, so you have
 4 your main -- main roof structure here (indicating). You
 5 have gable ends coming out these -- on this east side
 6 (indicating). So you have these large valleys draining
 7 down here (indicating). That water, I don't believe,
 8 there was gutters on the home until Ed purchased it. I
 9 don't know when the gutters were installed. I know
 10 there is gutters on the home now.
 11 Water comes down through those valleys, runs
 12 down on to the deck, splashes back against the stone.
 13 Or if there is -- a lot of times this time of year, you
 14 look at the pictures in Todd's report, you see a lot of
 15 snow on the deck. And if that snow is not shoveled,
 16 it's piled up in those areas. Water runs down on to
 17 that frozen snow, such as we have outside. Splashes
 18 back, or is pushed right next to the house, and runs
 19 down on to that masonry. Versus on this north side, we
 20 have that gable end. You don't have those issues of
 21 that direct water pushing against it. And we don't seem
 22 to get too many storms driven straight down from the
 23 north side in this area.
 24 Q. Thank you. And the valleys, or what I refer
 25 to the valleys, are created when you have a gable end

1 Q. I assume the overhang over the veneer was less
 2 of an overhang?
 3 A. Yes. This was a gable end. So it didn't have
 4 that overhang come down and exposed gable. And, yes, so
 5 it was much more exposed to the elements.
 6 Q. And then as you moved out of the recessed
 7 area, and into the northern extension of the east wall
 8 of the family room, did you get back into veneer there?
 9 A. Yes.
 10 Q. And was that also gable?
 11 A. Yes.
 12 Q. And did you also have problems there?
 13 A. Yes.
 14 Q. And so you are back to the ice and the water
 15 shield?
 16 A. Correct.
 17 Q. And so in that situation, where you use ice
 18 and water shield, does that eliminate the need for Tyvek
 19 or felt?
 20 A. Yes.
 21 Q. And then you said as you got around to the
 22 north side of the house, you didn't encounter any more
 23 problems?
 24 A. Correct.
 25 Q. Do you have any opinion as to why there

1 against another roof line, and you've got a depressed
 2 valley in between the two of them; is that kind of
 3 right?
 4 A. Correct, yes.
 5 Q. And those tend to, obviously, shed more water
 6 than the rest of the roof would?
 7 A. Yes. And you have a large roof surface area
 8 here, all coming into two smaller areas here
 9 (indicating). So the whole plane of that roof, that's a
 10 lot of water coming into those two areas -- or actually
 11 four areas.
 12 Q. Given your explanation, and that might explain
 13 why more problems were encountered kind of at the
 14 corners, than on the straight wall runs?
 15 A. Correct.
 16 Q. Did your company retain any of the materials
 17 that you took off of, or out of the house?
 18 A. No, photographed and disposed of.
 19 Q. And we have all those photographs; right?
 20 A. Yes.
 21 Q. Okay.
 22 MS. FOSTER: Sorry. Just to clarify, do you
 23 include the older doors in that?
 24 MR. MILLEMANN: Excuse me?
 25 MS. FOSTER: When you include materials, do

1 you always mean the doors?
 2 Q. (BY MR. MILLEMANN) Yes. You didn't keep the
 3 old door?
 4 A. I know I didn't. I know we did for a while,
 5 and I believe it was eventually disposed of.
 6 Q. As part of your estimate of what needed to be
 7 done to fix this house, and I realize it wasn't one
 8 estimate, it was evolving estimates as you discovered
 9 more; correct?
 10 A. Correct.
 11 Q. That did not include gutters, I take it?
 12 A. No.
 13 Q. So am I correct in understanding, that your
 14 opinion was for the problem that you encountered, and
 15 the condition you encountered, the work you did was
 16 sufficient to not only repair it, but to prevent it from
 17 re-occurring?
 18 A. Yes.
 19 Q. Besides the door, to your knowledge, and just
 20 if you know, did Mr. Petrus purchase any other
 21 materials, or provide directly any other labor related
 22 to the work that your company performed?
 23 A. No.
 24 MR. MILLEMANN: How are we doing on time?
 25 MS. GENTRY: It's about five to 12:00.

1 MR. MILLEMANN: This would be a logical point
 2 to take a lunch break. We're making good progress. So
 3 we were originally hoping to do Mr. McKenna to 2:00.
 4 MS. FOSTER: It was 2:30. And we've since
 5 moved it to 3:00. But Mr. Value has a hard stop at
 6 2:30.
 7 THE WITNESS: Kids.
 8 MR. MILLEMANN: I think I have a reasonable
 9 prospect of being done by then. If not, we can talk
 10 about what to do to finish up with him.
 11 MS. FOSTER: And it may be if I have
 12 clarifying questions, that I think would assist your
 13 understanding of his opinions. If we can't get to them
 14 today, we should have a discussion about how to address
 15 that. But I don't want to talk about it now, because I
 16 don't know the answer yet.
 17 MR. MILLEMANN: To?
 18 MS. FOSTER: How to address it. Does that
 19 make sense?
 20 MR. MILLEMANN: Sort of. No offense.
 21 MS. FOSTER: I'm clear as ever.
 22 MR. MILLEMANN: Yeah. I guess the threshold
 23 question would be, if, just for planning purposes, if
 24 we're not able to finish by 2:30, is Mr. Value available
 25 on Monday?

1 MS. FOSTER: We can discuss that at the break.
 2 MR. MILLEMANN: Okay. I think that's -- you
 3 and I talked about it. We are making very good
 4 progress. I think if we're not there, awfully close,
 5 maybe subject to what other counsel want to ask. Is 45
 6 minutes enough for everybody?
 7 MS. FOSTER: That's fine for me.
 8 MR. MILLEMANN: Okay.
 9 (A lunch recess was had.)
 10 (Ms. Andrea Fontaine joined the deposition.)
 11 Q. (BY MR. MILLEMANN) Beau, we're back on the
 12 record. And you understand you are still under oath?
 13 A. Yes.
 14 Q. So I think I understand that -- you did a good
 15 job of describing to me the work your company did in the
 16 process of fixing the damage, and then restoring the
 17 dwelling in a way that you believe would prevent the
 18 reoccurrence of it; is that a fair statement?
 19 A. Yes.
 20 Q. Have you formed any opinion as to what caused
 21 the damage, and the condition that your company
 22 encountered and corrected?
 23 A. Yes.
 24 Q. And what's your opinion?
 25 A. So I'll grab Exhibit 1.

1 Q. Okay.
 2 A. So I believe there is two issues. There is
 3 two separate issues that we repaired during this, caused
 4 by two separate things. Starting with the door, there
 5 was -- we have pictures to show that when the
 6 door -- the framing was done underneath the door, it was
 7 not done properly. And I guess there is not to -- I'll
 8 expand on that.
 9 So you can tell when you look at the original
 10 plans, there was a change order done at some point
 11 from -- to what was built. Because what is built is
 12 different than what the original plans show. The
 13 original plans show a straight wall there with a window,
 14 and a single door. And now, the wall steps back,
 15 because somehow, architecturally, I don't know if there
 16 was an architect involved, homeowner/builder
 17 relationship, whatever, they decided to recess that, and
 18 turn the stone into the door for looks.
 19 And you can tell that it was done afterwards.
 20 I'm sure being in the trade, growing up, being a framer
 21 for eight years myself. You show up on site. You frame
 22 that floor structure. And you are moving forward. And
 23 then at some point later, that change was made to recess
 24 that in.
 25 Q. So I'm sorry to interrupt you. When you say

1 it's recessed, Beau, I want to make sure I understand
 2 what you are talking about.
 3 I understand the part about the original, a
 4 prior plan showing a window and a single door. I get
 5 that.
 6 A. Yes.
 7 Q. But the recess part, I'm curious about.
 8 A. So this wall you see, like in our plan that we
 9 drew, goes straight across (indicating).
 10 Q. That's the south wall of the dining nook area;
 11 correct?
 12 A. Yes.
 13 Can I have a piece of paper?
 14 Q. Sure. Go ahead.
 15 A. So draw the corner of that dining room.
 16 (Witness drawing.) I believe those were out swinging
 17 doors, right?
 18 Q. So you have drawn an enlarged version of the
 19 area where the french doors were placed; right?
 20 A. Correct.
 21 Q. Go ahead.
 22 A. Yes. So what I've drawn here. Originally,
 23 this wall was straight coming across. A change was made
 24 to move this wall in (indicating). And this wall
 25 (indicating) was thickened on each side. So it filled

1 four-to-six-inch flashing going across there, that then
 2 came up underneath the door. And there was Tyvek
 3 material underneath there, also. But no structural
 4 support right in that area (indicating).
 5 Q. And that area, being the recessed area?
 6 A. Yes, in this recessed area (indicating).
 7 Because this is apart, you know, right in -- coming
 8 across this dotted line (indicating). That's where the
 9 floor originally was.
 10 Q. Uh-huh.
 11 A. But when you go to run your decking, that was
 12 exposed. And so anyhow, they cut this out (indicating),
 13 so that decking could run in there. And then like I
 14 said, they put the metal flashing, and some Tyvek
 15 underneath it, waterproofing it, and then running the
 16 deck over it.
 17 Q. So, Beau, if I understand you, if the lines on
 18 your paper were the deck boards.
 19 A. Yes.
 20 Q. That is the way they ran; wasn't it?
 21 A. Yes.
 22 Q. Then they actually -- what I understand you
 23 saying, the deck boards actually extended into the
 24 recessed area?
 25 A. Yes.

1 on the inside, so you didn't know the wall stepped. But
 2 on the outside, it gave the effect as the stone comes
 3 along, and then they returned it. The stone had depth
 4 returning back to the door.
 5 Q. It makes it look more like real stone?
 6 A. Yes, and it was an architectural thing. So,
 7 that happened on both sides of this door. And, Eric,
 8 did the good drawing the other day. So when they framed
 9 this floor, you know, then they moved this wall back.
 10 No big deal. Well, when you put the deck on, your deck
 11 is stepped down two inches below -- just approximately
 12 two inches -- below what the main floor framing is.
 13 So when they go to run that decking in, now
 14 they have this, approximately, four inches here
 15 (indicating), in front of this door, that is this actual
 16 sub-floor that's exposed. And decking running right up
 17 to it. Well, that's not going to work. That's not
 18 going to be a finished product.
 19 So what they did is they cut -- the framing
 20 contractor, somebody, cut the joist, and cut the rim
 21 board down in that area, and just cut the top of the
 22 joist back. They basically notched the top of the joist
 23 back.
 24 And then they put some metal flashing in
 25 there. I don't recall exactly what it was, but it is a

1 Q. And so if I'm the homeowner, I've got my door
 2 threshold. And when I open my doors, and look down,
 3 what I see is decking coming right up to the threshold?
 4 A. Right.
 5 Q. Am I right so far?
 6 A. Yes, you are.
 7 Q. And you are saying, underneath that is the
 8 issue?
 9 A. Yes. Can I draw one more?
 10 Q. Yes.
 11 A. (Witness drawing.) Over on the side, start
 12 with foundation, wall -- the foundation wall and
 13 footing. And then on top of that, you pressure treat,
 14 seal. And then your rim board, which we've been
 15 discussing.
 16 Q. Right.
 17 A. And then inside of that would be your TJIs
 18 running into this room (indicating), this way
 19 (indicating).
 20 Q. Your TJIs being the deck boards?
 21 A. No, TJIs being your joists, floor joists.
 22 Q. The joists for the deck?
 23 A. No, for the floor.
 24 Q. For the floor.
 25 A. Yes, so this is inside the house.

1 Q. That's inside the house?
 2 A. Yes. So this wall (indicating) was a cut,
 3 basically right there (indicating).
 4 Q. All right.
 5 A. And then so originally it was framed out here
 6 (indicating) with this (indicating). And then you put
 7 your wall on top of this (indicating), right here
 8 (indicating). And then your wall framing comes up. And
 9 you put your door there (indicating), and you step out
 10 on your deck, no problem.
 11 Q. All right.
 12 A. So now imagine -- let's see. Let's put
 13 it -- we go and we install -- they install, not
 14 me -- your decking ledgers and joists, and then you
 15 have -- because they are running the opposite way. So
 16 you have these joists. And again, they are step down
 17 approximately two inches, two-and-a-half inches. I
 18 don't know what the measurement was. But you always
 19 step down to go out your doors.
 20 Q. All right.
 21 A. It helps, so you don't have water coming
 22 inside. Then the decking running over them, like that
 23 (indicating). And so that decking is approximately one
 24 inch thick, and runs into the side of that. And then
 25 you have flashing that comes up here (indicating).

1 excuses for anybody. I'm saying, that's what happened.
 2 And I feel that this waterproofing underneath here
 3 (indicating) was not adequate.
 4 Q. Okay.
 5 A. And with all the moisture, and stuff, you
 6 know, especially that valley coming down, probably
 7 dumping, wherever it dumped, right in here (indicating),
 8 somewhere. And all that splashing running back in
 9 there, it sat in this spot that wasn't framed right,
 10 waterproofed right, and then started leaking in.
 11 Q. Essentially, underneath the decking?
 12 A. Underneath the decking.
 13 Q. Perched, if you would?
 14 A. Yes. And plus this almost created a trough
 15 that that water would sit in, because it wasn't sloped
 16 or anything. It was just sitting there flat, versus if
 17 this would have been framed right, it would have been
 18 drained out, and out, and that water sat there.
 19 And you made a good point earlier to ask me,
 20 if there was any visible signs on the top of the door
 21 outside, or -- and we are talking about the dining
 22 room -- or inside that dining room, inside those doors,
 23 if there was any visible damage to the hardwood floor,
 24 to the trim, anything around there. And there wasn't.
 25 And that tells me that all the weather stripping on the

1 Q. All right.
 2 A. So when you take and you move this wall back
 3 four inches to create this recess, this architectural
 4 recess, now, you have this little chunk right there
 5 (indicating), that's exposed. And you had this piece of
 6 framing, sub-floor, and little piece of rim,
 7 that -- well, we don't want to look at that. That's not
 8 finished. There is no way to finish that.
 9 So that's what I'm saying, they took and cut
 10 right below, where this decking line would be. They cut
 11 these joists, and notched them in like that
 12 (indicating), and notched them in right there
 13 (indicating). And then they put some flashing in here
 14 (indicating), and some ice and water shield in there to
 15 waterproof it. And they ran their decking right in to
 16 there (indicating).
 17 Q. Right there.
 18 A. Again, the wall sitting back here
 19 (indicating), once you get into the step. And then they
 20 ran the decking right into there (indicating). It was a
 21 change. It was something done after thought. Could it
 22 have been done different? Yeah, it's a framing
 23 contractor. I mean, I've hired plenty of framing
 24 contractors who have probably done -- do they do the way
 25 you want to make it done? I'm not trying to make

1 door was working fine. If there was weather stripping
 2 issues, we -- that water would have come inside. We
 3 would have had warped hardwood. MDF trim gets any water
 4 on it, it swells up. We would have had swelled trim.
 5 Q. And you didn't have either of those?
 6 A. And we didn't have any of those.
 7 Q. Or even staining?
 8 A. Right.
 9 Q. On top?
 10 A. Yeah. If we would have had weather stripping
 11 issues, we would have seen those things.
 12 Q. Okay.
 13 A. To me, this was a waterproofing issue
 14 underneath the decking. That was why everything we saw
 15 was, basically, subsurface.
 16 Q. I want you to finish this thought.
 17 A. Yes.
 18 Q. You said you had two different theories. So
 19 when you have concluded this one, I have a couple of
 20 questions.
 21 A. So I believe that one was for the main cause
 22 for the area underneath the door. The rot that we found
 23 in sub-floor, you know, extending out not very far,
 24 maybe a foot out from here (indicating), and the rot on
 25 all of the ends of these joists. And then the rot on

1 that rim board, right along that wall, I believe were
2 caused by this.

3 When we reframed it, we stepped the rim back
4 following the wall line. And so the same issue wouldn't
5 occur again. And that way everything waterproofs clear
6 down, and then out.

7 Q. So you did some inspections of the home, as
8 you've testified, before you disturbed anything?

9 A. Uh-huh.

10 Q. Was any of that visible to you when you did
11 those initial inspections, or could it have been?

12 A. Yes. So when we -- when I inspected the home
13 the first time with Michael Longmire, above where that
14 foam was removed underneath the door, we looked up, and
15 we saw the Tyvek. And really all we saw was the bottom
16 of the Tyvek, you couldn't see the flashing above it.

17 And we were wondering, what is going on here?
18 We didn't know how this was done. But we knew, why is
19 this done this way? What is going on? And then as we
20 took it apart, we figured what happened. You look at
21 the plans, see the original, see how it was changed.
22 And so it all makes sense.

23 Q. So when you say, you looked up and saw it.
24 This would have been when you were in the crawlspace,
25 removed insulation, and looking up through it?

1 And then this would just be a dining room wall elevation
2 cut.

3 Q. Okay.
4 (Exhibit 61 marked.)

5 Q. (BY MR. MILLEMANN) The condition that you
6 have described to me, and drawn in Exhibit 61, to hugely
7 simplify it, as I understand it, related to how,
8 essentially, the door was framed. And a function of how
9 the framing was done once the decision was made to
10 recess the door?

11 A. Correct.

12 Q. I want to try to break it down into three
13 possible categories. And if you are not able to answer
14 these, that's fine.

15 The first is, do you consider the condition
16 that you've drawn in Exhibit 61 to be a construction
17 defect?

18 A. I mean, it was improperly flashed.

19 Q. And I don't want to cut you off. When you
20 say, it's improperly flashed, is that the manner in
21 which it was a construction defect, or is there more to
22 it than that?

23 A. There is more to it than that, I guess. I
24 mean, it would definitely, by, you know, adjusting the
25 rim joist back, cutting the joists in the TJIs back in

1 A. Right.

2 Q. So when you were inspecting the house, other
3 than when you are in the crawlspace, when you are in the
4 interior of the main floor, or out on the deck before
5 you disturbed anything, was any of this apparent to you?

6 A. No.

7 Q. And so I think you said, you thought this was
8 caused by two things, and that was one of them?

9 A. Yes, that's one.

10 Q. And can you go ahead and label your drawing
11 here, just your name, and date? And then we're going to
12 mark it.

13 A. (Witness complying.)

14 Q. And whatever label is appropriate, can you
15 label these two sketches, however you think they should
16 be labeled?

17 A. Dining room wall layout.

18 Q. Okay.

19 A. "Dining room exterior wall," how about that?

20 Q. That's fine.

21 A. (Witness complying.)

22 MS. FOSTER: Maybe north, south.

23 THE WITNESS: Dining room south wall.

24 Q. (BY MR. MILLEMANN) Thank you.

25 A. And then put over here (indicating), for east.

1 the crawlspace, and shifting that rim back, it provides
2 better sealing. You know, your envelope, your exterior
3 envelope, it makes it right. It provides waterproofing
4 clear down by creating literally a pocket, and
5 unsupported structure underneath that door right there
6 (indicating), without blocking it, or anything. And,
7 actually, I take that back, I don't know if there was
8 blocking or not. I just remember the flashing. I know
9 there wasn't blocking solid from bottom -- from your
10 pressure treat seal up to there.

11 Q. Okay.

12 A. I mean, there is a couple of different ways it
13 could have been done. This was the least effective way.
14 I mean, without cutting the whole joist back, they could
15 have put solid blocking clear down to the rims
16 supporting that floor, and then cross-blocking flat
17 there, to help get that water sloping out.

18 Q. And specifically in what respect -- and if
19 you've already told me, just say that -- was the
20 flashing improper?

21 A. Well, the flashing was patching something
22 that, you know, wasn't structurally done right.

23 Q. Okay. Go ahead, if you need to.

24 A. And again, it created a flat spot where that
25 water -- you know, you have all this water. This spot

1 right here (indicating), you get snow piling back here
2 (indicating). The water is coming right back towards
3 the house. So it would sit in there. And if you look
4 at the pictures, and you look at the damage we saw, this
5 wasn't something that happened quickly. This was
6 something that probably started shortly after the house
7 was built, and slowly started -- that water started
8 penetrating and created rot. That's what it does.

9 Q. And on what do you base that opinion, the
10 duration of the development of the condition that you
11 observed?

12 A. Because we see this all the time. In my
13 industry now, from being a restoration contractor, we
14 deal with flashings, and rot, and mold all the time.
15 And have learned a lot about how long it takes something
16 to see the level of rot that we saw here.

17 Q. Much earlier this morning, you testified as to
18 what your practice was in terms of moisture barrier and
19 flashing.

20 A. Uh-huh.

21 Q. And I'm going to paraphrase your testimony,
22 and if I do it wrong, you tell me. What I understood
23 your testimony to be, is when we move from how you did
24 it, to what was the standard in Valley County
25 construction industry for that issue of moisture barrier

1 opinion, an improper construction technique, or is it
2 something else yet?

3 A. There may be two things: Improper technique
4 would be the first one to say. Building code may be an
5 issue. I mean, if a building inspector was to look at
6 the way the floor was cut, just literally notched, with
7 no supporting structure underneath that, would the
8 building official currently pass that? No. Would the
9 building official at the time? Probably, because things
10 were good.

11 Q. And that would be a topic for a long
12 conversation.

13 A. Yes.

14 Q. But my question is, from your own knowledge
15 and expertise, do you know whether what you've depicted
16 here violated a building code in effect in 2004, 2005?

17 A. I don't know the proper answer to that.

18 Q. That's fine. And, you know, it seems to me in
19 a report somewhere, and I don't know where it was, I saw
20 some reference to floor joists having been -- it didn't
21 say patched in, but laid in alongside of other floor
22 joists somewhere in the house. Do you know anything
23 about this?

24 A. I don't.

25 Q. Okay.

1 and flashing, I thought you told me, you weren't
2 necessarily comfortable saying what the standard was.
3 Did I get that right or wrong?

4 A. I think I -- you know, I said that, because it
5 wasn't a code.

6 Q. Yeah. Okay.

7 A. It was more of our practice. And it was -- it
8 was a newer -- you know, it was improving what people
9 were doing. And I think we were -- you know, I don't
10 know what all the other builders were doing.

11 Q. Okay.

12 A. But, you know --

13 Q. Fair enough. If I understand what you are
14 saying, to the extent there was a "standard," quote,
15 unquote, what you aspired to do would be above it?

16 A. Yes.

17 Q. And that is what you aspired to be able to
18 say, is your standards were higher and more stringent
19 than the prevailing construction standards in the
20 valley; is that fair?

21 A. Yes. And that's what I claimed earlier to be.
22 Yes.

23 Q. So this defect that you've depicted in Exhibit
24 61, I think you just told me, is this a result of a
25 non-compliance with a building code, or is it, in your

1 A. I know in one of our estimates, maybe we
2 talked about sistering floor joists to the other floor
3 joists, so that we didn't have to pull those joists.
4 Because you don't want to pull all the sub-floor and
5 hardwood in the entire dining room. You just want the
6 affected area. So we cut the old rotted area in the old
7 joists, sistered new joists to them. And that may
8 be --

9 Q. And that's what you did?

10 A. Yes.

11 Q. To the ends of those joists right in the area
12 of this very door --

13 A. Yes.

14 Q. -- that had been affected by rot?

15 A. Yes.

16 Q. And when you say, "sister," does that
17 essentially mean overlap?

18 A. Put one right next to the other one.

19 Q. And brace them?

20 A. Yes.

21 Q. Okay. And there was another one. You thought
22 there might be something else that caused this?

23 A. Yes. So in my opinion, that is the cause of
24 the exact damage, the floor joists damage, and the issue
25 underneath this door.

1 Q. Okay.
 2 A. Then I'm going to go back to Exhibit No. 1,
 3 showing the floor plan, and how we found rot on these
 4 corners behind the stone.
 5 Q. And these would be corners along the east side
 6 of the house; right?
 7 A. The east side of the house, on the face of the
 8 dining room, behind the stone wainscot, and the family
 9 room.
 10 Q. And there are really four corners there;
 11 right?
 12 A. Correct.
 13 Q. And did you find the rot in all four of those?
 14 A. I am not sure on that. I believe so. But as
 15 far as I am aware of, through pictures and stuff, yes.
 16 Q. Okay. Go ahead.
 17 A. So, obviously, finding rot on this corner over
 18 here (indicating), has nothing to do with door flashing
 19 in the dining room.
 20 Q. Fair enough.
 21 A. Sorry -- to be more clear. On the corner of
 22 the family room wall, it has nothing to do with the
 23 dining room door.
 24 Q. Okay.
 25 A. So I believe on these issues, as we discussed

1 overlap, or even if there was an inch-and-a-half
 2 overlap -- that's why it is standard practice now to do
 3 four inches -- it gets to that joint there at the top of
 4 the flashing, and your felt that there was some spots
 5 right at the same line. That water still penetrates
 6 through, and get into that wall.
 7 Q. And now it is in your OSB?
 8 A. And then it is in your OSB. And once water
 9 gets there, and then it keeps going. And once water
 10 finds a path, it follows that same path. And so then
 11 that OSB just slowly starts getting wetter, and starts
 12 working its way up the wall. The leak didn't start
 13 three feet up. The leak started down low. And then the
 14 water worked its way back up the wall.
 15 Q. How did you determine that?
 16 A. Just experience in the industry.
 17 Q. Okay. And so you've identified two issues
 18 there on these other four corners. And can you go
 19 ahead, please, Beau, and circle the four corners that
 20 we're talking about?
 21 A. (Witness complying.)
 22 Q. Okay. Thank you.
 23 Now, you've identified two causal factors, if
 24 I understand you. One is, as I understand you, that the
 25 vertical portion of the flashing didn't go up high

1 earlier, were the roof pitches, and then the valleys,
 2 and then you have a lot of water coming down these
 3 valleys. So all that water, you know, hits the deck, or
 4 when you have snow piled on the deck, hits the top of
 5 the snow, and then splashes back against the house.
 6 That's common on all houses on McCall.
 7 And so splashes against the house, splashes
 8 against the stone, which then goes into and penetrates
 9 the stone, and goes through the mortar. And, basically,
 10 during those winter months, everything is wet. And so
 11 then that moisture hits your vapor barrier, in this case
 12 felt, and then runs down the wall to the flashing at the
 13 bottom at the level of the deck.
 14 The cause for these, in my opinion, is that
 15 the flashing was not large enough. And that that vapor
 16 barrier to flashing connection was not overlapped
 17 enough. Because I do know for a fact, because I was
 18 there to see this, that we saw where the felt came down.
 19 And literally there were spots where the felt stopped
 20 right at the top of the inch-and-a-quarter drip
 21 flashing.
 22 So if you can imagine, you have decking that
 23 is one inch tall, and it's covered with snow. And then
 24 you have water, rain, things melting on top of that, it
 25 runs towards the house. If literally there is no

1 enough? That is, it was an inch-and-a-half, or some
 2 such thing, versus four; correct?
 3 A. Correct.
 4 Q. And then the felt was not sufficiently
 5 overlapped, over that vertical portion of the flashing,
 6 to ensure that if water came down that felt, it was
 7 carried out by the flashing?
 8 A. Correct.
 9 Q. Have I got it right?
 10 A. Yes.
 11 Q. Okay.
 12 A. And to expand on that, you are going to ask me
 13 code, or whatever. It wasn't code to do four by four,
 14 versus the smaller flashing. It was a standard we
 15 practiced.
 16 Q. Right.
 17 A. But it would be, you know, you would want to
 18 make sure that felt was over the flashing. And I think
 19 even with the smaller flashing, when the installer that
 20 day was in a hurry, whatever, and doesn't get sealed
 21 right down to the bottom of that flashing. So you can
 22 push your decking up against there is how that water got
 23 through there.
 24 Q. How do you seal it, by the way? How do you
 25 make sure that felt stays down?

1 A. At the time?
 2 Q. Thank you. At that time, yes.
 3 A. 2004?
 4 Q. Right.
 5 A. You didn't. You put everything down over the
 6 top of it. And you use plastic caps, which is small
 7 nails with a big round head on them, or something, to
 8 hold it on. Now, everything is taped.
 9 Q. It is?
 10 A. Yes.
 11 Q. The felt is taped to make sure it stays down?
 12 A. Behind the masonry, I'm not sure exactly if
 13 that's taped.
 14 Q. All right.
 15 A. But normally what we would do, and practice
 16 there, you run the moisture barrier or Tyvek all the way
 17 around. It's seamed taped, taped to the flashing, then
 18 your felt, or ice and water is going too over the top of
 19 that. So you know you have a barrier under there that
 20 is un-penetrable.
 21 Q. Your Tyvek actually in that case comes down
 22 inside of the flashing; correct?
 23 A. Yes.
 24 Q. And you've talked about your practice of using
 25 Tyvek, as well as felt. Although, as I understand it

1 out and walk around it, and make sure there is nothing
 2 like this. At the time, it was not something that had
 3 to be inspected. So at the time, code, no.
 4 Q. So as of 2004, 2005, this condition of only
 5 flashing and felt overlapping, was not a code violation,
 6 in your opinion, it was an improper construction
 7 technique; am I correct?
 8 A. Yeah. I mean, I guess, too, I mean, the
 9 moisture barrier being put on, installed properly,
 10 should be over the top of that flashing, and not stopped
 11 at the top of that flashing.
 12 Q. No, I understand. I'm including both of the
 13 issues.
 14 A. Okay.
 15 Q. Out of curiosity, had the same flashing been
 16 used, which I think there is testimony, do you agree,
 17 was inch-and-a-half by inch-and-a-half, or do you know?
 18 A. Inch-and-a-half by two-and-a-half, probably
 19 two-and-a-half.
 20 Q. And which of the two sides of the flashing was
 21 longer?
 22 A. So I think coming up the wall, it was like an
 23 inch-and-a-quarter to inch-and-a-half tall.
 24 Q. Okay.
 25 A. I believe in the report I read from the

1 here, correct me if I'm wrong, do I understand you
 2 correctly to be saying, had a higher flashing -- a
 3 flashing with a higher vertical piece, say, four inch
 4 been used, and the felt sufficiently secured below the
 5 top of that flashing, you think this would have been
 6 avoided?
 7 A. I believe that would have been a good chance
 8 of it being avoided, yes.
 9 Q. And the same question. Is this phenomena that
 10 you've described that occurred in the corners, as you've
 11 circled on Exhibit No.1, I assume your testimony is
 12 that's a construction defect, as well? Don't let me put
 13 words in your mouth.
 14 Is it your opinion that that's a construction
 15 defect?
 16 A. Yes.
 17 Q. And the same question I asked you about the
 18 other condition. Is that a defect, in your opinion,
 19 because of non-compliance with the prevailing code,
 20 defect because of improper construction technique, or
 21 for some other reason?
 22 A. Well, there is now and then.
 23 Q. I'm talking about then. Thank you.
 24 A. So then -- let me start with, now you have to
 25 have your moisture barrier inspected. And so they come

1 engineer, said it was an inch-and-a-quarter tall.
 2 Q. Okay. And so it was longer on the horizontal
 3 surface?
 4 A. Correct.
 5 Q. Had that same flashing been used, and the felt
 6 in your testimony properly overlaid and secured to
 7 extend over that flashing, do you think that would have
 8 prevented this condition from occurring?
 9 A. Likely.
 10 Q. Now, this --
 11 A. There --
 12 Q. I'm sorry. Go ahead.
 13 A. Just to expand on it, because again, there was
 14 no code on which size flashing to use. For water
 15 to -- even if that flashing was down there, it is still
 16 at the same height as the deck. So if water pools in
 17 there, because it's at the deck, for it to crawl up
 18 behind there in inch-and-a-quarter, it is way easier
 19 than for it to crawl up the wall four inches just --
 20 Q. No, I understand. But four inches is hardly a
 21 guarantee; right? I mean, of the two conditions you are
 22 describing, isn't the overlapping with the felt even
 23 more critical?
 24 A. Correct.
 25 Q. I don't know anything about this felt. I

1 assume it's a material that it can get wet, but it
 2 doesn't transfer the moisture through to its inside
 3 surface?
 4 A. Correct.
 5 Q. Are there any other explanations for the
 6 conditions you observed and repaired that are plausible,
 7 in your opinion, besides the two causes you've cited?
 8 A. No.
 9 Q. And you've corrected me, and thank you for
 10 doing it, as to our time frame. I want to make sure
 11 before we depart this subject. Your testimony as to
 12 both of the conditions depicted in Exhibit 61, and the
 13 condition you describe at the corners, your testimony
 14 that those both represented construction defects, is
 15 that they were construction defects at the time of 2004,
 16 2005, under practices you think should have been in
 17 place then?
 18 A. Yes.
 19 Q. And back to the other question, and if you
 20 can't answer this, you can't. You are applying a
 21 standard, as you testified, that I clearly understand is
 22 the techniques you would have used in 2004, 2005;
 23 correct?
 24 A. Yes. Excuse me. Yes.
 25 Q. And I apologize if I've asked this. But are

1 Q. Here (indicating)?
 2 A. In Exhibit 61, underneath the dining room
 3 door, cutting the end of these joists, and not providing
 4 structural blocking or anything underneath the end of
 5 that floor sheathing, right there (indicating). You
 6 know, I would say 90 percent of the framing contractors
 7 that would not -- you know, that build a million dollar
 8 homes in that time frame, that would not be their
 9 practice.
 10 Q. So I guess you could consider this a
 11 hypothetical. If I were the owner of this home as it
 12 was being built, and I wasn't a builder. I'm the owner.
 13 I hired the contractor. I hired the architect. I hired
 14 the interior decorator. And I were wandering around as
 15 construction was underway. This is a hypothetical.
 16 Would you have expected me to detect problems of the
 17 nature you described?
 18 A. No, that's why you hire a contractor.
 19 Q. And once the home was completed, would there
 20 have been anything, in your mind, that would have caused
 21 a non-builder owner to have any concern about how it
 22 looked?
 23 A. No.
 24 Q. Or to suspect that these conditions existed?
 25 A. No.

1 you able to tell me, if I were to say, okay, I
 2 appreciate that, Beau. And you've held yourself out,
 3 you know, as you've said, having your own standard, and
 4 it being higher.
 5 Do you have any ability, if I were to say,
 6 what was the prevailing standard? What was the
 7 prevailing standard in the industry for these kinds of
 8 issues in Valley County in 2004, 2005? Are you able to
 9 answer that?
 10 A. And I think you did ask me that earlier today.
 11 Q. Okay. I did. Sorry.
 12 A. I believe at the time, most contractors used a
 13 four-inch flashing on their decks.
 14 Q. Okay.
 15 A. Have I seen differently, absolutely. Because
 16 in the line of work I do now, restoration, we get called
 17 out for a lot of water damage, and the rot and mold
 18 damage, and we see decks all the time that have smaller
 19 flashings that have issues. We come in and we remove
 20 the siding, and we replace them.
 21 But on most of the high-end homes, I would
 22 assume that it would be a practice to use a larger
 23 flashing. Most of the stuff we're repairing is smaller,
 24 less expensive homes. And then to add on that, the
 25 framing underneath this door.

1 Q. Or to suspect that these defects existed?
 2 A. No.
 3 Q. If you look back on the homes that you built
 4 in 2003, 2004, 2005, did you ever learn of, or get
 5 called back to address water intrusion problems?
 6 A. Yes.
 7 Q. Once, more than once?
 8 A. Doors, you know, doors, double doors, you
 9 know, are a common thing, and having water coming
 10 through, you know, weather stripping, or issues on
 11 doors. It's -- so, yes, if that's -- to answer your
 12 question.
 13 Q. As you've pointed out, if I heard you
 14 correctly, if the problem here was water coming through
 15 inadequate weather stripping, or literally coming
 16 through the door, we would have expected to see staining
 17 on the hardwood; wouldn't we?
 18 A. Staining and cupping.
 19 Q. And cupping. That doesn't take very long to
 20 occur; does it, the cupping?
 21 A. No.
 22 Q. I know when our dishwasher malfunctioned, it
 23 was a one-time event, and it happened fast.
 24 Have you ever in any of the homes you've
 25 constructed, encounter, when I say, water intrusion, or

1 water invasion, problems that resulted in rot of wood
2 members or wood elements of the home?

3 A. Yes, a different situation. It wasn't a doors
4 deal. But a home in Tamarack, we had -- it was a
5 daylight basement, and the drainage didn't go the proper
6 way around the side of the basement. We had retaining
7 walls stepping down.

8 And when we -- the landscaper put in the
9 retaining wall. They came above their framing members.
10 So water run down, it starts running right into the
11 house, because above the framing members, and coming
12 underneath the sill, between the foundation and the
13 sill, and coming into the wall. So we went back and
14 opened up the wall, found the issue, and addressed it.

15 Q. Any other occasions that you had where you had
16 dry rot, or wet rot in the wood members due to moisture?

17 A. Yes.

18 Q. Can you tell me?

19 A. Yeah, another home in Tamarack, a large home
20 up on the hill. And we had a hot tub area above an
21 enclosed room below it. And so we built this waterproof
22 basin. And everything drained into one corner, and then
23 out of this waterproof area.

24 It took about six years, and we got a phone
25 call. And went out there, and the ceilings were wet and

1 A. I'm not thinking of anything offhand. I mean,
2 those are the two major ones.

3 Q. And never had any problems in any homes you've
4 constructed, with water getting trapped, or perched on a
5 deck, and getting into a wall like happened here?

6 A. Not that I recall, specifically, no.

7 Q. From your examination of the home, and
8 correction of the conditions that you encountered, were
9 there any other conditions that you would consider to
10 have been caused by construction defects, other than
11 those you've described to me?

12 A. No.

13 Q. Any problems with the materials used,
14 themselves, from your perspective, acknowledging that
15 you would have recommended a different sized flashing?
16 Any other problem with the materials used?

17 A. Or lack thereof?

18 Q. Yes.

19 A. I guess, it's all about practices. But I
20 would have Tyveked. So the dining room wall should have
21 been Tyveked around, or a moisture barrier around it. I
22 think to really help, even with that same sized
23 inch-and-a-quarter by two-inch flashing, let's call it.
24 If the Tyvek had been behind that, then they put the
25 felt, both of those layers go clear down, lap over that

1 stuff. And opened it up, and we had just Tyveked this
2 whole waterproof area. Actually, we used a different
3 product to help ditch the thing, and even better
4 than -- sorry -- not Tyvek, but better than your ice and
5 water is what I meant, first.

6 And we used that product through it. And it
7 had eventually failed. So water had gone through, and
8 caused a lot of rot and mold. And so we opened it up,
9 repaired it. Put it back completely with a different
10 product that is out there now. The local installers
11 spray down the product. And put in heated drains, too,
12 so it wouldn't back up, so...

13 Q. When did you construct that house?

14 A. Do what?

15 Q. When did you construct that house?

16 A. '06.

17 Q. And when did you go back to fix the problem?

18 A. 2011.

19 Q. Okay. And as you looked back on it, would
20 you -- please, don't take offense to this question. But
21 as you look back on it, would you consider what you did
22 in '06 to be a construction defect?

23 A. Yes.

24 Q. Any other occasions you've had with problems
25 with water and rot in homes that you've built?

1 inch-and-a-quarter flashing would definitely help. When
2 you ask that question, would you think the water would
3 go? A lot better chance if both those products would
4 have been used.

5 Q. So that's describing to me the failure to use
6 a product; correct, in that case Tyvek?

7 A. Correct.

8 Q. And you've clearly described to me some
9 construction techniques -- well, the construction
10 techniques that you believe form the basis of the
11 defect. My question is a little more narrow.

12 From looking at any of this from your
13 position, were any, quote, unquote, "substandard"
14 materials used in the construction process, or are we
15 talking about here, construction techniques?

16 A. No substandard products used.

17 Q. In your opinion, would any of the conditions
18 which you discovered, unearthed and fixed, have affected
19 the habitability of the home at the time?

20 A. No, because they were not within the building
21 envelope. They were in the crawlspace on the exterior
22 of the home.

23 Q. I assume given enough time, unattended,
24 perhaps it could have been. But at that point in time,
25 your testimony is those conditions didn't affect the

1 habitability?
 2 A. 2013 didn't affect it.
 3 Q. Even then?
 4 A. Yeah.
 5 Q. Were you able to complete your work within a
 6 satisfactory window to Mr. Petrus, in terms of the
 7 window where you told me he wanted you to complete,
 8 because he didn't use the house in that time frame?
 9 A. Yes, he was satisfied. Did it take longer?
 10 Yes, because it took him forever to make up his mind on
 11 what we were doing.
 12 Q. Okay. I assume you had some conversations
 13 along the way with Mr. Petrus?
 14 A. I did.
 15 Q. In any conversation, did he ever suggest to
 16 you that these conditions had deprived him of the
 17 ability to use the home?
 18 A. No.
 19 Q. In any conversations with you, did Mr. Petrus
 20 ever suggest that Nancy Gentry had -- that he had ever
 21 had a conversation with Nancy Gentry?
 22 A. I don't recall that, no.
 23 Q. Okay. And at the very beginning of this
 24 process, you told me either right at the start, or
 25 pretty close to it, you were forewarned by Mr. Petrus

1 the job was?
 2 A. Yeah, the second one here says, June 27th.
 3 Q. June 27th. So I missed that one.
 4 Can you tell me, what was the protocol for
 5 preparing daily reports?
 6 A. You know, we didn't -- we don't normally do
 7 this as a company. We did this back when I was a home
 8 builder. But the protocol for those project managers
 9 was every day to fill out reports. So as you can see on
 10 the report, how many subcontractors on the site, how
 11 many men were there, when the equipment was delivered,
 12 when the general notes, when the inspector showed up.
 13 All of that would be on the report: weather,
 14 temperature, everything.
 15 Q. Okay.
 16 A. We hadn't exercised -- we hadn't done that in
 17 a long time. On this job, we thought it would be a good
 18 idea to keep a log, what was happening on this, just
 19 knowing what had happened to us. So Eric had never done
 20 this before. So I sat down with Eric. I created an old
 21 Excel file, and sat down with Eric, and showed him how
 22 to do it. And he was supposed to every day, write a
 23 report of the things I discussed.
 24 Q. So every day he would sit down daily, put
 25 whatever information he thought was appropriate,

1 that he thought this could result in litigation. And if
 2 nothing else, wanted to hear that you would be able to
 3 testify as needed. Is that a fair summary?
 4 A. Yes.
 5 Q. Did then, or at any time, he tell you why?
 6 That is, what the basis might be, that he thought
 7 somebody was at fault?
 8 A. He did not.
 9 Q. Okay. Handing you what's been marked as
 10 Exhibit 35. I will tell you that these are Bates
 11 numbered RP 92 through RP 167. I will tell you, beyond
 12 that, these appear to me, to be the daily reports. And
 13 these appear to me, to be all the daily reports that
 14 were provided in the production on Tuesday.
 15 Do these appear to be the daily reports
 16 prepared by someone in your company?
 17 A. Yes, daily reports prepared by Eric Waite.
 18 Q. So Eric would have been the responsible party
 19 for these?
 20 A. Yes.
 21 Q. And although I don't necessarily think they
 22 are in chronological order -- they are not. When I went
 23 through them earlier, it appeared the earliest was April
 24 14th, and the latest was June 13th. Does that sound
 25 consistent with you, as far as what the time frame of

1 including the information you identified, into a daily
 2 report?
 3 A. Yes.
 4 Q. And do you know, did he prepare these from
 5 notes, diaries, anything like that, or did he just sit
 6 down, to the best of your knowledge, and based on his
 7 recollection for that day, go ahead and fill it out?
 8 A. I don't know for sure if he, you know,
 9 actually took notes on the job site, or if he just got
 10 back and had recollection, and at the end of the day
 11 just fill it up.
 12 Q. What is your practice, say, on a job -- on
 13 this job, where you weren't the foreman. You,
 14 obviously, have someplace where your company's records
 15 on this project are contained; right?
 16 A. Uh-huh.
 17 Q. And where is that?
 18 A. It's in a file, you know, that we store on the
 19 Cloud.
 20 Q. Okay.
 21 A. So all of our files are there. We all have
 22 access to them. So that whole file folder for the job,
 23 2130 Payette Drive, that Alyson gave you, you know, is
 24 stored so that we all have access to it, and we put our
 25 records in there.

1 Q. Did you, or do you in this situation, where
2 the job is over, collect from people like Eric, whatever
3 they might have? My question is, do documents and
4 information get consolidated, or does everybody just
5 kind of keep what they have?

6 A. The only thing they have personally is emails.
7 I do not allow my employees to store anything on their
8 computer, other than in our company file system.

9 Q. And since we're going to get Eric's emails as
10 well, we're going to get what he has, as well?

11 A. Yes.

12 Q. Okay. Thanks.

13 Did you end up replacing the whole deck, or
14 were you able to put the original Trex back down?

15 A. All the original Trex was put back down.

16 Q. That wasn't compromised, because it's not
17 wood; correct?

18 A. Correct.

19 Q. If you could look at RP 117? I believe the
20 date -- is that June 3rd?

21 A. Yes.

22 Q. Your eyes are better than mine. It says,
23 "trim out lights, outlets, and switches in the dining
24 room." Did you have to disturb the drywall or Sheetrock
25 in the dining room as part of your repairs?

1 all the way up through the entry foyer, and I believe
2 went through the powder bath. So there is no way, when
3 we have to replace this hardwood right here
4 (indicating), because we had to replace a small portion
5 of hardwood in the dining room. You can't just sand
6 that area and refinish that. It is not going to match.
7 We wouldn't do that in any home, but especially, the
8 high-end home. It's not the quality of product you
9 need.

10 Q. Other than the specific defects you've
11 identified for me, Beau, obviously, you have related to
12 the framing of the french door and the dining room door,
13 and the repair on the flashing on the four corners. Do
14 you have any opinion as to the quality of the
15 construction of this home?

16 A. It looked very good; high quality.

17 Q. One thing I noticed, and an example of this,
18 if you want to look at RP 132.

19 A. Okay.

20 Q. Do you see the date, April 14?

21 A. Yes.

22 Q. And then the project duration day, and the
23 completion day?

24 A. Yes.

25 Q. And then as you just turn to 133, 134, 135,

1 A. Yes.

2 Q. And why is that?

3 A. Because the wall, if we look at Exhibit 61,
4 this wall framing here (indicating) was rotted out on
5 this whole corner. The structural was rotted. So we
6 had to remove the Sheetrock from the east, southeast
7 corner of the wall to the southwest corner of the wall
8 on that entire wall. So that we could replace the
9 two-by-six structure and structural framing right there.

10 Q. And that's the wall in which the french door
11 was framed; correct?

12 A. Correct.

13 Q. Okay. How much of the flooring in the house
14 did you wind up sanding and refinishing?

15 A. All of it.

16 Q. And in your opinion was that necessary as part
17 of the repair and restoration?

18 A. Yes.

19 Q. And explain to me why.

20 A. Because if you look at the -- we don't have
21 the actual floor plans. This is just ours. So Exhibit
22 1 showing the floor plan of the house.

23 Q. Yes.

24 A. The hardwood ran throughout the dining room,
25 family room, I think, it went through the kitchen, and

1 the date never changes.

2 A. Okay.

3 Q. Can you tell me what that's all about? I will
4 tell you that the project duration and completion dates
5 change, but the date doesn't change. And I was
6 wondering if there was a reason for that?

7 MS. FOSTER: Do you want me to help explain as
8 a production matter, or would you prefer to ask him
9 questions?

10 MR. MILLEMANN: Have at it.

11 MS. FOSTER: I can establish that with him.
12 But if you look at these daily reports in the native
13 format in the Excel spreadsheet, you will see each day
14 is a separate sheet, and the title of each sheet, the
15 day, it does not match that date.

16 My speculation is, perhaps, as with the
17 original contract and quotes, the date wasn't updated in
18 that field. It was on the date that you don't have on
19 this. It would only be visible in the native format.
20 Does that make sense?

21 MR. MILLEMANN: Are you telling me, in the
22 native format, this date is different?

23 MS. FOSTER: Do you know what I mean?

24 MR. MILLEMANN: How do you like that answer?

25 MS. FOSTER: The worst answer yet. I'm trying

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1 to help.
 2 THE WITNESS: So it's an Excel spreadsheet.
 3 All right? And somebody smarter than me, you use this
 4 sheet and tab at the bottom, it says, "create new." So
 5 it goes to the next sheet, and makes -- changes the
 6 date.
 7 So if you look at our Excel sheet that we've
 8 produced to you, it has all the dates on those tabs,
 9 even though Eric did not change the actual date.
 10 Q. (BY MR. MILLEMANN) On the report?
 11 A. On the report. On the actual tab, it shows
 12 the exact date.
 13 Q. Just to see if we're talking about the same
 14 thing. Are you talking about these (indicating), or is
 15 this something altogether different?
 16 A. That's something altogether different.
 17 Q. Okay. So if I go back to the native data in
 18 the Excel spreadsheet, then I will be able to determine
 19 the date. Otherwise, I would have to work backwards to
 20 the project completion days; correct?
 21 A. Correct.
 22 MS. FOSTER: Thank you. Yours was much better
 23 than mine.
 24 THE WITNESS: I don't know.
 25 Q. (BY MR. MILLEMANN) You are saving me a lot of

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1 questions here.
 2 By the way, I learned a new term while I was
 3 going through these documents, "content manipulation."
 4 A. Yep.
 5 Q. That's moving stuff around; right?
 6 A. Yep.
 7 Q. By the way, these aren't even marked. And
 8 when I showed them to you, you said, no, that is
 9 something else. What are these?
 10 A. The file in our file system, I explained to
 11 you, we have a template folder. And inside that
 12 template folder, we have documents, such as these,
 13 interior design selections, other templates that are in
 14 that.
 15 So every time we get a new project, we take a
 16 template folder, copy it, we create a new file, call it
 17 2130 Payette Drive, and that is now your document. And
 18 it has several folders, about ten folders inside of
 19 that. And inside of those folders are sub-folders, and
 20 then documents like these. They are never used. In 98
 21 percent of our jobs, this particular one was never used.
 22 So it was just in there. It wasn't used for this job.
 23 Q. That's what I thought. Okay.
 24 Exhibit 33, which is RP 30. Are you able to
 25 tell me what this is?

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1 A. I guess without finishing reading it, it's a
 2 report that one of my guys wrote just on that day
 3 events.
 4 Q. Do you know who wrote it?
 5 A. I don't.
 6 Q. Did this come out of your files, Beau?
 7 A. Yes, it did.
 8 MS. FOSTER: I'm sorry. Your personal or
 9 Restoration Pro?
 10 THE WITNESS: Company files.
 11 Q. (BY MR. MILLEMANN) Do you have any personal
 12 files separate than Restoration Pro on this job?
 13 A. No.
 14 Q. Are there any other such notes written by
 15 people on the job?
 16 A. No.
 17 Q. So these notes just mostly say, tired of Mike
 18 Longmire getting in his way?
 19 A. Yeah, if Eric maybe asked him to put this
 20 together, because of something for the day, I don't
 21 know.
 22 Q. Exhibit 34 --
 23 A. Uh-huh.
 24 Q. -- RP 31. Are you able to tell me what this
 25 is?

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1 A. This is a sketch of the deck on the lake side
 2 of the house.
 3 Q. Okay. And the lower part of the exhibit?
 4 A. That is a sketch, an elevation cut of the
 5 foundation wall sill plate, and wall framing above that.
 6 It looks like how the deck ledger was to be installed
 7 with it, the flashing, and the moisture barrier above
 8 that.
 9 Q. And this is how it was to be installed in your
 10 restoration work?
 11 A. I don't know. I'm just telling you what I see
 12 here. I don't --
 13 Q. Do you know who prepared these?
 14 A. I would guess Eric did.
 15 Q. Oh, okay. And it looks like above the ledger,
 16 the darker line, the 90 degree line, that's the
 17 flashing; correct?
 18 A. Correct.
 19 Q. Do you have any ability from this drawing, to
 20 determine what size flashing was called out?
 21 A. Definitely four by four.
 22 Q. And then above that is kind of a squiggly
 23 line. Is that the ice and water -- what did you call
 24 that; ice and water shield?
 25 A. Yes.

1 Q. Is that what that is?
 2 A. Yes.
 3 Q. I'm assuming as constructed, it came down over
 4 the flashing?
 5 A. No, this is the way it was. Sorry.
 6 Q. "Yes"?
 7 A. Yes.
 8 Q. Exhibit 3. Do you like the order we went
 9 through here?
 10 A. Yeah.
 11 Q. Exhibit 3 is Petrus 289. Can you tell me, do
 12 you know what this is?
 13 A. It looks to me that this is an invoice from
 14 A-1 Heating for the reinstall of the gas piping to the
 15 barbecue.
 16 Q. Okay.
 17 A. Because we had to remove it to do the repair
 18 as we replaced that rim board.
 19 Q. I see. So when you started your work, was
 20 there gas piping to the deck?
 21 A. I believe so.
 22 Q. And then when you pulled deck off, or back?
 23 A. Yeah.
 24 Q. No, you just --
 25 A. No, yes, she just -- Alyson -- she, it's

1 A. June 2012, no.
 2 Q. Okay. Exhibit 5, which is Petrus 291, is an
 3 EnergySeal invoice, July 2012. Do you know anything
 4 about this?
 5 A. No.
 6 Q. Okay. Exhibit 6, Petrus 292 is another
 7 EnergySeal invoice, dated September 2012, an invoice for
 8 \$1,000 worth of work. Do you know anything about this?
 9 A. No.
 10 Q. Can you pull that back in front of you,
 11 Exhibit No. -- what is that -- 5?
 12 A. 6.
 13 Q. 6. Thank you. Do you see item 3 on that?
 14 A. Uh-huh. Yes, I do. Sorry.
 15 Q. Does that ring any bell to you as to what that
 16 is talking about?
 17 A. Well, it says, "Edge of floors at rim joist
 18 (where removed) Flexible FoamCore." Yes. That's the
 19 spray foam that they install. The same spray foam
 20 underneath that door area. And so I would assume that
 21 they were spraying some foam in somewhere underneath the
 22 edge of the floor.
 23 Q. In September 2012?
 24 A. Yes.
 25 Q. Did you see evidence of that when you looked,

1 Alyson.
 2 Q. That's fine.
 3 A. Pointed out the date on this invoice. So I
 4 think this didn't have nothing to do with us. Sorry. I
 5 didn't look at it in detail. I assumed. So this
 6 invoice was to Ed Petrus, not to Restoration Pro. It
 7 was dated 5-17, 2012, to reinstall the gas line bit.
 8 And to expand on that, in Todd McKenna's report, there
 9 is a picture of the gas line laying in the crawlspace.
 10 Q. I saw that.
 11 A. So I would assume that A-1 was hired to
 12 reinstall that gas line out to the barbecue.
 13 Q. And actually it doesn't change my other
 14 question. Did that then come up through the deck
 15 somehow, or come out through the wall?
 16 A. It came up through the deck.
 17 Q. So would you have had to remove that to do
 18 your work, or do you know?
 19 A. I believe it was removed. I would assume,
 20 because it went right through the rim board that we had
 21 to replace. That we had to remove that, and then have
 22 it reinstalled again.
 23 Q. Got you. Exhibit 4, which is Petrus 290. It
 24 appears to be an invoice from Sean McConnor, dated June
 25 2012. Do you know anything about this?

1 pulled the insulation back in the crawlspace, and looked
 2 in the french door threshold?
 3 A. I probably wouldn't have been able to tell,
 4 because even if it was removed and replaced, they
 5 probably pulled out past what was originally there. So,
 6 no, I didn't, to answer your question.
 7 Q. And then Exhibit 8, it's Petrus 195, a
 8 document from C&S Construction, dated February 2013.
 9 Have you ever seen this document before, or do you know
 10 what it is?
 11 A. Yes, I have. And it's a bid for the same
 12 repairs that we did, from C&S Construction.
 13 Q. You mentioned in your first conversation with
 14 Mr. Petrus, he wanted to know why your bid was higher?
 15 A. Yes.
 16 Q. Do you think he was referring to this bid, or
 17 do you know?
 18 A. Yes, because actually at that meeting, we were
 19 \$1,200 higher than C&S, so he sent us a copy of it.
 20 And, actually, I think he produced a copy right then,
 21 and said, I want to match this. And I said, no.
 22 Q. Showing you Exhibit 32, which was part of the
 23 document production on Tuesday, March 8th. And it is RP
 24 1 through RP 24. It appears to be a report from Rimkus,
 25 R-i-m-k-u-s, Consulting Group.

1 Have you seen this before?
 2 A. Yes.
 3 Q. Have you reviewed it?
 4 A. Yes.
 5 Q. If you know, was this the report which
 6 resulted from the engineer, who the adjuster brought to
 7 the site?
 8 A. Yes, it is.
 9 Q. In the opinions you've rendered today about
 10 the construction defects you've identified, are you
 11 relying to any extent on this report?
 12 A. No, I'm not.
 13 Q. Can you turn to page 2, which would be RP 4 of
 14 the report, the Section "II. Conclusions"?
 15 A. Okay.
 16 Q. There are three conclusions stated as to the
 17 cause of the decay and deterioration. And to be exact,
 18 it says, "Decay and deterioration of the deck framing,
 19 floor framing and wall sheathing at the southeast corner
 20 of the dining area was caused by moisture intrusion due
 21 to improper construction."
 22 And then it gives three specifics: "(a)
 23 Proper flashing had not been installed at the deck
 24 ledger board. (b) Weep holes not installed at the base
 25 of the stone veneer." And "(c) Gutters were not

1 Q. So is that something that you normally do now?
 2 Well, you are not building homes now. But in your home
 3 construction in Valley County, did you normally put
 4 gutters?
 5 A. And to -- well, in a lot of the home repairs
 6 that we do do, we install gutters. We don't do it. We
 7 hire a subcontractor to install gutters, and install
 8 heat tape in the gutters. On 10 to 15 projects a year,
 9 we do that.
 10 Q. Have you found that to be effective?
 11 A. Yes.
 12 Q. Do you have a problem with those getting taken
 13 off with falling snow and ice?
 14 A. If they are installed in the right position
 15 and heat tape is installed, no. It's all about your
 16 procedures.
 17 Q. And where would the right position be?
 18 A. Making sure you are down far enough from your
 19 fascia line. So that if the snow slides, it doesn't
 20 take off the gutter. That the rain actually drips into
 21 it a few inches down, and then heat tape is a mandatory.
 22 Q. And I assume you have to heat tape the whole
 23 system; right?
 24 A. Yes.
 25 Q. And the gutters that were installed on the

1 provided at the eaves."
 2 Do you agree, disagree, or have any opinion as
 3 to these conclusions?
 4 A. I agree with A and C. B, I mean, I am not a
 5 masonry contractor. But I don't know of weep holes
 6 underneath a stone veneer. That's why you have your
 7 flashings and everything, drains. That is something
 8 that you do on brick. But it's not a practice that I
 9 know of as a contractor.
 10 Q. And that's item B; right?
 11 A. Yes.
 12 Q. Now, C, you said you agree with. But let me
 13 make sure I understand. In the program you put forward
 14 to repair and restore the home, you did not include
 15 gutters; did you?
 16 A. No.
 17 Q. You didn't think they were necessary?
 18 A. They were already on.
 19 Q. So Mr. Petrus had already put them on?
 20 A. Yes.
 21 Q. So do you think the installation of gutters on
 22 that house was necessary to prevent the reoccurrence,
 23 despite the work that you did?
 24 A. It definitely helps. To make sure it doesn't
 25 happen again, would I put gutters on? Yes.

1 home were copper gutters?
 2 A. I believe so.
 3 Q. Is that what you --
 4 A. That's what I remember from the pictures, yes.
 5 Q. Is that standard for what you used in your
 6 homes or restorations?
 7 A. It depends on the home, and the caliber of the
 8 home. This year we installed one with copper gutters.
 9 All the others were not copper gutters. Copper is three
 10 to four times as expensive.
 11 Q. So is that an aesthetic issue?
 12 A. Yes.
 13 Q. Not a functioning issue?
 14 A. No.
 15 Q. Can you give me a ballpark estimate of what
 16 you think the gutters installed on 2130 Payette might
 17 have cost?
 18 A. Not really, because I don't know where all
 19 they were. I don't know if they went around on the
 20 front of the house, too, or not without seeing it.
 21 4,000 or \$5,000 if they were around the entire, or a
 22 good portion of the house.
 23 Q. And then non-copper gutters, you are saying
 24 are a fourth of that?
 25 A. Probably half. But to add on top of that,

1 heat tape would be in addition to that. That's just the
 2 gutter system, itself.
 3 Q. So I guess I want to clearly understand your
 4 answer. Do you believe without the gutters, that the
 5 work you performed, your company performed on the house,
 6 could be expected to prevent the reoccurrence of the
 7 conditions that you encountered?
 8 A. Without the gutters?
 9 Q. Yes.
 10 A. Yes, a very high chance. I mean, when we have
 11 four-inch flashing, ice and water shield down,
 12 everything seam taped, I don't see water getting through
 13 it.
 14 Q. Okay. I see where I saw it. If you look at
 15 page 4 of the report, it lists bullet items, RP 6. Do
 16 you see those bullet items?
 17 A. Yes.
 18 Q. And two-thirds of the way down, "New floor
 19 joists had been installed next to the existing floor
 20 joists." Are those the ones you are talking about
 21 existed in there?
 22 A. Yes.
 23 Q. So weep holes in masonry, it is your
 24 testimony, are not a standard practice in Valley County?
 25 A. Not for stone veneer, no.

1 MS. FOSTER: Our inspection refers to yours or
 2 theirs?
 3 THE WITNESS: I think theirs. That would be
 4 Rimkus.
 5 MS. FOSTER: It is theirs?
 6 THE WITNESS: Yes, their inspection.
 7 MS. FOSTER: Okay.
 8 THE WITNESS: Because he took a lot of photos.
 9 He was there at least two hours.
 10 MS. FOSTER: Thank you.
 11 Q. (BY MR. MILLEMANN) Because you've been
 12 designated as an expert witness, I need to ask you some
 13 background questions. Okay?
 14 A. Okay.
 15 Q. Have you been involved in any lawsuits as a
 16 party in a lawsuit?
 17 A. Yes.
 18 Q. Can you tell about those; starting with the
 19 first one, and finishing with the last one, if there is
 20 more than one?
 21 MS. FOSTER: And I'm going to object to the
 22 extent you had any attorney/client discussions with
 23 Mr. Millemann, who may have represented you, or anyone
 24 else. I remind you, that you are not obligated to waive
 25 that privilege, and disclose those conversations. I may

1 Q. For stone veneer. Thank you.
 2 A. Not that I'm aware of.
 3 Q. And have you been able to effectively gutter
 4 valleys, the part of the roof that comes down in a
 5 valley, can you effectively gutter that part of the
 6 roof?
 7 A. Yes, we have.
 8 Q. You have?
 9 A. Yes.
 10 Q. Did you receive a copy of this report?
 11 A. Yes.
 12 Q. Obviously, this came from you; right?
 13 A. Yes.
 14 Q. This is part of the documents you produced?
 15 A. Yes.
 16 Q. At page 11, under "Photographs," it mentions
 17 that there are, additional photographs were retained in
 18 our files and are available to you upon request. Did
 19 you ever have occasion to request any additional
 20 photographs from you?
 21 A. No.
 22 MR. MILLEMANN: And I assume, Counsel, you
 23 have not either?
 24 MS. FOSTER: No.
 25 MR. MILLEMANN: Okay.

1 be being over paranoid. I just want to make sure you
 2 remember that.
 3 THE WITNESS: I'm not obligated to disclose?
 4 MS. FOSTER: You are not obligated to waive
 5 your attorney/client privilege in conversations you have
 6 had with attorneys in the past, which may have included
 7 Mr. Millemann regarding those lawsuits.
 8 Q. (BY MR. MILLEMANN) And I'm not asking that.
 9 I just want to know if you were a party to any lawsuits,
 10 and identify them for me; when the lawsuit happened, and
 11 what the nature of the lawsuit was, and whether you were
 12 the defendant, the party being sued?
 13 A. Oh, one.
 14 Q. Okay.
 15 A. You were my attorney.
 16 Q. How did we do?
 17 A. We let them get a default judgment against us.
 18 Q. Well, darn it. That's not good.
 19 So what was that lawsuit?
 20 A. It wasn't worth the money, too. It was for a
 21 home in Tamarack that we were building. And then it was
 22 at the beginning of when everything started going, you
 23 know, sideways. And his construction lender stopped
 24 funding the project, so we stopped work. We got into a
 25 major dispute with him, because he still owed me

1 250,000, and his bank wouldn't pay me. And they said,
2 we're not going to pay any more on this. The resort is
3 going bankrupt.

4 So then he came back, and decided to accuse me
5 of faulty construction, so that he wouldn't have to come
6 up with the money to pay me. And you and I, we put all
7 our facts together on that, and determined it would cost
8 me 100,000 to try to get out of this. And me and my
9 company were already in a bad situation, because of
10 having several spec homes. And I had been very hurt
11 when Tamarack went bankrupt. And so we chose instead of
12 spending 100,000, to stop where we were at, and let them
13 get a default judgment.

14 Q. Who was the owner in that one?

15 A. Chuck Dominguez.

16 Q. Have you been a party to any other lawsuits?

17 A. Not that I recall.

18 Q. Okay.

19 A. Un-huh.

20 Q. And have you ever been convicted of any
21 felony?

22 A. No.

23 Q. Any criminal investigation related to any
24 felony?

25 A. No.

1 Q. Have you or any of your companies ever been
2 through bankruptcy proceedings?

3 A. Yes.

4 Q. Tell me when, and who, whether it was you, or
5 your company, or both.

6 A. So my contracting company that I've been
7 speaking of during this whole meeting.

8 Q. Remind me the name of that, again?

9 A. Everest Construction, building homes out at
10 Tamarack, and throughout the valley. I filed bankruptcy
11 in 2010. And ended up actually filing personal
12 bankruptcy. It came down to a couple things that I
13 tried to resolve, and couldn't get resolved.

14 Q. And so filed bankruptcy both for the company
15 and you, personally?

16 A. The company, we never filed bankruptcy. I
17 just let it go, and filed personal bankruptcy.

18 Q. In that bankruptcy, are you familiar with the
19 term, "discharging creditor claims"?

20 A. Yes.

21 Q. Which is what you did in a bankruptcy; right?
22 You discharge claims, and then you can move on?

23 A. Right.

24 Q. Were there any claims in the bankruptcy that
25 were discharged, that were claims by customers of yours

1 regarding products that you had constructed?

2 A. No. And to add on to that. Since then, as
3 you know as we discussed earlier, had issues with homes
4 I had built since then, and went back, even though I
5 didn't have to. I filed a bankruptcy. I went back and
6 made them good on my own goodwill.

7 Q. Just to see if any of these ring a bell.

8 There was a case, Silver Valley Framing, Inc., I guess,
9 versus Richard Williams. In which I see there is a Beau
10 and Carrie Value listed as a plaintiff. Do you remember
11 anything about that?

12 A. It was a framing company that I sold. And
13 Rick Williams was a contractor that I worked for down in
14 the Boise valley area. He had eight lots out by the
15 Nampa area. We had an agreement to purchase a lot from
16 him. And I was trading houses that I would frame for
17 him towards that purchase.

18 So I had -- it was about an \$80,000 lot.
19 Round numbers, I think, I had about \$50,000 worth of
20 projects that I already framed for him. And he got in
21 trouble financially, and sold the lot to somebody else
22 out from underneath me. So I sued him.

23 Q. Another one that popped up was Idaho State
24 Insurance Fund the Value Building, Inc.?

25 A. Uh-huh.

1 Q. What was that one about?

2 A. So with the State Insurance Fund, I had -- my
3 framing company, we had a large accident on a job, where
4 people got -- two people got seriously injured. And we
5 ended up getting into a dispute with the State Insurance
6 Fund over that, because they said we weren't properly,
7 you know, safe, and some of the practices and stuff. So
8 that's where that originated.

9 Q. How did that one turn out?

10 A. We settled. And it took me about ten years to
11 get them paid off, but they are paid off.

12 Q. It looks like ICM Equipment Company versus
13 Value Building. Does that ring any bells?

14 A. Yeah, a --

15 Q. That looks like 2000 something. The date is
16 cut off. 2001.

17 A. We leased equipment from them. I don't
18 know -- I don't recall what the issues were.

19 Q. And then Idaho First Bank versus Beau Value,
20 2009?

21 A. That was for a spec home at Tamarack.

22 Q. Did you get financing from the bank?

23 A. Yes, I did.

24 Q. And defaulted on the loan?

25 A. Yes, I did.

1 Q. That was after the bankruptcy; right, or, no?
 2 A. No, the bankruptcy was in 2010.
 3 Q. Okay. Have you slowed down?
 4 A. Why?
 5 Q. You have as many speeding tickets as I do.
 6 Just give me a minute here, please.
 7 A. Yes.
 8 (Pause in proceeding.)
 9 MR. MILLEMANN: That's all the questions I
 10 have for now.
 11 MR. NEVALA: I have a few. I'm going to try
 12 to make it short.
 13 EXAMINATION
 14 QUESTIONS BY MR. NEVALA:
 15 Q. Beau, have you seen architectural plans for
 16 the home at 2130 Payette Drive?
 17 A. Yes.
 18 Q. And do you remember who the architect was?
 19 A. I do not.
 20 Q. Could it have been Andy Laidlaw?
 21 A. It definitely could have been.
 22 Q. I think you referred to seeing those plans
 23 with a recessed wall, and a window, and a single door in
 24 the dining room area; is that correct?
 25 A. Yes.

1 changes that wouldn't show up on the original set of
 2 plans?
 3 A. All the time.
 4 Q. And tell me how that process works, say, last
 5 minute? Maybe if there is a change from the decorator,
 6 or decorator to the architect, how do they relay that?
 7 How do they explain? How do they get that information,
 8 that change, to you, as the builder?
 9 A. You walk the job with the homeowner. You
 10 know, whoever it is that you are doing this change with,
 11 the decorator, the architect. You know, in most cases,
 12 it's on the go. You know, so it's either you, as the
 13 owner/builder, you know, or if, you know, in my case
 14 that would be a project manager walking that with them.
 15 They say, hey, we want to recess these. It's done on
 16 the site. Maybe you draw a sketch on a napkin. Maybe
 17 you draw it on a piece of paper.
 18 Q. Who would draw that? Would the architect draw
 19 it?
 20 A. If it was an architect, normally the architect
 21 would draw this. If it's an idea between you and the
 22 homeowner, you and the decorator, normally you, the
 23 project manager, or builder, draw it out and say, okay.
 24 Let's do this. You look at this. You then turn around
 25 to your framing contractor, and ask him to make that

1 Q. And that ultimately was not how the home was
 2 constructed. It was constructed with double
 3 out-swinging french doors; is that correct?
 4 A. That is correct.
 5 Q. And the recessed wall in that dining room
 6 area, in front of the doors, you said was, I think the
 7 phrase you used was, it was an architectural recess; is
 8 that right?
 9 A. Architectural change, I mean, it was a
 10 structural recess. They actually -- the main framing of
 11 the wall stayed out, and they had a header up in the
 12 wall to support the main framing, but then they moved.
 13 What I meant by architectural recess is to give it a
 14 look, you know. And if you look at the pictures, I
 15 could describe it. It has a nice deeper header on the
 16 top, and the sill, and returns, it was for a look, a
 17 cosmetic look.
 18 Q. And the look was to make the stone veneer
 19 appear as though it had depth, and more like real stone;
 20 is that right?
 21 A. I would assume, to give that depth of the
 22 door.
 23 Q. So not in your experience as a restoration
 24 expert, but as your experience as a builder, have you
 25 built off of architectural plans where there has been

1 modification, and hand him the change. You know, it
 2 goes in his trailer, with his set of plans, and you
 3 never see it again.
 4 Q. So it's your experience that typically there
 5 is a meeting, and a lot of times -- I don't want to
 6 speak in generalities -- but oftentimes, there is a
 7 meeting between, if there is a decorator, and an
 8 architect, and a builder all involved, you would go to
 9 the project. And the designer, I guess, whose idea it
 10 would be to make the change, would explain what they
 11 envision; is that fair?
 12 A. That's correct.
 13 Q. Would they seek approval from the architect?
 14 A. No.
 15 Q. Would they ask the architect, can you redo
 16 this?
 17 A. A lot of times, they wouldn't, no.
 18 Q. Okay.
 19 A. Every time you do that, it cost more money.
 20 Q. Sure. I'm getting there.
 21 Would they seek approval from the builder, or
 22 the framing contractor to say, can you do this?
 23 A. It depends on the knowledge of the builder,
 24 and how much he knows about structure, and what can and
 25 can't be done, and about his homes. But most high-end

1 home builders, I would think, are pretty knowledgeable
2 about what can be done on their project. And he,
3 meeting with the designer, or homeowner, yeah, we can do
4 this, and make that change. And then turn around and
5 instruct the framer.

6 Q. Have you ever experienced a situation as a
7 builder, you said, I can't make that change?

8 A. Yeah. Yes.

9 Q. What usually follows a conversation with all
10 involved about how to --

11 A. Follows what, sir?

12 Q. What follows your denial or, essentially, your
13 explaining to them that this change can't be made?
14 We've got to do something different. Do you go back and
15 have conversations, more conversations, say, this design
16 doesn't work? You know, from a construction standpoint,
17 I can't build it that way?

18 A. It depends on how persistent the customer is
19 on that issue. If it is something they really want.
20 For us to say, no, we can't do it. There is a bearing
21 there that transfers through, that you can't move, or it
22 is something larger.

23 Q. Got to be a real reason?

24 A. Yeah. And so if the homeowner is persistent,
25 I want this wall moved three feet, and I don't care what

1 close, but it won't quite fit. What do you do?

2 A. Say, the opening is not big enough to fit the
3 door?

4 Q. Yeah, height-wise.

5 A. Height-wise. Then you have to -- you know, if
6 there is no room to push your header up any further, you
7 get an engineer involved, and try to get a shorter,
8 wider header, steel, you know, whatever you have the
9 room for. I mean, that all depends on each situation.
10 I mean, I guess it's hard to answer that question.

11 Q. Fair. No, that's fair.

12 A. Definitely.

13 Q. Would you go back to the architect, and say,
14 can we design, or the decorator, and say, can we put a
15 shorter door in?

16 A. Yes. I mean, so if we have a wall that I
17 can't -- you know, they tell me they want a nine-foot
18 door in there, and a ten-foot wall. Our header is 12
19 inches and you have plates -- and sorry. You only have
20 eight foot eight. I go back to the homeowner or
21 decorator, and say, I only have eight foot eight. Our
22 options are to go down to an eight-foot door, or try to
23 give them options, you know, literally, versus just
24 saying, no. You try and come up with a solution to the
25 answer.

1 it takes. And then I'm going to get a hold of the
2 architect, and say, the homeowner wants this wall moved
3 three feet. Tell me how to do it. She don't care how
4 much it costs.

5 Q. So in this case, there is a load bearing
6 header above that door. I am assuming, it would have
7 been much easier to put the window and the single door
8 that was originally on the original plans; is that what
9 you are saying?

10 A. Yes, as per built, yes, or as per
11 plans -- built as per plans, yes.

12 Q. So when the decision was made to put the door
13 that was ultimately put in the house, the double
14 swinging, out-swinging french doors. I don't remember
15 the height of the door. I know they are quite tall.

16 A. About nine feet.

17 Q. So in order to fill that nine-foot hole with
18 this door, from a construction standpoint, not from a
19 design standpoint, but from a construction standpoint,
20 you've got to either find space above, or find space
21 below; is that fair to say?

22 A. For the header?

23 Q. For the door.

24 A. For the door from the --

25 Q. Let's assume the door is -- let's assume, it's

1 Q. I want to go back to what you said before
2 about what you observed. Did you observe, or did you
3 explain what you observed, that there were cuts made
4 below this door, where the door would have been to allow
5 the -- were those cuts made so this would fit?

6 A. No, they were made to -- so that the
7 decking -- because of this recess -- I don't know if
8 you've looked at --

9 Q. Yes, I haven't seen it close. I watched you
10 draw it.

11 A. Exhibit 61.

12 Q. Yeah.

13 A. Glad to have that. And so -- sorry. It's
14 kind of hard to explain.

15 MS. FOSTER: More paper?

16 THE WITNESS: No, I like using my hands
17 better. Can I use that? So if this is your rim joist
18 out here (indicating). And then your joist coming in.
19 And then on top of this is your floor sheathing. So
20 this is the end of your floor (indicating). Imagine you
21 have your floor. The only thing you have done on your
22 house is your floor framed.

23 Q. (BY MR. NEVALA) Okay.

24 A. So then the next thing that happens is your
25 wall sits on the interior of your house, sitting here

1 (indicating). So that would be traditional. You have
2 your wall there (indicating). So then when you put your
3 decking on, it steps down two inches on the outside of
4 the house.

5 Q. Okay.

6 A. And so what happens is then when you take this
7 wall, and say, I want to shift this wall in four inches
8 to give this cosmetic look. You now have -- say, this
9 is now the inside of the edge of your wall, where this
10 clip is (indicating). And then you have the deck here
11 (indicating). This (indicating) is the top of your
12 decking. Well, now, out in front of this door, you have
13 four inches by two inches of exposed framing, OSB
14 sheeting, and rim board that are exposed.

15 So what they did, is they cut that, notched
16 it, and notched it up here (indicating). So they could
17 run that decking into the new wall.

18 Q. Okay. Using that sheet, that stack of papers.
19 Tell me where the threshold would be for the door.

20 A. Right here (indicating), back here
21 (indicating).

22 Q. Okay. Would you ever recess something,
23 because you had too high a threshold, or would you just
24 get a shorter threshold?

25 A. Too high of a thresh?

1 Q. A tripping hazard.

2 A. You could. You could. I mean, you could.

3 Q. So my client, Chris Kirk, he went out and
4 inspected the house a couple of times. And the first
5 time he went out, he looked at this door very carefully.
6 And he saw some things that were out of the ordinary to
7 him. One being, he saw non-factory screws in a
8 threshold. Did you see any of that?

9 A. I don't recall seeing those.

10 Q. And I want --

11 A. But they definitely could be there. I
12 don't --

13 Q. I want to say, specifically, I think that he
14 said, in the weep channel?

15 MS. FOSTER: Drain channel.

16 Q. (BY MR. NEVALA) I call it a weep channel.

17 A. I recall a letter, I believe, that Chris
18 Kirk -- that we have in our files. The only reason I
19 know it, because I read it the other day with Alyson,
20 that discussed that.

21 Q. Okay. But you didn't see any of that? You
22 don't remember?

23 A. I didn't. I don't recall seeing it. But I'm
24 not saying that they weren't there.

25 Q. Do you remember seeing any pry marks on the

1 door that might have come from, like a crowbar?

2 A. No.

3 Q. And any markings on the overhead trim board,
4 that indicated the locking mechanism was engaged to lock
5 when someone tried to close the door?

6 A. Yes, I remember seeing a mark in the trim.

7 Q. Any markings or alterations that you saw on
8 the locking mechanism of the stationary door, that
9 showed it would -- this is what Chris observed. So a
10 locking mechanism on a stationary door pried open to the
11 extent it was not functional. Did you see any of that?

12 A. I mean, we couldn't get it opened very well.

13 I do know that. And so being --

14 Q. So the stationary door wouldn't open?

15 A. No.

16 Q. Okay.

17 A. And just to tell you, too, I didn't focus much
18 on the door.

19 Q. Okay.

20 A. Because that wasn't the problem that I was
21 there to look at. We were there to replace the door.

22 Q. You were going to replace the door?

23 A. So I didn't really care about the door. I
24 cared about the rot underneath, and what it was going to
25 take to remove the door, and get a new door in there. I

1 A. I did not.
 2 Q. Weather stripping on the astragal of the
 3 operable door, had it been removed?
 4 A. I don't know.
 5 Q. The roof above the deck, and above these
 6 french doors was originally designed without gutters.
 7 Can you tell me about the roof line, or the roofing
 8 there? Would it have lent itself a design to snow, ice,
 9 build up in that corner; any opinion?
 10 A. Yes.
 11 Q. Was it designed in such a way that snow would
 12 have slid off of that roof easily?
 13 A. It was composite shingle roof, yeah. And if
 14 it builds up enough, it's going to slide off there. Not
 15 like a metal roof, but, yes.
 16 Q. So the pitch is enough, such that it would
 17 have lent itself to sliding?
 18 A. Yes.
 19 Q. Are you familiar with the term "design
 20 defect"?
 21 A. Yes.
 22 Q. Can you tell me what you think it means?
 23 A. If something is designed to where it's going
 24 to cause a future problem, you know, either current
 25 problem during construction, you get into it. And you

1 Q. So you don't think it's a plausible
 2 explanation, that this could have been a design defect
 3 that resulted in, either through a door, the design of
 4 the door, the recess wall, or the roof lines that could
 5 have ultimately resulted in this problem?
 6 A. The recess of -- I believe you said the recess
 7 of the door?
 8 Q. Yeah, of the wall.
 9 A. Of the wall. That could have been. I don't
 10 know who designed it. I don't know if it was something
 11 that was drawn by an architect. And said, hey, here's
 12 how to do it, or if it was drawn on a napkin. But, you
 13 know, if somebody specified, and said, do it this way,
 14 and it was done that way. That could have been a
 15 defect, yes.
 16 Q. And one last question on this issue. It's
 17 also your experience that those last minute changes
 18 between either an interior decorator, an exterior
 19 decorator, a designer, an architect, a builder, they
 20 don't always result in the architect going back to their
 21 office, and revising the plans. A lot of times they are
 22 just -- either there is a short meeting, and the
 23 decision is made, or sometimes there is a sketch, and an
 24 explanation to the builder, here, build it this way?
 25 MS. FOSTER: Object to the form of the

1 are, like, there are many of these, where you got these
 2 architects that design -- sorry -- it took a minute on
 3 my word there, but be very careful. That design stuff
 4 that you get into the field of building, and it doesn't
 5 work. And that is a design defect. They draw this
 6 beautiful elevation. And by the time you start putting
 7 it all together, the window is six inches below the roof
 8 line. The roof lines don't meet. I mean, it happens
 9 all the time.
 10 Q. Can you generalize as to the reason? Is it
 11 aesthetic, typically?
 12 A. Absolutely. They get paid to draw beautiful
 13 plans that people want to build, and have this
 14 architectural appealing home. And they don't draw plans
 15 that are what makes the most sense and most efficient.
 16 They draw what the homeowner wants to have this big,
 17 beautiful, amazing architectural appealing home.
 18 Q. So in your opinion, on this house, could there
 19 have been design defects?
 20 A. There could have been.
 21 Q. Were there any that you can opine to?
 22 A. I mean, I haven't -- if you are coming back to
 23 the valleys and stuff there, I would say, no, you know,
 24 just because it's out -- out of all these million dollar
 25 homes, that's the way they look. That's what they do.

1 question.
 2 Q. (BY MR. NEVALA) I can try to rephrase it, and
 3 try to make it easier. Try to answer it.
 4 A. I agree that's how the meeting goes. It
 5 doesn't always go back to an architect. A lot of times,
 6 it is done on the fly. We have a scheduled date to get
 7 this job done. We don't want to send it back to the
 8 architect to redesign --
 9 Q. Has that been your experience with your
 10 building, everywhere you've built?
 11 A. Larger changes -- just discussing this door,
 12 that would be something I would -- you would change in
 13 the field, and keep on going. Larger changes, moving a
 14 wall three feet, or more major things, you are going to
 15 take back to the architect, and have them draw something
 16 up.
 17 Q. Because of time?
 18 A. Yes.
 19 Q. And critical path is important, done by a
 20 certain time frame.
 21 A. Yes, they want to move in by June 1st.
 22 Q. You produced in discovery a lot of
 23 photographs. And I reserve the right to review those
 24 photographs with my client. He and I have not had a
 25 chance to really sit down and be able to analyze them as

1 I would like to.
 2 If you can give me some, if you can tell me,
 3 who took the photographs, and if there was any
 4 methodology, or how these photographs came about? How
 5 did you take them? Do you know who took them? Did you
 6 take them?
 7 A. A combination of several employees. The first
 8 photographs were myself, when I went out and did the
 9 original inspection. And some of the second photographs
 10 taken were by Eric, before we started the work. And
 11 then photographs during the process were taken by a
 12 foreman in the field. And then we take after
 13 photographs.
 14 Alyson and I reviewed them the other day,
 15 going through a large amount of them. And what I did,
 16 to just make it easier on you guys, take that file, and
 17 arrange it by date. And literally, it starts with the
 18 day, the first picture I took on my inspection, and we
 19 just went through them in sequence.
 20 So it shows all the photos I took in
 21 inspection. And then it shows the photos I took before
 22 construction. That were taken -- I didn't take them.
 23 That were taken before construction started. And then
 24 as the process went along.
 25 Q. Do the photos show what you described in your

1 crawlspace. There was mold in other areas of the crawl,
 2 not at that area underneath the door.
 3 Q. Okay.
 4 A. But there was mold -- and it wasn't heavy
 5 mold. I mean, it was small, little, you know, spots of
 6 mold on the bottom of the sub-flooring, sub-sheeting,
 7 so...
 8 Q. Can you quantify it at all? I mean, was it
 9 all pervasive throughout the house?
 10 A. It seemed to be more on the north side of the
 11 home from the family -- mid family room, kind of in line
 12 with the entryway, towards the north of the home. I
 13 don't recall, probably. But I thought Mike Longmire
 14 said that there was some sort of water intrusion that
 15 happened on the north side of the home; maybe a master
 16 bathroom, or something. I don't remember thoroughly,
 17 but I believe that was a discussion. And it seemed
 18 definitely the majority of the mold was on that side of
 19 the home, not under the kitchen, dining room area.
 20 Q. Do you have any idea when that other water
 21 intrusion --
 22 A. I don't. I just think I remember something
 23 about that conversation.
 24 MR. PIERCE: That's all the questions I have.
 25 Thank you.

1 sketches that we've marked as Exhibit 61?
 2 A. Yes, they do.
 3 Q. Do they show that?
 4 A. Yes.
 5 MR. NEVALA: I don't have any other questions.
 6 Thanks, Beau.
 7 MR. PIERCE: I have just a couple.
 8 EXAMINATION
 9 QUESTIONS BY MR. PIERCE:
 10 Q. Just to follow-up on the photographs. Would
 11 it be fair to say then, that the first of the
 12 photographs would have been taken when you first came to
 13 the job site in the fall of 2014?
 14 A. The fall of 2013.
 15 Q. Or fall of 2013. Excuse me.
 16 A. Yes.
 17 Q. And then with reference to the crawlspace, was
 18 any mold visible prior to removing insulation down
 19 there?
 20 A. No. Underneath the door area?
 21 Q. Right.
 22 A. No.
 23 Q. Or anywhere? Was there any mold visible
 24 anywhere else that you know of?
 25 A. Yes, because we did a mold remediation in the

1 MS. FOSTER: I have clarifying questions. But
 2 if you want to go first, I can --
 3 MR. MILLEMANN: It doesn't matter. I have one
 4 clarifying question.
 5 MS. FOSTER: No, you go ahead.
 6 FURTHER EXAMINATION
 7 QUESTIONS BY MR. MILLEMANN:
 8 Q. Beau, you used the term in the response to one
 9 of Mr. Nevala's questions, and the term was
 10 "owner/builder"?
 11 A. Uh-huh.
 12 Q. Does that term have any particular meaning in
 13 your trade or industry?
 14 A. Owner/builder would be like myself, if I built
 15 my own home. I said the term incorrectly the way I used
 16 it, because Chris Kirk wasn't an owner/builder. I
 17 believe what I know about him, I was absolutely guessing
 18 he was a builder that was on site, himself, and not
 19 having a project manager on site. That was just an
 20 assumption by me from what I know, I've heard about him.
 21 That's what I meant by what I said.
 22 Q. But in your trade and profession,
 23 "owner/builder" would mean a builder, who is the owner
 24 of the home, and building the house?
 25 A. Correct.

1 Q. Or owner of the property, and building the
2 house?
3 A. Correct.
4 MR. MILLEMANN: That's all I had.
5 EXAMINATION
6 QUESTIONS BY MS. FOSTER:
7 Q. Okay. I had a few follow-up questions to the
8 testimony you gave. Please correct me if I'm wrong, but
9 I believe you testified that the conditions you
10 observed, that your folks observed, when you opened up
11 around the door, and around the lake facing wall, that
12 did not impact the habitability of the home. Did I
13 understand that correctly?
14 A. You are correct.
15 Q. You also mentioned that there was a problem
16 with the operation of the door. And I'm trying to
17 understand the conditions you observed that negatively
18 affect the operation of the door, in your opinion.
19 A. Yes.
20 Q. How so?
21 A. Because if water is going to sit underneath
22 that door in that flashing area there, that water is
23 going to weep upwards through the sub-flooring, you
24 know, or directly to the bottom of that threshold of
25 that door, which there is wood in the bottom of that

1 door, the joists and the dry rot, both on the southern
2 facing side, and then the conditions you observed on the
3 eastern facing side, had not been fixed by your folks,
4 what would have happened over time to the house?
5 A. Eventually, you know, that rot on those floor
6 joists would continue to move, and you may notice some
7 creaking. You may notice -- and that water would
8 continue, because remember, the sub-floor was rotted
9 right underneath that hardwood. And which is still
10 amazing that the hardwood did not show any signs of the
11 water, but the sub-floor directly underneath it is
12 rotted.
13 So as that water has -- kept going there, I
14 think eventually, you are going to see those signs in
15 your hardwood. Eventually, it is going to start
16 buckling, and show signs of moisture there.
17 On the stone, I mean, if that continued, I
18 mean, it would take a long time. But if that continued,
19 eventually the stones would fall off the wall.
20 Q. Okay. Would it create a safety hazard?
21 A. It could. But, I mean, I would think you
22 would see those signs long before --
23 Q. Okay.
24 A. -- a safety hazard would occur.
25 Q. And do you have any idea how long it would

1 door. And it's going to swell that, making that door
2 not want to open.
3 Q. To make it -- make it sticky?
4 A. Yes.
5 Q. Did you observe on the door that was there
6 before replaced, that it had been swollen at the bottom?
7 A. I did not observe that, no.
8 Q. Did you observe that it had, one way or the
9 other?
10 A. I did not.
11 Q. Okay.
12 A. If -- he had mentioned that somebody put
13 screws down through that threshold.
14 Q. Right.
15 A. You know, if that was swollen up, the door
16 won't open. Somebody maybe screwed down through it,
17 trying to get that to go back down, so the door would
18 open. Trying to put two and two together.
19 Q. Did you observe screws in the threshold?
20 A. I don't recall seeing them.
21 Q. Do you know whether the door that was replaced
22 was the original door that came with the home in 2004,
23 2005?
24 A. I do not know that.
25 Q. If these conditions you observed around the

1 have taken, and maybe you don't, for it to start seeing
2 signs in the hardwood inside, as you just described?
3 A. You know, I don't know. It depends on how you
4 take care of the home. If the homeowner shovels the
5 deck every year, and keeps it maintained, has Michael
6 Longmire out there shoveling the deck, then you may
7 never see it.
8 Q. Okay.
9 A. If it's a big snow year, and they get a ton of
10 snow packed up, and then we get rain for two weeks in a
11 row, you are going to see it.
12 Q. Okay. Thank you. It may take me a couple
13 tries to get this question to be clear, but here's my
14 first try.
15 Homes built along the lake in the 2004, 2005
16 area, would you expect them on average to exhibit, six
17 years later, the level of rot and conditions you saw
18 here?
19 A. On average, no.
20 Q. Why not?
21 A. Because these are -- I feel these are flaws.
22 And, you know, we see a few homes with issues like this,
23 or completely different, but things that were not
24 constructed properly. But the average home, absolutely
25 not. The majority of the homes on the lake are high-end

1 homes, and don't have major issues.
 2 But do have -- he would say, they do
 3 their -- with, you know, design -- tough designs and
 4 things like that, we get called out -- I mean,
 5 obviously, the home I discussed, that we put copper
 6 gutters on. It is a high-end home on the lake. It had
 7 caused an issue where the water was coming off, and was
 8 deteriorating the retaining wall below it. So are there
 9 issues? Yes. Rot; not the majority of them.
 10 Q. So there are issues, but not issues of this
 11 type, on average?
 12 A. That's a tough question.
 13 Q. Is that a hard question? Am I not asking it
 14 well?
 15 A. I mean, because we -- that's the business we
 16 get called out for a lot now with what I do. You know,
 17 we fix a lot of issues. But I mean, average, no.
 18 Q. So on average, million dollar homes around the
 19 lake, built about 10 or 12 years ago, are you seeing,
 20 being called out to fix rot, or damage of the type
 21 you've seen here, very often?
 22 A. Again, that's really --
 23 Q. Is that a hard question?
 24 A. Well, I don't know. You know, average home, I
 25 mean, if you take all the homes on the lake, and the

1 average one, we visit five to ten high-end homes a year
 2 with issues.
 3 Q. Okay.
 4 A. Does that help?
 5 Q. Maybe there is not an answer to the question.
 6 And do you know whether this house was
 7 originally designed to have gutters?
 8 A. I would have no idea.
 9 Q. And going back to exhibit number -- I'm
 10 jumping around with some follow-up questions -- Exhibit
 11 No. 3. This is the invoice from Valley County, A-1
 12 Heating, dated May 17th, 2012. And I think you
 13 testified, you do not know what this was for? Is that
 14 what you testified?
 15 A. I mean, I have an understanding of what I
 16 think it was for. But did we have any involvement
 17 in -- my company have any involvement in this? No.
 18 Q. And did you know whether foam was removed from
 19 underneath the crawlspace, underneath the door area, in
 20 connection with the job that was done for this invoice?
 21 A. I would assume that they would have to drill a
 22 hole through some foam to install this gas line.
 23 Q. They would have to bring the foam off to do
 24 that?
 25 A. Yes, or either just drill a hole through it,

1 and push a line through it. I'm not sure exactly how to
 2 do it.
 3 Q. Do you know how long Mike Longmire first
 4 observed water in the crawlspace in order to call your
 5 company?
 6 A. He told me that he had an HVAC company come
 7 out to install the gas line. And they observed that the
 8 insulation was wet, and saw the rim board was rotted.
 9 Q. Did they pull the foam off from underneath?
 10 A. Yes.
 11 Q. And when you first inspected the crawlspace in
 12 the fall of 2013, did you observe foam had been pulled
 13 off in the area of the gas piping?
 14 A. Yes.
 15 Q. And did you observe foam pulled off in any
 16 other areas of the crawlspace at that time?
 17 A. No.
 18 Q. Turning back to your hand drawn drawing,
 19 Exhibit 61. You described, what you described as
 20 problems with the framing --
 21 A. Uh-huh.
 22 Q. -- of the doors. And I want to gain a better
 23 understanding of how it changed to the doors going from
 24 flat to recessed would have occurred. So that's not a
 25 question. That's a predicate to what I'm about to ask.

1 A. Okay.
 2 Q. If you have plans, such as the one that you
 3 originally saw for the house, where there was only the
 4 window, and the single door on the south facing side;
 5 right?
 6 A. The plans in our documents somewhere?
 7 Q. Correct.
 8 A. Yes.
 9 Q. And if you were the builder -- this is a
 10 hypothetical.
 11 A. Okay.
 12 Q. Called upon at some point to recess those
 13 doors in the manner shown here. I think you said,
 14 that's not the sort of change you would bring back to
 15 the architect; is that right?
 16 A. That is what I said, yes.
 17 Q. And that's true?
 18 A. That -- you know, and it depends on how each
 19 homeowner and architectural relationship is. But in
 20 general, a change like this would not go back to the
 21 architect. It would be something that would be made in
 22 the field.
 23 Q. Okay. And you also describe that when you
 24 make this change, you need to make some correlative
 25 changes to the framing?

1 A. Yes.
 2 Q. And the joists?
 3 A. Yes.
 4 Q. Are those the sort of changes that you, as the
 5 builder, would decide to make, or the sort of changes
 6 that you would give to the architect?
 7 A. The builder or the framing contractor should
 8 be able to make those changes. I mean, this depends on,
 9 again, the builder's knowledge, and the -- I can't find
 10 the right word -- the reliability, the knowledge of the
 11 framing contractor, too, to make sure you do it right.
 12 Q. But that's -- okay. Go ahead.
 13 A. I wanted to add on this. I overheard you
 14 (indicating) talking and --
 15 MS. FOSTER: Let the record reflect, he's
 16 pointing to Dan Nevala.
 17 THE WITNESS: Sorry. Dan. You mentioned tall
 18 threshold.
 19 MR. NEVALA: Yes.
 20 THE WITNESS: Because I want to come back to
 21 that "tall threshold." I recall a conversation with
 22 Mike Longmire about some issue with the tall threshold,
 23 and that's why the door was recessed down.
 24 I just remember the conversation. I don't
 25 remember where it went. I think it would be a good

1 I think you just discussed some, or all of
 2 them with Mr. Nevala. Could you take a moment to read
 3 through those, 1 through 10, for me?
 4 A. Okay. (Witness complying.) Okay.
 5 Q. In your opinion, are any of the items listed
 6 in 1 through 10 potential causes of the conditions that
 7 you observed at 2130 Payette?
 8 A. Are they the main cause, in my opinion, no.
 9 You know, the screws through the threshold could be a
 10 cause. But timing-wise, if those were done after the
 11 sale of the home -- I don't know when exactly that
 12 was -- but would those screws cause this much damage in
 13 two years? No.
 14 Q. Okay.
 15 A. Again, the weather stripping issues that were
 16 discussed would have let water inside, and you would
 17 have seen it on the floor. And that wasn't the issue.
 18 Q. You mean, the observations listed here, you
 19 believe would have resulted in water coming inside the
 20 dining room; is that what you mean?
 21 A. The weather stripping, yes. The screws would
 22 have pushed the water down to where we did see the
 23 water.
 24 Q. But not within a two-year period?
 25 A. Not the rot and stuff to the extent that we

1 point, and to either look through the photos, and ask
 2 Eric further about exactly how that door was when we
 3 pulled it. You know, was it recessed down
 4 three-quarters of an inch, and sitting right on top of
 5 the floor joist with no OSB underneath it? I think it
 6 might have been. I can't give you a direct answer on
 7 it. But I do recall conversations about this tall
 8 threshold, but I'm not specific on an answer for you.
 9 MR. NEVALA: Appreciate it.
 10 MS. FOSTER: Do you have the exhibits from
 11 yesterday?
 12 THE REPORTER: Yes.
 13 Q. (BY MS. FOSTER) I'm going to show you Exhibit
 14 30, that was marked yesterday in the deposition of Chris
 15 Kirk as Exhibit 30. And this is a letter from Dan
 16 Nevala to Jason Mau, at the time was Mr. Petrus'
 17 attorney, dated August 29th, 2013. And have you seen
 18 this letter before?
 19 A. Yes, I believe it's the letter you and I
 20 reviewed the other day.
 21 Q. And if you look at the bottom of the first
 22 page of the letter, which is RP 85, to the top of the
 23 letter, page 2 of the letter, on RP 86. There are ten
 24 items listed that Mr. Kirk states he discovered in his
 25 inspection of the property in August of 2013.

1 saw, within a two-year period.
 2 Q. And item No. 10, it states, "foam insulation
 3 has been removed." This was in August of 2013. And you
 4 first inspected in October of 2013, two months later or
 5 less; is that right?
 6 A. Uh-huh, yes.
 7 Q. And at that time, the only foam insulation you
 8 saw was removed in the crawlspace, was that removed in
 9 connection with the gas pipe line; is that right?
 10 A. Well, gas pipe. And then, I believe,
 11 Mr. Longmire or somebody had opened it up further along
 12 in there.
 13 Q. In that same general area?
 14 A. In that same general area, underneath the door
 15 in the dining room.
 16 Q. Okay. Thank you.
 17 And since we have you here. How long have you
 18 worked with Eric Waite?
 19 A. Almost 20 years.
 20 Q. Do you have an opinion as to his competence?
 21 A. That's why he still works for me. I do. I
 22 think he's highly competent. And when I first met Eric,
 23 he came to work for me as a framer. He didn't know
 24 anything. Within 18 months, he was running a crew for
 25 me. It was not million dollar homes. These were

1 smaller homes in Boise, but he learned quickly. He was
 2 very competent. And then he went and ran his own
 3 business for a while. And then came back to work for me
 4 four years ago. I'm glad to have him on board.
 5 Q. What's his position in your company?
 6 A. General manager of McCall operations.
 7 Q. How many employees does he supervise, if any?
 8 A. Between eight and 20, depending on the season.
 9 Q. And do you trust him to be the general manager
 10 of your business?
 11 A. Yes.
 12 Q. And you trust him to be a project manager for
 13 your projects?
 14 A. Yes.
 15 Q. And have you ever had complaints from clients
 16 about his work?
 17 A. Maybe minor little things, but they've been
 18 handled professionally. And by the time we're done, we
 19 got glowing reviews from the customers. And not every
 20 job is perfect. But if there is an issue, we address
 21 it, and handle it. And more often, I have clients
 22 actually call in, saying, what a pleasure he was to work
 23 with.
 24 MS. FOSTER: Thank you. No further questions
 25 for me.

1 inspection report was. So I'm not sure.
 2 Q. I'll represent to you that it was about a
 3 year-and-a-half before you were there.
 4 A. Okay.
 5 Q. Is it possible that the mold that you saw
 6 could have appeared sometime between his inspection and
 7 your inspection?
 8 A. Yes.
 9 MR. PIERCE: That's all I have. Thank you.
 10 MR. NEVALA: I've got nothing.
 11 MS. FONTAINE: No thank you.
 12 MR. MILLEMANN: Thank you, Beau.
 13 THE WITNESS: Free?
 14 MS. FOSTER: Do we need to continue with him
 15 on Monday?
 16 MR. MILLEMANN: No.
 17 (Deposition concluded at 3:16 p.m.)
 18 (Signature requested.)
 19
 20
 21
 22
 23
 24
 25

1 MR. MILLEMANN: No further questions.
 2 FURTHER EXAMINATION
 3 QUESTIONS BY MR. PIERCE:
 4 Q. I have a couple follow-up questions on the
 5 mold. Sorry.
 6 A. Yes.
 7 Q. Do your photos show mold; any of the
 8 photographs that we haven't seen here yet?
 9 A. I believe they do.
 10 Q. And are there different types of mold?
 11 A. Yes.
 12 Q. Are all types of mold harmful to humans?
 13 A. It depends on each person, and how they react
 14 to mold. Some can be highly affected by it, and others
 15 could never be affected by it.
 16 Q. How long does mold take to grow, just based on
 17 your knowledge?
 18 A. Again, that varies. It depends on moisture
 19 content, humidity level in the space, and the source
 20 it's growing on.
 21 Q. As I understand it, your first visit to the
 22 property was about a year-and-a-half after Mr. McKenna
 23 did his inspection report; is that correct, as far as
 24 you know?
 25 A. Yes, I'm not -- I don't know when his

1 CERTIFICATE OF WITNESS
 2 I, BEAU VALUE, being first duly sworn, depose
 3 and say:
 4 That I am the witness named in the foregoing
 5 deposition, Volume I, consisting of pages 1 through 208;
 6 that I have read said deposition and know the contents
 7 thereof; that the questions contained therein were
 8 propounded to me; and that the answers contained therein
 9 are true and correct, except for any changes that I may
 10 have listed on the Change Sheet attached hereto:
 11 DATED this ____ day of _____, _____.
 12
 13 _____
 14 BEAU VALUE
 15
 16 SUBSCRIBED AND SWORN to before me this ____ day
 17 of _____, 20__.
 18
 19 _____
 20 NAME OF NOTARY PUBLIC
 21
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

ERRATA SHEET FOR BEAU VALUE

- 1
- 2 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 3
- 4
- 5 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 6
- 7 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 8
- 9
- 10 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 11
- 12 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 13
- 14
- 15 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 16
- 17 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 18
- 19
- 20 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 21
- 22 Page ____ Line ____ Reason for Change _____
Reads _____
Should Read _____
- 23
- 24 You may use another sheet if you need more room.
- 25 WITNESS SIGNATURE _____

REPORTER'S CERTIFICATE

- 1
- 2 I, COLLEEN P. ZEIMANTZ, CSR No. 345, Certified
- 3 Shorthand Reporter, certify:
- 4 That the foregoing proceedings were taken
- 5 before me at the time and place therein set forth, at
- 6 which time the witness was put under oath by me;
- 7 That the testimony and all objections made were
- 8 recorded stenographically by me and transcribed by me or
- 9 under my direction;
- 10 That the foregoing is a true and correct record
- 11 of all testimony given, to the best of my ability;
- 12 I further certify that I am not a relative or
- 13 employee of any attorney or party, nor am I financially
- 14 interested in the action.
- 15 IN WITNESS WHEREOF, I set my hand and seal this
- 16 28th day of March, 2016.
- 17
- 18
- 19
- 20
- 21 

- 22 COLLEEN P. ZEIMANTZ, CSR 345
- 23 Notary Public
- 24 P.O. Box 2636
- 25 Boise, Idaho 83701-2636
- My commission expires September 7, 2017.

ORIGINAL

CHANGE SHEET FOR BEAU VALUE - 30(B)(6) DISASTER RESPONSE, LLC
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No Change

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EXHIBIT 6

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY
 PETRUS FAMILY TRUST DATED MAY 1,)
 1991, and EDMOND A. PETRUS, JR.,) Case No.
 individually and as Co-Trustee of) CV-2014-71-C
 the Petrus Family Trust Dated May)
 1, 1991,)
) Plaintiffs,)
) vs.)
 NANCY GENTRY-BOYD, CHRIS KIRK d/b/a)
 KIRK ENTERPRISES; TODD MCKENNA)
 d/b/a HOMECRAFT HOME INSPECTIONS;)
 RE/MAX RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
) Defendants.)
 _____)

DEPOSITION OF ERIC WAITE

March 14, 2016

REPORTED BY:

COLLEEN P. ZEIMANTZ, CSR 345

Notary Public

1 THE DEPOSITION OF ERIC WAITE was taken on
2 behalf of the Defendants, at the offices of Millemann,
3 Pittenger, McMahan & Pemberton, LLP, located at 706
4 North First Street, McCall, Idaho, commencing at 9:05
5 a.m., on March 14, 2016, before Colleen P. Zeimantz,
6 Certified Shorthand Reporter and Notary Public within
7 and for the State of Idaho, in the above-entitled
8 matter.

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21 ALSO PRESENT: Chris Kirk
22 Nancy Gentry-Boyd
23
24
25

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9 E X H I B I T S

10 DESCRIPTION PAGE
11 (None.)
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1 ERIC WAITE,
2 first duly sworn to tell the truth relating to said
3 cause, testified as follows:
4 EXAMINATION
5 QUESTIONS BY MR. MILLEMANN:
6 Q. Good morning, Mr. Waite. We met first when we
7 walked through the door. I am Steve Millemann. I don't
8 think we've met before; have we?
9 A. No.
10 Q. And I think you mentioned when you sat down,
11 you have not previously had your deposition taken?
12 A. Never.
13 Q. Let me offer you a couple of ground rules,
14 partly to remind myself, but also to make the
15 proceedings easier for all of us.
16 As you can see, we have a court reporter here,
17 Colleen. And her job is to take down verbatim
18 everything that is said.
19 A. Uh-huh.
20 Q. She has a hard time with -- not personally,
21 but with technology, head nods, and "uh-huhs," and that
22 sort of thing. So if we bug you a little bit on an
23 answer, it is just we want a "yes," or "no," or an
24 audible answer.
25 A. Okay.

1 Q. And the other thing that's difficult for her,
2 and I'll try to keep this in mind, myself, if I'm
3 talking over the top of my question, again, it is very
4 difficult. So if you can try to be aware that I have
5 finished my question, that's very difficult. So if you
6 can try to be aware that I've finished with my question.
7 I will try to be aware that you have finished with your
8 answer before I ask another one.

9 A. Okay.

10 Q. If at any point you need a break, just say so.
11 The only proviso on that is if there is a question on
12 the table, I will probably ask you to answer that
13 question before we take a break. And I think that's
14 about it for ground rules.

15 How would you like to be addressed in this
16 deposition?

17 A. Eric.

18 Q. Is Eric okay?

19 A. Yes.

20 Q. Feel free to address me as, Steve, if you need
21 to.

22 A. Okay.

23 Q. So your full name for the record, Eric.

24 A. Eric John Waite.

25 Q. And, Eric, what's your current address?

1 finished your year at Boise State?

2 A. Okay. So I got married early. Did a few
3 little miscellaneous things. College didn't work out.
4 I went to work for Commercial Tire for a while. I was
5 laid off of there about '99, and that's when I started
6 construction. I started as a framer.

7 I worked for Value Building for several years
8 down in Boise. And then after that, I started my own
9 company, framing. I worked in that industry for until
10 probably 2010; 2008, on a consistent basis. And then
11 after that, after the recession hit, I kind of jumped
12 around, and did quite a few different things.

13 I did a lot of traveling, stacking log homes
14 for a company out of Meridian. I got into some
15 hazardous cleanup, oil cleanups. And then at some
16 point, probably 2012, I wound up out in North Dakota
17 working in the oil fields for a while.

18 And then in 2013, I took up employment for
19 Restoration Pro at the time. And I got back into the
20 construction industry.

21 Q. Thank you.

22 A. Yep.

23 Q. So it sounds like around 1999 or 2000, you
24 started construction framing?

25 A. Correct.

1 A. 1003 Woody Drive, here, in McCall.

2 Q. How long have you resided at that address?

3 A. I think we bought that house in August of just
4 this last year.

5 Q. How long have you resided here, in McCall?

6 A. I moved here in July of 2013.

7 Q. Had you previously lived in McCall prior to
8 July?

9 A. No.

10 Q. Had you previously lived in Valley County
11 prior to July 2013?

12 A. No.

13 Q. Where did you live prior to coming to McCall
14 in 2013?

15 A. Meridian; specifically, Meridian, Boise
16 Valley.

17 Q. Can you give me a brief synopsis of your
18 educational background?

19 A. High school diploma, started college. I went
20 to a semester of college, and that's it, at Boise State.

21 Q. Did you grow up in the Boise area?

22 A. Canyon County area, and then I got married and
23 moved to Boise. Yep.

24 Q. Can you give me a chronological overview of
25 your employment since you got out of high school and

1 Q. Was that your first entry into the trades?

2 A. Yes, it was.

3 Q. And did you have your own company, or did you
4 frame for somebody else?

5 A. I framed for Beau Value, he was a framer at
6 the time.

7 Q. And I think you mentioned the name, Value
8 Building?

9 A. Correct.

10 Q. How long did you work for Beau?

11 A. Well, Beau sold his company at some point, and
12 I worked for the new owners. And I think it was 2002 or
13 2003, I started working for myself.

14 Q. So you worked for that time frame from
15 1999-ish to 2003 would have been with Beau's company,
16 and then with another company?

17 A. Yes.

18 Q. All of it framing?

19 A. Uh-huh.

20 Q. That's a "yes"?

21 A. Yes. Yes. Sorry. That's a "yes."

22 Q. Don't apologize here. It's an awkward
23 scenario here. It is not exactly like a normal
24 conversation.

25 And that was construction framing. Was that

1 residential development?
 2 A. Mostly residential, yes.
 3 Q. And was that single-family residential?
 4 A. Mostly single-family, some multi-family.
 5 Q. And if you can generalize, was it more spec
 6 homes, or more what I would call, custom building for an
 7 owner pursuant to a set of plans?
 8 A. Most -- I would say, mostly spec homes, yes.
 9 Q. And when I use that term, and correct me if
 10 you use it differently, the distinction in my mind on
 11 that, is a spec home is one being built by the builder
 12 pursuant to a set of plans the builder gets with the
 13 intention of upon completion selling it?
 14 A. Yes.
 15 Q. Does that make sense?
 16 A. Yes.
 17 Q. As opposed to a home for an owner, who comes
 18 to the builder, and says, here is my architect, or here
 19 are my plans, please, build this home?
 20 A. Right.
 21 Q. And you started your own framing company in
 22 about 2002, 2003?
 23 A. Yes.
 24 Q. What was the name of that company?
 25 A. Talon Framing.

1 A. I was just a project manager, and an
 2 estimator.
 3 Q. So up until, let's take the period prior to
 4 2013, prior to when you came to McCall and went to work
 5 with Restoration Pro, clearly, you were doing framing.
 6 Were you doing any other type of building in the
 7 building sequence, from footings and foundation, to
 8 finish?
 9 A. Nope.
 10 Q. Have you had any experience as a finish
 11 carpenter?
 12 A. Minimal experience as a finish carpenter.
 13 Q. How about experience with masonry work?
 14 A. Very minimal.
 15 Q. When you were doing framing, where did your
 16 responsibility as a framer end? That is what would have
 17 been the status of the structure when your work
 18 completed?
 19 A. Well, a lot of times, it depended on the
 20 builder that I was working for. But oftentimes, I set
 21 windows, and doors, exterior doors. And in the latter
 22 parts, 2008 area, I was -- depending on the builder
 23 again, putting house wrap on the house, also.
 24 Q. Okay.
 25 A. Yep.

1 Q. And was that a dba, or an LLC?
 2 A. It was an S corp.
 3 Q. And it sounds like you did framing as your own
 4 company for a period of five to seven years, something
 5 like that?
 6 A. Yeah. You know, I did a little bit off and
 7 on. The work wasn't very consistent for me. So, yeah,
 8 it was off and on. I think the last home I framed was
 9 probably in 2010.
 10 Q. And then between, it sounds like, sort of in
 11 that period, it was challenging for anybody in the
 12 trades.
 13 A. Yes, it was.
 14 Q. You did what you had to do. Stack some log
 15 homes, did some oil cleanup, ended up with a number of
 16 other Idahoans in North Dakota; does that sound right?
 17 A. Yes, I didn't do any framing in there. I
 18 worked in the oil fields.
 19 Q. Came back to Idaho, and started working with
 20 Restoration Pro in 2013?
 21 A. Yes.
 22 Q. Which is then when you moved to McCall?
 23 A. Yes.
 24 Q. What was your position then when you started
 25 with Restoration Pro?

1 Q. House wrap being some sort of moisture
 2 barrier?
 3 A. Correct.
 4 Q. In 2008, when you started doing that, was
 5 there a standard moisture barrier you used?
 6 A. You know, it varied. Tyvek was the main one,
 7 and then there were others. There is Franklin wrap, and
 8 there are all kinds you can use. Mostly Tyvek, most of
 9 what I was doing was for Everest Construction up here.
 10 So I was actually putting Tyvek on almost every house I
 11 was doing for him.
 12 Q. When did that start?
 13 A. The first home I did up here was in 2004.
 14 Q. Okay.
 15 A. And then the last one I did up here, I believe
 16 was in this -- let's see. I worked in the winter of
 17 2007, '08. So it was April, I finished up in 2008.
 18 That was the last home I did up here.
 19 Q. And that was working for Beau's company,
 20 Everest Construction?
 21 A. That's correct.
 22 Q. Between I think the first home you started
 23 working on for Everest Construction was in 2004?
 24 A. Uh-huh.
 25 Q. That's a "yes"?

1 A. Yes.
 2 Q. And that was in Valley County?
 3 A. Yes, that was in Donnelly.
 4 Q. Between that first home, and say, the end of
 5 2005. So let's just take a two-year period there, 2004
 6 and 2005. If you can recall, on how many homes did you
 7 do work for Everest Construction; ballpark?
 8 A. I can't remember very many. I would say, one
 9 or two during that time. It wasn't until about 2006, or
 10 the latter part of 2005, when I started framing up here
 11 consistently.
 12 Q. And so in that 2004, 2005 period, did you live
 13 up here, or did you commute from the valley?
 14 A. I just commuted from the valley, correct.
 15 Q. I'm sorry if you answered it. I missed it.
 16 Did you say one home or two homes in that period?
 17 A. I can only remember one right now.
 18 Q. And that would be the first one you did?
 19 A. Yep.
 20 Q. And that's where you referenced that you had
 21 used Tyvek?
 22 A. You know, I don't remember doing Tyvek on that
 23 house. That was a house that was already started. And
 24 Beau asked me to come in and finish it. I do remember
 25 setting the windows on that house. But I do not

1 A. Uh-huh, yes.
 2 Q. Did you have any prior experience estimating?
 3 A. No.
 4 Q. So how did you learn to do that?
 5 A. So there is a program that we use specifically
 6 that helps us to estimate projects. I've been around
 7 construction for a long time, so I, just from being
 8 around it, I learned. Okay, this is what needs to be
 9 done. And here you go. You jump right into it.
 10 Q. Is that your position today?
 11 A. I am the general manager, yeah.
 12 Q. And as general manager, what are your duties
 13 and responsibilities for Restoration Pro?
 14 A. It's now called Disaster Response.
 15 Q. Thank you.
 16 A. But I still have the same duties and
 17 responsibilities as a project manager and estimator. I
 18 still estimate jobs. I still project manage jobs. But
 19 now, I oversee employees, and supply control at the
 20 shop, job costs, pretty much everything. I do
 21 everything there.
 22 Q. Generation of invoices to customers?
 23 A. Yes, I generate invoices to customers. Yes.
 24 Actually, our accountant generates invoices based off
 25 the estimates I write, but I deliver them to the

1 remember doing the Tyvek. Yeah, I don't.
 2 Q. So based on your own experience, would you
 3 feel that you would be able to tell me what the
 4 prevailing standards were in the residential
 5 construction business in Valley County in 2004 and 2005
 6 regarding moisture barriers to start with?
 7 A. I can't be sure. Nope, I can't be sure.
 8 Q. The extent of your experience would have been
 9 that one home that you worked on?
 10 A. Yes.
 11 Q. So you could tell me what was done on that
 12 home. But as far as being able to tell me based on your
 13 own knowledge and experience what the standards would
 14 have been in the residential home construction industry
 15 for moisture barrier, for insulation, for flashing, you
 16 wouldn't be able to do that?
 17 A. No.
 18 Q. Okay. And I appreciate that.
 19 A. Yep.
 20 Q. That probably saves us a little bit of time
 21 here.
 22 A. Okay.
 23 Q. You mentioned when you came to work for
 24 Restoration Pro in 2013, your job title was project
 25 manager and estimator?

1 customers.
 2 Q. And does your current position have a
 3 geographic area that you are responsible for?
 4 A. We do service mainly from Cascade to
 5 New Meadows. But we do go down to Riggins, Grangeville.
 6 We've been down to Council. We have even been down to
 7 Garden Valley.
 8 Q. And on the job, which is the subject of this
 9 lawsuit, which was Mr. Petrus' home at 2130 Payette
 10 Drive, you are familiar with that that job; right?
 11 A. Yes.
 12 Q. At that time that that job was done, was your
 13 position general manager or project manager?
 14 A. Project manager.
 15 Q. So as project manager on that job, would you
 16 have been responsible for cost accounting and generation
 17 of the data for the invoices?
 18 A. Writing the estimates portion, yes, I helped
 19 write the estimates, and determined scope of work to
 20 follow for that job, yes.
 21 Q. And then on the other end of it, that is, once
 22 the estimate has been done and approved, and you are on
 23 the job working, where it comes time to issue project
 24 invoices to the owner. As project manager, was that
 25 your responsibility, or somebody else's?

1 A. We had an accountant at the time who would
 2 generate those. But, basically, it was based off of
 3 percentage of completion. We billed on what was
 4 completed at the time, yes.
 5 Q. And was that your responsibility on the job at
 6 2130 Payette to provide that information to the --
 7 A. Yes.
 8 Q. -- accountant?
 9 "Yes"?
 10 A. Yes.
 11 Q. Let's just start with at any time in your work
 12 history to date, have you had responsibility for
 13 selecting the type of moisture barrier that would go
 14 behind masonry?
 15 A. Yeah. Yes.
 16 Q. Did you do so on the job at 2130 Payette?
 17 A. I assisted in determining which moisture
 18 barrier to use, yes.
 19 Q. And prior to, say, January 1, 2006, had you
 20 been called upon in your employment to make decisions
 21 regarding the type, and amount of moisture barrier,
 22 which would go behind masonry?
 23 A. No.
 24 Q. And prior to January 1, 2006, would you have
 25 had responsibility on the job for determining what type

1 that you are aware of, that you would have separate and
 2 apart from the files that Disaster Pro has?
 3 A. That would be absolutely, no, because we keep
 4 everything off of that file. We have a specific file
 5 for that. No other places to keep anything.
 6 Q. And Beau is knowledgeable on those files, and
 7 where they are, and what's in them?
 8 A. Yes, he is.
 9 Q. Have you ever had any conversations about the
 10 home at 2130 Payette, or this lawsuit with Nancy Gentry?
 11 A. No, never.
 12 Q. Have you ever witnessed any conversations that
 13 she had with any other person?
 14 A. No.
 15 Q. Have you ever had any such conversations with
 16 Chris Kirk?
 17 A. I don't remember having any conversations with
 18 Chris Kirk.
 19 Q. And how about Todd McKenna?
 20 A. Not about this job, no.
 21 Q. And how about Steve Lacey?
 22 A. Remind me who Steve Lacey was again.
 23 Q. Steve Lacey, the testimony, I think, shows
 24 that Steve Lacey would have been on the site, at least
 25 in April of 2013, to inspect the condition that had been

1 of flashing would be used in a project on which the deck
 2 adjoined the house?
 3 A. No.
 4 Q. Have you retained any documents, yourself,
 5 separate from the records at Restoration Pro or Disaster
 6 Pro about the 2130 Payette job?
 7 A. No.
 8 Q. What about email communications? Do you still
 9 have those?
 10 A. I was actually asked about that, and I have
 11 not checked yet. But I don't typically delete any
 12 emails, so I should have access to every email.
 13 Q. From your recollection on that project, and
 14 I'm going to refer to it as the "project," that being
 15 the work you did for Mr. Petrus at 2130 Payette, do you
 16 recall engaging in email communications relative to that
 17 project?
 18 A. Yes.
 19 Q. And with whom do you recall doing so?
 20 A. Mr. Petrus, probably maybe Mr. Longmire, Beau
 21 Value, subcontractors, I think that would be about it.
 22 Q. So other than the emails, which Ms. Foster has
 23 agreed to provide, once you've had a chance to look
 24 through your email records, your server. Other than
 25 those, would there be any other documents of any kind

1 discovered. And he might have been there with Chris
 2 Kirk. I'm not sure.
 3 A. I don't think I've had any conversations with
 4 Steve Lacey.
 5 Q. Has anyone ever represented to you that Nancy
 6 Gentry said one thing or another in any way related to
 7 that house?
 8 A. No, because I didn't even know the name of the
 9 homeowner, until this came about just recently.
 10 Q. So to wrap this questioning up. In none of
 11 your conversations with Mr. Petrus, did he state to you,
 12 that Nancy said something or other about the project?
 13 A. Nope.
 14 Q. So, Eric, I'm looking at a pleading that's
 15 called "Plaintiff's Amended Expert Witness Disclosure,"
 16 which I wouldn't expect you to know anything about.
 17 A. Okay.
 18 Q. I will tell you, it's a pleading that we, as
 19 attorneys, are required to submit to disclose when we
 20 intend to call expert witnesses, and who they are, and
 21 what they might testify about. And the fact that a
 22 disclosure might say one thing or another isn't a
 23 reflection on probably anything other than, I know in my
 24 case, at least as an attorney, I try to be as broad as I
 25 can about what the witness might say. Fair enough?

1 A. Yes.
 2 Q. The amended expert witness disclosure that we
 3 were provided here lists both you and Mr. Value as
 4 expert witnesses.
 5 A. Okay.
 6 Q. And it lists topics that jointly between the
 7 two of you that you might testify about.
 8 A. Okay.
 9 Q. Are you with me so far?
 10 A. Yes.
 11 Q. And my purpose here is to limit, if I can, my
 12 questioning to you. If not, we'll go to every topic
 13 necessary. But the disclosure states, they, and this is
 14 referring to both you and Mr. Value, are expected to
 15 testify to their observations and opinions regarding
 16 defendants' failure to apply with applicable standard of
 17 care and applicable building codes in the design and
 18 structure of the home. Okay?
 19 A. Okay.
 20 Q. I think you've answered my question already on
 21 this, but let me make sure. As you sit here today, do
 22 you consider yourself an expert, based upon your
 23 personal knowledge and experience, on what the
 24 applicable standard of care, and applicable building
 25 codes were in McCall in 2004 and '05?

1 A. No, not in 2004 or '05.
 2 Q. In the process of your work, I gather from
 3 your answer, you've gained more knowledge --
 4 A. Yes.
 5 Q. -- subsequent to that?
 6 "Yes"?
 7 A. Yes.
 8 Q. Okay. Thank you.
 9 So have you ever worked, Eric, as a general
 10 contractor?
 11 A. No.
 12 Q. Prior to your going to work in 2013 with
 13 Restoration Pro, had you ever been called upon to work
 14 as a project manager?
 15 A. No.
 16 Q. Over the course of your experience in the
 17 construction trades, have you encountered sticky doors
 18 or sticky windows in a completed home?
 19 A. Yes.
 20 Q. Once, more than once? Can you give me some
 21 range of times that you've encountered that?
 22 A. Definitely more than once. Yes, more than
 23 once.
 24 Q. Can you generalize for me, or tell me, if you
 25 can, specific to Valley County, based on your own

1 experience, without having done any investigation about
 2 a sticky door, what the possible causes might be to have
 3 a door that was sticky?
 4 A. Sometimes it's set improperly. Sometimes
 5 there are adverse conditions that change the condition
 6 of the door, and it needs to be adjusted. I've adjusted
 7 several, myself.
 8 Q. Based on your experience, which is
 9 considerable, would the mere fact that there was a
 10 sticky door on a completed home, suggest to you that
 11 there had been water intrusion causing rot in the door
 12 or the walls?
 13 A. Not necessarily.
 14 Q. And what you are saying is, is that there are
 15 other possible explanations for that door sticking?
 16 A. Yes.
 17 Q. And based on your experience -- and this is a
 18 hypothetical. If you had a customer who called you, and
 19 said, hey, Eric, you know, that house you guys did. I
 20 have a door that's sticking. Can you come look at it?
 21 And you went and looked at it. And you did some
 22 adjustment to the hinges, and the door appeared to swing
 23 fine.
 24 At that point in time, would you have any
 25 reason to suspect, based on that door, alone, that the

1 structure had water invasion, or rot in the walls or the
 2 threshold?
 3 A. No.
 4 Q. The home at 2130 Payette, did you have
 5 occasion to be in that home, and around that home before
 6 any of Restoration Pro's work started?
 7 A. I believe I was in there once, maybe twice, a
 8 few times, yes.
 9 Q. And what would have been the purpose of you
 10 being in there before the work started?
 11 A. Familiarize myself with the job, further
 12 inspection. That's it.
 13 Q. And this lawsuit involves, or at least started
 14 with some french doors off of a dining area in the home.
 15 Are you familiar with those?
 16 A. Yes.
 17 Q. I'm showing you what was marked as Exhibit 1
 18 in Beau Value's deposition. And this is a floor plan
 19 that I think he testified at some point was prepared by
 20 Restoration Pro?
 21 A. Yep.
 22 Q. Does that sound right?
 23 A. Yep.
 24 Q. Did you prepare this, or somebody else?
 25 A. I'm not sure if I did or not.

1 Q. And Beau put some directional arrows on this
2 to help us orient ourselves. Do those make sense to
3 you?
4 A. Yes.
5 Q. And so the french doors in question, am I
6 correctly pointing to those?
7 A. Yes.
8 Q. And those would be on the generally south wall
9 of the dining room?
10 A. Yes.
11 Q. So prior to the time that Restoration Pro
12 worked and disturbed the premises, did you have the
13 opportunity to be in the area of those french doors
14 inside the house and outside the house?
15 A. Yes.
16 Q. About what time of year would that have been?
17 A. I don't remember.
18 Q. Do you remember if there was snow on the
19 ground?
20 A. I don't. I'm not remembering there being snow
21 on the ground.
22 Q. Do you remember whether you opened and closed
23 those doors?
24 A. No.
25 Q. Do you remember what the flooring was inside

1 the home, adjacent to those doors?
2 A. Wood flooring.
3 Q. Hardwood flooring?
4 A. Yes.
5 Q. Do you remember seeing any evidence of
6 moisture damage to that wood flooring?
7 A. No.
8 Q. And all these questions would have been before
9 you disturbed the premises?
10 A. Correct.
11 Q. And when I say, "disturbed," I mean, started
12 to take stuff apart; fair enough?
13 A. Uh-huh, yes.
14 Q. And prior to disturbing the premises, you
15 didn't see any water damage to the wood floor?
16 A. No.
17 Q. Did you see any evidence of damage to the door
18 frames?
19 A. No.
20 Q. Did you see any evidence of water intrusion or
21 water on the interior walls in the dining room?
22 A. To like the drywall?
23 Q. Yes.
24 A. No.
25 Q. Did you see any evidence of staining on the

1 drywall that would have caused you to suspect water?
2 A. No.
3 Q. Outside those french doors, did you see any
4 evidence on the surface of the decking to suggest that
5 there was either water intrusion or rot underneath the
6 door?
7 A. No.
8 Q. Did you help prepare the estimates for the job
9 at 2130?
10 A. Yes.
11 Q. And Beau went through those with us. So I
12 don't really plan to take your time to do it again.
13 A. Okay.
14 Q. Would he have been competent, in your mind, to
15 review those estimates with me?
16 A. Yes.
17 Q. It appeared to me, the job started with
18 principally removal of, and replacement of those french
19 doors. Is that consistent with your recollection?
20 A. Yes.
21 Q. Until you disturbed those doors, and saw what
22 was underneath them, that is, let's back up. Before
23 Restoration Pro disturbed that premises, did you have
24 any reason to suspect that the condition, which you
25 later discovered underneath the door, around the door,

1 and certain spots in the walls existed?
2 A. There -- from the crawlspace, I saw something,
3 yes.
4 Q. And this was before you disturbed the premise?
5 A. Yes.
6 Q. What did you see from the crawlspace?
7 A. I just saw moisture penetration coming through
8 that section of the wall, underneath the door.
9 Q. Do you remember when you were in the
10 crawlspace?
11 A. That was one of those preliminary times. It
12 was probably a month or two before. I can't remember
13 for sure.
14 Q. Do you remember whether it was dry down there
15 when you were down there?
16 A. I think it was dry, yes.
17 Q. And when you say, you saw evidence of moisture
18 penetration, had any insulation been removed, that you
19 know of, when you were in that crawlspace?
20 A. There was a little bit removed, yes.
21 Q. Did that allow you to look through to the area
22 underneath those french doors?
23 A. Yes.
24 Q. Was that foam insulation?
25 A. Yes.

1 Q. Do you have to cut that out when you remove
2 it?

3 A. You can pull it. You can pull it with your
4 hand.

5 Q. Without that having been removed, would you
6 have been able to observe anything from the crawlspace,
7 suggesting rot under the french doors?

8 A. No.

9 Q. So other than that, did you see anything
10 inside this house, or outside this house, before you
11 started to disturb it, that suggested to you there was
12 any probability that you were going to find the rot that
13 you subsequently found?

14 A. No.

15 Q. Do you remember whether the french doors were
16 functioning when your company started to do work on the
17 premises?

18 A. Yes.

19 Q. And they were?

20 A. Yes.

21 Q. Were you told why Mr. Petrus wanted to replace
22 those doors?

23 A. I can't be sure. Yes.

24 Q. Do you remember what you were told?

25 A. There was an issue -- there was water

1 Q. And when Rocky Baumgartner and his employees
2 came on the project to begin doing that, replacing the
3 rock veneer on the exterior of the home, what would have
4 been the exposed surface they were working from? Would
5 it have been the OSB?

6 A. No. We had wrapped the house prior to their
7 arrival with the Grace Ice & Water Shield material, and
8 Tyvek, I believe.

9 Q. And that's the surface they would have worked
10 from?

11 A. That's where they would have started their
12 work, correct.

13 Q. Were you there when they were doing their
14 work?

15 A. Yes.

16 Q. Did you observe the techniques they used to
17 put the rock veneer on?

18 A. Yes.

19 Q. Can you just generally describe them to me?

20 A. So they put additional wrap on, tar paper
21 material.

22 Q. Is that also known as felt?

23 A. Yeah.

24 Q. Okay. Go ahead.

25 A. And then some type of wire, and then the

1 penetration found by some other person underneath the
2 door.

3 Q. And if you know, was that by observing from
4 the crawlspace through the hole in the insulation?

5 A. Probably.

6 Q. Would there have been any other way to observe
7 it, in your mind?

8 A. No.

9 Q. Who else, besides yourself, worked on this
10 project for Restoration Pro?

11 A. Several of the employees.

12 Q. Do you remember them by name?

13 A. Yeah, Terry Mack, Tony Thayer, Toby King, Pat
14 Glasser. That's it for now. That's all I can think of.

15 Q. Did you, or the employees of Restoration Pro,
16 replace the masonry veneer on that structure?

17 A. No.

18 Q. Who did that?

19 A. Subcontractors.

20 Q. Did you --

21 A. The subcontractor did.

22 Q. Sorry. I didn't mean to talk over you. Do
23 you remember who they were?

24 A. We hired Baumgartner Masonry, Rocky
25 Baumgartner, and then his employees.

1 masonry.

2 Q. Did they install any type of flashing at the
3 base of the walls?

4 A. No.

5 Q. Did you do that?

6 A. Yes.

7 Q. And what type of masonry did you use at the
8 base of the walls where the rock veneer was going on?
9 Did I say, "masonry"? I'm sorry. What type of
10 flashing?

11 A. Metal flashing, four by four L-type flashing.

12 Q. And if I'm looking at the profile of that
13 wall, and I have OSB. Is the Tyvek next, or the ice and
14 water shield next?

15 A. So we actually -- I believe, we ice and water
16 shielded that whole wall. And when we started earlier,
17 put Tyvek on, I can't remember.

18 Q. So with the ice and water shield, you wouldn't
19 need it?

20 A. Correct, yes.

21 Q. Is ice and water shield something that you
22 have found to be used more recently for moisture
23 protection on the envelope of a home?

24 A. Yes. In certain conditions, yes.

25 Q. And would those be conditions where it was

1 perceived that there was a higher risk of moisture
 2 penetration?
 3 A. Yes.
 4 Q. Is the standard use for ice and water shield
 5 of roofs, and valleys, and that sort of thing?
 6 A. Yes.
 7 Q. So it would have had OSB. And moved out, it
 8 would have ice and water shield. Then I would have had
 9 the tar paper or felt that Baumgartner put on. And then
 10 the mesh, and then the masonry compound; right, and then
 11 the rock veneer?
 12 A. Yes.
 13 Q. Have I got that right?
 14 A. Yes.
 15 Q. Where, in there, would the flashing have been?
 16 A. So the flashing actually comes during the ice
 17 and water shield. In our application, we ran the first
 18 layer of ice and water shield on the wall from the
 19 foundation up. Then we ran the flashing at the ledger
 20 height for the deck. And then we ran ice and water
 21 shield down over the flashing, as well.
 22 Q. So you used ice and water shield all the way
 23 from the top of the wall to the foundation?
 24 A. Correct.
 25 Q. Beau went through with me the invoices that

1 A. Yes.
 2 Q. And he testified that he did not consider that
 3 work to be a necessary part of the repairs of the
 4 conditions you encountered? Would you concur with that?
 5 A. Yes, partly. The area that was in our repair
 6 area did need to be painted.
 7 Q. Would that have been the area in and around
 8 the french doors?
 9 A. Yes.
 10 Q. Would that be the only interior area that
 11 would have needed to be repainted as part of the
 12 repairs?
 13 A. Yes.
 14 Q. Were you out there responsible for the job
 15 from its start to its completion?
 16 A. Yes.
 17 Q. Do you have a recollection about how long that
 18 job took?
 19 A. I don't know. April sometime to July maybe.
 20 Q. And so you are personally familiar with all of
 21 the work that Restoration Pro did out there?
 22 A. Yes.
 23 Q. Setting aside the interior painting, is there
 24 any other work that you and your crew were called upon
 25 to do, and that you did, that you did not consider a

1 were generated by Restoration Pro, Disaster Pro, and we
 2 kind of looked at those, and we totaled those. And he
 3 also went through with me a statement that he described
 4 that I have, that he described as kind of a wrap up of
 5 the job. Do those generally make sense?
 6 A. Uh-huh.
 7 Q. "Yes"?
 8 A. Yes.
 9 Q. And we have them, and you are welcome to look
 10 at them. The conclusion from both the invoices and the
 11 statement, was that Restoration Pro was paid
 12 approximately \$57,337.15 work on the project. Does that
 13 sound right to you, or do you know?
 14 A. I don't know the exact dollar amount, but that
 15 sounds close.
 16 Q. And if we cross-checked the invoices against
 17 the statement, which was generated at the conclusion of
 18 the job, would that be a reasonable way to determine
 19 that?
 20 A. Yes.
 21 Q. And he testified that a part of that money was
 22 spent on painting the interior of the home, or getting a
 23 subcontractor to do so?
 24 A. Yes.
 25 Q. Do you remember that?

1 necessary part of the repairs and remediation of the
 2 conditions which you encountered?
 3 A. I don't think so.
 4 Q. There was a time in April of 2014, when -- and
 5 we've referenced, as various people were briefly at the
 6 site to take a look at what was going on in response to
 7 an invitation that had been extended by Mr. Petrus'
 8 attorney. And those people included -- not all of them
 9 necessarily together -- but Chris Kirk, Nancy Gentry,
 10 with her realtor, Michael Wood, and possibly others at
 11 other times.
 12 Do you remember being present when Ms. Gentry,
 13 and her realtor, Michael Wood, came out the project in
 14 April of 2013?
 15 A. No, I don't.
 16 Q. Did you witness, or hear any conversations,
 17 whatsoever, between either of them and anyone else?
 18 A. No.
 19 Q. Okay.
 20 MS. FOSTER: Counsel, you switched years.
 21 Could you clarify which year you are talking about?
 22 Q. (BY MR. MILLEMANN) I'm talking about when
 23 Ms. Gentry and her realtor were at the site.
 24 A. No.
 25 Q. Any time?

1 A. No.
 2 MR. MILLEMANN: Thank you, Counsel.
 3 Q. (BY MR. MILLEMANN) Did you render any opinion
 4 to Mr. Petrus about whether anyone else was at fault for
 5 the conditions that you uncovered at 2130 Payette Drive?
 6 A. Anyone else, as in?
 7 Q. Anyone else, besides yourself, and Restoration
 8 Pro?
 9 MS. FOSTER: I'm going to object to the extent
 10 the question presumes that Disaster Pro caused any --
 11 MR. MILLEMANN: There is no such assumption.
 12 MS. FOSTER: Just to clarify.
 13 Q. (BY MR. MILLEMANN) I'm trying to focus
 14 whether you rendered any opinion to Mr. Petrus, one,
 15 that anyone was at fault for the conditions you
 16 uncovered at that house; and two, who?
 17 A. I wouldn't have specifically said anyone. All
 18 that I said was, there is water getting in the wall
 19 here, and we've got an issue.
 20 Q. At the time that you were working on this
 21 project, did you consider it part of your
 22 responsibilities to determine what had caused the
 23 condition that you observed, or merely to fix it?
 24 A. No, it was part of my responsibility to find
 25 out what caused the problem, yes.

1 masonry, we exposed the flashing and existing moisture
 2 barrier, and additional rot that was not seen. It
 3 actually wrapped completely around this southeast
 4 corner. It went up the wall. There were framing
 5 members. There was OSB. And there were two by framing
 6 members that were completely rotting out. Floor joists,
 7 rim board, rotting.
 8 I noticed -- we noticed a section underneath
 9 the door that was a little unusual. The way that it was
 10 built and flashed. We noticed that the Tyvek didn't run
 11 down behind the ledgers for the deck. And also, that
 12 the flashings were not to today's standards. We noticed
 13 the foam, the interior foam in the crawlspace, the
 14 insulation was wet. And there was some mold growing in
 15 the crawlspace. That's about it.
 16 Q. When did you notice the mold growing in the
 17 crawlspace? I asked that, because it appears to me from
 18 the progression of estimates, that the initial estimate
 19 maybe didn't have mold remediation, but the next one,
 20 which is still before you started work, did?
 21 A. I'm not sure. I'm not sure when the mold was
 22 noticed the first time. I don't know.
 23 Q. So let's focus on the area of the french
 24 doors, if we could. And we've looked at photos --
 25 A. Okay.

1 Q. Did you generate any written reports, written
 2 emails, memoranda of any kind that you know of, on the
 3 issue of what caused the condition that you uncovered at
 4 2130 Payette?
 5 A. I can't be sure. I'm not sure.
 6 Q. If you had, where would I find those?
 7 A. In the emails that I gave you.
 8 Q. Or in the company's files?
 9 A. Correct.
 10 Q. You don't specifically recall having done so?
 11 A. Un-huh. No, I don't.
 12 MR. MILLEMANN: How are we doing? Okay?
 13 THE WITNESS: Yep.
 14 Q. (BY MR. MILLEMANN) Good.
 15 So we're going to come back and focus on parts
 16 and pieces. But can you walk me through kind of
 17 chronologically, what you and your crew discovered, and
 18 what you and your crew did, from the time you began work
 19 on the job, until you completed?
 20 A. Sure. When we started on this job, you know,
 21 obviously, we set up a containment in the house. And
 22 then we started removing the building materials on the
 23 interior and the exterior. I do remember removing some
 24 of the flooring, and seeing rotted floor, sub-floor.
 25 I remember once when we started removing the

1 Q. -- to save you time, which would suggest, that
 2 underneath those doors, there was rot discovered in the
 3 sub-floor, and on the ends of floor joists, that
 4 required you to do remediation work. Am I correct so
 5 far?
 6 A. Yes.
 7 Q. I think the photos also suggest, as you've
 8 pointed out, some additional rot in the area of the
 9 southeast corner, where those doors are, that also
 10 required remediation; correct?
 11 A. Yes.
 12 Q. And you mentioned that you observed flashing,
 13 which was not to today's standards, anyway?
 14 A. That's correct.
 15 Q. Okay. So let's focus on the area of the
 16 french doors, and the rot that you discovered underneath
 17 them, and in the corner next to them. In the process of
 18 uncovering the condition, and repairing, and remediating
 19 the condition, did you reach any conclusion on how, or
 20 what the cause of that condition was?
 21 A. Not specifically. Suggestively, yes.
 22 Q. And help me, in your terminology, when you
 23 say, specifically and not suggestively?
 24 A. This was where the water was coming in. There
 25 was no spot located to where it started. We could just

1 see where it ended.
 2 Q. Did you ever form any opinion as to where it
 3 had started?
 4 A. Yes.
 5 Q. And what is that opinion?
 6 A. So in my opinion, the flashing and the house
 7 wrap was inadequate. And in addition, there may have
 8 been other penetrations in the house wrap that led to
 9 water intrusion through that area.
 10 Q. And I appreciate that. And when you say,
 11 Eric, that the house wrap and the flashing was
 12 inadequate, you are referencing that to today's
 13 standards?
 14 A. Yes.
 15 Q. You've already told me, you are not able to
 16 reference that to standards in place in 2004 and '05?
 17 A. I can't.
 18 Q. And I appreciate that. I'm not going to ask
 19 you to.
 20 So let's start with the house wrap. What did
 21 you observe in the area of the french doors, as far as
 22 the wrap?
 23 A. So we did notice, that there was Tyvek. There
 24 was portions of ice and water shield. There was
 25 flashing underneath the door. There was felt paper

1 A. Not that I could tell from this, yeah.
 2 Q. And the flashing, I think that's the second
 3 thing you mentioned that you thought could have
 4 contributed to the condition you uncovered.
 5 Relative to today's standards, what did you
 6 find to be inadequate about the flashing?
 7 A. Well, we typically, we put -- there should be
 8 a higher flashing there, a four-by-four flashing, the
 9 house wrap could wrap that four inches. I didn't see
 10 that here.
 11 Q. What did you see?
 12 A. I actually saw the two-by-two flashing on,
 13 then the finished decking material put on the deck, and
 14 then the felt paper running down to the flashing, and
 15 probably somewhat overlapping maybe a quarter inch. I
 16 did not observe the felt paper even running completely
 17 over the flashing. I did not see in that.
 18 Q. And that would be the standard today, anyway,
 19 to have the felt paper overlap the flashing?
 20 A. Yes.
 21 Q. And to have the moisture barrier, whatever it
 22 was, go all the way to the foundation?
 23 A. Yes.
 24 Q. And then when you repaired that area around
 25 the french door, some of that involved replacement of

1 around the corner.
 2 Q. That would have been behind the masonry?
 3 A. Correct. Correct.
 4 Q. Was there Tyvek? Where you found felt paper
 5 behind the masonry, did you find Tyvek?
 6 A. Part, part. Some areas, yes. If I remember
 7 correctly, there was Tyvek around the french doors. And
 8 then there was Tyvek on the upper areas, I don't know,
 9 three or four feet above the deck as we rounded the
 10 corner there, on the east side.
 11 Q. Did that Tyvek correspond with windows or not?
 12 A. Yes, it probably corresponded with the
 13 windows. Yes.
 14 Q. So you identified two conditions that you
 15 thought could have contributed to creating the condition
 16 that you uncovered. One was inadequate house wrap.
 17 What was inadequate about that relative to today's
 18 standards, from your perspective?
 19 A. Well, today's standards, I mean, the house
 20 wrap would go from the foundation all the way up. And
 21 the house wrap did not go down past the flashing, which
 22 was at the top of the ledger.
 23 Q. Anything else about the house wrap that you
 24 would have then viewed as inadequate relative to today's
 25 standards?

1 the masonry veneer; correct?
 2 A. Uh-huh, yes.
 3 Q. And that was Baumgartner's work?
 4 A. Yes.
 5 Q. I think you've told me, that you think that
 6 was ice and water shield placed on the OSB. And then
 7 Baumgartner would have placed the felt, and the mesh,
 8 and the masonry; correct?
 9 A. Yes.
 10 Q. So in that situation, was the determination
 11 made that you didn't need Tyvek, because the ice and
 12 water shield would be an adequate moisture barrier?
 13 A. Yes.
 14 Q. And you mentioned something, I don't remember
 15 your exact words, but something unusual, or peculiar
 16 about the door, the french door framing. Tell me what
 17 you observed that you found to be unusual or peculiar?
 18 A. So this was not noticed, until we pulled the
 19 french door out. The floor had been modified. We
 20 didn't know why at that point. And then in just further
 21 evaluation, we realized that there was a plan change, at
 22 some point or another. And that in order for the deck
 23 to work, the floor had to be modified to align with the
 24 wall, the wall placement.
 25 Q. And are you talking about the sub-floor?

1 A. Correct.
 2 Q. How did it have to be modified, in your
 3 opinion?
 4 A. So the floor was thrown to a specific plan,
 5 and then the wall was built to -- was placed at a
 6 different position on the floor, which left a portion of
 7 the flooring exposed on the exterior of the wall. That
 8 portion had to be removed, so that the deck could run
 9 over, and meet the exterior wall.
 10 Q. So in that scenario, what was the decking then
 11 affixed to?
 12 A. The decking was affixed to the rim board, the
 13 lower portion. The deck ledger was affixed to the lower
 14 portion of the rim board that was not cut out.
 15 Q. And what if anything, in your opinion, or how
 16 if any way in your opinion, did that condition
 17 potentially contribute to the moisture intrusion?
 18 A. Well, there is a need for additional flashing.
 19 And there is the possibility of additional water
 20 intrusion when that's made. I mean, I could have put it
 21 back that exact way that I found it, and that was not
 22 the correct way to do it.
 23 Q. I think you've answered this in your prior
 24 answer. But would any of that have been visible without
 25 removing the french door framing?

1 given today's construction standards?
 2 A. Correct.
 3 Q. And then if I understand correctly from Beau's
 4 testimony, you were asked to explore farther north of
 5 the french door, along the east wall of the home, at
 6 least to, at some corner spots to determine if there
 7 were other areas of rot; do you remember that?
 8 A. Yes.
 9 Q. You were asked by Mr. Petrus to do that?
 10 A. I'm not sure who asked me.
 11 Q. And on Exhibit 1 to Beau Value's depo, he
 12 circled three more corners in the areas north of the
 13 french doors, where he said there were some additional
 14 areas found, and rot that had to be dealt with. Does
 15 that conform, to your recollection?
 16 A. Yes. And I do believe, this corner
 17 (indicating), as well.
 18 Q. And this corner would be the next protruding
 19 corner as we move west from Beau Value's northerly most
 20 circle?
 21 A. Yes.
 22 Q. And as we get into what I would consider the
 23 north corner of the home?
 24 A. Yes.
 25 Q. And your recollection, you had to do some work

1 A. Honestly, we did not see it, until we started
 2 removing building materials, that's correct.
 3 Q. And the plan change that you refer to, did you
 4 understand the plan change was to recess those french
 5 doors?
 6 A. Yes.
 7 Q. Is it possible the plan change was to fur a
 8 wall out from them to create a sense of depth?
 9 A. It could have been.
 10 Q. In that case, would the sub-floor have been
 11 cut off, or would it just be that the exterior wall
 12 would have been beyond the sub-floor?
 13 A. I don't know. I don't know.
 14 Q. Did you specify to Baumgartner, what type of
 15 felt, and how much felt they were to use behind the
 16 masonry veneer?
 17 A. No.
 18 Q. That was their call?
 19 A. Yes.
 20 Q. Did you observe what they ultimately elected
 21 to do in terms of felt, or tar paper, as you've called
 22 it?
 23 A. I can't specifically tell you, no.
 24 Q. Simply put, you relied on Baumgartner to put
 25 whatever type and amount of felt would be necessary

1 there, too?
 2 A. I believe so.
 3 Q. With that correction, would those be the four
 4 corners, in addition to the areas of the french doors
 5 where you did some work?
 6 A. Yes.
 7 Q. And how did you, when you were told, hey, I
 8 want you to take a look at other points on this wall to
 9 make sure we don't have this problem elsewhere? How did
 10 you undertake to do it?
 11 A. So specifically, I can't remember the order,
 12 but there was decking removal. The actual deck, one by
 13 six members were removed. Then there were deck ledger
 14 materials removed. And then there was stone removed at
 15 some point, as well. I don't know which order we did
 16 them in. I can't remember.
 17 Q. The "stone" being the rock veneer?
 18 A. The rock veneer, yes.
 19 Q. Did you deem all of those steps necessary in
 20 order for you to answer the question of whether you had
 21 any other involvement of rot on those corners?
 22 A. Yes.
 23 Q. And when you had gone through those steps, the
 24 removal, in whatever order, the removal of the decking,
 25 and I think you said, rim joists, and then the removal

1 of rock veneer. What did you observe in those corners?
 2 A. A similar problem to the original problem,
 3 just not as extensive.
 4 Q. In those areas, did you have any involvement
 5 of sub-floor or floor joists?
 6 A. No.
 7 Q. So in those areas, you were dealing
 8 exclusively with wall members?
 9 A. Exterior sheeting, yes, and framing.
 10 Q. And did you also then apply the ice and water
 11 shield to those areas?
 12 A. Yes.
 13 Q. Did you do any exploration along the north
 14 wall of the home, in between these corners,
 15 specifically? It looks like there is a wall that comes
 16 out of the family room, that has a couple of doors. Do
 17 you see what I'm pointing to?
 18 A. Yes.
 19 Q. Did you do any exploration at all along that
 20 wall?
 21 A. Yes, we did.
 22 Q. And I take it, you found no rot?
 23 A. No rot.
 24 Q. And is that rock veneer along that wall, or
 25 sided?

1 were improper?
 2 A. There was a question on the amount of felt
 3 that was previously used. We found a single layer of
 4 felt underneath those rock areas. And in my previous
 5 discussions with my mason, he has never done a single
 6 layer of felt. So that seemed unusual to me.
 7 Q. Whether or not that was or --
 8 A. Correct.
 9 Q. -- was not consistent with the standard in
 10 2004, 2005, you don't know?
 11 A. Correct.
 12 Q. And this is a hypothetical. If you had been
 13 the owner of this home, and setting aside, Eric, what
 14 you observed in the crawlspace when some insulation was
 15 taken down. Even with your experience and expertise,
 16 would there have been anything about the appearance of
 17 the home, and the walls, and the deck, and the door,
 18 that would have caused you to suspect that you were
 19 going to find what you found?
 20 A. As a professional?
 21 Q. Yes.
 22 A. On the exterior, no.
 23 Q. And what about the interior, if anything, as a
 24 professional would have caused you to have concern?
 25 A. I saw the inspection report. And it noted

1 A. I believe all of this east-type wall is rock
 2 veneer.
 3 Q. So they had to go through the same process
 4 there to satisfy yourself, that you didn't have any
 5 problems with that wall?
 6 A. Yes.
 7 Q. Did you observe anything different in that
 8 wall about the construction techniques or materials,
 9 than you did in the rest of the house?
 10 A. No.
 11 Q. As you exposed the structure and went about
 12 the business of eradicating, and repairing, and
 13 remediating what you found. Other than you've told me
 14 about size of flashing, and moisture barrier
 15 installation, did you encounter any materials that you
 16 thought were improper for the construction of the home?
 17 Or was your observation more in the area of construction
 18 technique?
 19 A. I think it was -- I didn't observe any other
 20 materials that were not standard.
 21 Q. And so as you looked at your theories, which
 22 you've given me, about what might have caused it. It
 23 sounds to me, those theories related more to how
 24 materials were applied, not whether -- other than the
 25 size of the flashing, whether the materials, themselves,

1 moisture penetration. It showed pictures of moisture
 2 coming in through the foam board.
 3 Q. In the crawlspace?
 4 A. In the crawlspace.
 5 Q. Right.
 6 A. So that would have been my only concern.
 7 Q. But to the extent as a professional owner of
 8 this home, and you go down in that crawlspace, and you
 9 observed that, that might have caused you some concern?
 10 A. Yes.
 11 Q. Did you see the conclusion or the comment that
 12 the inspector had about moisture in the crawlspace?
 13 A. Yes.
 14 Q. Probably some reference to probably spring
 15 runoff, but keep an eye on it, to see if you need a sump
 16 pump. Did you see that?
 17 A. Yes.
 18 Q. Did those comments make sense to you or not?
 19 A. Yes.
 20 Q. So as a non-professional, another
 21 hypothetical, based on your experience. And you built
 22 for people who were, obviously, not builders; correct?
 23 A. Yes.
 24 Q. Just ill-informed citizens like myself, and
 25 the rest of the folks out there. For a non-professional

1 owner of the home, would there have been anything, in
2 your opinion, before you saw what you saw when you
3 disturbed the home, that would have caused a
4 non-professional owner to suspect any of the conditions
5 that you discovered?

6 A. I don't believe so.

7 Q. We've focused on the area of the french doors
8 and the area of these, I think, now four additional
9 corners; correct?

10 A. Yes.

11 Q. As you went about the business of doing your,
12 I guess, what has been referred to, as destructive
13 testing, and then repairs. Did you see anything else
14 about the home that you thought evidenced improper
15 construction technique, at least relative to today's
16 standards?

17 A. Not that I can think of.

18 Q. I asked you, and you've been very clear with
19 me, and I appreciate it, about your ability to formulate
20 an opinion as to what the construction standards were
21 for McCall, or even Valley County in the residential
22 construction business in 2004 and 2005. I don't know if
23 I asked you, so let me do so.

24 Do you consider yourself able to render an
25 opinion as to what the applicable building codes might

1 A. Yes, they would.

2 Q. You wouldn't have any additional ones?

3 A. No.

4 Q. Did you take your observations, and put them
5 directly onto the reports, which are in Exhibit 35, or
6 did you take notes, and transfer them from notes to
7 these reports?

8 A. Sometimes I did take notes, yes. Most of the
9 time I took notes on the job, when I was on-site there,
10 and I would bring back, come back, and enter them in
11 here, yes.

12 Q. And once you had done the daily report for
13 that day, what did you do with your notes?

14 A. I probably threw them away.

15 Q. Okay.

16 MS. FOSTER: Is this a good time to take a
17 break, Counsel?

18 MR. MILLEMANN: If you need to, yes.

19 (A recess was had.)

20 Q. (BY MR. MILLEMANN) I don't have a whole lot
21 more, Eric. I'll try to wrap it up.

22 When you, and when I say, "you," you and your
23 crew, Restoration Pro, started work on the 2130 Payette
24 project, had copper gutters been installed in that
25 house?

1 have been to this home when it was constructed in 2004
2 and '05?

3 A. I don't know, specifically, what the building
4 code said.

5 Q. Okay. I'm showing you what's marked as
6 Exhibit 35 in Beau Value's deposition.

7 A. Okay.

8 Q. And I'll represent to you that it is a series
9 of what occur to be daily job reports for the project at
10 2130 Payette.

11 A. Okay. Yep.

12 Q. Do you recognize those?

13 A. Yes.

14 Q. Did you have any responsibility for preparing
15 these?

16 A. Yes.

17 Q. Tell me how you did so.

18 A. Most of the time, I visited the job site,
19 tried to, on a daily basis, so that I could write a
20 thorough report. On occasion, I would request the
21 information from, you know, employees on-site, along
22 with pictures and documentation.

23 Q. So to the extent that daily reports exist for
24 this project, would they be found in the company's files
25 for the project?

1 A. Yes, they were there.

2 Q. And do you know who installed them?

3 A. No.

4 Q. That was not part of your work?

5 A. No. Let me rephrase that. I did have someone
6 come back out to put up some gutters that we had taken
7 down. And I believe I used the same guys, who put them
8 up. Michael Longmire replaced those, so I probably do
9 have a record of that.

10 Q. Okay.

11 A. Who did put them up.

12 Q. Was that to put gutters back up that you had
13 to take off?

14 A. Uh-huh.

15 Q. "Yes"?

16 A. Yes.

17 Q. I'll show you what was marked as Exhibit 32 in
18 Beau Value's deposition, which appears to be a report
19 from a Rimkus Consulting Group?

20 A. Yes.

21 Q. Have you seen that document before?

22 A. Uh-huh.

23 Q. "Yes"?

24 A. Yes.

25 Q. Did you undertake any effort to evaluate the

1 conclusions or statements that are contained in Exhibit
2 32?

3 A. Somewhat, yes.

4 MS. FOSTER: Do you want to take a minute to
5 look through it, or do you remember it?

6 THE WITNESS: What's that?

7 MS. FOSTER: Do you need to take a minute to
8 look through it?

9 THE WITNESS: (Witness complying.) Okay. I'm
10 familiar with it again.

11 Q. (BY MR. MILLEMANN) Having looked through
12 Exhibit 32, I probably don't have that many questions
13 about it.

14 My question is, you testified earlier about
15 your opinion as to what might have caused the rot and
16 the conditions that you uncovered at 2130 Payette;
17 correct?

18 A. Yes.

19 Q. Are those opinions that you've rendered
20 formulated by the Rimkus report, or formulated on your
21 own?

22 A. They were formulated on my own.

23 Q. You already told me that you haven't had your
24 deposition taken before; correct?

25 A. Correct.

1 produced by Ms. Foster from Restoration Pro of the job.
2 Did you take most of those photographs?

3 A. I'm not sure. I did take a lot of photographs
4 during the process. The guys removing the materials
5 would have taken several of those photos.

6 Q. So either you or your employees?

7 A. Correct.

8 Q. Did you take photographs -- can you explain to
9 me how, I guess, was it each day, every hour, was it
10 time when something was new? What was the process?

11 A. Usually photographs were taken when we see
12 something that's not correct, or we're just looking for
13 evidence, you know, proof of evidence, something that we
14 saw.

15 Q. When you first met with Mr. Petrus about
16 preparing this, or making the repairs to this, or even
17 created the estimate, did he explain to you that this
18 would likely result in litigation?

19 A. At some point or another, yes, he did.

20 Q. Is it common for you to take the number of
21 photographs that you took in this case on other repairs?

22 A. We take a lot of photographs. I think it was
23 extra, yes.

24 Q. Photographs are easy to take?

25 A. Yep.

1 Q. Have you been a party to a lawsuit, either the
2 person suing, or the person being sued?

3 A. No.

4 MR. MILLEMANN: I have no further questions.

5 MR. NEVALA: I just have a couple.

6 EXAMINATION

7 QUESTIONS BY MR. NEVALA:

8 Q. I'm just curious. I want to ask the adverse
9 of what Steve just asked.

10 Were you interviewed by anyone putting
11 together the Rimkus report?

12 A. No.

13 Q. Okay.

14 A. Not that I remember.

15 Q. Have you seen plans for the house at 2130?

16 A. Yes.

17 Q. Do you remember where you got those plans?

18 A. I'm not sure if Mr. Petrus provided those
19 plans, or if Mr. Michael Longmire provided them. I
20 remember looking at them at the kitchen island bar at
21 one point or another.

22 Q. Did you use those plans to help prepare the
23 estimate for your repairs?

24 A. No.

25 Q. There were a lot of photographs that were

1 Q. When you first went out to 2130 and walked the
2 house, I think you testified, you went inside and walked
3 around and familiarized yourself with the house. Was
4 there any evidence, was there anything that jumped out
5 to you as to why the house wouldn't be livable?

6 A. No.

7 Q. When you first inspected the french doors that
8 we've been talking about, did you see anything out of
9 the ordinary, in terms of, was there anything out of the
10 ordinary about the doors?

11 A. No. I mean, there was always the issue, they
12 have been sticking. They may have been sticking when we
13 first started there, but, no.

14 Q. Did you see any unusual markings on the doors?

15 A. No, not that I remember.

16 Q. So you didn't see anything that, what it
17 appeared that somebody had taken a crowbar and pried the
18 door?

19 A. No.

20 Q. Did you see any evidence of any of the locking
21 mechanisms not locking properly?

22 A. I'm not sure. I don't remember.

23 Q. Did you inspect the threshold?

24 A. I don't remember personally inspecting the
25 threshold. I don't remember.

1 Q. So you probably don't remember. Do you
 2 remember seeing any non-factory screws in the threshold?
 3 A. Any what?
 4 Q. Any non-factory screws in the threshold.
 5 A. I don't remember seeing those.
 6 MR. NEVALA: I don't have anything else.
 7 Thank you, Eric.
 8 MS. FOSTER: I have a few questions just to
 9 clarify a few things.
 10 EXAMINATION
 11 QUESTIONS BY MS. FOSTER:
 12 Q. Eric, you testified that you didn't build or
 13 work on homes in McCall, except for one in 2004, 2005;
 14 is that right?
 15 A. I just built that one, framed that one.
 16 Q. And since 2006, '07, '08, do you have any idea
 17 of how many homes you've worked on in the McCall area,
 18 or in the valley area?
 19 A. In the McCall area, specifically, a dozen or
 20 so. They were not spec homes, as mentioned before.
 21 They were specific -- a majority of them were in
 22 Tamarack.
 23 Q. And that's when you were building homes? This
 24 is before your work at Disaster Response; is that right?
 25 A. Yes.

1 didn't frame for anyone else, other than Everest
 2 Construction.
 3 Q. In homes that you -- well, let's look at it a
 4 different way. You gave some testimony about
 5 supervising masons out at 2130 Payette, the mason
 6 subcontractor. Did you supervise them while installing
 7 the felt or tar paper?
 8 A. Yes.
 9 Q. Was it their decision which tar, felt paper to
 10 use?
 11 A. It is their decision, but they are supposed to
 12 follow the standard code at the time of application. We
 13 have each of our subcontractors sign documents saying
 14 that they will follow the guidelines per code.
 15 Q. If you saw something was amiss, or you thought
 16 something was amiss in the type of tar paper, or in the
 17 installation technique by the mason, would you say
 18 something?
 19 A. Yes.
 20 Q. What would you do?
 21 A. I would ask them if that was current code.
 22 And if they said it was, and I had a question, then I
 23 would verify whether it was or was not.
 24 Q. Did that happen here on this job at 2130
 25 Payette?

1 Q. And have you worked on homes in
 2 the -- obviously, you've worked on homes in the McCall
 3 area with Disaster Response. Do you have any idea how
 4 many homes you would have worked on in the McCall area
 5 since you've joined Disaster Response?
 6 A. We typically work on a hundred plus homes a
 7 year.
 8 Q. And in the dozen or so homes that you help
 9 build in 2006, did you, yourself, have a common practice
 10 with respect to moisture barriers?
 11 A. Yes.
 12 Q. What was it?
 13 A. The foundation to the roof.
 14 Q. Would you cover the entire wall space?
 15 A. Yes, I would cover the entire wall space. I
 16 would actually even wrap the window sills.
 17 Q. Why would you do that?
 18 A. I took a Tyvek class, and that's what they
 19 told me to do. That's what they said to do.
 20 Q. Do you remember when that class was,
 21 approximately?
 22 A. I don't.
 23 Q. Do you have any idea of whether other builders
 24 were using the same techniques as you at that time?
 25 A. You know, I only framed for one builder. I

1 A. No, I didn't observe anything that didn't look
 2 correct.
 3 Q. You were asked about the causes of the damage
 4 that you acquired in 2130 Payette. And I'm not trying
 5 to be repetitive. I just want to make sure we're all on
 6 the same page.
 7 Do you have an opinion what did cause the
 8 damage that you uncovered?
 9 A. Yes, it was my opinion that the house wrap
 10 didn't go down to the foundation. There was a void
 11 between the flashing and the house wrap, where the
 12 moisture penetrated the wall. That's my opinion that
 13 that was. There may have been additional issues, as
 14 well.
 15 Q. And did you observe whether there was a
 16 moisture barrier over the entire wall face facing the
 17 lake?
 18 A. So --
 19 Q. I know I don't have photos that I'm showing
 20 you, so if you can remember.
 21 A. So I do remember that there was Tyvek in along
 22 the door. It ran from the flashing up. I do remember
 23 from pictures taken, that I have looked at recently,
 24 that the Tyvek was not all the way down to the ledger.
 25 That it started three feet up the wall, or

1 approximately.
 2 Q. So there was a strip of wall that had no
 3 moisture barrier, such as Tyvek?
 4 A. There was a strip of wall that didn't have any
 5 house wrap, but did only have felt.
 6 Q. And did you notice whether the felt was -- let
 7 me rephrase that, please.
 8 Did anything strike you as unusual or
 9 incorrect about that felt?
 10 A. So in regards to felt, in other discussions
 11 with my mason on other jobs, minimum that he's always
 12 chosen to use is two layers of felt, sometimes three.
 13 So when I saw one layer of felt, I just thought that was
 14 unusual. Well, that's not what his standard is.
 15 Q. Could you tell whether the felt, the single
 16 layer had been overlapped correctly? And do you know
 17 what I mean by that?
 18 A. Yeah. So at the base, at the flashing, it
 19 only overlapped the flashing probably a quarter inch.
 20 Up the wall where it was, it probably was overlapped
 21 sufficiently for one layer. But there was no damage up
 22 there at that portion of the wall. The damage was at
 23 the bottom.
 24 Q. And I think you -- I'm not quoting you
 25 precisely, but there were some questions asked about the

1 secure -- there really wasn't any framing there to nail
 2 to any longer. And then to try and seal that, or fasten
 3 that to -- there was inadequate nailing on that. You
 4 just couldn't fasten that right. You just can't do that
 5 the way it was done. Yeah.
 6 Q. Does it create an area for water to perch?
 7 A. Yes, there was definitely a larger area for
 8 the water to sit on. Yeah. And eventually it entered
 9 in. Yeah.
 10 Q. Would you consider this a construction defect?
 11 A. Yeah.
 12 Q. I only have one more category of questions. I
 13 want to refer back to Mr. McKenna's testimony
 14 about -- it's in black and white, but hopefully you can
 15 see it. This is what's previously been marked
 16 Plaintiff's Exhibit 28. This is the inspection report
 17 from Mr. McKenna; is that right?
 18 A. Yes.
 19 Q. If you turn to page 13. If you would take a
 20 look at pages 13, 14 and 15.
 21 A. (Witness complying.)
 22 Q. I guess I just mean 13, 14, not 15. Do you
 23 remember these?
 24 A. Yes.
 25 Q. And I think you testified to Mr. Millemann,

1 framing of the french doors. Do you have an opinion as
 2 to whether there were any problems with the framing of
 3 the french doors, particularly at the bottom?
 4 A. I would say, particularly the floor framing, I
 5 will reiterate that cutting out the floor, modifying the
 6 floor, and the way it was done and flashed, cutting the
 7 joist and the rim board, that shouldn't have been done
 8 that way. That's the way I look at it.
 9 The rim board, the joists are actually
 10 supposed to be fastened to the rim board at the top and
 11 the bottom. And when you cut out the joists, you are
 12 not only changing the structural capabilities of that
 13 joist, but you are eliminating that fastening point at
 14 the top. So now the joist can roll, per se. I just
 15 would not have done that at all.
 16 Q. And is there anything about the framing
 17 underneath the door that could have contributed to the
 18 damage you saw?
 19 A. Yes.
 20 Q. Can you explain that?
 21 A. When the floor was cut out and modified like
 22 that, there was additional flashing that was put down,
 23 and there are pictures to reference it. But it was
 24 notched back, probably four or five inches. That there
 25 was no -- underneath the flashing, there was no

1 that the comments written on page 13 about the signs of
 2 the spring runoff, and the sump pump made sense to you?
 3 A. Yes, so these comments here make sense to me.
 4 I see there are signs of ant intrusion that should be
 5 addressed. That's true. I would recommend a certified
 6 exterminator to be contracted.
 7 There is also some signs of spring runoff in
 8 the crawlspace, which is typical for the area. It
 9 should be monitored each spring to see if a sump pump
 10 needs to be installed. I believe it should go a little
 11 further up here. It does say, under foundations,
 12 basements, and crawlspaces report of abnormal water
 13 penetration. I think it should have been reiterated
 14 that there is water penetration here, and further
 15 evaluation should have been done.
 16 Q. And you think that should have been in the
 17 comment section?
 18 A. I think it should have been.
 19 Q. Why is that?
 20 A. I mean, this here makes it sound kind of like
 21 normal. And whether or not it's normal, it's
 22 still -- there is an issue there. And I don't know. I
 23 just don't feel like -- I don't know. I would have
 24 written that differently. I would have said, there are
 25 signs of water intrusion in this crawlspace that should

1 have been addressed, or elaborated on the ants. There
2 is sign of ant intrusion. If you are seeing sawdust,
3 where is the sawdust coming from, or where is the wood
4 dust coming from. They are, obviously, chewing on
5 something.

6 So I don't remember when I saw this the first
7 time. But a sump pump is just going to fix any future
8 issues. It will pump out future water, but it won't
9 stop future water here. There is a problem that should
10 have been addressed.

11 Q. Have you seen many reports like this in your
12 profession?

13 A. Yes.

14 Q. Why do you see reports like this in your
15 profession?

16 A. Well, we specialize in several areas of
17 repair, and water damage and intrusion, specifically.
18 And when a report comes back like this, typically agents
19 will come call us to come out. They'll send me a copy
20 of the report, and I'll go out and look at the property,
21 and see what -- see if there is something that needs to
22 be addressed.

23 Q. So if you look at the pictures, can you see
24 these okay, even though they are black and white?

25 A. Yeah.

1 further evaluations done on this report.

2 Q. And is it significant to you that the water
3 was coming over the footing in this photo?

4 A. Yes, there is a leak, either the french drain
5 system is not set up right, or there is water pooling
6 outside. I mean, an irrigation problem, I don't -- I
7 don't know.

8 Q. And would a sump pump address the water coming
9 in over the footing?

10 A. No, a sump pump will remove the water once it
11 is there. It won't stop it coming in. I have seen
12 exterior sump pumps. Those that are installed outside
13 below grade, that might help with that, but that's in
14 one case.

15 Q. So if you saw a picture of water coming over
16 the footing, you would think there was a water intrusion
17 problem?

18 A. Yes.

19 Q. And you would expect to see that called out in
20 the comments in the inspection report?

21 A. Yeah.

22 Q. And it's not called out in here?

23 A. It's not called out down here, no.

24 Q. Thank you. That's all I have on this
25 document.

1 Q. Pictures 5.1, 5.2, and all the pictures on the
2 next page, page 14. Is this the type of damage that has
3 inspired realtors to call you to come take a look?

4 A. Yes.

5 Q. Anything in particular?

6 A. Well, first of all, ants. Oftentimes ants
7 aren't even mentioned. For some reason we go out and
8 find ants. I would have known something chewed on here.
9 Some type of demolition done, or removing of building
10 materials to see what it is. Over here on Picture 5,
11 this shows additional ant signs over here, sawdust.

12 Q. This is Picture 3 at the top of page 14?

13 A. Yeah, this is Picture 3. Picture 4, it's just
14 showing past moisture signs, which we see that all the
15 time. Picture 5, actually, you could see the water
16 rolling in over the top of the foundation, or
17 sorry -- over the top of the footing.

18 A lot of times, I don't even see that. I
19 mean, if I -- you see water, the foundation, because
20 it's coming underneath the footing, not above the
21 footing. That one right there (indicating), I don't
22 know where this area is, specifically. That's telling
23 me there is water coming in, and there is a drain
24 problem somewhere, which may not be related to this
25 case. But I would have -- there should have been

1 A. Okay.

2 Q. I'm sorry. Actually, there is one more
3 question I have on this document that I forgot about.

4 Okay. I'm turning to page 18. This is the
5 photo of the barbecue gas line in the crawlspace that
6 was identified as needing a proper cap. Do you recall
7 seeing this picture?

8 A. Yes, I've seen that picture.

9 Q. And do you have any idea why a gas line would
10 have been pulled out from underneath the deck in that
11 fashion?

12 A. I have no idea. I will say this, that seeing
13 this picture, it shows a gas line was installed in this
14 picture, because it has a fitting into it. What it's
15 doing in the crawlspace, I have no idea. If it was
16 never on the exterior of the home, it would never have
17 had this hand on it. I mean, this, I can't explain
18 that.

19 Q. And we don't know. Do you know what
20 circumstances would involve removing a gas line from the
21 deck?

22 A. Well, this --

23 Q. Do you know?

24 A. Yes. So this fitting on the end of this would
25 have had to have been taken off, because it actually

1 sits on top of the deck. And then the hose comes up
2 from the bottom. So it was taken off the top. The hose
3 was then pulled underneath the deck, pulled through the
4 foundation, or the floor framing, whatever, it went
5 through. And then this cap was put back on it.

6 Q. And you don't know what circumstances would
7 require a gas line to be pulled back through like this?

8 A. No. I mean, not wanting to -- not wanting the
9 gas line out on the outside. I don't know. I don't
10 know.

11 Q. Okay. That's fine. Thank you.

12 And finally, Mr. Nevala asked you whether you
13 were interviewed by the engineer who worked on the
14 Rimkus report. Did you speak to the engineer who worked
15 on the Rimkus report?

16 A. I don't remember speaking to an engineer. I
17 do remember Ed Petrus at some point or another
18 mentioning some company named Rimkus was doing a report.
19 I don't remember if I met anybody out there or not. I
20 don't know.

21 Q. And do you know whether your company provided
22 Rimkus with photographs that you had taken of the repair
23 work?

24 A. I don't know.

25 Q. You don't know?

1 A. I don't know.

2 MS. FOSTER: Okay. Thank you. I don't have
3 any other questions for you.

4 FURTHER EXAMINATION

5 QUESTIONS BY MR. MILLEMANN:

6 Q. Eric, do you know of your own personal
7 knowledge whether the gas line you've pointed out in the
8 photo in Mr. McKenna's report, was, in fact, ever an
9 installed fixture on the deck prior to closing, prior to
10 when Mr. Petrus bought the home?

11 A. Yes, it's installed.

12 Q. How is it that you know that?

13 A. Because we had it taken out, so we could
14 perform the repair.

15 Q. So you had it taken out?

16 A. Afterwards.

17 Q. After you had started your work?

18 A. Yes.

19 Q. Who took it out for you?

20 A. A-1 Heating & Cooling.

21 Q. So A-1 Heating & Cooling pulled that gas line
22 out, so you could remove the decking?

23 A. Yes.

24 Q. Did they put it in the crawlspace?

25 A. Yes, but not in this photo.

1 Q. Right. My question is, do you know when this
2 gas line, that you see in the photo you've pointed to,
3 was placed in that crawlspace?

4 A. No.

5 Q. You've testified about Picture 5, and
6 Mr. McKenna's report showing water, evidence that water
7 came over the footing. What did you or Restoration Pro
8 do to prevent that from reoccurring?

9 A. I actually never observed water coming in. I
10 never -- I saw this photo of the water on that
11 foundation, but I never saw that water on that
12 foundation.

13 Q. So did you or Restoration Pro do anything to
14 address a supposed problem of water coming over the
15 footings and into the crawlspace?

16 A. No.

17 Q. So whatever was going on could still be going
18 on as far as you know?

19 A. Could be.

20 Q. And when you've told me your opinion as to
21 possible causes of the conditions, Eric, that you
22 uncovered at the property, I did not hear you talk about
23 one of the causes being coming over the footing. So you
24 are not testifying today, are you, that you think that
25 water coming over the crawlspace was the cause of the

1 conditions you repaired?

2 A. No.

3 Q. And you told Ms. Foster, that you considered
4 the manner in which the felt overlapped the flashing, to
5 be a construction defect; do you remember that?

6 A. Insufficient.

7 Q. And that's by today's standards?

8 A. Yes.

9 Q. When Baumgartner reinstalled the masonry
10 veneer at 2130 Payette, how many layers of felt did they
11 place behind it?

12 A. A minimum of two.

13 Q. Is felt a water barrier, itself?

14 A. Yes.

15 Q. So when you replaced the felt in 2130 Payette,
16 did you see any OSB surface that was not covered either
17 with Tyvek or felt?

18 A. Just behind the rim board, below the flashing.

19 Q. So just below the deck?

20 A. Correct.

21 Q. And you mentioned, and this might have been a
22 casual reference in response, I believe to a question by
23 Mr. Nevala, that doors had always been sticking. What
24 do you base that statement on?

25 A. Well, I was just told that there was an issue

1 with the doors sticking. And I know when we operated
2 them -- I mean, we opened them, because that's how we
3 accessed the work from the inside to the outside. And
4 we opened them and closed them. As for, you know, a
5 perfect operation, I don't know if they were working
6 perfectly.

7 Q. When you opened and closed them, were they
8 sticking?

9 A. Yes.

10 Q. But you were able to open and close them?

11 A. Yep.

12 Q. And who told you that the doors had been
13 sticking?

14 A. Either Mr. Petrus or Michael Longmire.

15 MR. MILLEMANN: I have nothing further.

16 MR. NEVALA: Nothing further for me.

17 MS. FOSTER: I'm sorry. One further question
18 to clarify.

19 FURTHER EXAMINATION

20 QUESTIONS BY MS. FOSTER:

21 Q. Mr. Millemann asked you whether the water
22 coming over the footings could have caused the damage,
23 and you said, no. Could it have resulted from the same
24 conditions that caused the damage that you saw?

25 A. Well, either way, let's say that there is

1 water -- see, this area, where the water is coming in
2 (indicating). There was no damage on the framing, on
3 the exterior. This particular area, where the water is
4 showing the water coming in. I don't see how that could
5 be related to -- it's possible. It could be related to,
6 but I don't know.

7 Q. And you don't know where this photo was in the
8 crawlspace?

9 A. I don't. I don't know where that photo was
10 taken. I mean, this -- I know that this area right here
11 (indicating), is not the area under the door. This was
12 not the area that we were asked to work in.

13 Q. Okay. This was something else completely?

14 A. Yes. It appears to be, yes.

15 Q. But you don't know for sure?

16 A. I don't know.

17 MS. FOSTER: Okay. Fine. Thank you.

18 MR. MILLEMANN: Nothing further.

19 MS. FOSTER: You are done.

20 (Deposition concluded at 11:24 a.m.)

21 (Signature requested.)
22
23
24
25

1 CERTIFICATE OF WITNESS

2 I, ERIC WAITE, being first duly sworn, depose
3 and say:

4 That I am the witness named in the foregoing
5 deposition, Volume I, consisting of pages 1 through 79;
6 that I have read said deposition and know the contents
7 thereof; that the questions contained therein were
8 propounded to me; and that the answers contained therein
9 are true and correct, except for any changes that I may
10 have listed on the Change Sheet attached hereto:

11 DATED this ____ day of _____, ____.

12
13
14 ERIC WAITE

15
16 SUBSCRIBED AND SWORN to before me this ____ day
17 of _____, 20 ____.

18
19
20 NAME OF NOTARY PUBLIC

21
22 NOTARY PUBLIC FOR _____
23 RESIDING AT _____
24 MY COMMISSION EXPIRES _____
25

1 ERRATA SHEET FOR ERIC WAITE

2 Page ____ Line ____ Reason for Change ____
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Should read _____

4 Page ____ Line ____ Reason for Change ____
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Should read _____

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7 Page ____ Line ____ Reason for Change ____
8 Reads
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10 Page ____ Line ____ Reason for Change ____
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12 Page ____ Line ____ Reason for Change ____
13 Reads
Should read _____

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15 Reads
Should read _____

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17 Page ____ Line ____ Reason for Change ____
18 Reads
Should read _____

19 Page ____ Line ____ Reason for Change ____
20 Reads
Should read _____

21
22 Page ____ Line ____ Reason for Change ____
23 Reads
Should read _____

24 You may use another sheet if you need more room.

25 WITNESS SIGNATURE _____

ORIGINAL

CERTIFICATE OF ERIC WAITE
Petrus Family Trust v. Gentry-Boyd

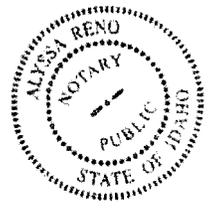
ERIC WAITE, Notary Public, State of Idaho,
do hereby certify that the foregoing is a true and correct copy
of the original of the same as the same appears from the
records of the County of Valley, Idaho, and that I have
examined the original of the same and find it to be
a true and correct copy of the original as the same
appears from the records of the County of Valley,
Idaho.

Witness my hand and seal this 21st day of April, 2016.

Notary Public, State of Idaho

Eric Waite

APPROVED AND FORWARDED:
April 21, 2016



Alyssa Reno *[Signature]*

Eric Waite
Valley County
1/11/18

ORIGINAL

CHANGE SHEET FOR ERIC WAITE
Petrus Family Trust v. Gentry-Boyd

No Change

Eric Waite

REPORTER'S CERTIFICATE

1
2 I, COLLEEN P. ZEIMANTZ, CSR No. 345, Certified
3 Shorthand Reporter, certify:

4 That the foregoing proceedings were taken
5 before me at the time and place therein set forth, at
6 which time the witness was put under oath by me;

7 That the testimony and all objections made were
8 recorded stenographically by me and transcribed by me or
9 under my direction;

10 That the foregoing is a true and correct record
11 of all testimony given, to the best of my ability;

12 I further certify that I am not a relative or
13 employee of any attorney or party, nor am I financially
14 interested in the action.

15 IN WITNESS WHEREOF, I set my hand and seal this
16 28th day of March, 2016.

17

18

19

20



21

COLLEEN P. ZEIMANTZ, CSR 345

22

Notary Public

23

P.O. Box 2636

24

Boise, Idaho 83701-2636

25 My commission expires September 7, 2017.

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EXHIBIT 7



RE-21 REAL ESTATE PURCHASE AND SALE AGREEMENT

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



ID# 12715

DATE 01/03/2012

LISTING AGENCY McCall Real Estate Company Office Phone # (208) 634-2100 Fax #
Listing Agent Dean Odomak E-Mail Phone # (208) 634-5758
SELLING AGENCY REMAX Report Realty Office Phone # (208) 634-9408 Fax # (208) 634-9428
Selling Agent Kevin Batchelor E-Mail kevinb@remax.net Phone # (208) 634-9469

1. BUYER: Mr. E. Petrus (Hereinafter called 'BUYER') agrees to purchase, and the undersigned SELLER agrees to sell the following described real estate hereinafter referred to as 'PROPERTY' COMMONLY KNOWN AS 2130 Fayette Drive

McCall City Valley County, ID, Zip 83638 legally described as: Amended Fayette Lakes Cottage Sites, Lot 36, Valley County, McCall, Idaho State Lease # R-9067-9

OR Legal Description Attached as addendum # (Addendum must accompany original offer.)

2. \$ 755,000.00 PURCHASE PRICE: Seven hundred fifty five thousand DOLLARS, payable upon the following TERMS AND CONDITIONS (not including closing costs):

3. FINANCIAL TERMS: Note A+C+D+E must add up to total purchase price.

(A) \$ 5,000.00 EARNEST MONEY: BUYER hereby deposits five thousand DOLLARS as Earnest Money evidenced by: cash personal check cashiers check note (due date); and a receipt is hereby acknowledged. Earnest Money to be deposited in trust account upon receipt, or upon acceptance by BUYER and SELLER and shall be held by: Listing Broker Selling Broker other Three Business days after acceptance by all parties. for the benefit of the parties hereto. THE RESPONSIBLE BROKER SHALL BE: Kevin Batchelor

(B) ALL CASH OFFER: NO YES If this is an all cash offer do not complete Sections 4C and 4D, fill blanks with "0" (ZERO). IF CASH OFFER, BUYER'S OBLIGATION TO CLOSE SHALL NOT BE SUBJECT TO ANY FINANCIAL CONTINGENCY. BUYER agrees to provide SELLER within 7 business days (five (5) if left blank) from the date of acceptance of this agreement by all parties, evidence of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank or financial statement or contract(s) for the sale of BUYER'S current residence or other property to be sold.

(C) \$ 0.00 NEW LOAN PROCEEDS: This Agreement is contingent upon BUYER obtaining the following financing: FIRST LOAN of \$ not including mortgage insurance, through FHA VA CONVENTIONAL INFA RURAL DEVELOPMENT OTHER with interest not to exceed % for a period of year(s) at Fixed Rate Other. In the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money may be returned at BUYER'S request. BUYER shall pay no more than point(s) plus origination fee if any. SELLER shall pay no more than point(s). Any reduction in points shall first accrue to the benefit of the BUYER SELLER Divided Equally N/A.

SECOND LOAN of \$ with interest not to exceed % for a period of year(s) at Fixed Rate Other. BUYER shall pay no more than point(s) plus origination fee if any. SELLER shall pay no more than point(s). Any reduction in points shall first accrue to the benefit of the BUYER SELLER Divided Equally N/A.

LOAN APPLICATION: BUYER has applied shall apply for such loan(s) within N/A business days (five (5) if left blank) of SELLER'S acceptance. Within N/A business days (ten (10) if left blank) of final acceptance of all parties, BUYER agrees to furnish SELLER with a written confirmation showing lender approval of credit report, income verification, debt ratios, and evidence of sufficient funds and/or proceeds necessary to close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. If such written confirmation is not received by SELLER(S) within the strict time allotted, SELLER(S) may at their option cancel this agreement by notifying BUYER(S) in writing of such cancellation within N/A business days (three (3) if left blank) after written confirmation was required. If SELLER does not cancel within the strict time period specified as set forth herein, SELLER shall be deemed to have accepted such written confirmation of lender approval and shall be deemed to have elected to proceed with the transaction. SELLER'S approval shall not be unreasonably withheld. If an appraisal is required by lender, the PROPERTY must appraise at not less than purchase price or BUYER'S Earnest Money may be returned at BUYER'S request. BUYER may also apply for a loan with different conditions and costs and close transaction provided all other terms and conditions of this Agreement are fulfilled, and the new loan does not increase the costs or requirements to the SELLER. FHA / VA: If applicable, it is expressly agreed that notwithstanding any other provisions of this contract, BUYER shall not be obligated to complete the purchase of the PROPERTY described herein or to incur any penalty or forfeiture of Earnest Money deposits or otherwise unless BUYER has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Veterans Administration or a Direct Endorsement lender setting forth the appraised value of the PROPERTY of not less than the sales price as stated in the contract. SELLER agrees to pay fees required by FHA or VA.

(D) \$ 0.00 ADDITIONAL FINANCIAL TERMS: Additional financial terms are specified under the heading 'OTHER TERMS AND/OR CONDITIONS' (Section 4). Additional financial terms are contained in a FINANCING ADDENDUM of same date, attached hereto, signed by both parties.

(E) \$ 750,000.00 APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING (Not including closing costs): Cash at closing to be paid by BUYER at closing in GOOD FUNDS, including: cash, electronic transfer funds, certified check or cashier's check. NOTE: If any of above loans being Assumed or taken 'subject to', any net differences between the approximate balances and the actual balance of said loan(s) shall be adjusted at closing of escrow in: Cash Other cashiers check or wire funds.

BUYER'S Initials (Signature) Date 1/3/12 SELLER'S Initials (Signature) Date 2/1/12

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Exh. No. 5 Date Name 3-9-16 A. Canty Boyd M & M Court Reporting

PROPERTY ADDRESS 2130 PAYETTE DRIVE

McCall

ID: 12713

69 **4. OTHER TERMS AND/OR CONDITIONS:** This Agreement is made subject to the following special terms, considerations and/or contingencies which
70 must be satisfied prior to closing. 1. Buyer to verify lease documentation with Idaho State Land Board plus any
71 affiliate department(s) concerning the lease and permits of the subject property. 2. Buyer has
72 the choice to take over the existing lease or renew a lease with the State of Idaho until such
73 time the state gives the buyer the first right to purchase the land lease and hand over the land
74 to the buyer by Warranty Deed or Deed of Trust without any encumbrances. 3. Buyer will have 30
75 business days to conduct due diligence with the Idaho Land Board plus any of the affiliate
76 departments. 4. Selling agency compensation will be 2.5% of the negotiated selling price paid by
77 seller. 5. Seller to pay all lease transfer fees or affiliated fees.

81 **5. ITEMS INCLUDED & EXCLUDED IN THIS SALE:** All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED IN THE
82 PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor
83 coverings, attached television antennas, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm
84 windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached
85 fireplace equipment, awnings, ventilating, cooling and heating systems, air ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and
86 equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should
87 satisfy himself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than \$100.

88 **(A) ADDITIONAL ITEMS SPECIFICALLY INCLUDED IN THIS SALE:** dishwashers, Disposals, Refrigerators,
89 Window Treatments, Trash Compactor and any other fixtures that are attached to the subject
90 property.

91 **(B) ITEMS SPECIFICALLY EXCLUDED IN THIS SALE:** Sellers personal property.

92 **6. MINERAL RIGHTS:** Any and all mineral rights appurtenant to the PROPERTY are included in and are part of the sale of this PROPERTY unless
93 otherwise agreed to by the parties in writing.

94 **7. WATER RIGHTS:** Any and all water rights including but not limited to water systems, wells, springs, lakes, streams, ponds, rivers, ditches, ditch rights,
95 and the like, if any, appurtenant to the PROPERTY are included in and are a part of the sale of this PROPERTY unless otherwise agreed to by the parties in
96 writing.

97 **8. TITLE CONVEYANCE:** Title of SELLER is to be conveyed by warranty deed, unless otherwise provided, and is to be marketable and insurable except
98 for rights reserved in federal patents, state or railroad deeds, building or use restrictions, building and zoning regulations and ordinances of any
99 governmental unit, and rights of way and easements established or of record. Liens, encumbrances or defects to be discharged by SELLER may be paid out
100 of purchase money at date of closing. No liens, encumbrances or defects which are to be discharged or assumed by BUYER or to which title is taken
101 subject to, exist unless otherwise specified in this Agreement.

102 **9. TITLE INSURANCE:** There may be types of title insurance coverages available other than those listed below and parties to this agreement
103 are advised to talk to a title company about any other coverages available that will give the BUYER additional coverage.

104 **(A) PRELIMINARY TITLE COMMITMENT:** Prior to closing the transaction, SELLER or BUYER shall furnish to BUYER a preliminary commitment
105 of a title insurance policy showing the condition of the title to said PROPERTY. BUYER shall have 5 business days (five (5) if left blank) from receipt
106 of the preliminary commitment or not fewer than twenty-four (24) hours prior to closing, within which to object in writing to the condition of the title as set
107 forth in the preliminary commitment. If BUYER does not so object, BUYER shall be deemed to have accepted the conditions of the title. It is agreed that if
108 the title of said PROPERTY is not marketable, or cannot be made so within 5 business days (five (5) if left blank) after notice containing a written
109 statement of defect is delivered to SELLER, BUYER'S Earnest Money deposit will be returned to BUYER and SELLER shall pay for the cost of title
110 insurance cancellation fees, escrow and legal fees, if any.

111 **(B) TITLE COMPANY:** The parties agree that Anchor Title Title Company
112 located at 700 S. Main St. Cascade, ID 83611 shall provide the title policy and preliminary report of commitment.

113 **(C) STANDARD COVERAGE OWNER'S POLICY:** SELLER shall within a reasonable time after closing furnish to BUYER a title insurance policy in the
114 amount of the purchase price of the PROPERTY showing marketable and insurable title subject to the liens, encumbrances and defects elsewhere set out
115 in this Agreement to be discharged or assumed by BUYER unless otherwise provided herein. The risk assumed by the title company in the standard
116 coverage policy is limited to matters of public record. BUYER shall receive a ILTA/ALTA Owner's Policy of Title Insurance. A title company, at
117 BUYER's request, can provide information about the availability, desirability, coverage and cost of various title insurance coverages and endorsements. If
118 BUYER desires title coverage other than that required by this paragraph, BUYER shall instruct Closing Agency in writing and pay any increase in cost
119 unless otherwise provided herein.

120 **(D) EXTENDED COVERAGE LENDER'S POLICY (Mortgagee policy):** The lender may require that BUYER (Borrower) furnish an Extended Coverage
121 Lender's Policy. This extended coverage lender's policy considers matters of public record and additionally insures against certain matters not shown in
122 the public record. This extended coverage lender's policy is solely for the benefit of the lender and only protects the lender.

123 BUYER'S Initials [Signature] Date 1/3/12

SELLER'S Initials [Signature] Date 2/1/2012

PROPERTY ADDRESS: 2130 Payette Drive

McCall

ID#: 12715

107 10. **INSPECTION:**
 108 (A) BUYER chooses to have inspection not to have inspection. If BUYER chooses not to have inspection, skip Section 10C. BUYER shall have
 109 the right to conduct inspections, investigations, tests, surveys and other studies at BUYER'S expense. BUYER shall, within 30 business days (ten
 110 [10] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items. BUYER is strongly advised to
 111 exercise these rights and to make BUYER'S own selection of professionals with appropriate qualifications to conduct inspections of the entire
 112 PROPERTY. SELLER shall make PROPERTY available for inspection and agrees to accept the responsibility and expense for making sure all the
 113 utilities are turned on for the inspection except for phone and cable. Some inspections, investigations, tests, surveys and other studies may require
 114 additional days to complete. The parties agree that unless specifically set forth below, the above timeframes for investigations, tests, surveys and other
 115 studies shall govern.

116 Additional inspections/timeframes: 1. All documentation concerning the State Lease with the pertinent
 117 Idaho State Departments.

118 _____
 119 _____
 120 _____
 121 _____
 122 _____
 123 _____
 124 _____

125 (B) **FHA INSPECTION REQUIREMENT, if applicable:** "For Your Protection: Get a Home Inspection", HUD #2584-CN must be signed on or before
 126 execution of this agreement.

127 (C) **SATISFACTION/REMOVAL OF INSPECTION CONTINGENCIES:**

128 1). If BUYER does not within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall conclusively be deemed
 129 to have: (a) completed all inspections, investigations, review of applicable documents and disclosures; (b) elected to proceed with the transaction and
 130 (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair
 131 or correct.

132 2). If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall provide to SELLER
 133 pertinent section(s) of written inspection reports. SELLER shall have 3 business days (three [3] if left blank) in which to respond in writing.
 134 SELLER, at their option, may correct the items as specified by BUYER'S in their letter or may elect not to do so. If SELLER agrees to correct the items
 135 asked for in BUYER'S letter, then both parties agree that they will continue with the transaction and proceed to closing. This will remove BUYER'S
 136 inspection contingency.

137 3). If SELLER elects not to correct the disapproved items, or does not respond in writing within the strict time period specified, then the BUYER(S) have
 138 the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written
 139 notice within 3 business days (three [3] if left blank) that they will not continue with the transaction and will receive their Earnest Money back.

140 4). If BUYER does not give such written notice of cancellation within the strict time periods specified, BUYER shall conclusively be deemed to have
 141 elected to proceed with the transaction without repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or
 142 correct. SELLER shall make the PROPERTY available for all inspections. BUYER shall keep the PROPERTY free and clear of liens; indemnify and hold
 143 SELLER harmless from all liability, claims, demands, damages and costs; and repair any damages arising from the inspections. No inspections may be
 144 made by any governmental building or zoning inspector or government employee without the prior consent of SELLER unless required by local law.

145 11. **LEAD PAINT DISCLOSURE:** The subject PROPERTY is is not defined as "Target Housing" regarding lead-based paint or lead-based paint
 146 hazards. The term lead-based paint hazards is intended to identify lead-based paint and all residual lead-containing dusts and soils regardless of the
 147 source of the lead. If yes, BUYER hereby acknowledges the following: (a) BUYER has been provided an EPA approved lead-based paint hazard
 148 information pamphlet, "Protect Your Family From Lead In Your Home", (b) receipt of SELLER'S Disclosure of Information and Acknowledgment Form and
 149 have been provided with all records, test reports or other information, if any, related to the presence of lead-based paint hazards on said PROPERTY,
 150 (c) that this contract is contingent upon BUYER'S right to have the PROPERTY tested for lead-based paint hazards to be completed no later than
 151 _____ or the contingency will terminate, (d) that BUYER hereby waives does not waive this right, (e) that if test results show
 152 unacceptably amounts of lead-based paint on the PROPERTY, BUYER has the right to cancel the contract subject to the option of the SELLER (to be given
 153 in writing) to elect to remove the lead-based paint and correct the problem which must be accomplished before closing. (f) that if the contract is canceled
 154 under this clause, BUYER'S earnest money deposit will be returned to BUYER. Additionally, if any structure was built before 1978 and is a residential home,
 155 apartment or child-occupied facility such as a school or day-care center, federal law requires contractors that disturb lead-based paint in that structure to
 156 provide the owner with a "Renovate Right" pamphlet. The contractor shall be certified and follow specific work practices to prevent lead contamination.

157 12. **MOLD DISCLAIMER:** BUYER is hereby advised that mold and/or other microorganisms may exist at the Property. Upon closing BUYER
 158 acknowledges and agrees to accept full responsibility and risk for any matters that may result from mold and/or other microorganisms and to
 159 hold SELLER and any Broker or agent representing SELLER or BUYER harmless from any liability or damages (financial or otherwise) relating to
 160 such matters.

161 13. **SQUARE FOOTAGE VERIFICATION:** BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY
 162 OR IMPROVEMENTS IS APPROXIMATE. IF SQUARE FOOTAGE IS MATERIAL TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION
 163 PERIOD.

BUYER'S Initials BP X _____ Date 1/3/12 SELLER'S Initials (MARV) Date 2/1/2012

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PROPERTY ADDRESS: 2130 Payette Drive

McCall

ID# 12715

14. SELLER'S PROPERTY CONDITION DISCLOSURE FORM: If required by Title 55, Chapter 25 Idaho Code SELLER shall within ten (10) calendar days after execution of this Agreement provide to BUYER or BUYER'S agent, "Seller's Property Condition Disclosure Form" or other acceptable form. BUYER has received the "Seller's Property Condition Disclosure Form" or other acceptable form prior to signing this Agreement: Yes No N/A

15. COVENANTS, CONDITIONS AND RESTRICTIONS (CC&Rs): As part of the BUYER'S inspection of the PROPERTY as set forth in Section 10, BUYER is responsible for obtaining and reviewing a copy of any CC&Rs which may affect the PROPERTY. BUYER shall have 21/2 business days (ten (10) if left blank) but in no event shall such time period exceed that time period set forth for inspections in Section 10) to review and approve of any such CC&Rs that may affect the PROPERTY. Unless BUYER delivers to SELLER a written and signed objection to the terms of any applicable CC&Rs with particularity describing BUYER'S reasonable objections within such time period as set forth above, BUYER shall be deemed to have conclusively waived any objection to the terms of any CC&Rs affecting the PROPERTY.

16. SUBDIVISION HOMEOWNER'S ASSOCIATION: BUYER is aware that membership in a Home Owner's Association may be required and BUYER agrees to abide by the Articles of Incorporation, bylaws and rules and regulations of the Association. BUYER is further aware that the PROPERTY may be subject to assessments levied by the Association described in full in the Declaration of Covenants, Conditions and Restrictions. BUYER has reviewed Homeowner's Association Documents: Yes No N/A. Association fees/dues are \$0.00 per per . BUYER SELLER N/A to pay Homeowner's Association SET UP FEE of \$ 0.00 and/or PROPERTY TRANSFER FEES of \$ 0.00 at closing.

17. HOME WARRANTY PLAN: Home Warranty Plans available for purchase can vary in many respects including, but not limited to, scope of coverage, options, exclusions, limitations, service fees, and pre-existing conditions. BUYER and SELLER are advised to investigate Home Warranty Plans before purchasing a plan and BUYER and SELLER acknowledge that Home Warranty Plans vary from plan to plan. Further, BUYER and SELLER acknowledge that a Home Warranty Plan is separate and apart from any terms contained within this Real Estate Purchase and Sale Agreement and does not create any warranties, including, without limitation, any warranty of habitability, agreements or representations not expressly set forth herein. A Home Warranty Plan will will not be included in this transaction. BUYER SELLER shall order a Home Warranty Plan which shall be issued by a company selected by BUYER SELLER. The cost of the Home Warranty Plan shall not exceed \$500.00 and shall be paid for at closing by BUYER SELLER.

18. COSTS PAID BY: The parties agree to pay the following costs as indicated below. None of the costs to be paid by the parties in this section creates an inspection or performance obligation other than strictly for the payment of costs. There may be other costs incurred in addition to those set forth below. Such costs may be required by the lender, by law, or by other such circumstances.

	BUYER	SELLER	Shared Equally	N/A		BUYER	SELLER	Shared Equally	N/A
Appraisal Fee				<input checked="" type="checkbox"/>	Title Ins. Standard Coverage Owner's Policy		<input checked="" type="checkbox"/>		
Appraisal Re-inspection Fee				<input checked="" type="checkbox"/>	Title Ins. Extended Coverage Lender's Policy - Mortgage Policy	<input checked="" type="checkbox"/>			
Closing Escrow Fee			<input checked="" type="checkbox"/>		Additional Title Coverages				<input checked="" type="checkbox"/>
Lender Document Preparation Fee				<input checked="" type="checkbox"/>	Fuel in Tank - Dollar Amount to be Determined by Supplier				<input checked="" type="checkbox"/>
Tax Service Fee				<input checked="" type="checkbox"/>	Domestic Well Water Potability Test		<input checked="" type="checkbox"/>		
Flood Certification/Tracing Fee				<input checked="" type="checkbox"/>	Domestic Well Water Productivity Test		<input checked="" type="checkbox"/>		
Lender Required Inspections				<input checked="" type="checkbox"/>	Sepic Inspections				<input checked="" type="checkbox"/>
Attorney Contract Preparation or Review Fee	<input checked="" type="checkbox"/>				Sepic Pumping				<input checked="" type="checkbox"/>
N/A				<input checked="" type="checkbox"/>	Survey		<input checked="" type="checkbox"/>		
N/A				<input checked="" type="checkbox"/>	Property Corners Marked		<input checked="" type="checkbox"/>		

Upon closing SELLER agrees to pay up to EITHER 5% (N/A if left blank) of the purchase price OR 2 1/2% (N/A if left blank) of lender-approved BUYER'S closing costs, lender fees, and prepaid costs which includes but is not limited to those items in BUYER columns marked above.

19. OCCUPANCY: BUYER does does not intend to occupy PROPERTY as BUYER'S primary residence.

20. RISK OF LOSS OR NEGLECT: Prior to closing of this sale, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materially damaged by fire, neglect, or other destructive cause prior to closing, this agreement shall be voidable at the option of the BUYER.

21. FINAL WALK THROUGH: The SELLER grants BUYER and any representative of BUYER reasonable access to conduct a final walk through inspection of the PROPERTY approximately 5 calendar days (three (3) if left blank) prior to close of escrow. NOT AS A CONTINGENCY OF THE SALE, but for purposes of satisfying BUYER that any repairs agreed to in writing by BUYER and SELLER have been completed and PROPERTY are in substantially the same condition as on the date this offer is made. SELLER shall make PROPERTY available for the final walk through and agree to accept the responsibility and expense for making sure all the utilities are turned on for the walk through except for phone and cable. If BUYER does not conduct a final walk through, BUYER specifically releases the SELLER and Broker(s) of any liability.

BUYER'S Initials (JD) Date 1/3/12 SELLER'S Initials (JPPX) Date 2/1/2012

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PROPERTY ADDRESS: 2130 Fayette Drive

McCall

ID# 12715

- 22. SINGULAR AND PLURAL terms each include the other, when appropriate.
- 23. FORECLOSURE NOTICE: If the PROPERTY described above is currently involved in a foreclosure proceeding (pursuant to Idaho Code § 45-1608) any contract or agreement with the owner or owners of record that involves the transfer of any interest in residential real property, as defined in § 45-022(3)(b), Idaho Code, subject to foreclosure must be in writing and must be accompanied by and affixed to RE-42 Property Foreclosure Disclosure Form.
- 24. MECHANIC'S LIENS - GENERAL CONTRACTOR DISCLOSURE STATEMENT NOTICE: BUYER and SELLER are hereby notified that, subject to Idaho Code § 55-525 et seq., a "General Contractor" must provide a Disclosure Statement to a homeowner that describes certain rights afforded to the homeowner (e.g. lien waivers, general liability insurance, extended policies of title insurance, surety bonds, and sub-contractor information). The Disclosure Statement must be given to a homeowner prior to the General Contractor entering into any contract in an amount exceeding \$2,000 with a homeowner for construction, alteration, repair, or other improvements to real property, or with a residential real property purchaser for the purchase and sale of newly constructed property. Such disclosure is the responsibility of the General Contractor and it is not the duty of your agent to obtain this information on your behalf. You are advised to consult with any General Contractor subject to Idaho Code § 55-525 et seq. regarding the General Contractor Disclosure Statement.
- 25. SALES PRICE INFORMATION: Pursuant to Idaho Code § 54-2083(d), a "sold" price of real property is not confidential client information.
- 26. TRANSMISSION OF DOCUMENTS: Facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency, the BUYER and SELLER will confirm facsimile or electronic transmitted signatures by signing an original document.
- 27. BUSINESS DAYS: A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real PROPERTY is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized by the state of Idaho as found in Idaho Code § 73-108. The time in which any act required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day. The first day shall be the day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.
- 28. CALENDAR DAYS: A calendar day is herein defined as Monday through Sunday, midnight to midnight, in the local time zone where the subject real PROPERTY is physically located. A calendar day shall include any legal holiday. The time in which any act required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day, thus the first day shall be the day after the date of execution. Any reference to "day" or "days" in this agreement means the same as calendar day, unless specifically enumerated as a "business day."
- 29. ATTORNEY'S FEES: If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.
- 30. DEFAULT: If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right and/or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of title insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER'S Broker, provided that the amount to be paid to SELLER'S Broker shall not exceed the Broker's agreed-to commission. SELLER and BUYER specifically acknowledge and agree that if SELLER elects to accept the Earnest Money as liquidated damages, such shall be SELLER'S sole and exclusive remedy, and such shall not be considered a penalty or forfeiture. If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of brokerage fee, title insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be held pending resolution of the matter. If SELLER defaults, having approved said sale and fails to consummate the same as herein agreed, BUYER'S Earnest Money deposit shall be returned to him/her and SELLER shall pay for the costs of title insurance, escrow fees, appraisals, credit report fees, inspection fees, brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be entitled.
- 31. EARNEST MONEY DISPUTE / INTERPLEADER: Notwithstanding any termination of the contract, BUYER and SELLER agree that in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, unless mutual written instructions are received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interplead all parties and deposit any monies or things of value into a court of competent jurisdiction and shall recover court costs and reasonable attorney's fees.
- 32. COUNTERPARTS: This Agreement may be executed in counterparts. Executing an agreement in counterparts shall mean the signature of two identical copies of the same agreement. Each identical copy of an agreement signed in counterparts is deemed to be an original, and all identical copies shall together constitute one and the same instrument.
- 33. "NOT APPLICABLE" DEFINED: The letters "N/A," "NA," "n.a.," and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.

BUYER'S initials ([Signature]) Date 11/3/12

SELLER'S initials ([Signature]) Date 2/1/2012

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Received Mar-05-2012 19:32 From-8584508697 To-MCCALL REAL ESTATE Page 006

PROPERTY ADDRESS: 2130 Payette Drive

McCall

ID#: 12715

34. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

35. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).

- Section 1:
- A. The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).
 - B. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.
 - C. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S).
 - D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).

- Section 2:
- A. The brokerage working with the SELLER(S) is acting as an AGENT for the SELLER(S).
 - B. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.
 - C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S) and has an ASSIGNED AGENT acting solely on behalf of the SELLER(S).
 - D. The brokerage working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).

Each party signing this document certifies that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above. In addition, each party certifies that the brokerage's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

36. CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing agency all funds and instruments necessary to complete this transaction. Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER. The closing shall be no later than (Date) 03/30/2012.

The parties agree that the CLOSING AGENCY for this transaction shall be AmeriTitle located at 700 S. Main St., Cascade, ID 83611.

If a long-term escrow / collection is involved, then the long-term escrow holder shall be B/R.

37. POSSESSION: BUYER shall be entitled to possession upon closing or date _____ time _____ A.M. P.M. Property taxes and water assessments (using the last available assessment as a basis), rents, interest and reserves, liens, encumbrances or obligations incurred, fuel in fuel tank, and utilities shall be prorated as of Closing.

38. ASSIGNMENT: This Agreement and any rights or interests created herein may may not be sold, transferred, or otherwise assigned.

39. ENTIRE AGREEMENT: This Agreement contains the entire Agreement of the parties respecting the matters herein set forth and supercedes all prior Agreements between the parties respecting such matters. No warranties, including, without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding upon either party.

40. TIME IS OF THE ESSENCE IN THIS AGREEMENT.

41. AUTHORITY OF SIGNATORY: If BUYER or SELLER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER or SELLER.

42. ACCEPTANCE: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) 01/05/2012 at (Local Time in which PROPERTY is located) 4:00 A.M. P.M. If acceptance of this Agreement is not received within the time specified, the offer is withdrawn and the entire Earnest Money, if any, shall be refunded to BUYER on demand.

BUYER'S Initials (RS) X Date 1/3/12

SELLER'S Initials (JBB) X Date 2/1/2012

PROPERTY ADDRESS: 2130 Fayette Drive McCall ID# 12715

43. BUYER'S SIGNATURES:

370 43. BUYER'S SIGNATURES:
371 SEE ATTACHED BUYER'S ADDENDUM(S): (Specify number of BUYER addendum(s) attached.)
372 BUYER does not currently hold an active Idaho real estate license.
373 BUYER Signature [Signature] BUYER (Print Name) Ramona Petrus
374 Date 01/03/2013 Time 3:00 P.M. Phone # Call #
375 Address City State Zip
376 E-Mail Fax #

380 BUYER does not currently hold an active Idaho real estate license.
381 BUYER Signature BUYER (Print Name)
382 Date Time AM P.M. Phone # Call #
383 Address City State Zip
384 E-Mail Fax #

44. SELLER'S SIGNATURES: On this date, I/We hereby approve and accept the transaction set forth in the above Agreement and agree to carry out all the terms thereof on the part of the SELLER.

402 SIGNATURE(S) SUBJECT TO ATTACHED COUNTER OFFER
403 SIGNATURE(S) SUBJECT TO ATTACHED ADDENDUM(S) #
404 SELLER does not currently hold an active Idaho real estate license.
405 SELLER Signature Nancy Gentry Boyd SELLER (Print Name) NANCY GENTRY BOYD
406 Date 2/1/2012 Time 3:00 P.M. Phone # 858-459-8985 Cell # 858-442-8985
407 Address 2725 AVENIDA DE LA PLAYA City LA FOLLE State CA Zip 92037
408 E-Mail gentry.boyd.nancy@gmail.com Fax # 858-459-7452
409 CONTRACTOR REGISTRATION # (if applicable)

410 SELLER does not currently hold an active Idaho real estate license.
411 SELLER Signature SELLER (Print Name)
412 Date Time AM P.M. Phone # Call #
413 Address City State Zip
414 E-Mail Fax #
415 CONTRACTOR REGISTRATION # (if applicable)

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Page 1 of 1

RE-13 COUNTER OFFER # 1 (1.2.3 etc.)

THIS COUNTER OFFER SUPERSEDES ALL PRIOR COUNTER OFFERS

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

1 This is a COUNTER OFFER to the Purchase and Sale Agreement Dated: 1-3-2012

2

3 ADDRESS: 2130 Payette Drive, McCall, Idaho 83638 ID#: 12715

4

5 BUYER: Mr. E Petrus

6

7 SELLER: Nancy Gentry Boyd

8

- 9 The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes:
- 10 This is a SELLER counter offer. The SELLER reserves the right to withdraw this offer or accept any other offers prior to the receipt of a true copy of signed acceptance of this Counter Offer within the time frame specified herein.
- 11 This is a BUYER counter offer. The undersigned BUYER reserves the right to withdraw this offer at any time prior to the receipt of a true copy of signed acceptance of this Counter Offer within the time frame specified herein.
- 12 (1.) Purchase price to be \$1,000,000.00
- 13 (2.) Upon release of inspection contingencies earnest money to be increased to \$15,000.00
- 14 (3.) ~~Cooperating brokerage fees will be paid per listing and/or compensation agreement with the seller. Selling agency compensation can not be negotiated within the Purchase and Sale agreement and any and all other terms shall be shown from this agreement.~~
- 15 (4.) Buyer to reimburse seller for prepaid 2012 lease fees calculated from date of close.
- 16 (5.) Buyer to pay fees necessary to process the lease transfer and the dock permit into buyer's name.
- 17 (6.) Seller will not include a Home Warranty Plan in this transaction.
- 18 (7.) Buyer to pay Seller for remaining fuel in the propane tank based on market price on last fill date.
- 19 (8.) Buyer to pay for Water Potability test as part of buyer's inspections.
- 20 (9.) Seller will provide a copy of the Well Driller's report to the buyer, but will not pay for a productivity test.
- 21 (10.) Seller will pay to have property corners marked by a surveyor. Buyer to pay for survey.
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39 To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, the terms in this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums not modified by this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or loan amount on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

40 If a signed acceptance is not delivered on or before (date): 2-6-2012 at 5:00 A.M. P.M. this Counter Offer shall be deemed to have expired.

41 DELIVERY: Delivery shall be to the agent/broker working with the maker of the Counter Offer in person, by mail, facsimile or electronic transmission of any signed original document, and retransmission of any signed original document. ~~Retransmission of any signed facsimile or electronic transmission shall be deemed to be the same as delivery of an original.~~

42 SELLER Nancy Gentry Boyd Date Feb 1 2012 Time 10:00 A.M. P.M.

43

44 SELLER _____ Date _____ Time _____ A.M. P.M.

45

46 BUYER _____ Date _____ Time _____ A.M. P.M.

47

48 BUYER _____ Date _____ Time _____ A.M. P.M.

Printed Under Contract and Reseller Permit No. C-1 License Expires 8/31/11



RE-13 COUNTER OFFER #2 (1,2,3 etc.)
THIS COUNTER OFFER SUPERSEDES ALL PRIOR COUNTER OFFERS

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING



This is a COUNTER OFFER to the Purchase and Sale Agreement Dated: 01/03/2012

ADDRESS: 2130 Fayette Drive, McCall, ID 83638

ID#: 12715

BUYER: Mr. E. Petrus

SELLER: Nancy Gentry Boyd

The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes:
This is a SELLER counter offer. The SELLER reserves the right to withdraw this offer or accept any other offers prior to the receipt of true copy of signed acceptance of this Counter Offer within the time frame specified herein.

This is a BUYER counter offer. The undersigned BUYER reserves the right to withdraw this offer at any time prior to the receipt of true copy of signed acceptance of this Counter Offer within the time frame specified herein.

- 1. Purchase price to be \$800,000.00
2. Upon release of inspection contingencies earnest money to be increase by \$10,000.00 for a total of \$15,000.00.
3. Selling brokerage/agent receives commission of 2% per executed RE-12 Compensation Agreement dated 1/3/2012.
4. Seller to pay the 2012 year lease fees.
5. Seller to pay for all transfer and dock fees.
6. Seller to provide a home Warrantee Plan not to exceed \$500.00.
7. Buyer will pay for the remainder of propane (fuel) in the tank as of closing. Propane company to calculate the remainder of the propane (fuel).
8. Buyer will pay for the potable water test.
9. Seller will provide the copy of the Well Driller's report. Seller will pay for the well's productivity test.
10. Property corners to be marked by a licensed surveyor and paid by the seller.
11. Buyer & Seller agree to extend the acceptance date of Counter offer #1 to 02/07/2012.

To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all pri Addendums, the terms in this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all pri Addendums not modified by this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or lo amount on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. Upon l execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

If a signed acceptance is not delivered on or before (date): 02/09/2012 at 11.59 AM. P.

DELIVERY: Delivery shall be to the agent/broker working with the maker of the Counter Offer in person, by mail, facsimile or elector transmission of any signed original document, and retransmission of any signed original document. Retransmission of any signed facsim or electronic transmission shall be deemed to be the same as delivery of an original.

SELLER Date Time A.M. P.
SELLER Date Time A.M. P.
BUYER Date 02/07/2012 Time 11:40 AM P.
BUYER Date Time A.M. P.

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RE-13 COUNTER OFFER # 3 (1,2,3 etc.)
THIS COUNTER OFFER SUPERSEDES ALL PRIOR COUNTER OFFERS

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
 IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.




1 This is a COUNTER OFFER to the Purchase and Sale Agreement Dated: 2-8-2012

2 ADDRESS: 2130 Payette Drive, McCall, Idaho 83638 ID#: 12715

3 BUYER: Mr. E Petrus

4 SELLER: Nancy Gentry Boyd

5 The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes:

6 This is a SELLER counter offer. The SELLER reserves the right to withdraw this offer or accept any other offers prior to the receipt of a true copy of signed acceptance of this Counter Offer within the time frame specified herein.

7 This is a BUYER counter offer. The undersigned BUYER reserves the right to withdraw this offer at any time prior to the receipt of a true copy of signed acceptance of this Counter Offer within the time frame specified herein.

8 (1.) Purchase price to be \$825,000.00

9 (2.) Buyer to have 10 business days for due diligence and to complete inspections.

10 (3.) Closing to be on or before 03/15/2012.

11 (4.) Upon release of inspection contingencies earnest money to be increased by \$10,000.00 to bring total earnest money to \$15,000.00 and shall become non-refundable.

12 (5.) Cooperating brokerage fees will be paid per compensation agreement with the seller and Cooperating Brokerage Agreements already in place with Mountain Central Association of Realtors.

13 (6.) Buyer to reimburse seller for prepaid 2012 lease fees calculated from date of close.

14 (7.) Buyer to pay for necessary to transfer lease and dock permit into buyer's name.

15 (8.) Seller will not include a Home Warranty Plan in this transaction.

16 (9.) Buyer to pay Seller for remaining fuel in the propane tank based on market price on last fill date.

17 (10.) Buyer to pay for water potability and well productivity as part of buyer's inspections.

18 (11.) Seller will provide a copy of the Well Driller's report to the buyer.

19 (12.) Seller will pay to have property corners marked by a surveyor.

20 (13.) Seller will not pay for a survey but will provide a copy of the most recent survey completed in 1998 for the Idaho Department of Lands.

21 (14.) Buyer & Seller Agree to extend the acceptance date of Counter Offer #1 to 02/13/2012.

22 To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, the terms in this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums not modified by this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or loan amount on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

23 If a signed acceptance is not delivered on or before (date): 2-13-2012 at 5:00 A.M. P.M. this Counter Offer shall be deemed to have expired.

24 DELIVERY: Delivery shall be to the agent/broker working with the maker of the Counter Offer in person, by mail, facsimile or electronic transmission of any signed original document, and retransmission of any signed original document. Retransmission of any signed facsimile or electronic transmission shall be deemed to be the same as delivery of an original.

25 SELLER Nancy Gentry Boyd Date 2/9/12 Time 8:00 A.M. P.M.

26 SELLER _____ Date _____ Time _____ A.M. P.M.

27 BUYER _____ Date _____ Time _____ A.M. P.M.

28 BUYER _____ Date _____ Time _____ A.M. P.M.

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RE-13 COUNTER OFFER #4

THIS COUNTER OFFER SUPERSEDES ALL PRIOR COUNTER OFFERS

027-5428
(1, 2, 3 etc.)

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



This is a COUNTER OFFER to the Purchase and Sale Agreement Dated: 02/08/2012

ADDRESS: 2130 Payette Drive, McCall, ID 83638

ID#: 12715

BUYER: Mr. E. Petrus

SELLER: Nancy Gentry Boyd

The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes:
 This is a SELLER counter offer. The SELLER reserves the right to withdraw this offer or accept any other offers prior to the receipt of true copy of signed acceptance of this Counter Offer within the time frame specified herein.

This is a BUYER counter offer. The undersigned BUYER reserves the right to withdraw this offer at any time prior to the receipt of true copy of signed acceptance of this Counter Offer within the time frame specified herein.

1. Purchase price to be \$825,000.
 2. Price to include ALL furniture, appliances and attachments. Agents to compile an inventory list.
 3. Buyer to have 20 business days for due diligence and to complete inspections.
 4. Upon release of inspection contingencies earnest money to be increased by \$10,000 to bring the total earnest money to \$15,000.00.
 5. Cooperating brokerages fees will be paid per compensation agreement with the seller and cooperating brokerage agreements already in place with MCAR (Mountain Central Association of Realtors)
 6. The 2012 state lease fees that have been prepaid will be transferred to the buyer.
 7. Seller to pay all fees (lease, dock permit & any other incurred fees) necessary for the state transfer to occur.
 8. Seller to pay for the remaining fuel in tank.
 9. Seller to pay for the water potable & productivity test.
 10. Seller to provide the well driller's report buyer.
 11. Seller will pay to have the property corners marked and any other pertinent survey to be conducted for the closing of this transaction by a licensed surveyor.
 12. Seller will pay for a home warranties plan not to exceed \$500.00.
 13. Closing to be on or before 03/15/2012.
- End of Counter Offer #4.

To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all pri Addendums, the terms in this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all pri Addendums not modified by this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or loa amount on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. Upon ii execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

If a signed acceptance is not delivered on or before (date): 02/11/2012 at 12 Noon A.M. P.M. this Counter Offer shall be deemed to have expired.

DELIVERY: Delivery shall be to the agent/broker working with the maker of the Counter Offer in person, by mail, facsimile or electron transmission of any signed original document, and retransmission of any signed original document. Retransmission of any signed facsimil or electronic transmission shall be deemed to be the same as delivery of an original.

SELLER _____ Date _____ Time _____ A.M. P.M.

SELLER _____ Date _____ Time _____ A.M. P.M.

BUYER [Signature] Date 02/10/2012 Time 9:40 PST A.M. P.M.

BUYER _____ Date _____ Time _____ A.M. P.M.

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44 5428

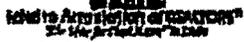
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PETRLIS

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RE-13 COUNTER OFFER #4

THIS COUNTER OFFER SUPERSEDES ALL PRIOR COUNTER OFFERS



THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS, IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



This is a COUNTER OFFER to the Purchase and Sale Agreement Dated: 02/08/2012

ADDRESS: 2130 Ravette Drive, McCall, ID 83638

ID# 2768

BUYER: Mr. Z. Petrus

SELLER: Nancy Gentry Boyd

The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes: This is a SELLER counter offer. The SELLER reserves the right to withdraw this offer except any other offers prior to the receipt of a copy of signed acceptance of this Counter Offer within the time frame specified herein. This is a BUYER counter offer. The undersigned BUYER reserves the right to withdraw this offer at any time prior to the receipt of a copy of signed acceptance of this Counter Offer within the time frame specified herein.

Purchase price to be \$925,000. Prices to include A/C, furniture, appliances and attachments. Agents to compile an inventory list.

Buyer to have 20 business days for due diligence and to complete inspections.

Upon release of inspection contingencies earnest money to be increased by \$10,000 to bring in total earnest money to \$15,000.00.

Cooperating brokerages fees will be a 100% commission agreement with the seller and cooperating brokerage agreements already in place with STAR (Mountain Central Association of Realtors)

The 2012 state lease fees that have been accrued will be transferred to the buyer.

Seller to pay all fees (Lease, Deed, etc) and other incurred fees) necessary for the state transfer to occur.

Seller to pay for the remaining well in hand.

Seller to pay for the water table & productivity test.

Seller to provide the well drillers report to buyer.

Seller will pay to have the property corners marked and any other pertinent survey to be conducted for the closing of this transaction by a licensed surveyor.

Seller will pay for a home inspection plan not to exceed \$300.00.

Closing to be on or before 02/11/2012.

End of Counter Offer #4.

In the event the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all printendums, the terms of this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all printendums not modified by this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or loss account on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

A signed acceptance is not delivered on or before (date): 02/11/2012 at 12 Noon [] A.M. [X] P.M. the Counter Offer shall be deemed to have expired.

DELIVERY: Delivery shall be to the agent/broker working with the maker of the Counter Offer in person, by mail, facsimile or electronic transmission of any signed original document, and retransmission of any signed original document. Retransmission of any signed facsimile or electronic transmission shall be deemed to be the same as delivery of an original.

SELLER _____ Date _____ Time _____ [] A.M. [X] P.M.

SELLER _____ Date _____ Time _____ [] A.M. [] P.M.

BUYER [Signature] Date 02/10/2012 Time 9:40 P.M. [X] A.M. [] P.M.

BUYER _____ Date _____ Time _____ [] A.M. [] P.M.

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RE-13 COUNTER OFFER # 5 (1,2,3 etc.) JULY 2011 EDITION
Page 1 of 1

THIS COUNTER OFFER SUPERSEDES ALL PRIOR COUNTER OFFERS

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

1 This is a COUNTER OFFER to the Purchase and Sale Agreement Dated: 2-8-2012

2 ADDRESS: 2130 Payette Drivn, McCall, Idaho 83638 ID#: 12715

3 BUYER: Mr. E Petrus

4 SELLER: Nancy Gentry Boyd

- 5 The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes:
- 6 This is a SELLER counter offer. The SELLER reserves the right to withdraw this offer or accept any other offers prior to the receipt of a true copy of signed acceptance of this Counter Offer within the time frame specified herein.
- 7 This is a BUYER counter offer. The undersigned BUYER reserves the right to withdraw this offer at any time prior to the receipt of a true copy of signed acceptance of this Counter Offer within the time frame specified herein.
- 8 (1.) Purchase price to be \$825,000.00
- 9 (2.) Buyer to have 20 business days for due diligence and to complete inspections.
- 10 (3.) Closing to be on or before 03/15/2012.
- 11 (4.) Upon release of inspection contingencies earnest money to be increased by \$10,000.00 to bring total earnest money to \$15,000.00 and shall become non-refundable.
- 12 (5.) Cooperating brokerage fees will be paid per compensation agreement with the seller and Cooperating Brokerage Agreements already in place with Mountain Central Association of Realtors.
- 13 (6.) Buyer to pay balance of 2012 lease fees due for the period from July 1, 2012 through 12-31-2012.
- 14 (7.) Seller to pay dock and lease transfer fees.
- 15 (8.) Seller will not include a Home Warranty Plan in this transaction.
- 16 (9.) Propane in tank to be included at no additional cost to buyer.
- 17 (10.) Seller to pay for water potability test.
- 18 (11.) Seller will provide a copy of the Well Driller's report to the buyer which includes well productivity report.
- 19 (12.) Seller will pay to have property corners marked by a surveyor.
- 20 (13.) Seller will not pay for a survey but will provide a copy of the most recent survey completed in 1998 on behalf the Idaho Department of Lands which found no issues with property lines.
- 21 (14.) Buyer & Seller Agree to extend the response time for Counter Offer #1 to 2/9/2012.
- 22 (15.) Seller rejection of Counter Offer #4 dated 2-10-2012 is hereby withdrawn.
- 23 (16.) Time for response to Counter Offer #4 dated 2-10-2012 is extended to 2-16-2012.

24 To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, the terms in this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums not modified by this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or loan amount on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

25 If a signed acceptance is not delivered on or before (date): 2-17-2012 at 5:00 A.M. P.M. this Counter Offer shall be deemed to have expired.

26 DELIVERY: Delivery shall be to the agent/broker working with the maker of the Counter Offer in person, by mail, facsimile or electronic transmission of any signed original document, and retransmission of any signed original document. Retransmission of any signed facsimile or electronic transmission shall be deemed to be the same as delivery of an original.

27 SELLER: Nancy Gentry Boyd Date 2/14/12 Time 3:50 A.M. P.M.

28 SELLER _____ Date _____ Time _____ A.M. P.M.

29 BUYER _____ Date _____ Time _____ A.M. P.M.

30 BUYER _____ Date _____ Time _____ A.M. P.M.

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RE-13 COUNTER OFFER #6 (1,2,3 etc.)

THIS COUNTER OFFER SUPERSEDES ALL PRIOR COUNTER OFFERS

Idaho Association of REALTORS
The Single Real Estate Trade in Idaho

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



This is a COUNTER OFFER to the Purchase and Sale Agreement Dated: 02/08/2012

ADDRESS: 2130 Payatte Drive, McCall, Idaho 83638

ID# 12715

BUYER: Mr. E. Petrus

SELLER: Nancy Gentry Boyd

The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes:
 This is a SELLER counter offer. The SELLER reserves the right to withdraw this offer or accept any other offers prior to the receipt of true copy of signed acceptance of this Counter Offer within the time frame specified herein.

This is a BUYER counter offer. The undersigned BUYER reserves the right to withdraw this offer at any time prior to the receipt of true copy of signed acceptance of this Counter Offer within the time frame specified herein.

1. Purchase price to be \$ 837,000. This price to include all furnishings, appliances, house hold kitchen items, linens etc. Agents to make a inventory list.

2. Buyer to have 20 business days for due diligence and to complete inspections.

3. Closing to be on or before 03/16/2012.

4. Upon release of inspection contingencies earnest money to be increased by \$ 10,000.00 to bring the total earnest money to \$ 15,000.00.

5. Cooperating Brokerage fees will be paid per compensation agreement with the seller and Cooperating Brokerage Agreements already in place with Mountain Central Association of Realtors.

6. Buyer to pay balance of 2012 lease fees due for the period from July 1, 2012 through 12-31-2012.

7. Seller to pay dock & lease transfer fees.

8. Seller will not include a Home Warranty Plan in this transaction.

9. Propane in tank to be included at no additional cost to buyer.

10. Seller to pay for water potability test.

11. Seller will provide a copy of the Well Driller's report to the buyer which includes well productivity test report.

12. Seller will pay to have property corners marked by a surveyor.

13. Seller will not pay for a survey but will provide a copy of the most recent survey complete in 1998 on behalf the Idaho Department of Lands which found no issues with property lines.

14. Buyer & Seller agree to extend the response time for Counter Offer # 1 to 02.09/2012.

15. Seller rejection of Counter Offer # 4 dated 02/10/2012 is hereby withdrawn.

16. Time for response to Counter Offer # 4 dated 02/10/2012 is extended to 02/16/2012.

End of Counter Offer #6.

To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all Addendums, the terms in this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all Addendums not modified by this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or amount on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. Upon execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

If a signed acceptance is not delivered on or before (date): 02/16/2012 at 12.00 Noon A.M. P.M.

DELIVERY: Delivery shall be to the agent/broker working with the maker of the Counter Offer in person, by mail, facsimile or elect transmission of any signed original document, and retransmission of any signed original document. Retransmission of any signed facs or electronic transmission shall be deemed to be the same as delivery of an original.

SELLER _____ Date _____ Time _____ A.M. P.M.

SELLER _____ Date _____ Time _____ A.M. P.M.

BUYER [Signature] Date 02/15/2012 Time 10:00 A.M. P.M.

BUYER _____ Date _____ Time _____ A.M. P.M.

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ADDENDUM # 1 (All addendums shall be numbered sequentially.) **JULY 2011 EDITION**
Page 1 of 1

RE-11 ADDENDUM

Idaho Association of REALTORS® **THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.**

1 Date: 2-22-2012

2 This is an ADDENDUM to the Purchase and Sale Agreement Other N/A
3 ("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is
4 being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

5 **AGREEMENT DATED:** 1-3-2012 ID # 12715

6 **ADDRESS:** 2130 Payette Drive, McCall, ID 83638

7 **BUYER(S):** Mr. F. Patrus

8 **SELLER(S):** Nancy Gentry Boyd

9 The undersigned parties hereby agree as follows:
10 Exhibit A: 2130 Payette Drive Excluded Items List and 35 accompanying photographs are herein included by reference in the
11 Purchase and Sale Agreement Dated 1-3-2012.

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47 To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior
48 Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior
49 Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement
50 is made an integral part of the aforementioned Agreement.

51 **BUYER:** _____ **Date:** _____

52 **BUYER:** _____ **Date:** _____

53 **SELLER:** Nancy Gentry Boyd **Date:** Feb 24, 2012

54 **SELLER:** _____ **Date:** _____

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57 **JULY 2011 EDITION** **RE-11 ADDENDUM** Page 1 of 1

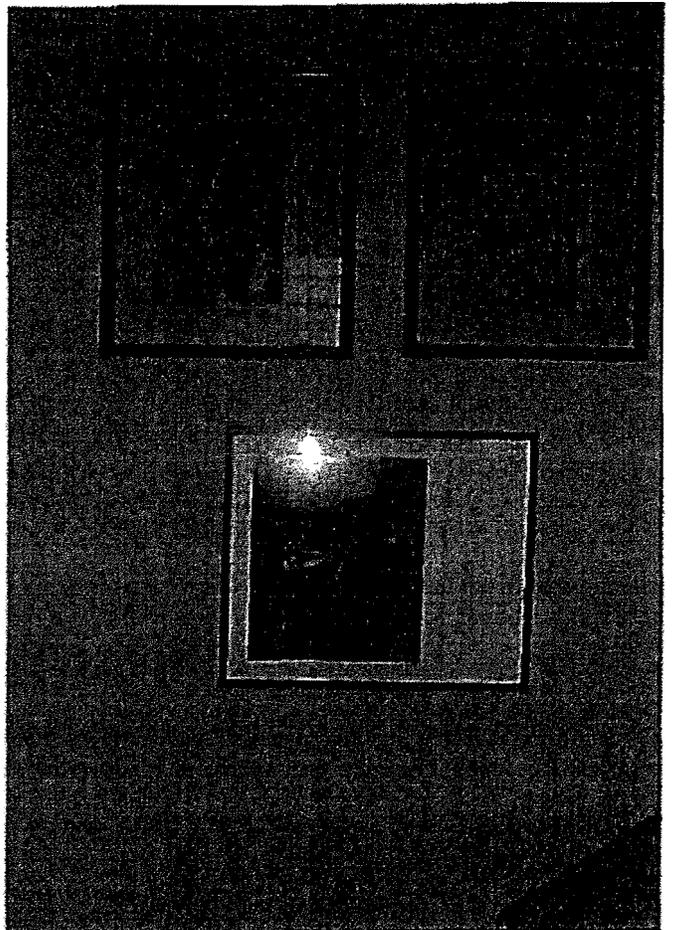
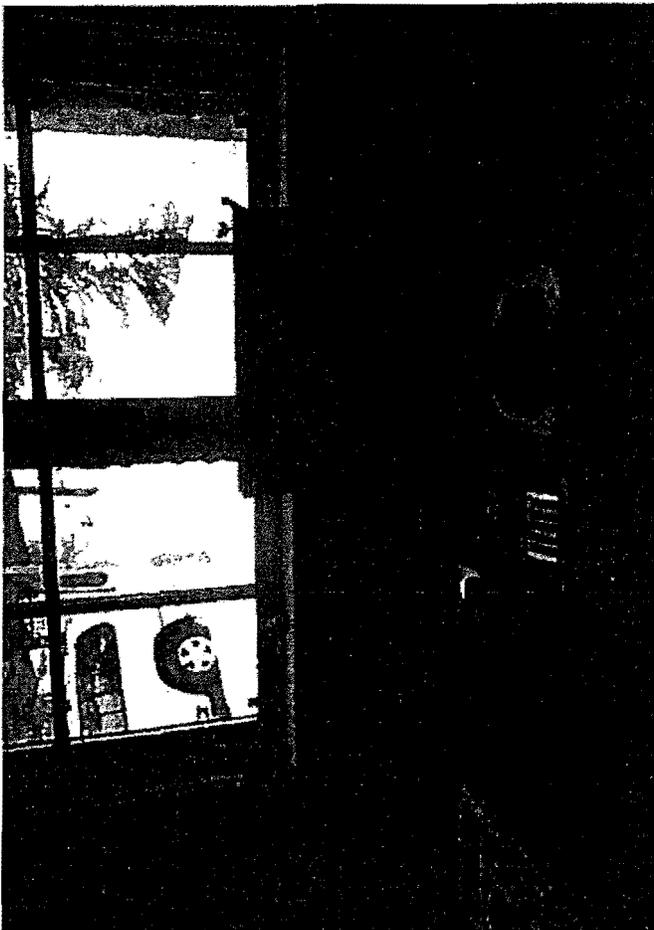
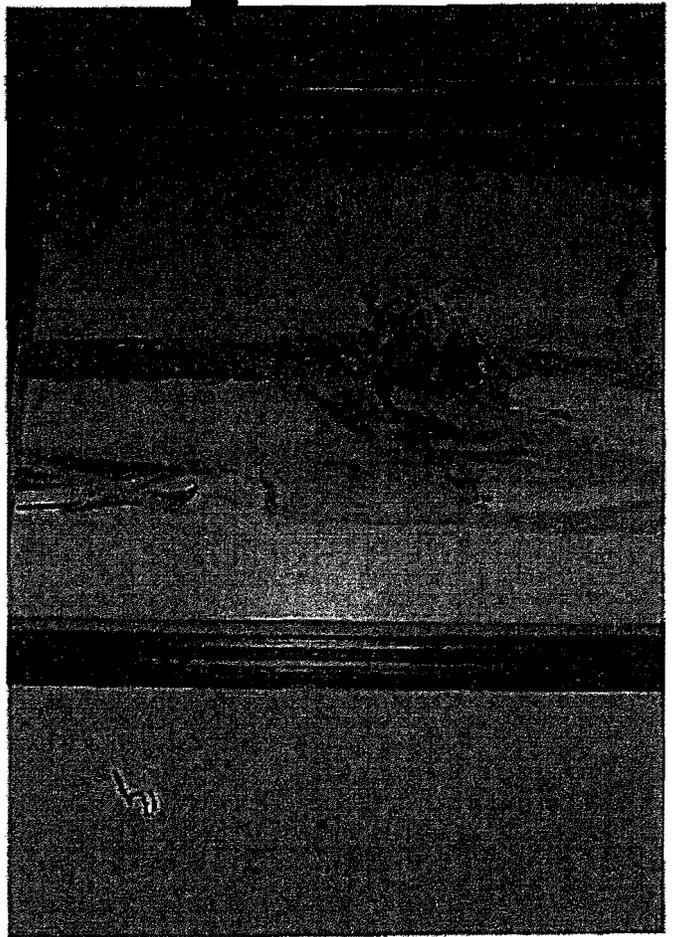
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Exhibit A: 2130 Payette Drive Excluded Items List

1. All pantry items, all clothing, all medicine cabinet items
2. 3 Pictures in den next to hanging mirror
3. Computer and peripherals in den
4. All books, CDs, and DVDs
5. Large painting in front entry hall
6. Bronze statue of deer on living room coffee table
7. Plants and pottery on each side of main deck French doors
8. Pictures above plants on each side of main deck French doors
9. Dining room table
10. Top four shelves of dishes on both right and left built-in cabinets above ~~placemat~~ ^{counter} in dining room. All dishes in center cabinet above ~~placemat~~ ^{counter}
11. Porcelain pig wall hanging in kitchen
12. Tin "Trout" basket on center island
13. Tin flower basket in laundry room
14. Triangle table in Guest Apartment
15. Chair and ottoman in Guest apartment living room
16. Small flat screen TV and peripherals in Guest Apartment bedroom
17. All monogram towel sets
18. Isaac Walton "Coffee Table" chest in upstairs master bedroom
19. 18 patio/deck chairs-light gray
20. 3 patio/deck tables and small deck tables
21. Main level master bedroom TV and peripherals including DVD/DVR player
22. Hunting scene picture in hallway outside main level master
23. 3 hurricane lamps on table behind couch in living room
24. All food and alcohol.
25. Snow Blower on deck
26. Richard Murray framed horse picture in dining room
27. Four Bicycles or less depending on truck space
28. Bicycle helmets
29. Fly fishing poles and fishing gear
30. Two large beige deck umbrellas
31. Oil Painting "Cattle drinking" in living room
32. Copper pot by fireplace.
33. Dog picture above fireplace
- ~~34. Chair and ottoman in Guest apartment~~ (Same as # 15)

Buyer _____ Date _____ Seller Nancy Dinty Boyd Date 2/24/12

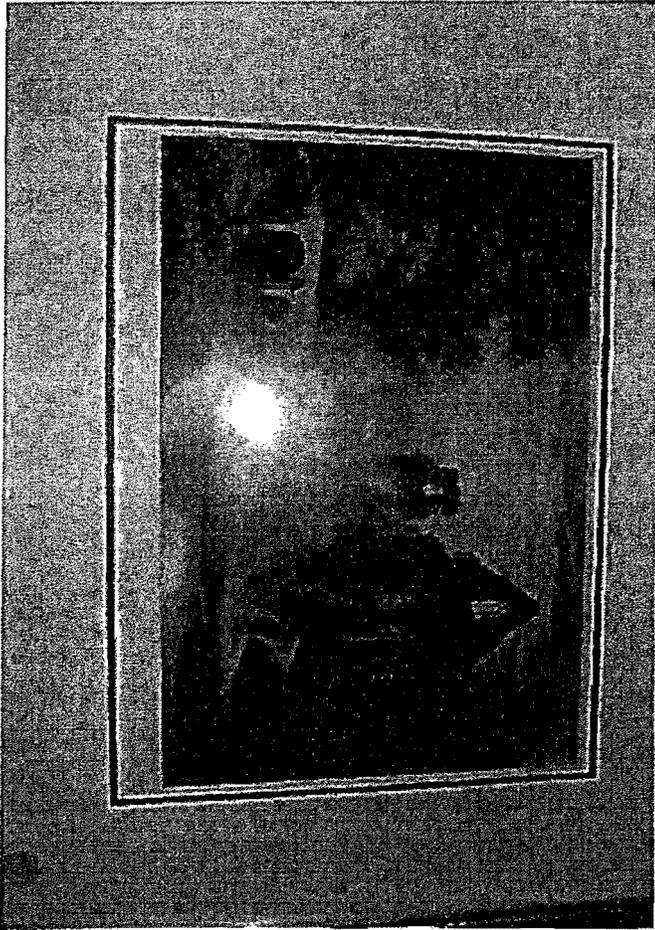
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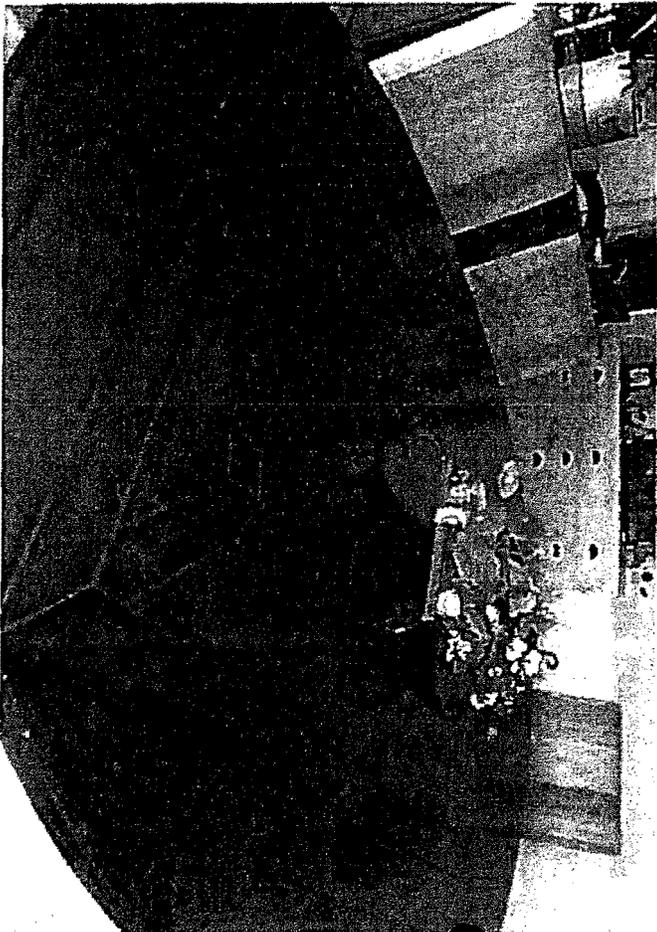
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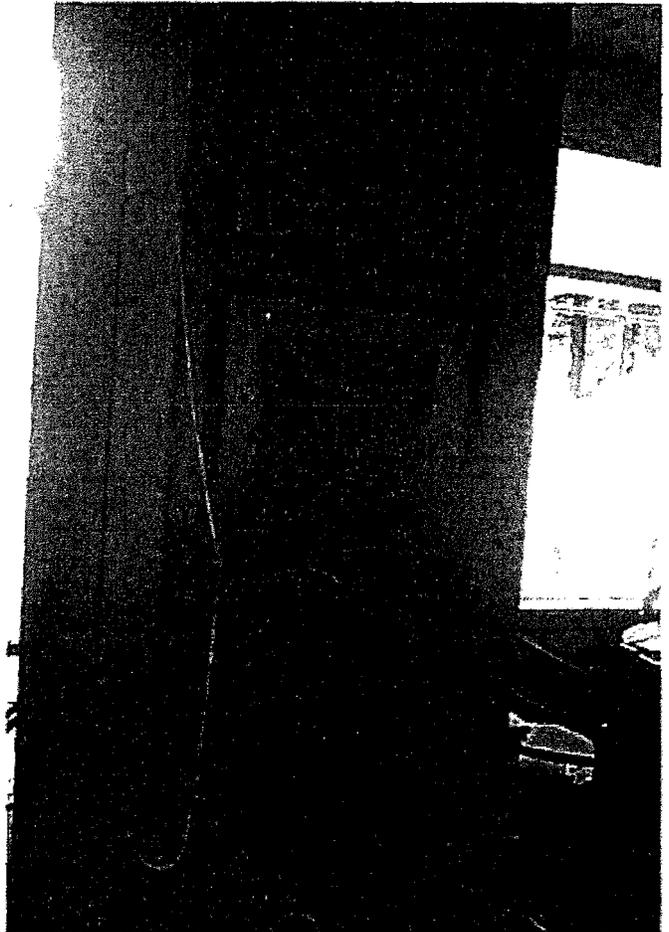
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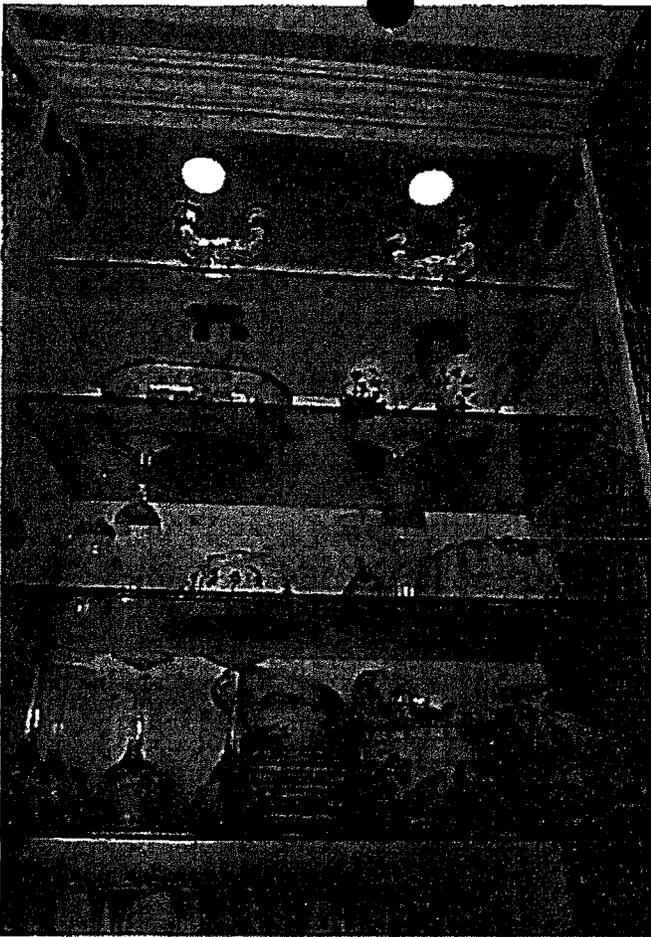
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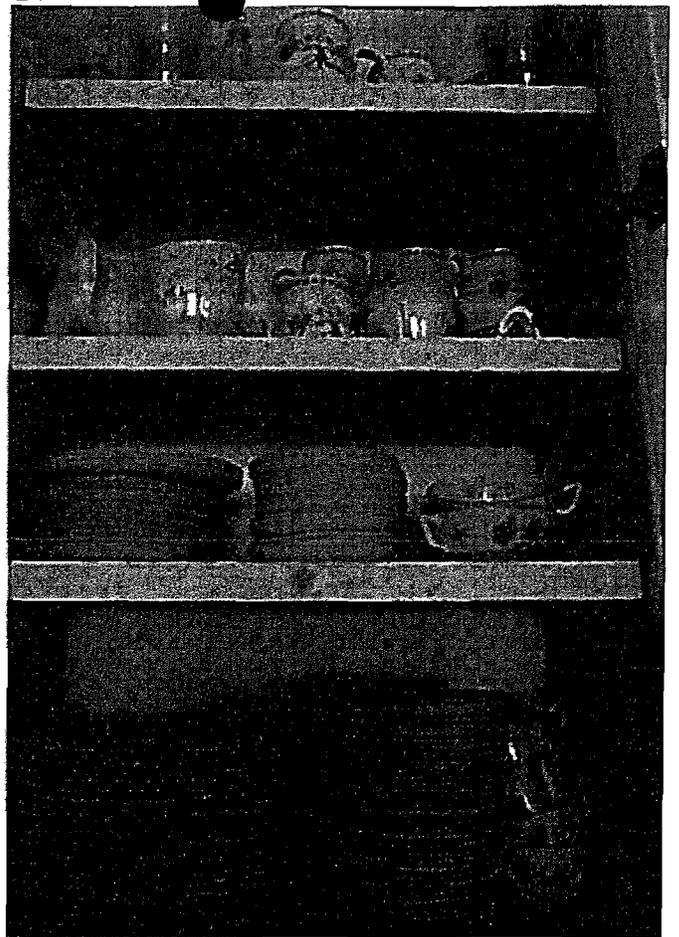
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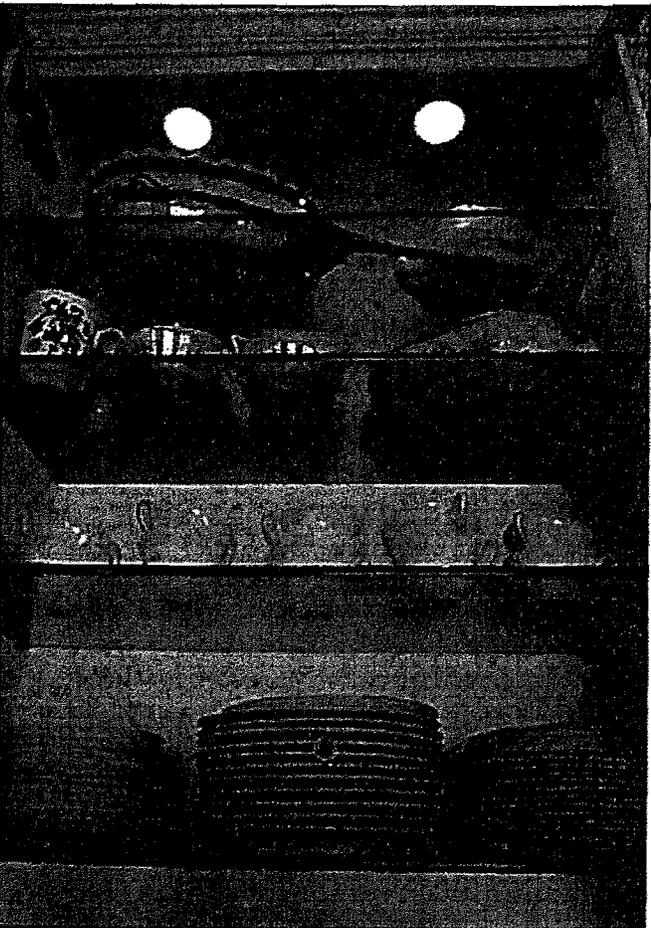
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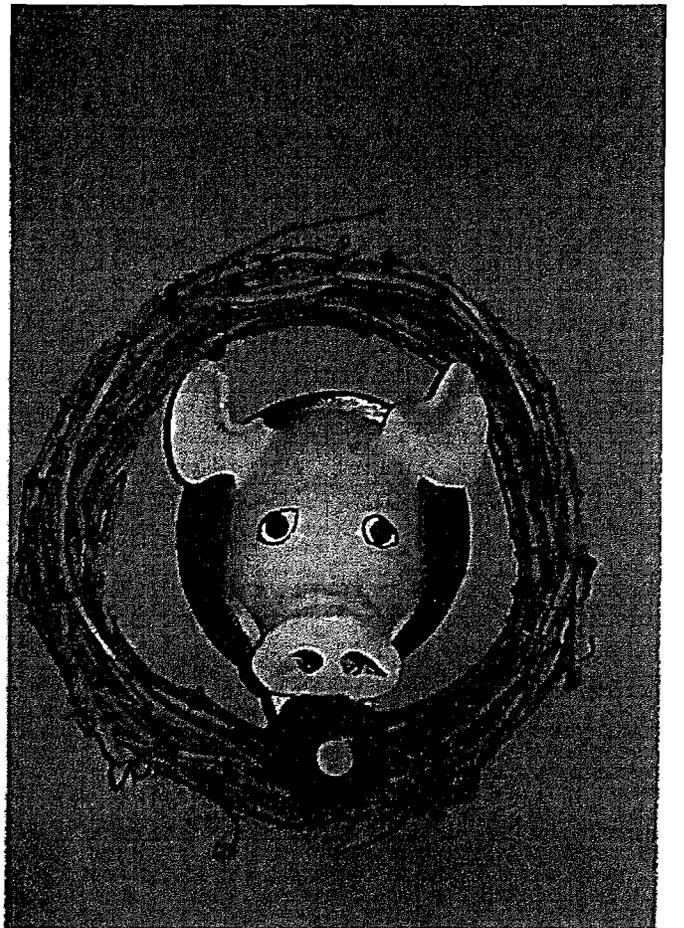
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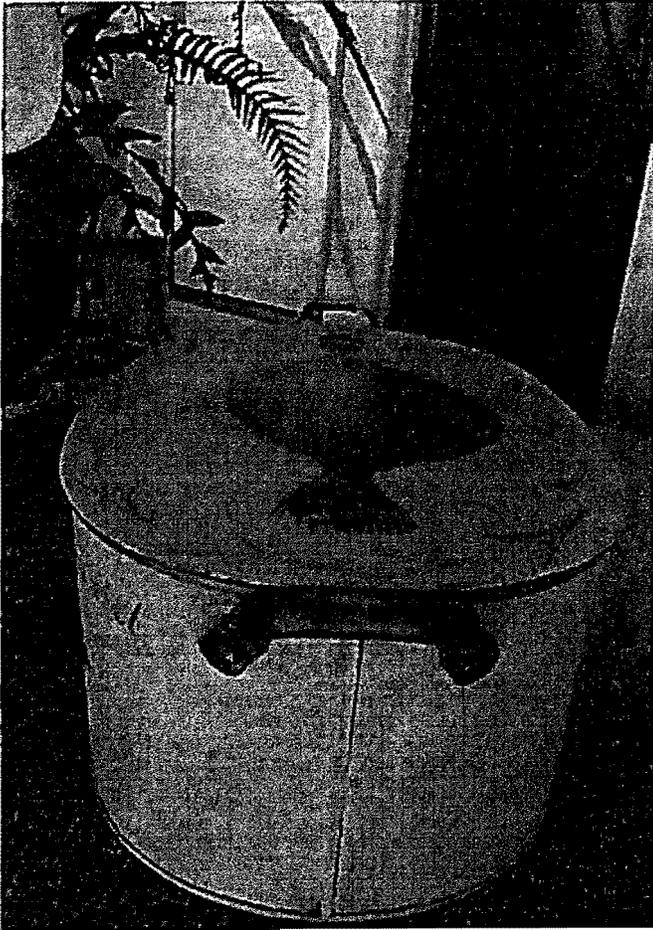
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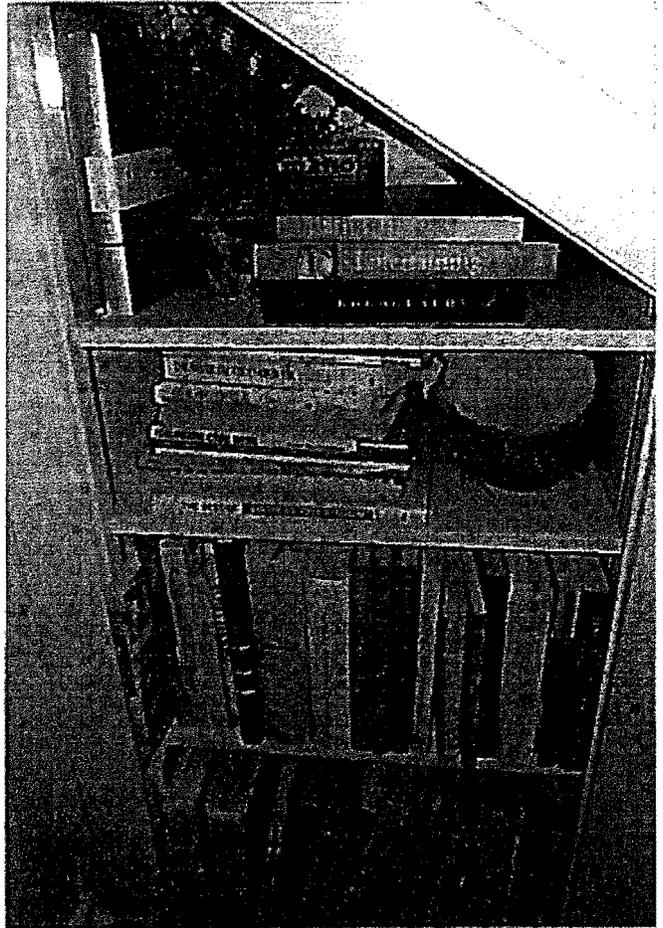
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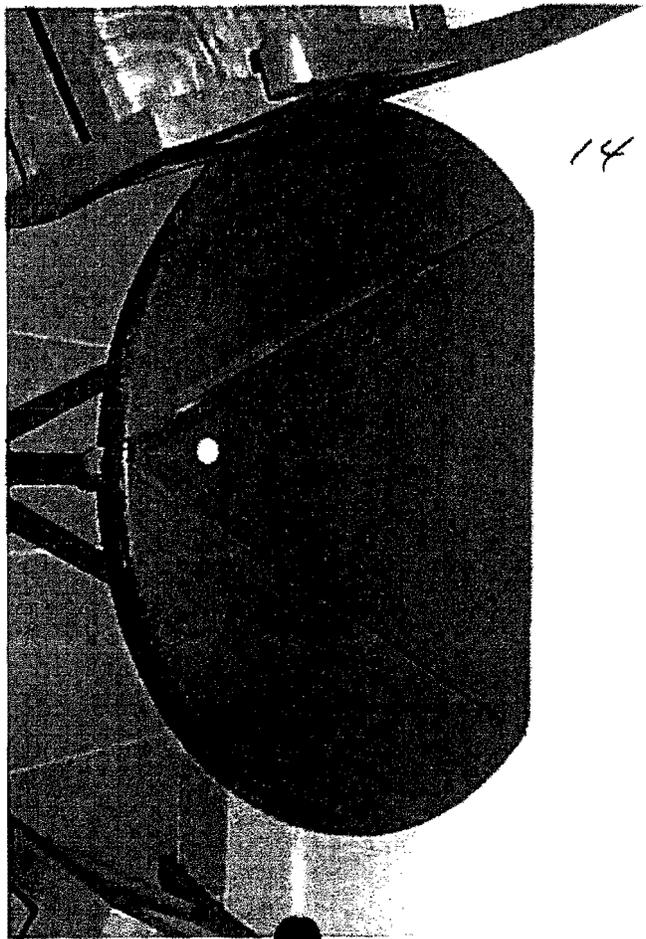
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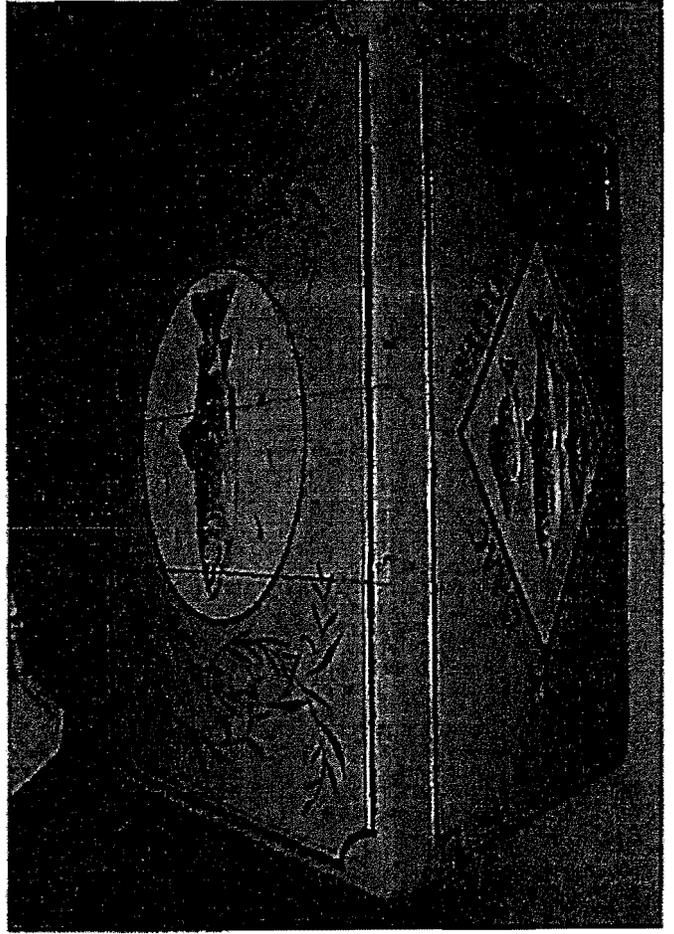


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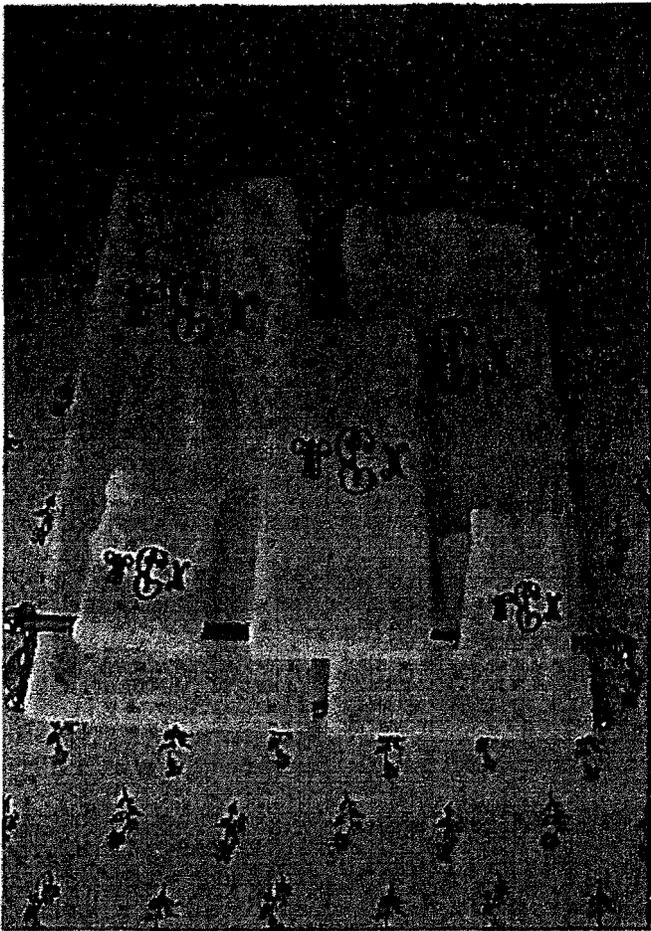




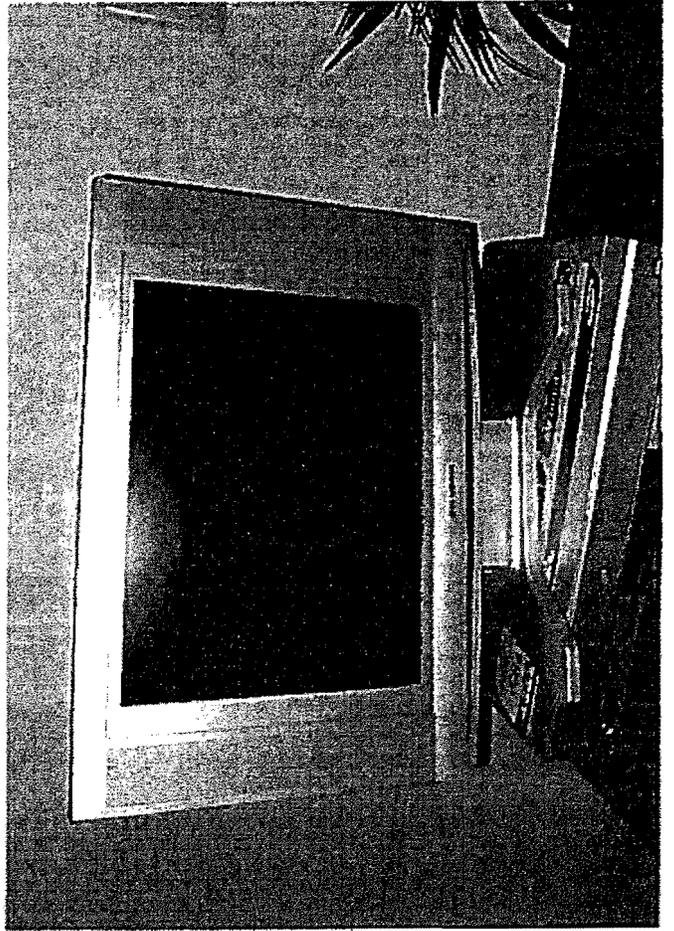
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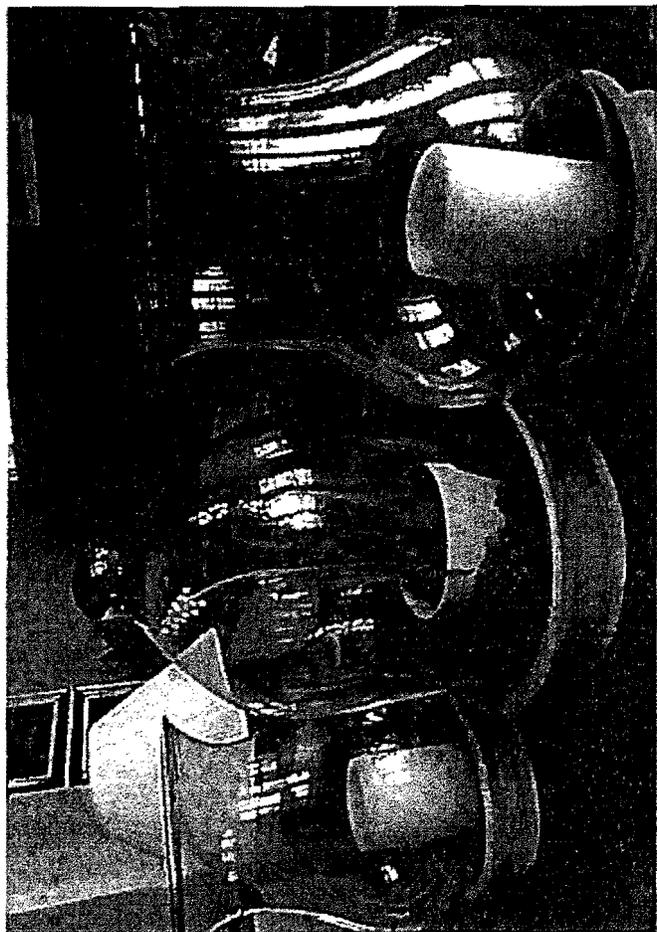
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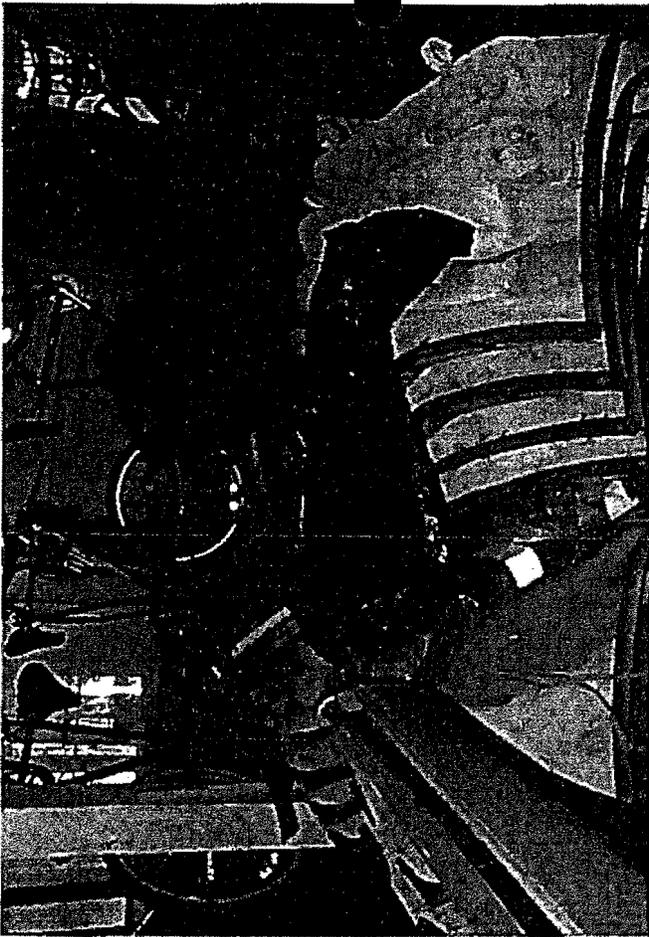


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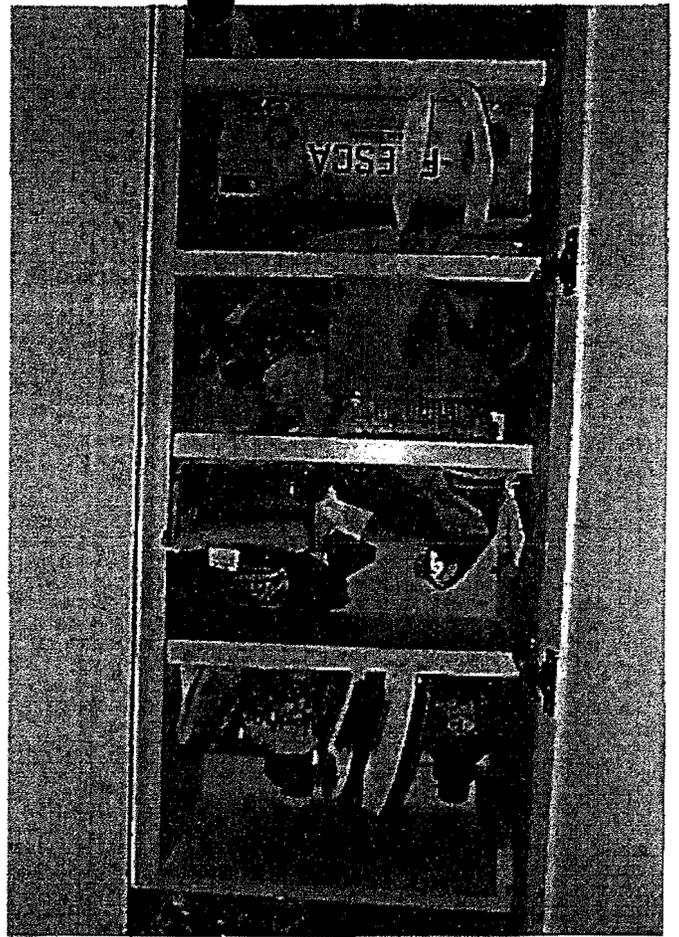
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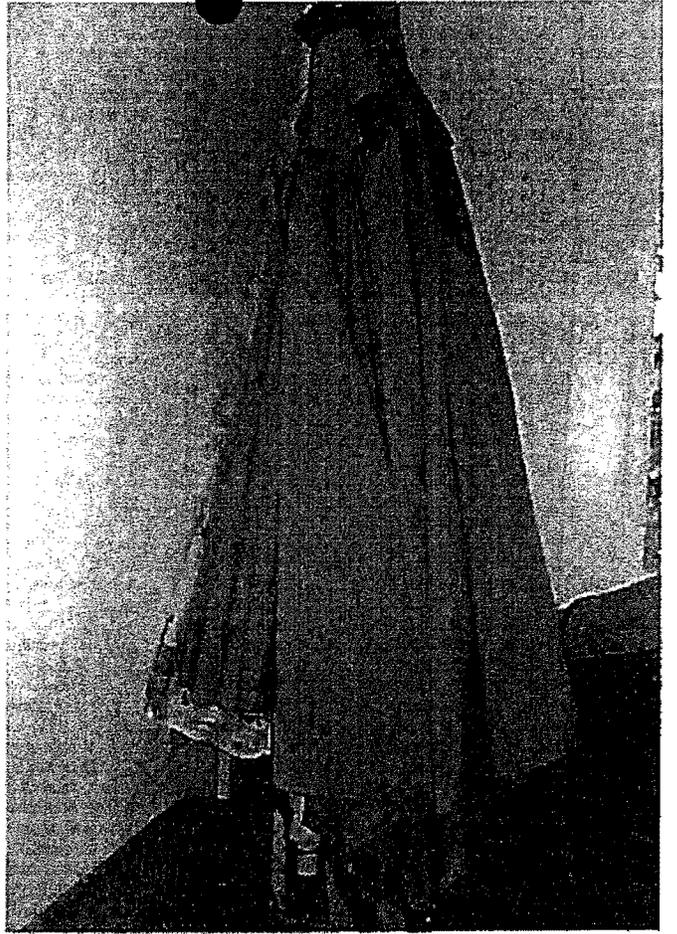
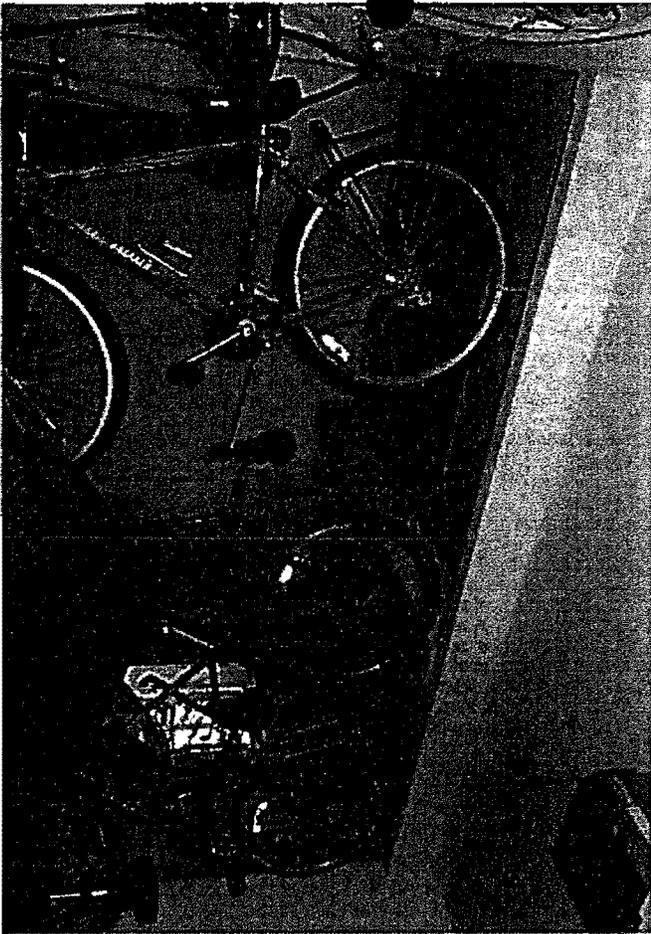
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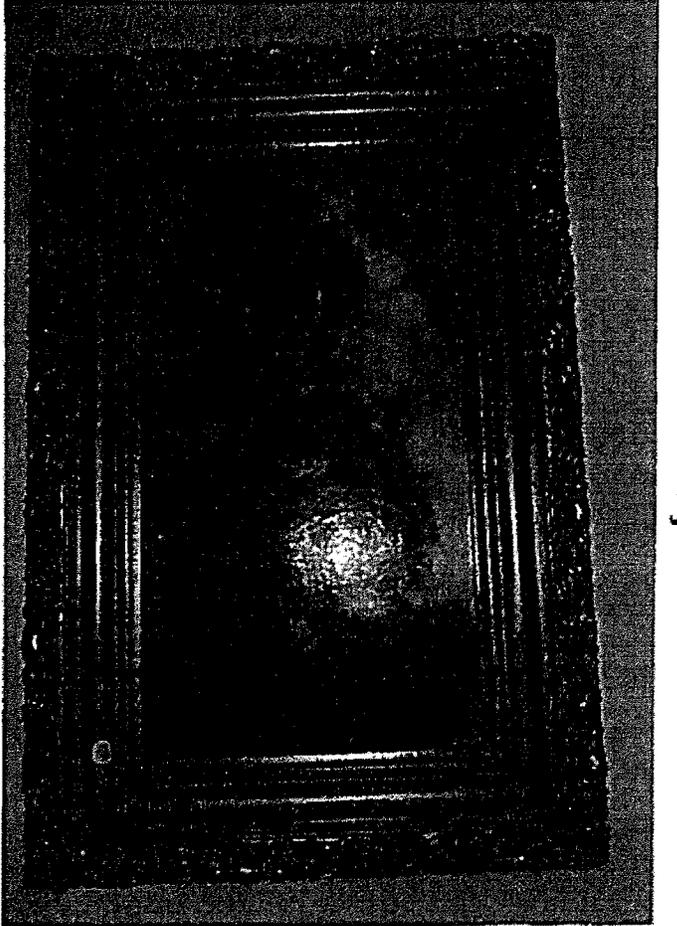
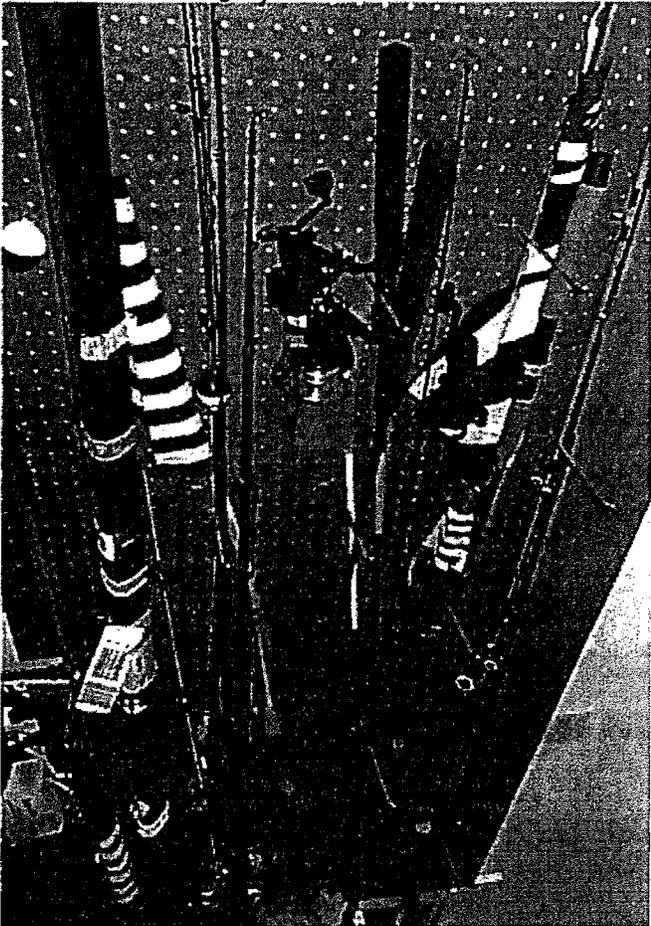
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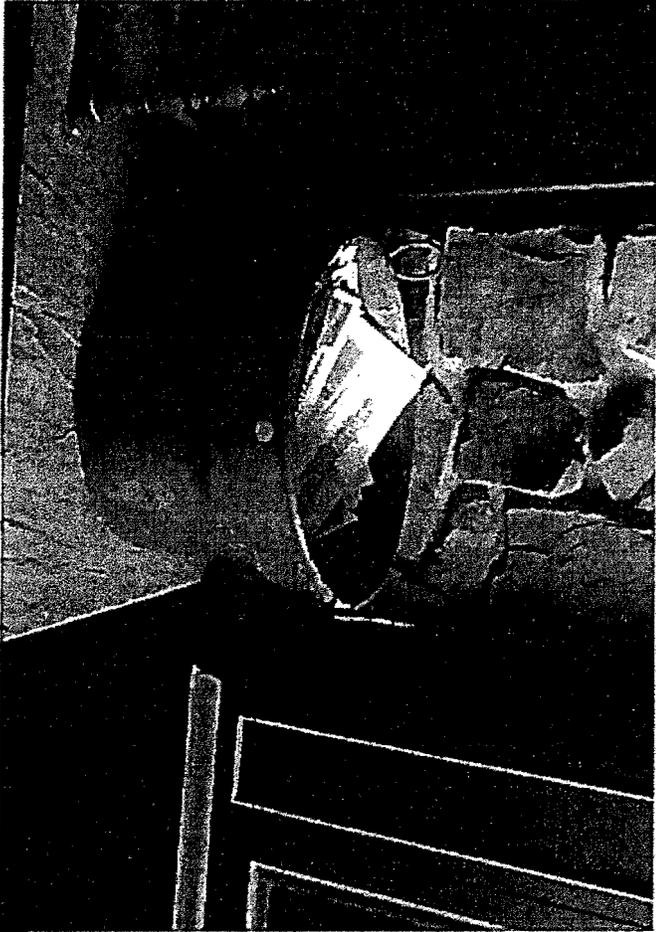


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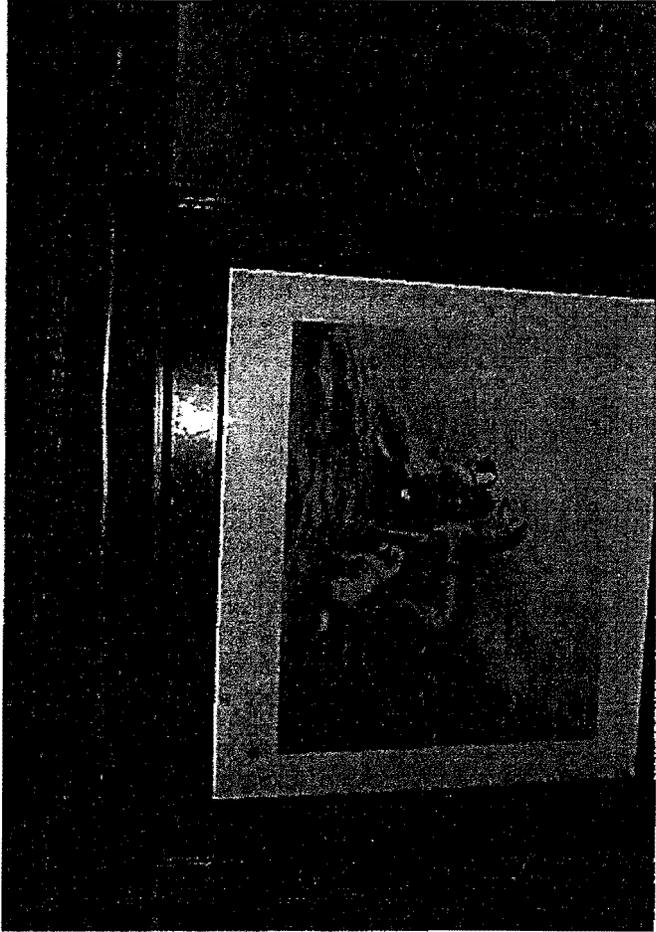


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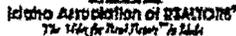


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ADDENDUM # 2

(All addendums shall be numbered sequentially.)

RE-11 ADDENDUM 208-634-5428



THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS, IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



Date: 02/26/2012

This is an ADDENDUM to the Purchase and Sale Agreement Other Addendum # 1. ("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 01/03/2012 ID #12715

ADDRESS: 2130 Fayette Dr. McCall, ID 83638

BUYER(S): Mr. E. Petrus

SELLER(S): Nancy Gentry Boyd

The undersigned parties hereby agree as follows:

1. Per Exhibit A: 2130 Fayette Drive Excluded Items List:

Buyer hereby includes the following in the sale:

- a. Item # 9: Dining Room Table.
- b. Item # 19,20,30: 18 Patio/deck chairs-light gray, 3 Patio/Deck tables and small deck tables, Two large beige deck umbrellas.
- d. Item # 18: Isaac Walton "Coffee Table" chest in upstairs master room.

2. Closing date to be on or before 03/30/2012. This will allow the seller sufficient time to remove the remainder items listed in Exhibit A. 2130 Fayette Drive Excluded Items List, excluding items in lines 18 thru 21 above.

End of Addendum #2.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: Date: 02/26/2012

BUYER: _____ Date: _____

SELLER: _____ Date: _____

SELLER: _____ Date: _____

ADDENDUM # 3 (All addendums shall be numbered sequentially.) JULY 2011 EDITION
Page 1 of 1

RE-11 ADDENDUM

Idaho Association of REALTORS® THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING. Idaho Association of REALTORS®

1 Date: 2-29-2012

2 This is an ADDENDUM to the Purchase and Sale Agreement Other N/A

3 ("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is

4 being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

5

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7 AGREEMENT DATED: 1-3-2012 ID# 12715

8

9 ADDRESS: 2130 Payette Drive, McCall, ID 83638

10

11 BUYER(S): Mr. E. Petrus

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13 SELLER(S): Nancy Gantry Boyd

14 The undersigned parties hereby agree as follows:

15 Terms and conditions set out in seller signed Addendum #1 dated 2-22-2012 and amended in buyer signed Addendum #2

16 dated 2-26-2012 are included in the contract herein by reference and are subject to the following modifications:

17 Due diligence period to begin 2-1-2012.

18 Closing to be on or before April 5, 2012.

19 Seller to have five calendar days from closing and recording to remove excluded items.

20 Buyer or buyer's agent to conduct a final post-closing walk-thru of home five days after closing and provide written acceptance

21 within one business day of the condition of home and confirmation of the removal of all excluded items agreed upon by all

22 parties.

23 Buyer to obtain insurance binder on property effective as of date of closing and recording.

24 Seller to hold harmless the buyer or new owner of any liability not limited to theft, fire, personal injury or any other unforeseen

25 circumstance for a period of five calendar days from date of closing and recording.

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48 To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior

49 Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior

50 Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement

51 is made an integral part of the aforementioned Agreement.

52

53 BUYER: _____ Date: _____

54

55 BUYER: _____ Date: _____

56

57 SELLER: Nancy Gantry Boyd Date: Feb 29, 2012

58

59 SELLER: _____ Date: _____



RE-11 ADDENDUM



Idaho Association of REALTORS®
The 1st in the West™

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

Date: 03/02/2012

This is an ADDENDUM to the Purchase and Sale Agreement Other and Addendum #3
("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 01/03/2012

ID #12715

ADDRESS: 2130 Payette Dr. McCall, ID 83638

BUYER(S): Mr. E. Petrus

SELLER(S): Nancy Gentry Boyd

The undersigned parties hereby agree as follows:

1. Mr. E. Petrus assigns the Purchase & Sale Agreement ID# 12715 and all pertinent documentation associated with this contract unto "Petrus Family Trust dated 5/1/91".
2. Per paragraph 3, lines 27 thru 31, of the Purchase & Sale Agreement, buyer has 7 business days to provide evidence of sufficient funds to close this transaction.
3. Terms and conditions set out in Purchase and Sale Agreement and seller signed Addendum #1 dated 2/22/12 and amended in buyer signed Addendum #2 dated 2/26/12 are included in the contract herein by reference and are subject to the following modifications:
 - a. Due diligence to begin the next business day after this Addendum is executed.
 - b. Closing to be on or before 4/20/2012.
 - c. Seller to have five(5) calendar days from closing to remove excluded items.
 - d. Buyer or Buyers agent to conduct a final post-closing walk-thru of the home five days after closing and provide written acceptance within one business day of the condition of the home and confirmation of the removal of all excluded items agreed upon by all parties.
 - e. Buyer to obtain insurance binder on property effective as of date of closing and recording.
 - f. Seller to hold harmless the buyer or new owner of any liability not limited to theft, fire, personal injury or any other unforeseen circumstance for a period of five calendar days from date of closing and recording.
 - g. Each party to bear their own attorney's fees and costs associated with the Purchase & Sale Agreement and/or with this transaction in any way.
4. All Trust, financial and/or proof of funds information is to be treated as strictly confidential and shall not be shared or disclosed to any third parties and all such information shall be returned to Buyer at closing. End of Addendum # 4.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: _____ Date: 03/02/2012

BUYER: _____ Date: _____

SELLER: _____ Date: _____

SELLER: _____ Date: _____

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ADDENDUM # 4

(All addendums shall be numbered sequentially.)

RE-11 ADDENDUM

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS, IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

03/02/2012

It is an ADDENDUM to the Purchase and Sale Agreement. Addendum means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term).

AGREEMENT DATED: 01/09/2012 ID #12915

ADDRESS: 2130 Bayview Dr. McCall, NC 28638

BUYER(S): Mr. S. Petrus

SELLER(S): Nancy Century Boyd

- we understand parties hereby agree as follows:
1. Mr. S. Petrus, hereinafter the Purchaser & Sale Agreement for 12915 and all pertinent information associated with this contract into Petrus Family Trust dated 5/1/91.
2. Under Paragraph 2, Lines 27 thru 31, of the Purchase & Sale Agreement, Buyer has 7 Business days to provide evidence of sufficient funds to close this transaction.
Terms and conditions set out in Purchase and Sale Agreement and Waiver signed Addendum #1 dated 2/29/12 are included in Buyer signed Addendum #2 dated 2/29/12 are included in the contract.
Buyer by accepting and agreeing not to the following modifications:
Buyer to close the next business day after this Addendum is executed.
Closing to be on or before 4/20/2012.
Seller to have 5(5) calendar days from closing to remove enclosing items.
Buyer or Buyer agent to conduct a final post-closing walk-thru of the home five days after closing and provide written acceptance within one business day of the completion of the home and completion of the removal of all excluded items agreed upon by all parties.
Buyer to obtain insurance binder on property effective as of date of closing and recording.
Seller to hold harmless the Buyer or new owner of any liability not limited to theft, fire, mechanical failure or any other unforeseen circumstance for a period of five calendar days from date of closing and recording.
Each party to bear their own attorney's fees and costs associated with the Purchase & Sale Agreement and/or with this transaction in any way.
All terms, financial and/or asset or needs information is to be treated as strictly confidential and shall not be shared or disclosed to any third parties and all such information shall be returned to Buyer at closing. End of Addendum # 4.

The phrase "condition of the home" used in line 30 means "clean and fixable". Seller may share trust financial and proof of funds information with seller's attorney.

Handwritten signatures and initials including 'ASCO' and '5/1/91'.

In the event the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain in effect. Upon its execution by both parties, this agreement shall be an integral part of the aforementioned Agreement.

BUYER: [Signature] Date: 02/02/2012
BUYER: P+S (6) Trustee of Petrus Family Trust dated 5/1/91 Date: 5/1/91
SELLER: Nancy Century Boyd Date: 3/5/12

BUYER: Buyer, AS CO-Trustee of the Petrus Family Trust dated 5/1/91 Date: 5/1/91

ADDENDUM # 4

(All addendums shall be numbered sequentially.)

RE-11 ADDENDUM



THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



date: 03/02/2012

This is an ADDENDUM to the Purchase and Sale Agreement Other and Addendum #3. 'Addendum' means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term).

AGREEMENT DATED: 01/03/2012 ID #12715

ADDRESS: 2130 Payette Dr. McCall, ID 83638

BUYER(S): Mr. E. Petrus

SELLER(S): Nancy Gentry Boyd

The undersigned parties hereby agree as follows:

1. Mr. E. Petrus assigns the Purchase & Sale Agreement ID# 12715 and all pertinent documentation associated with this contract unto "Petrus Family Trust dated 5/1/91".
2. Per paragraph 3, lines 27 thru 31, of the Purchase & Sale Agreement, buyer has 7 business days to provide evidence of sufficient funds to close this transaction.
3. Terms and conditions set out in Purchase and Sale Agreement and seller signed Addendum #1 dated 2/22/12 and amended in buyer signed Addendum #2 dated 2/26/12 are included in the contract herein by reference and are subject to the following modifications:
 - a. Due diligence to begin the next business day after this Addendum is executed.
 - b. Closing to be on or before 4/20/2012.
 - c. Seller to have five(5) calendar days from closing to remove excluded items.
 - d. Buyer or Buyers agent to conduct a final post-closing walk-thru of the home five days after closing and provide written acceptance within one business day of the condition of the home and confirmation of the removal of all excluded items agreed upon by all parties.
 - e. Buyer to obtain insurance binder on property effective as of date of closing and recording.
 - f. Seller to hold harmless the buyer or new owner of any liability not limited to theft, fire, personal injury or any other unforeseen circumstance for a period of five calendar days from date of closing and recording.
 - g. Each party to bear their own attorney's fees and costs associated with the Purchase & Sale Agreement and/or with this transaction in any way.
4. All Trust, financial and/or proof of funds information is to be treated as strictly confidential and shall not be shared or disclosed to any third parties and all such information shall be returned to Buyer at closing. End of Addendum # 4.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: [Signature] Date: 03/02/2012

BUYER: As Trustee of Petrus Family Trust dated 5/1/91 Date: 5/1/91

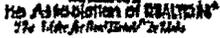
SELLER: _____ Date: _____

SELLER: _____ Date: _____

ADDENDUM # 4

(All addendums shall be numbered sequentially.)

RE-11 ADDENDUM



THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



03/02/2012

is an ADDENDUM to the Purchase and Sale Agreement Other and Addendum #3. "Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is used to change, correct or revise the agreement (such as modification, addition or deletion of a term).

AGREEMENT DATED: 01/03/2012 ID #12715

ADDRESS: 2150 Payette Dr, McCall, ID 83638

SELLER(S): Mr. E. Petrus

BUYER(S): Nancy Gentry Boyd

The undersigned parties hereby agree as follows:

Mr. E. Petrus assigns the Purchase & Sale Agreement ID# 12715 and all pertinent documentation associated with this contract unto "Petrus Family Trust dated 5/1/91". Per paragraph 3, lines 27 thru 31, of the Purchase & Sale Agreement, buyer has 7 business days to provide evidence of sufficient funds to close this transaction. Terms and conditions set out in Purchase and Sale Agreement and seller signed Addendum #1 dated 2/22/12 and amended in buyer signed Addendum #2 dated 2/25/12 are included in the contract and by reference and are subject to the following modifications: Due diligence to begin the next business day after this Addendum is executed. Closing to be on or before 4/20/2012. Seller to have five(5) calendar days from closing to remove excluded items. Buyer or Buyer's agent to conduct a final post-closing walk-thru of the home five days after closing and provide written acceptance within one business day of the condition of the home and confirmation of the removal of all excluded items agreed upon by all parties. Buyer to obtain insurance binder on property effective as of date of closing and recording. Seller to hold harmless the buyer or new owner of any liability not limited to theft, fire, personal injury or any other unforeseen circumstance for a period of five calendar days from date of closing and recording. Each party to bear their own attorney's fees and costs associated with the Purchase & Sale Agreement and/or with this transaction in any way. All Trust, Financial and/or proof of funds information is to be treated as strictly confidential and shall not be shared or disclosed to any third parties and all such information shall be returned to Buyer at closing. End of Addendum # 4.

The phrase "condition of the home" used in Line 3D means "clean and livable". Seller may share trust, financial and proof of funds information with seller's attorney.

Seller: [Signature] Buyer: [Signature]

In the event the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement shall be an integral part of the aforementioned Agreement.

SELLER: [Signature] Date: 03/02/2012

BUYER: AS Co-Trustee of Petrus Family Trust dated 5/1/91. Date: 5/1/91

SELLER: _____ Date: _____

BUYER: _____ Date: _____

02/29/2012 18:59 7602302153

PETRLS

PAGE 01/05

ADDENDUM # 4

(All addendums shall be numbered sequentially.)

Page 1 of 1

RE-11 ADDENDUM

State Association of REALTORS

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



Date: 03/02/2012

This is an ADDENDUM to the Purchase and Sale Agreement Other and Addendum #2. Addendum means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term).

AGREEMENT DATED: 01/09/2012 ID #12713

ADDRESS: 2130 Savetta Dr, McCall, ID 83638

BUYER(S): Mr. S. Petrus

SELLER(S): Nancy Gentry Boyd

- The undersigned parties hereby agree as follows:
- Mr. S. Petrus assigns the Purchase & Sale Agreement ID# 12713 and all pertinent information associated with this contract unto Petrus Family Trust dated 5/1/91.
- Per paragraph 2, lines 27 thru 31, of the Purchase & Sale Agreement, Buyer has 7 business days to provide evidence of sufficient funds to close this transaction.
- Terms and conditions set out in Purchase and Sale Agreement and Seller signed Addendum #1 dated 2/22/12 and amended in Buyer signed Addendum #2 dated 2/20/12 are included in the contract and are subject to the following modifications:
- Buyer to begin the walk business day after this Addendum is executed, closing to be on or before 4/20/2012.
- Seller to have five (5) calendar days from closing to remove excluded items.
- Buyer or Buyer's agent to conduct a final post-closing walk-thru of the home five days after closing and provide written acceptance within one business day of the condition of the home and explanation of the removal of all excluded items agreed upon by all parties.
- Buyer to obtain insurance binder on property effective as of date of closing and recording.
- Seller to hold harmless the buyer or new owner of any liability not limited to theft, fire, personal injury or any other unforeseen circumstance for a period of five calendar days from date of closing and recording.
- Each party to bear their own attorney's fees and costs associated with the Purchase & Sale Agreement and/or with this transaction in any way.
- All Trust, Financial and/or proof of funds information is to be treated as strictly confidential and shall not be shared or disclosed to any third parties and all such information shall be returned to Buyer at closing. End of Addendum # 4.

The phrase "condition of the home" used in Line 3D means "clean and empty". Seller may share trust financial and proof of funds information with seller's attorney.

Handwritten signatures and initials: BVP, Seller, Buyer, Nancy Gentry Boyd.

In the event the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement made an integral part of the aforementioned Agreement.

BUYER: *[Signature]* Date: 02/02/2012

BUYER: A.S. Trustee of Petrus Family Trust dated 5/1/91 Date: 5/1/91

SELLER: Nancy Gentry Boyd Date: 3/5/12

SELLER: _____ Date: _____



ADDENDUM # 5

(All addendums shall be numbered sequentially.)

RE-11 ADDENDUM



Idaho Association of REALTORS®
The Best Real Estate in Idaho

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

Date: 03/18/2012

This is an ADDENDUM to the Purchase and Sale Agreement Other
(*Addendum* means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 01/03/2012

ID # 12715

ADDRESS: 2130 Payette Dr. McCall, ID 83638

BUYER(S): Petrus Family Trust Dated 5/1/91

SELLER(S): Nancy Gentry Boyd

The undersigned parties hereby agree as follows:

1. Per letter dated March 16, 2012 from "A1 Heating & Air Conditioning", see attached Exhibit #1, the three sides of the air conditioning enclosure must be removed.
2. The inspection of the air condition units will be conducted once the three sides have been removed, see exhibit #1
3. Exhibit # 2, Inspection Report:
 - a. Page 11, Paragraph 4.1, Upstairs master bedroom inside of the right hand side of the door entrance, the drywall needs to be repaired by a qualified specialist and painted.
 - b. Paragraph 4.1, the entrance door into the apartment bedroom, right hand side, the drywall has separated completely from the post allowing daylight to shine through. This needs to be repaired by a qualified specialist and painted.
 - c. Page 18 & 29, Paragraph 6.4, The propane line needs to be capped off properly.
 - d. Page 14 & 28, Paragraph 5.0, buyer hereby waives ant issue.
4. Mr. Scott Corkill, Department of Lands, is issuing a letter to the Hazards regarding the encroachment permit for their water line. Encroachment permit may need to be rescinded if not properly permitted. Waiting response to Mr. Corkill's letter.
5. Interior of home has four areas where pictures were removed and not listed on the exclusion list that was not included per Exhibit # A of addendum #1 & #2. Buyer requests items be returned or identified.

End of Addendum # 5

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: [Signature] as CO-TRUSTEE of Petrus Family Trust 5/1/91 Date: 03/18/2012

BUYER: _____ Date: _____

SELLER: _____ Date: _____

SELLER: _____ Date: _____

Exhibit # 1

Kevin Batchelor

From: Michael Wood [michael.mccallrealtor@gmail.com]
Sent: Friday, March 16, 2012 1:12 PM
To: Kevin Batchelor
Subject: Fwd: 2130 Payette Drive

Begin forwarded message:

From: "A1 Heat" <A1heat@frontiernet.net>
Date: March 16, 2012 7:50:42 AM MDT
To: <Michael.wood@mccallrealestate.com>
Subject: 2130 Payette Drive

Hello Michael,

The heat pumps at the residence have a cover built around them. The cover is used for noise dampening. With the current cover the heat pumps are not accessible. The front and sides need to be removed not for access, but also for the heat pumps to run correctly and efficiently. The roof needs to also be four feet above the top of the heat pumps to allow proper ventilation of units while they are running.

Dan Lish

Valley County Service Tech
A-1 Heating & Air Conditioning
155 Commerce St
McCall, Idaho 83638
208.634.1586 fax 208.634.4715
a1heat@frontiernet.net

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

This message may contain confidential or proprietary information intended only for the use of the

addressee(s) named above or may contain information that is legally privileged. If you are not the intended addressee, or the person responsible for delivering it to the intended addressee, you are hereby notified that reading, disseminating, distributing or copying this message is strictly prohibited. If you have received this message by mistake, please immediately notify me by replying to the message and delete the original message and any copies immediately thereafter.

Thank you.

Exhibit # 2



Inspection Report

Ed Petrus

Property Address:
2130 Payette Dr.
McCall ID 83638



2130 Payette Dr.



2130 Payette Dr.

Homecraft Home Inspections

Todd McKenna
P.O. Box 1264, McCall ID., 83638

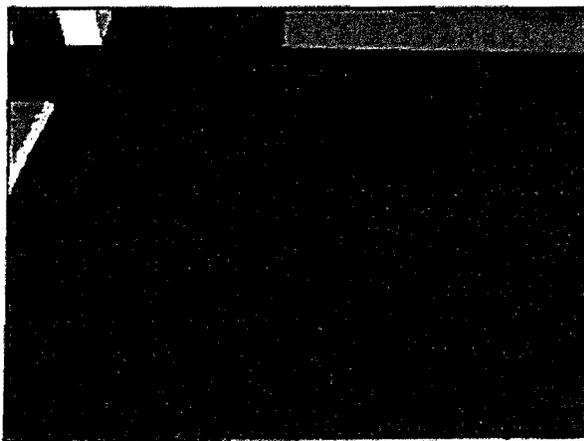


Raised panel
 Wood
 Window Types:
 Thermal/Insulated
 Casement
 Window Manufacturer:
 WEATHER SHIELD
 Cabinetry:
 Wood
 Countertop:
 Tile
 Granite
 Marble

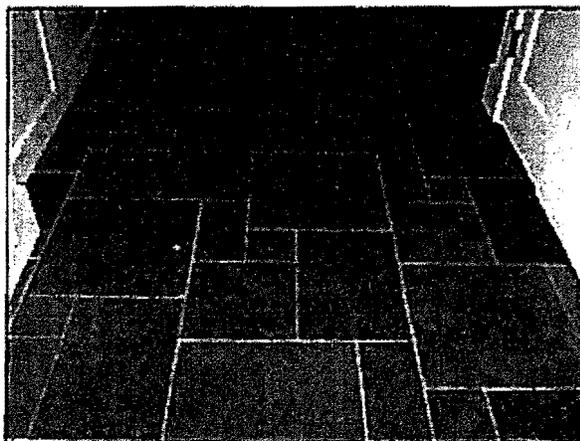
Comments:

4.1 There are some settling cracks throughout the home, which is typical for the age of the home. Some of the cracks though are large enough that they should be addressed, such as the crack in the upstairs master bedroom. Also the doorway leading to the apartment bedroom has had the drywall pull completely away from the post allowing daylight to shine through, that will need to be addressed. All in all the drywall is in very good shape beyond the typical settling cracks.

4.2 .



4.2 Picture 1 Hardwood flooring

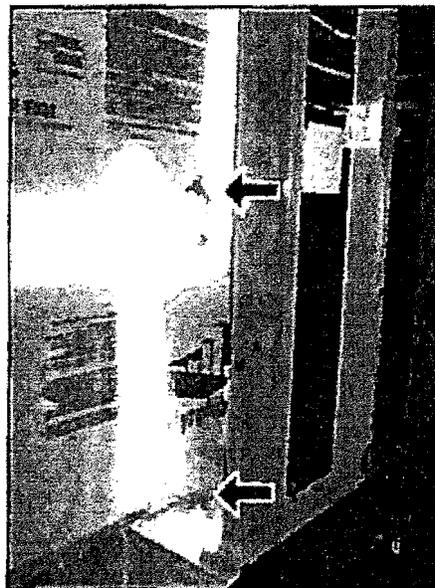


4.2 Picture 2 Tile flooring

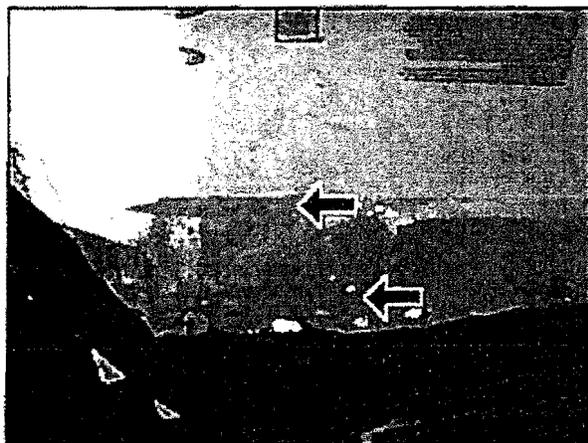
5.0 There are signs of ant intrusion that should be addressed(Picture 1-3). I would recommend a certified exterminator be contacted. There is also some signs of spring run off in the crawlspace(Picture 4,5), which is typical for the area. It should be monitored each spring to see if a sump needs to be installed.



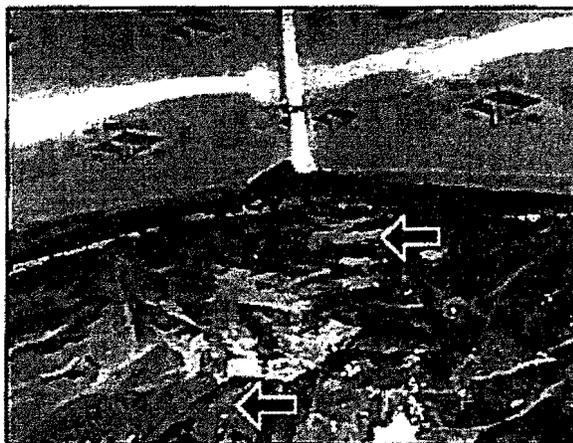
5.0 Picture 1 Ant signs



5.0 Picture 2 Ant signs



5.0 Picture 3 Ant signs

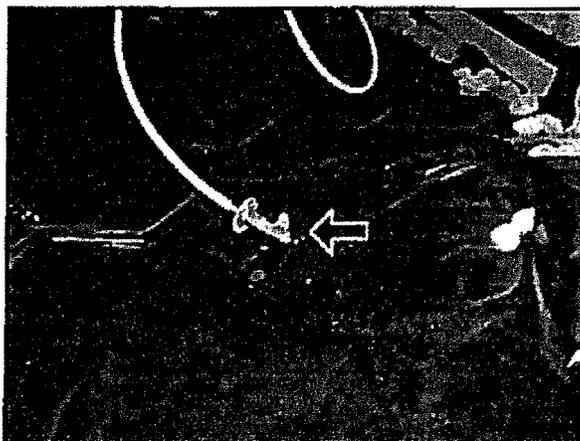


5.0 Picture 4 Past moisture signs



5.0 Picture 5 Water signs

6.4 There is what appears to be a line for an exterior gas BBQ that is laying in the crawlspace. It should be capped off properly.



6.4 Picture 1 Needs proper cap

6.5 Located on the side of the garage.



6.5 Picture 1 Propane shut off

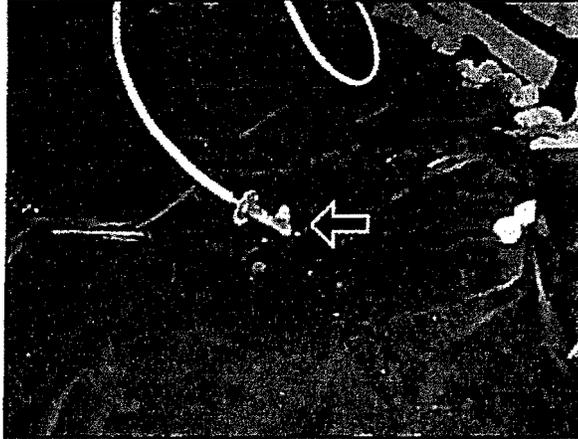
The plumbing in the home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. Washing machine drain line for example cannot be checked for leaks or the ability to handle the volume during drain cycle. Older homes with galvanized supply lines or cast iron drain lines can be obstructed and barely working during an inspection but then fails under heavy use. If the water is turned off or not used for periods of time (like a vacant home waiting for closing) rust or deposits within the pipes can further clog the piping system. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

6. Plumbing System

6.4 FUEL STORAGE AND DISTRIBUTION SYSTEMS (Interior fuel storage, piping, venting, supports, leaks)

Repair or Replace

There is what appears to be a line for an exterior gas BBQ that is laying in the crawlspace. It should be capped off properly.



6.4 Picture 1 Needs proper cap

Home inspectors are not required to report on the following: Life expectancy of any component or system; The causes of the need for a repair; The methods, materials, and costs of corrections; The suitability of the property for any specialized use; Compliance or non-compliance with codes, ordinances, statutes, regulatory requirements or restrictions; The market value of the property or its marketability; The advisability or inadvisability of purchase of the property; Any component or system that was not observed; The presence or absence of pests such as wood damaging organisms, rodents, or insects; or Cosmetic items, underground items, or items not permanently installed. Home inspectors are not required to: Offer warranties or guarantees of any kind; Calculate the strength, adequacy, or efficiency of any system or component; Enter any area or perform any procedure that may damage the property or its components or be dangerous to the home inspector or other persons; Operate any system or component that is shut down or otherwise inoperable; Operate any system or component that does not respond to normal operating controls; Disturb insulation, move personal items, panels, furniture, equipment, plant life, soil, snow, ice, or debris that obstructs access or visibility; Determine the presence or absence of any suspected adverse environmental condition or hazardous substance, including but not limited to mold, toxins, carcinogens, noise, contaminants in the building or in soil, water, and air; Determine the effectiveness of any system installed to control or remove suspected hazardous substances; Predict future condition, including but not limited to failure of components; Since this report is provided for the specific benefit of the customer(s), secondary readers of this information should hire a licensed inspector to perform an inspection to meet their specific needs and to obtain current information concerning this property.

Prepared Using HomeGauge <http://www.HomeGauge.com> : Licensed To Homecraft Home Inspections

ADDENDUM # 5 (All addendums shall be numbered sequentially.)

RE-11 ADDENDUM

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

JULY 2011 EDITION Page 1 of 1

Date: 03/18/2012

This is an ADDENDUM to the Purchase and Sale Agreement Other ("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 03/02/2012

ID #12715

ADDRESS: 2130 PAYETTE DR, McCall, ID 83432

BUYER(S):

SELLER(S): Nancy Gentry Boyd

The undersigned parties hereby agree as follows:

1. Per letter dated March 16, 2012 from "AI Heating & Air Conditioning", see attached exhibit #1, the north side of the air conditioning unit must be removed.

2. The installation of the air conditioning unit will be completed with the three sides have been removed, see exhibit #1.

3. Exhibit # 2, Inspection Report:

a. Page 11, Paragraph 4.1, "Replace master bedroom inside of the right hand side of the door entrance. The drywall needs to be repaired by a qualified specialist and painted."

b. Paragraph 4.2, "The entrance door into the apartment bedroom, right hand side, has a crack that has separated completely from the wall allowing daylight to shine through. This needs to be repaired by a qualified specialist and painted."

c. Page 13 & 15, Paragraph 5.4, "The propane line needs to be capped off properly."

d. Page 14 & 28, Paragraph 5.5, Buyer hereby waives ant issues.

4. Mr. Scott Corhill, Department of Lands, is issuing a letter to the Messrs regarding the encroachment permit for their water line. Encroachment permit may need to be reviewed or not properly permitted. Waiting response to Mr. Corhill's letter.

5. Interior of home has four areas where pictures were removed and not listed on the exclusion list that was not included per exhibit # 1 of addendum #1 & #2. Buyer requests items be returned or identified.

End of Addendum #5

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: *[Signature]* as COPIE of Peter's Family *[Signature]* Date: 03/18/2012

BUYER: _____ Date: _____

SELLER: *Nancy Gentry Boyd* Date: *April 2, 2012*

SELLER: _____ Date: _____

Susan Ulrich

From: Susan Ulrich [susanulrich@remax.net]
Sent: Friday, March 30, 2012 4:37 PM
To: 'Michael Wood'
Cc: 'kevinb@remax.net'
Subject: 2130 Payette Dr.
Attachments: Petrus-Boyd #6.pdf

Hello Michael,

I have attached Addendum #6 as per Mr. Petrus's email attached. He is traveling and unable to sign it today but I wanted to get it to you asap as were his wishes.

Kind Regards,
Susan

VIEW AREA LISTINGS
www.mccallresortrealty.com

Susan Ulrich 208.630.4242
Assoc. Broker, GRI, CRS, RSPS, CDPE, ABR, SFR

RE/MAX Resort Realty
1101 E. Lake Street
McCall, ID 83638
Office: 208.634.5400 Fax: 208.634.5428



ADDENDUM # 6

(All addendums shall be numbered sequentially.)

RE-11 ADDENDUM



Idaho Association of REALTORS®
The Trust for Real Estate in Idaho

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

Date: 03/30/2012

This is an ADDENDUM to the Purchase and Sale Agreement Other
("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: 01/03/2012 ID # 12715

ADDRESS: 2130 Payette Dr. McCall, ID 83638

BUYER(S): Petrus Family Trust Dated 5/1/91

SELLER(S): Nancy Gentry Boyd

The undersigned parties hereby agree as follows:

1. Due Diligence period shall be extended to April 7, 2012.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: _____ Date: _____

BUYER: _____ Date: _____

SELLER: _____ Date: _____

SELLER: _____ Date: _____

Transmission Report

Date/Time
Local ID 1

04-02-2012
2086345428

04:16:23 p.m.

Transmit Header Text
Local Name 1

RE/MAX Resort Realty

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

	ADDENDUM # 6 RE-10 INSPECTION CONTINGENCY RELEASE	(All addendums shall be numbered sequentially.) JULY 2011 EDITION Page 1 of 1
THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.		

1 This is an ADDENDUM to the Purchase and Sale Agreement Dated: 1-3-2012

2 ADDRESS: 2130 Payette Drive, McCall, ID ID# 12715

3 BUYER: Patrus Family Trust Dated 5/1/91

4 SELLER: Nancy Gentry Boyd

5 This is a BUYER Addendum. This is a SELLER Addendum.

6

7 **1. ITEMS IN NEED OF REPAIR.** The SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing, as set forth in the Purchase and Sale Agreement. BUYER reserves the right to have only the items which are specifically set forth in this paragraph re-inspected prior to closing to satisfy the BUYER that such service, repair or replacement is acceptable to the BUYER. BUYER shall not unreasonably withhold acceptance of such service, repair or replacement.

8 1. Letter from Nancy Gentry Boyd stating that she has made no agreement or assurance to the Graves or anyone that the enclosure surrounding the air conditioner and heat pump area would remain indefinitely or for any period of time.

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Abbreviations:

HS: Host send	PL: Polled local	MP: Mailbox print	CP: Completed	TS: Terminated by system
HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
WS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct



ADDENDUM # 6

(All addendums shall be numbered sequentially.)

RE-10 INSPECTION CONTINGENCY RELEASE



THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

This is an ADDENDUM to the Purchase and Sale Agreement Dated: 1-3-2012

ADDRESS: 2130 Payette Drive, McCall, ID ID#: 12715

BUYER: Petrus Family Trust Dated 5/1/91

SELLER: Nancy Gentry Boyd

[X] This is a BUYER Addendum. [] This is a SELLER Addendum.

1. ITEMS IN NEED OF REPAIR. The SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing, as set forth in the Purchase and Sale Agreement. BUYER reserves the right to have only the items which are specifically set forth in this paragraph re-inspected prior to closing to satisfy the BUYER that such service, repair or replacement is acceptable to the BUYER. BUYER shall not unreasonably withhold acceptance of such service, repair or replacement.

1. Letter from Nancy Gentry Boyd stating that she has made no agreement or assurance to the Graves or anyone that the enclosure surrounding the air conditioner and heat pump area would remain indefinitely or for any period of time.

2. WAIVER OF FURTHER INSPECTIONS AND REMOVAL OF INSPECTION CONTINGENCY. BUYER has made an inspection of the property or has had the property inspected by inspector(s) chosen by the BUYER. BUYER hereby confirms and asserts that such inspection(s) was/were performed in a diligent, prudent, thorough and competent manner and that such inspector(s) was/were qualified to inspect the property. Further, BUYER hereby confirms and asserts that BUYER has completed all inspections, investigations, tests, surveys and has reviewed all applicable documents and disclosures. Excepting only those items specifically set forth in Paragraph 1 above, BUYER hereby elects to proceed with the transaction and hereby waives the right to further inspection of the property (except for any final walk through inspection provision set forth in the Purchase and Sale Agreement) and removes the BUYER'S inspection contingency.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums, or Counter Offers not modified by this ADDENDUM shall remain the same.

The herein agreement, upon execution by both parties, is made an integral part of the aforementioned Agreement.

BUYER: _____ Date: _____

BUYER: _____ Date: _____

SELLER: _____ Date: _____

SELLER: _____ Date: _____

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PETRUS

PAGE 82/82

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ADDENDUM # 1 (All addendums shall be numbered sequentially.) JULY 2011 EDITION
Page 1 of 1

RE-10 INSPECTION CONTINGENCY RELEASE

Including Association of Realtors®
The REALTOR® and REALTOR® **THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.** REALTOR®

1 This is an ADDENDUM to the Purchase and Sale Agreement Dated: 1-3-2012

2

3 ADDRESS: 2130 Bayette Drive, McCall, ID ID# 12715

4

5 BUYER: Petrus Family Trust Dated 5/1/91

6

7 SELLER: Nancy Gentry Boyd

8 This is a BUYER Addendum. This is a SELLER Addendum.

9

10 **1. ITEMS IN NEED OF REPAIR.** The SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing, as set forth in the Purchase and Sale Agreement. BUYER reserves the right to have only the items which are specifically set forth in this paragraph re-inspected prior to closing to satisfy the BUYER that such service, repair or replacement is acceptable to the BUYER. BUYER shall not unreasonably withhold acceptance of such service, repair or replacement.

11 1. Letter from Nancy Gentry Boyd stating that she has made no agreement or assurance to the Buyer or anyone that the procedure surrounding the air conditioner and heat pump area would remain indefinitely or for any period of time.

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26 **2. WAIVER OF FURTHER INSPECTIONS AND REMOVAL OF INSPECTION CONTINGENCY.** BUYER has made an inspection of the property or has had the property inspected by inspector(s) chosen by the BUYER. BUYER hereby confirms and asserts that such inspection(s) was/were performed in a diligent, prudent, thorough and competent manner and that such inspector(s) was/were qualified to inspect the property. Further, BUYER hereby confirms and asserts that BUYER has completed all inspections, investigations, tests, surveys and has reviewed all applicable documents and disclosures, including only those items specifically set forth in Paragraph 1 above. BUYER hereby elects to proceed with the transaction and hereby waives the right to further inspection of the property except for any final walk through inspection specified set forth in the Purchase and Sale Agreement and releases the BUYER's inspection contingency.

27 To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums, of Counter Offers not modified by this ADDENDUM shall remain the same.

28 This herein agreement, upon execution by both parties, is made an integral part of the aforementioned Agreement.

29 BUYER: [Signature] Date: 4/2/12

30 BUYER: _____ Date: _____

31 SELLER: Nancy Gentry Boyd Date: 4/5/12

32 SELLER: _____ Date: _____

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JULY 2011 EDITION RE-10 INSPECTION CONTINGENCY RELEASE ADDENDUM Page 1 of 1

Company: RE/MAX Resort Realty Provided by: Susan Ulrich BR: 2005-11763
Printed under National Gold Standard Computer Forms Co. v. 9/1



RE-25 SELLER'S PROPERTY CONDITION DISCLOSURE FORM

JULY 2010 EDITION Page 1 of 4



Seller's Name(s): Nancy Gentry Boyd Date: 2-2-2011

Property Address: 2150 Pavette Drive, McCall Idaho 83638

Section 55-2501, et seq., Idaho Code, requires SELLERS of residential real property to complete a property condition disclosure form and deliver a signed and dated copy of the completed disclosure form to each prospective transferee or his agent within ten (10) calendar days of transferor's acceptance of transferee's offer. "Residential Real Property" means real property that is improved by a building or other structure that has one (1) to four (4) dwelling units or an individually owned unit in a structure of any size. This also applies to real property which has a combined residential and commercial use. THE PURPOSE OF THE STATEMENT: This is a statement made by the SELLER of the conditions and information concerning the property known by the SELLER. This is NOT a statement of any agent representing the SELLER and no agent is authorized to make representations, or verify representations, concerning the condition of the property. Unless otherwise advised, the SELLER does not possess any expertise in construction, architectural, engineering or any other specific areas related to the construction or condition of the improvements on the property. Other than having lived at or owning the property, the SELLER possesses no greater knowledge than that which could be obtained upon careful inspection of the property by the potential BUYER. Unless otherwise advised, the SELLER has not conducted any inspection of generally inaccessible areas such as the foundation or roof. This disclosure is not a warranty of any kind by the SELLER or by any agent representing the SELLER in this transaction. It is not a substitute for any inspections. The BUYER is encouraged to obtain his/her own professional inspections.

Notwithstanding that transfer of newly constructed residential real property that previously has not been inhabited is exempt from disclosure pursuant to section 55-2505, Idaho Code, SELLERS of such newly constructed and non-exempt existing residential real property shall disclose information regarding annexation and city services in the form as prescribed in questions 1, 2, and 3.

- 1. Is the property located in an area of city impact, adjacent or contiguous to a city limit, and thus legally subject to annexation by the city?
2. Does the property, if not within city limits, receive any city services, thus making it legally subject to annexation by the city?
3. Does the property have a written contract to annex recorded in the county recorder's office, thus making it legally subject to annexation by the city?

THE FOLLOWING ARE IN THE CONDITIONS INDICATED:

Table with columns: Appliances Section, Electrical Systems Section, Name/Not Included, Working, Not Working, Do Not Know, Remarks. Rows include items like Built-in Vacuum System, Dishwasher, Refrigerator, Air Purifier, Security System, etc.

SELLER'S Initials (NAB) Date 2/2/11 BUYER'S Initials (AB) Date 3/16/12

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RE-25 SELLER'S PROPERTY CONDITION DISCLOSURE FORM

Page 2 of 4

PROPERTY ADDRESS:

2130 Payette Drive, McCall Idaho 83838

HEATING & COOLING SYSTEMS SECTION	None/Not Included	Working	Not Working	Do Not Know	Remarks
A/C Fan(s)	N/A				
Central Air Conditioning		✓			
Room Air Conditioner(s)		✓			
Evaporative Cooler(s)	N/A				
Fireplace(s)		✓			
Fireplace Insert(s)		✓			
Furnace/Heating System(s)		✓			
Humidifier(s)	N/A				
Wood/Pellet Stove(s)	N/A				
Air Cleaner(s)	N/A				

MOISTURE & DRAINAGE CONDITIONS SECTION	Yes	No	Do Not Know	Remarks
Is the property located in a floodplain?	✓			
Are you aware of any site drainage problems?		✓		
Has there been any water intrusion or moisture related damage to any portion of the property, including but not limited to, the crawlspace, floors, walls, ceilings, siding, or basement, based on flooding, moisture seepage, moisture condensation, sewer overflow/backup, or leaking pipes, plumbing fixtures, appliances, or moisture related damage from other causes?		✓		
Have you had the property inspected for lead paint or any type of mold?		✓		
If the property has been inspected for mold, is a copy of the inspection report available?	N/A			
Are you aware of the existence of any mold-related problems on any interior portion of the property, including but not limited to, floors, walls, ceilings, basement, crawlspace, and attic, or any mold-related structural damage?		✓		
Have you ever had any water intrusion, moisture related damage, mold or mold-related problems on the property remediated, repaired, used or replaced?		✓		

FUEL TANK SECTION	N/A ()	Propane ()	Oil ()	Diesel ()	Gasoline ()	Other ()
Location:						
In Use: ()						
Not in Use: ()						
Above Ground: ()						
Buried: ()						
Owned: ()						
Leased: ()						

WATER & SEWER SYSTEMS SECTION	None/Not Included	Working	Not Working	Do Not Know	Remarks
Hot Tub/Spa and Equipment		✓			
Pool and Pool Equipment	N/A				
Pumping System - Faucets and Fixtures		✓			
Water Heaters		✓			
Water Softener (owned)	N/A				
Water Softener (leased)	N/A				
Septic System	N/A				
Sump Pump/Kit Pump	N/A				
Landscape Sprinkler System		✓			

WATER & SEWER SYSTEM TYPE SECTION	Public System	Community System	Private System	Cistern	Other
Domestic Water Provided By:			Well		
Injection Water Provided By:			Well		
Property Sewer Provided By:	✓				
If Septic System, Date Last Pumped					

ROOF SECTION: App. (if known):	Yes	No	Do Not Know	Remarks
Is there present damage to the roof?		✓		
Does the roof leak?		✓		

SIDING SECTION: App. (if known):	Yes	No	Do Not Know	Remarks
Are there any problems with the siding?		✓		

SELLER'S Initials (NAB) () Date 2/7/11 BUYER'S Initials (BA) () Date 2/18/12

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JULY 2010 EDITION

RE-25 SELLER'S PROPERTY CONDITION DISCLOSURE FORM

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RE-25 SELLER'S PROPERTY CONDITION DISCLOSURE FORM

Page 3 of 4

PROPERTY ADDRESS:

2130 Payette Drive, McCall Idaho 83638

	Yes	No	Do Not Know	Remarks
HAZARDOUS CONDITIONS SECTION				
Are you aware of any asbestos or other toxic or hazardous materials on the property?		✓		
Has the property ever been used as an illegal drug manufacturing site?		✓		
Are you aware of any current or previous insect, rodent or other pest infestation(s) on the property?		✓		
Have you ever had the property serviced by an exterminator or had the property otherwise remediated for insect, rodent or other pest infestation(s)?		✓		
Is there any damage due to wind, fire, or flood?		✓		
OTHER DISCLOSURES SECTION				
Are there any conditions that may affect your ability to clear title such as encroachments, easements, zoning violations, lot line disputes, restrictive covenants, etc.?	✓			LEASE
Has the property been surveyed since you owned it?		✓		
Have you received any notices by any governmental or quasi-governmental entity affecting this property; i.e. Local Improvement District (LID) or zoning changes, etc.?		✓		
Are there any structural problems with the improvements?		✓		
Are there any structural problems with the foundation?		✓		
Have any substantial additions or alterations been made without a building permit?		✓		
Has the fireplace/wood stove/chimney/flu been inspected?		✓		
Has the fireplace/wood stove/chimney/flu been cleaned?		✓		
Have you ever filed a homeowner's insurance claim on the property?		✓		
ADDITIONAL REMARKS AND/OR EXPLANATIONS SECTION: Please list any other existing problems that you know of concerning the property including legal, physical, product defects or others that are not already listed. (Use additional pages if necessary).				

The referenced property herein is exempt from the code because of Section 95-2505 for any of the following reasons:

- A transfer pursuant to court order including, but not limited to a transfer ordered by a probate court during the administration of the decedent's estate, a transfer pursuant to a will or execution, a transfer by a trustee in bankruptcy, a transfer as a result of the exercise of the power of eminent domain, and a transfer that results from a decree for a specific performance of a contract or other agreement between persons;
- A transfer to a mortgagee by a mortgagor by deed in lieu of foreclosure or in satisfaction of the mortgage debt;
- A transfer to a beneficiary of a deed of trust by trustee in default;
- A transfer by a foreclosure sale that follows a default in the satisfaction of an obligation secured by a mortgage;
- A transfer by a sale under a power of sale following a default in the satisfaction of an obligation that is secured by a deed of trust or another instrument containing a power of sale occurring within one (1) year of foreclosure on the default;
- A transfer by a mortgagee, or beneficiary under a deed of trust, who has acquired the residential real property by a deed in lieu of foreclosure;
- A transfer by a fiduciary in the course of the administration of a decedent's estate, a guardianship, a conservatorship or a trust;
- A transfer from one (1) co-owner to one (1) or more other co-owners;
- A transfer made to the transferor's spouse or to one (1) or more persons in the legal line of consanguinity of one (1) or more of the transferors;
- A transfer between spouses or former spouses as a result of a decree of divorce, dissolution of marriage, annulment or legal separation or as a result of a property settlement agreement incidental to a decree of divorce, dissolution of marriage, annulment or legal separation;
- A transfer to or from the state, a political subdivision of the state, or another governmental entity;
- A transfer that involved newly constructed residential real property, that previously has not been inhabited, except as required by questions 1, 2 and 3;
- A transfer to a transferee who has occupied the property as a personal residence for one (1) or more years (immediately prior to the transfer);
- A transfer from a transferor who has both not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise;
- A transfer by a relocation company to a transferee within one (1) year from the date that the previous owner occupied the property;
- A transfer from a decedent's estate;

SELLER'S Initials (NB) () Date 2/7/11 BUYER'S Initials () () Date 3/10/12

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JULY 2010 EDITION

RE-25 SELLER'S PROPERTY CONDITION DISCLOSURE FORM

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Nancy Boyd

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RE-25 SELLER'S PROPERTY CONDITION DISCLOSURE FORM

Page 4 of 4

PROPERTY ADDRESS: 2130 Payson Drive, McCall Idaho 83638

The SELLER certifies that the information herein is true and correct to the best of the SELLER'S knowledge as of the date signed by the SELLER. The SELLER is familiar with the residential property and each act performed in making a disclosure of an item of information is made and performed in good faith.

SELLER and BUYER understand and acknowledge that the statements contained herein are the representations of the SELLER regarding the condition of the property. No SELLER made herein is a statement of SELLER'S agent or agents, and no agent is authorized to make any statement or give any statement relating to the condition of the property. SELLER and BUYER also understand and acknowledge that SELLER in no way warrants or guarantees the above information regarding the property. SELLER and BUYER also understand and acknowledge that, unless otherwise specifically set forth, no agent of the SELLER is an expert in environmental or other conditions which are or may be hazardous to human health, and which may exist on the property. BUYER MAY, AT BUYER'S OPTION AND EXPENSE, CONSULT WITH ANY INDEPENDENT QUALIFIED INSPECTOR TO ASSESS OR DETECT THE PRESENCE OF SUCH KNOWN OR SUSPECTED HAZARDOUS CONDITIONS.

SELLER and BUYER understand that Listing Broker and Selling Broker in no way warrant or guarantee the above information on the property.

SELLER hereby acknowledges receipt of a copy of this form:

Nancy Gentry Boyd 2/7/11
SELLER Nancy Gentry Boyd DATE 2/7/11 SELLER _____ DATE _____

BUYER hereby acknowledges receipt of a copy of this disclosure form and does hereby WAIVE NOT WAIVE the right to rescind the related purchase agreement within three (3) business days from the date of receipt of this form. IF BUYER DOES NOT WAIVE THE RIGHT TO RESCIND as set forth above, BUYER may only rescind the purchase and sales agreement within three (3) business days following receipt of this disclosure statement, by a written, signed and dated document that is delivered in the seller's or his agent's by personal delivery, ordinary or certified mail, or facsimile transmission. BUYER'S rescission must be based on a specific objection to a disclosure in the disclosure statement. The notice of rescission must specifically identify the disclosure objected to by the BUYER. If no signed notice of rescission is received by the SELLER within the three (3) business day period, BUYER'S right to rescind is waived.

[Signature] 3/10/12
BUYER _____ DATE 3/10/12 BUYER _____ DATE _____

AMENDED DISCLOSURE FORM: Subsequent to the delivery of the initial SELLER'S Property Condition Disclosure Form previously acknowledged, SELLER hereby makes the following amendments. (Attach additional pages if necessary.) Other than those amendments made below, the SELLER states that there have been no changes to the information contained in the initial SELLER'S Property Condition Disclosure Form. IF THERE ARE NO UPDATES, THERE IS NO NEED TO SIGN BELOW.

The hot tub/spa refers to the tiled tub in the main level Master Bedroom

There are no environmental matters, zoning violations, utility disputes, or restrictive covenants that would affect seller's ability to clear title

SELLER hereby acknowledges receipt of this amended form:

Nancy Gentry Boyd 3/8/2012
SELLER Nancy Gentry Boyd DATE 3/8/2012 SELLER _____ DATE _____

BUYER hereby acknowledges receipt of a copy of the amended disclosure form and does hereby WAIVE NOT WAIVE the right to rescind the related purchase agreement based solely on the amendments to the disclosure form within three (3) business days from the date of receipt of this amended form. IF BUYER DOES NOT WAIVE THE RIGHT TO RESCIND as set forth above, BUYER may only rescind the purchase and sales agreement within three (3) business days following receipt of this amended disclosure statement, by a written, signed and dated document that is delivered to the SELLER or his agent's by personal delivery, ordinary or certified mail, or facsimile transmission. BUYER'S rescission must be based on a specific objection to a disclosure in the disclosure statement. The notice of rescission must specifically identify the disclosure objected to by the BUYER. If no signed notice of rescission is received by the SELLER within the three (3) business day period, BUYER'S right to rescind is waived.

[Signature] 3/10/12
BUYER _____ DATE 3/10/12 BUYER _____ DATE _____

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JULY 2010 EDITION

RE-25 SELLER'S PROPERTY CONDITION DISCLOSURE FORM

Page 4 of 4

Payson Used (Immunized) Carcass/Frame Co. Down to 6000000000000000

Received Feb-07-2011 03:48pm

From-8584597452

To-MCCALL REAL ESTATE

Page 008

EXHIBIT 8



P.O. Box 2629 / 507 E. Pine Street
McCall, ID 83638

Bus (208) 634-5241
Fax (208) 634-8403

Exh. No. 24
Date
Name 3-15-14
M & M Court Reporting

BUYER'S ESTIMATED CLOSING STATEMENT

RE: YOUR ESCROW NO: IM18173

DATE: 04-20-2012
ESTIMATED CLOSE DATE: 04/20/2012

BUYER(S): PETRUS FAMILY TRUST DATED May 1, 1991

SELLER(S): Nancy Gentry Boyd

SUBJECT PROPERTY: 2130 Payette, McCall, ID 83638

TITLE ORDER NO.: 0018173

PRORATE DATE: 04/20/2012	CHARGE	CREDIT
PURCHASE PRICE	\$837,000.00	
HELD BY BROKER		\$15,000.00
BUYER DEPOSITS:		
PRORATIONS AS OF Close of Escrow :		
Real Prop. Tax 1/1/2012 thru 4/20/2012 @ 5,780.74 paid to 01/01/2012		1,742.14
ESCROW FEES:		
AmeriTitle		
ESCROW CLOSING FEE 1/2 Each	325.00	
TITLE CHARGES:		
AmeriTitle		
Recording Services: QuitClaim Deed	13.00	
E-recording fee to Simplifile	4.50	
ADDITIONAL CHARGES & CREDITS:		
Payette Lakes Recreational Water and Sewer District		
45.00 per month prepaid thru December 31, 2012 (255 da. prpd)	376.23	
Home Warranty of America		
Premium	940.00	
A-1 Heating & Air Conditioning		
Buyer agreed portion of upgrade for thermostat	278.00	
WIRE TRANSFER FUNDS TO CLOSE		822,194.59
PLEASE WIRE TRANSFER TO AmeriTitle		
TOTALS	\$838,936.73	\$838,936.73

The undersigned are aware that the figures listed above are estimated figures and may change between the date of signing and the date of recording. Escrow agent herein is authorized and instructed to make the necessary adjustments at the time of closing. I/We hereby acknowledge receipt of a copy of this statement.

Accepted and Approved: Dated: 4/9/11

PETRUS FAMILY TRUST DATED May 1, 1991

BY: Edmond A. Petrus
Edmond A. Petrus, Trustee

IDBCS - 1
PETRUS000276



P.O. Box 2629 / 507 E. Pine Street
 McCall, ID 83638

Bus (208) 634-5241
 Fax (208) 634-8403

BUYER'S FINAL CLOSING STATEMENT

RE: YOUR ESCROW NO: IM18173

DATE: 04/20/2012
 CLOSE OF ESCROW: 04/20/2012

BUYER(S): PETRUS FAMILY TRUST DATED May 1, 1991

SELLER(S): Nancy Gentry Boyd

SUBJECT PROPERTY: 2130 Payette, McCall, ID 83638

TITLE ORDER NO.: 0018173

PRORATE DATE: 04/20/2012	CHARGE	CREDIT
PURCHASE PRICE	\$837,000.00	
BUYER DEPOSITS:		
Petrus		15,000.00
PETRUS FAMILY TRUST DATED May		822,194.59
PRORATIONS AS OF Close of Escrow :		
Real Prop. Tax 1/1/2012 thru 4/20/2012 @ 5,780.74 paid to 01/01/2012		1,742.14
ESCROW FEES:		
AmeriTitle		
ESCROW CLOSING FEE 1/2 Each	325.00	
TITLE CHARGES:		
AmeriTitle		
Recording Services: QuitClaim Deed	13.00	
E-recording fee to Simplifile	4.50	
ADDITIONAL CHARGES & CREDITS:		
Payette Lakes Recreational Water and Sewer District 45.00 per month prepaid thru December 31, 2012 (255 da.prpd)	376.23	
Home Warranty of America Premium	940.00	
A-1 Heating & Air Conditioning Buyer agreed portion of upgrade for thermostat	278.00	
BALANCE NEEDED TO CLOSE		
TOTALS	\$838,936.73	\$838,936.73

This statement delivered to buyer/borrower is certified to be a true and actual copy of the original


 ESCROW OFFICER: Colleen Cole

PETRUS000275

DOUGLAS A. MILLER, Clerk
 By John Deputy
 MAY 20 2016

C. Tom Arkoosh, ISB No. 2253
 Daniel A. Nevala, ISB No. 6443
 ARKOOSH LAW OFFICES
 802 W. Bannock Street, Suite 900
 P.O. Box 2900
 Boise, ID 83701
 Telephone: (208) 343-5105
 Facsimile: (208) 343-5456
tom.arkoosh@arkoosh.com
dan.nevala@arkoosh.com

Case No. _____ Inst. No. _____
 Filed _____ A.M. 5:00 P.M.

Attorneys for Chris Kirk d/b/a Kirk Enterprises

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

PETRUS FAMILY TRUST DATED)	
MAY 1, 1991, and EDMOND A.)	Case No. CV-2014-71-C
PETRUS, JR., individually and as Co-)	
Trustee of the Petrus Family Trust Dated)	DEFENDANT CHRIS KIRK D/B/A
May 1, 1991,)	KIRK ENTERPRISES' MOTION
)	FOR SUMMARY JUDGMENT
Plaintiffs,)	
)	
v.)	
)	
NANCY GENTRY-BOYD; CHRIS)	
KIRK d/b/a KIRK ENTERPRISES;)	
TODD MCKENNA d/b/a HOMECRAFT)	
HOME INSPECTIONS; RE/MAX)	
RESORT REALTY; KEVIN)	
BATCHELOR; and DOES 1-4,)	
)	
Defendants.)	

COMES NOW, Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk"), by and through his counsel of record, Arkoosh Law Offices, and pursuant to Idaho Rule of Civil Procedure 56, hereby requests that the Court enter judgment as a matter of law, dismissing both Count VI (Breach of Implied Warranty of Habitability) and Count VII (Conspiracy to Commit Fraud) of Plaintiffs'

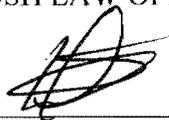
Second Amended Complaint.

This Motion is supported by the pleadings and filings in the record before the Court as well as the Memorandum and Affidavits of Chris Kirk and Daniel Nevala, filed contemporaneously herewith.

Respectfully Submitted,

DATED this 20th day of May, 2016.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 20th day of May, 2016, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Alyson A. Foster	_____	U.S. Mail, Postage Prepaid
Jason J. Rudd	_____	Overnight Courier
ANDERSEN SCHWARTSMAN	<u> X </u>	Hand Delivered
WOODARD BRAILSFORD, PLLC	_____	Facsimile (208) 342-4455
101 S. Capitol Blvd., Suite 1600	<u> X </u>	E-mail aaf@aswblaw.com
Boise, ID 83702		jjr@aswblaw.com
<i>Attorney for Plaintiffs</i>		
Michael G. Pierce	<u> X </u>	U.S. Mail, Postage Prepaid
P.O. Box 1019	_____	Overnight Courier
489 West Mountain Road	_____	Hand Delivered
Cascade, ID 83611	_____	Facsimile (208) 382-3783
<i>Attorney for Defendant Todd</i>	<u> X </u>	E-mail
<i>McKenna d/b/a Homecraft Home</i>		michael@michaelpiercelaw.com
<i>Inspections</i>		
Steven J. Millemann	_____	U.S. Mail, Postage Prepaid
George C. Pittenger	_____	Overnight Courier
MILLEMANN, PITTENGER,	<u> X </u>	Hand Delivered
MCMAHAN & PEMBERTON LLP	_____	Facsimile (208) 634-4516
706 N. First Street	<u> X </u>	E-mail sjm@mpmplaw.com
P.O. Box 1066		
McCall, ID 83638		
<i>Attorneys for Defendant Nancy</i>		
<i>Gentry-Boyd</i>		
Phillip J. Collaer	_____	U.S. Mail, Postage Prepaid
ANDERSON, JULIAN & HULL LLP	_____	Overnight Courier
C.W. Moore Plaza	<u> X </u>	Hand Delivered
250 S. Fifth Street, Suite 700	_____	Facsimile (208) 344-5510
P.O. Box 7426	<u> X </u>	E-mail pcollaer@ajhlaw.com
Boise, ID 83707-7426		
<i>Attorneys for Defendant Re/Max</i>		
<i>Resort Realty & Kevin Batchelor</i>		

Courtesy Copy:
Honorable Jason D. Scott

Via e-mail to gknapp@co.valley.id.us



Daniel A. Nevala

DOUGLAS A. MILLER, CLERK
By John Deputy

MAY 20 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

C. Tom Arkoosh, ISB No. 2253
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dan.nevala@arkoosh.com

Attorneys for Chris Kirk d/b/a Kirk Enterprises

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

PETRUS FAMILY TRUST DATED)
MAY 1, 1991, and EDMOND A.)
PETRUS, JR., individually and as Co-)
Trustee of the Petrus Family Trust Dated)
May 1, 1991,)
Plaintiffs,)

Case No. CV-2014-71-C

**MEMORANDUM IN SUPPORT OF
DEFENDANT CHRIS KIRK D/B/A
KIRK ENTERPRISES' MOTION
FOR SUMMARY JUDGMENT**

v.)
NANCY GENTRY-BOYD; CHRIS)
KIRK d/b/a KIRK ENTERPRISES;)
TODD MCKENNA d/b/a HOMECRAFT)
HOME INSPECTIONS; RE/MAX)
RESORT REALTY; KEVIN)
BATCHELOR; and DOES 1-4,)
Defendants.)

Defendant, Chris Kirk d/b/a Kirk Enterprises ("Kirk"), by and through his counsel of record, Arkoosh Law Offices, and pursuant to Idaho Rule of Civil Procedure 56, respectfully submits this memorandum in support of his *Motion for Summary Judgment*. The Affidavits of Chris Kirk and Daniel Nevala, together with the accompanying exhibits, support this motion.

MEMORANDUM IN SUPPORT OF DEFENDANT CHRIS KIRK D/B/A KIRK
ENTERPRISES' MOTION FOR SUMMARY JUDGMENT - 1

I. INTRODUCTION AND BACKGROUND FACTS

As the pleadings indicate, this case involves a residential home located at 2130 Payette Drive, McCall (herein referred to as the “Home”). Kirk built the Home for Defendant Nancy Gentry-Boyd (“Gentry-Boyd”) in 2004-2005. Gentry-Boyd took possession and owned the Home as her second home from September 2005 until she sold it in April 2012 to the Petrus Family Trust and Edmond Petrus, Jr. (collectively, “Petrus”). Petrus alleges that Kirk and Gentry-Boyd engaged in a conspiracy to commit fraud by colluding to build a low-grade home, using shoddy materials, in an effort to save money and defraud him as a subsequent purchaser. Additionally, Petrus claims that Kirk breached an implied warranty of habitability purportedly owed to Petrus, even though he was the second buyer who purchased the Home seven years after it was built and sold to Gentry-Boyd. *See*, Counts VI and VII, *Second Amended Complaint*, pp. 10-12.

Kirk is an experienced custom-home builder. He grew up in McCall, graduating from McCall-Donnelly high school in 1974, before attending the University of Idaho and graduating in 1978. His first construction job in the McCall area was in 1981. At that time, he began working for a local builder, building custom homes. In 1984, Kirk began building custom homes in McCall for himself under the name Chris Kirk Enterprises. He estimates that he has built between 20 and 30 new custom homes between the years 1984 and 2006 in addition to completing some home remodels. *See generally* Kirk Dep. 18-25.

Gentry-Boyd began visiting McCall years ago and bought her first home in McCall in 1979. *See* Gentry-Boyd Dep. 11-12. At the time she was deciding to build the Home, she and Kirk had been social friends for 20 years. When she decided to build the Home, she asked Kirk if he would build it for her. *Id.*, pp. 27-28. Kirk agreed, and Gentry-Boyd hired Andy Laidlaw, a local architect draw up plans for the Home. *Id.* Kirk built the Home without issue and Gentry-Boyd took

possession in September 2005. Gentry-Boyd, a full-time California resident, used the Home as a vacation home during the years 2005-2012, until selling it to Petrus. During that time, Gentry-Boyd never encountered any water or moisture related issues or problems with the Home. She did complain once to Kirk of “sticky doors.” Kirk visited the Home sometime within the first year after Gentry-Boyd moved in (2005) and adjusted the hinges of the doors, which remedied the problem. *See* Kirk Dep., pp. 121-122. Kirk also remembers being at the Home during social events from 2005-2009 and asking Gentry-Boyd about the doors and her telling him they “were fine.” *Id.*, pp. 162.

Petrus is a highly educated and sophisticated man. He practiced law in California from approximately 1987 until 2007 for a number of different law firms. He was a litigator who concentrated on business, insurance, and bad faith litigation, and was involved, to a lesser degree, in at least one insurance case involving the failure to tender a defense in a construction defect case. *See generally* Petrus Dep. 34-40.

In August 2013, Petrus put Kirk on notice that the Home suffered problems with its south-facing French doors and that a review of the doors unveiled evidence of water intrusion. *See Affidavit of Chris Kirk* (“Kirk Aff.”), Ex. 1. The notice alleged that the cause of the problem was improperly applied ice and water shield, and invited Kirk to come and inspect the doors. In response to receiving the notice, Kirk scheduled a time to inspect the Home. Kirk’s general inspection of the doors unveiled to him many problems, which he outlined in a response letter. *See Affidavit of Daniel Nevala* (“Nevala Aff.”), Ex. 1. Then, in April 2014, Kirk was invited to the Home for a second inspection of more than just the doors. However, at the scheduled time, Petrus only allowed Kirk to complete a partial inspection of the Home. After allowing Kirk to inspect the crawlspace, interior, and doors, Petrus stopped the inspection and demanded that Kirk leave the

property, threatening to call the sheriff when Kirk asked to inspect the roof, gutters, and other areas of the exterior of the Home. Kirk left. Then, sometime after demolition on the Home had started, Kirk was invited out for a third time to inspect the damage to the Home. At no time did Kirk have the opportunity to inspect the Home's roof, gutters, or fully inspect the exterior to help determine the possible causes or source of the water intrusion. *See generally*, Kirk Dep. pp. 157-161. Consequently, Petrus stripped Kirk of his statutory right to inspect the roof, the copper gutters that Petrus had installed after buying the Home, and the exterior of the Home. Resultantly, Kirk reported to Petrus the conclusions from his partial inspection, but denied responsibility for causing the alleged damage.

In March 2014, Petrus filed suit against Kirk, Gentry-Boyd, and his home inspector, Defendant McKenna. *See, Complaint*. Defendants Re/Max and Batchelor were added to the lawsuit in September 2015. *See, Second Amended Complaint*. The original *Complaint* alleged negligence against Kirk; stating that he negligently installed doors and flashing in violation of the building standards and the applicable standard of care. *See, Complaint*, pp. 7-9. The current version of the complaint drops the negligence claim and replaces it with claims of: (1) breach of implied warranty of habitability, and (2) conspiracy to commit fraud. *See, Second Amended Complaint*, pp. 10-12.

Reviewing the applicable facts and law, summary judgment in favor of Kirk is proper on both counts. First, the conspiracy to commit fraud claim fails because the *Second Amended Complaint* fails to plead with particularity facts supporting the underlying fraud claim against Gentry-Boyd, effectively nullifying the standalone conspiracy to commit fraud claim against the alleged co-conspirator, Kirk. Second, no evidence that Kirk or Gentry-Boyd committed fraud exists. Third, the warranty claim is time-barred against Kirk. Fourth, no privity or special

relationship exists between Kirk and Petrus such that an implied warranty would flow from a builder (Kirk) to a subsequent purchaser (Petrus). Fifth, Petrus expressly waived the implied warranty of habitability through his purchase and sale contract with Gentry-Boyd to Kirk's benefit. Sixth, Petrus breached a statutory prerequisite to filing suit by preventing Kirk from completing a full and reasonable inspection of the Home under Idaho's Notice and Opportunity to Repair Act by demanding that he leave the property before allowing him to inspect the roof, gutters, and exterior of the Home. Seventh, Petrus disclaimed and assumed any liability stemming from mold or other microorganisms that existed in the Home at the time of sale (April 2012).

II. SUMMARY OF UNDISPUTED MATERIAL FACTS

For purposes of this *Motion for Summary Judgment* only, Kirk submits that the following facts are not in dispute:

1. Defendant Kirk is a resident of Valley County, Idaho, and was the builder and general contractor who built the Home located at 2130 Payette Drive, McCall, Idaho under an oral contract for Nancy Gentry-Boyd. *See, Second Amended Complaint*, ¶ 5, and Kirk Aff., ¶¶ 4-5.

2. Andy Laidlaw and Claire Remsberg of McCall Design and Planning were the architects who designed the Home. Gentry-Boyd Dep. 28:10-12, 37:8-17, Kirk Aff. ¶ 7.

3. Construction of the Home started in June 2004 and was substantially completed in August 2005 with final billing in September 2005. Kirk Dep. 64:2-6 and Kirk Aff. ¶ 6.

4. Gentry-Boyd lived in the Home from 2005 to 2012 without any water-related problems. *See* Gentry-Boyd Dep. 110:20-25; 130:10-11; 150:16-17; 152:16-19; 154:21; 155:18; 171:1.

5. Sometime within Gentry-Boyd's first year of owning the Home, Gentry-Boyd complained to Kirk about a sticky door. Kirk visited the Home and adjusted the screws on the

door's adjustable hinges, which solved the problem. Gentry-Boyd Dep. 47:2-6; Kirk Dep. 121:2-25, 122:1-6.

6. Without input from Gentry-Boyd, Kirk chose both the materials used in the construction of the Home, based off the architects' plans, and the subcontractors hired for the construction of the Home. *See* Kirk Aff. ¶ 8.

7. Prior to August 2013, Kirk had never met Plaintiff Edmond A. Petrus, Jr., or any representative of the Petrus Family Trust, nor had any discussions with Mr. Petrus or any representative of the Petrus Family Trust. Kirk Aff. ¶ 13.

8. Petrus, or his agents, invited Kirk to inspect the Home on three separate occasions, once in August 2013, and twice in April 2014. Kirk Aff. ¶ 16.

9. Petrus purchased the Home from Gentry-Boyd. The closing of the transaction occurred on April 20, 2012. Gentry-Boyd Dep., Ex. 5; Petrus Dep., Ex. 24.

10. On August 7, 2013, Jason Mau, counsel for Petrus, sent a letter to Kirk for the intended purpose of complying with the requirements of Idaho's Notice and Opportunity to Repair Act by explaining that Petrus was alleging a construction defect against Kirk related to the Homes south-facing French doors. Kirk Aff., Ex. 1.

11. Kirk inspected the Home's French doors and reported his findings in a response letter to Petrus' counsel, which summarized the findings as:

- a. The locking mechanism on the operable door that was present when construction of the Home was complete had been removed and reinstalled in an inappropriate manner by a third party unknown to Kirk;
- b. The locking mechanism on the stationary door appeared to have been pried upon to the extent that it was not functional;

- c. Markings on the overhead trim board indicated that the locking mechanism was engaged to lock when someone had tried to close the door;
- d. Weather stripping on the astragal of the operable door had been completely removed;
- e. Weather stripping on the bottom of the operable door had been trimmed and was not intact;
- f. Weather stripping on the stationary door could not be verified or inspected because the door would not open;
- g. Screws were installed into the threshold that were not factory and were not installed in the correct area;
- h. Several screws had been added to the threshold, especially in the weep channel;
- i. The ice and water shield installed in the crawl space had been altered and displaced;
- j. Foam insulation had been removed.

12. On or about September, 2015, Plaintiffs filed their *Second Amended Complaint and Demand for Jury Trial*, making a claim that Kirk conspired with Gentry-Boyd to commit fraud in the construction of the Home, in an effort “to intentionally cut costs in the construction of the home and defraud the subsequent purchaser.” *See, Second Amended Complaint*, Count VII, pg. 11. More specifically, Plaintiffs’ allege:

71. At all relevant times hereto, Defendant Gentry-Boyd as owner-builder and Defendant Kirk as contractor agreed and combined to engage in a conspiracy to use and install in a substandard manner an exterior envelope that did not meet the applicable building codes and standard of care, in a manner that would be concealed from a general inspection of the Home, to intentionally cut costs in the construction of the Home and defraud the subsequent purchaser.

72. In furtherance of the conspiracy, Defendants Gentry-Boyd and Kirk, and each of them, conspired and agreed upon themselves, and combined to engage in a conspiracy to commit the wrongs alleged in this Complaint, to build the Home using materials and standards that did not meet the applicable building codes and standards of care, and to avoid a final inspection to obtain a certificate of occupancy, of which the principal element was to cut costs and inflict wrongs on the subsequent purchaser, and that these wrongful acts were committed pursuant to and in furtherance of such conspiracy and agreement, and with the consent, approval, or ratification of Defendant Gentry-Boyd and Defendant Kirk, and each is liable as a direct participant, co-conspirator, or aider and abettor of the wrongful acts herein alleged.

See, Second Amended Complaint, pp. 11-12.

13. During the planning and construction of the Home, Kirk had conversations with Gentry-Boyd, her architects, and her designer. None of these conversations ever included talk about building a substandard Home or using substandard materials in the construction of the Home, for any purpose whatsoever. Kirk Aff. ¶¶ 7, 21; Kirk Dep. 173:4-15.

14. Kirk and Gentry-Boyd never agreed or discussed using or installing substandard materials in the construction of the Home. Further, Kirk and Gentry-Boyd never discussed using or installing substandard materials in such a manner as to not meet the applicable building code or standard of care for the purpose of cutting costs or defrauding a subsequent purchaser. Kirk Aff. ¶ 21.

15. Kirk and Gentry-Boyd never agreed or discussed intentionally concealing any portion of the Home's construction or materials to conceal substandard materials that did not meet the applicable building code or standard of care. Kirk and Gentry-Boyd never agreed or discussed trying to avoid a general home inspection or a final home inspection to obtain a certificate of occupancy, or to defraud a subsequent purchaser of the Home. Kirk Aff. ¶ 21.

16. Beau Value is an experienced custom-home builder and remediation expert who was retained by Petrus both to repair the Home and serve as an expert witness in this case. *See*

Plaintiffs' Expert Witness Disclosures.

17. Beau Value testified that no substandard materials were used in the construction of the Home and that none of the conditions he discovered and fixed would have affected the habitability of the Home because they were in the crawlspace and exterior of the Home. He also testified that Petrus never suggested that the conditions deprived him of the ability to use the Home. *See* Value Dep. 145:12 – 146:18; 194:7-14.

18. Eric Waite is the general manager for Disaster Response and was the project manager assigned to manage the repair and remediation work on the Home for Petrus. *See* Waite Dep. 16:1-11; 17:12-14. Petrus has also named Waite as an expert witness in this case. *See Plaintiffs' Expert Witness Disclosures.*

19. When asked if he observed any evidence as to why the Home would not be livable when he first went out to the Home and walked it, Waite testified, “No.” *See* Waite Dep. 61:1-6.

III. LEGAL STANDARD

“Summary Judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law.” *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswald*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). “The burden may be met by establishing the absence of evidence on an element that nonmoving party will be required to prove at trial.” *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475,

478 (Ct. App. 1994)).

“Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party,” to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). “[I]f the nonmoving party fails to provide a specific showing to establish the essential elements of his or her case, judgment shall be granted to the moving party.” *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008) (citing *Atwood v. Smith*, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party’s case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); see *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If the non-moving party does not provide such a response, summary judgment, if appropriate, shall be entered against the party. *Id.* “Questions of law are subject to free review.” *Halvorson v. North Latah County Highway Dist.*, 151 Idaho 196, 201, 254 P.3d 497, 502 (2011).

IV. ARGUMENT AND AUTHORITIES

1. Summary Judgment Or Dismissal¹ Is Proper On Count VII Because Petrus Fails To Meet The Pleading Requirement Of Establishing The Elements Of Fraud With Supporting Facts.

Idaho courts have very clearly laid out the pleading requirements for fraud. In *Glaze v. Deffenbaugh*, 144 Idaho 829, 833, 172 P.3d 1104, 1108 (2007), the Court found the fraud to have been properly dismissed because the alleging party had failed to support all of the nine elements by specifying “[w]hat factual circumstances constituted fraud.” *Id.* (citing I.R.C.P. 9(b); *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005)). Specifically, the Court held that “[t]he [alleging party does] not plead any false representations . . . rendering the fraud claim fatally defective.” *Id.* Thus, a fraud claim will be dismissed when the alleging party has not supported each and every element with factual circumstances.

Conclusory allegations do not support the elements of a fraud claim. *See Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986). In *Witt*, the Idaho Supreme Court held the district court was correct in finding that the alleging party had not supported the elements of fraud with facts because the complaint contained “[n]o particular factual allegations disclosing what these so-called tactics were, what made them devious, or when they were made.” *Id.* A similar pleading requirement in federal courts requires the “who, what, when, where and how” of the alleged fraud. *See Cooper v. Pickett*, 137 F.3d 616, 626 (9th Cir. 1997) (citing *DiLeo v. Ernst & Young*, 901 F.2d 624m 627-28 (7th Cir. 1990)). Thus, a fraud claim will be dismissed if the elements are only supported by general allegations.

Here, Count VII (Conspiracy to Commit Fraud) of the *Second Amended Complaint* must

¹ Counsel recognizes that this argument could have also been properly presented to the Court through a standalone motion to dismiss pursuant to I.R.C.P. 12(b)(6), but now presents the argument under rule 56 as part of this motion for summary judgment.

be dismissed against Kirk because Petrus has not pled specific facts in support of all nine elements of fraud, and the allegations relied upon are conclusory. The Idaho Supreme Court has made it clear that a party cannot recover on a claim for civil conspiracy.

A civil conspiracy that gives rise to legal remedies exists only if there is an agreement between two or more to accomplish an unlawful objective or to accomplish a lawful objective in an unlawful manner. Civil conspiracy is not, by itself, a claim for relief. The essence of a cause of action for civil conspiracy is the civil wrong committed as the objective of the conspiracy, not the conspiracy itself.

McPheters v. Maile, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003) (internal citations omitted). The civil conspiracy claims at issue are contained within Count VII of the *Second Amended Complaint*, "Conspiracy to Commit Fraud." While the claim is labeled as a conspiracy, the thrust of the claim is for fraud against Kirk and Gentry-Boyd.

A claim of fraud requires the plaintiff to allege nine elements with particularity: (1) a statement or representation of fact, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that there be reliance, (6) the hearer's ignorance of the falsity of the statement, (7) reliance by the hearer, (8) justifiable reliance, and (9) resultant injury. *Luttunich v. Key Bank Nat. Association*, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005).

Where a claim of fraud does not exist, no claim of a civil conspiracy to commit fraud can rest upon it. *McPheters v. Maile*, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). Thus, to demonstrate the alleged acts of Kirk constituted a civil wrong, Petrus must allege with particularity, facts meeting all nine elements of fraud. Petrus has failed to meet this standard. Instead, he makes the following incomplete and conclusory allegations:

71. At all relevant times hereto, Defendant Gentry-Boyd as owner-builder and Defendant Kirk as contractor agreed and combined to engage in a conspiracy to use and install in a substandard manner an exterior envelope that did not meet the applicable building codes and standard of care, in a manner that would be concealed from a general inspection of the Home, to intentionally cut costs in the construction of the Home and defraud the subsequent purchaser.

72. In furtherance of the conspiracy, Defendants Gentry-Boyd and Kirk, and each of them, conspired and agreed upon themselves, and combined to engage in a conspiracy to commit the wrongs alleged in this Complaint, to build the Home using materials and standards that did not meet the applicable building codes and standards of care, and to avoid a final inspection to obtain a certificate of occupancy, of which the principal element was to cut costs and inflict wrongs on the subsequent purchaser, and that these wrongful acts were committed pursuant to and in furtherance of such conspiracy and agreement, and with the consent, approval, or ratification of Defendant Gentry-Boyd and Defendant Kirk, and each is liable as a direct participant, co-conspirator, or aider and abettor of the wrongful acts herein alleged.

See, Second Amended Complaint, pp. 11-12.

Ignoring for a moment the conclusory nature of the above allegations (which themselves render the allegation a nullity in analyzing a fraud claim as mentioned above under *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477), paragraphs 71 and 72 in Plaintiffs' *Second Amended Complaint* do nothing to tell us "who" Kirk made a false representation to, "where" the statement was made, "when" the statement was made, and "how" the statement was made. *Cooper*, 137 F.3d 616, 626. Further, Petrus fails to allege that Kirk knew that a third party would rely upon a false representation made by him. The dismissal standard is that "it must appear beyond a doubt that the claimant can prove no set of facts in support of his claim which would entitle him to relief". *Ernst v. Hemenway & Moser Co.*, 120 Idaho 941, 821 P.2d 996 (App. 1991). In essence, the time has passed for Petrus to allege what the facts are: the who, what, where, when and how. He has failed to do this.

Petrus has not supported each element of fraud with factual circumstances. Like the alleging party in *Witt*, Petrus has failed to state with any particularity when the representations were made. Further, Petrus has not alleged to whom the representations were made with any specificity and offers no evidence whatsoever to support the required element of justifiable reliance. It is impossible for Petrus to show facts to support the required element of justifiable

reliance. There is no way he could have relied upon any statements made by Kirk in his purchase of the Home. Kirk had never met Petrus until August 2013, a year and a half after Petrus closed on the sale. *See* Kirk Aff. ¶ 13 and Nevala Aff, Ex. 8.

Therefore, Petrus has clearly failed to meet the burden of alleging factual circumstances for all the elements of fraud. As such, his claim for fraud against Defendant Kirk fails, and the Court should grant Defendant Kirk's *Motion for Summary Judgment* as to the conspiracy count. In short, Petrus makes a failed attempt to allege that Kirk and Gentry-Boyd conspired to commit fraud but offers zero factual support for the allegations.

2. No Evidence Of Fraud Exists.

Even if the Court finds that Petrus sufficiently pled all nine elements of fraud, which he did not, Count VII must nonetheless be dismissed on the basis that Petrus is unable to offer specific evidence that Kirk and Gentry-Boyd agreed or planned to defraud him. The essence of a civil conspiracy cause of action is the civil wrong committed as the objective of the conspiracy, not the conspiracy itself. *McPheters v. Maile*, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003). The agreement to defraud that is the foundation of a conspiracy charge must be demonstrated by specific evidence. *Mannos v. Moss*, 143 Idaho 927, 935, 155 P.3d 1166, 1174 (2007). And, where a claim of fraud does not exist, no claim of a civil conspiracy to commit fraud can rest upon it. *See McPheters*, 138 Idaho 391, 395, 64 P.3d 317, 321. Thus, to demonstrate the acts of Kirk and Gentry-Boyd constituted a civil wrong, Petrus must not only make a showing of the elements of fraud, but must also offer specific evidence of Kirk and Gentry-Boyd agreeing or planning to defraud a subsequent home purchaser. No such evidence exists.

Kirk admits having had many general conversations regarding aspects of the construction of the Home with Gentry-Boyd, but denies having had any conversations regarding the use of

substandard materials, let alone agreeing with Gentry-Boyd that he would use such materials. *See* Kirk Aff. ¶ 21. Kirk also denies having had any conversations, let alone making any agreement with Gentry-Boyd that he would conceal any portion of the Home's construction or materials for the purpose of concealing substandard materials that did not meet applicable building codes and standards of care, to avoid a general home inspection, a final home inspection to obtain a certificate of occupancy, or to defraud a subsequent purchaser of the Home. *See* Kirk Aff. ¶ 21.

Kirk acknowledges that silence may constitute fraud when a duty to disclose exists, (*G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Janinda v. Lanning*, 87 Idaho 91, 390 P.2d 826 (1964)), however, no such duty ever existed. A party may be under a duty to disclose: (1) if there is a fiduciary duty or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it. *Bethlahmy, supra*. Further, fraudulent concealment occurs "when the fact of damage has, for the purpose of escaping responsibility therefor, been fraudulently and knowingly concealed from the injured party by an alleged wrongdoer standing at the time of the wrongful act, neglect or breach in a professional or commercial relationship with the injured party." *Pichon v. Benjamin*, 108 Idaho 852 at 853, 702 P.2d 890 at 891.

Here, Petrus is unable to establish the existence of any special relationship of this type between Kirk and Petrus. In particular, Petrus is unable to prove: (a) the existence of a fiduciary relationship between Kirk and Petrus; (b) that Kirk made any partial or ambiguous statement which, not elaborated upon, would have been misleading; (c) that Kirk obtained any information

subsequently that would have made a previous representation untrue or misleading; (d) that Kirk, or anyone else, made a false representation and that Kirk knew that Petrus would rely on that representation; or (e) that Kirk knew that Petrus was about to enter into the transaction under a mistake of fact. It is not in dispute that, prior to August 2013, Kirk had never met or had any conversations with Petrus or any representatives of the Petrus Family Trust. Kirk Aff. ¶ 13.

Additionally, Petrus has no evidence that Kirk had any superior knowledge of the damage, resulting in a duty to disclose the damage. In fact, Kirk testifies that he attended social functions at Defendant Gentry-Boyd's Home and specifically observed no damage to the Home. Kirk Aff. ¶ 18. This is important because Kirk also testifies that he was advised by Gentry-Boyd of a problem with the doors sticking a year after construction had been completed:

Notwithstanding, during the first year after completion of construction, Gentry-Boyd contacted me with a complaint that some doors were sticking. In response, I contacted the door installers and it was my understanding that the sticking door problem was remedied to Defendant Gentry-Boyd's satisfaction, as she never made a subsequent complaint to me regarding the doors or any other needed home repairs.

Id. Gentry-Boyd similarly testified at her deposition that there was one time when the doors were sticking and she called Kirk and he came out, adjusted the doors, and they quit sticking. *See* Gentry-Boyd Dep. 46:24-47:6.

So, following the one-time adjustment Kirk made to repair the "sticky doors," Gentry-Boyd lived in the Home for approximately six years² prior to selling to Petrus, and at no time did she contact Kirk with complaints regarding the need for any further repairs.

The first time Kirk became aware of substantial alterations and damage to the Home was in August 2013, when he attempted to exercise his right to conduct a pre-litigation inspection of the Home. Kirk Aff. ¶ 15. He testifies that none of the abnormalities or damage witnessed during

² *Second Amended Complaint and Demand for Jury Trial*, ¶1. (Petrus Family Trust acquired the leasehold interest in the home in April 2012.)

his 2013 inspection were present at the time of the completion of the Home, or during the subsequent years, 2005-2009, when he observed the doors in question during social events. *See* Kirk Aff. ¶ 18. In Kirk's professional opinion, "the damage to the Home, as detailed in the Plaintiff's lawsuit, was not the result of using materials and standards that did not meet the applicable building codes and standards of care. Rather, the damage was likely a result of a combination of misuse, neglect, damage and possible alteration. *Id.* ¶ 20. Once the damage and alterations occurred, the extreme weather and elements in McCall could have quickly exacerbated the problem." *Id.* ¶ 20. As shown by Kirk's own testimony, he had no prior knowledge of the alterations and damage to the Home. Without personal knowledge of the alterations, Kirk would have no legal duty to report even the potential of damage to a subsequent home purchaser.

Taking the facts in the light most favorable to Petrus, he is unable to provide evidence sufficient to establish that any action or inaction by Kirk amounted to fraud, let alone the existence of an agreement to defraud between Kirk and Gentry-Boyd, which both Kirk and Gentry-Boyd deny occurred. The Court should therefore determine as a matter of law that Petrus is unable to offer specific evidence of Kirk and Gentry-Boyd agreeing or planning to defraud Petrus, or any other subsequent purchasers of the Home, and therefore Petrus has failed to raise a genuine issue of material fact, and the Count VII must therefore be dismissed.

3. Summary Judgment On Count VI Is Proper Because The Applicable Statute Of Limitations Bars A Warranty Claim Against Kirk.

A statute of limitations acts as an absolute bar against an action unless a tolling statute applies. Because Petrus can offer no evidence to prove that Kirk is guilty of fraudulent or even passive concealment, no tolling of any statute of limitations applies to the warranty claim. Kirk completed construction of the Home at the latest in September 2005. *See* Kirk Aff. ¶ 5. Petrus filed suit in March 2014, approximately eight-and-a-half years later. *See Complaint*. Petrus' warranty

claim sounds in contract and his conspiracy claim sounds in fraud without any necessary foundational facts.

In a contract action upon an improvement to real property, the statute of limitations begins to run “at the time of final completion of construction of such an improvement.” I.C. § 5-241. Oral contract actions must be brought within four years of accrual. I. C. § 5-217. Written contract actions must be brought within five years of accrual. I. C. § 5-216. “Causes of action based upon breach of warranty, whether express or implied, are contractual in nature.” *Tusch Enterprises v. Coffin*, 113 Idaho at 51, 740 P.2d 1036 (1987) (Bakes, J., concurring in part and dissenting in part). “Warranties may be either express or implied, but in either event the relations between the parties arise out of a contract and are not based on what is known as tort or on duties imposed by law or on any theory unrelated to contract” *Id.*; *see also Id.* at 50, 740 P.2d at 1035 (treating implied warranty of habitability as a contract action); *Id.* at 50 n. 8, 740 P.2d 1035 n. 8 (quoting Prosser & Keeton, *The Law of Torts* § 101) (“[T]he only contract action has been for breach of a warranty, express or implied.”); 1A C.J.S. *Actions* § 143 (2011) (“Where the claim is for a breach of implied warranties of habitability, the claim is based on the contract not in tort.”); *Black's Law Dictionary* “warranty” (9th ed. 2009) (defining a warranty as “[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised”).

Because Kirk and Gentry-Boyd had an oral contract, if Gentry-Boyd were to bring a claim against Kirk under an implied warranty theory based on latent defect, she would have had a four-year window to bring the claim after the completion of construction. This would have been September 2009. To the extent Petrus has any claim against Kirk based on a theory of implied warranty, it too is time barred by the four-year oral contract statute of limitations found in I.C. §

5-217, when the warranty expired. The statute of repose found in I.C. § 5-241 does not apply to this cause of action against Kirk and should not work to extend any time bar. Since a claim for a breach of warranty is a contract cause of action, the claim for breach of implied warranty of habitability is untimely and barred by the statute of limitations.

Additionally, while Petrus does claim that he has suffered property damage, his fraud theory fails because he can offer no proof to establish or support it. So, while I.C. § 5-241 provides that in cases of property damage, a nine-year timeframe exists (six years statute of repose and three years statute of limitation) it does not apply to a contract or warranty claim, which is governed instead by the applicable contract statute of limitations.

4. No Liability Under An Implied Warranty Of Habitability Theory Should Flow From A Builder To A Subsequent Purchaser Without Proof Of Fraud When The Home Is Habitable.

The implied warranty of habitability is a warranty that typically flows from a builder to the original buyer, or first resident, of a newly constructed residential home. The legal principal behind the warranty is that a homeowner buying a new home has a reasonable expectation that the home will be habitable. 3 Causes of Action 379 (Originally published in 1984). The warranty is not a seller warranty if that seller is a homeowner who lives in the home for years and is not the builder of the home.

Count Six of the *Second Amended Complaint* claims that Kirk materially breached the implied warranty of habitability. As grounds for the claim against Kirk, Petrus alleges: (1) Kirk was the general contractor who built the Home;; (2) that the sale of the Home gave rise to an implied warranty of habitability; (3) that latent and concealed defects made the Home unfit for use and habitation; (4) that Kirk was provided written notice of his right to inspect the Home; (5) that Kirk inspected the Home and disputed the claim; and (6) by reason of the alleged conduct,

breached the warranty. *See Second Amended Complaint*, ¶¶ 60-69. Notwithstanding these allegations, as explained below, Petrus' breach of warranty claim against Kirk fails as a matter of law.

It is clear that no privity exists between Kirk and Petrus. Kirk met Petrus for the first time in August 2013. It is also clear that Gentry-Boyd lived in the Home from 2005 to 2012 without issue and that Petrus lived in the Home for some time before discovering the claimed defects first complained of in 2013. *See, Summary of Undisputed Facts*. Petrus has offered no proof of fraud.

While a divided Idaho Supreme Court held that it is possible for a subsequent purchaser to maintain a claim of breach of implied warranty of habitability against a builder under the right circumstances, the facts of our case differ and do not warrant that same application. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). *Tusch* involved a subsequent purchaser of duplexes purchased for investment purposes, who discovered a month after the sale that the walls and foundations were cracking. *Id.* The duplexes had never been occupied. *Id.* Our facts are much different. Gentry-Boyd lived in the Home from 2005 to 2012 without issue. Petrus lived in the Home from April 2012 until first complaining of a problem with the French doors in March 2013. Petrus did not purchase the Home solely for investment purposes like the buyers in *Tusch*. Further, in *Tusch*, the defects were major (cracking walls and foundation) and were discovered within a month of the sale. Here, the initial damage to the Home (French doors not working properly) was minor in comparison to cracked walls and a cracked foundation.

The problems Petrus encountered did not render the Home unlivable or uninhabitable as Petrus' own expert testified. *See, Value Dep.* 145:12 – 146:18; 194:7-14. This, coupled with the fact that the damage to the Home was not discovered until years after the end of construction, and after both Gentry-Boyd and Petrus lived in the Home for some significant time, the warranty claim

against Kirk should fail.

The Court should not view this case the same as *Tusch*. Instead, the Court must view this case in light of a record that fails to show any fact establishing that Kirk engaged in any fraud, fails to show that Kirk built a home that was not up to the applicable building code and standards, and fails to show that the Home was uninhabitable, based on the fact that both Gentry-Boyd and Petrus both lived in the Home. Further, based on the testimony of Petrus' experts, stating that the Home was not uninhabitable, the Court should hold that even if a lack of privity between builder and subsequent buyer is not required for the warranty to apply, the surrounding facts here differ significantly from *Tusch* and warrant summary judgment.

5. Petrus Failed To Comply With The Statutory Prerequisites Of The Notice And Opportunity To Repair Act By Not Allowing Kirk To Inspect The Home's Roof, Gutters, and Complete Exterior.

Any action commenced by a claimant prior to compliance with the requirements of Idaho's Notice and Opportunity to Repair Act (the "Act") shall be dismissed by the court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section. I.C. § 6-2503. In short, compliance is an absolute prerequisite to filing suit. Here, Petrus failed to comply with the Act prior to commencing suit.

Petrus attempted to comply with the Act by providing Kirk with notice in 2013 that there was a problem with the south-facing French doors of the Home. *See Kirk Aff., Ex. 1.* Petrus invited Kirk to inspect the doors. Kirk inspected the doors and reported to Petrus his findings. Because Kirk's findings at the time did not indicate to Kirk any evidence of a construction defect, he denied responsibility for the cause, but outlined to Petrus all of what he saw during his inspection. *See Kirk Aff., ¶ 15; and Nevala Aff. Ex. 1.*

The failure and statutory breach came when Petrus filed his *Complaint* in March 2014

alleging much more than just a problem with the French doors. The *Complaint* alleges the presence of mold in the crawlspace and significant damaged caused by moisture related to the water damage below. *See, Complaint*, p. 3. These allegations were much broader than those included in the August 7, 2013 notice letter to Kirk. *See Kirk Aff. Ex. 1*. The allegation of mold damage was significant.

After improperly filing his *Complaint*, in violation of the Act, Petrus invited Kirk out to inspect the Home a second time, in April 2014, because the problems with the Home were greater than just the French doors. During this second inspection, Kirk, the person who built the Home and was intimately familiar with what went into its construction, wanted to climb onto the roof, inspect the gutters that had been installed after Gentry-Boyd sold the Home, and look at the entire exterior of the Home. Petrus prevented Kirk from doing so. He allowed Kirk to inspect the crawlspace and interior of the Home, but stopped the inspection short and demanded that Kirk leave the property or he would call the sheriff when Kirk wanted to inspect the other areas of the Home. This action by Petrus effectively denied Kirk the opportunity to complete an inspection in accordance with the Act.

The filing of suit claiming excessive damage outside the scope of the August 7, 2013 notice letter, prior to allowing Kirk a second opportunity to inspect the Home, violates the Act and should result in bar to suit against Kirk.

6. Kirk Is An Intended Beneficiary Of Petrus' Waiver Of The Implied Warranty Of Habitability In The Purchase And Sale Contract With Gentry-Boyd.

If the Court finds that the implied warranty claim is not time barred, and not barred because the Home was actually habitable, the Court should still grant summary judgment on the claim because Petrus knowingly waived any warranty of habitability claim against Gentry-Boyd through the clear language of the purchase and sale agreement. This waiver of the warranty against the

seller flows to the benefit of the builder as a third-party beneficiary to the purchase and sale contract. Given the nature of a warranty of habitability, as a builder warranty, and not a seller warranty, the waiver language included in the sale contract contemplates and ultimately benefits the builder.

The waiver language of the sale contract states in part that ...“No warranties, including, without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding on either party.” Under Idaho law [I.C. § 29–102], if a party can demonstrate that a contract was made expressly for its benefit, it may enforce that contract, prior to rescission, as a third-party beneficiary. The test for determining a party's status as a third-party beneficiary capable of properly invoking the protection of I.C. § 29–102, is whether the agreement reflects an intent to benefit the third party. *Am. W. Enterprises, Inc. v. CNH, LLC*, 155 Idaho 746, 752, 316 P.3d 662, 668 (2013). Again, because a warranty of habitability is a builder warranty, made at the time a builder builds a new home for a first-resident buyer, the inclusion of language waiving this warranty in a sale contract between the first buyer, who was not also the builder, and a subsequent buyer, indicates the intent to benefit the third-party builder because the warranty doesn't exist between the seller and buyer unless the seller also built the home. Thus, the original builder is the only party the warranty waiver can benefit. Because of this, the Court should find that Kirk is the intended third-party beneficiary to Petrus' waiver and properly conclude that no warranty flowed from Kirk to Petrus.

7. Petrus Assumed the Risk of Mold and Microorganisms Existing In the Home.

Petrus accepted responsibility through his sale contract with Gentry-Boyd for any mold or other microorganism damage that may exist at the Home. The specific language of the sale contract reads as follows:

12. **MOLD DISCLAIMER: BUYER** is hereby advised that mold and/or other microorganisms may exist at the Property. Upon closing BUYER acknowledges and agrees to accept full responsibility and risk for matters that may result from mold and/or other microorganisms and to hold SELLER and any Broker or agent representing SELLER or BUYER harmless from any liability or damages (financial or otherwise) relating to such matters.

See Petrus Dep., Ex. 1.

This disclaimer should serve to bar any claim Petrus has for damages arising from mold or microorganisms. *See* Salinas v. Vierstra, 107 Idaho 984, 695 P.2d 369 (1985); *See also* Roundtree v. Boise Baseball, LLC., 154 Idaho 167, 296 P.3d 393 (2013). The *Second Amended Complaint* alleges the presence of mold in the crawlspace and concludes that significant damage to the Home was caused by moisture. *See, Second Amended Complaint*, ¶¶ 17, 78, 86. Because Petrus has assumed this risk pursuant to the above-highlighted disclaimer, his mold-related claims and damages should be barred.

VI. CONCLUSION

Kirk built the Home in 2005. Petrus filed his *Complaint* in 2014. Because there is no material fact in dispute as to the statute of limitations on the warranty claim, it fails, and summary judgment is proper. Further, the warranty claim fails because the undisputed facts show that the *Complaint* was filed without full compliance of the statutory requirements of the Notice and Opportunity to Repair Act. Under the statute, Petrus absolutely needed to allow Kirk the chance to conduct a full inspection of the Home a second time if he was going insist that the expanded damage was caused by a construction defect. His failure to do this is fatal, and the facts that it happened are not in dispute. Additionally, Petrus waived the warranty to Kirk's benefit and disclaimed any mold-related damage. Beyond that, neither the *Second Amended Complaint* nor the record, offers any facts to support the critical elements necessary to maintain a claim of fraud or

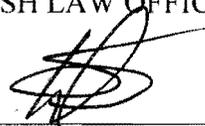
conspiracy to commit fraud because those facts do not exist.

Based upon the foregoing argument and authorities cited herein, the Court should grant Defendant Kirk's *Motion for Summary Judgment*, dismissing in their entirety Counts VI, and VII of the *Second Amended Complaint* against Kirk on the basis that no genuine issues of material fact exist regarding these claims and Kirk is entitled to judgment as a matter of law.

Respectfully Submitted,

DATED this 20th day of May, 2016.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 20th day of May, 2016, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Alyson A. Foster	_____	U.S. Mail, Postage Prepaid
Jason J. Rudd	_____	Overnight Courier
ANDERSEN SCHWARTSMAN	<u> X </u>	Hand Delivered
WOODARD BRAILSFORD, PLLC	_____	Facsimile (208) 342-4455
101 S. Capitol Blvd., Suite 1600	<u> X </u>	E-mail aaf@aswblaw.com
Boise, ID 83702	_____	jjr@aswblaw.com
<i>Attorney for Plaintiffs</i>		

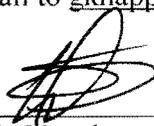
Michael G. Pierce	<u> X </u>	U.S. Mail, Postage Prepaid
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489 West Mountain Road	_____	Hand Delivered
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<i>Inspections</i>		

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<i>Resort Realty & Kevin Batchelor</i>		

Courtesy Copy:
Honorable Jason D. Scott

Via e-mail to gknapp@co.valley.id.us



Daniel A. Nevala

knowledge.

2. I am a Defendant in the above-entitled lawsuit. I have read and understand the allegations contained in Plaintiffs' *Second Amended Complaint and Demand for Jury Trial*, dated September 18, 2015.

3. I am a retired custom-home builder, with over 25 years of experience building custom homes in the McCall, Idaho area, and have intimate knowledge of the local building standards and requirements.

4. I was the builder and general contractor for a home located at 2130 Payette Drive, McCall, Idaho (the "Home").

5. I had an oral contract to build the Home for my friend, Nancy Gentry-Boyd.

6. Construction of the Home commenced in June 2004 and was substantially completed in August 2005, with final billing in September 2005.

7. As the builder and general contractor for the Home, I worked off a set of plans prepared by the architects for the project, Andy Laidlaw and Claire Remsberg, of McCall Design and Planning, and consulted with the architects, Ms. Gentry-Boyd, and Ms. Gentry-Boyd's decorator, Joanne Hutchinson, if questions arose during the course of construction.

8. As the builder and general contractor for the Home, I chose the materials used in the construction of the Home, based off the architects' plans, and also chose the subcontractors hired to help complete work on the Home. Ms. Gentry-Boyd provided no input on these decisions.

9. The materials used in construction of the Home were purchased from McCall lumberyards, suppliers that I had worked with for years, and who had supplied me and most of the other builders who were building in McCall with the materials used in all of our construction.

10. No substandard or below code materials were used in the construction of the Home.

11. The flashing used to flash the area surrounding the Home's French doors was of the quality and standard used in the construction industry in McCall at the time of construction of the Home.

12. The vapor barrier used in the construction of the Home consisted of either a felt paper or synthetic vapor barrier commonly referred to by its trade name, Tyvek, or a combination of both. The use of these materials met industry standard at the time of the Home's construction and was not below code.

13. Prior to August 2013, I had never met Edmond A. Petrus, Jr. ("Petrus"), or any representative of the Petrus Family Trust, nor did I have any discussions with Mr. Petrus or any representative of the Petrus Family Trust.

14. I was never informed by any party to this lawsuit of the sale of the Home to Mr. Petrus, individually or as a representative of, the Petrus Family Trust.

15. On August 21, 2013, at the invitation of Plaintiffs' counsel, I attempted to exercise my right to inspect the Home's French doors and was accompanied by Mr. Petrus and the Home's caretaker, Mr. Longmire. During my inspection, and for the first time, I discovered the following:

- a. The locking mechanism on the operable door that was present when construction of the Home was complete had been removed and reinstalled by a third-party unknown to me, in an inappropriate manner;
- b. The locking mechanism on the stationary door appeared to have been pried upon to the extent that it was not functional;
- c. Markings on the overhead trim board indicated that the locking mechanism was engaged to lock when someone had tried to close the door;
- d. Weather stripping on the astragal of the operable door had been completely

- removed;
- e. Weather stripping on the bottom of the operable door had been trimmed and was not intact;
 - f. Weather stripping on the stationary door could not be verified or inspected because the door would not open;
 - g. Screws were installed into the threshold that were not factory and were not installed in the correct area;
 - h. Several screws had been added to the threshold, especially in the weep channel;
 - i. The ice and water shield installed in the crawl space had been altered and displaced;
 - j. Foam insulation had been removed.

16. I was invited to inspect the Home by Petrus, or his counsel, a total of three times. I first visited the Home on March 21, 2013, as explained above. The second and third visits were both in April 2014. The second visit was before the Home's demolition started and the third visit was after demolition of the Home had started. During the first inspection, I inspected the Home's French doors and area immediately around the French doors. During the second inspection, I inspected the Home's crawlspace, interior, and French doors. I wanted to inspect the Home's roof, gutter system, and exterior, but was prevented from doing so by Petrus. He demanded that I leave and threatened to call the sheriff if I did not.

17. At the time construction of the Home was completed in 2005, the doors were fully functional and properly installed, flashed, and waterproofed.

18. None of the above-referenced abnormalities existed at the time of the completion

of the Home. In addition, I attended social functions at the Home between 2005 and 2009, and used the doors referenced above. During these social events, I was able to observe the condition of the doors and witnessed no problems. The alterations and damage witnessed during my 2013 inspection were not present. Notwithstanding, during the first year after completion of construction, Gentry-Boyd contacted me with a complaint that the doors were sticking. In response, I adjusted the door hinges, and it was my understanding that the sticking door problem was remedied to Gentry-Boyd's satisfaction, as she never made a subsequent complaint to me regarding the doors or any other need for repairs to the Home.

19. My first inspection revealed that at some point after construction on the Home was completed, the Home had been severely altered and damaged.

20. Based upon my personal knowledge, it is my opinion that the damage to the Home, as detailed in the Plaintiffs' lawsuit, was not the result of using materials and standards that did not meet the applicable building codes and standards of care. Rather, the damage was likely a result of a combination of misuse, neglect, damage, and possible alteration. Once the damage and alterations occurred, the extreme weather and elements in McCall could have quickly exacerbated the problem.

21. During construction of the Home, I had general conversations with Gentry-Boyd regarding aspects of the construction of the Home, as would be typical between any builder and owner during the construction process. With that said,

- a. At no time did I and Defendant Gentry-Boyd ever have any conversation, let alone agree, that I would use and install substandard materials, including, but not limited to, a substandard exterior envelope, which did not meet the applicable building codes and standards of care, for the purpose of cutting costs.

The materials I used to construct the Home met or exceeded building codes and applicable standards of care.

- b. At no time did I and Defendant Gentry-Boyd ever have any conversation, let alone agree, that I would intentionally conceal any portion of the home's construction or materials, for the purpose of concealing substandard materials that did not meet applicable building codes and standards of care, to avoid a general home inspection, a final home inspection to obtain a certificate of occupancy, or to defraud a subsequent purchaser of the Home. To the best of my knowledge and recollection, the Home was inspected several times by the County building inspector at the time, Bill Housdorf, and passed each inspection, including the final inspection.

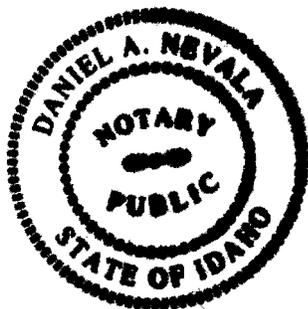
22. That attached hereto as **Exhibit 1** is a true and correct copy of a notice of construction defect letter I received from Jason Mau, dated August 7, 2013.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 20 day of May, 2016.


Chris Kirk

SUBSCRIBED AND SWORN to before me this 20th day of May, 2016.




Notary Public for State of Idaho
Residing at McCall, Idaho
My Commission Expires: 6-21-2018

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 20th day of May, 2016 I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Alyson A. Foster	_____	U.S. Mail, Postage Prepaid
Jason J. Rudd	_____	Overnight Courier
ANDERSEN SCHWARTSMAN	<u> X </u>	Hand Delivered
WOODARD BRAILSFORD, PLLC	_____	Facsimile (208) 342-4455
101 S. Capitol Blvd., Suite 1600	<u> X </u>	E-mail aaf@aswblaw.com
Boise, ID 83702		jjr@aswblaw.com
<i>Attorney for Plaintiffs</i>		
Michael G. Pierce	<u> X </u>	U.S. Mail, Postage Prepaid
P.O. Box 1019	_____	Overnight Courier
489 West Mountain Road	_____	Hand Delivered
Cascade, ID 83611	_____	Facsimile (208) 382-3783
<i>Attorney for Defendant Todd</i>	<u> X </u>	E-mail
<i>McKenna d/b/a Homecraft Home</i>		michael@michaelpiercelaw.com
<i>Inspections</i>		
Steven J. Millemann	_____	U.S. Mail, Postage Prepaid
George C. Pittenger	_____	Overnight Courier
MILLEMAN, PITTENGER,	<u> X </u>	Hand Delivered
MCMAHAN & PEMBERTON LLP	_____	Facsimile (208) 634-4516
706 N. First Street	<u> X </u>	E-mail sjm@mpmplaw.com
P.O. Box 1066		
McCall, ID 83638		
<i>Attorneys for Defendant Nancy</i>		
<i>Gentry-Boyd</i>		
Phillip J. Collaer	_____	U.S. Mail, Postage Prepaid
ANDERSON, JULIAN & HULL LLP	_____	Overnight Courier
C.W. Moore Plaza	<u> X </u>	Hand Delivered
250 S. Fifth Street, Suite 700	_____	Facsimile (208) 344-5510
P.O. Box 7426	<u> X </u>	E-mail pcollaer@ajhlaw.com
Boise, ID 83707-7426		
<i>Attorneys for Defendant Re/Max</i>		
<i>Resort Realty & Kevin Batchelor</i>		

Courtesy Copy:
Honorable Jason D. Scott

Via e-mail to gknapp@co.valley.id.us



Daniel A. Nevala

EXHIBIT 1

Jason R. Mau
jmau@greenerlaw.com
(208) 319-2600

ALFA® INTERNATIONAL
The Global Legal Network

August 7, 2013

VIA CERTIFIED MAIL

Chris Kirk
Kirk Enterprises
P.O. Box 846
McCall, ID 83638

Re: **NOTICE OF CONSTRUCTION DEFECT**
2130 Payette Dr., McCall, Idaho 83638
GBSO File No. 19456-002

Dear Mr. Kirk:

We represent and write on behalf of Ed Petrus, the current owner of the home located at 2130 Payette Drive in McCall ("Home"). This letter is being sent directly to you to assure that all requirements for notice under the Notice and Opportunity to Repair Act are satisfied.

We are notifying you of continuing problems with the construction of the Home and assert a construction defect claim. Mr. Petrus, the claimant, asserts these claims as a "homeowner" pursuant to Idaho Code section 6-2502(5), which includes a subsequent purchaser of a residence from a person who contracts with a construction professional for the construction of a residence. Mr. Petrus purchased the Home from Nancy Boyd in April, 2012.

The claim regards the south-facing French Doors ("Doors") that open out to the deck on the lake side of the Home. Mr. Petrus became aware of problems with the Doors when he first occupied the Home. Mr. Petrus hired others to further review the problems with the Doors, which unveiled evidence of water intrusion.

A detailed inspection of the Doors disclosed the presence of excessive water in the foam insulation on the stem wall under the Doors. Energy Seal was hired to remove the insulation, and after removing the insulation, further water intrusion and damage was discovered. This damage includes, but is not limited to, damage to the lakeside load point next to the Doors as well as damage to the floor sheeting. Also, it was discovered that ice and water shield was applied/flushed to the interior side of the rim joist instead of the exterior side, which undoubtedly has contributed to the water damage. This damage was observed by Mr. Petrus' maintenance man/property caretaker, Mike Longmire, and confirmed by other construction personnel. We have reviewed the cost of repair by one contractor, which we believe you have reviewed as well, and which states that repairs will require the reinstallation of new Doors, repair of the water damaged rim and floor joists, and replacement and refinishing of the portions of the deck and floor near the Doors' threshold.

August 7, 2013
Page 2

At this time, it is anticipated that the necessary repairs will commence in early- to mid-September.

Pursuant to I.C. §6-2503, we are providing you with the opportunity to remedy the construction defect. Our general understanding of the damage per the findings to date suggests that the damage has been caused by the improper installation of flashing in the area of the Doors. This general characterization of the damage and current claim is subject to modification upon further investigation.

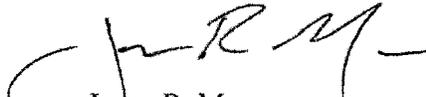
If you want to take advantage of the opportunity to perform the work, or be involved in the direction of the work, and be given the opportunity to cure the identified problems that are your responsibilities, you must notify Mr. Petrus, via the undersigned, within twenty-one (21) days from the date of this letter. Upon receipt of that written notification, Mr. Petrus will assess your response, have it reviewed and analyzed by his consultants and contractors, and determine if any remedial work you agree to perform is acceptable and can be accomplished this fall. You may be assured we will be prompt in so advising you. Mr. Petrus will also cooperate per I.C. § 6-2503(2)(a) should you wish to inspect the extent of damage to the Doors.

Failing a timely response that is adequate and reasonable, Mr. Petrus will have no alternative but to do what is reasonable and necessary to mitigate his damages and cure the aforementioned deficiencies. Should this occur, Mr. Petrus reserves his right to seek recompense from you or others for the cost of the repairs, plus attorney's fees and cost of suit.

If you have not already done so, we urge you to provide a copy of this letter to your insurance carrier. We look forward to your response within the statutory timeframe.

Very truly yours,

GREENER BURKE SHOEMAKER OBERRECHT P.A.



Jason R. Mau

JRM/krt
cc: Client
Nancy Boyd
(590719)

ORIGINAL



Alyson A. Foster (ISB #9719)
 Jason J. Rudd (ISB #9406)
**ANDERSEN SCHWARTZMAN
 WOODARD BRAILSFORD, PLLC**
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Attorneys for Plaintiffs

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

PETRUS FAMILY TRUST DATED MAY
 1, 1991, et al., ,

Plaintiffs,

v.

NANCY GENTRY-BOYD et al.,

Defendants.

Case No. CV-2014-71-C

**PLAINTIFFS' OPPOSITION TO
 DEFENDANT CHRIS KIRK D/B/A
 KIRK ENTERPRISES' MOTION FOR
 SUMMARY JUDGMENT**

DOUGLAS A. MILLER, CLERK
 By Glenn Deputy
 JUN 12 2016

Case No. _____
 Filed _____ A.M. _____ P.M.

INTRODUCTION

Defendant Chris Kirk, d/b/a Kirk Enterprises (“Kirk”), requests summary judgment on Plaintiffs’ breach of the implied warranty of habitability based on an array of legal arguments that misapply the law and ignore factual disputes that must be presented to a jury.

The bulk of Kirk’s arguments misunderstand the law governing the implied warranty of habitability. The Idaho Supreme Court held unambiguously in *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987), that a subsequent home purchaser such as Petrus may pursue this claim against the original builder. No Idaho court has yet determined when the statute of limitations accrues for this claim. But, key Idaho Supreme Court decisions set forth principles that compel only one conclusion: the claim accrues upon discovery of defect, not upon completion of construction. Indeed, as a claim borne of “public policy,” the case law indicates that it would as “absurd” for an implied warranty of habitability claim to accrue based on the original build contract as it would for lack of contractual privity to prevent relief. *Id.* at 46, 51. This conclusion has been reached by many other jurisdictions and is the natural result of Idaho case law. Plaintiffs’ claims thus have not expired.

Kirk’s factual arguments are likewise not well founded. Kirk argues a lack of sufficient evidence of uninhabitability based on the fact that Petrus continued to “inhabit” the home. But as might be expected, the implied warranty of habitability does not require a serious defect to become deadly before it is invoked. In fact, in *Tusch* the court held that the plaintiff had the right to have a jury decide whether the warranty was breached by a cracked foundation that caused wall cracking and water intrusion—even though these symptoms did not force the residents out of the home. The defects here are serious enough that, as Plaintiffs’ expert testified, left untreated *would* ultimately create a serious safety hazard. These are factual questions ripe for a jury.

Kirk also complains that he was not provided sufficient notice under the Idaho’s Notice of Opportunity to Repair Act (“NORA”) because the complaint “expanded” the claimed damages and Kirk believes he did not have sufficient opportunity to inspect after receiving the complaint.

The law, however, is clear: NORA only requires a claimant to provide enough information for a builder to identify the “general nature and location” of a defect, not the exhaustive explanation Kirk argues for. Petrus’s notice to Kirk—given several months before the complaint was filed—provided a wealth of detail, and far more than the Idaho Supreme Court has required in similar cases. Kirk was allowed full access to the home to inspect, and he decided not to accept responsibility. This should end the inquiry.

Finally, Kirk attempts to invoke asserted disclaimers in the purchase and sale agreement between the home’s original owner, Nancy Gentry-Boyd (“Gentry”), and Plaintiffs. Kirk is not a party to, or third party beneficiary of, that agreement. And the contractual language he cites do not provide the broad disclaimer he seeks anyway.

In sum, Kirk’s attempt to avoid responsibility for the damages caused by his construction defects should be rejected. Plaintiffs’ expert opines that the damages were caused by faulty construction, and factual issues surrounding the nature and cause of the damages should be resolved by a jury. Kirk’s motion should be denied.

STATEMENT OF FACTS

I. Kirk Builds 2130 Payette Drive

1. In 2004, Gentry hired Kirk to build a custom home for her on lakefront property at 2130 Payette Drive. (Gentry Depo. at 28:10-13, 27:7-10.)¹ She paid Kirk approximately \$1,035,000.00. (Kirk Depo. at 75:11-23.)² The home was completed in summer 2005. (*Id.*, 64:2-6.)

2. Kirk was the builder and general contractor. (Affidavit of Chris Kirk (“Kirk Aff.”), ¶7.) He chose the materials to use in the construction of the home and the subcontractors. (*Id.*, ¶ 8.) He was at the site every day or almost every day. (Kirk Depo. at 79:12-13.)

¹ This deposition transcript of Nancy Gentry-Boyd, March 19, 2016, is attached as Exhibit 7 to the Affidavit of Greg Pittenger.

² This deposition transcript of Robert Christopher “Chris” Kirk, individually and as the 30(b)(6) representative of Kirk Enterprises, is attached as Exhibit 12 to the Affidavit of Greg Pittenger.

3. At issue in this case are a pair of French sliding doors located on the southeastern corner of the dining room (the “French Doors”). (Declaration of Edmond A. Petrus (“Petrus Decl.”) at Ex. 1 thereto.) These are outswing, double-panel French Doors. (*Id.*) The original plans called for in-swing doors, which Kirk testifies are more suitable for keeping out the elements. (Kirk Depo. at 39:9-10; 117:6-12.) In the design process, Gentry requested to change to outswing doors. (Kirk Depo. at 165:23-166:4, 169:16-20 & Ex. 29 to Kirk Depo.)

4. Either Kirk or people working for him installed the French Doors, placed moisture barrier around the doors, and installed flashing. (Kirk Depo. at 79:6-21-80:2.) He reviewed that work as it was performed. (*Id.*, 83:24-84:1.)

5. The home was completed in August or September 2005. (Kirk Aff., ¶ 6.)

6. From 2005 to 2009, Gentry used the Home as a vacation home in the summer and winter. (Gentry Depo. at 45:18-46:4.)

7. A few years after living in the Home, Gentry called Kirk to come look at the Doors because they were sticking; Kirk inspected them and made some adjustments. (Gentry Depo. 51:19-52:11, 53:6-8; Ex. 12 to Affidavit of Alyson A. Foster (“Foster Aff.”), Gentry Responses to Interrogatories at 9.) Kirk also contacted the door installers. (*Id.*; Gentry Depo. at 66:2-13.) Gentry also admits that after Kirk left, the problem with the Doors continued, but that she chose not to have Kirk look at them again. (Gentry Depo. at 54:17-55:6, 71:24-8.) Gentry also admitted that she does not call the home builder every time a door sticks, but that in this case it was serious enough that she did. (*Id.*, 111:19-112:7.)

8. On another occasion, a cold draft came through the Doors and interfered with a bridge game. (*Id.*, 56:16-58:16.) Gentry remedied the problem by affixing duct tape along the seam between the doors. She never removed that tape but somehow continued to use the doors in the summers. (*Id.*, 59:3-60:9.)

9. Gentry began trying to sell the Home in 2009. (Wood Depo. at 14:21-15:2; Foster Decl., Ex 7.)³

II. Gentry Sells 2130 Payette Drive to Petrus Family Trust

10. In early 2012, Plaintiff Petrus visited the Home. Petrus visited the home two or three times. (Petrus Depo. at 91:22-92:1.)⁴ He did not try to open the French Doors during any of these visits. (Declaration of Edmond A. Petrus in Opposition to Defendants' Motions for Summary Judgment ("Petrus Decl."), ¶ 12.)

11. On April 20, 2012, Plaintiffs and Gentry finalized the Purchase and Sale Agreement for the home. (*Id.*, ¶ 10.)

12. The home sale process provides two primary means for the buyer to learn of underlying problems with the home: the RE-25 Seller's Property Condition Disclosure Form and the report of the home inspector. Here, neither avenue revealed to Petrus any problems with water and moisture around the French Doors. (Ex. 2 to Pittenger Aff.; Petrus Decl., ¶¶ 9, 19, Ex. 2 to Petrus Decl.)

13. First, as required by Idaho law, Gentry completed and submitted a R-25 Seller's Disclosure Form. (Ex. 2 to Pittenger Aff.) Gentry initially completed the form on February 2, 2011, and re-executed it on March 10, 2012. (*Id.*) She did not disclose that she experienced any water intrusion, moisture, or other problems with the home, much less any specific problems with the French Doors. (*Id.* at 1, 4.)

14. Second, on or about March 15, 2012, Defendant Todd McKenna, d/b/a Homecraft Inspections ("McKenna"), conducted an inspection of the home. (Ex. 2 to Petrus Decl.) For the "Foundations, Basements and Crawlspace" section of the report, McKenna indicated that "the item, component or unit is not functioning as intended, or needs further inspection by a qualified contractor. Items, components or units that can be repaired to satisfactory condition may not

³ The deposition transcript of Michael Wood, June 1, 2016 (rough draft) is attached as Exhibit 4 to the Declaration of Alyson A. Foster.

⁴ The deposition transcript of Ed Petrus, March 15, 2016, is attached as Exhibit 1 to the Affidavit of Phillip Collaer.

need replacement.” (*Id.* at 13.) The photos included for that section indicated “ant signs,” “past moisture signs,” and “water signs” in the crawlspace. (*Id.* at 14.) McKenna’s comment stated:

There are signs of ant intrusion that should be addressed (Picture 1-3). I would recommend a certified exterminator be contacted. There is also some signs of spring run off in the crawlspace (Picture 4,5), which is typical for the area. It should be monitored each spring to see if a sump needs to be installed. (*Id.*)

15. Petrus met with McKenna to review his report. (Petrus Depo. at 67:19-68:9, 88:2-89:4.) Petrus asked McKenna about the photos showing water seepage in the crawl space and expressed concern about them. (*Id.*, 88:5-10.) In response, McKenna “said this is normal seepage for this type of property, this type of area, this type of house, this type of – you know, this is normal, nothing unusual.” (*Id.*, 88:12-14.) Petrus pressed him on the point, but McKenna assured him no further action was required. (*Id.*, 88:15-89:4.) Petrus therefore understood that there were no exigent problems from moisture or water, and that, at most, ant extermination may be necessary. (Petrus Decl., ¶ 9.) As such, Petrus did not ask Gentry to make any repairs to the crawlspace, and he assumed responsibility for any ant extermination. (*Id.*)

16. The Inspection Report did not indicate any problem with the French Doors. (*Id.* at Ex. 2, p. 10.) McKenna did not try to open or close the French Doors and “did not even look at them.” (McKenna Depo. at 54:19-55:3;⁵ Petrus Depo. at 166:8-167:19.)

III. Petrus Discovers The French Doors Do Not Function Properly.

17. Within days of moving into the home, Petrus for the first time tried the French Doors at issue. (Petrus Decl., ¶ 12.) He immediately observed that the French Doors did not open properly, did not close properly, and would not lock. (Petrus Depo. at 116:1-119:4.) Petrus’s home maintenance agent, Mike Longmire, also observed that one door panel would not open, was swollen, and “looked like it had gotten wet.” (Longmire Depo. at 25:7-13.)⁶

⁵ The deposition transcript of Todd McKenna, March 11, 2016, is attached as Ex. 13 to the Affidavit of Greg Pittenger.

⁶ The deposition transcript of Mike Longmire, March 14, 2016, is attached as Ex. 3 to the Foster Decl.

18. Around the same time, Petrus asked Longmire to install a grill/barbecue in the area next to the French Doors. (Longmire Decl., ¶ 2.) Longmire hired a local company, Valley County A-1 Heat, to install a gas line in the crawlspace underneath the French Doors. (*Id.*; Longmire Depo. at 15:25-16:15.) To accomplish this, Valley County A-1 Heat drilled a hole through the insulation foam in the crawlspace underneath the French doors. (Longmire Decl., ¶ 2.) Water came out of the hole and the insulation was saturated. (*Id.*) Longmire then hired an insulation company, Energy Seal, to investigate. (*Id.*, ¶ 3.) They removed a portion of the wet foam insulation underneath the French Doors and found that the floor joists underneath the French doors and the corner post were rotten. (*Id.*)

19. Between August 2012 and summer 2013, Petrus attempted to have Gentry take responsibility for the necessary repairs. (Exs. 6, & 7 to Boyd Depo.; Ex. 41 to Batchelor Depo.) Gentry informed Petrus that the due diligence period had ended and she had no further responsibilities. (Foster Decl., Ex. 9.)

IV. Petrus Provides Kirk With Notice And Opportunity To Repair

20. On August 7, 2013, Petrus (through his attorney) sent a letter to Chris Kirk to provide notice under the Notice and Opportunity to Repair Act. (Petrus Decl., ¶ 23 & Ex. 4 thereto). This was several months prior to filing suit. (*Id.*) That letter stated:

We are notifying you of continuing problems with the construction of the Home and assert a construction defect claim. Mr. Petrus, the claimant, asserts these claims as a "homeowner" pursuant to Idaho Code section 6-2502(5), which includes a subsequent purchaser of a residence from a person who contracts with a construction professional for the construction of a residence. Mr. Petrus purchased the Home from Nancy Boyd in April, 2012.

The claim regards the south-facing French Doors ("Doors") that open out to the deck on the lake side of the Home. Mr. Petrus became aware of problems with the Doors when he first occupied the Home. Mr. Petrus hired others to further review the problems with the Doors, which unveiled evidence of water intrusion.

A detailed inspection of the Doors disclosed the presence of excessive water in the foam insulation on the stem wall under the Doors. Energy Seal was hired to remove the insulation, and after removing the insulation, further water intrusion and damage was discovered. This damage includes, but is not limited to, damage to the lakeside load point next to the Doors as well as damage to the floor sheeting. Also, it was discovered that ice and water shield was applied/flushed to the interior side of the rim joist instead of the exterior side, which undoubtedly has contributed to the water damage. This damage was observed by Mr. Petrus' maintenance man/property caretaker, Mike Longmire, and confirmed by other construction personnel. We have reviewed the cost of repair by one contractor, which we believe you have reviewed as well, and which states that repairs will require the reinstallation of new Doors, repair of the water damaged rim and floor joists, and replacement and refinishing of the portions of the deck and floor near the Doors' threshold.

At this time, it is anticipated that the necessary repairs will commence in early- to mid September.

Pursuant to I.C. §6-2503, we are providing you with the opportunity to remedy the construction defect. Our general understanding of the damage per the findings to date suggests that the damage has been caused by the improper installation of flashing in the area of the Doors. This general characterization of the damage and current claim is subject to modification upon further investigation.

If you want to take advantage of the opportunity to perform the work, or be involved in the direction of the work, and be given the opportunity to cure the identified problems that are your responsibilities, you must notify Mr. Petrus, via the undersigned, within twenty-one (21) days from the date of this letter. Upon receipt of that written notification, Mr. Petrus will assess your response, have it reviewed and analyzed by his consultants and contractors, and determine if any remedial work you agree to perform is acceptable and can be accomplished this fall. You may be assured we will be prompt in so advising you. Mr. Petrus will also cooperate per I. C. § 6-2503(2)(a) should you wish to inspect the extent of damage to the Doors.

(*Id.* at Ex. 4.)

21. On August 11, 2013, Kirk requested to inspect the home. (Petrus Decl., ¶ 24 & Ex. 5 thereto.) On August 20, 2011, Plaintiffs' attorney scheduled Kirk's inspection for August 20, 2013. (Petrus Decl., ¶ 25 & Ex. 6.)

22. Kirk inspected the home on August 21, 2013. (*Id.* Ex. 7.) He was allowed as much time as he wanted to conduct his inspection. (Longmire Decl., ¶ 4.) He was there for approximately two hours. (*Id.*)

23. On August 30, 2013, Petrus received a letter from Kirk stating that “Kirk exercised his right to inspect the property on August 21, 2013,” and setting forth what Kirk claims to have observed. (Petrus Decl., ¶ 26 & Ex. 7 thereto). In specific, Kirk claimed that:

1. The locking mechanism on the operable door had been removed and reinstalled in an inappropriate manner.
2. The locking mechanism on the stationary door appeared to have been pried open to the extent that it was not functional.
3. Markings on the overhead trim board indicated that the locking mechanism was engaged to lock when someone had tried to close the door.
4. Weather stripping on the astragal of the operable door had been removed.
5. Weather stripping on the bottom of the operable door had been trimmed and was not intact.
6. The weather stripping on the stationary door could not be verified or inspected because the door would not open.
7. Screws were installed into the threshold that were not “factory” and were not installed in the correct area.
8. Several screws had been added to the threshold, especially in the weep channel.
9. The water shield installed in the crawl space had been altered and displaced.
10. Foam insulation had been removed.

(*Id.*)

24. In April 2014, Kirk visited and inspected the site twice more. (*Id.*) Petrus was present when Kirk inspected the home. (*Id.*; Petrus Decl., ¶ 27.) Kirk told Petrus he would try to get the doors fixed for him. (*Id.*) Petrus also overheard Kirk saying that he had told Gentry that

out-swinging doors, as opposed to in-swinging doors, are a problem because they do not keep water out and that he had advised her not to use them; but, she had insisted on those doors anyway. (*Id.*) Kirk was at the house for over an hour. (*Id.*)

25. At some point during that visit, Kirk requested to go on the roof. (*Id.* ¶ 28.) Petrus was uncomfortable with him going on the roof, both for liability reasons and because Petrus was concerned he might harm something. (*Id.*) There was no rot or problems on the roof. (*Id.*) Petrus therefore told Kirk he did not want him to go on the roof and asked him to leave. (*Id.*)

V. The Damage Resulted From Defective/Substandard Construction Techniques

26. In October 2013, Petrus hired Restoration Pro, n/k/a Disaster Response, to perform the remediation work. (Value Depo. at 45:4-12.)⁷ Eric Waite, project manager, acted as the on-site project manager for the remediation. (*Id.*, 14:16-24.) Beau Value, owner of Disaster Response, supervised Waite and stayed apprised of the repairs. (*Id.*, 81:20-82:10.) Petrus has designated Value as an expert witness and has notified all parties that Waite may provide testimony that involves expert knowledge and opinions.

27. To remediate the damages, the Disaster Response team removed the stone veneer around the French Doors, other doors, hardwood around the doors, the deck joists, and decking. (Value Depo. at 44:20-47:5; 52:8-53:2; 94:11-95:13.) They discovered extensive rot on the bottom and sides of the door, the subfloor, underneath the doors, and the deck joists. (*Id.*; Value Decl., Ex. 1.) As they continued to remove stone veneer around the southeast corner next to the doors, they discovered additional extensive wood rot and structural rot up to 2-3 ½ feet high in that area. (Value Depo. at 94:11-95:13.) They continued to remove the stone veneer, including all mesh and masonry, along the south-facing wall to discover rotted materials. (*Id.*) They removed the flashing and rim boards. (*Id.*; 105:1-17.) They removed and replaced all rotted

⁷ The deposition transcript of Beau Value, March 11, 2016, is attached as Ex. 5 to the Affidavit of Greg Pittenger.

materials and installed a heavy moisture barrier. (*See generally* Value Depo. 94:11-99:25; 103:13-105:17, describing this process.)

28. In total, Petrus paid Disaster Response \$57,337.16 for this work, which did not include the \$4,976.52 Petrus paid for replacement doors. (*Id.*, 73:3-10; Foster Decl., Ex. 5.)

29. In Value's expert opinion, the damage was caused by three defects that occurred during construction of the home. (*See generally* Value Depo. at 112:20-133:11, discussing causation opinions; Declaration of Beau Value in Opposition to Defendants' Motion for Summary Judgment, ¶ 8-12.) First, the French Doors were not framed properly and the flashing underneath the doors was inadequate. (*Id.* at 113:2-116:4; 124:5-126:8; Value Decl., ¶ 8-12.) As a result, water did not drain properly away from the Doors and created a trough of water under the doors. (*Id.*)

30. Second, improper flashing was used along the bottom of the exterior wall. (*Id.*) The flashings were only 1½ inches high, rather than 4 inches high, and this allowed water to rise up vertically and seep through to the walls. (*Id.*; Value Depo. at 130:25-133:15; 136:15-137:19.)

31. Third, the amount and placement of the moisture barrier along the wall was inadequate and below industry standards. (*Id.* at 133:24-136:11; Value Decl., ¶¶ 8-12.) All of this created a lack of waterproofing that allowed water to enter the structure and create rot. (Value Decl., ¶¶ 8-12; Value Depo. 112:20-138:8.) And, he testified, "this wasn't something that happened quickly. This was something that probably started shortly after the house was build, and slowly started – that water started penetrating and created rot." (*Id.* at 126:5-8; Value Decl., ¶ 8.)

32. Value testifies that if the repairs had not been made, eventually the hard wood would buckle and the stones would start falling off the veneer.

(Page 195)

25 Q. If these conditions you observed around the

(Page 196)

1 door, the joists and the dry rot, both on the southern

2 facing side, and then the conditions you observed on the

3 eastern facing side, had not been fixed by your folks,

4 what would have happened over time to the house?
5 A. Eventually, you know, that rot on those floor
6 joists would continue to move, and you may notice some
7 creaking. You may notice -- and that water would
8 continue, because remember, the sub-floor was rotted
9 right underneath that hardwood. And which is still
10 amazing that the hardwood did not show any signs of the
11 water, but the sub-floor directly underneath it is
12 rotted.
13 So as that water has -- kept going there, I
14 think eventually, you are going to see those signs in
15 your hardwood. Eventually, it is going to start
16 buckling, and show signs of moisture there.
17 On the stone, I mean, if that continued, I
18 mean, it would take a long time. But if that continued,
19 eventually the stones would fall off the wall.
20 Q. Okay. Would it create a safety hazard?
21 A. It could. But, I mean, I would think you
22 would see those signs long before --
23 Q. Okay.
24 A. -- a safety hazard would occur.

(Value Depo. at 195:25-196:21.)

33. Value also testifies that the flashing size (1¼ inches high) and felt application violated building codes in effect at the time of building. (Value Decl., ¶¶ 10-12.) Specifically, the International Residential Code of 2003 requires that flashing “be installed to prevent water from reentering the exterior wall envelope.” (*Id.*, ¶ 11.) The flashing used here was 1¼ inches tall, less than 2 inches, and not sufficient to prevent water from reentering the exterior wall envelope, particularly on the south-facing, lakeside wall facing the elements. (*Id.*) In Value’s opinion, the flashing did not comply with this code. (*Id.*)

34. In addition, the Code requires felt or material to overlap the lower layer not less than 2 inches. (Value Decl., ¶ 12.) Here, the home was constructed using flashing that was only 1¼ inches and therefore the felt therefore could not lap the lower layer by at least 2 inches. (*Id.*) In some places, the felt did not overlap the flashing at all and rested above it. (Value Depo. at 131:14-21.) Accordingly, in Value’s opinion, this did not comply with either the flashing code or the weather-resistant sheathing paper code. (Value Decl., ¶ 12.)

35. Value reviewed the August 29, 2013 letter from Kirk listing his observations and what he believes caused the damage. In Value's opinion, the items listed in the letter were not the main cause of the damage. Specifically:

- Value did not observe any screws in threshold. (Value Depo. at 195:19-20.) Neither Petrus nor Longmire, nor anyone else to their knowledge, installed screws in the threshold. (Petrus Decl., ¶ 31; Longmire Decl., ¶ 8.)
- Even if screws had been installed by Petrus (they were not), Value opines they would not have led to the damages that occurred. (Value Depo. at 204:8-13.)
- If weather stripping had been an issue, it "would have let water inside, and you would have seen it on the floor. And that wasn't the issue." (Value Depo. at 204:15-17.)
- The only foam insulation that had been removed was the removal that demonstrated the damages. (Value Depo. at 205:2-15.) The removal of foam was not the cause of the damages.

36. In addition:

- Since Petrus moved into the home, no one removed or reinstalled the locking mechanism. (Petrus Decl., ¶ 31; Longmire Decl., ¶ 8.) The doors were re-keyed only. (Petrus Decl., ¶ 32; Longmire Decl., ¶ 9.)
- Neither Petrus nor Longmire, nor anyone else to their knowledge, attempted to pry open the locking mechanism on the stationary door. (Petrus Decl., ¶ 31; Longmire Decl., ¶ 8.)
- Neither Petrus nor Longmire, nor anyone else to their knowledge, removed weather stripping from the doors. (Petrus Decl., ¶ 31; Longmire Decl., ¶ 8.)
- The doors are provided by the manufacturer sealed. (Ex. 15 to Foster Decl.)

37. Value also testifies that there is a significant difference between mold and rot. (Value Decl., ¶¶ 13-17.) Mold is a growth of fungus or other microorganisms, and may be remedied through sanding and microbial treatment. (*Id.*, ¶¶ 14, 16.) Rot, in contrast, is a structural degradation of wood or other natural materials, and may be remedied only through replacement. (*Id.*, ¶¶ 15-16.) While mold and rot both may arise from exposure to moisture, they are qualitatively different conditions that require different methods, at different price levels, of repair and remediation. (*Id.*, ¶¶ 13-17.) Indeed, in this case, Disaster Pro separately identified and

charged for the mold remediation performed in the crawlspace at the Home, which was miniscule as compared to the rot and water damage. (Value Depo. at 77:17-21.) Simply put, in the construction industry, “mold” and “rot” are not interchangeable conditions.

ARGUMENT

The standard for a motion under Idaho Rule of Civil Procedure 56(c) is undoubtedly well known to this Court. Summary judgment may be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). Because summary dispositions are disfavored, the Court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. *Id.*; *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Thus, summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint Sch. District No. 2*, 128 Idaho 714, 718, P.2d 583, 587 (1996).

I. Summary Judgment Should Not Be Granted on Count VI, Breach of the Implied Warranty of Habitability

A. The Statute of Limitations Does Not Bar Plaintiffs’ Claim

Kirk argues that the statute of limitations bars Plaintiffs’ claim. Kirk is incorrect, as a matter of law.

Idaho Code § 5-241 governs the accrual of actions arising out of the design or construction of improvement of real property. Contract actions under this statute accrue and the statute begins to run at the time of final completion of construction. I.C. § 5-241(b). Tort actions, on the other hand, “if not previously accrued, accrue and the statute begins to run six years after final completion of construction.” I.C. § 5-241(a). The Idaho Supreme Court and the Court of Appeals have both stated that the language of this subsection (a) creates a “limited discovery rule for tort claims.” *Hibbler v. Fisher*, 109 Idaho 1007, 1012, 712 P.2d 708, 713 (Ct. App. 1985); *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 23, 644 P.2d 341, 345 (1982). This discovery rule is for latent defects only and, for the purposes of the current Motion,

functions as follows: assuming “that the [plaintiffs] reasonably [do] not discover the latent defects before the end of the six-year accrual period allowed by I.C. § 5-241, they ha[ve] four more years under § 5-224 in which to file the [tort] action.” *Id.*

As a result, the key question is whether a claim for breach of the implied warranty of habitability is a tort, thus triggering the discovery rule. The statute does not specifically address this issue.

Kirk contends that this cause of action sounds entirely in contract, and thus that the claim accrued upon completion of construction in 2005. (Motion at 17-19.) And, he argues, because the agreement between Gentry and Kirk was oral, the statute of limitations expired in 2009, *i.e.*, four years after completion of construction. (*Id.* at 18, citing I.C. § 5-217). Thus, according to Kirk, the statute expired well before Petrus even purchased the home, much less discovered the latent defect at issue. *Id.*

The Idaho Supreme Court has not directly addressed the issue of whether a cause of action for breach of the implied warranty of habitability accrues, as in tort, upon discovery of the latent defect, or whether it accrues, as in contract, upon completion of the contract. But the Idaho Supreme Court has analyzed the nature of this type of claim and provided key opinions that guide this analysis. And contrary to Kirk’s arguments, the most persuasive interpretation of Idaho law, and of other jurisdictions to have addressed this question specifically, is to treat the implied warranty of habitability raised by a subsequent purchaser as an action in tort, subject to the discovery rule.

To start, an action based on implied warranty is “a freak hybrid born of the illicit intercourse of tort and contract.” *Salmon Rivers Sportsman Camps v. Cessna Aircraft Co.*, 97 Idaho 348, 353, 544 P.2d 306, 311 (1975) (quoting Prosser, “Assault Upon the Citadel,” 69 Yale L.J. 1099, 1126 (1960)). The Court in *Salmon Rivers* recognized the “dual character of an action for breach of implied warranty as it has developed in American jurisprudence.” *Id.* Thus, a plaintiff may base an action for breach of warranty in either tort or contract, and “judicial

utilization of the contract concept of warranty should not camouflage the fact that the courts employed the concept *to permit a recovery in tort.*” *Id.* (citing Prosser, *supra*; emphasis added).

In *Salmon Rivers*, a products liability case, the Court addressed the issue of whether a claim for breach of the implied warranty of fitness for a particular purpose could be brought as a contract claim by a subsequent purchaser of a plane. The Court concluded that, given the contractual nature of the claim asserted, the lack of privity between the manufacturer and the subsequent purchaser precluded recovery. Notably, in so holding, the Court recognized as axiomatic that where there is no privity, “liability to the consumer must be in tort and not in contract.” *Id.* The Court ultimately held that, in that case involving the sale of goods, the implied warranty of fitness for purpose could not be pursued by a subsequent purchaser, and that privity was required.

The Court, however, did *not* address whether the statute of limitations for such a claim accrues at the date of sale or the date of discovery of defect. 97 Idaho at 352, n.6. But the Court indicated that, if it did, it would consult the holding of *Tomita v. Johnson*, 49 Idaho 643, 290 P.394 (1930), which applied the discovery rule. In *Tomita*, a defective potato seed product liability case, the Idaho Supreme Court held that a claim for breach of the implied warranty of fitness for purpose accrued upon discovery. *Id.* (“right of action in damages for breach of such warranty [of suitability for purposes intended] accrues *at the time it is ascertained by the purchaser* that the seed is not as represented”) (emphasis added). The *Tomita* court did not explicitly address whether the implied warranty claim was based in contract or tort. *Id.* But crucially, the *Salmon Rivers* Court recognized that the accrual analysis would depend on whether the implied warranty claim was founded in tort or contract. 97 Idaho at 352, n.6.

Twelve years after *Salmon Rivers*, in the seminal case *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987), the Idaho Supreme Court addressed the claim at issue here—the implied warranty of habitability. The Court held that the warranty may be invoked by a subsequent purchaser against a home builder despite the lack of contractual privity. *Id.* The court

recognized the “growing trend” of other courts to extend the warranty to subsequent purchasers, and relied heavily on this long but instructive passage from the Arizona Supreme Court:

The same policy considerations that lead to [our adoption of the implied warranty of habitability for sales of new homes]—that house-building is frequently undertaken on a large scale, that builders hold themselves out as skilled in the profession, that modern construction is complex and regulated by many governmental codes, and that homebuyers are generally not skilled or knowledgeable in construction, plumbing, or electrical requirements and practices—are equally applicable to subsequent homebuyers. Also, we note that the character of our society is such that people and families are increasingly mobile. Home builders should anticipate that the houses they construct will eventually, and perhaps frequently, change ownership. The effect of latent defects will be just as catastrophic on a subsequent owner as on an original buyer and the builder will be just as unable to justify improper or substandard work. Because the builder-vendor is in a better position than a subsequent owner to prevent occurrence of major problems, the cost of poor workmanship should be his to bear.

Id. Critical to the Court’s analysis was that the implied warranty of habitability applies to *latent* defects, not *patent* defects. By their very nature, latent defects cannot reasonably be discovered upon purchase, and realistically may not be discovered even within the first years of home occupation. Accordingly, the “catastrophic” result of a latent defect may affect subsequent purchasers as much as first-time purchasers. And, because the builder-vendor “is in a better position” to prevent the occurrence of problems, “the cost of poor workmanship should be his to bear.” *Id.*

Tusch also recognized that “the implied warranty of habitability is “a creature of public policy.” *Id.* at 46. It serves to level the playing field between the average consumer home purchaser and the more experienced and knowledgeable home builder, and to place responsibility for poor workmanship where it belongs: on the builder. In this context, then, the cause of action is tortious, not contractual. It arises from the relationship and duties of a builder to a consumer—and even to subsequent consumers the builder has never heard of or met—not from the existence or terms of a contract between them. Indeed, a claim for breach of the implied warranty of habitability can be pursued even in the absence of a claim for breach of contract. *Id.*

at 50. (This is not true, for example, for the breach of the covenant of good faith and fair dealing, which may be pursued only when a contractual provision has been breached. *See, e.g., Bushi v. Sage*, 146 Idaho 764, 766, 203 P.3d 694, 696 (2009).)

In a footnote, the court in *Tusch* held that its view of the implied warranty of habitability does not embrace negligence, but rather “expands” the contractual nature of the claim to eliminate privity. 113 Idaho at 50, n.8. Read together, however, this line of cases is best understood to mean that a claim for implied warranty of habitability either sounds in tort or should be “expanded” to use the date of discovery as the accrual date. Specifically, the *Salmon Rivers* Court held that, where a claim does not require privity, liability is in tort, not contract. *Salmon Rivers* concluded that, in a goods case, the implied warranty could only be invoked by the purchaser in privity.⁸ Meanwhile, *Tusch* held that an implied warranty of habitability claim of a subsequent purchaser does not require privity. And the *Tomita* Court ruled that an implied warranty claim for products liability accrues upon discovery of defect—a holding acknowledged by the *Salmon Rivers* court. The only logical result is that a claim for implied warranty of habitability accrues in accordance with the discovery rule.

Nor does this expose builders to years of potential liability for poor workmanship. Section 5-241(a) essentially creates a period of repose for contractors exposed to tort claims: again, “[t]ort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.” Thus, at the outside, all tort claims arising from construction defects must be brought within ten years after final completion of construction. *Hibbler*, 109 Idaho at 1012. This is consistent with the statutes of repose in other jurisdictions.

⁸ In *State v. Mitchell Const. Co.*, 108 Idaho 335, 340, 699 P.2d 1349, 1354 (1984), several justices questioned the viability of even this limitation of privity. *Id.* (Huntley, J., dissenting) (“the requirement in *Salmon Rivers*, of privity in implied warranty for economic loss did not make sense when the decision was written and its application has resulted in substantial injustice to many litigants in Idaho since 1975”); *id.* (Donaldson, C.J., concurring). To the extent *Salmon Rivers* has been called into doubt, that doubt weighs in favor of the subsequent purchaser, not the manufacturer/builder.

It is also worth noting that applying the discovery rule to habitability claims appears to be the majority rule. Consistent with this analysis, several other jurisdictions have specifically held that a claim for breach of the implied warranty of habitability accrues upon discovery of defect, not the completion of contract. *See, e.g., Berish v. Bornstein*, 71 Mass. App. Ct. 1101, 878 N.E.2d 581 (2007) (discovery rule applies to claims for breach of the implied warranty of habitability); *Swaw v. Ortell*, 137 Ill. App. 3d 60, 70-71, 484 N.E.2d 780, 787 (1984) (“The discovery rule applies to actions against contractors for failure to construct or design a building properly.”); *Gibson v. John D. Campbell & Co.*, 624 S.W.2d 728, 731 (Tex. App. 1981), citing *Richman v. Watel*, 565 S.W.2d 101, 102 (Tex. Civ. App. 1978) (“The breach of the implied warranty of fitness arising from the construction and sale of a new house is considered to be a tort rather than a contract concept.”).

Finally, Kirk’s arguments that the breach-of-contract statute of limitations applies are unpersuasive. Kirk relies primarily on the dissenting opinion of Justice Bakes in *Tusch*, in which he argued that warranty claims, whether express or implied, are contractual in nature and thus privity must be required. This opinion was not embraced by the majority, however, and does not account for the reasoning of *Salmon Rivers* and the holding of *Tomita*. In other words, Kirk has pinned his hopes on what is, by definition, a losing argument.

In sum, the Court should hold that Plaintiffs’ claim for implied warranty of liability did not begin to accrue until Petrus discovered the damage, which he did shortly after moving in. Because he filed his claim in 2014—within two years of moving in—that claim is not barred by the statute of limitations.

B. There is Sufficient Evidence that the Defects Breached the Warranty of Habitability

Kirk next argues that he should not be held liable under the implied warranty of habitability because Petrus was a subsequent purchaser, has not proven fraud, and has not proven the home was not habitable. Kirk’s arguments should be rejected.

First, as explained above, the Idaho Supreme Court held unambiguously in *Tusch* that the implied warranty of habitability may be brought by a subsequent purchaser against a builder. 113 Idaho at 50-51. Although Kirk is correct that the opinion had dissenters, *Tusch* remains the law. And the holding of *Tusch* cannot be any clearer:

We hold only that subsequent purchasers of residential dwellings, who suffer purely economic losses from latent defects manifesting themselves within a reasonable time, may maintain an action against the builder (or builder-developer, as the case may be), of the dwelling based upon the implied warranty of habitability despite the fact that no privity of contract exists between the two.

Id. Under this clear law, Petrus may pursue a claim as a subsequent purchase. Indeed, Kirk does not dispute that Petrus discovered the latent defects within a “reasonable time” (nor could he: Petrus discovered them within a month or so of moving in).

Kirk argues *Tusch* is distinguishable because Petrus did not buy the home for investment purposes. But this is irrelevant: the *Tusch* decision turned on the fact that latent defects affect a subsequent resident as much as the initial resident, and thus he should be able to pursue a claim against the builder despite the lack of privity. *Id.* at 49. The investment nature of the property in *Tusch* was inconsequential; if anything, the fact that Petrus lived in the home strengthens, not weakens, his expectation of habitability.

Kirk also attempts to distinguish this case from *Tusch* because, he argues, the “initial” damages here were “French doors not working properly,” which is “minor in comparison to cracked walls and a cracked foundation.” (Motion at 20.) This is again irrelevant and misleading. The damages here are the dry rot that Petrus spent \$60,000 to repair; the problems with the doors were a symptom, not the extent, of those damages. Plaintiffs began to uncover the true problem within a couple months of moving in when foam insulation was removed beneath the French Doors and water came “gushing” out. Moreover, the extent of the damage is not relevant to whether lack of privity bars a claim: that goes to the value of the claim, not standing.

Second, contrary to Kirk’s intimations (Motion at 21), fraud is not an element of the implied warranty of habitability. *See, e.g., Tusch*, 113 Idaho at 50-51.

Third, the evidence is sufficient to create a triable issue on whether the damages were so severe as to trigger the implied warranty of habitability. “[T]he implied warranty of habitability protects homebuyers against “major defects which render the house unfit for habitation, and which are not readily remediable.” *Goodspeed v. Shippen*, 154 Idaho 866, 871, 303 P.3d 225 (2013). A finding of “unfit for habitation” does not depend on whether people continued to live in the residence after discovering the defect, as Kirk argues.

In *Tusch*, for example, the tenants living in the duplexes noticed that “the walls had begun cracking around the windows and many of the doors would not close properly.” 113 Idaho at 40. Further investigation revealed the foundation was cracking, and experts opined that the foundation had been improperly constructed given fill dirt conditions. *Id.* Summary judgment was granted against the plaintiffs on issues other than habitability (*i.e.*, whether the defendants were “builders,” and the subsequent purchaser issue), but the Court nonetheless ruled that the alleged defects were severe enough to send to a jury:

[I]t is not for us to weigh the facts. That function rests with the trier of fact. Whether the implied warranty of habitability extends from [one defendant] or [the other defendant,] *Tusch Enterprises has alleged major defects in the construction of the south duplex which would fall within the warranty.*

113 Idaho at 49 (emphasis added). *See also Goodspeed*, 154 Idaho at 871 (alleged defects sent to jury involved basement flooding).

The same conclusion is warranted here. As in *Tusch*, the defects at issue here are structural and not easily remediable. Although both the *Tusch* residents and Petrus remained residing in spite of the defects, the defects are serious enough to trigger the warranty of habitability because of their structural, serious nature. Indeed, as Value testified, if left unchecked, the dry rot would have caused the floors to warp, stone veneer to fall off, and eventually a safety hazard to emerge. (Value Depo. at 195:25-196:24.) Residents are not required to stay in a home until a deadly hazard emerges before the warranty is triggered. *Cf. Atherton Condominium Apartment–Owners Assoc. Bd. of Directors v. Blume Development Co.*, 115

Wash.2d 506, 516, 799 P.2d 250 (1990) (“The condominiums [suffering from water intrusion] do not have to degrade to a state where they are uninhabitable for this doctrine to apply. . . The homeowners' association does not have to wait until their windows cave in or portions of their deck rot off before the warranty applies.”); *Burbo v. Harley C. Douglass, Inc.*, 125 Wash. App. 684, 697, 106 P.3d 258, 265 (2005) (the construction defect does not have to be so dangerous to require evacuation).

Here, the evidence is that the French Doors, joists, deck, and wall were rotted and needed replacement and rebuilding. Unremedied, these defects and damages would have resulted in further damages and safety hazards. As in *Tusch*, this is sufficient evidence for a jury to determine whether the implied warranty of habitability was breached.

C. Plaintiffs Complied with the Notice and Opportunity to Repair Act

Kirk next argues that Plaintiffs failed to comply with Idaho’s Notice of Opportunity to Repair Act (“NORA”), I.C. § 6-2503. Kirk is mistaken.

NORA requires a written notice of claim on the construction professional prior to filing an action alleging a construction defect. I.C. § 6-2503(1). The written notice must “state that the claimant asserts a construction defect claim against the construction professional and...describe the claim in reasonable detail sufficient to determine the general nature of the defect.” *Id.* Notably, in *Mendenhall v. Aldous*, 146 Idaho 434, 436, 196 P.3d 352, 354 (2008), the Idaho Supreme Court held that the phrase “reasonable detail” requirement “is satisfied when a claimant provides a builder with enough information to identify the general nature and location of the defect.” That is, the Court was clear that the obligation was necessary, but not particularly onerous. *Id.* Thus, the plaintiff in *Mendenhall* provided a letter that simply identified a “water problem with north roof of great room, east spouting leaks in four places.” *Id.* The Court held that this short sentence “surely provided enough detail and pertinent information to permit the Aldouses to inspect the home and determine ‘the general nature of the defect[s]’.” *Id.*

The same conclusion is warranted here. While the relevant notice in *Mendenhall* was about 15 words long, Petrus's NORA letter went on for pages and provided extensive detail of the conditions found and their location:

A detailed inspection of the Doors disclosed the presence of excessive water in the foam insulation on the stem wall under the Doors. Energy Seal was hired to remove the insulation, and after removing the insulation, further water intrusion and damage was discovered. This damage includes, but is not limited to, damage to the lakeside load point next to the Doors as well as damage to the floor sheeting... repairs will require the reinstallation of new Doors, repair of the water damaged rim and floor joists, and replacement and refinishing of the portions of the deck and floor near the Doors' threshold.

(Petrus Decl., ¶ 23 & Ex. 4 thereto.) This is more than enough information for Kirk to identify the general nature and location of the defect. Petrus explained that the problem with the French Doors was caused by the water intrusion, and that they had discovered extensive damage to the rim, floor joists, deck, and floor. This was reasonably detailed to provide Kirk with enough information to identify “the general nature and location of the defect.” Indeed, if anything, Petrus gave a *highly specific* explanation of the “nature and location of the defect.” And again, all of this was given to Kirk months before the suit began.

And, in fact, Kirk had the opportunity to inspect the house three times. The first time, he was allowed as much time and access as he wanted. He did not provide a repair. After Petrus filed his complaint, Kirk was allowed to inspect twice more. The second time, he spent at least an hour investigating and was asked to leave only after he asked to go on the roof—which he could have done the first time, but which was obviously unrelated to the problems uncovered and identified.

Kirk's argument that the complaint changed the scope of the claimed damages is unpersuasive. NORA does not require a claimant to send the builder a copy of the complaint prior to inspecting; nor does it require the claimant to have ascertained the full extent of damages and defects prior to sending the NORA notice. *Mendenhall*, 146 Idaho at 436. All NORA requires is for the claimant to provide the builder “with enough information to identify the

general nature and location of the defect.” *Id.* That is precisely what Petrus did: his letter identified that water intrusion and rot had occurred around the area of the French Doors. That put Kirk on sufficient notice to inspect that area.

And, Plaintiffs allowed Kirk three chances to inspect. Petrus is only required to provide Kirk with reasonable access to the claimant's residence during normal working hours to inspect the premises and the claimed defect. I.C. § 6-2503(4)(a). He did so, and allowed Kirk to inspect the crawlspace and interior of the Home, the areas around the doors, and the deck.

In sum, Plaintiffs complied with NORA and Kirk’s argument must be rejected.

D. The Waiver of Implied Warranty of Habitability Is Not Enforceable by Kirk

Kirk next argues that Plaintiffs waived their warranty claims against Kirk by virtue of Section 39 of the Purchase and Sale Agreement between Petrus and Gentry:

ENTIRE AGREEMENT: This agreement contains the entire Agreement of the Parties respecting the matters set forth and supersedes all prior agreements between the Parties respecting said such matters. No warranties, including, without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding upon either party.

(Ex. 1, Pittenger Aff., at 6.) This argument must be rejected.

First, Kirk is neither a party to nor the third-party beneficiary of this agreement. Idaho law, I.C. § 29-102, provides that “A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” Thus, a person can only assert status as a third-party beneficiary if the agreement “reflects an intent to benefit” him and “that the contract was made primarily for his benefit.” *Am. W. Enterprises v. CNH*, 155 Idaho 746, 752-53, 316 P.3d 662, 668-69 (2013). It is not enough to be a “mere incidental beneficiary.” *Id.* “[T]he contract itself must express an intent to benefit the third party.” *Id.*

Here, the Purchase and Sale Agreement does not mention Kirk, Kirk Enterprises, or any construction company or general contractor or builder, either generally or by name. It simply

conveys real property from Gentry to Petrus. (Ex. 1 to Pittenger Aff.) There is no contract provision suggesting this form real estate contract was created to benefit Kirk whatsoever.

Kirk's only argument is that the implied warranty of habitability is owed only by the contractor, and thus this disclaimer must be applied to his benefit. (Motion at 23.) This is incorrect. This form real estate purchase and sale agreement is not limited to non-builders; builder-developers or builder-contractors certainly can enter these agreements to sell property, and the implied warranty of habitability certainly is owed by them. Kirk's unsupported third-party-beneficiary argument must be rejected.

In all events, under Idaho law, this disclaimer is not enforceable at all. In *Goodspeed*, 154 Idaho at 871, the Idaho Supreme Court rejected this very disclaimer—the exact same wording—because there was no evidence the buyer intended to waive or disclaim the warranty.

[O]ne seeking the benefit of such a disclaimer must not only show a conspicuous provision which fully discloses the consequences of its inclusion but also that such was *in fact* the agreement reached. The heavy burden thus placed upon the builder is completely justified, for by his assertion of the disclaimer he is seeking to show that the buyer has relinquished protection afforded him by public policy. A knowing waiver of this protection will not be readily implied.

Id. The Court concluded that, without evidence of actual knowledge and intent by the buyer, the disclaimer was not enforceable. And the location and appearance of this disclaimer is not a “conspicuous provision” that meets this burden:

The disclaimer is contained within a clause that is of the font type and size as the surrounding text. Nothing in the location, spacing, or margins of the clause set it apart from the other terms of the contract. The only part of the clause that could be considered to be in a different type style is the caption, which is in all capitals. However, that caption, “ENTIRE AGREEMENT,” is the same as all of the other numbered captions and does not alert the reader that it contains a warranty disclaimer.

Id.

The disclaimer and circumstances here are precisely the same as in *Goodspeed*. Accordingly, Kirk's argument must be rejected.

E. Mold Disclaimer Does Not Bar Plaintiffs' Claims

Finally, Kirk argues that Plaintiffs' mold-related claims are barred by the mold disclaimer contained within the Purchase and Sale Agreement. Again, Kirk is neither a party to nor the third-party beneficiary of this agreement. He cannot seek to enforce it against Plaintiffs.

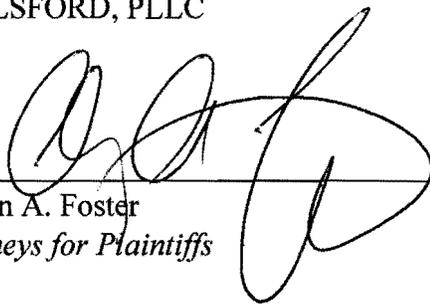
In any event, to the extent Kirk seeks to enforce this disclaimer against the entirety of Plaintiffs' damages claims, the mold disclaimer does not apply to dry rot. Thus, for the reasons set forth in pp. 19-21 of Plaintiffs' Opposition to Defendant Nancy Gentry-Boyd's Motion for Summary Judgment and for those set forth in pp. 19-23 of Plaintiffs' Opposition to the Re/Max Defendants' Motion for Summary Judgment (both of which Plaintiffs incorporate herein), this argument must be rejected.

CONCLUSION

For all of the foregoing reasons, Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment should be DENIED.

DATED this 10th day of June 2016.

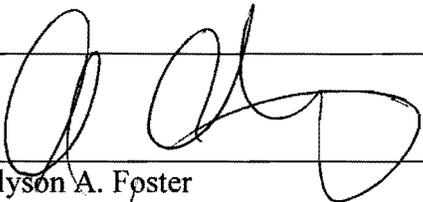
ANDERSEN SCHWARTZMAN WOODARD
BRAILSFORD, PLLC

By  _____
Alyson A. Foster
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2016, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

<p>C. Tom Arkoosh Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, ID 83701 <i>Attorneys for Chris Kirk d/b/a Kirk Enterprises</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 343-5456 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: tom.arkoosh@arkoosh.com; dan.nevala@arkoosh.com</p>
<p>Michael G. Pierce MICHAEL PIERCE LAW P.O. Box 1019 489 West Mountain Road Cascade, ID 83611 <i>Attorney for Todd McKenna d/b/a Homecraft Home Inspections</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-382-3783 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: michael@michaelpiercelaw.com</p>
<p>Steven. J. Millemann Gregory C. Pittenger MILLEMAN, PITTENGER, MCMAHAN & PEMBERTON LLP 706 North First Street P.O. Box 1066 McCall, ID 83638 <i>Attorneys for Defendant Nancy Gentry-Gentry</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-634-4516 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: sjm@mpmplaw.com; gcp@mpmplaw.com</p>
<p>Phillip J. Collaer ANDERSON, JULIAN & HULL LLP C.W. Moore Plaza 250 South Fifth Street, Suite 700 P.O. Box 7426 Boise, ID 83702 <i>Attorneys for Re/Max Resort Realty and Kevin Batchelor</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-344-5510 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: pcollaer@ajhlaw.com</p>



 Alyson A. Foster

DOUGLAS A. MILLER, CLERK
By Gilmer Deputy

JUN 12 2016

Case No. _____ Ret. No. _____
Filed _____ A.M. _____ P.M.

ORIGINAL



Alyson A. Foster (ISB #9719)
Jason J. Rudd (ISB #9406)
**ANDERSEN SCHWARTZMAN
WOODARD BRAILSFORD, PLLC**
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Facsimile: (208) 342-4455
aaf@aswblaw.com
jjr@aswblaw.com

Attorneys for Plaintiffs

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

v.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT REALTY;
KEVIN BATCHELOR; and DOES 1-4

Defendants.

Case No. CV-2014-71-C

**DECLARATION OF ALYSON A.
FOSTER IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

Pursuant to Idaho Code § 9-1406, I, Alyson A. Foster, depose and say that the following
facts are true and correct:

DECLARATION OF ALYSON A. FOSTER IN OPPOSITION OF DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT - 1

1. I am an attorney for Plaintiffs Petrus Family Trust dated May 1, 1991 and Edmond Petrus, Jr. individually and as Co-Trustee of the Petrus Family Trust in the above captioned case.
2. I make this declaration upon my personal knowledge in opposition of Defendants' Motions for Summary Judgment filed herein.
3. Attached as **Exhibit 1** is a true and correct copy of Remax Resort Realty's Supplemental Answers and Responses to Plaintiffs' First Interrogatories, Requests for Production, and Requests for Admission, which was marked as Exhibit 36 to the 30(b)(6) and individual deposition of Kevin Batchelor for Re/Max Resort Realty.
4. Attached as **Exhibit 2** is a true and correct copy of a March 6, 2012 email from Kevin Batchelor to Ed Petrus concerning the home inspection (PETRUS 000493-494), which was marked as Exhibit 38 to the deposition of Kevin Batchelor.
5. Attached as **Exhibit 3** is a true and correct copy of the deposition transcript of Michael Longmire, dated March 14, 2016.
6. Attached as **Exhibit 4** is a true and correct copy of the rough deposition transcript of Michael Wood, dated June 1, 2016.
7. Attached as **Exhibit 5** is a true and correct copy of an invoice dated September 16, 2013 from and produced by Nu-Vu Glass, Inc., Bates numbered NU-VU00004.
8. Attached as **Exhibit 6** is a true and correct copy of various fax transmissions received by Chris Kirk (KIRK00730-732, 759, 772-773), which were marked as Exhibit 29 to the 30(b)(6) and individual deposition of Robert Christopher "Chris" Kirk d/b/a Kirk Enterprises, dated March 10, 2016.

9. Attached as **Exhibit 7** is a true and correct copy of RE-11 Addendum Nos. 1 and 2 to an Exclusive Seller Representation Agreement of Nancy Gentry-Boyd, which were marked as Exhibit 51 to the deposition of Michael Wood.

10. Attached as **Exhibit 8** is a true and correct copy of the RE-16 Seller Representation Agreement between Nancy Gentry-Boyd and McCall Real Estate Company, which was marked as Exhibit 52 to the deposition of Michael Wood.

11. Attached as **Exhibit 9** is a true and correct copy of an email chain between Ed Petrus, Kevin Batchelor and Michael Wood concerning installation and water intrusion (BATCHELOR 98-101), which was marked as Exhibit 6 to the deposition of Nancy Gentry-Boyd.

12. Attached as **Exhibit 10** is a true and correct copy of an email chain between Ed Petrus, Kevin Batchelor and Michael Wood concerning installation and water intrusion (BATCHELOR 68-69), which was marked as Exhibit 41 to the deposition of Kevin Batchelor.

13. Attached as **Exhibit 11** is a true and correct copy of an email chain between Ed Petrus, Kevin Batchelor and Michael Wood concerning installation and water intrusion (PETRUS000191-193), which was marked as Exhibit 7 to the deposition of Nancy Gentry-Boyd.

14. Attached as **Exhibit 12** is a true and correct copy of Nancy Gentry-Boyd's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents dated August 28, 2015, which was marked as Exhibit 4 to the deposition of Nancy Gentry-Boyd.

15. Attached as **Exhibit 13** is a true and correct copy of an email dated June 19, 2012 between Michael Wood and Nancy Gentry-Boyd, Bates-numbered WOOD000184, which was produced and authenticated by Michael Wood at his deposition on June 1, 2016, at page 40:8-20.

16. Attached as **Exhibit 14** is a true and correct copy of a photograph which was marked as Exhibit 9 to the deposition of Beau Value.

17. Attached as **Exhibit 15** is a true and correct copy of an email string among Mark Birrer, Chris Kirk, and others (KIRK00043-44), which was marked as Exhibit 27 to the deposition of Chris Kirk.

18. Attached as **Exhibit 16** is a true and correct copy of an email from Michael Wood to Nancy Gentry-Boyd dated April 3, 2013, Bates-numbered WOOD000205, produced and authenticated by Michael Wood at his deposition on June 1, 2016, at page 72:9-73:11.

19. Attached as **Exhibit 17** is a true and correct copy of an email string between Michael Wood and Nancy Gentry-Boyd dated April 4, 2013, Bates-numbered WOOD000208, produced and authenticated by Michael Wood in his deposition on June 1, 2016, at page 59:3-22.

20. Attached as **Exhibit 18** is a true and correct copy of an email string between Ed Petrus and Nancy Gentry-Boyd dated April 9, 2013, Bates-numbered PETRUS000194, which was marked as Exhibit 8 to the deposition of Nancy Gentry-Boyd.

21. After the deposition of Nancy Gentry-Boyd, Ms. Gentry-Boyd, through her counsel, agreed to look for responsive emails for production. None were produced and we assumed she did not have any in her possession any longer.

22. On June 1, 2016, during the deposition of Michael Wood, Mr. Wood brought and provided his file on 2130 Payette, which included the documents attached hereto as Exhibits 13, 16, and 17.

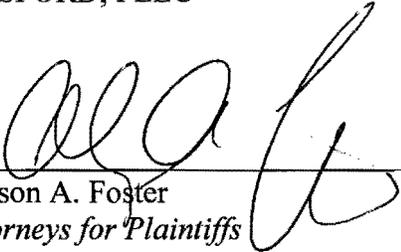
23. Attached as **Exhibit 19** is a true and correct copies of documents Bates-number WOOD000205-206, 238, produced and authenticated by Michael Wood in his deposition of June 1, 2016.

I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

DATED THIS 10th day of June 2016.

ANDERSEN SCHWARTZMAN WOODARD
BRAILSFORD, PLLC

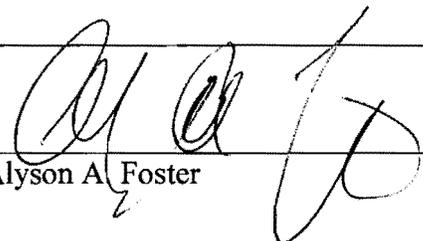
By


Alyson A. Foster
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2016, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

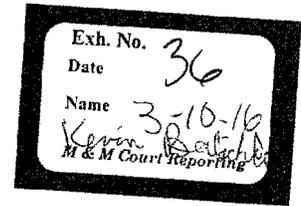
<p>C. Tom Arkoosh Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, ID 83701 <i>Attorneys for Chris Kirk d/b/a Kirk Enterprises</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 343-5456 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: tom.arkoosh@arkoosh.com; dan.nevala@arkoosh.com</p>
<p>Michael G. Pierce MICHAEL PIERCE LAW P.O. Box 1019 489 West Mountain Road Cascade, ID 83611 <i>Attorney for Todd McKenna d/b/a Homecraft Home Inspections</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-382-3783 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: michael@michaelpiercelaw.com</p>
<p>Steven. J. Millemann Gregory C. Pittenger MILLEMAN, PITTENGER, MCMAHAN & PEMBERTON LLP 706 North First Street P.O. Box 1066 McCall, ID 83638 <i>Attorneys for Defendant Nancy Gentry-Boyd</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-634-4516 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: sjm@mpmplaw.com; gcp@mpmplaw.com</p>
<p>Phillip J. Collaer ANDERSON, JULIAN & HULL LLP C.W. Moore Plaza 250 South Fifth Street, Suite 700 P.O. Box 7426 Boise, ID 83702 <i>Attorneys for Re/Max Resort Realty and Kevin Batchelor</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-344-5510 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: pcollaer@ajhlaw.com</p>



 Alyson A. Foster

EXHIBIT 1

Phillip J. Collaer – ISB No. 3447
 Andrea J. Fontaine – ISB No. 7175
 ANDERSON, JULIAN & HULL LLP
 C. W. Moore Plaza
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 Post Office Box 7426
 Boise, Idaho 83707-7426
 Telephone: (208) 344-5800
 Facsimile: (208) 344-5510
 E-Mail: pcollaer@ajhlaw.com
 ajfontaine@ajhlaw.com



Attorneys for Defendants, Re/Max Resort Realty and Kevin Batchelor

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

PETRUS FAMILY TRUST DATED MAY 1,
 1991, and EDMOND A. PETRUS, JR.,
 individually and as Co-Trustee of the Petrus
 Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
 d/b/a KIRK ENTERPRISES; TODD
 MCKENNA d/b/a HOMECRAFT HOME
 INSPECTIONS; RE/MAX RESORT
 REALTY; KEVIN BATCHELOR; and DOES
 1-4,

Defendants.

Case No. CV-2014-71-C

**DEFENDANT RE/MAX RESORT
 REALTY'S SUPPLEMENTAL
 ANSWERS AND RESPONSES TO
 PLAINTIFFS' FIRST
 INTERROGATORIES, REQUESTS
 FOR PRODUCTION, AND
 REQUESTS FOR ADMISSION**

COMES NOW Defendant Kevin Batchelor, by and through his counsel of record,
 Anderson, Julian & Hull, LLC, and hereby supplements his answers and responses to
**PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION
 and REQUESTS FOR ADMISSION** as follows:

**DEFENDANT RE/MAX RESORT REALTY'S SUPPLEMENTAL ANSWERS AND
 RESPONSES TO PLAINTIFFS' FIRST INTERROGATORIES, REQUESTS FOR
 PRODUCTION, AND REQUESTS FOR ADMISSION - 1**

INTERROGATORIES

INTERROGATORY NO. 9: Please describe the nature of your relationship with, Defendant Batchelor, including his role and title, and identify all documents which evidence, refer, or relate to such relationship.

ANSWER: Defendant objects to Interrogatory No. 9 on the grounds that it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding and subject to these objections, Defendant Batchelor is the designated broker and co-owner of Re/Max Resort Realty.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 9: Notwithstanding and subject to the foregoing objections, Defendant Batchelor sold the Re/Max Resort Realty franchise to Shane Hinson and Nicole Youstetter on or around December 18, 2015.

INTERROGATORY NO. 11: Please state whether Defendant Batchelor is considered an officer of Defendant Re/Max for insurance or corporate filing purposes, and identify all documents which evidence, refer, or relate to the same.

ANSWER: Defendant objects to Interrogatory No. 11 on the grounds that it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding and subject to these objections, Defendant is an officer of Defendant Re/Max Resort Realty.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 11: Notwithstanding and subject to the foregoing objections, Defendant Batchelor is no longer an officer of Defendant Re/Max Resort Realty as of December 18, 2015.

INTERROGATORY NO. 17: Please identify each instance between 2005 and the present where Defendant McKenna performed a real estate inspection in relation to a circumstance or transaction in which you represented a buyer (or potential buyer) or seller of real estate as a real estate agent or broker, or in which you were otherwise involved, and for each such inspection provide the following:

- a. the date on which the inspection was performed; and
- b. the address of the property inspected;
- c. any documents or communications between you and Defendant McKenna relating to each such inspection.

ANSWER: Defendant objects to Interrogatory No. 17 on the grounds that it is overly broad, unduly burdensome, vague, ambiguous, compound and not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding and subject to these objections, Defendant has no information responsive to this Interrogatory. Defendant further answers that Defendant Batchelor's discussions with Defendant McKenna were limited to scheduling inspection appointments and clarifying terminology in inspection reports.

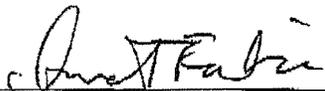
SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 17: Notwithstanding and subject to the foregoing objections, Defendant Batchelor, individually, unless otherwise stated, was involved in transactions wherein Defendant McKenna performed inspections for the following properties:

1. August, 16, 2011 – 1423 Eagle Drive, McCall, Idaho (Selling agent);
2. March 15, 2012 – 2130 Payette Drive, McCall, Idaho (Selling agent);

3. May 16, 2013 – 301 Rio Vista, McCall, Idaho (Defendant Batchelor and Shane Hinson acted as dual agents);
4. May 29, 2013 – 1054 Fireweed Dr., McCall, Idaho (Selling agent);
5. 27 Wood Duck Court, McCall, Idaho (Co-Listing Agent).

DATED this 18th day of January, 2016.

ANDERSON, JULIAN & HULL LLP

By 
Phillip J. Collaer, Of the Firm
Andrea J. Fontaine
Attorneys for Defendants,
Re/Max Resort Realty and Kevin
Batchelor

Petrus v. Re/Max
1458-126

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada
 Valley

Kevin Batchelor, as the designated agent for Re/Max Resort Realty, being first duly sworn upon oath, deposes and states:

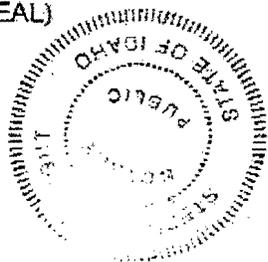
That he is an agent of Re/Max Resort Realty in the above-entitled action, that he has read the foregoing document, and based on his information and belief, it contains true and complete Answers to the interrogatories propounded therein.

[Handwritten Signature]

Kevin Batchelor

SUBSCRIBED AND SWORN to before me this 15 day of January, 2016.

(SEAL)



[Handwritten Signature]

Notary Public for Idaho
Residing at: Donnelly Rd
My commission expires: 4-25-18

DEFENDANT RE/MAX RESORT REALTY'S SUPPLEMENTAL ANSWERS AND RESPONSES TO PLAINTIFFS' FIRST INTERROGATORIES, REQUESTS FOR PRODUCTION, AND REQUESTS FOR ADMISSION - 5

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of January, 2016, I served a true and correct copy of the foregoing **Defendant Re/Max Resort Realty's Supplemental Answers and Responses to Plaintiffs' First Interrogatories, Requests for Production, and Requests for Admission** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

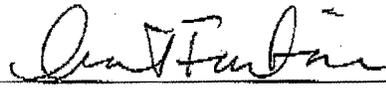
Thomas A. Banducci	<input type="checkbox"/>	U.S. Mail, postage prepaid
Jason J. Rudd	<input type="checkbox"/>	Hand-Delivered
ANDERSON BANDUCCI PLLC	<input type="checkbox"/>	Overnight Mail
101 S. Capitol Blvd., Suite 1600	<input checked="" type="checkbox"/>	Facsimile (208) 342-4455
Boise, Idaho 83702	<input type="checkbox"/>	Email:
Telephone: (208) 342-4411		tab@andersenbanducci.com
<i>Attorney for Plaintiffs</i>		jjr@andersenbanducci.com

C. Tom Arkoosh	<input type="checkbox"/>	U.S. Mail, postage prepaid
Daniel A. Nevala	<input type="checkbox"/>	Hand-Delivered
ARKOOSH LAW OFFICES	<input type="checkbox"/>	Overnight Mail
802 W. Bannock Street, Suite 900	<input checked="" type="checkbox"/>	Facsimile (208) 343-5456
P.O. Box 2900	<input type="checkbox"/>	Email:
Boise, ID 83701		tom.arkoosh@arkoosh.com
<i>Attorneys for Chris Kirk d/b/a Kirk Enterprises</i>		Dan.nevala@arkoosh.com

Michael G. Pierce	<input type="checkbox"/>	U.S. Mail, postage prepaid
P.O. Box 1019	<input type="checkbox"/>	Hand-Delivered
489 West Mountain Road	<input type="checkbox"/>	Overnight Mail
Cascade, ID 83611	<input checked="" type="checkbox"/>	Facsimile (208) 382-3783
<i>Attorney for Todd McKenna d/b/a Homecraft Home Inspections</i>	<input type="checkbox"/>	Email:
		Michael@michaelpiercelaw.com

Steven J. Millemann
 George C. Pittenger
 MILLEMAN, PITTEMBERGER,
 MCMAHAN & PEMBERTON LLP
 706 North First Street
 P.O. Box 1066
 McCall, ID 83638
*Attorneys for Defendant Nancy
 Gentry-Boyd*

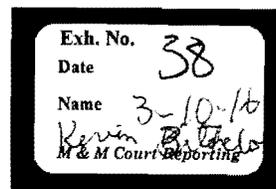
- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile (208) 634-4516
- Email: sim@mpmplaw.com



Andrea J. Fontaine

**DEFENDANT RE/MAX RESORT REALTY'S SUPPLEMENTAL ANSWERS AND
 RESPONSES TO PLAINTIFFS' FIRST INTERROGATORIES, REQUESTS FOR
 PRODUCTION, AND REQUESTS FOR ADMISSION - 7**

EXHIBIT 2



From: Kevin Batchelor <kevinb@remax.net>
To: 'Ed Petrus' <epetrus@me.com>
Subject: House Inspection
Date: March 6, 2012 at 3:41:54 PM PST

Ed:

Todd McKenna of Homecraft will be conducting the inspection on Friday 9th. Todd's email address is tmckenna14@yahoo.com. His tel number is (208) 315-3317.

Kind Regards,

Kevin Batchelor, GRI, ABR, CDPE, RSPS
Broker/Owner

www.mccallresortrealty.com

RE/MAX Resort Realty

1101 E. Lake St.
McCall, ID 83638

(208) 634-5400 - Office
(208) 634-5428 - Fax
(208) 634-9469 - Direct



!SIG:5493b34a19111044213750!

EXHIBIT 3

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY
 PETRUS FAMILY TRUST DATED MAY 1,)
 1991, and EDMOND A. PETRUS, JR.,) Case No.
 individually and as Co-Trustee of) CV-2014-71-C
 the Petrus Family Trust Dated May)
 1, 1991,)
 Plaintiffs,)
 vs.)
 NANCY GENTRY-BOYD, CHRIS KIRK d/b/a)
 KIRK ENTERPRISES; TODD MCKENNA)
 d/b/a HOMECRAFT HOME INSPECTIONS;)
 RE/MAX RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
 Defendants.)
 _____)

DEPOSITION OF MICHAEL LONGMIRE

March 14, 2016

REPORTED BY:

COLLEEN P. ZEIMANTZ, CSR 345

Notary Public

Page 2

1 THE DEPOSITION OF MICHAEL LONGMIRE was taken on
 2 behalf of the Defendants, at the offices of Millemann,
 3 Pittenger, McMahan & Pemberton, LLP, located at 706
 4 North First Street, McCall, Idaho, commencing at 11:30
 5 a.m., on March 14, 2016, before Colleen P. Zeimantz,
 6 Certified Shorthand Reporter and Notary Public within
 7 and for the State of Idaho, in the above-entitled
 8 matter.

APPEARANCES:

9 For the Plaintiffs:
 10 ANDERSEN BANDUCCI PLLC
 11 BY MS. ALYSON A. FOSTER
 12 101 S. Capitol Blvd., Suite 1600
 13 Boise, Idaho 83702-7720
 14 aaf@andersenbanducci.com

15 For the Defendant Nancy Gentry-Boyd:
 16 MILLEMANN, PITTENGER, MCMAHAN & PEMBERTON LLP
 17 BY MR. STEVEN J. MILLEMANN
 18 706 North First Street
 19 McCall, Idaho 83638
 20 sjm@mpmplaw.com
 21
 22
 23
 24
 25

Page 3

1 APPEARANCES (Continued):
 2 For the Defendant Re/Max and Kevin Batchelor:
 3 ANDERSON, JULIAN & HULL, LLP
 4 BY MS. ANDREA J. FONTAINE (by telephone)
 5 C.W. Moore Plaza
 6 250 South Fifth Street, Suite 700
 7 Boise, Idaho 83707-7426
 8 afontaine@ajhlaw.com

9 For the Defendant Chris Kirk and Kirk Enterprises:
 10 ARKOOSH LAW OFFICES
 11 BY MR. DANIEL A. NEVALA
 12 802 W. Bannock Street, Suite 900
 13 Boise, Idaho 83701-2900
 14 dan.nevala@arkoosh.com

15 ALSO PRESENT: Chris Kirk
 16 Nancy Gentry-Boyd
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 4

I N D E X

1	TESTIMONY OF MICHAEL LONGMIRE	PAGE
2	Examination by Mr. Millemann	5
3	Examination by Mr. Nevala	86
4	Examination by Ms. Foster	90
5	Further Examination by Mr. Millemann	93
6		
7		
8	E X H I B I T S	
9	DESCRIPTION	PAGE
10	Exh 62 - Copy of Fax Invoices of Michael	60
11	Longmire to Ed Petrus, 08/16/2014,	
12	Petrus 000484-492	
13	Exh 63 - Copy of Amended Notice Duces Tecum	82
14	of Taking Deposition of Mike Longmire	
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1 MICHAEL LONGMIRE,
 2 first duly sworn to tell the truth relating to said
 3 cause, testified as follows:
 4 EXAMINATION
 5 QUESTIONS BY MR. MILLEMANN:
 6 Q. Good morning, Mike. We've met before;
 7 correct?
 8 A. Yes.
 9 Q. And are you comfortable if I refer to you as
 10 Mike in the deposition?
 11 A. That's fine.
 12 Q. And refer to me as Steve, if you need to
 13 address me.
 14 Have you had your deposition taken before?
 15 A. Never.
 16 Q. So this is a different situation, but I have
 17 some questions I want to ask you about what you know
 18 regarding Mr. Petrus' house and the work that was done
 19 on it.
 20 The court reporter here is taking down all of
 21 my questions, and all of your answers, verbatim. So she
 22 needs audible responses. Head nods, and "uh-huhs,"
 23 don't work very well. So if we bug you at all about
 24 that, it's just so we are trying to get a record that we
 25 both will be able to understand and is accurate. Okay?

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1 A. That's fine.
2 Q. And if at any point you don't understand a
3 question that I've asked you, please tell me. And I
4 will try to do a better job of clearly stating my
5 question.
6 If you need a break at any time, just tell me.
7 The only exception to that is if I have a question on
8 the table at the time, I want you to answer it before we
9 take a break.
10 A. Okay.
11 Q. The other thing, and you haven't done it at
12 all so far, so you are off to a good start. It's
13 difficult for Colleen if I talk over the top of your
14 answers, and if you talk over the top of my questions.
15 I will try my best not to do that. If you can be aware
16 that I have finished my question before you answer it,
17 it will just make life a lot easier for all of us.
18 A. Okay.
19 Q. My intention here, Mike, would be to start,
20 and see how far we get, which involves pushing probably
21 into the lunch hour. But this deposition is being taken
22 at your pleasure. So if you would prefer that we stop
23 at some point for a lunch break, just tell me. Okay?
24 A. Okay. No problem.
25 Q. Are you under the influence of any medication,

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1 or anything that would impair your ability to answer my
2 questions this morning?
3 A. I don't believe so.
4 Q. You are currently employed, Mike, by Ed
5 Petrus; is that correct?
6 A. Yes.
7 Q. In what capacity?
8 A. Caretaker.
9 Q. And when did you start being caretaker for
10 Mr. Petrus?
11 A. May of -- May 9th. I would have to look at my
12 invoices to tell you exactly.
13 Q. Was it after he purchased the home?
14 A. Yes.
15 Q. So I think that would probably be May of 2012.
16 I think the home was closed in late April of 2012.
17 A. Yes.
18 Q. Does that sound right?
19 A. Yes.
20 Q. Did you have any occasion to be in that home
21 before Mr. Petrus purchased it?
22 A. Ask me that again, Steve.
23 Q. Yes. I think the record that's been
24 established here reflects that the closing of
25 Mr. Petrus' purchase of the home from Ms. Gentry was

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1 about April 20, 2012. So my question is, were you ever
2 in that home, to your knowledge, before Mr. Petrus
3 purchased it from Ms. Gentry?
4 A. Yes.
5 Q. Tell me the first time you remember being in
6 the home.
7 A. I couldn't give you a date, but I installed
8 the gas stove for Master Craft when the house was being
9 built.
10 Q. And then after that, were you ever in the
11 home --
12 A. No.
13 Q. -- prior to when Mr. Petrus purchased it?
14 A. No.
15 Q. Can you give me a brief summary, Mike, of your
16 educational background?
17 A. Educational background?
18 Q. Yes.
19 A. Throughout four years of college at Gonzaga,
20 that would be the extent of the education.
21 Q. And did you graduate with a degree from
22 Gonzaga?
23 A. Yes.
24 Q. And what was the degree in?
25 A. Design.

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1 Q. And when you say, "design," help me
2 understand, what type of design?
3 A. Graphic design.
4 Q. When did you get that degree, Mike?
5 A. All so long ago, Steve. 1975.
6 Q. And then after graduating from Gonzaga, what
7 was the first employment you have that you remember?
8 A. I worked for Dillingham Corporation.
9 Q. Where was that?
10 A. Hawaii.
11 Q. What was your position?
12 A. Supervisor.
13 Q. What type of work did Dillingham do that you
14 were a supervisor?
15 A. That was a landscaping division.
16 Q. And how long did you do that?
17 A. About a year-and-a-half.
18 Q. And then what did you do for employment?
19 A. Worked in a restaurant in Spokane. Then after
20 that, moved to San Diego, and did a maintenance
21 business. Then contracting in San Diego for about 20
22 years. And then moved up here.
23 Q. About when did you move to McCall?
24 A. 1996.
25 Q. Your maintenance business in San Diego, do you

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1 remember ballpark about when you started doing that?
 2 A. Oh, it was 1979, maybe.
 3 Q. What type of maintenance were you doing?
 4 A. Oh, painting apartments, roofing, just general
 5 maintenance on units for customers.
 6 Q. Were you working directly for the owners, or
 7 for associations, or contractors?
 8 A. Directly for the owners.
 9 Q. And then you said you did contracting for a
 10 better part of 20 years down there?
 11 A. Yes.
 12 Q. What type of contracting?
 13 A. Mostly home remodels.
 14 Q. And how did you acquire the skills to get into
 15 the home remodel contracting business in San Diego?
 16 A. Probably -- my family was -- my dad was a
 17 developer. So we would buy homes, fix them up, sell
 18 them. That's how it started.
 19 Q. Did you grow up in the San Diego area?
 20 A. No, Hawaii.
 21 Q. And then since moving to McCall in 1996, how
 22 have you been employed?
 23 A. I worked for Master Craft for a while. And
 24 generally, self-employed --
 25 Q. And --

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1 A. -- doing a range of things.
 2 Q. What types of things?
 3 A. Stove maintenance, stove installs, tile, just
 4 sort of, I guess, you would call it, handyman stuff.
 5 Q. Fair enough. The caretaker position that you
 6 have for Mr. Petrus, do you do that for other people, as
 7 well?
 8 A. Yes.
 9 Q. Currently how many homeowners do you do
 10 caretaking for?
 11 A. Maybe 12.
 12 Q. And when did you start getting into the
 13 caretaking business?
 14 A. Actually, I would say, Ed was probably the
 15 first caretaking job I had.
 16 Q. And then it's grown since then?
 17 A. Yes.
 18 Q. What generally are your responsibilities as a
 19 caretaker for Ed Petrus?
 20 A. Generally?
 21 Q. Everything you are asked to do?
 22 A. Yes.
 23 Q. Do you charge by the hour then for your
 24 services?
 25 A. Yes.

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1 Q. Have you been called upon to do any
 2 construction work or remodel work on the home?
 3 A. My policy is that I don't do anything
 4 personally as far as construction only because of the
 5 liability. So if it's not handyman-related, light
 6 bulbs, that type of thing, that's okay. Any kind of
 7 construction, no.
 8 Q. Well, based on the fact that we're all sitting
 9 here today, that sounds like a smart policy.
 10 A. Yes.
 11 Q. So the only time you know of that you would
 12 have been in that home prior to when Mr. Petrus
 13 purchased it, would have been when you were installing
 14 the stove as part of the original construction?
 15 A. Yes.
 16 Q. And I realize that you may not be able to give
 17 me exact dates, and that's fine. Well, before we get
 18 there. We're not going to mark this.
 19 But, Mike, I'm handing you a pleading that's
 20 titled "Amended Notice Duces Tecum of Taking Deposition
 21 of Mike Longmire." Could you take a look at that, and
 22 just tell me if you've seen that before?
 23 A. I don't believe I've seen this before.
 24 Q. You do or do not, Mike?
 25 A. I do not.

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1 Q. This was the Notice that was provided to
 2 Ms. Foster for the taking of this deposition. And in
 3 the Notice, you are instructed to bring with you certain
 4 documents. And the description of those starts on page
 5 2 of the Notice, and there are five categories of
 6 documents that are requested.
 7 I guess my first question just to start at the
 8 start is. Have you brought any documents with you
 9 today?
 10 A. No.
 11 Q. Okay. So could you read item 1 on page 2 to
 12 yourself. And just tell me when you've had a chance to
 13 read it.
 14 A. (Witness complying.) Okay.
 15 Q. Item 1 seeks documents relating to your
 16 inspection of or examination of the residence here in
 17 question.
 18 Have you prepared any reports, or summaries,
 19 or anything in writing containing your observations at
 20 any point about the Petrus home?
 21 A. No.
 22 Q. And then item 2 is, "All documents relating to
 23 alterations, restoration, repairs, remediations and/or
 24 improvements to the home made by you or others under
 25 your supervision or direction, or Communications

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1 regarding any of the above."
 2 Let's break that down, if we can. Have there
 3 been any alterations, restoration, repairs,
 4 remediations, or improvements of the home made by you?
 5 A. Yes.
 6 Q. Describe those for me.
 7 A. We put a Jacuzzi on the deck, the rear deck,
 8 and I just put some strengthening posts under there to
 9 make sure that there wasn't a problem with the Jacuzzi.
 10 Q. When you say, the rear deck, is that the
 11 deck --
 12 A. Facing the lake, the lake side.
 13 Q. So I'm going to show you a document that was
 14 marked as Exhibit 1 in a prior deposition. And it
 15 purports to be a floor plan of the residence. And the
 16 directional arrows were placed on it by Beau Value.
 17 Based on your knowledge of the home, and take a minute,
 18 if you need to.
 19 A. Okay. Yes.
 20 Q. Does this generally appear to be an accurate
 21 floor plan?
 22 A. Yes.
 23 Q. So can you point me to the deck where the
 24 jacuzzi was placed?
 25 A. Right here (indicating), in this corner.

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1 Q. So that would be generally the northeast
 2 corner of the deck; is that right?
 3 A. Yes.
 4 Q. When was that Jacuzzi installed?
 5 A. When Ed first moved in, which would be 2012.
 6 Q. '12. Okay. Any other alterations, or
 7 repairs, or --
 8 A. No.
 9 Q. -- improvements that you have made to the
 10 home?
 11 A. No.
 12 Q. Any such alterations, or repairs, or
 13 improvements, which were made by others under your
 14 supervision or direction?
 15 A. Alterations? Not under my direct supervision.
 16 Q. Okay.
 17 A. I mean, I act as an agent. But, for example,
 18 I didn't supervise Beau.
 19 Q. Okay. Fair enough. So we can carve that out.
 20 Restoration or disaster --
 21 A. I call it, for example, adding a gas line for
 22 the barbecue, I would call somebody. Supervising, I
 23 don't know if that would be -- they are under their own
 24 supervision.
 25 Q. I understand. Did you have somebody install a

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1 gas line for a barbecue at this residence?
 2 A. Yes.
 3 Q. Can you point out on Exhibit No. 1 where that
 4 was placed?
 5 A. It would be in this area here (indicating).
 6 Q. So you are pointing to the deck kind of in the
 7 southeast corner of the home off the french doors coming
 8 out of dining room?
 9 A. Yes.
 10 Q. Who did you have install a gas line for the
 11 gas barbecue there?
 12 A. A-1.
 13 Q. About when was that done, Mike?
 14 A. At the same time, when I first went to work
 15 for Ed.
 16 Q. Do you have in your possession any documents
 17 of any kind related to that work?
 18 A. Not to that transaction.
 19 Q. Do you have other documents related to A-1
 20 work?
 21 A. They are usually sent directly to Ed.
 22 Q. So to the best of your knowledge, no?
 23 A. No. Everything is run through Ed.
 24 Q. And I'm sorry. I think you had already told
 25 me. But was that done soon after Mr. Petrus purchased

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1 the home?
 2 A. Yes.
 3 Q. And did you have any interactions with whoever
 4 from A-1 came and did that?
 5 A. Yes.
 6 Q. And is there anything noteworthy about those
 7 interactions that you recall?
 8 A. A-1 was doing something else at the house. I
 9 don't remember exactly. But we asked him to put that
 10 gas line in. And when they made the penetration in the
 11 wall for the gas line, they found water.
 12 Q. And the penetration, which wall would we be
 13 talking about?
 14 A. The stem wall in that same location.
 15 Q. Would that be accessible from the crawlspace,
 16 or other ways?
 17 A. Yes, crawlspace.
 18 Q. So they had to penetrate a wall. And I assume
 19 that means go through some insulation, as well?
 20 A. Yes.
 21 Q. In order to fish the gas line out --
 22 A. Yes.
 23 Q. -- to the deck?
 24 A. Yes.
 25 Q. And in the process of doing that, they

1 observed water?
 2 A. Yes.
 3 Q. And did they report that to you?
 4 A. Immediately.
 5 Q. Did you go down and look at what they were
 6 reporting?
 7 A. Yes.
 8 Q. What did you see?
 9 A. The insulation was saturated with water.
 10 Q. And the insulation on the stem wall or
 11 somewhere else?
 12 A. On the stem wall.
 13 Q. And with the penetration they had made in the
 14 spot they had made it, could you see through to the area
 15 underneath the french doors?
 16 A. Originally, it was lower than the french
 17 doors, themselves.
 18 Q. So what else did you observe, if anything?
 19 You said you observed that there was wet insulation.
 20 A. In the beginning, that was it.
 21 Q. And you don't have any documents regarding
 22 that incident?
 23 A. I had EnergySeal come and tear the foam out,
 24 when it was time to tear the foam out. So they did that
 25 work.

1 until the insulation was removed, none of that was
 2 visible from the crawlspace?
 3 A. True.
 4 Q. So do you have any documents in your
 5 possession regarding EnergySeal's work or what ensued
 6 from it?
 7 A. No. No.
 8 Q. Maybe we can cut to the chase here. Do you
 9 have any documents in your possession -- and I have
 10 received from Ms. Foster, what I believe to be your
 11 invoices?
 12 A. Yes. Yes.
 13 Q. Other than your invoices, do you have any
 14 documents regarding any work that was done on the house
 15 at any time?
 16 A. I may have some copies of the EnergySeal
 17 invoices, but they were always turned into Ed.
 18 Q. Would you have anything else that you know of?
 19 A. I generally have copies of bills or summaries
 20 from EnergySeal, for example.
 21 Q. Did you take any photographs?
 22 A. I did not.
 23 Q. Did you prepare any reports for Mr. Petrus,
 24 either in email form, or otherwise?
 25 A. No.

1 Q. So A-1 points out to you, that, hey, there is
 2 some wet insulation in here?
 3 A. Yes.
 4 Q. They put the gas line to where you wanted it;
 5 correct?
 6 A. Yes.
 7 Q. Then you had EnergySeal come to replace the
 8 wet insulation?
 9 A. Yes.
 10 Q. And in the process of EnergySeal doing that,
 11 did you observe anything of relevance to the matters
 12 we're talking about in this lawsuit?
 13 A. Yes, the area was exposed then without the
 14 insulation.
 15 Q. So the insulation was removed from the
 16 crawlspace. And at that point, you could see through to
 17 the area underneath the french doors?
 18 A. Yes.
 19 Q. And did you go look?
 20 A. Yes.
 21 Q. And what did you see?
 22 A. The floor joists were rotten. The corner post
 23 support was rotten. And I could see ice and water
 24 shield from the inside of the crawlspace.
 25 Q. Am I correct in understanding, Mike, that

1 Q. Do you use email as a communication means with
 2 Mr. Petrus?
 3 A. I do.
 4 Q. So if you were to search your emails, would
 5 you be likely to find communications with Mr. Petrus
 6 dating back to when you --
 7 A. No.
 8 Q. -- to 2012?
 9 A. No, they would be -- I wouldn't have those.
 10 Q. And that's because?
 11 A. They've gotten erased, or I usually take care
 12 of the business with him, and that's it.
 13 Q. So you don't save them electronically?
 14 A. No.
 15 Q. Into a directory?
 16 A. No.
 17 Q. And you don't print them and save hard copies?
 18 A. No.
 19 Q. In any case that you remember?
 20 A. Not that I can remember.
 21 Q. So item 4 in this Notice Duces Tecum ask for
 22 all written communications between you and the Petrus
 23 Family Trust, and/or Edmond A. Petrus.
 24 To your knowledge, do you have any written
 25 communications between you and Mr. Petrus?

1 A. I may have some.
2 Q. And item 5 is, all reports or other documents
3 which state your, observations regarding, and then it
4 talks about the damage to the home, and related matters,
5 and the correction of the damages to the home.

6 You told me you may have some EnergySeal
7 receipts. To your knowledge, do you have any documents
8 in your possession that relate to the damage to the home
9 and the repairs that were done?

10 A. I may have some.

11 MR. MILLEMANN: Counsel, I guess I mistakenly
12 understood, that Mr. Longmire would be provided with
13 this Notice in advance to the deposition. He is saying
14 that he wasn't.

15 Do you have any objection to going through the
16 matters requested in this Notice with him, and him
17 search and provide you, and you provide us with
18 documents?

19 MS. FOSTER: I can discuss that with him. I
20 don't have any objection, but I want to talk to my
21 client. But I don't foresee any problems.

22 MR. MILLEMANN: You want the talk to
23 Mr. Petrus about it?

24 MS. FOSTER: Probably. I don't currently
25 anticipate an objection.

1 A. Yes.

2 Q. How many times do you think you had occasion
3 to be in that home, ballpark, in that two year period of
4 time?

5 A. A hundred times or more.

6 Q. Fair enough. And as I understand the
7 testimony, Restoration Pro, after they started their
8 work, then they disturbed the premises. They disturbed
9 the area around the french doors. They took rock vincer
10 off. They exposed the area around the french doors, and
11 then eventually some other areas. Is that consistent
12 with your recollection?

13 A. Yes.

14 Q. And purely ballpark, but in the hundred times
15 that you are talking about that you were in the home
16 between when Mr. Petrus purchased, and when Restoration
17 Pro started tearing things off, did you ever observe any
18 signs of moisture damage to the hardwood floor in the
19 area next to the dining room french doors?

20 A. No.

21 Q. The same time frame for all these questions.
22 Okay? This is before the house was disturbed. Did you
23 ever observe any signs on the french doors, themselves,
24 of moisture damage?

25 A. Yes.

1 MR. MILLEMANN: Okay. Well, then when we're
2 done, I'm going to continue the deposition then, until I
3 have an answer to that. Because if I need to have
4 Mr. Longmire go get them. And if I need to subpoena
5 him, which I was told, I didn't, then I'll do so. But
6 we'll continue and cover what we can cover today.

7 MS. FOSTER: Okay.

8 Q. (BY MR. MILLEMANN) Between the time that
9 Mr. Petrus purchased the home, which I will tell you was
10 in April of 2012, and the time that Restoration Pro or
11 Disaster Pro, the names have changed, Beau Value's
12 company --

13 A. Yes.

14 Q. -- started to do their work, did you have
15 occasion to be in that home?

16 A. Yes.

17 Q. And I think, Mike, the records will show that
18 Restoration Pro/Disaster Pro started their work,
19 ballpark, April of 2014.

20 A. Right.

21 Q. Does that sound right to you?

22 A. Yes.

23 Q. So there would have been almost a two-year
24 period, I guess, between when you were hired, and when
25 they started doing their work; does that sound right?

1 Q. What did you observe?

2 A. The eastern panel of the french door set was
3 swollen.

4 Q. When you say, "the eastern panel," there are
5 two doors; right?

6 A. Yes.

7 Q. And describe to me, what's the first time you
8 remember observing that?

9 A. The first day I went to work for Mr. Petrus.

10 Q. Okay. And what did you observe?

11 A. The door mechanically wouldn't open. And the
12 panel, itself, was swollen. It looked like it had
13 gotten wet.

14 Q. Was that a clad door?

15 A. Yes.

16 Q. So with wood inside the clad?

17 A. Yes.

18 Q. And the eastern of the two would have been the
19 door closer to the --

20 A. Lake.

21 Q. To the lake. Thank you.

22 So the first thing you said is the door -- did
23 the door not open at all, or was it sticking?

24 A. It did not open at all.

25 Q. You couldn't get the door open?

1 A. No.
 2 Q. And specifically, when you say, it was
 3 swollen, what did you observe?
 4 A. All the joints in the door were pulled apart.
 5 So when a door has moisture, it pushes those joints
 6 apart.
 7 Q. And the joints, being the joints --
 8 A. The millwork joints.
 9 Q. The millwork joints. Underneath the clad, or
 10 was that visible?
 11 A. It was visible.
 12 Q. And when you observed that, what did you do?
 13 A. I pointed out to Ed, and he -- because he
 14 asked me, why do the doors not open? And I said, well,
 15 it could be moisture, or mechanically there something is
 16 wrong.
 17 Q. Did you know at that time what the cause was?
 18 A. No.
 19 Q. In your experience, would you agree with me,
 20 that sticky doors can be caused by a variety of things?
 21 A. Yes.
 22 Q. So you physically could not open the door? I
 23 mean, even if you turned the handle and pushed on it,
 24 you couldn't get it open?
 25 A. Impossible to open.

1 Was that the design of these doors? Did one
 2 of them stay locked in a fixed position?
 3 A. Yes.
 4 Q. Which one?
 5 A. The one on the left. Are we talking about --
 6 Q. I'm sorry. The dining room french doors.
 7 A. The affected french doors?
 8 Q. Yes. So when you say, "left," you mean,
 9 "east"?
 10 A. Yes.
 11 Q. So the same door that you saw was swollen?
 12 A. Yes.
 13 Q. So the other door would have been the door
 14 that would swing open and closed?
 15 A. The active door.
 16 Q. The active door. Thank you.
 17 And that one functioned?
 18 A. Yes.
 19 Q. But it just wasn't used for whatever reason?
 20 A. Right.
 21 Q. So back to the time frame when Mr. Petrus has
 22 purchased in 2012, and Restoration Pro's commencement of
 23 work in 2014. Are you with me?
 24 A. Yes.
 25 Q. You told me you didn't see any signs of any

1 Q. Did that condition change?
 2 A. No.
 3 Q. So from the time that you first saw it soon
 4 after Mr. Petrus bought the home, until the time that
 5 Restoration Pro started disturbing the home, it's your
 6 testimony that you could not open the door?
 7 A. That's correct.
 8 Q. And what about the other door?
 9 A. The other door would open.
 10 Q. So was that the door then that was used to
 11 come and go through those french doors?
 12 A. We never used that door.
 13 Q. You didn't use the french doors at all, even
 14 after you put the barbecue out there?
 15 A. Right.
 16 Q. How did you access the barbecue?
 17 A. Through the other french doors.
 18 Q. Those coming out of the family room?
 19 A. Yes.
 20 Q. So when I think of french doors, I think of
 21 two doors, which this isn't always the case. But the
 22 ones we have, one of them remains closed. You can open
 23 it by lifting, or pulling down the astragal locks on
 24 those. The ones we have, we go in and out through one
 25 of them, unless you have some reason to open both.

1 damage on the hardwood flooring next to those doors;
 2 right?
 3 A. Right.
 4 Q. Did you see any signs of moisture intrusion on
 5 the Sheetrock on the walls in those areas?
 6 A. No.
 7 Q. If you stepped outside the doors, did you see
 8 any signs on the decking, on the surface of the decking
 9 that was visible of moisture damage?
 10 A. No.
 11 Q. Other than seeing the swollen door, which
 12 you've honestly testified could have been moisture, did
 13 you see anything else in the interior or the exterior of
 14 the home before Restoration Pro started doing, that
 15 caused you concern about whether there was rot anywhere
 16 in the home?
 17 A. Could you ask that again, Steve?
 18 Q. Sure. I'll try to do a better job of it.
 19 This same time frame between when Mr. Petrus
 20 purchased the home, and when Restoration Pro started
 21 their work. And if you want, Mike, exclude the
 22 crawlspace that you told me about from this. Other than
 23 that, did you ever see anything that caused you to
 24 think, we might have rot of some sort, or moisture
 25 damage of some sort in this house?

1 A. Just the swollen door.
 2 Q. That was it. Okay. And that swollen door,
 3 the east door of the french door set, even if you pulled
 4 up the astragal pins, you couldn't get the door open?
 5 A. Yeah, the hardware did not function.
 6 Q. The hardware did not function. Okay. And
 7 when you say, the hardware didn't function, explain to
 8 me.
 9 A. It seemed as though the hardware did not
 10 function. In other words, there was no way to
 11 physically open the door.
 12 Q. Because you didn't have astragal pins on the
 13 bottom and the top?
 14 A. It may have. I don't know.
 15 Q. Did you look to see if those were engaged or
 16 not?
 17 A. I actually called Mark Birrer, the
 18 representative to come out, and I didn't touch the door.
 19 Q. Do you know whether he did come out?
 20 A. Yes.
 21 Q. Were you there when he came out?
 22 A. Yes.
 23 Q. Ballpark on that, can you give me a timeframe
 24 on that?
 25 A. It was fairly soon after we discovered the

1 any alterations to the door?
 2 A. No, we ended up ordering a new set. He came
 3 back to verify the serial numbers on the unit to match
 4 the set.
 5 Q. And was there any warranty in place to cover
 6 those, if you know?
 7 A. We tried pursuing that with Nu-Vu Glass, but
 8 they wouldn't -- after a while, they wouldn't talk to me
 9 about it.
 10 Q. So the fix was replace the doors?
 11 A. Yes.
 12 Q. As far as what was causing that door not to
 13 open, you didn't ever hear a definitive opinion?
 14 A. Right.
 15 Q. Do you recall Nancy Gentry coming to the house
 16 with Michael Wood, her realtor?
 17 A. Yes.
 18 Q. In April of 2014?
 19 A. Yes.
 20 Q. You were there?
 21 A. Yes.
 22 Q. Did you have any interactions with Ms. Gentry?
 23 A. No, other than let them in, and stand there.
 24 Q. So do you recall whether you said anything to
 25 Nancy Gentry?

1 problem.
 2 Q. The problem being, the sticky door?
 3 A. Yes.
 4 Q. And did you talk with Mr. Birrer?
 5 A. Yes, he came out, and we discussed a solution.
 6 Q. What did he say to you?
 7 A. Obviously, the door doesn't work. And he
 8 wasn't knowledgeable enough about the hardware to give
 9 me an answer.
 10 Q. Did he believe it was a hardware problem?
 11 A. To the best of my memory, he acknowledged the
 12 swollen panel was a problem. But I don't remember his
 13 conclusion on what the solution would be.
 14 Q. Okay. Did you ever conclude, yourself,
 15 whether the problem with opening that eastern more of
 16 the two french doors, was a moisture problem, or a
 17 hardware problem, or something else?
 18 A. Try that one more time, Steve.
 19 Q. Yes. Did you ever form an opinion, yourself,
 20 as to whether your inability to open that door was
 21 caused by moisture, caused by hardware problems, or
 22 something else?
 23 A. Well, my opinion would be that it was a
 24 combination.
 25 Q. Did Mr. Birrer come back at any point and do

1 A. I made no comments to Nancy.
 2 Q. And at that time, if you recall, had some of
 3 the problems with rot under the door and the floor
 4 joists been exposed?
 5 A. I believe when she came, she -- Beau had
 6 already taken that section out, and you could see it.
 7 Q. Do you recall making a statement to her,
 8 without quoting, to the effect that, Nancy, there is no
 9 way you could have known about this?
 10 A. No, I never said that.
 11 Q. So if Mr. Wood and Nancy testified that you
 12 did, their recollection is wrong?
 13 A. Yes.
 14 Q. You have a clear recollection about what you
 15 said?
 16 A. I never would have said that.
 17 Q. Why wouldn't you have said that?
 18 A. It was not my place to make any comments about
 19 that.
 20 Q. Do you believe it to be a true statement?
 21 A. Could you rephrase that for me, Steve?
 22 Q. As you sit here today, are you aware of any
 23 facts or evidence which would suggest to you that Nancy
 24 Gentry knew of the problems that were uncovered in the
 25 area of the french door and elsewhere?

1 A. Nancy made one statement to that effect. She
2 said that I remember -- they had five days to find it,
3 and they didn't.
4 Q. I don't understand. So you do remember some
5 conversation with her?
6 A. No, this is just what -- this is a statement
7 she made when I was standing on the deck.
8 Q. That they had five days to find it.
9 A. Which at the time, I wasn't -- that didn't
10 make any sense to me.
11 Q. Okay. My question is, are you aware of any
12 evidence that would suggest that before she sold this
13 house, and up until the time she sold this house to Ed
14 Petrus, that she knew about the problems which were
15 exposed and corrected by Restoration Pro?
16 A. I have no personal knowledge that she knew, or
17 did not know.
18 Q. Has anybody suggested to you that she knew?
19 A. Yes.
20 Q. Who?
21 A. Ed.
22 Q. And what has Ed told you on that subject?
23 A. That she knew that the doors were affected.
24 Q. She knew the doors were affected?
25 A. Weren't working properly.

1 Q. Did he ever tell you how she knew that?
2 A. No.
3 Q. So Ed said to you, words to the effect, she
4 knew the doors weren't working properly. Anything else
5 that Ed said to you, that expressed an opinion that
6 Nancy knew about the damage to the house that was
7 discovered?
8 A. No, just that.
9 Q. Has anybody else suggested to you, or offered
10 you an opinion, that they think Nancy Gentry knew about
11 these problems?
12 A. No.
13 Q. No?
14 A. No.
15 Q. When Nancy was there, did you witness any
16 conversations between her and anyone else?
17 A. No.
18 Q. Did you hear any statements made by her, or by
19 anyone else?
20 A. No -- the only -- the statement that I
21 referred to about the five days.
22 Q. Did you have some takeaway from what that
23 statement meant from your perspective?
24 A. At the time, no.
25 Q. Do you now?

1 A. Yes, I guess there is something in real
2 estate, where you have five days to find errors in the
3 house, or defects in the house.
4 Q. That's what you think she meant?
5 A. Yes.
6 Q. I see. And what's the basis for you thinking
7 that? Did somebody tell you that?
8 A. Individuals that referred to that, the five
9 day -- I still don't know what it's called.
10 Q. Okay. So to wrap this line of questioning up.
11 Other than your observation that the east of the two
12 french doors had some swelling. In the two-year period
13 that you were in and out of the house a hundred times,
14 you did not observe anything else that would have
15 suggested to you that the rot and the condition, which
16 was exposed by Restoration Pro, existed?
17 A. Other than my observation, under the
18 crawlspace.
19 Q. Other than in the crawlspace?
20 A. Right.
21 Q. When the insulation was pulled off?
22 A. Right.
23 Q. When Nancy came with her realtor, do you
24 remember who else was there, if anyone?
25 A. I can't remember if Beau was working at that

1 time. It may have been Tony. It may have been somebody
2 working there.
3 Q. Who is Tony?
4 A. Tony works for Beau.
5 Q. Did you prepare any notes, or reports, or
6 emails for Ed about that day and that visit?
7 A. No. It would have mostly been a phone call,
8 usually.
9 Q. So at no point did you see moisture standing
10 on the interior walls?
11 A. No.
12 Q. Or evidence on the door of any moisture
13 intrusion, save and except your observation that the
14 east door appeared swollen; correct?
15 A. No moisture -- other than a swollen door, I
16 didn't see any moisture evidence surrounding the door.
17 Q. The door, itself, or the threshold, or the
18 framing?
19 A. Just the swollen door.
20 Q. I'm giving you that one. I'm trying to make
21 sure there is nothing else?
22 A. Yeah, no.
23 Q. So other than that, you didn't see any
24 evidence around the doorway to suggest there was
25 moisture intrusion?

1 A. Right.
2 Q. Nor any evidence on the decking outside of
3 what you later found?
4 A. Right, the deck is Trex, plastic.
5 Q. Nor any evidence along the east wall of the
6 home where some additional rot was found, to suggest
7 what was in there?
8 A. No.
9 Q. Have you ever had any conversations with
10 Michael Wood about this case, or this home?
11 A. I may have had one conversation with Michael,
12 but I don't remember the content, because I've known
13 Michael for a while.
14 Q. Ever have any conversations with Jean Odmark
15 about this home?
16 A. No.
17 Q. How about Kevin Batchelor?
18 A. Any conversations about the home?
19 Q. Yes.
20 A. I don't know if I've ever actually talked to
21 Kevin about, specifically, about the home.
22 Q. You've talked to him about other things?
23 A. Yes.
24 Q. But nothing to do with this lawsuit, or this
25 problem?

1 Q. Did he mention to you that the door appeared
2 that somebody had tried to pry it open?
3 A. No.
4 Q. Did you ever hear of anything like that?
5 A. No. He mentioned to me, as I remember now,
6 something about more screws being put into the
7 threshold, but I didn't know anything about that.
8 Q. And it's your testimony that to your
9 knowledge, neither Mr. Petrus, nor his girlfriend, nor
10 any of their children used either of the french doors in
11 question here?
12 A. I don't believe they ever used them, because
13 they didn't work.
14 Q. Well, one of them did work; right?
15 A. Yeah, but there is a table there, and they
16 just -- it just wasn't used.
17 Q. I see. There's a table in front of those
18 doors?
19 A. There is a dining room table there, yes.
20 Q. So they could --
21 A. Another dining room table, actually, it's
22 a -- I don't know what you would call it. But there is
23 another table here. There is two dining room style
24 tables.
25 Q. And one of them would have made it

1 A. We stayed away from that kind of conversation.
2 Q. Sure. Fair enough.
3 How about Chris Kirk? Have you ever had any
4 conversations with him about any --
5 A. Just the two visits, when he came to inspect.
6 Q. And did you have any conversations with him on
7 either of those occasions?
8 A. Small talk, no specifics.
9 Q. Anything that you recall that stands out?
10 A. One thing Chris mentioned to me, he mentioned,
11 the door had a water diversion channel, which I wasn't
12 familiar with. I'm unfamiliar with that term.
13 Q. Did he mention to you, or did you ever observe
14 that the door appeared to have -- that it appeared that
15 somebody had tried to close the door or open it with the
16 astragal pins still engaged?
17 A. No.
18 Q. Didn't ever observe any signs on the exterior
19 or interior framing of the door --
20 A. No.
21 Q. -- that an astragal pin had slammed against
22 it?
23 A. No.
24 Q. No?
25 A. No.

1 inconvenient to use those doors?
2 A. Yeah, impossible to use them.
3 Q. Impossible?
4 A. Yeah.
5 Q. Okay. So they just simply relied on the
6 doors --
7 A. Yes, the french doors.
8 Q. Out of the family room?
9 A. Yes.
10 Q. Did you ever have any conversations with Todd
11 McKenna about this case?
12 A. Yes.
13 Q. Do you have any recollection of what was said
14 in any of them?
15 A. With Todd? I had one conversation with Todd.
16 Q. Okay. About when was that?
17 A. I don't remember exactly.
18 Q. Can you place it in the sequence of events, in
19 terms of before the home was disturbed, and the rot was
20 discovered, or after?
21 A. I believe it was before Beau started work on
22 the repair.
23 Q. Where did the conversation occur?
24 A. At a barbecue, a birthday barbecue.
25 Q. And what do you remember about the

1 conversation?
 2 A. Todd asked me to ask Ed for leniency in the
 3 lawsuit.
 4 Q. Are those the words that he used?
 5 A. As close as I can remember. And then I asked
 6 him questions about, didn't he check the doors? And he
 7 said, no. And I asked him questions about his
 8 profession, in general. I said, when you say that you
 9 checked the doors, don't you check all the doors? And
 10 he says, I don't need to. And he mentioned -- I
 11 mentioned, electrical outlets, the same thing? I said,
 12 when you check the electrical outlets, do you not check
 13 them all? And he said, no, I don't need to.
 14 And then he told me that he didn't have
 15 insurance. And I said, well, why wouldn't you have
 16 insurance? I tried to not have a conversation with him,
 17 because I didn't really think it was, you know -- he
 18 pursued me, because he thought I would have some control
 19 over what Ed would do.
 20 Q. Or influence, anyway?
 21 A. Yes. And I said, I don't have anything to do
 22 with it.
 23 Q. And when you mentioned several times, asking
 24 him if he checked the doors. Did you mean, open and
 25 close?

1 A. I have no personal knowledge of that, just the
 2 evidence.
 3 Q. Did you ask Todd about that?
 4 A. I did not ask Todd about that.
 5 Q. Was that on the outside of the door?
 6 A. The outside.
 7 Q. And was there any tape across the threshold,
 8 or the bottom of the doors?
 9 A. No.
 10 Q. And did the tape on the vertical seam of the
 11 two doors, did it extend from top to bottom?
 12 A. Yes.
 13 Q. Or the evidence of it did?
 14 A. Yes.
 15 Q. Did you have to remove the tape, or had it
 16 already been removed?
 17 A. No, it was already removed.
 18 Q. But it was obvious to you, looking at it, that
 19 it had been there?
 20 A. Somebody taped it.
 21 Q. Okay.
 22 A. And there was no -- no weather stripping
 23 between where the astragal hits the other door.
 24 Q. Now, when I think of astragal, I think of a
 25 pin that goes up into a receptacle and down.

1 A. I said, yeah. Did you see if the doors
 2 worked? And he said, he didn't check them, because
 3 there was snow against the doors.
 4 Q. At any point from the time you started being
 5 in and around the house, which would, I guess, have been
 6 in May of 2012, up until the door being removed, did you
 7 ever observe any tape on the door?
 8 A. Yes.
 9 Q. And when did you remember first observing tape
 10 on the door?
 11 A. The very first day. There was tape residual,
 12 duct tape on the astragal.
 13 Q. Okay. So when you say, the astragal --
 14 A. Between the two doors, where the astragal
 15 would make the seam.
 16 Q. So the tape was on the vertical seam of the
 17 doors?
 18 A. Yes.
 19 Q. Was there still tape, or evidence that there
 20 had been?
 21 A. Residual, like when you pull duct tape off,
 22 the residual from the tape.
 23 Q. And do you have any knowledge of whether the
 24 vertical seam was taped? And if so, by whom, and what
 25 period of time?

1 A. Those would be head and toe bolts.
 2 Q. Okay. What's the astragal?
 3 A. The astragal is the actual part of the door
 4 that makes the -- without an astragal, you have an
 5 opening between the two doors. So the astragal actually
 6 makes the connection between the two doors in order to
 7 stop.
 8 Q. And that's the seam you saw that appeared to
 9 have been taped at some point?
 10 A. Yes.
 11 Q. But you didn't see any sign along that seam,
 12 inside or outside, of moisture penetration?
 13 A. No.
 14 Q. You called the others -- I'm sorry, Mike,
 15 what?
 16 A. Head and toe bolts.
 17 Q. Head and toe bolts. So when I asked you
 18 earlier about astragal, it probably didn't make any
 19 sense. But when you tried to open the east of the two
 20 french doors, were those bolts engaged; do you know?
 21 A. There was no sign of the hardware inside. So
 22 I don't know. They weren't engaged -- I mean, as far as
 23 I could tell, without forcing the door, which I wouldn't
 24 do. I couldn't open the door. So I left it at that.
 25 Q. Could you tell for sure, whether they were or

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1 weren't?
 2 A. Could not.
 3 Q. And when I asked you earlier about any
 4 evidence of scarring on the door frame --
 5 A. I didn't see any evidence of that.
 6 Q. My question was, regarding those bolts. You
 7 didn't see that?
 8 A. No.
 9 Q. Have you ever had any conversation with any
 10 current or past building inspector about the house?
 11 A. I have had conversations with John, the
 12 current building inspector. I don't believe that I
 13 referred to the particular house. But I was doing
 14 some -- searching for some code information that I knew
 15 already, but I wanted to see what was in force at the
 16 time.
 17 Q. What did you learn?
 18 A. That building paper at seven pounds is not
 19 enough.
 20 Q. You mean, felt?
 21 A. Yeah, but building paper is not -- it's
 22 asphalt saturated paper. Felt leads you to believe that
 23 it's 15 or 30 pound felt.
 24 Q. So let's back up. Without asking John Powell,
 25 did you know of your own knowledge what building codes

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1 would have applied to the house when it was constructed
 2 in 2004 or '05?
 3 A. I would say, I would know more what the
 4 standard practice was. Not necessarily, because there
 5 is some issues in that particular time in McCall's
 6 history about what was acceptable, and what the codes
 7 actually -- what McCall -- city of McCall was accepting
 8 or enforcing.
 9 Q. So did you ever learn from John Powell,
 10 specifically what building code would have been in place
 11 when that house was constructed.
 12 A. I think it would be -- Steve, I don't remember
 13 exactly what he came up with.
 14 Q. Did you have any written exchanges with John
 15 Powell?
 16 A. No.
 17 Q. So then you apparently had some verbal
 18 exchange with him about the -- what would you call it,
 19 the asphalt paper?
 20 A. The weight of the paper that's supposed to be
 21 under rock.
 22 Q. Under the rock veneer?
 23 A. Yes.
 24 Q. And what did John Powell tell you?
 25 A. We found it in the code book that said it

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1 needed to be at least 15 pound felt.
 2 Q. And you found it in the code book. Was that
 3 the code currently in place?
 4 A. The code that he, to the best of his
 5 knowledge, was in force at the time.
 6 Q. What time frame did you give him?
 7 A. 2004 or '06; 2004.
 8 Q. And he told you that the code at the time, was
 9 15 pound felt?
 10 A. That part of the code hadn't changed much in
 11 many years. So it wasn't like 2004 it was a question,
 12 or was not a question. It was already in force before
 13 that.
 14 Q. But your understanding from John Powell, there
 15 was at that time that this house was constructed, a
 16 specific code provision that called out that felt behind
 17 masonry had to be at least 15 pounds?
 18 A. Yes.
 19 Q. As opposed to there had to just be an adequate
 20 moisture barrier?
 21 A. Right.
 22 Q. And as you sit here today, do you have any
 23 idea what code he was referring to?
 24 A. No, I can't remember that.
 25 Q. And why did you ask him this question?

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1 A. Because when it was all taken off of the wall,
 2 I was curious, myself, because there was only one layer
 3 of building paper.
 4 Q. Okay. And what pound of paper was that?
 5 A. Well, building paper is seven pounds. So it's
 6 not 15 pounds. So it would take two layers of building
 7 paper to meet the 15 pound requirement.
 8 Q. And you only observed one?
 9 A. One.
 10 Q. And did you observe anywhere on the exterior
 11 wall, or area of the french doors, any Tyvek?
 12 A. Around the light fixture.
 13 Q. What about the windows?
 14 A. In the area of the doors?
 15 Q. Or along the corners to the north that
 16 were --
 17 A. I don't remember now which ones had Tyvek, if
 18 there was any Tyvek, but there wasn't in the affected
 19 area.
 20 Q. The affected area being the doors?
 21 A. Doors, yes.
 22 Q. Was there any evidence of moisture barrier you
 23 observed in the affected area around the doors, besides
 24 the one layer of felt?
 25 A. No, just that one spot of Tyvek about where

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1 the light fixtures were.
 2 Q. So you didn't observe -- what's it
 3 called -- the ice and water shield.
 4 A. No ice and water shield. The only ice and
 5 water shield was under the floor on the inside of the
 6 envelope. I believe I asked Chris about that.
 7 Q. Do you remember what you asked him?
 8 A. Why is there ice and water shield on the
 9 inside of the envelope?
 10 Q. Do you remember what he said?
 11 A. That's when he told me about the water
 12 diversion channel, which is a term I'm not familiar
 13 with.
 14 Q. So you asked him why there was ice and water
 15 shield underneath the door, and he told you something
 16 about a water intrusion channel?
 17 A. Yes, water diversion channel.
 18 Q. Did that answer your question, as to why there
 19 was ice and water shield?
 20 A. No.
 21 Q. Do you remember any other conversations with
 22 John Powell related to this property?
 23 A. I believe I just asked him about the weather
 24 proofing. That was it. I don't remember asking him
 25 about -- discussing anything else with him, besides

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1 that.
 2 Q. Would it be fair for me to say, and if not,
 3 tell me, that the reason that you went to John Powell is
 4 that you didn't consider yourself an expert in such
 5 matters?
 6 A. Yes.
 7 Q. And as far as what the codes were at the time,
 8 or what the, as you refer to the term, standard practice
 9 in the industry was at the time, do you hold yourself
 10 out as an expert on those topics?
 11 A. No.
 12 Q. Do you ever have any conversations with Steve
 13 Minor about this project?
 14 A. Yes.
 15 Q. One, or more than one?
 16 A. One conversation -- well, if you -- if you
 17 count the time that I called him to ask him to come out
 18 and look at the job; two.
 19 Q. Good for you. One substantive conversation, I
 20 take it?
 21 A. Yes, when he came to the job.
 22 Q. And can you bracket that for me at all, as far
 23 as when that occurred?
 24 A. Steve Minor was after Mike Clarke first, then
 25 Chuck Thielst, then Steve Minor.

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1 Q. Okay. So you would have talked to him before
 2 Beau commenced work on the project?
 3 A. Yes.
 4 Q. Well before?
 5 A. Yes. Well, that was the third phase. Chuck
 6 had decided that he did not want to do the work.
 7 Q. Did you have Steve Minor come out to
 8 potentially doing the work?
 9 A. Yes. And I explained to him, the situation,
 10 and we looked at the damage. I told him that there
 11 could be -- that this could be -- there might be
 12 involvement in a lawsuit, because that seems to be the
 13 reason that no one wants to touch it. And Steve said,
 14 well, someone has to fix it. And I said, okay. Well,
 15 great. So give me a price. And I never heard from him
 16 again.
 17 Q. And when you say, you showed him the area of
 18 the damage. I assume this was before Beau's crew
 19 had --
 20 A. Oh, yes.
 21 Q. So were you looking through the opening of the
 22 crawlspace?
 23 A. No. You are actually looking at the
 24 exposed -- the foam at this point had been taken off
 25 again.

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1 Q. In the crawlspace?
 2 A. Yes, and everything was exposed.
 3 Q. In the crawlspace?
 4 A. Yes.
 5 Q. And so you went in the crawlspace with him,
 6 and said?
 7 A. Here it is.
 8 Q. Here it is. What do you think?
 9 A. Yes.
 10 Q. And you told him, this could end up in
 11 litigation?
 12 A. Yes.
 13 Q. Why did you tell him that?
 14 A. It seemed to be the deciding factor from
 15 everybody that wanted to do the repairs.
 16 Q. But on what did you base your statement to him
 17 that this could wind up in litigation?
 18 A. What point were we then? Could you ask me
 19 that one more time, Steve?
 20 Q. Yes. What was your basis for telling him,
 21 that this could wind up in litigation?
 22 A. My basis?
 23 Q. Was that just your opinion, or had somebody
 24 else told you that this could wind up in litigation?
 25 A. I would say that by this time, that action had

1 been discussed with Ed.
 2 Q. Do you remember the substance of any of those
 3 conversations?
 4 A. Oh, no, I don't remember that. It was -- no,
 5 I don't remember that part of it; the specific
 6 conversation.
 7 Q. And that's the extent of your conversations
 8 with Steve Minor?
 9 A. Yes.
 10 Q. He just didn't get back to you?
 11 A. He just didn't get back.
 12 Q. So did you then contact Beau?
 13 A. I contacted Beau. I needed somebody to do the
 14 job.
 15 Q. And also be prepared, potentially, to testify?
 16 A. Yes.
 17 Q. How about Steve Lacey? Have you had any
 18 conversations with him about this?
 19 A. Steve Lacey, he was -- I let him see the
 20 project somewhere along the line for someone else. He
 21 was looking at it for somebody else.
 22 Q. Do you remember the substance of any --
 23 A. No, I don't believe -- in fact, Ed may have
 24 let him in for that inspection. I don't remember
 25 talking to Steve, myself.

1 Gentry must have known about this?
 2 A. Other than?
 3 Q. Well, you told me, that he told you he thinks
 4 she knew about it, because she had problems with the
 5 doors; right?
 6 A. Yes.
 7 Q. Has he ever offered you any other explanation
 8 or opinion as to why he believes Nancy Gentry knew about
 9 these problems?
 10 A. Any other reason? One more time, Steve.
 11 Q. Yeah. You've told me that Mr. Petrus at some
 12 point suggested to you, that he thought Nancy Gentry
 13 must have known about this, because she had problems
 14 with the doors; right?
 15 A. Yes.
 16 Q. Besides that, has he ever offered you any
 17 other reason that he believes Nancy Gentry must have
 18 known about these problems?
 19 A. Because of the tape, talk about penetration of
 20 air through the doors disturbing card games. That's
 21 what he's told me. But I don't have --
 22 Q. Anything else?
 23 A. I don't have any personal --
 24 Q. No, I'm just asking you what he's told you.
 25 A. Yes.

1 Q. At any time in the process of people coming to
 2 inspect the property, whether that be Chris Kirk, or
 3 Steve Lacey, or Nancy, or someone else, were you ever
 4 present -- did you ever witness Mr. Petrus denying any
 5 requests to inspect any part of the house?
 6 A. No.
 7 Q. Were you ever present, specifically, to hear
 8 Mr. Petrus tell Chris Kirk and Steve Lacey, no, you
 9 can't get up on the roof. You are done?
 10 A. No, I wasn't present for that. I don't
 11 remember that.
 12 Q. Now, I assume you've had many conversations
 13 with Mr. Petrus about this?
 14 A. Yes.
 15 Q. You told me that he said words to the effect,
 16 that Nancy must have known about this to you, because
 17 she had problems with the door; right?
 18 A. Yes.
 19 Q. At any other time, has he ever suggested to
 20 you that the reason that he believes that Nancy Gentry
 21 knew or should have known about the conditions that were
 22 repaired by Restoration Pro?
 23 A. Try that one again, please.
 24 Q. Has he ever at any time, has Mr. Petrus
 25 offered you any other reference why he believes Nancy

1 Q. Anything else that comes to mind that he's
 2 told you?
 3 A. No.
 4 Q. Has anyone, either Beau Value, or Eric Waite,
 5 or anyone else, suggested to you that they believe the
 6 condition they discovered under and around the doors was
 7 caused by water coming through the vertical seam of the
 8 doors?
 9 A. I don't believe anybody believes it came from
 10 the vertical seam.
 11 Q. And that's the seam that was taped; correct?
 12 A. Yes.
 13 Q. So we know Restoration Pro did work there to
 14 repair damage and remediate conditions; correct?
 15 A. Yes.
 16 Q. And Beau Value and Eric Waite have told me
 17 about that. I think Beau Value said it was his
 18 understanding that Mr. Petrus purchased the replacement;
 19 is that your understanding?
 20 A. Yes.
 21 Q. To your knowledge, has Mr. Petrus expended any
 22 other monies, besides those two sources of expenditures
 23 in the repair or restoration of the damage?
 24 A. I believe there was also some painting that he
 25 paid for directly.

1 Q. Do you know who would have done that?
 2 A. Herman Hernandez.
 3 Q. Because Beau and Eric both testified that in
 4 their invoices, there was money to have the entire
 5 interior painted.
 6 A. Yes.
 7 Q. Is it your understanding, that even more
 8 painting than that was done, and paid for by Mr. Petrus?
 9 A. You know, without seeing the invoices, I don't
 10 remember who paid for which part of it that Herman did
 11 or which -- I can't remember how they split that up.
 12 Q. Fair enough. Anything else, just that you are
 13 aware of, any other expenditures you are aware of which
 14 would have been made by Mr. Petrus, as part of the
 15 repair and restoration of the home, besides Restoration
 16 Pro, the door, and possibly some painting?
 17 A. No.
 18 Q. Did Mr. Petrus have gutters installed on the
 19 roof?
 20 A. Yes.
 21 Q. Who did that work; do you know?
 22 A. Boise Gutter.
 23 Q. When was that done?
 24 A. That was done the first year, so 2012, I
 25 think.

1 A. Not that I knew of.
 2 Q. And it was done before really any of the
 3 damage that was later discovered was uncovered; correct?
 4 A. Right.
 5 Q. Are they all the way around the house?
 6 A. No, about 50 percent of the house was done.
 7 Q. Which sides, or is it just different spots?
 8 A. It's kind of the trouble areas, as I remember;
 9 so the mud room, the back entry, across the back of the
 10 house, roughly 50 percent.
 11 MR. MILLEMANN: Would you mark that, please?
 12 (Exhibit 62 marked.)
 13 Q. (BY MR. MILLEMANN) Mike, I've shown you
 14 what's been marked as Exhibit 62, which I will represent
 15 to you, appears to me to be a packet of invoices from
 16 you to Mr. Petrus?
 17 A. Yes.
 18 Q. Is that what it looks like to you?
 19 A. Yes.
 20 Q. I'll also tell you, that I've just assembled
 21 it in the order it came to me. So the earliest
 22 invoices, in fact, is the last page?
 23 A. Is most current.
 24 Q. And then we work our way to the first page,
 25 which is the most current? And if you want to take a

1 Q. Were they copper gutters?
 2 A. Yes.
 3 Q. With heat tape?
 4 A. No heat tape.
 5 Q. To date, is there any heat tape?
 6 A. No.
 7 Q. And they function without it?
 8 A. Yes.
 9 Q. They don't freeze up?
 10 A. It hasn't been a problem so far.
 11 Q. And if you know from your conversations with
 12 Mr. Petrus, why did he have copper gutters installed on
 13 the roof lines?
 14 A. Originally, it was because the way the house
 15 is designed, the water comes down in the mud room when
 16 you enter the rear of the house. So to get rid of that
 17 problem, and most of the upper roof comes down a valley
 18 above that, where the doors are, and empties on to the
 19 deck. So to alleviate that problem.
 20 Q. So in part, it was just to eliminate drippings
 21 in an area where people would be trafficking?
 22 A. Yes.
 23 Q. Did anybody recommend to Mr. Petrus that he
 24 put the gutters in as part of the repair or restoration
 25 of the home?

1 look at it to confirm that. The first page, which is
 2 Petrus 484, is an invoice, dated August 16, 2014.
 3 A. Okay.
 4 Q. The last page, which is Petrus 492, is an
 5 invoice dated May 9, 2012.
 6 MS. FOSTER: It goes backwards.
 7 THE WITNESS: Okay. Yeah, I got it.
 8 Q. (BY MR. MILLEMANN) Does that make sense?
 9 A. Yes.
 10 Q. So did you prepare these invoices?
 11 A. Yes.
 12 Q. I want you to look at them, and take as much
 13 time as you need. Are these all the invoices that you
 14 invoiced to Mr. Petrus for the period May 2012 through
 15 August 2014?
 16 A. I believe they are.
 17 Q. Did you find these, and provide these to
 18 Counsel, if you know, or --
 19 A. Yes.
 20 Q. Okay. And where would you have found these in
 21 your records?
 22 A. I have hard copies.
 23 Q. Do you prepare them on a computer or --
 24 A. I do.
 25 Q. And do you maintain a directory with these in

Page 62

1 it?

2 A. On my computer?

3 Q. Yes.

4 A. No.

5 Q. Do you maintain them for any period of time,

6 or, no?

7 A. A short period of time.

8 Q. Until you are paid?

9 A. Yes.

10 Q. So let's start with the oldest invoice.

11 A. Okay.

12 Q. Which would be the last page, which is

13 Petrus -- and when I refer to these numbers, Mike, down

14 on the bottom right, in the very small print, do you see

15 the number, "Petrus," and "000492"?

16 A. Yes.

17 Q. Those are the numbers I'm referring to. So if

18 we start with the May 9, 2012 invoice, Petrus 492, would

19 I be correct in assuming, this would have been your

20 first invoice to Mr. Petrus?

21 A. Yes.

22 Q. That was your first invoice?

23 A. (Witness nodding head.)

24 Q. "Yes"?

25 A. Yes.

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1 Q. And in that first invoice, I noticed an entry,

2 "investigate water issue." And it looks like it was one

3 hour; is that correct?

4 A. Yes.

5 Q. And when you bill, is a part of an hour an

6 hour? I didn't ever see anything less than \$35. So is

7 an hour kind of --

8 A. It's an hour, usually. Yeah, I'm very

9 generous with my time, so it's an hour.

10 Q. I'm not suggesting otherwise.

11 A. No, I --

12 Q. So do you recall, prior to May 9, 2012, what

13 investigation of what water issue you --

14 A. I would be looking for any --

15 MS. FOSTER: Let me object. Objection to the

16 extent you've assumed understandably that investigate

17 water issue occurred prior to May 9th.

18 So just to move things along, I would ask him

19 if, when he starts the date running. I know it's weird,

20 but it will help.

21 Q. (BY MR. MILLEMANN) Are the items on --

22 A. Well, see, if you look at the other invoices,

23 they have days next to them. This first invoice, I'm

24 not sure. This is when I first started working with Ed.

25 So this would have been the first invoice for him. So

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1 it may have been -- I don't know exactly chronologically

2 if the "investigate water issue" came at the right

3 period. Is that --

4 Q. Well, let's start taking it from the easiest

5 point forward. Am I correct in assuming, that the items

6 indicated on Petrus 492, for which you are billing on

7 May 9, 2012, had been completed?

8 A. Yes.

9 Q. Am I correct in understanding, the invoice

10 date was May 9, 2012?

11 A. Yes.

12 Q. So to the extent that "investigate water

13 issue" involved your time, it was something you did

14 before May 9, 2012?

15 A. Yes.

16 Q. Tell me what you remember about what that

17 entry represents?

18 A. That represents going under the -- to look and

19 see if there was some obvious source of water

20 under -- that caused the insulation to be saturated.

21 Q. So by --

22 A. Looking for an obvious source of water.

23 Q. Okay. So by the time that this first invoice

24 was generated, do I understand, that you had already

25 been in the crawlspace, and had observed, or been told

Page 65

1 that there was wet insulation?

2 A. Yes, because I believe -- I don't know when

3 A-1 -- the date of A-1's service.

4 Q. But that would have been the source of your

5 information?

6 A. Yes. Yes.

7 Q. And so do you remember what you did, or is it

8 just what you told me that you got?

9 A. Yeah, I would go in the crawlspace, and look,

10 maybe there was a broken pipe, look for an obvious

11 source. Because there wasn't really any obvious source

12 with everything still covered up.

13 Q. Was there water in the crawlspace on that

14 occasion?

15 A. No water in the crawlspace, just saturated

16 insulation. The foam is open cell foam. So it's like a

17 sponge. So you can't tell.

18 Q. And can you tell me where in the crawlspace,

19 once it was pointed out to you, you observed saturated

20 foam?

21 A. Right underneath the doors. That's where the

22 gas line was.

23 Q. So it was after the penetration had been made

24 through the insulation in the walls of the crawlspace to

25 get to the area under the doors?

Page 66

1 A. Yes.

2 Q. Again, so this is something, again, tell me if

3 I'm wrong, would not have been visible, unless the

4 penetration had been made through the walls in the

5 crawlspace by A-1?

6 A. We wouldn't have seen the actual water. There

7 were stains on the foundation. But the actual water

8 source, or where the bulk of the water was discovered

9 when we put the gas line in.

10 Q. So you learned of that, either from A-1 or

11 somebody, that when they went --

12 A. From A-1.

13 Q. When they punctured the insulation in the

14 crawlspace to put the gas line through, that's when they

15 encountered the wet insulation?

16 A. Yes.

17 Q. And then the next invoice, Mike, is dated

18 August 15, 2012. Do you have that one in front of you?

19 A. Yes.

20 Q. It's Petrus 491. There is an entry there that

21 says, August 2, Mike Clarke, with an "e" on the end of

22 his name, "doors," and actually there are two hours.

23 A. That would have been going through the job

24 with Mike.

25 Q. So was Mike the first person you had come out?

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1 A. Yes.

2 Q. And the job at that time was to replace the

3 doors?

4 A. To replace whatever was damaged.

5 Q. At that point in time had the rest of the

6 insulation been pulled off, so you could see what was

7 underneath the door?

8 A. To my recollection, I can't remember if it was

9 partially removed for Mike to be able to see what was

10 there. But the actual removal was EnergySeal.

11 Q. Okay.

12 A. Timing-wise, I'm not sure exactly which came

13 first.

14 Q. All right.

15 A. I mean, he was looking at this same thing

16 we -- the question was about the ice and water

17 shield -- why is the ice and water shield on the inside?

18 Q. So it had been opened up for Mike to look at?

19 A. Oh, yes, for him to look at. Yes.

20 Q. Either him or previously?

21 A. Yes.

22 Q. So at that point, you would have had a pretty

23 good look at the area underneath the doors?

24 A. Yes.

25 Q. And what resulted from Mike Clarke coming out

Page 68

1 and looking at the job?

2 A. He assessed it. But again, he didn't want to

3 get involved, because Chris Kirk had built the house.

4 Q. Is that what he told you?

5 A. Yes.

6 Q. Did he tell you why that concerned him?

7 A. Friendship; friendship and unspoken law about

8 contractors in lawsuits.

9 Q. Is that your take, or his? Did he say there

10 is an unspoken law?

11 A. No, but not -- just any time you mention

12 litigation, contractors get nervous.

13 Q. So even at this early date, two years -- well,

14 not quite two years before Beau Value started work,

15 contractors potentially being hired to fix the problem

16 were being told there is probably going to be a lawsuit

17 here? And that it would probably involve Chris Kirk?

18 A. I don't know, that that was the case. But

19 Chris built the house, so everyone is aware of Chris'

20 reputation.

21 Q. Which is, what?

22 A. Good.

23 Q. So you don't remember whether you told Mike,

24 hey, Mike, you have to assume this is going to result in

25 litigation, and it could involve Chris Kirk?

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1 A. My words to him were more something like, you

2 could be called to talk about what -- you know, what

3 you've witnessed.

4 Q. Okay.

5 A. And most likely their response usually is,

6 well, I don't want to testify, or do anything like that.

7 And I said, well, if you are subpoenaed, you are

8 subpoenaed. It's not whether you want to or not.

9 You've looked at the project.

10 Q. And so a similar kind of conversation was had

11 with Steve Minor when he came?

12 A. I put that out front with Steve Minor, because

13 I didn't want to go through -- I had gone through this

14 with all of the other contractors, and then have them

15 back out at the end. So I wanted Steve to be aware of

16 the circumstance so I wouldn't waste his time or my

17 time.

18 Q. And the other contractors when Steve came on

19 the job would have Mike Clarke and Chuck Thielst?

20 A. First it was Mike Clarke, and then Chuck

21 Thielst, and then Steve.

22 Q. And then Steve. So you advised all three of

23 them that, hey, this could result in litigation. And if

24 so, you would be expected to testify?

25 A. Yes.

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1 Q. Okay. And either because you told them, or on
2 their own, at least in the case of Mike Clarke, he made
3 the assumption that that would involve Chris Kirk?
4 A. I think Mike was aware that Chris built the
5 house.
6 Q. You said that.
7 A. Yes.
8 Q. So my question was, either because you told
9 him it might involve Chris Kirk, or just because he knew
10 Chris built the house, he assumed Chris would be drawn
11 into it?
12 A. Yes.
13 Q. And in any of your conversations with any of
14 the three contractors -- actually four, I guess, because
15 it was Clarke, Thielst, Minor, and then Beau; right?
16 A. Beau. Yes.
17 Q. Was there any discussion of the fact that
18 Ms. Gentry might get pulled into the litigation, as
19 well?
20 A. No. No, I don't believe that was discussed.
21 Q. Okay. Did Mike ever provide an estimate?
22 A. No.
23 Q. Or a report?
24 A. No.
25 Q. Did Steve Minor ever provide any kind of a

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1 report?
2 A. No.
3 Q. And then your next invoice, Mike, February 7,
4 2013.
5 A. Uh-huh.
6 Q. Petrus 490. January 30, "Plow snow, go
7 through door job with Chuck." I assume that is Thielst?
8
9 A. Yes.
10 Q. And he did provide an estimate; didn't he?
11 A. Yes.
12 Q. So he was not apparently reluctant to proceed
13 even though he might have to testify?
14 A. I would say, Chuck was up and down.
15 Q. Okay.
16 A. And at the very end, he just said, no. Which,
17 of course, burned off another -- you asked why it took
18 two years.
19 Q. Actually, I didn't ask that, but that is
20 helpful to know.
21 A. By the time we went through the process, and
22 then we had to close it up again for winter, and go
23 after it again in the spring.
24 Q. Was the house used during that two-year
25 period?

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1 A. Yes.
2 Q. At any point, did it become uninhabitable from
3 your perspective during that period?
4 A. No.
5 Q. In fact, you've testified that there was a
6 dining room table in front of those doors, so they were
7 not going to be used anyway; right?
8 A. Right, they weren't.
9 Q. And then on the 7th of February, there seems
10 to be a meeting with Chuck, and a floor guy, and a stone
11 mason?
12 A. Yes.
13 Q. By that point, obviously, you could see enough
14 that you were assuming that the flooring would be
15 involved, and so would the stone?
16 A. Well, the stone not so much for -- they would
17 all be involved. They weren't exposed yet. I mean,
18 obviously, the stone is involved, because it touches the
19 door. The floor guy, because we could see where it was
20 rotten -- not the floor, itself, the hardwood floor,
21 because you can't see it, because the sheathing was
22 there. But the sheathing was rotten, and the TJIs were
23 rotten, and the corner was rotten, so...
24 Q. In fact, there was no evidence on the visible
25 surface of the hardwood floor?

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1 A. The skin was not disturbed anywhere.
2 Q. Or stained?
3 A. No.
4 Q. Or cupped?
5 A. No.
6 Q. But the focus of this point of Petrus 490 was
7 still, we've got to replace the door. We know that's
8 going to affect some other things. We've seen that
9 there is some joists that are rotten underneath it. So
10 we know that much; right?
11 A. Right. We're looking at it from the back
12 side.
13 Q. Okay. And then your next invoice, April 12,
14 2013, Petrus 489. There are two entries of relevance, I
15 guess, March 16, "Paperwork doors." March 18, "Door bid
16 mail." Can you tell me what those refer to?
17 A. Paperwood doors, I think we're going to see
18 whether the doors were going to be covered by the
19 manufacturer.
20 What was the other one?
21 Q. "Door bid mail."
22 A. Yeah, that one we would have been sending the
23 stuff to Ed from Chuck, probably.
24 Q. Okay. A bid from --
25 A. From Chuck for the doors.

1 Q. If I look through the invoices, do they
2 provide the accurate flavor for the services you
3 provided to Ed?
4 A. Yes.
5 Q. That is, do you try to include everything you
6 do in these invoices?
7 A. Yes.
8 Q. You don't have some flat rate, and I only bill
9 for stuff on top of that?
10 A. No, I bill per hour.
11 Q. Everything is straight time?
12 A. Straight time.
13 Q. Okay. Then the next invoice is November 10,
14 2013. Do you see that one?
15 A. Yes.
16 Q. Petrus 488. And the September 30 entry is,
17 "Chuck fired, Steve Minor, Beau Value, organize." Can
18 you --
19 A. So that's when Chuck decided that he didn't
20 want to be part of the program. So then Steve Minor was
21 next, and then Beau.
22 Q. All that happened on September 30?
23 A. Yes, making the phone calls, getting them
24 altogether, lining the other ones up.
25 Q. And when you say, "Chuck didn't want to be

1 part of the program," meaning, he didn't want to have to
2 be called as a witness?
3 A. Right.
4 Q. He hadn't done any work yet?
5 A. No, the door was actually delivered to his
6 shop.
7 Q. Oh, it was. And so did he deliver it to you?
8 A. He delivered it to the garage.
9 Q. And then on October 17, "Steve Minor door
10 winterize." Did Steve do some work on the door?
11 A. No. "Winterize" means after Steve looked at
12 it, I believe, we foamed it up again.
13 Q. And when you say, "foamed it up," help me
14 understand what you are saying?
15 A. EnergySeal came back and re-foamed it, so
16 there wouldn't be any cold intrusion for the winter.
17 Q. And where did they apply foam?
18 A. Over the same area.
19 Q. The doors?
20 A. No, under -- in the crawlspace.
21 Q. Okay.
22 A. Yeah. We haven't touched the exterior or the
23 interior hasn't been touched. This is all crawlspace.
24 Q. So to re-foam what had been taken out?
25 A. Yes.

1 Q. In order to see the area?
2 A. Yes. Just for protection in the wintertime,
3 because again, we're in another season.
4 Q. Sure. And then the next invoice is December
5 31, 2013, and that's Petrus 487. Do you see that one?
6 A. Yes.
7 Q. There is an entry, it just says, "Cory." What
8 is that all about?
9 A. Oh, there is a table in the -- the card table.
10 That's where the Christmas tree goes. And so that's
11 removed. And I hired Cory to muscle the table for me.
12 Q. Where is that in the house?
13 A. It's --
14 Q. Looking at Exhibit 1?
15 A. It's in this bay (indicating).
16 Q. In the northeast corner of the family room?
17 A. Yes, this bay (indicating).
18 Q. Okay.
19 A. That's their Christmas charge. We do that
20 every year.
21 Q. That one you charge a little more for.
22 A. Well, that's just to get somebody to show up
23 and be muscle.
24 Q. Got you. Trust me, I'm not being critical of
25 the rate.

1 A. If you had to pick the table up, you would
2 understand.
3 Q. Yes, I'm sure I would.
4 So the next invoice, April 22, 2014, Petrus
5 486. To your knowledge, was any warranty ever honored
6 on the doors?
7 A. No, I got no response from Nu-Vu.
8 Q. Okay. April 14 has the entry, "Tear out rock
9 find source of leak."
10 A. That was the start of Beau's work.
11 Q. So that's when he started to demo the outside?
12 A. Yes.
13 Q. Okay. And then for April 15, "Tear out doors
14 Nancy at 4 p.m." Is that Ms. Gentry?
15 A. Yes.
16 Q. That's the day --
17 A. She came and looked.
18 Q. With Michael Wood; do you remember?
19 A. Yes.
20 Q. But again, you don't remember any
21 conversations either that you had, or anybody else had
22 with them?
23 MS. FOSTER: Objection. That was not his
24 testimony.
25 Q. (BY MR. MILLEMANN) Other than --

1 A. I didn't say what --
2 Q. I believe what you told me, and tell me if I'm
3 wrong, and we can go through it all again. That the one
4 statement you remember is Nancy saying something about,
5 they had five days to find it?
6 A. Yes.
7 Q. Okay. And I believe you told me, correct me
8 if I'm wrong, you don't remember any other statement
9 that anybody made while Nancy and Michael were there?
10 A. Not outside the door. There were two
11 statements that I remember that Nancy made.
12 Q. Okay. Go ahead and tell me what they were.
13 A. One is, "I see they still have my furniture."
14 "And how much longer am I going to have to take care of
15 this man's problems." That's all I remember.
16 Q. And she said those things to you, or just --
17 A. As I was escorting them through the house.
18 Q. I see.
19 A. So no conversation on my part. I didn't feel
20 it was appropriate for me to say anything.
21 Q. And you don't recall hearing anyone there say
22 to her, "Nancy, there is no way you could have known
23 about this"?
24 A. No, I didn't hear anything to that effect.
25 Q. Were you with her the entire time that she was

1 inspecting the home?
2 A. I can't say that I stood there the whole time.
3 I may have stepped away for a minute. So they could
4 look at it, themselves.
5 Q. Or more than a minute?
6 A. Yeah.
7 Q. Okay. April 18, is a reference to "Jan"?
8 A. Yes.
9 Q. Who is that?
10 A. Jan, I believe, worked for Nancy.
11 Q. And so does that "talk to Jan," have anything
12 to do with the entry right before it, "panel for stereo
13 cab"?
14 A. No.
15 Q. So on April 18 of 2014, you talked to Jan
16 Loff?
17 A. Yes.
18 Q. Telephone, in person?
19 A. In person.
20 Q. How is it that that conversation occurred?
21 A. Ed asked me to go and talk to Jan to see if
22 she had any recollection of the doors.
23 Q. Where did you encounter Jan?
24 A. Gravity.
25 Q. Was anybody with you?

1 A. No.
2 Q. Do you recall the conversation?
3 A. I do.
4 Q. What do you recall being said by yourself and
5 by Jan?
6 A. I just asked her, if she remembered anything,
7 any problems with that french door set. And she said
8 that it was a little sticky in the wintertime.
9 Q. Remember anything else?
10 A. That was it.
11 Q. Did she tell you that they were unable to open
12 it?
13 A. She didn't say that.
14 Q. She just said it was a little sticky in the
15 wintertime?
16 A. Sticky in the wintertime.
17 Q. That's the sum total of what you remember her
18 telling you?
19 A. Yes.
20 Q. And then you've noted, I think, on the 21st,
21 apparently, one of the days that Chris Kirk was there;
22 correct?
23 A. Yes.
24 Q. And then the next invoice, June 8th, 2014,
25 Petrus 485. Do you have that one in front of you?

1 A. I do.
2 Q. June 2 references a meeting with city
3 inspector code search?
4 A. Yes, that's when I would have asked him about
5 the paper.
6 Q. That's John Powell?
7 A. Yes.
8 Q. I don't see it referenced anywhere else. Did
9 you just have one meeting with him?
10 A. I believe I only talked to him once.
11 Q. And you've told me everything you can remember
12 about what John told you?
13 A. Yes.
14 MS. FOSTER: Steve, are you done with that
15 exhibit?
16 MR. MILLEMANN: Yes.
17 MS. FOSTER: Can we take a five minute break?
18 MR. MILLEMANN: I'm just about finished. Do
19 you want to take a break anyway?
20 MS. FOSTER: I just have to go to the
21 bathroom. And I've destroyed the exhibit, so I'm trying
22 to fix it.
23 MR. MILLEMANN: I have another one we can mark
24 if we need to.
25 MS. FOSTER: Okay.

1 MR. MILLEMANN: Why don't we take a quick
2 break.

3 (A recess was had.)
4 (Exhibit 63 marked.)

5 Q. (BY MR. MILLEMANN) I've put back in front of
6 you a document we talked about quite a bit earlier, but
7 I've gone ahead and marked it, Exhibit 63. And that is
8 the "Amended Notice of Deposition Duces Tecum of Taking
9 Deposition of Mike Longmire," which I believe you
10 testified, you hadn't seen before?

11 A. Right.

12 Q. And what I would ask is, if you can -- this is
13 your copy of that document. This one has to stay with
14 us. Can you go through that document, after we depart
15 today, including making sure you understand the
16 definition of document, which includes electronic
17 transmissions.

18 A. Uh-huh.

19 Q. Search to see if you have any papers or
20 electronic files that would be responsive to those, and
21 let me know?

22 A. Sure.

23 Q. Okay. And if you do, I guess, first, let me
24 know. And then if you did, we can figure out how to get
25 them to me.

1 usually --

2 Q. And this request asks for all written
3 communications between you and Mr. Petrus. So I guess
4 what I would ask, and you can tell me if you are willing
5 to do this, otherwise, I'll have to serve you with a
6 subpoena, and bring you back here. Is will you go and
7 look, and search, and make sure, after reviewing this
8 that --

9 A. Sure.

10 Q. -- you don't have any documents, whatsoever,
11 that haven't been --

12 A. Sure.

13 MS. FOSTER: Let him ask the question.

14 Q. (BY MR. MILLEMANN) -- that haven't been
15 provided to Ms. Foster?

16 MS. FOSTER: I don't agree that he can't do
17 this. I am objecting that this is harassing. Because
18 he's told you, he's given me everything he has, and I
19 have given it to you. But to the extent you would like
20 him to go back and check again, I would have no
21 objection.

22 But I just want to note for the record, we
23 have not withheld anything or not before -- to put it in
24 plain English. We had already gotten everything from
25 him before the subpoena came, and gave it to you. If

1 A. Well, anything that I've had to do with all
2 these proceedings, I've given to Ed's attorney. So
3 there is no -- I mean, I've given him all the copies of,
4 you know, all the reports, everything that we've ever
5 done, Ed has a copy.

6 Q. You've given them to Ed or Ms. Foster?

7 A. Ms. Foster has all the stuff through the
8 last --

9 MS. FOSTER: He means, when did you give them
10 to me?

11 Q. (BY MR. MILLEMANN) Well, generally.

12 A. It's been a process of a year or -- well,
13 through this whole process when -- to Jason. I've
14 turned everything over to them. I mean, and they have
15 copies of everything.

16 Q. (BY MR. MILLEMANN) So your testimony is that
17 there are no documents, no emails, nothing, whatsoever,
18 that you have in your possession that would relate in
19 any way to this house, and the problems raised in this
20 lawsuit, that you haven't given to the attorney?

21 A. Yes, that's true.

22 Q. Including any emails between you and
23 Mr. Petrus?

24 A. Most of the emails are not of the nature,
25 anything to do with the house. Emails to Ed are

1 you want him to check again, we can do it. But I just
2 want to make that, for the record, clear.

3 MR. MILLEMANN: And I want to make clear for
4 the record, is I was told I did not need to serve
5 Mr. Longmire with a subpoena. That he would be provided
6 it, and he would come prepared. All right.

7 Q. (BY MR. MILLEMANN) So what I'm hearing him
8 saying, and correct me if I'm wrong, is you may have
9 communications between you and Mr. Petrus that you have
10 not provided to Ms. Foster; is that true?

11 A. Communications concerning -- any
12 communications?

13 Q. Any communications.

14 A. Then I would be happy to look through my
15 emails.

16 Q. I would appreciate it. And if you
17 could -- because that's what this request is, any
18 communications that do not include the attorney. Okay?
19 For example, Mike, if you have an email to Mr. Petrus,
20 and it's also copied to Ms. Foster or Mr. Mau, that one
21 is off limits. I don't get it, because there is an
22 attorney/client privilege there. Okay? But any other
23 communications between you and Mr. pet-trus or
24 peat-trus -- how is it pronounced?

25 A. Peat-trus.

1 Q. Peat-trus. Thank you. I would like you to
 2 search and let me know.
 3 A. I would be happy to do that.
 4 MR. MILLEMANN: Do you want the witness to
 5 directly; no, or through you?
 6 MS. FOSTER: Through me, please.
 7 Q. (BY MR. MILLEMANN) So how long do you think
 8 it would take you to do that?
 9 A. I will look this afternoon, and see what I
 10 have.
 11 Q. And I don't mean you have to do it today. But
 12 would it be fair to say, within a week, you could do
 13 that?
 14 A. Oh, sure.
 15 MR. MILLEMANN: And so, Counsel, I will hear
 16 from you one way or the other within a week?
 17 MS. FOSTER: Absolutely.
 18 MR. MILLEMANN: Okay. I don't have any
 19 further questions for the witness at this point.
 20 MR. NEVALA: I just have a couple.
 21 EXAMINATION
 22 QUESTIONS BY MR. NEVALA:
 23 Q. Mr. Longmire, have you seen a copy of the
 24 plans for the house?
 25 A. Yes.

1 A. Yes.
 2 Q. Do you remember who took the photographs?
 3 A. Tony.
 4 Q. Do you know Tony's last name?
 5 A. I do not.
 6 Q. Did you visit with them, either Tony, or any
 7 of the other employees, while they were doing their
 8 demo, and taking their photographs?
 9 A. Visit?
 10 Q. Did you have any conversations with them?
 11 A. Yes.
 12 Q. Do you remember those conversations?
 13 A. Not specifically, no.
 14 Q. The same question for the construction phase,
 15 when they were rebuilding. Were you there every day?
 16 A. Not every day.
 17 Q. Okay. But you were there?
 18 A. A majority of the time. I mean, let me be
 19 more specific. I would check on them at least once a
 20 day.
 21 Q. And when you checked in on them, or check with
 22 them, who did you typically talk to? Was it Eric?
 23 A. Eric.
 24 Q. Have you and Mr. Petrus talked about Chris
 25 Kirk and the construction of the home?

1 Q. Did you share those plans, or go over those
 2 plans with the contractors that were preparing bids to
 3 make the repair?
 4 A. I know that Beau looked at the plans. I don't
 5 know that Chuck looked at the plans. I think only Beau,
 6 as I remember.
 7 Q. Do you remember where you got the plans?
 8 A. They were in the house.
 9 Q. Was anything else in the house in terms of
 10 paperwork?
 11 A. Just the plans that I know of.
 12 Q. Did you ever see a copy of a certificate of
 13 final inspection?
 14 A. No.
 15 Q. Did you ever see a copy of truss measurements
 16 that were left in the house?
 17 A. Truss measurements?
 18 Q. Yes.
 19 A. No.
 20 Q. Were you on-site when Beau and his company was
 21 doing their demolition?
 22 A. Yes.
 23 Q. Were you there every day?
 24 A. When they were tearing out, yes.
 25 Q. Did you witness them taking photographs?

1 A. I'm not sure I'm at -- what you are asking me.
 2 Q. I'll start over. Have you had conversations
 3 with Mr. Petrus about Chris Kirk.
 4 A. I would say, yes, to that.
 5 Q. Have you had conversations with Mr. Petrus
 6 about the construction of the home?
 7 A. Are you asking me, have I discussed with him
 8 my opinion of the home?
 9 Q. Have you and Mr. Petrus talked about the
 10 construction of the home?
 11 A. Sure.
 12 Q. Did he ask you your opinion on the
 13 construction of the home?
 14 A. Yes.
 15 Q. And what was it?
 16 A. Concerning?
 17 Q. In general.
 18 A. In general, I would tell him that the house
 19 was well built.
 20 Q. And what would he say back?
 21 A. I don't know that I can answer that question.
 22 Q. Would he agree with you, or disagree with you?
 23 A. Generally ask me for advice, whether he
 24 agrees. Sometimes he agrees, sometimes he doesn't.
 25 Q. Prior to this lawsuit, did you have any

1 knowledge of Chris Kirk's reputation as a builder?
 2 A. Sure.
 3 Q. And what was it?
 4 A. Good.
 5 Q. Have you ever been a caretaker -- I guess you
 6 have not. Strike that. Let me just start again.
 7 MR. NEVALA: I don't have anything further.
 8 Thank you.
 9 MS. FOSTER: Let me see if I have anything.
 10 EXAMINATION
 11 QUESTIONS BY MS. FOSTER:
 12 Q. I do have. I have a couple questions for you,
 13 Mike. Since you were hired by Mr. Petrus to become a
 14 caretaker, between that time, and when Beau Value's
 15 folks started doing their work, to your knowledge, did
 16 anyone make any alterations to the door, the french
 17 doors at issue?
 18 A. None.
 19 Q. Did you make any?
 20 A. Never.
 21 Q. Did you ever make any changes to the threshold
 22 of the door?
 23 A. Never.
 24 Q. Ever put any screws in the threshold?
 25 A. Never.

1 you screw in, and you can see it from the outside of the
 2 door?
 3 A. And you actually have to flip them?
 4 Q. Right.
 5 A. These are actuated by the handle.
 6 Q. Actuated by the handle?
 7 A. Yes.
 8 Q. So you testified, you couldn't open the
 9 eastern panel of the door?
 10 A. Yes.
 11 Q. And you don't know whether these bolts had
 12 been activated?
 13 A. Right, I do not. They weren't functioning.
 14 And no matter what Mark tried to do, he couldn't get it
 15 to work, so...
 16 Q. Mark Birrer.
 17 A. Yes, the representative.
 18 Q. Would the handle move?
 19 A. So it wasn't simply that someone didn't -- or
 20 couldn't figure out how to unlock or lock the doors.
 21 The mechanical part of it wasn't functioning.
 22 Q. So would the handle move at all?
 23 A. I don't remember exactly. But you couldn't
 24 actuate the head and toe bolts with the handle, like you
 25 are supposed to.

1 Q. And you said before, you don't know what a
 2 drain channel is on the door?
 3 A. Water diversion channel.
 4 Q. Thank you. Water diversion channel. And we
 5 don't know what that is?
 6 A. I do not.
 7 Q. And you never made any changes to the top of
 8 the door?
 9 A. No. No.
 10 Q. And do you know whether Ed had anyone make
 11 changes?
 12 A. No, they were there -- no, no one did anything
 13 to the house.
 14 Q. I wanted to follow up on some questions that
 15 Mr. Millemann had about the astragal locks, I guess, the
 16 head and toe --
 17 A. Bolts.
 18 Q. -- bolts.
 19 Those are locking mechanisms that are inside
 20 the door, is that right?
 21 A. Inside, yes.
 22 Q. So it's not the type that I might have with
 23 the --
 24 A. The old-fashioned ones.
 25 Q. Right. So by old-fashioned ones, the old ones

1 Q. And do you recall when Beau Value's folks came
 2 out to work around the french doors, at that time, was
 3 the eastern panel able to be opened?
 4 A. To my recollection, no. The only time when
 5 the doors both opened is when we took the units out.
 6 Q. Okay. Thank you.
 7 And my last question is, between the doors
 8 that the house came with when Ed bought it, the french
 9 doors, and the doors that have been installed now.
 10 A. Uh-huh.
 11 Q. Have there been any other doors installed in
 12 that area?
 13 A. No.
 14 Q. Just the two sets?
 15 A. That's it.
 16 MS. FOSTER: All right. No further questions.
 17 FURTHER EXAMINATION
 18 QUESTIONS BY MR. MILLEMAN:
 19 Q. Mike, when you talked to John Powell, did you
 20 ask him to do any searching of city files to determine
 21 what inspections were done on the home?
 22 A. No.
 23 Q. Did you ask him to do any searching of city
 24 files to determine if the certificate of occupancy was
 25 issued?

1 A. No.
 2 Q. Have you talked to any other building
 3 inspector about either of those issues?
 4 A. No.
 5 Q. Do you have any personal knowledge on either
 6 of those issues?
 7 A. No, I do not.
 8 Q. And I'm talking about inspections during the
 9 construction of the home?
 10 A. Inspections? At that time, the inspector was
 11 somewhat lenient, so I'm not sure. And in McCall,
 12 you've got a rough inspection, and then that was it.
 13 Q. My question is, do you have any personal
 14 knowledge of what building inspections were actually
 15 done on that house?
 16 A. No.
 17 Q. While it was being constructed?
 18 A. No.
 19 Q. Or whether a certificate of occupancy was
 20 issued?
 21 A. No.
 22 Q. At that time, in 2004 and 2005, were you
 23 building in McCall?
 24 A. Installing fireplaces mostly.
 25 Q. So you were around building projects?

1 Q. So in no time in your conversations with
 2 Mr. Petrus, or in your email exchanges with him, was the
 3 topic of who should be sued in this lawsuit referenced?
 4 A. No.
 5 Q. Nor did you offer any opinion or advice on
 6 that?
 7 A. No, my opinion would be strictly on the
 8 building part of it, or, you know, where the problem
 9 came from, or whatever.
 10 MR. MILLEMANN: I have nothing further.
 11 MR. NEVALA: Nothing further.
 12 MS. FOSTER: Nothing.
 13 MR. MILLEMANN: Thank you, Mike.
 14 (Deposition concluded at 1:42 p.m.)
 15 (Signature requested.)
 16
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 25

1 A. Yes.
 2 Q. Do you know at that time in McCall, and if you
 3 don't that's fine, whether the City of McCall had a
 4 practice of issuing certificates of occupancy for
 5 residential projects?
 6 A. Usually, yes.
 7 Q. You had occasion to see them?
 8 A. See one, personally?
 9 Q. Uh-huh.
 10 A. No. No, I never had a project where I had to
 11 get one.
 12 Q. Because you were just working on the stove?
 13 A. Yes.
 14 Q. You mentioned Mr. Petrus will ask for advice,
 15 and you'll give advice. And sometimes he'll take it,
 16 and sometimes he won't; right?
 17 A. Right.
 18 Q. Did he ask you for any advice on who he should
 19 sue in this lawsuit?
 20 A. No.
 21 Q. Did you have any conversations with him,
 22 outside of the presence of his attorney, on which that
 23 topic was discussed at all?
 24 A. No, I wasn't privy to any of those
 25 conversations.

1 CERTIFICATE OF WITNESS
 2 I, MICHAEL LONGMIRE, being first duly sworn,
 3 depose and say:
 4 That I am the witness named in the foregoing
 5 deposition, Volume I, consisting of pages 1 through 96;
 6 that I have read said deposition and know the contents
 7 thereof; that the questions contained therein were
 8 propounded to me; and that the answers contained therein
 9 are true and correct, except for any changes that I may
 10 have listed on the Change Sheet attached hereto:
 11 DATED this ____ day of _____, _____.
 12
 13 _____
 14 MICHAEL LONGMIRE
 15
 16 SUBSCRIBED AND SWORN to before me this ____ day
 17 of _____, 20___.
 18
 19 _____
 20 NAME OF NOTARY PUBLIC
 21
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

1 ERRATA SHEET FOR MICHAEL LONGMIRE

2 Page ___ Line ___ Reason for Change _____
 Reads _____
 3 Should read _____

4

5 Page ___ Line ___ Reason for Change _____
 Reads _____
 6 Should read _____

7

8 Page ___ Line ___ Reason for Change _____
 Reads _____
 9 Should read _____

10

11 Page ___ Line ___ Reason for Change _____
 Reads _____
 12 Should read _____

13

14 Page ___ Line ___ Reason for Change _____
 Reads _____
 15 Should read _____

16

17 Page ___ Line ___ Reason for Change _____
 Reads _____
 18 Should read _____

19

20 Page ___ Line ___ Reason for Change _____
 Reads _____
 21 Should read _____

22

23 Page ___ Line ___ Reason for Change _____
 Reads _____
 24 Should read _____

25 You may use another sheet if you need more room.

26 WITNESS SIGNATURE _____

1 REPORTER'S CERTIFICATE

2 I, COLLEEN P. ZEIMANTZ, CSR No. 345, Certified

3 Shorthand Reporter, certify:

4 That the foregoing proceedings were taken

5 before me at the time and place therein set forth, at

6 which time the witness was put under oath by me;

7 That the testimony and all objections made were

8 recorded stenographically by me and transcribed by me or

9 under my direction;

10 That the foregoing is a true and correct record

11 of all testimony given, to the best of my ability;

12 I further certify that I am not a relative or

13 employee of any attorney or party, nor am I financially

14 interested in the action.

15 IN WITNESS WHEREOF, I set my hand and seal this

16 29th day of March, 2016.

17

18

19

20

21 COLLEEN P. ZEIMANTZ, CSR 345

22 Notary Public

23 P.O. Box 2636

24 Boise, Idaho 83701-2636

25 My commission expires September 7, 2017.



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Angela Jenkins

From: Ed Petrus <eapetrus@me.com>
Sent: Thursday, April 04, 2013 2:14 PM
To: Kevin Batchelor
Subject: Re: Door instillation/water intrusion

Kevin I spoke to Mike Longmeyer about Chris Kirk's argument that cost repair inflated - he says good luck -- everything at rock bottom prices and door quote is what every contractor would get. Call him if you want.
Thanks Ed

Sent from my iPhone

On Apr 4, 2013, at 12:34 PM, Kevin Batchelor <kevinb@remax.net> wrote:

Ed, please see the notes below.

Kevin

From: Michael Wood [<mailto:michael.mccallrealtor@gmail.com>]
Sent: Thursday, April 04, 2013 11:52 AM
To: Kevin Batchelor
Subject: Re: Door instillation/water intrusion

Kevin, Nancy contacted me and assured me she will respond to Mr. Petrus by the end of next week. Thanks!

On Apr 3, 2013, at 1:16 PM, Kevin Batchelor wrote:

Michael:

Ed, wanted me to pass this email onto you from August 13, 2012. Ed wants a decision made ASAP as this has been going on too long. Hopefully Nancy will get back to you ASAP before legal action is incurred, which will cost a lot more money.

Kevin

From: Michael Wood <michael.mccallrealtor@gmail.com>
Date: Monday, August 13, 2012 1:57 PM
To: Microsoft Office User <eapetrus@me.com>
Subject: Re: Door instillation/water intrusion

Former owner is working with the Builder Chris Kirk to facilitate this. I have given Chris the info he requested. Am waiting for marching orders.

On Aug 13, 2012, at 2:46 PM, Ed Petrus wrote:

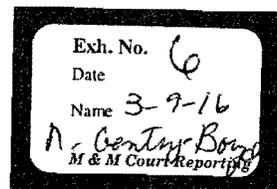


EXHIBIT 9

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EXHIBIT 5

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Copy 2

PH:(208) 734-9877 FAX:(208) 736-8877

Contractor License: RCE-7092 NV#0057586
Federal Tax ID: 82-0310706

P/O#: B-1221
Taken By: Mark
Installer:

Cust State Tax ID:
Cust Fed Tax ID:
Ship Via:

Workorder: T30783

Date: 9/16/2013

Time: 04:06 PM

SalesRep: MARK

Adv. Code:

Bill To: CSC01

Sold To: CSC01

C & S CONSTRUCTION
480 S SAMSON TRAIL
MCCALL, ID 83638

PETRUS
2130 PAYETTE
MCCALL, ID 83638

(208) 634-9241

Qty	Part Number	Description	List	Sell	Total
1	GENPART	WEATHER SHIELD ALUM CLAD 6'0 X 9'0 OUTSWING FRENCH DOOR (WS #550906192)	\$4,976.52	\$4,976.52	\$4,976.52

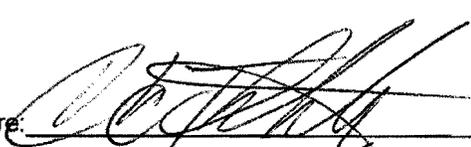
Thank you for your business!

Instructions:

COORDINATE DELIVERY WITH CHUCK FROM C&S CELL 634-9241

Sub Total: \$4,976.52

Tax: \$298.59

Customer's Signature: 

Net 10th

Total: \$5,275.11

NU-VU00004

EXHIBIT 6

F A X T R A N S M I T T A L



MCCALL DESIGN & PLANNING INC
P O BOX 729, MCCALL, ID. 83638
208 634-5707 FAX 208 634-4452

TO: Chris Kirk

DATE: 8-3-04

FAX #: 634-4425

NUMBER OF PAGES (including transmittal) **3**
If all pages are not received, please contact this office at 208/634-5707.

PROJECT: Boyd Residence

WE ARE SENDING YOU: Framing revisions

COMMENTS:

Please see attached:

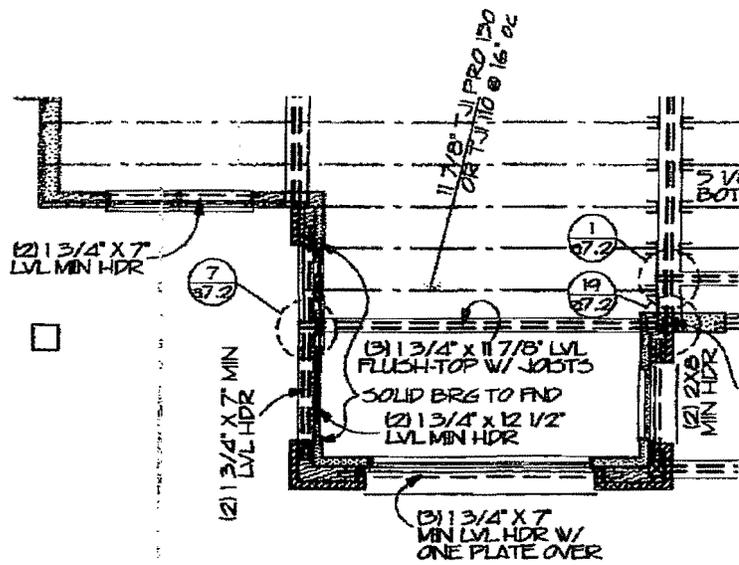
Revised headers in area of Dining atrium door.

Revised detail 7/a7.2 for beam connection over atrium door.

Thank you.

BY: Claire Remsberg

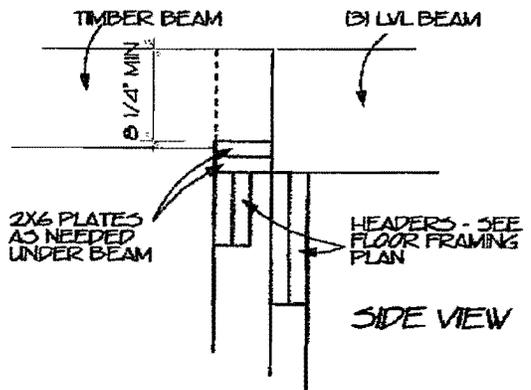
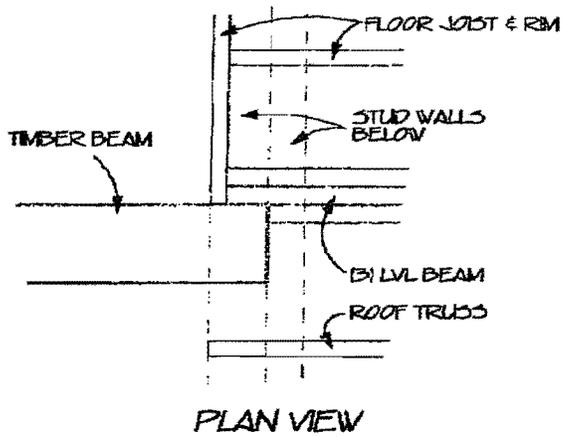
Exh. No.	29
Date	
Name	3/10/16 Chris Kirk
M & M Court Reporting	



UPPER FLOOR FRAMING

1/4" = 1'-0"

KIRK00731



BEAM DETAIL

T-1-0

4:08:41:2004 1:13AM 2086944482

No. 1742 p. 3

KIRK00732

F A X T R A N S M I T T A L



MCCALL DESIGN & PLANNING INC
P O BOX 729, MCCALL, ID. 83638
208 634-5707 FAX 208 634-4452

TO: Chris Kirk

DATE: 9-10-04

FAX #: 634-4425

NUMBER OF PAGES (including transmittal)

If all pages are not received, please contact this office at 208/634-5707.

PROJECT: Boyd Residence

WE ARE SENDING YOU: Window changes

COMMENTS:

Please accept my deepest apologies for 13th hour changes.

But . . . please note the following changes to windows:

South & east kitchen windows are to be 58 high (R.O. 5'-2 7/8" high)

We will need to find a solution to lever/stragal clearance issue at livingroom French door, but please continue with order as is.

Thank you.

BY: Claire Remsberg

CC: Mark Blirrer, WestPac

F A X T R A N S M I T T A L



MCCALL DESIGN & PLANNING INC
P O BOX 729, MCCALL, ID. 83638
208 634-5707 FAX 208 634-4452

TO: Chris Kirk

DATE: 9-13-04

FAX #: 634-4425

NUMBER OF PAGES (including transmittal) 2
If all pages are not received, please contact this office at 208/634-5707.

PROJECT: Boyd Residence

WE ARE SENDING YOU: Door change

COMMENTS:

Please change the south exterior door at Dining Nook (#40) to an out-swing, clad French door 6-0 9-0, with the west leaf (near kitchen) active and hinged at the jamb.

Please see attached floor plan.

Thank you.

BY: Claire Remsberg

CC: Mark Birner or Marilyn, WestPac

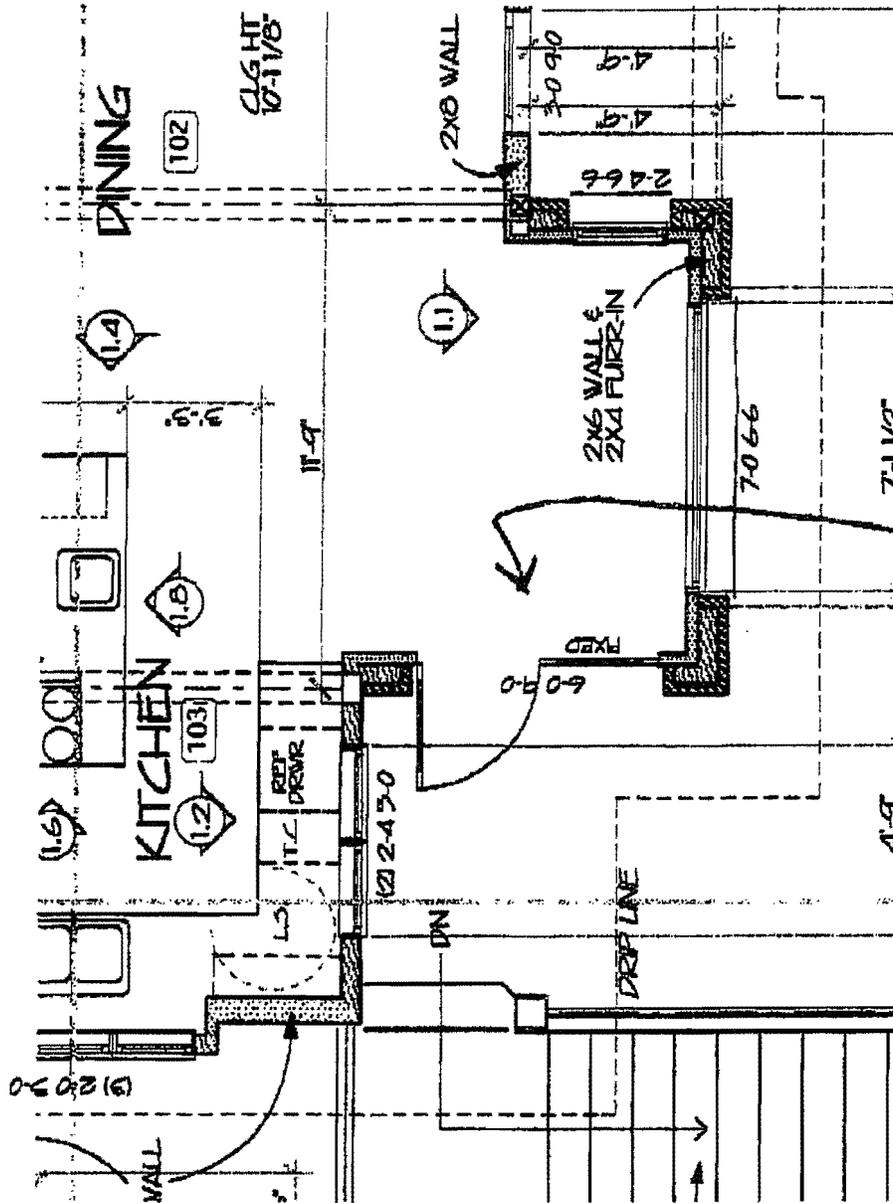


EXHIBIT 7

JULY 2009 EDITION

RE-11 ADDENDUM # 1 (1,2,3, etc.)

Page 1 of 1



THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



1 Date: 2-8-2010

2 This is an ADDENDUM to the Purchase and Sale Agreement Other Exclusive Seller Representation Agreement
3 ("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being
4 used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).
5

6
7 AGREEMENT DATED: 5-10-2009 ID# RE16

8 ADDRESS: 2130 Payette Drive

9 BUYER(S): N/A

10 SELLER(S): Nancy Gentry Boyd

11 The undersigned parties hereby agree as follows:

12 The term of this agreement is extended to 9-15-2010.
13 Total purchase price to be \$1,950,000.00.

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Exh. No. 51
Date
Name 6-1-16
M & M Court Reporting

48 To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior
49 Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior
50 Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement
51 is made an integral part of the aforementioned Agreement.

52 BUYER: _____ Date: _____

53 BUYER: _____ Date: _____

54 SELLER: Nancy Gentry Boyd Date: 2/10/2010

55 SELLER: _____ Date: _____

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JULY 2009 EDITION

RE-11 ADDENDUM # 2 (1,2,3, etc)

Page 1 of 1



THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



1 Date: 5-7-2010

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3 This is an ADDENDUM to the Purchase and Sale Agreement Offer Exclusive Seller Representation Agreement

4 ("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being

5 used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

6

7 AGREEMENT DATED: 5-10-2009 ID # RE16

8

9 ADDRESS: 2130 Payette Drive

10

11 BUYER(S): N/A

12

13 SELLER(S): Nancy Gentry Boyd

14

15 The undersigned parties hereby agree as follows:

16 Seller authorizes Bill McMurray, Broker of Community Real Estate Company to release this listing and transfer it on the MLS

17 to McCall Real Estate Company. Upon transfer this agreement is terminated.

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48 To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior

49 Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior

50 Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement

51 is made an integral part of the aforementioned Agreement.

52

53

54 BUYER: _____ Date: _____

55

56 BUYER: _____ Date: _____

57

58 SELLER: Nancy Gentry Boyd Date: May 19, 2010

59

60 SELLER: _____ Date: _____

61

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JULY 2009 EDITION RE-11 ADDENDUM Page 1 of 1

Printed Using Professional Computer Forms CD On-Line Forms Software 7/03

EXHIBIT 8

RE-16 SELLER REPRESENTATION AGREEMENT
(EXCLUSIVE RIGHT TO REPRESENT)

JULY 2010 EDITION
Page 1 of 4

Idaho Association of REALTORS® THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
The One for Real Estate™ to Make IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

1 DATE: 2-2-2011 AGENT: Jean Odmark
 2 Acting as Agent for the Broker

3 1. SELLER Nancy Gentry Boyd
 4 retains Michael Anderson Broker of McCall Real Estate Company as
 5 SELLER'S exclusive Broker to sell, lease, or exchange the property described in Section 2 below, during the term of this agreement and on
 6 any additional terms hereafter set forth.

7 2. PROPERTY ADDRESS AND/OR LEGAL DESCRIPTION. The property address and/or the complete legal description of the property
 8 are as set forth below.
 9 Address 2130 Payette Drive
 10 County Valley City McCall Zip 83638
 11 Legal and/or Property Description Amended Payette Lakes Cottage Sites, Lot 36, Valley County, Idaho. State Lease #R-5057-B
 12 or Legal and/or Property Description Attached as addendum # n/a. (Addendum must accompany this agreement)

13 3. TERM OF AGREEMENT. The term of this Agreement shall commence on 2-2-2011 and shall expire at 11:59
 14 p.m. on 9-1-2011 unless renewed or extended. If the SELLER accepts an offer to purchase or exchange,
 15 the terms of this Agreement shall be extended through the closing of the transaction.

16 4. PRICE: SELLER agrees to sell the property for a total price of \$ 1,800,000.00.

17 5. FINANCING. SELLER agrees to consider the following types of financing: (Complete all applicable provisions).
 18 FHA VA CONVENTIONAL IHFA RURAL DEVELOPMENT Exchange
 19 Cash Cash to existing loan(s) Assumption of existing loan(s)
 20 SELLER will carry contract and accept a minimum down payment of \$ n/a and an acceptable
 21 secured note for the balance to be paid as follows: n/a

22 Other acceptable terms n/a

23 6. BROKERAGE FEE.
 24 (A) If Broker or any person, including SELLER, procures a purchaser ready, willing and able to purchase, transfer or exchange the
 25 property on the terms stated herein or on any other price and terms agreed to in writing, the SELLER agrees to pay a total brokerage fee
 26 of 4 % of the contract or purchase price OR \$ n/a of which 2 % of the contract or purchase price OR
 27 \$ n/a will be shared with the cooperating brokerage unless otherwise agreed to in writing. The fee shall be paid in cash at
 28 closing and deducted from the seller's proceeds on the settlement statement unless otherwise designated by the Broker in writing.
 29 (B) Further, the brokerage fee is payable if the property or any portion thereof or any interest therein is, directly or indirectly, sold,
 30 exchanged or optioned or agreed to be sold, exchanged or optioned within 30 calendar days (ninety [90] if left blank) following
 31 expiration of the term hereof to any person who has examined, been introduced to or been shown the property during the term hereof.
 32 (C) If SELLER, upon termination of this Agreement, enters into a Right to Sell Agreement to market said property with another Broker,
 33 then the time period specified above in Section 6B, shall not apply and will be of no further force or effect.
 34 (D) In the event SELLER terminates this representation agreement prior to its expiration SELLER shall be liable to Broker for a
 35 cancellation fee equal to 0 % of the PRICE enumerated in Section 4 above or \$ 0.00. This cancellation fee is
 36 only available if Broker is not compensated under Sections 6A or 6B above.

37 7. ADDITIONAL FEES: n/a

38 8. INCLUDED ITEMS. SELLER agrees to leave with the premises all seller-owned attached floor coverings, attached television antennae,
 39 satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window
 40 coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached
 41 fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation
 42 fixtures and equipment, all water systems, wells, springs, water, water rights, ditches and ditch rights, if any, that are appurtenant thereto
 43 that are now on or used in connection with the premises and shall be included in the sale unless otherwise provided herein.
 44 Also included: dishwasher, disposal, washer, dryer, freezer, microwave, refrigerator, trash compactor, window treatments

SELLER'S (initials) (TAB) () Date: 2/7/2011

Exh. No. 52
 Date 6-1-16
 Name Michael Wood

PROPERTY ADDRESS: 2130 Payette Drive McCall

9. EXCLUDED ITEMS. Seller's personal property, furniture and furnishings

10. TITLE AND EXISTING ENCUMBRANCES. Title to the property is to be conveyed by Warranty Deed unless otherwise provided herein, and is to be marketable and insurable except for rights reserved in federal patents, federal, state or railroad deeds, building or use restrictions, building and/or zoning regulations and ordinances of any governmental entity, and rights of way and easements established or of record. The individual executing this Agreement warrant and represents that said individual either owns the property or has full power and right to enter into this Agreement and to sell and convey the property on behalf of the SELLER and that to the best of said individual's knowledge the property is in compliance with all applicable building and zoning regulations and with any applicable covenants and restrictions affecting the property except: n/a

The SELLER agrees to provide good and marketable title to the property at the time of closing. The property is currently encumbered by the following liens: [X] 1st Mortgage [X] 2nd Mortgage [] Home Equity Loan [] Other n/a [] The property is not encumbered by any mortgage, lien, or other security instrument.

Loan payments [X] are [] are not current; loan [] is [X] is not assumable. If loan is assumable, Buyer [] will [] will not be required to qualify and [] will [] will not release SELLER'S liability.

SELLER is aware that some loans have a recapture provision or prepayment penalty and SELLER may be required to pay additional funds to satisfy such recapture or penalty.

The property [] is [X] is not currently under foreclosure proceedings. If property is currently or becomes involved in foreclosure proceedings, Idaho law requires certain additional disclosures to be provided in a separate form and affixed to the Purchase and Sale Agreement. Foreclosure means that a trustee or beneficiary has filed a notice of default in the county where the property identified in Section 2 is situated and in addition to any statements required by Idaho law, the notice also states that trustee or beneficiary has elected to sell the property to satisfy an obligation.

11. MULTIPLE LISTING SERVICE AUTHORIZATION. (Name of MLS) Mountain Central/Intermountain. By initialing this line, it is understood that Broker is a member of the above MLS. SELLER authorizes and directs Broker to offer to cooperate with and compensate other Brokers, and to submit a Property Data Sheet and any authorized changes to MLS as required in the Rules and Regulations of the above MLS. SELLER understands and agrees that any MLS information regarding the above property will be made available to Buyer's Agents and/or Dual Agents. SELLER acknowledges that pursuant to Idaho Code §54-2083(6)(d), a "sold" price of real property is not confidential client information.

12. LOCKBOX AUTHORIZATION. By initialing this line, SELLER directs that a lockbox containing a key which gives MLS Keyholders access to the property shall be placed on any building located on the property. SELLER authorizes MLS Keyholders to enter said property to inspect or show the same. SELLER agrees to hold Broker harmless from any liability or loss.

13. INTERNET AUTHORIZATION. SELLER [X] does [] does not agree to allow listing to be displayed on Internet. SELLER [X] does [] does not agree to allow address to be displayed on Internet. SELLER [] does [X] does not agree to allow for Automated Valuation Model (AVM). SELLER [] does [X] does not agree to allow blogging and/or consumer comments.

14. ADVERTISING AUTHORIZATION. SELLER [X] does [] does not agree to allow Broker to advertise said property in print media. SELLER [X] does [] does not agree to allow Broker to advertise said property in other advertising media. SELLER [X] does [] does not agree to allow Broker to place the Broker's sign on above property.

15. SELLER'S PROPERTY DISCLOSURE FORM. If required by Title 55, Chapter 25 Idaho Code, SELLER shall within ten (10) calendar days after execution of a Purchase and Sale Agreement provide to Buyer "Seller's Property Disclosure Form" and Buyer shall have three (3) business days from receipt of the disclosure report to rescind the offer in a written signed and dated document delivered to the SELLER or the SELLER'S Agents. Buyer rescission must be based on a specific written objection to a disclosure made in the Seller's Property Disclosure Form.

SELLER'S Initials (MAB) Date: 2/7/2011

PROPERTY ADDRESS: 2130 Payette Drive McCall

16. LEAD BASED PAINT DISCLOSURE. SELLER has been advised of disclosure obligations regarding lead-based paint and lead-based paint hazards in the event property is a defined "Target Housing" under Federal Regulations. The term lead-based paint hazard is intended to identify lead-based paint and all residential lead-containing dusts and soils regardless of the source of lead. Said property [] is [X] is not "Target Housing". If yes, SELLER agrees to sign and complete the Information Disclosure and Acknowledgment Form provided and deliver to my agent all records, test reports or other information related to the presence of lead-based paint or lead-based paint hazards, if any. Additionally, if any structure was built before 1978 and is a residential home, apartment or child-occupied facility such as a school or day-care center, federal law requires contractors that disturb lead-based paint in that structure to provide the owner with a "Renovate Right" pamphlet. The contractor shall be certified and follow specific work practices to prevent lead contamination

17. TRANSACTION RELATED SERVICES DISCLAIMER: SELLER understands that Broker is qualified to advise SELLER on general matters concerning real estate, but is not an expert in matters of law, tax, financing, surveying, structural conditions, property inspections, hazardous materials, or engineering. SELLER acknowledges that Broker advises SELLER to seek expert assistance for advice on such matters. The Broker or Broker's agents may, during the course of the transaction, identify individuals or entities who perform services including BUT NOT LIMITED TO the following: home inspections, service contracts, appraisals, environmental assessment inspection, code compliance inspection, title insurance, closing and escrow services, loans and refinancing services, construction and repair, legal and accounting services, and/or surveys. SELLER understands that the identification of service providers is solely for SELLER'S convenience and that the Broker and their agents are not guaranteeing or assuring that the service provider will perform its duties in accordance with SELLER'S expectations. SELLER has the right to make arrangements with any entity SELLER chooses to provide these services. SELLER hereby releases and holds harmless the Broker and Broker's agents from any claims by SELLER that service providers breached their agreement, were negligent, misrepresented information, or otherwise failed to perform in accordance with SELLER'S expectations. In the event SELLER requests Broker to obtain any products or services from outside sources, SELLER agrees to pay for them immediately when payment is due. For example: surveys or engineering, environmental and/or soil tests, title reports, home or property inspections, appraisals, etc.

18. CONSENT TO LIMITED DUAL REPRESENTATION AND ASSIGNED AGENCY: The undersigned SELLER(S) have received, read and understand the Agency Disclosure Brochure prepared by the Idaho Real Estate Commission. The undersigned SELLER(S) understand that the brokerage involved in this transaction may be providing agency representation to both SELLER(S) and Buyer. The undersigned SELLER(S) each understands that, as an agent for both SELLER/client and Buyer/client, a brokerage will be a limited dual agent of each client and cannot advocate on behalf of one client over another, and cannot legally disclose to either client certain confidential client information concerning price negotiations, terms or factors motivating Buyer/client to buy or SELLER/client to sell without specific written permission of the client to whom the information pertains. The specific duties, obligations and limitations of a limited dual agent are contained in the Agency Disclosure Brochure as required by Section 54-2085, Idaho Code. The undersigned SELLER(S) each understands that a limited dual agent does not have a duty of undivided loyalty to either client.

The undersigned SELLER(S) further acknowledge that, to the extent the brokerage firm offers assigned agency as a type of agency representation, individual sales associates may be assigned to represent each client to act solely on behalf of the client consistent with applicable duties set forth in Section 54-2087, Idaho Code. In an assigned agency situation, the designated broker (the broker who supervises the sales associates) will remain a limited dual agent of the client and shall have the duty to supervise the assigned agents in the fulfillment of their duties to their respective clients, to refrain from advocating on behalf of any one client over another, and to refrain from disclosing or using, without permission, confidential information of any other client with whom the brokerage has an agency relationship. SELLER [X] does [] does not consent to allow Buyer's Agents and/or Limited Dual Agents to show property and to allow the Broker to share brokerage fees as determined by the Broker with Buyer's Agents and/or Limited Dual Agents.

19. SELLER NOTIFICATION AND CONSENT TO RELEASE FROM CONFLICTING AGENCY DUTIES: SELLER acknowledges that Broker as named above has disclosed the fact that at times Broker acts as agent(s) for other Buyers and for SELLERS in the sale of the property. SELLER has been advised and understands that it may create a conflict of interest for Broker to introduce Buyers to SELLER Client's property because Broker could not satisfy all of its Client duties to both Buyer Client and SELLER Client in connection with such a showing or any transaction which resulted. Based on the understandings acknowledged, SELLER makes the following election: (Make one selection only)

Initials: TSB
Limited Dual Agency and/or Assigned Agency
OR

SELLER does want Broker to introduce any interested Client of Broker to Client SELLER'S property and hereby agrees to relieve Broker of conflicting agency duties, including the duty to disclose confidential information known to the Broker at that time and the duty of loyalty to either party. Relieved of all conflicting agency duties, Broker will act in an unbiased manner to assist the SELLER and Buyer in the introduction of Buyers to such SELLER Client's property and in the preparation of any contract of sale which may result. SELLER authorizes Broker to act in a limited dual agency capacity. Further, SELLER agrees that Broker may offer, but is not obligated to offer, assigned agency representation, and if offered by the Broker, SELLER authorizes Broker to act in such capacity.

Initials: /
Single Agency

SELLER does not want Broker to introduce interested Buyer Clients to Client SELLER'S property and hereby releases Broker from any responsibility or duty under the agency agreement to do so. Broker shall be under no obligation or duty to introduce the Buyer to any Client SELLER'S property.

SELLER'S Initials (TSB) Date: 2/7/11

Feb-02-2011 04:54pm From-MCCALL REAL ESTATE

2088743719

T-523 P.004/088 F-377

JULY 2010 EDITION

RE-16 SELLER REPRESENTATION AGREEMENT

Page 4 of 4

PROPERTY ADDRESS: 2130 Payette Drive McCall

20. INFORMATION WARRANTY. SELLER warrants that all information provided by SELLER herein and hereafter will be true and correct.

21. DEPOSIT. Brokers are authorized to receive a deposit from any prospective purchaser who offers to purchase or exchange the property and shall notify SELLER of the receipt of any such deposit. Acceptance of such deposit by a Broker shall not constitute SELLER'S acceptance of any such offer.

22. DEFAULT: IF BUYER defaults in the performance of any purchase and sale agreement procured under this Agreement, the holder of the Earnest Money shall be entitled to pay the costs incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of brokerage fee, title insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney fees. If SELLER elects to accept the Earnest Money as liquidated damages, the holder of the Earnest Money shall pay from the Earnest Money the aforementioned costs incurred by SELLER'S Broker, and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER'S Broker, provided the amount to be paid to SELLER'S Broker shall not exceed the Broker's agreed-to commission.

23. GENERAL PROVISIONS. In the event either party shall initiate any suit or action or appeal on any matter relating to this Agreement the defaulting party shall pay the prevailing party all damages and expenses resulting from the default, including all reasonable attorneys' fees and all court costs and other expenses incurred by the prevailing party. This Agreement is made in accordance with and shall be interpreted and governed by the laws of the State of Idaho. All rights and obligations of the parties hereunder shall be binding upon and inure to the benefit of their heirs, personal representatives, successors and assigns.

24. NON-DISCRIMINATION. SELLER and Broker acknowledge that it is illegal to discriminate in the showing, sale or leasing of the property on the basis of race, religion, creed, color, sex, marital status, national origin, familial, or handicapped status of such person.

25. SINGULAR AND PLURAL terms each include the other, when appropriate.

26. FACSIMILE TRANSMISSION. Facsimile or electronic transmission of any signed original document and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency, the BUYER and SELLER will confirm facsimile or electronic transmitted signatures by signing an original document.

27. TIME IS OF THE ESSENCE IN THIS AGREEMENT.

28. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

29. BROKERS ARE REQUIRED TO PRESENT ALL WRITTEN OFFERS UP UNTIL THE TIME OF CLOSING (per Idaho Code §54-2051).

30. OTHER TERMS AND CONDITIONS: Seller agrees that on 3-1-2011 the total price will be reduced to \$1,700,000.00. Seller agrees that on 4-1-2011 the total price will be reduced to \$1,500,000.00. Seller agrees that beginning on 5-30-2011 the price will be reduced by 550,000.00 every 15 calendar days until sold or withdrawn from the market.

CONTRACTOR REGISTRATION # (if applicable)

n/a

We must talk before I lower the price 2-7-2011 HMB

Nancy Gentry Boyd 2/7/2011
Seller Signature Nancy Gentry Boyd Date

Agent or Broker (on behalf of Brokerage) Signature Date

Seller Signature Date

Brokerage Address

301 E Lake Street

Address 2325 Avenida De La Plaza

City McCall ID 83638
State Zip

City La Jolla CA 92037
State Zip

Brokerage Phone 208-634-2100 Brokerage Fax 208-634-3719

Phone 858-459-8985 Fax 868-459-7452

Brokerage Email heverly.anderson@mccallrealestate.com

Gentry Boyd, Nancy w/ mail
Email *gentryboyd@comcast.net* Cell 858-442-8985

Agent/Broker Email jean@jeanodmark.com

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JULY 2010 EDITION

RE-16 SELLER REPRESENTATION AGREEMENT

Page 4 of 4

Printed by Professional Computer Forms Co. Dry-Lex Form 808694 1/10

Right Now You Are a Customer

All real estate consumers are "Customers" under Idaho law unless a representation agreement is signed. (A real estate licensee working with a customer is called a "Non-Agent".) The law requires all real estate licensees to provide the following "Customer level" services, to everyone:

- Perform necessary and customary acts to assist you in the purchase or sale of real estate;
- Perform these acts in good faith and with reasonable care;
- Properly account for money or other property you place in the licensee's care;
- Disclose "adverse material facts" to you which are, or should be, within the licensee's knowledge. These are facts that would significantly affect the desirability or value of the property to a reasonable person, and facts that indicate to a reasonable person that one of the parties cannot, or will not, complete obligations of the contract.

As a Customer, your brokerage will not act as your Agent and is not required to promote your best interests or keep your bargaining information confidential. If you use the services of a brokerage without a written agreement, you will remain a Customer.

As a Customer, you may be asked to sign a Compensation Agreement, a contract that requires you to pay a fee to the broker for some service the brokerage provides you.

If you enter into a Compensation Agreement, the brokerage and its agents must also:

- Be available to receive and present written offers and counter-offers to you or from you.

Remember! Unless you enter a written agreement for Agency Representation, you will NOT be represented at all.

The Compensation Agreement is not the same as an Agency Representation Agreement. A Compensation Agreement cannot be used to change or eliminate any Customer level services.

You May Become a Client

If a brokerage offers agency representation and you choose to sign a representation agreement, you will become a "Client". The brokerage and its licensees must act as your "Agent". They will owe you the following duties in addition to the basic Customer level services required of all licensees:

- Perform the terms of your agency agreement with skill and care;
- Promote your best interests in good faith, honesty, and fair dealing;
- Maintain the confidentiality of some client information, including bargaining information, even after the representation has ended.

Please Note: "Sold" prices of property are not confidential information, for either buyers or sellers, and may be disseminated by your Agent.

These Are Your Agency Options

Agency Representation (Single Agency)

Under "Agency Representation" (sometimes referred to in real estate documents as "Single Agency"), your brokerage may represent you, and only you, in your real estate transaction. (This representation can be modified in writing at a later date.)

As a seller, your agent will seek a buyer to purchase your property at a price and under terms and conditions acceptable to you and will assist with your negotiations. If you make a written request, your agent will seek reasonable proof of a prospective purchaser's financial ability to complete your transaction.

As a buyer, your agent will seek a property for you to purchase at an acceptable price and terms and will assist with your negotiations. Your agent will also advise you to consult with appropriate professionals, such as inspectors, attorneys, and tax advisors.

Limited Dual Agency

"Limited Dual Agency" means the brokerage and its agents represent both the buyer and the seller in the same transaction. You may choose Limited Dual Agency representation with your brokerage because you do not want it to be restricted in the search for suitable properties or buyers. There are two options under Limited Dual Agency.

Each brokerage is required to have a written policy describing the types of agency representation it offers.

RECEIPT ACKNOWLEDGED

Your signature below indicates a real estate licensee gave you a copy of the Idaho Real Estate Commission's "Agency Disclosure Brochure." Signing this document does not create an agency relationship or a contractual relationship of any kind.

Signature Nancy Anthony Boyd

Date 5/12/09

Signature _____

Date _____

1 A. That is correct.
 2 Q. Did you obtain these?
 3 A. Yes, as part of the property profile when we
 4 listed it.
 5 Q. And if I'm reading correctly the first page of
 6 the Exhibit pertains to 2011; is that correct?
 7 A. November 1st, 2011 was the billing date, yes.
 8 Q. And the second page applies to the same
 9 period?
 10 A. Correct.
 11 Q. And then the third page, if I understand, it
 12 applies to the period 2010?
 13 A. Yes.
 14 Q. And the fourth also to the period 2010?
 15 A. Yes.
 16 MR. MILLEMANN: Would you mark this Exhibit
 17 54, please.
 18 (Exhibit 54 marked.)
 19 Q. (BY MR. MILLEMANN) First Exhibit 54, Michael,
 20 are you able to identify that?
 21 A. A home warranty plan.
 22 Q. How many pages does that consist of?
 23 A. I'm showing three pages.
 24 Q. Do you know whether a home warranty plan was
 25 purchased by Mr. Petrus as part of this transaction?

1 A. No.
 2 MR. MILLEMANN: Nothing further.
 3 FURTHER EXAMINATION
 4 QUESTIONS BY MR. NEVALA:
 5 Q. Michael, I have a couple quick questions. For
 6 the record, Dan Nevala. Michael, I represent Chris
 7 Kirk.
 8 A. Okay.
 9 Q. Michael, I want to take you inside the house
 10 for a minute I know you walked through the out swinging
 11 french doors we've been talking about. Did you ever
 12 open the in-swinging french doors that you recall?
 13 A. The in-swinging.
 14 Q. Yes, we talked about them.
 15 A. Yes, we opened them at every showing.
 16 Q. Were those french doors easier to the open and
 17 swing? How would you describe the difference?
 18 A. I didn't notice a difference. Obviously, I
 19 used those far more than the others. I don't recall
 20 ever thinking about it.
 21 Q. You don't recall any trouble closing those
 22 doors?
 23 A. No.
 24 Q. Locking those doors?
 25 A. No.

1 A. I have seen it in the file, but I don't
 2 recall. I would have to review the closing statement.
 3 Q. Do you have the closing statement available to
 4 you in your documents?
 5 A. I do. And it may not appear there because he
 6 may have paid for this outside of closing.
 7 Q. Sure. Fair enough.
 8 A. Okay. So according to the closing statement I
 9 show Ed Petrus purchasing a home warranty plan a premium
 10 plan for \$940 at closing.
 11 Q. You show him purchasing a premium plan?
 12 A. Yes.
 13 Q. Okay. And do you have any understanding as to
 14 whether Exhibit 54 is a summary of that plan?
 15 A. I don't personally know but I see that it is
 16 marked as plat item there is an asterisk.
 17 Q. I'm sorry. As platinum?
 18 A. I see a mark on the platinum plan.
 19 Q. Which you equate to premium plan?
 20 A. Given two choices, yes.
 21 Q. Did you have any conversations with Mr. Petrus
 22 about the home warranty plan?
 23 A. No.
 24 Q. Have you had any conversations with
 25 Mr. Batchelor about the home warranty plan?

1 Q. I think that when you described that when
 2 Mr. Petrus, in June of 2012, after closing, contacted
 3 you about his troubles with the out-swinging french
 4 doors, and you went out to visit with him. At that
 5 point, did you -- he described his trouble with you or
 6 demonstrated the trouble that he was having. Did you
 7 look at the doors? There was some conversation earlier
 8 about weatherstripping. Did you notice anything wrong
 9 with the doors?
 10 A. I didn't. I mean, it was -- other than
 11 reviewing the email, I did not -- I was not aware that
 12 they was missing weatherstripping.
 13 Q. And I think you said, the term you used was
 14 pristine. When the house was sold, you described the
 15 home as pristine. The doors were cleaned and everything
 16 was -- so you didn't notice anything different?
 17 A. I didn't. The home was exquisitely well
 18 maintained.
 19 Q. Okay. Would you describe these french doors
 20 as BL difficult to operate in general?
 21 A. They are more complex than a standard door,
 22 yes. But I did not find them generally overly
 23 difficult.
 24 Q. Is it hard to lock them?
 25 A. Well, you have to secure one door. I mean

1 some you actually do throws top and bottom on the
2 non-handle door. And then you secure the other one. I
3 cannot remember on these. Some have internal hardware
4 that secures the entire door when you close it from the
5 hardware. But I don't remember on these doors.

6 Q. Do you remember how pins are engaged in this?

7 A. I guess. My mental picture there was an upper
8 pin and a lower pin that would come down and lock it to
9 the frame. But that may not be accurate.

10 Q. Do you engage them with the handle or do you
11 engage them?

12 A. If I understand how it works, and if I'm
13 remembering these doors, I know on doors that would
14 generally lift the handle that will actually move the
15 linkage and allow me to flip the dead bolt. That may
16 not be true of these doors. It's true of many, though.
17 So it's a two-step process, one to secure the french
18 doors into the frame, and then secure the dead bolt.
19 Without the linkage, though, many doors the dead bolt
20 does not throw in the linkage does not seep sink.

21 Q. Do you remember when you testified the email
22 with the attachment on the bid for the fix, the cost of
23 the repair for the replacement of the door, do you
24 remember sending that to Chris Kirk?

25 A. I don't remember.

1 would have been subsequent to that when we received
2 requests from the buyer. And I don't know the exact
3 timeline. But after we had agreed to make certain
4 repairs through the contractual process, which may have
5 been three or six days later. I would have asked Todd
6 to accompany me to show me what he was talking about.

7 Q. And was anybody else present during that time?

8 A. I don't recall anybody else being present.

9 Q. Okay. And while you were in the crawlspace,
10 did you notice anything -- well, let me back up.

11 You also indicated in your testimony earlier,
12 that I believe it was in 2014, you went out to the
13 property with Nancy while it was being repaired or and
14 you saw dry rot on the wall?

15 A. I think that was 2013.

16 Q. Okay.

17 A. But I don't remember even what month.

18 Q. Okay. Whenever it was the --

19 A. Yeah.

20 Q. The wall was exposed, and you saw the dry rot?

21 A. Right.

22 Q. From the deck point of view. So my question
23 now is, when you were in the crawlspace with Todd back
24 in 2012, did you see anything that would have alerted
25 you to possible problem in that wall?

1 Q. Do you recall talking to Chris about it ever?

2 A. I don't.

3 Q. Do you remember any conversations with Chris
4 about this?

5 A. Beyond that initial one, which only based on
6 the email, I know I must have contacted him for
7 information on the supplier.

8 Q. Okay.

9 A. But, no. No, my communications were primarily
10 with Nancy and, you know, beyond that, I don't -- I
11 don't recall any conversations with Chris.

12 MR. NEVALA: Okay. Thank you. That's all I
13 have.

14 EXAMINATION

15 QUESTIONS BY MR. PIERCE:

16 Q. I just maybe have or one or two. And for the
17 record, this is Michael Pierce, attorney for Todd
18 McKenna.

19 Michael, you said you had been in the
20 crawlspace with Todd to look at items that had been
21 earmarked for repair; is that correct?

22 A. That's correct.

23 Q. And if I understood you correctly, you thought
24 that was, approximately, March 18th of 2012?

25 A. No, that's when he did his inspection. It

1 A. I don't recall seeing anything, no, I -- my
2 focus was on a repair issue. So I don't know that I was
3 looking that closely, but I don't remember seeing
4 anything that was obvious.

5 MR. PIERCE: Okay. That's all the questions I
6 have. Thank you.

7 THE WITNESS: Okay.

8 FURTHER EXAMINATION

9 QUESTIONS BY MS. FOSTER:

10 Q. Just two cleanup topics. The file you have
11 here that I'm going to make a copy of. Is this a file
12 that you keep normally on this 2130 Payette sale?

13 A. I keep files like this on every home.

14 Q. Okay. Is this?

15 A. So depending on how complex the transaction
16 is, that will determine how big the file is. But I keep
17 everything that I can remember to keep on file.

18 Q. And this is your complete file for 2130
19 Payette?

20 A. To the best of my knowledge, yes.

21 Q. Okay. And I want to ask you very briefly
22 about the weatherstripping. Do you recall prior to June
23 2012, so prior to closing, that may be a dozen times or
24 less that you were in the home, did you notice the
25 existence or absence of weatherstripping on the french

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1 doors?
 2 A. I didn't.
 3 Q. Not one way or the other?
 4 A. No, I just didn't notice it, yeah. That was
 5 news to me when I saw it.
 6 Q. And did you see when you went out on --
 7 A. I didn't even notice it when I was with Ed.
 8 It was only the email reference to that.
 9 Q. You didn't notice it one way or the other when
 10 you were there on June 2012 either?
 11 A. No.
 12 Q. When you were out there with Ed?
 13 A. No, I was captivated by the damage. I didn't
 14 notice.
 15 Q. The damage when you were out there when it was
 16 opened up, you mean?
 17 A. Yes, if that's the event you are referring to.
 18 I didn't notice whether there was or wasn't whether
 19 stripping.
 20 Q. Including when it was just you and Ed, when
 21 you went into the house?
 22 A. I am afraid my attention was on hardware. I
 23 was not looking at weatherstripping.
 24 MS. FONTAINE: Alyson, this is Andrea
 25 Fontaine. Do you mind if I ask a couple of questions?

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1 MS. FOSTER: No, of course. Thank you for
 2 speaking up. I forgot you were there.
 3 EXAMINATION
 4 QUESTIONS BY MS. FONTAINE:
 5 Q. For the record this is the Andrea Fontaine on
 6 behalf of the Kevin Batchelor and Re/Max Realty.
 7 Michael, I had a couple questions for you. Is
 8 it your practice to open the home for a buyer, or buyers
 9 agent during the final walk through?
 10 A. That would be typical on our high-end homes.
 11 It is not necessarily typical on a home of, say, 250,000
 12 under value.
 13 Q. So the 2130 Payette Drive would be considered
 14 a high-end home, in your opinion?
 15 A. Definitely.
 16 Q. All right. And would it be your typical
 17 practice to secure a home after a final walk through in
 18 a home in a high-end home, such as 2130 Payette Drive?
 19 A. Yes.
 20 Q. And do you recall, I think you testified, you
 21 do not recall whether you opened or secured the home
 22 with respect to 2130 Payette during final walk through
 23 by Kevin Batchelor; is that correct?
 24 A. That's correct. I don't have any specific
 25 memories.

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1 Q. And you had indicated that you sometimes get a
 2 key to the buyer's agent for a final walk through.
 3 Would you do that with a high-end home, such as 2130
 4 Payette Drive?
 5 A. Generally not. We generally, as part of our
 6 agreement with the seller, we take full responsibility
 7 for that.
 8 Q. Do you think that you gave Kevin Batchelor the
 9 key to the home in this case?
 10 A. I don't recall if I did or did not. In a case
 11 with Kevin, we may have secured permission from the
 12 seller to give him a key, and allow him access to the
 13 home without his being present. But I can't recall. So
 14 there are exceptions to that rule, and that's something
 15 I don't physically remember whether or not we did that
 16 for Kevin.
 17 Q. But you would have had to have gotten Nancy
 18 Gentry-Boyd's permission to allow that?
 19 A. Generally we do. If we're going to allow
 20 somebody in the home unaccompanied, we'll get either
 21 verbal or written permission.
 22 Q. And then is the key returned to you after the
 23 final walk through?
 24 A. Yes.
 25 Q. And you do recall whether Kevin Batchelor

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1 returned a key to you?
 2 A. I would assume if we gave him a key. And we
 3 weren't present personally to lock it. He would have
 4 returned it. We do not release keys until closing.
 5 Q. So you simply don't recall whether that was
 6 the case for the walk through on 2130 Payette Drive?
 7 A. Yeah, I can't remember how we handled that.
 8 MS. FONTAINE: Thank you. I don't have any
 9 other questions.
 10 MS. FOSTER: No further questions.
 11 MR. MILLEMANN: No further questions.
 12 Michael, do you want to review the deposition?
 13 THE WITNESS: Yes, please.
 14 MR. MILLEMANN: You can send it here, or have
 15 it reviewed here.
 16 THE WITNESS: I don't know what the -- okay.
 17 I want to make sure I didn't misstate anything.
 18 MS. FOSTER: You will have an opportunity to
 19 review it.
 20 (Deposition concluded at 1:56 p.m.)
 21 (Signature requested.)
 22
 23
 24
 25

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2 the within deposition transcript which has been
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY
 PETRUS FAMILY TRUST DATED MAY 1,)
 1991, and EDMOND A. PETRUS, JR.,) Case No.
 individually and as Co-Trustee of) CV-2014-71-C
 the Petrus Family Trust Dated May)
 1, 1991,)
 Plaintiffs,) ROUGH DRAFT
 vs.) REALTIME UNEDITED
 NANCY GENTRY-BOYD, CHRIS KIRK d/b/a) REPORTER'S
 KIRK ENTERPRISES; TODD MCKENNA) TRANSCRIPT
 d/b/a HOMECRAFT HOME INSPECTIONS;)
 RE/MAX RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
 Defendants.)

DEPOSITION OF MICHAEL WOOD
 June 1, 2016

REPORTED BY:
 COLLEEN P. ZEIMANTZ, CSR 345
 Notary Public

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1 THE DEPOSITION OF MICHAEL WOOD, was taken on
 2 behalf of the Plaintiffs, at the offices of Millemann,
 3 Pittenger & Pemberton, LLP, located at 706 North First
 4 Street, McCall, Idaho, commencing at 11:00 a.m., on June
 5 1, 2016, before Colleen P. Zeimantz, Certified Shorthand
 6 Reporter and Notary Public within and for the State of
 7 Idaho, in the above-entitled matter.

APPEARANCES:

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Examination by Mr. Pierce	
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Exh 48 - Copy of Letter to Mr. Batchelor from Mr. Kolodny, Re: 2130 Payette Drive, April 13, 2012, Gentry-Boyd First Responses 225-226	
Exh 49 - Copy of Email to Wood from Batchelor, Re: Walk Thru, 04/16/2012, Gentry-Boyd First Responses 239	
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Exh 53 - Copy of Manatron GRM Info Center for 2130 Payette Drive, 1-3, 2012, 4 pages	#
Exh 54 - Copy of HWA, Home Warranty, 4-4, 2012, 3 pages	#

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MICHAEL WOOD,
first duly sworn to tell the truth relating to said cause, testified as follows:

EXAMINATION

QUESTIONS BY MS. FOSTER:

Q. Good morning. My name is Alyson Foster. I'm an attorney for Ed Petrus, and the Petrus Family Trust. And we are here today on some litigation involving Mr. Petrus, the Trust, and some other parties, that we can discuss.

We issued you a subpoena. And you are pursuant here to a subpoena; is that right?

A. That's correct.

Q. Thank you for coming today. Please state your name.

A. Michael Wood.

Q. What would you like me to call you?

A. Michael.

Q. Michael. Okay. You can call me Alyson. Have you ever had your deposition taken before?

A. Yes.

Q. When was that?

A. About 40 years ago.

Q. 40 years ago. Was it like this?

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A. It was a criminal case. I don't remember all the details.

Q. Well, let me tell you what this process is like. It's fairly straightforward. I'm going to be asking you questions. If you don't understand any of my questions, please say so, and I'm happy to rephrase them or explain. If you don't, and you answer a question, I'll assume you know what I meant.

I'm going to try not to interrupt you, and please do the same for our court reporter's sake, because she's taking down everything you say. And it will help her as she transcribes the record of our conversation.

When I ask you questions, and you give a "yes" or a "no" answer, please say the words "yes" or "no," instead of "uh-huh" or "un-huh." That's very common. It's a little harder for her to transcribe.

If you need a break, just let me know. I'm going to do my best to get through this as quickly as possible. But if you do need a break, no problem. I'm happy to take one. If there is a question pending, I'm going to ask you to answer the question first. But in general, please let me know if you need to take a break.

And are you under any medication such that, or for any other reason, are you unable to give truthful or

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clear testimony today?

A. I'm not on under any medication that would prevent me --

Q. I just mean, just anything that would impair your ability to speak with me today?

A. No. No.

Q. Okay. I'm not trying to inquire about your personal life. Not yet. Thanks for coming today.

Are you familiar with the case that we're here about?

A. Yes.

Q. Okay. How did you learn about this case that's pending?

A. Originally, I was contacted by Ed. And subsequently, as more information was learned, I -- they would contact me for inquiries.

Q. Okay. Where are you employed right now?

A. I'm a real estate agent for McCall Real Estate Company.

Q. You work with Jean Odmark?

A. I do.

Q. Did you and Jean represent Nancy Gentry-Boyd in connection with the sale of her home at 2130 Payette?

A. We did.

Q. Were you her agent?

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1 A. That's a difficult question. We were
 2 operating under a compensation agreement, not a listing
 3 agreement. So Nancy was more of a customer than a
 4 client. Her agent would have been my broker, Michael
 5 Anderson, I think is the compensation agreement. That
 6 is who she was hiring. And we were agents for him.
 7 Q. Michael Anderson?
 8 A. Yes.
 9 Q. He's the broker at McCall Real Estate?
 10 A. Yes, he's the owner and designated broker.
 11 Q. What was your professional relationship with
 12 her? And what I'm asking is, were you her agent?
 13 A. I was acting in that capacity under the
 14 direction of my broker.
 15 Q. And she was a customer not a client?
 16 A. If I understand the law correctly, yes.
 17 Q. So she didn't sign a representation agreement?
 18 A. No.
 19 Q. Only the compensation agreement?
 20 A. Yeah. We didn't have an exclusive right to
 21 sell. We were just promised payment if we did get it
 22 sold.
 23 Q. That's helpful. Thank you.
 24 I meant to ask at the beginning. Are you
 25 represented by an attorney here today?

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1 A. I am not.
 2 Q. The room is filled with attorneys. Have you
 3 met everyone?
 4 A. Yes, when I came in.
 5 Q. There may be times, and there may not, when I
 6 ask you questions, that they may raise an objection.
 7 That's just sort of legal things between us that
 8 probably won't affect your answering my questions. I
 9 just wanted to give you a heads up, if you hear people
 10 talk, that's totally normal.
 11 A. Okay.
 12 Q. So you were acting as an agent for Nancy
 13 Gentry-Boyd; am I understanding that right?
 14 A. Well, that would be her understanding.
 15 Legally, I'm an agent for the broker, and the broker is
 16 her agent.
 17 Q. And how would you describe your role in
 18 respect to Nancy in that transaction? What was your
 19 role?
 20 A. I was more in an assistance role to the
 21 Odmark.
 22 Q. An assistant to Jean Odmark?
 23 A. Yes.
 24 Q. And did you represent Nancy in dealings with
 25 other folks like Ed Petrus?

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1 A. Ed and other people who wanted to see the
 2 home, yes.
 3 Q. So in that capacity, you were
 4 representing -- is it Ms. Boyd, or Ms. Gentry-Boyd?
 5 A. It's Nancy Gentry-Boyd. That's how I know
 6 her.
 7 Q. I've heard a few. Can I call her Nancy?
 8 A. That's acceptable, yes.
 9 Q. So when you were interacting and speaking
 10 with, say, Ed Petrus, and other individuals in
 11 connection with the showing and sale of the 2130
 12 Payette, were you acting as a representative for Nancy?
 13 A. I was.
 14 Q. And as her representative, you mentioned just
 15 between customer and client, what did you consider to be
 16 your function?
 17 A. Well, we previously had a listing agreement,
 18 and we had a full representation agreement with her.
 19 The major distinction between customer and client is
 20 confidentiality. So in a customer relationship, we do
 21 not owe that duty. Although we find in best practices,
 22 regardless of the relationship, confidentiality is a
 23 must.
 24 Q. And when you say, "confidentiality," what do
 25 you mean?

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1 A. I cannot pass along anything that Nancy told
 2 me without her permission.
 3 Q. So your understanding is, as a customer, you
 4 are not obligated to adhere to that principal of
 5 confidentiality, but as best practice, you do?
 6 A. Yes.
 7 Q. Understood. I'm going to hand you a binder
 8 with a bunch of documents. If you could turn to Tab 3,
 9 and we're going to look at the compensation agreement
 10 with seller. It's Re/Max 56. It should be the third
 11 document in your stack.
 12 A. Which number, 56?
 13 Q. That's it. Right in front of you.
 14 A. Yes.
 15 MS. FOSTER: It's right after the first two
 16 discovery responses, Dan.
 17 This is a one-page document, Re/Max labeled
 18 56. It may have been marked previously in previous
 19 exhibits, but for convenience sake, let's mark it as
 20 Exhibit 47.
 21 (Exhibit 47 marked.)
 22 Q. (BY MS. FOSTER) Is this the compensation
 23 agreement you referenced?
 24 A. It is.
 25 Q. And is this the only contract entered between

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1 McCall Real Estate Company and Nancy Gentry-Boyd with
2 respect to 2130 Payette?
3 A. We had a previous contract that expired.
4 Q. It had expired. This was the one in effect in
5 2014?
6 A. Yes, this was a contract in which we initiated
7 the sale of the home.
8 Q. Right, 2012. Sorry. And it says, it expired
9 on March 1st, 2012. Was it extended?
10 A. Under the clause, unless negotiations are
11 still in progress, it was an automatic renewal until
12 that offer either closed or expired.
13 MR. MILLEMANN: Counsel, for the record, do I
14 understand that you are continuing the numbering from
15 the Gentry deposition?
16 MS. FOSTER: Yes.
17 MR. MILLEMANN: So 47 is the first of
18 Mr. Wood's exhibits?
19 MS. FOSTER: Correct.
20 MR. MILLEMANN: Thank you.
21 Q. (BY MS. FOSTER) Okay. When did you first
22 become involved with Nancy in connection with this sale;
23 do you remember?
24 A. If my memory serves, it was in 2011, but I
25 can't be more specific. I probably have information

Page 15

1 here. Actually, this says, the first we first
2 represented her in 2009, May 12.
3 Q. And I see you have a folder of documents, and
4 you've pulled them out. What is this folder of
5 documents you brought with you today?
6 A. That's our transaction file.
7 Q. Is that something that you could provide a
8 copy of to me and everyone in the room?
9 A. I would allow you to make copies.
10 Q. Yes, fair enough. Thank you.
11 And why did Nancy contact you in 2009?
12 A. She did not contact me. She contacted Jean
13 Odmark. They have a long-term, both business and
14 personal relationship.
15 Q. And what was the relationship between McCall
16 Real Estate and Nancy in 2009?
17 A. None. We were with Community Real Estate in
18 2009.
19 Q. So this was when you were with Community Real
20 Estate?
21 A. Yes.
22 Q. And was she trying to the sell the house back
23 then?
24 A. Yes, she was.
25 Q. And the one at 2130 Payette?

Page 16

1 A. Yes.
2 Q. How far in the process were you in the
3 process?
4 A. We didn't get it sold. The State lease was in
5 disarray, and it was a mess.
6 Q. Was it listed?
7 A. Yes, it was listed several times in 2009 and
8 2011. But with uncertainty of the whole outcome of the
9 whole lease arrangement, nobody wanted to step into
10 that.
11 Q. Right. And did you represent her in
12 connection with trying to sell it back in 2009; you and
13 Mr. Wood. I know your name is Michael. I called you
14 Mr. Wood. Sorry.
15 A. Yes.
16 Q. You did?
17 A. I did.
18 Q. And you spoke with her back then?
19 A. Yes.
20 Q. And did she tell you why she was trying to
21 sell the house back then.
22 A. My recollection she was very upset with what
23 was happening with the State lease program. The fees
24 being charged were exorbitant. And the projections on
25 those fees were going through the roof. It was no

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1 longer an affordable proposition for her, and she was
2 done.
3 Q. So tried to sell it in 2009, but didn't sell;
4 right?
5 A. Right.
6 Q. Did she try to sell it with you in 2010?
7 A. I would have to check the file. It was either
8 in 2010 or '11.
9 Q. And in 2012, it did sell to Ed Petrus?
10 A. Yes.
11 Q. I want to mostly focus on that transaction
12 with you today. But before we leave the 2009. Was
13 there any other reason that you understood from her,
14 that moved her to try to sell her house back then?
15 A. Not that I recall.
16 Q. Problems with the lease program with the
17 State?
18 A. That was the focus, yes.
19 Q. Disarray, too expensive?
20 A. And uncertain future.
21 Q. Uncertain future?
22 A. There was no -- none of us knew where they
23 were going to go with it. They were going to be raising
24 lease fees, not incrementally, but exponentially every
25 year. And she was done.

Page 18

1 Q. And did there come a time when she told you
2 that her husband was ill, and she also wanted to sell
3 because of that?
4 A. She didn't tell me that. I believe I knew
5 that, because she told Jean that.
6 Q. Do you know when that was?
7 A. I don't.
8 Q. Could you please turn to the first tab in your
9 binder. This has already been marked as Exhibit 4 to
10 the Nancy Gentry-Boyd deposition. These are written
11 discovery responses that she provided in this case.
12 Have you ever seen a document like this before? Do you
13 know what this is?
14 A. Yes, I've seen this before.
15 Q. You've seen this document before?
16 A. Not this one. I've seen a document like this
17 before.
18 Q. Okay. When was that what context?
19 A. Taking college course.
20 Q. Tell me about your educational experience,
21 please.
22 A. I have a high school degree, I mean, a
23 diploma. And I have a paralegal certificate from Boston
24 University.
25 Q. Well, I didn't realize that. Well, that was

Page 19

1 helpful. Was it helpful? Were you ever a paralegal?
2 A. I don't act in that capacity. But in real
3 estate, it's been helpful. It's been very important to
4 know my boundaries, to know what I can and can't do.
5 Well, I mean, attorneys exist for a purpose. Paralegals
6 take orders from attorneys. It keeps you from
7 practicing law in an unauthorized manner.
8 Q. I don't know how many paralegals take orders
9 from me, but I appreciate the sentiment?
10 A. Well, that's what they were trying to drum
11 into me.
12 Q. So how long have you been a real estate agent?
13 A. Since 2004.
14 Q. What did you do before that?
15 A. Property maintenance.
16 Q. Here, in McCall?
17 A. Yeah.
18 Q. How long did you do that for?
19 A. 25 years.
20 Q. Property maintenance is that for folks who
21 live out of town?
22 A. A lot of the work I did was for lakefront
23 owners and their homes. So a lot of the homes I'm now
24 selling, I used to go out and do things for them, fix,
25 and repair, and so forth.

Page 20

1 Q. Interesting. So do you know Mike Longmire?
2 A. Yes.
3 Q. Is that similar to what he does?
4 A. No, Mike has got more skill than I have.
5 Yeah. Mike has actually done work for me. So I've
6 known him for a number of years. No, I did things like
7 washing windows, and cleaning decks, and that kind of
8 maintenance.
9 Q. No construction background?
10 A. No.
11 Q. Or home inspection background?
12 A. No.
13 Q. Any classes or training in home construction
14 or construction?
15 A. No.
16 Q. And you became a real estate agent in 2004?
17 A. Yes.
18 Q. Now, are you a broker, as well?
19 A. I'm an associate broker.
20 Q. Associate broker. And when did you start with
21 McCall Real Estate Company?
22 A. 2004.
23 Q. And you've been there since then?
24 A. I think until 2009, and we were Community from
25 2009 into 2011, and returned to McCall Real Estate.

Page 21

1 Q. And you were with Jean Odmark the whole time?
2 A. No, correction. Jean and I were partners in
3 2008. Prior to that, I was an independent agent.
4 Q. Okay. What's the difference?
5 A. Well, Jean and I have -- we have a split
6 arrangement on income on everything we do. And we work
7 together as a team on all listings, and representing all
8 buyers. The relationship started out as I was a
9 personal assistant to her, and it has gradually moved
10 into a full partnership.
11 Q. So you have some sort of split fee arrangement
12 on --
13 A. Yes.
14 Q. -- when you represent buyers; is that right?
15 A. Right.
16 Q. And you represent sellers, as well?
17 A. Yes.
18 Q. Same sort of deal?
19 A. Yes, it's the same across the board.
20 Q. Okay. If you could look at this document that
21 I've shown you, and turn to page 3. You are listed here
22 with Jean Odmark. Do you see that, in No. 5?
23 A. I do.
24 Q. And underneath it says, "Mr. Wood and
25 Ms. Odmark were defendant's realtors and may have

1 knowledge related to the condition of the home during
 2 the period of defendant's ownership thereof the
 3 defendant is Nancy. Do you have knowledge relating to
 4 the condition of 2310 Payette during the period of
 5 Nancy's ownership?
 6 A. Some, yes.
 7 Q. What do you know?
 8 A. It's a beautiful home, and well kept, and
 9 showed beautifully.
 10 Q. Anything else?
 11 A. I knew of no defects in the home.
 12 Q. Okay. And then the word "realtor," there is
 13 the word "realtor," "agent," "broker." Do they all have
 14 different meanings?
 15 A. They do.
 16 Q. What does "realtor" mean?
 17 A. Means I'm a member of a national association
 18 that has a code of ethics.
 19 Q. So realtor is a position not a relationship?
 20 A. It's a designation.
 21 Q. Designation. Okay. And then if you could
 22 turn to Tab 4.
 23 MS. FOSTER: I don't know that this has been
 24 marked an exhibit previously, so we can mark it 48.
 25 (Exhibit 48 marked.)

1 associate broker for Nancy be accurate or inaccurate in
 2 Idaho?
 3 A. I don't know. As I understand the law,
 4 Michael --
 5 Q. Understanding you are not a lawyer.
 6 A. Michael Anderson is the broker, and we work as
 7 agents for him. So even though I am an associate broker
 8 in his office, I'm acting in the capacity of an agent
 9 for my broker in representing, in this case, Nancy.
 10 Q. And in representing Nancy, you communicate
 11 with her about how she wants to sell the house?
 12 A. Yes.
 13 Q. And how much she wants to sell it for?
 14 A. Yes.
 15 Q. And you represent her when you communicate
 16 with Ed Petrus about the sale negotiations?
 17 A. Generally, again, best practices, I
 18 communicate with the agent representing Mr. Petrus. And
 19 that's the way this transaction was handled.
 20 Q. Did you communicate with Ed directly prior to
 21 closing?
 22 A. Yes.
 23 Q. And in what context?
 24 A. And I have -- I don't know if it was direct or
 25 through one of his attorneys, particularly related to

1 Q. (BY MS. FOSTER) I don't know that you've seen
 2 this document before. Have you seen this?
 3 A. No.
 4 Q. This is a two-page document. It's Bates
 5 labeled Gentry-Boyd First Responses 225 and 226.
 6 A. Okay. Let me correct my testimony. I
 7 recognize it now. I have seen it. It's in my file as
 8 well.
 9 Q. It's a letter from Robert -- is it Kolodny?
 10 A. Yes.
 11 Q. To Kevin Batchelor, for the audience. And
 12 it's dated April 13th, 2012. And in the third
 13 paragraph, Mr. Kolodny has written, "I have suggested
 14 through Michael Wood and Jean Odmark, brokers for Nancy
 15 Gentry-Boyd," et cetera, et cetera.
 16 He's referencing you as a broker. But is he
 17 wrong there? Is that imprecise?
 18 A. That's imprecise. Jean is not a broker.
 19 She's just a sales agent. I can call myself a broker in
 20 the state of Idaho, because I took the training and
 21 passed the test. But because I do not own and run an
 22 office, I'm an associate broker working under a managing
 23 broker. Perhaps in California, "broker" means something
 24 different than it does under Idaho law.
 25 Q. With respect to you, would calling you an

1 the air-conditioning situation, where we had a unit
 2 burned out. I was receiving communication from his
 3 attorney in the matter, and responding. So in that
 4 situation, of course, Kevin Batchelor was apprised of
 5 that communication. But I don't recall if I had direct
 6 communication with Mr. Petrus, but I was certainly
 7 coordinating through his representatives at that time.
 8 Q. Okay. On behalf of Nancy?
 9 A. Yes.
 10 Q. Okay. I don't have any more questions about
 11 Tab 4. Thanks.
 12 A. Okay.
 13 Q. And you are aware that in this case, there are
 14 some issues surrounding the doors on, I think, the
 15 southwest corner of the deck. Are you familiar with
 16 these french doors --
 17 A. Yes.
 18 Q. -- at issue?
 19 A. Yes.
 20 Q. You walked through the house before it was
 21 sold; is that right?
 22 A. Yes.
 23 Q. Did you ever try those doors?
 24 A. I use them on occasion, yes.
 25 Q. Were you able to close them?

1 A. Yes.
 2 Q. Were you able to lock them?
 3 A. Yes.
 4 Q. Did there come a time when you weren't able to
 5 close them or lock them?
 6 A. Never.
 7 Q. Never?
 8 A. Never.
 9 Q. So you've never told Ed Petrus that you were
 10 never able to close that door?
 11 A. Ed and I had a conversation related to a
 12 specific event where I had some difficulty locking the
 13 door. And I mentioned that, because he was having that
 14 problem, and that's why he called me out to the house.
 15 Q. So this was shortly after he moved in in May
 16 or June of 2012?
 17 A. It was the end of June, about two months after
 18 closing, and he called me directly.
 19 Q. And what did he say?
 20 A. He was having trouble with the door. He
 21 wanted me to come out, so he could explain what the
 22 issue was. And see if I could help him in getting in
 23 touch with who supplied the door.
 24 Q. Okay. Why did he call you?
 25 A. I don't know.

1 the waterfront. We would come back in, tour the rest of
 2 the home, bedrooms, upstairs, and so forth. That route
 3 didn't take us through that nook. And for obvious
 4 reasons, most showings the door was never operated.
 5 However, sometimes buyers want to go through every door
 6 and peek in every closet. And on such occasions, I
 7 would be required to go through the home and secure all
 8 doors and windows.
 9 Q. So what was the occasion when you weren't able
 10 to lock this door?
 11 A. It was after a showing, a buyer had went out
 12 the door. And when I was going back and securing the
 13 home, I just remember having to fiddle with it and try
 14 to get it aligned correctly before I could get the home
 15 secured.
 16 Q. When was that?
 17 A. I don't recall.
 18 Q. Was the buyer Ed?
 19 A. No. I don't even remember who it was. It was
 20 just a showing. It was the only one I recall.
 21 Q. And on that occasion, you had trouble locking
 22 the door?
 23 A. I had trouble locking it.
 24 Q. And were there other occasions you went
 25 through the door when you were showing the home?

1 Q. Did you call Nancy, and tell her that he had
 2 called you about this?
 3 A. No.
 4 Q. What did you do?
 5 A. I went out and met with him.
 6 Q. What was said?
 7 A. He took me over to the door. He showed me
 8 that he was having trouble with the latch hardware.
 9 That's when we had the conversation pertaining to the
 10 fact that on one occasion, I had a similar problem. I
 11 can't recall the exact conversation, but the gist of it
 12 was to the effect that this was not unusual that a door
 13 that large, and with all the linkages involved, that
 14 sometimes you have problems getting everything aligned
 15 and locked up. So I told him that on one occasion, I
 16 had a similar problem.
 17 Q. So you told him there was one occasion where
 18 you weren't able to lock it?
 19 A. Yes.
 20 Q. And what was that occasion?
 21 A. It was after a showing -- normally, we would
 22 have a kind of a route we would take people through the
 23 house. Obviously, they come through. The first thing
 24 we want them to see is the lake. We would go through
 25 the east french doors out onto the deck. They could see

1 A. I have no specific recollection of other
 2 occasions that I used the door.
 3 Q. So the only time you recall using the door,
 4 you had trouble locking it; is that correct?
 5 A. I know that I used the door on another
 6 occasion when we initially listed the home. But I don't
 7 recall having any problems with that door. That was the
 8 only time during a showing that I had to secure the
 9 door, that I can remember.
 10 Q. So you used the door, you remember, two
 11 occasions; am I understanding that right?
 12 A. Yes.
 13 Q. And the first time was in what context?
 14 A. I think when we first listed the home, going
 15 through taking pictures, and moving in and out of the
 16 home.
 17 Q. And who were you with?
 18 A. Probably Nancy.
 19 Q. So was this 2009?
 20 A. Yes.
 21 Q. And you went through that door, you recall,
 22 specifically?
 23 A. I can't recall, specifically. I seem to
 24 remember that I have operated the door without problems
 25 on a previous occasion.

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1 Q. And you recall that you locked it on that
2 previous occasion?
3 A. Yes.
4 Q. Why were you the one locking it?
5 A. Just because in real estate, you return it to
6 whatever condition you find it. If you show a home, and
7 lights are on, you leave them on. If lights are on, you
8 turn them on, you turn them back off. So it's habit.
9 Q. So it's just habit?
10 A. Yes.
11 Q. And on that first occasion, you recall you
12 were the one that locked it. But you were there with
13 other people; is that right?
14 A. I was probably there with my camera, and I was
15 taking pictures. But I don't have any specific
16 recollection. I just seem to have a vague memory that I
17 have operated the door.
18 Q. Okay. And that would have been in 2009?
19 A. Yes.
20 Q. And then there came a second time you operated
21 the door during a showing, and you had trouble locking
22 it; is that what you are saying?
23 A. That's correct.
24 Q. What you are saying?
25 A. Yes.

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1 Q. Was the door swollen, is that why you couldn't
2 lock it?
3 A. I don't recall that being a problem.
4 Q. You don't recall swelling being a problem?
5 A. Nothing -- I saw no reason, not no visible
6 reason the door wouldn't lock.
7 Q. But you couldn't lock it?
8 A. I was able to lock it. I just had to kind of
9 lean on it a certain way, and get everything lined up,
10 and then I could throw the dead bolt.
11 Q. So that happened once?
12 A. Once that I can remember, yes.
13 Q. And that was the second time you used the
14 door?
15 A. In all likelihood, yes.
16 Q. And so when you saw Ed in late June of 2012,
17 you told him about this incident?
18 A. I did.
19 Q. And did you also tell him, yes, this door has
20 always been a problem?
21 A. No, I did not.
22 Q. And did you tell him that Nancy has always
23 known this door was a problem?
24 A. No, I had not.
25 Q. Had you ever discussed the door with Nancy?

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1 A. No.
2 Q. And you also didn't tell Ed, I guess you are
3 telling me, that the door had previously been swollen?
4 A. No, I don't recall having that conversation
5 with Ed.
6 Q. Okay. Not at any time?
7 A. Not at any time.
8 Q. Not on the phone, not in person?
9 A. No.
10 Q. And in this conversation, did you discuss with
11 Ed that there had been duct tape on the seam of the
12 door?
13 A. I did not know about duct tape on the door.
14 Q. Did you discuss it with Ed in that
15 conversation in late June of 2012?
16 A. No, I not -- my recollection the question on
17 duct tape came up months later.
18 Q. Okay. So your recollection is in late June of
19 2012, you did not discuss with Ed that there had been
20 duct tape on the seam?
21 A. No, at that point, the issue was door
22 hardware. He wanted the manufacturer's contact
23 information, which I got him in touch with the
24 manufacturer's rep, who came up, and discussed the door.
25 Q. Who was the manufacturer's rep?

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1 A. I do not recall the name of the manufacturer.
2 I have it on file.
3 Q. The name of the manufacturer do; you remember
4 that?
5 A. I don't have it.
6 Q. Was it New View?
7 A. New View, I think so.
8 Q. Or Weather Shield?
9 A. New View sounds familiar, but I -- so I have
10 Weather Shield or Pac -- the gentleman's name was Mark
11 Birrer, B-i-r-r-e-r. And then I have another name here,
12 but that one I don't remember. I think it was Mark, who
13 we arranged to come up and meet with Ed.
14 Q. Okay. And did Mark come out and meet with Ed,
15 to your knowledge?
16 A. It is my understanding he did. I was not
17 present.
18 Q. You were not present for that?
19 A. No.
20 Q. Did you ever speak with Mark Birrer?
21 A. Initially on the phone, yes, to set it up.
22 Q. After your late June 2012 meeting?
23 A. Yes.
24 Q. And what did you say to Mark?
25 A. Just that they were having trouble with the

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1 door hardware, and they wanted me to come up and look at
 2 it, and give him his best recommendation for a repair.
 3 Q. Did you talk with Ed after that at all?
 4 A. Not that I recall, beyond perhaps confirming
 5 with him, and passing along the contact information. I
 6 don't recall having a conversation after that point.
 7 Q. So you only recall one conversation with Ed
 8 about the door in late June of 2012?
 9 A. Regarding that door, now, if we move forward a
 10 couple months there were other conversations related to
 11 that door. But in June, it was just related to getting
 12 the manufacturer's rep up to see it.
 13 Q. What were the other conversations if you moved
 14 a couple months up? What did you mean by that?
 15 A. In August, I was contacted by Kevin Batchelor,
 16 and apprised of some ongoing, I guess, progress, or lack
 17 of progress on the door issue.
 18 Q. He called you?
 19 A. He called me. And I can't remember if it was
 20 what point in August, or if it was even in September.
 21 At some point, Kevin asked me about duct tape.
 22 Q. So Kevin asked you about the duct tape, not
 23 Ed?
 24 A. That's my recollection.
 25 Q. And what was the conversation?

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1 A. That Ed had discovered duct tape. He wanted
 2 to know why it was there.
 3 Q. And what did you say?
 4 A. I didn't know about duct tape, but I would ask
 5 Nancy.
 6 Q. And did you ask Nancy?
 7 A. I did.
 8 Q. And what was that conversation?
 9 A. I asked her why there was duct tape, and she
 10 told me that she had some ladies over for bridge. There
 11 was a cold draft coming through the door, and she went
 12 out and put duct tape on it to stop that.
 13 Q. And did she tell you where she was sitting
 14 when she was playing bridge?
 15 A. And we were discussing that that nook on what
 16 would it be the -- on the southeast corner of the house.
 17 Q. So as you are facing the lake from inside the
 18 house, is it on the right or left?
 19 A. Right.
 20 Q. Is that west?
 21 A. No, it's -- you are facing east, so it's the
 22 southeast corner of the house.
 23 Q. So your recollection is that you discussed
 24 with her, that she was sitting in the southeast nook
 25 right next to the french doors?

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1 A. The conversation was about duct tape on those
 2 doors. And it's my understanding, we were talking about
 3 the same doors. She referred to ladies out there for a
 4 bridge game. I don't recall her telling me that they
 5 were playing bridge at the moment. But there was a cold
 6 draft, and making the ladies uncomfortable. And she
 7 used duct tape to make a repair.
 8 Q. Did she say there was moisture coming through?
 9 A. No.
 10 Q. Just wind?
 11 A. Just a cold draft.
 12 Q. And did you tell Kevin Batchelor that?
 13 A. Yes.
 14 Q. I'll show you what's been previously marked as
 15 Exhibit 3 for Nancy Gentry-Boyd's deposition. Are these
 16 the doors we're discussing?
 17 A. Yes.
 18 Q. Okay. And did you have any other
 19 conversations on the telephone or in person with Kevin
 20 Batchelor about the door?
 21 A. I don't have a specific recollection. I know
 22 there were future conversations, but I don't remember
 23 details. It was more of updates. There was some
 24 interaction between Nancy and I, and so forth, just
 25 keeping her apprised of what was happening.

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1 Q. How often did you speak to Nancy about the
 2 door?
 3 A. During that entire period, maybe three times.
 4 Q. And what were you discussing with her?
 5 A. Initially, after I met with Ed, in June, I
 6 contacted her to get the information on who the
 7 manufacturer was the supplier for the doors.
 8 Q. Did she know who it was?
 9 A. She was able to track it down. I don't know
 10 how she did, but she had access, or knew somebody that
 11 could tell her. That's how she put me in touch with
 12 Mark.
 13 Q. So she gave you Mark's name and number?
 14 A. That's how I recall, yes.
 15 Q. And what else did you guys talk about at that
 16 time regarding the door and Ed?
 17 A. Nothing just it was -- he was having some
 18 trouble with the hardware, and we were just trying to
 19 help him resolve that. It wasn't an issue at that
 20 point, other than we had a door that was balky and
 21 that's not unusual, so...
 22 Q. And was she surprised in your conversation
 23 with you?
 24 A. I don't recall just helpful.
 25 Q. You don't recall her being surprised?

1 A. Neither surprised and asked to help with Ed
 2 and she said she would.
 3 Q. And that's your conversation with her at that
 4 time?
 5 A. Yes.
 6 Q. And nothing else you recall saying in that
 7 conversation to her?
 8 A. No.
 9 Q. Or that she said to you?
 10 A. No.
 11 Q. And then you said what was the next
 12 conversation you had with her about this?
 13 A. I'm trying to remember. I think within my
 14 email at some future point, and I don't know the exact
 15 time, I informed her of the ongoing status of that door.
 16 Q. And this was in an email?
 17 A. If I recall.
 18 Q. It would be in your file?
 19 A. It would be in my file. I'll look in the
 20 communications section here. Okay. And so the June
 21 19th email, in addition to the question on door
 22 hardware, I also inquired about a painting contractor
 23 for exterior painting. Okay. So then this will correct
 24 my earlier testimony. Nancy responded to that inquiry
 25 indicating that Chris Kirk would be able to give us the

1 Nancy Boyd, about the matters we discussed?"
 2 Did you understand what the "matters we
 3 discussed" referenced here?
 4 A. I would have to assume it was relating back to
 5 the June conversation about those doors.
 6 Q. Finding the door supplier?
 7 A. And making the repairs.
 8 Q. And making the repairs. And you had spoken to
 9 Nancy at that time; is that right?
 10 A. She was made aware of that on the June 19th
 11 email I had. We traded emails on that issue.
 12 Q. Okay. And you have the that in your folder?
 13 A. I do.
 14 Q. Can I take a quick look at it?
 15 A. Let's see. (Witness complying.)
 16 Q. And this is an email from you to Nancy, and
 17 you are BCCing Jean Odmark, and this is June 19th, 2012,
 18 no Bates number on this. But it says, "The buyer
 19 contacted me," so that's Ed; correct?
 20 A. Yes.
 21 Q. "To inquire about the company that supplied
 22 the doors and hardware for the lakefront home. The
 23 double doors in the nook beside the kitchen had
 24 malfunctioned, and are missing weatherstripping."
 25 Did you discuss with Ed missing

1 information on the door supplier, and also on a painting
 2 contractor.
 3 Q. And what was your next contact with Nancy?
 4 A. Let's see. So on August 2nd, I received an
 5 email directly from Mr. Petrus.
 6 Q. Is that 1:07 p.m.?
 7 A. Yes.
 8 Q. Do you have that in front of you?
 9 A. I do.
 10 Q. Can I take a quick look and make sure it's
 11 what I have?
 12 A. (Witness complying.)
 13 Q. If you could turn to Tab 6. And then look at
 14 the bottom of that first page this has previously been
 15 marked as Exhibit 41 in Mr. Batchelor's deposition.
 16 It's Batchelor 68. Is that the email you were
 17 discussing?
 18 A. It is.
 19 Q. This is an email from Ed to you about six
 20 weeks after you met with him, approximately; is that
 21 right?
 22 A. That would be correct, yes.
 23 Q. And he says, "We're moving forward. And it is
 24 apparent that the doors will have to be, I assume,
 25 totally reinstalled. Have you spoken to your client,

1 weatherstripping?
 2 A. I don't recall, but apparently I did.
 3 Q. But you don't recall that?
 4 A. I don't.
 5 Q. Okay. And when you say, "the double doors
 6 have malfunctioned," is that only the locking mechanism
 7 you are referencing?
 8 A. It was.
 9 Q. And when you went out in late June of 2012,
 10 and met with Ed, did you try the door?
 11 A. Yes, I don't know if he was informed or
 12 demonstrating it for me. But, yeah, I attempted to lock
 13 it, and could not lock it.
 14 Q. You could not lock it?
 15 A. Yeah.
 16 Q. Was it able to close all the way?
 17 A. I don't recall.
 18 Q. What was preventing it from being locked when
 19 you tried, if you could tell?
 20 A. Well, if I understand it, there is a rod that
 21 goes up and down to secure the door top and bottom. And
 22 that was not aligning with the holes in the frame.
 23 Q. And how did you come to that understanding,
 24 that that was the problem?
 25 A. That's just my amateur understanding of how

1 that door worked.
 2 Q. So that's what you thought might be mapping
 3 when you were out there?
 4 A. That's what I thought might be happening.
 5 Q. But no one ever told you that that's what had
 6 happened?
 7 A. No, that was just a guess.
 8 Q. And you didn't have anyone tell you that that
 9 was preventing the lock mechanism from functioning that
 10 day?
 11 A. I didn't know. I knew it was malfunctioning.
 12 And Ed had to talk to the manufacturers rep.
 13 Q. And turning back to this email, August 2nd.
 14 Actually, I'm sorry. Before you do that. After the
 15 June 19th email from Nancy, can you show me the next one
 16 in your folder upon which she responded to you, and
 17 provided you Chris Kirk's name?
 18 A. That would be this one? No.
 19 Q. That's the one.
 20 A. That's the one we're talking about. So that's
 21 this one.
 22 Q. Okay. So it looks like the same day, she
 23 said, Michael, Chris Kirk will know who supplied the
 24 doors. I do not. Also, Chris Kirk would know the name
 25 of the painting contractor. And then she says, the

1 learned from Nancy that at least she thought that if you
 2 keep the doors locked, they will dry out and function
 3 again?
 4 A. Yes.
 5 Q. But you didn't tell Ed that?
 6 A. I did not.
 7 Q. And then did you have any emails after that
 8 with Nancy?
 9 A. After August 2nd, Ed contacted me.
 10 Q. So that's the next email in your chain?
 11 A. Yes.
 12 Q. Let's look at that one then. And we can look
 13 at the one on Exhibit 41, since it's already been
 14 marked. And it says, "In addition to the matters we
 15 discussed, it is apparent that CTR was contacted by your
 16 client about the problem with the doors so it was never
 17 contracted to fix or repair it."
 18 Did you know what he was talking about there?
 19 A. I did not.
 20 Q. Do you know what CTR is?
 21 A. I do.
 22 Q. How do you know what CTR is?
 23 A. They are a cleanup and total restoration
 24 company.
 25 Q. Here, in the McCall area?

1 doors sometimes stick after the winter. If you keep
 2 them locked, they will dry out and function again. Is
 3 that right?
 4 A. Yes.
 5 Q. And was this the first time you learned from
 6 her that the doors sometimes were sticking sometime
 7 after the winter?
 8 A. Yes.
 9 Q. And she said if you keep them locked, they
 10 will dry out and function again. Do you have an
 11 understanding of what that meant?
 12 A. I did not.
 13 Q. Sitting here today, do you know what that
 14 means?
 15 A. No.
 16 Q. Okay. And did you tell Ed, Ed, if you keep
 17 them locked, they'll dry out and function again?
 18 A. No.
 19 Q. You didn't pass this on to him?
 20 A. No, I -- honestly, I was paying attention to
 21 the problem at hand, and I didn't really think about
 22 that.
 23 Q. Okay. And I read that email correctly?
 24 A. Yes.
 25 Q. Okay. So clearly, as of June 19th, 2012, you

1 A. Yes.
 2 Q. Did you ever discuss CTR with Nancy?
 3 A. No.
 4 Q. Did you ever ask her about it?
 5 A. No.
 6 Q. And then it says, towards the end, "Those
 7 doors have clearly been a problem for Nancy for years,
 8 and the duct tape she used did not fix true problem."
 9 Do you see that?
 10 A. Yes.
 11 Q. And did you think that was true?
 12 A. I didn't know.
 13 Q. You didn't know. Did you ask Nancy?
 14 A. Not at this point, no.
 15 Q. Okay. Well, in your response the next day,
 16 you didn't tell Ed, that's not true, Nancy didn't have
 17 this as a problem for years; right?
 18 A. That was not knowledge that I had. So I
 19 certainly couldn't share that with Nancy.
 20 Q. With Nancy?
 21 A. I mean, with Ed. This is all news to me.
 22 Q. So you didn't know whether this sentence was
 23 true?
 24 A. I did not.
 25 Q. And you didn't ask Nancy about it?

1 A. I did not.
 2 Q. And why not?
 3 A. It was not my business.
 4 Q. What did you see your -- what was your
 5 business at this point? What was your role?
 6 A. I was trying to help Ed out to resolve the
 7 door issue as a courtesy.
 8 Q. Okay. But he said there that you referred to
 9 Nancy as your client right in the first sentence, after
 10 you've spoken to your client, Nancy Boyd. Excuse me,
 11 the first line?
 12 A. Yes, I see that.
 13 Q. And you didn't tell him, she's not my client?
 14 A. No, I did not.
 15 Q. Did you consider her your client at that
 16 point?
 17 A. I did not.
 18 Q. But you knew he thought she was your client
 19 when you wrote that?
 20 A. I was not even parsing it that way, no.
 21 Q. And he says, he starts mentioning lawyers.
 22 Did that cause you any concern?
 23 A. Not at that time. We had had lawyers involved
 24 with the transaction almost from day one. So, no, that
 25 was not causing me any concern.

1 A. Yes, he did say that.
 2 Q. And when you tried them, were they difficult
 3 to open when you were out there in late June of 2012?
 4 A. I don't recall.
 5 Q. And in this email to Nancy, you said,
 6 apparently he has been told that CTR, a disaster cleanup
 7 company, was consulted about the issue, and that you
 8 were aware of an ongoing problem with the doors.
 9 Did she respond to that?
 10 A. I can't recall. I would have to look. I
 11 don't have any recollection of her response.
 12 Q. And did she email you back?
 13 A. I don't have an email from her during that
 14 time period.
 15 Q. And you don't recall talking to her at that
 16 time?
 17 A. I don't. I'm going to assume we had a
 18 conversation, but I have no recollection of it.
 19 Q. Okay. Because going back to Exhibit 41, the
 20 next email from you to Ed on the 3rd, which is the next
 21 day. It says, "Ed, the seller will be contacting the
 22 builder to obtain cost information." And how did you
 23 know that?
 24 A. I'm going to assume that I had a conversation
 25 with Nancy.

1 Q. All right. And then did you contact Nancy
 2 after you received that email on August 2nd, 2012?
 3 A. August 7th?
 4 Q. August 2nd. I misspoke. 2nd.
 5 A. I emailed her at 2:51 that day to inform her
 6 of what he said in reference to the seller's property
 7 disclosure statement, he was pointing back to that.
 8 Q. Is that an email you are looking at in your
 9 folder?
 10 A. Yes.
 11 Q. Can I take a look?
 12 A. Yes. (Witness complying.)
 13 Q. Okay. And this is an email from you to Nancy,
 14 ccing Jean Odmark, forwarding Ed's email of 1:07; is
 15 that right?
 16 A. Yes.
 17 Q. And you state, he, Ed, had mentioned earlier
 18 that they were difficult to open, and that he was
 19 looking into the cause. Is that referencing the
 20 conversation of late June of 2012?
 21 A. Yes.
 22 Q. And so in that conversation, he had told that
 23 you the doors were difficult to open?
 24 A. Yes.
 25 Q. And not just to lock, but also to open?

1 Q. But you don't recall it?
 2 A. I don't.
 3 Q. Okay. And then if you go up to about ten days
 4 later, Ed emails again, and says, "Michael we're running
 5 out of time. The doors must be reinstalled. He wants
 6 to do this before winter." In that ten days had you
 7 spoken to Nancy about her consult with Chris Kirk?
 8 A. I have no recollection. I --
 9 Q. And did you -- I'm sorry. I interrupted you.
 10 Go ahead.
 11 A. I just have no recollection. I don't know
 12 what did or didn't happen at that time.
 13 Q. Did you talk to Chris Kirk during that period?
 14 A. I don't recall talking to the Chris Kirk
 15 during that matter.
 16 Q. Did you recall that you?
 17 A. I'm going to the assume, again, I have no
 18 recollection, but I am going to assume that Chris had
 19 the information as to the manufacturer and the
 20 representative.
 21 Q. Okay. But you --
 22 A. Back in June, I'm going to assume that I
 23 reached out to Chris at that time.
 24 Q. Okay. And then you responded on August 13th,
 25 former owner is working with the builder, Chris Kirk, to

1 facilitate this. I've given Chris the input he
 2 requested and waiting for marching orders."
 3 So is it fair to say that you did talk to
 4 Chris to get the info --
 5 A. I must have, yes.
 6 Q. And do you know what the info he requested
 7 was?
 8 A. I don't.
 9 Q. And did you talk to Nancy again in this ten
 10 day period, or on the 13th, to see what the status was?
 11 A. I have no recollection of talking to her. I'm
 12 assuming there was a conversation, but I have no memory
 13 of it.
 14 Q. Okay. So you have no memory of her talking
 15 with you about whether the door had always been a
 16 problem?
 17 A. Beyond the initial email, that would have been
 18 the first time that was disclosed to me.
 19 Q. That was the first time she had ever disclosed
 20 to you that she had had problems with the door in the
 21 past?
 22 A. Yes.
 23 Q. And you, yourself, at one time had had trouble
 24 locking the door; correct?
 25 A. Correct.

1 Q. And that was the only time in recent visits to
 2 the home that you had even tried the door; is that
 3 right?
 4 A. That's correct.
 5 Q. So if I'm understanding, and was that in 2012,
 6 do you know when you tried the door during the showing
 7 and couldn't lock it?
 8 A. That was not in 2012. It would have been
 9 possibly 2011.
 10 Q. Okay. But not 2009, when you first started
 11 showing the house?
 12 A. Not in 2009.
 13 Q. So in 2011, you showed the house, and couldn't
 14 lock the door; right? You have to say yes or no for the
 15 record.
 16 A. I could lock the door. I had difficulty
 17 locking the door.
 18 Q. Fair enough. And that's the only time you
 19 tried the door in that time period. And then in June,
 20 Ed called you, and said he was having trouble with the
 21 door?
 22 A. Yes.
 23 Q. And you went out there, and you tried the
 24 door, but you don't remember whether it worked?
 25 A. I remember Ed walking me over to the door to

1 demonstrate the issue. I don't remember if I tried to
 2 operate the door, or if Ed demonstrated the issues he
 3 was having.
 4 Q. Okay.
 5 A. But it was clear, it was not working
 6 correctly.
 7 Q. So it was clear at that time, it was not
 8 opening correctly?
 9 A. I don't -- I don't have a distinct
 10 recollection. I know it would not latch. The dead bolt
 11 mechanism would not latch.
 12 Q. And I think you said, you had to shut the door
 13 in a certain way to get it to lock the previous year.
 14 Was that the same experience in 2012?
 15 A. Again, I don't recall if I actually physically
 16 tried to operate the door in June. I know that the door
 17 would shut on the previous occasion that I mentioned to
 18 Ed. What I couldn't get is the latch mechanism to work.
 19 Q. Without shoving it a certain way?
 20 A. Well, yeah, putting a little pressure. I
 21 don't remember if it was upper or lower. I had to get
 22 the alignment so whatever the linkage was secured to the
 23 frame.
 24 Q. When Ed demonstrated to you, did you see the
 25 same difficulties you had experienced?

1 A. I would say, that's correct.
 2 Q. And then you emailed on Nancy on June 19th,
 3 and she responded by saying, that the door will dry out
 4 if you keep it locked, and start working again; is that
 5 correct?
 6 MR. MILLEMANN: Objection to the question;
 7 asked and answered. And the document speaks for itself.
 8 Q. (BY MS. FOSTER) You may answer.
 9 A. That's what she had emailed me, yes.
 10 Q. And then on August 2nd, when Ed emailed you,
 11 and said these doors have clearly been a problem for
 12 Nancy for years. You didn't ask her if that was true,
 13 but you also didn't dispute it; did you?
 14 A. No, I was not -- I was not in a position of
 15 challenging anybody's statements at that point. This
 16 was not beyond acting in a capacity as a courtesy to
 17 facilitate the repairs. I was not representing anybody
 18 at this point, and did not feel an obligation to
 19 challenge people's statements.
 20 Q. Just to be clear, and we've discussed this.
 21 You see here that Ed thought Nancy was your client at
 22 that time; correct?
 23 A. I --
 24 MR. MILLEMANN: Objection; asked and answered.
 25 THE WITNESS: Yeah.

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1 Q. (BY MS. FOSTER) You can answer it.
 2 A. As I said, I did not parse that sentence. I
 3 was not -- at that point, my concern was over a door.
 4 It wasn't over how Ed perceived me and the relationship.
 5 Q. But you didn't correct him?
 6 A. I saw no need to.
 7 Q. So, no?
 8 A. No, I did not correct Ed.
 9 Q. Okay. And Ed testified -- Ed had his
 10 deposition taken here, too, just like a bunch of folks
 11 have. And he testified that when he spoke with you, you
 12 told him that Nancy and her bridge friends had
 13 difficulty with moisture and air getting through the
 14 door that was bothering their bridge game at the card
 15 table on the other side of the room. Is that true?
 16 A. No.
 17 Q. Okay. What's false about that?
 18 A. We were discussing the door on the southeast
 19 corner. And it was my understanding, that is where they
 20 were playing bridge.
 21 Q. Not on the other side of the room?
 22 A. Not on the other side of the room. I had no
 23 idea about the other side of the room.
 24 Q. Okay.
 25 A. And wind and moisture were never mentioned in

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1 that conversation.
 2 Q. It was a draft?
 3 A. A cold draft was the words Nancy used.
 4 Q. Okay. Okay. So then after these August 2012
 5 emails that we just looked at, looking at your last one,
 6 again looking at -- oh, what are you looking at?
 7 A. You are still here (indicating)?
 8 Q. Yes.
 9 A. Okay.
 10 Q. Are you looking at the same email in your
 11 folder?
 12 A. Yes. Yes, the same email.
 13 Q. Okay. So after this last email from you that
 14 I have here, in Exhibit 41, at August 13th, 2012, 1:57
 15 p.m., do you have any conversations or emails with Ed
 16 after that?
 17 A. Much later, and I don't know if it was
 18 directly from Ed. Let's say, August 13th, I respond to
 19 Ed. The next communication I have a record of was March
 20 18th, 2013.
 21 Q. Can I see that quickly? And see if I have
 22 already have that as an Exhibit?
 23 A. (Witness complying.)
 24 Q. Okay. Yes, if you could turn to Tab 7. And
 25 this is previous low been marked Exhibit No. 7 in the

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1 deposition of Nancy Gentry-Boyd. Is this the next email
 2 that you have in your set of emails, from March 18th,
 3 2013?
 4 A. It's a portion of that conversation.
 5 Q. What's missing?
 6 A. I don't have a copy of the -- thank you,
 7 Michael, portion of this email.
 8 Q. Okay. That's fine. So between August of 2012
 9 and March of 2013, did you have conversations or emails
 10 with anybody about 2130 Payette?
 11 A. Not that I recall.
 12 Q. And not about the doors then?
 13 A. No.
 14 Q. Did you have conversations or emails with
 15 anybody about Ed Petrus?
 16 A. Not during that time.
 17 Q. Not during that time?
 18 A. Not that -- I mean, not that I can recall.
 19 Q. Okay. So then the next you heard about it,
 20 anything about the doors, was March of 2013, this email?
 21 A. Yes.
 22 Q. And had you known what had happened with the
 23 doors prior to that?
 24 A. The last I knew is they were going to have to
 25 be totally reinstalled. That's all I knew about the

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1 situation, so...
 2 Q. Okay.
 3 A. Whatever that meant, that's as far as I -- had
 4 followed the progress.
 5 Q. Okay. Then on March 18th, Ed emails you
 6 again. And says that Kevin, or someone in his office,
 7 will be dropping off a copy of the estimates to replace
 8 the defective doors is that Kevin Batchelor?
 9 A. Yes.
 10 Q. And did Kevin Batchelor drop off an estimate?
 11 A. I believe he provided us one I don't know if
 12 he dropped it off, emailed. It's my understanding he
 13 delivered it.
 14 Q. Did you speak with Kevin at that time about
 15 the doors?
 16 A. I don't recall.
 17 Q. You don't recall?
 18 A. No.
 19 Q. And he says in this email, Ed does, "Please
 20 provide a copy to Nancy at your earliest convenience."
 21 Did you provide a copy of to Nancy of the bid?
 22 A. I believe I did. I don't have a recollection
 23 of doing that but.
 24 Q. It would be in your files?
 25 A. I think on March 19th, I would have emailed

1 that to her.
2 Q. And you forwarded to her a portion of
3 Mr. Petrus' note or is it the entire note that you
4 forwarded. I only see a portion there.
5 A. It's the entire -- well, this is what is
6 forwarded, a two-page document.
7 Q. Okay.
8 A. So this was actually an attachment, but it was
9 also shows as a visual representation on the email.
10 Q. Understood.
11 A. The full document was up here (indicating).
12 But that's what Nancy would have received.
13 Q. But you've cut and pasted a selection of the
14 email up above; is that right?
15 A. Yes.
16 Q. And is that the section that says, your client
17 clearly knew she had problems of water intrusion coming
18 through the doors?
19 A. Yes.
20 Q. And you didn't tell Ed that that was
21 incorrect; did you?
22 A. I did not dispute his statement. I did not
23 have personal knowledge of that.
24 Q. Did you ask Nancy about it?
25 A. No.

1 Q. And do you know why she requested it? Did she
2 tell you?
3 A. I don't recall, why. I'm going to assume she
4 did not have copies and wanted them.
5 Q. And in the next email up, it says, it's from
6 Maura. Who is Maura? Is that Nancy's assistant?
7 A. I don't -- I don't know. Again, I don't
8 recall who Maura was.
9 Q. Okay. I can tell you Nancy testified that
10 she's I can't remember if she's her husband's secretary,
11 or assistant, or her personal assistant. I can't
12 recall.
13 A. Okay.
14 Q. But this email says, "Hi, Michael. I received
15 documents. Thank you. In comparing what was in the
16 AmeriTitle documents of what you sent, the addenda No. 5
17 that you sent, which is signed by parties is not
18 included. Either way Nancy fulfilled the requirements
19 of that addendum."
20 Do you know what it's addressing, when it
21 says, "Nancy fulfilled the requirements of that
22 addendum"?
23 A. Off the top of my head, I don't know. I would
24 have to look Addendum No. 5.
25 Q. Okay. You don't remember what Addendum No. 5

1 Q. Did she respond to your email to address that
2 contention?
3 A. Let me see. Okay. The next chain I have is a
4 response from Nancy on April 4th. And I don't know. I
5 don't think it relates directly to this previous email.
6 Q. Is it about the door?
7 A. No. This has to do with a request, I believe,
8 from Nancy for copies of closing documents. So I don't.
9 In my email chain I don't have any response.
10 Q. To that email?
11 A. To this email with the bid.
12 Q. Can I see that email from Nancy to you?
13 A. This was on April 4th. And I believe it was
14 on a different matter. (Witness complying.)
15 Q. This says that you have attached the addenda
16 to the purchase and sale agreement for 2130 Payette. So
17 it's the same house; right?
18 A. Yes, this relates to the same house. This is
19 the email that submitted to the documentation she
20 requested.
21 Q. This is on April 4th, 2013?
22 A. Right.
23 Q. Did she call you to ask for that?
24 A. Probably. I -- like I said, I don't have an
25 email request. So it was probably a phone conversation.

1 was?
2 A. We had -- let me pull the contract documents.
3 Q. All right. I have Addendum No. 5, if you
4 would like to take a look. It's previously marked
5 Exhibit No. 5 in the deposition of Nancy Gentry-Boyd,
6 Bates No. Re/Max 34. Is that Addendum 5?
7 A. That is a partially assigned addendum, yes,
8 addendum 5.
9 Q. And is that the fully signed addendum 5?
10 A. That is yes.
11 Q. Since that one is not as clear, I'm going to
12 go back to this original. Do you know whether there are
13 differences between these two?
14 A. There should be no differences.
15 Q. Let's look at the one that's easier to read
16 Bates labeled 34.
17 MS. FOSTER: Off the record.
18 (Discussion held off the record.)
19 MS. FOSTER: On the record.
20 Q. (BY MS. FOSTER) Does this addendum have
21 anything to do with the doors?
22 A. To my knowledge, no.
23 Q. Okay.
24 MS. FOSTER: Off the record.
25 (Discussion held off the record.)

1 MS. FOSTER: We're back on.
 2 Q. (BY MS. FOSTER) So you don't know what is
 3 meant here by, "either way Nancy fulfilled the
 4 requirements of that addendum"?
 5 A. The buyer requested a list of repairs, which
 6 Nancy undertook to complete per this agreement. So my
 7 understanding is she made all the requested repairs per
 8 the contract.
 9 Q. And this repair was not included; correct?
 10 A. Which repair?
 11 Q. To the french doors that we're requesting?
 12 A. There was no request for the repair of the
 13 french doors.
 14 Q. Is that what is being referenced here?
 15 A. I believe this is the request. This is what
 16 he requested be repaired this is what I repaired.
 17 Q. And did you agree?
 18 A. I believe that Nancy had fulfilled her
 19 obligations under the contract, yes.
 20 Q. Okay. And then what are you looking at?
 21 A. This was an April 4th communication, 11:51
 22 a.m. Kevin wrote me.
 23 MR. MILLEMANN: I'm sorry. Michael, what
 24 year?
 25 THE WITNESS: 2013, April 4th, 2013. Kevin

1 responsible for something.
 2 Q. And you don't recall. So you recall her
 3 saying that you recall her being upset, and saying there
 4 is no problem attributable to her. Do you remember
 5 anything specific she said?
 6 A. I don't.
 7 Q. That was your impression of the conversation?
 8 A. That was my conversation of the.
 9 Q. Do you know whether that was an experienced
 10 trouble with the door or problems she experienced in the
 11 past?
 12 A. Prior to June email, in June, I never had.
 13 Q. And she never gave you the impression in that
 14 that conversation, or any other conversation that she
 15 had?
 16 A. No.
 17 Q. That's your testimony?
 18 A. No, this was no big deal. She did not
 19 understand the problem, what the issue was.
 20 Q. And then if you could turn to Tab 9, which is
 21 an email previously marked as Exhibit 8 to Nancy
 22 Gentry-Boyd's exhibit. This is an email between Ed and
 23 Nancy the bottom is half is April 9th, 2013. Nancy
 24 says, "Dear Mr. Petrus. The due diligence was completed
 25 prior to the close of escrow. You closed escrow. I

1 wrote me to pass along information from August 13th
 2 requesting a decision. I responded to Kevin that Nancy
 3 had contacted me and assured me she would respond to
 4 Mr. Petrus by the end of the week.
 5 Q. (BY MS. FOSTER) Okay. So if you could take a
 6 look at Tab 8. This is previously marked Exhibit No. 6
 7 to Nancy Gentry-Boyd's deposition. Is this the email
 8 chain you were referencing?
 9 A. Yes.
 10 Q. And after April 4th, Nancy contacted me that
 11 she will respond to Mr. Petrus by the end of next week.
 12 That's the same email we were just looking at; right?
 13 A. Yes, that's the same email.
 14 Q. And at this time, you talked with Nancy about
 15 if she had ever had problems with the door prior to
 16 selling the house?
 17 A. I didn't have specific recollections. I did
 18 talk to Nancy on the phone. I do remember talking with
 19 her on occasion about this. I was actually in
 20 California for one of those phone calls. But I don't
 21 remember the nature of the discussion. And she was
 22 upset. She felt she had done what she was supposed to
 23 do and she did not feel there was a problem.
 24 Q. She did not feel there was a problem?
 25 A. Not one attributed to her as though she were

1 have no further responsibilities."
 2 And do you agree that all that is true?
 3 A. I agree that that is true.
 4 Q. Okay. If Nancy had known about something that
 5 was a defect in the house, and didn't disclose it, and
 6 it wasn't found in due diligence, wouldn't that be her
 7 responsibility?
 8 MR. MILLEMANN: Objection. It calls for
 9 speculation. It calls for a legal conclusion.
 10 THE WITNESS: The property disclosure deals
 11 specifically with what she knows. But she's not under
 12 obligation to discover.
 13 Q. (BY MS. FOSTER) Right. So if she does know
 14 something, but she doesn't put it down on the property
 15 disclosure form, and it's not found at inspection, isn't
 16 that her responsibility?
 17 MR. MILLEMANN: Object to the form of the
 18 question. Object it calls for speculation. It calls
 19 for a legal conclusion, and mischaracterizes the terms
 20 of property disclosure, itself.
 21 Q. (BY MS. FOSTER) You can answer the question
 22 if you remember it?
 23 A. Can you please ask re-ask the question?
 24 Q. So if she, Nancy, does know something, but she
 25 doesn't put it down on the property disclosure form, and

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1 it isn't found at inspection; isn't that her
2 responsibility?
3 MR. MILLEMANN: The same objections.
4 THE WITNESS: I'm not able to answer that
5 again. Because what Nancy knows, or did not know, I had
6 no knowledge of.
7 Q. (BY MS. FOSTER) Well, let me ask it this way.
8 You are a real estate agent; right?
9 A. Yes.
10 Q. And you deal with property disclosure forms
11 all the time; right?
12 A. Yes.
13 Q. And you understand what the disclosures of
14 responsibility are when they fill out a property
15 disclosure form; correct?
16 A. Yes.
17 Q. You are a licensed broker?
18 A. Yes.
19 Q. Okay. Isn't it true, that if a seller doesn't
20 disclose something that's a defect, that they know about
21 on the property disclosure form, that's their
22 responsibility, regardless of whether it's found in due
23 diligence?
24 MR. MILLEMANN: Object to the form of the
25 question. It's leading, and it calls for speculation.

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1 THE WITNESS: I don't know how to answer that
2 one.
3 Q. (BY MS. FOSTER) Do you advise your clients or
4 your customers to be complete and honest when they fill
5 out a property disclosure form?
6 A. I advise my clients to disclose everything
7 they know about, and in detail. And if there was any
8 issues with the property to describe, not just the
9 problem, but how it was remedied, and that's best
10 practices.
11 Q. When you saw the email from Nancy in June
12 19th, 2012, where she said, if you keep the door locked,
13 it will dry out and won't be a problem. Did you
14 consider that to be the sort of condition that should be
15 disclosed on a property disclosure form?
16 A. I would have preferred that if that was an
17 issue, if she recognized it as an issue, that you
18 disclose.
19 Q. Why would you have preferred that?
20 A. Just we probably wouldn't be sitting here
21 today. But having done this for many homes, a lot of
22 things owners are used to, and they do not see them as
23 issues. So they don't disclose a lot of things, which
24 they just figure are the normal function of the home.
25 Q. Is it normal for a door to have to stay locked

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1 so that it can dry out?
2 A. I wouldn't know. I have difficulties with
3 doors at every house that I have listed.
4 Q. Right. So in your experience, have you ever
5 had a seller that had a door that in order to dry out
6 had to stay locked?
7 A. I've never had that experience.
8 Q. So this was new?
9 A. This was new.
10 Q. This was not something normal that you had
11 encountered before?
12 A. I've encountered many doors that don't
13 function properly. But I've never encountered that, no.
14 Q. How defective must the door be that in your
15 opinion, as a real estate agent, worthy of being listed
16 on a property disclosure form?
17 A. Generally if the seller is aware of a defect
18 of water intrusion or other issues, best practices, they
19 should disclose it.
20 Q. So if that door needs to stay locked in order
21 to dry out, and you knew about it, would you advise the
22 seller to disclose that?
23 MR. MILLEMANN: Object to the form of the
24 question. It's leading, and calls for speculation.
25 THE WITNESS: I cannot, under law, and

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1 especially under the terms of that disclosure, in any
2 way be involved with it, beyond the initial advice I
3 give, tell what you know, and what you discovered, and
4 anything that you discovered of the condition of your
5 home. And that's in the opening paragraph of the
6 disclosure form. And specifically, within that
7 paragraph, real estate agents are enjoined from
8 participating in the disclosure process. We are not
9 qualified. We are not owners of the home, nor can we
10 make recommendations beyond just best practices.
11 Q. (BY MS. FOSTER) So if you know of a defect,
12 and you know the seller knows and doesn't disclose it,
13 you can't get involved in that? Is that what you are
14 tell me?
15 A. If I know of a defect on the listing of the
16 house, I'm going to advise the seller to disclose it,
17 yes. If I don't know about it, I certainly can't.
18 Q. I'm just trying to understand what your role
19 is with the property disclosure form. If you had a
20 client who knew of a defect, and you knew they knew, and
21 you knew they didn't put it down on the property
22 disclosure form, what do you do?
23 A. Well, you'll notice in your disclosure, we
24 amended that disclosure when certain things came to
25 light. So you'll notice on page 4, there is an

1 amendment. So sometime during the listing, I have a
 2 property currently listed. The seller calls up and just
 3 says, oh, I remember the neighbor was repairing his
 4 condo, and water leaked into my condo. And I said, we
 5 have to amend the disclosure, which we did.
 6 Q. So if you found out the seller knew of the
 7 defect, you would advise them to include it in their
 8 property disclose form?
 9 A. I would advise them to do so, yes.
 10 Q. And if they didn't do so?
 11 A. That's on them.
 12 Q. That's on them. That's not something you
 13 would normally do about that?
 14 A. I cannot compel them.
 15 Q. And are you obligated to tell the potential
 16 buyer about this? Or do you consider yourself obligated
 17 to tell a potential buyer if this happens?
 18 A. If it's considered a material fact, yes, if it
 19 is something in my current knowledge. So if a roof is
 20 leaking, yes, the buyer would need to know.
 21 Q. Okay.
 22 A. And I would certainly ask, beg, and plead that
 23 the seller provide that information to the buyer.
 24 Q. Okay. But you can't compel them to do it?
 25 A. No.

1 A. Absolutely not.
 2 MS. FOSTER: Okay. Let's see. I want to try
 3 to get you out of here sooner, rather than later. Can
 4 we take a five minute break to see if I can look at it
 5 and see if I have any questions about it.
 6 THE WITNESS: Sure.
 7 (A recess was had.)
 8 MS. FOSTER: We're back on.
 9 Q. (BY MS. FOSTER) I've gone through your file
 10 quickly, and I did find one email that I wanted to ask
 11 you about, but only one. This is an email dated April
 12 3rd, 2013 from you to Jean Odmark and Nancy. Take a
 13 quick look, if you don't mind?
 14 A. Yes.
 15 Q. Okay. And --
 16 MR. MILLEMANN: I'm sorry. What's the date on
 17 that again?
 18 THE WITNESS: April 3rd, 2013, 1:24 p.m.
 19 MR. MILLEMANN: Can I see that quickly?
 20 MS. FOSTER: Yes.
 21 Q. (BY MS. FOSTER) And can you compare it to Tab
 22 8 in your binder?
 23 A. (Witness complying.)
 24 Q. So halfway down the page, on Tab 8, which is
 25 previously marked Exhibit 6 for the Nancy Gentry-Boyd

1 Q. And so if they refused, you would disclose it
 2 to the buyer?
 3 A. Again, if it rises to the level of material
 4 fact.
 5 Q. Correct.
 6 A. And again, that goes into client
 7 confidentiality, and do I know what I think I know.
 8 Q. Right.
 9 A. And I could actually violate my client
 10 relationship by revealing something based on supposition
 11 or speculation.
 12 Q. Yes, certainly.
 13 A. So it would have to be documented by an
 14 outside third party before I could make a disclosure.
 15 Q. And what about a customer relationship? The
 16 same thing, same answer?
 17 A. Best practices, yes, the same answer.
 18 Q. Okay. So if it had been documented that these
 19 french doors would need to stay locked in order to dry
 20 out, is that something that you would have disclosed to
 21 the punitive buyer?
 22 A. I would have expected, if that was a known
 23 fact, that it would have been disclosed, yes.
 24 Q. Okay. And so you don't help fill out these
 25 property disclosure forms, yourself?

1 deposition, Bates labeled Batchelor 98. There is an
 2 email from Kevin Batchelor to you on April 3rd, 2013, at
 3 1:16, passing on Ed's questions about the door. And we
 4 discussed this earlier; right?
 5 A. I believe so, yes.
 6 Q. Okay. And then it looks like about eight
 7 minutes later, you emailed Nancy and Jean with a copy of
 8 the original inspection contingency release and portions
 9 of the inspection report; is that right?
 10 A. I think Nancy had requested that I send her
 11 that portion of the contract for her review.
 12 Q. When did she request that?
 13 A. I'm going to assume, on April 3rd.
 14 Q. Is it before or after you got that 1:16 email
 15 from Kevin Batchelor; do you know?
 16 A. I don't know if the time stamp is correct.
 17 This was after.
 18 Q. And I don't know if there is a Pacific -- no,
 19 there isn't. Okay. So it was after. So it was between
 20 1:16 and 1:24 p.m. on April 3rd, Nancy asked you to send
 21 those documents?
 22 A. That's the way I read it, yes.
 23 Q. Did she call you?
 24 A. I'm going to assume, yes, because I don't have
 25 an email making that request.

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1 Q. And did you understand what she wanted those
2 documents for?
3 A. Probably just to look at them. She should
4 have had a full set of copies, but whether she could
5 locate those are or not. She knew I would be a quick
6 source.
7 Q. Did you understand that she wanted to look at
8 them in order to see that this was a repair that
9 Mr. Petrus had requested?
10 MR. MILLEMANN: Objection; lack of foundation.
11 It calls for speculation.
12 THE WITNESS: All I know, she wanted these
13 documents.
14 Q. (BY MS. FOSTER) You didn't know why?
15 A. I don't recall why. But there is a previous
16 email, which she requested other documents, which I
17 sent, specifically Addendum 5?
18 Q. Right.
19 A. So I'm kind of in the habit when somebody
20 requests documents, which I have on file, and I have
21 them, I will forward them as a convenience to them.
22 Q. But you have no understanding of what she
23 wanted them?
24 MR. MILLEMANN: The same objection.
25 THE WITNESS: I don't know what the reason

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1 would have been. I was responding to her request.
2 Q. (BY MS. FOSTER) Well, as her agent, did you
3 have any understanding as to what relevance those
4 documents might have to Ed's inquiry?
5 MR. MILLEMANN: Same objection, the third
6 time.
7 THE WITNESS: I have no recollection of what
8 the discussion was. Clearly, in the framework we were
9 discussing, I recognized it was what was happening.
10 Q. (BY MS. FOSTER) And sitting here, as her
11 agent, and as an agent, what is the connection
12 before --
13 MR. MILLEMANN: Object to the form.
14 MS. FOSTER: Let me finish the question.
15 MR. MILLEMANN: Were you finished?
16 MS. FOSTER: No.
17 Q. (BY MS. FOSTER) You said, I have no
18 recollection of what he did. It clearly was in the
19 framework we were discussing. I recognized it
20 was -- what was happening. What do you mean by that?
21 A. Well, the emails before and after are related
22 to the home on 2130 Payette. And I'm going to assume,
23 based on this, that Nancy wanted to see a portion of the
24 contract related to some of Mr. Petrus' claims.
25 Q. A portion of the contract related to his

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1 claims about the doors?
2 A. About the transaction.
3 Q. His claims here about the doors only, though;
4 right, at this time?
5 A. His claims are about the doors. Nancy's
6 request relates to the actual transaction.
7 Q. Okay. Just to be clear, your testimony today
8 is, you don't know what relevance the documents she
9 requested could have to Ed's claims about the door? Is
10 that your testimony?
11 A. If you are asking my opinion, they had no
12 relevance.
13 Q. Why not?
14 A. Because the doors were not mentioned in those
15 documents.
16 Q. Is that why she asked for them, to see if the
17 doors were mentioned in the documents?
18 MR. MILLEMANN: Object to the question. It
19 calls for speculation.
20 THE WITNESS: As again, because I have no
21 recollection, all I can speak to is that she requested
22 them, and I delivered them.
23 Q. (BY MS. FOSTER) And you say, you don't know
24 why. And you don't think they are relevant to the
25 doors?

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1 A. The doors never came up during the inspection
2 and sale of the home. So these documents did not
3 pertain to the doors.
4 Q. Did you say to her, Nancy, why are you asking
5 for these documents? They are not relevant?
6 A. No.
7 Q. Why not?
8 A. Anything she wanted, she can get. This was
9 her transaction I have the files. Any document within
10 that file, that I shared with you, that she wanted,
11 she's entitled to. But that applies to all my clients
12 and customers. If they want something, and I have it,
13 I'll, as a courtesy, provide it.
14 Q. I guess my question is, when I read these, I
15 hadn't seen these emails before today. And I interpret
16 them -- and just having seen them today, to mean, that
17 Nancy wanted to see what was in the repair list to see
18 whether the doors were there. That's how I interpreted
19 it. And I just want to know from you, whether you think
20 my interpretation is reasonable, or not?
21 MR. MILLEMANN: Objection. It calls for
22 speculation.
23 THE WITNESS: Again, I don't know.
24 Q. (BY MS. FOSTER) You don't know?
25 A. I don't even remember doing this. Okay. So

1 the conversation, or the reasons related to it, I don't
2 have any recollection. But I believe Nancy wanted to
3 review the contract, and what she had agreed to do to
4 refresh her mind.

5 Q. And then after that, she sent an email,
6 saying, the due diligence period is closed, and I have
7 no more further responsibilities; right?

8 A. I would have to check the file. Is
9 that -- does that follow subsequently?

10 Q. Yes. Tab 9.

11 A. Okay.

12 Q. And did you ever see this email before today?
13 I guess you did, because Ed forwarded it to you on April
14 9th?

15 A. Yes, cc'd to me.

16 Q. And you agreed with all of what she said, or
17 you testified; right?

18 A. I did.

19 Q. And had you reviewed the documents you sent
20 Nancy on the 4th, in this email we were just discussing,
21 when you sent them to her, did you review them?

22 A. To the extent, I had to pull them from the
23 file, organize them, scan them, and email them to her,
24 yes.

25 Q. And did you review them substantively to see

1 A. Patchwork, but those things like that. I was
2 aware of, because I was directly involved in
3 facilitating the repairs.

4 Q. So when you testified that you think she's
5 correct here, that due diligence was completed, and I
6 have no further responsibilities, is that opinion by
7 you, based on the fact that the repair of the door was
8 not requested during the sale of the home?

9 A. My opinion is that she met all of her
10 requirements of the contractual agreement with the buyer
11 in selling her home.

12 Q. And does one of those include the fact that
13 the repair was not listed in the items requested to be
14 repaired by Mr. Petrus?

15 A. It was not asked for. It was not evidenced.
16 So, therefore, there was no repair.

17 Q. Now, you've seen this email from her saying on
18 June 19th, the door needed to be locked in order to dry
19 out. And that was something you learned before closing;
20 right?

21 A. Yes.

22 Q. And then you told me, that if you had known
23 she had known that, then you would wanted it on the
24 property disclosure form; isn't that true?

25 A. No, that not how I would characterize that

1 what was in them?

2 A. I refer to them in that respect. But we did
3 not have a full inspection report. I recognize the
4 difference between a full inspector's report and the
5 pages we had. So I was at least aware that I was only
6 sending her those portions that were released to us.

7 Q. Okay. And did you look at it to see for
8 yourself, whether the doors had been listed as a
9 potential repair?

10 A. I doubt I needed to. I had enough
11 recollection, even now, that that was not on the list.

12 Q. So you didn't look at it to double-check?

13 A. No, I was not worried about -- as I said, when
14 the repair request were made, it wasn't my
15 responsibility to organize the repairs, to meet
16 contractors and repairmen at that property. This was
17 not one of the issues that we dealt with.

18 Q. Okay.

19 A. We dealt with the gas line that was not capped
20 per code. We dealt with the air-conditioning heat pump
21 unit that burned out. And a sound proofing enclosure
22 that had largely been responsible for that, and nearly
23 burnt the house down. There was some, I guess,
24 Sheetrock --

25 Q. I don't have any questions about that.

1 statement. If any issue was a known issue on the house,
2 I would expect her to disclose, and I would certainly
3 ask her to disclose it. The issue with sticky doors is
4 all homes have them for one reason or another. And some
5 of them are seasonal, but they don't rise to a level of
6 an issue, particularly in the mind of a home seller.

7 Q. Right. Well, I'm not asking you just about a
8 plain old sticky door. I'm asking you about what she
9 said in her email, a door you needed to keep locked in
10 order to dry out. That's what I'm asking you about.

11 A. Nancy did not believe that was a problem,
12 so...

13 Q. How do you know she believed that?

14 A. Because she apparently dealt with it before,
15 and it was a self-solving issue. And it was apparently
16 related, a seasonal issue. And apparently, she did not
17 believe it rose to a level of a disclosure issue.

18 Q. But you do; right?

19 A. No, I don't. I don't know that it would rise.
20 As I've said, was it a material fact? I don't know. If
21 it is a material fact, if I've got water coming through
22 the ceiling, then, yes, it needs to be disclosed. If
23 I've got mold, and discoloration on a floor, we need to
24 know why, and disclose it. If there is no evidence of
25 any defect, then a sticky door would not rise to a level

1 of disclosure.
 2 Q. Let me ask you this. What do you mean by
 3 "sticky door"?
 4 A. Well, any time you have large doors,
 5 especially in the french-style configuration, they seem
 6 to be a curse for me. I have a listing on the lake
 7 right now with a door that I cannot seem to get locked.
 8 But my business partner has no problems, whatsoever. So
 9 would I have to disclose to the seller, they have a
 10 problem. And, no, I probably would have to disclose, I
 11 have a problem. Especially since my partner is 80 years
 12 old, and she can get it locked, and I can't. So, yeah,
 13 the fact that hardware is not operable at times, does
 14 not flag any serious concern on my part, not without
 15 supporting evidence that there are bigger issues
 16 involved.
 17 Q. So are you defining a sticky door to be one
 18 that has a hardware problem?
 19 A. Generally. It's usually when you are trying
 20 to latch it, that I run into problem with doors. And
 21 again, because they are large, and heavy, and tolerances
 22 are pretty tight.
 23 Q. So what about a door that she's describing?
 24 Is this a door that she says need to be kept locked, so
 25 it will dry out, and start functioning again. Does that

1 way you've used the word "material" earlier in your
 2 testimony?
 3 A. If it's a known fact, in other words, if we've
 4 had an inspector come in, and say, there is a problem
 5 with this door. It has swollen. Then we have an actual
 6 expert opinion on it. I would want that disclosed if
 7 that was known.
 8 Q. And what about if the seller knew it without
 9 having called the inspector, but she knew it was a fact?
 10 A. I don't know what she knows that's the
 11 problem.
 12 Q. But if she did?
 13 A. If she did, it would be up to her decide
 14 whether it rose to the level of disclosure.
 15 Q. You wouldn't advise her to disclose it?
 16 A. Not if the door is operable. As I said, if
 17 the door is operable, but it gives you fits, it doesn't
 18 necessarily mean there is an underlying problem. These
 19 doors are big and heavy, and even a sun shining on a
 20 door in the afternoon can cause it to become balky.
 21 Q. No. I'm trying to understand, you said this
 22 was the first time you had encountered a door that you
 23 had to keep locked to dry out. You've never had that
 24 happen in all your years as a real estate agent.
 25 A. I've never had that disclosed me.

1 fit your definition of a "sticky door," or is that
 2 something different?
 3 A. To her, it was a sticky door. I don't --
 4 Q. I'm asking what you think?
 5 A. I don't know what to think. I have no
 6 personal knowledge of it. Again, you are asking me to
 7 speculate on something without knowing the cause.
 8 Q. No. No. I'm asking what you mean when you
 9 say, "sticky door." Because you keep using the phrase,
 10 and I want to know, if a door, in your opinion, when you
 11 say the word "sticky door" includes --
 12 A. Okay. My definition of a "sticky door" is a
 13 door that operates, can be locked, but may be difficult.
 14 Q. To open and close?
 15 A. To open and close.
 16 Q. Okay. So when she describes that door that
 17 needs to -- so she says, it needs to be kept locked in
 18 order to dry out. So that means that it's wet; right?
 19 A. I don't know what she meant by that. But
 20 she's, I guess, she's assuming it was wet.
 21 Q. Does that meet your definition of a "sticky
 22 door" or is that something different?
 23 A. I would say, that's something different.
 24 Q. And so if that's something different, is that
 25 something that you would consider material, because the

1 Q. And you never had a door fit that description
 2 prior to this email from Nancy; correct?
 3 A. Correct.
 4 Q. So you don't have any comparable experience
 5 with a door just like this?
 6 A. No.
 7 Q. So this is not, as you said, this is different
 8 from your average sticky door; correct?
 9 A. From my experience, it would be different,
 10 yes.
 11 Q. And based on your experience, if you knew that
 12 the seller knew this door had to be kept locked in order
 13 to dry out, would you want her to put that on the
 14 property disclosure form?
 15 A. I would want her to, yes.
 16 Q. Jumping to a different topic. Do you know
 17 Todd McKenna?
 18 A. I do.
 19 Q. And how long have you known him?
 20 A. Maybe ten years.
 21 Q. Are you personal friends?
 22 A. No.
 23 Q. Do you have professional relationship with
 24 him?
 25 A. Yes. Yes.

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1 Q. Are you aware of his professional reputation
2 in the community?
3 A. To the extent that I use him as a home
4 inspector, yes.
5 Q. So you know what your opinion of his
6 competence is?
7 A. Yes.
8 Q. Okay. And what is your opinion?
9 A. He's been very competent. We've had good
10 success in using him.
11 Q. For sellers or buyers?
12 A. Both.
13 Q. Both?
14 A. We've had him represent when we have buyers
15 and he's been chosen as in this case to represent
16 somebody else's buyer.
17 Q. Okay. And do you know if he has a reputation
18 for being the inspector you hire, if you want to cover
19 up a defect, or get something sold?
20 A. No.
21 Q. You are not aware of any reputation in that
22 regard?
23 A. No.
24 Q. And in your experience, is that something he
25 does downplay a defect in order to get a transaction to

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1 go through?
2 A. No. He doesn't appear to be motivated by
3 that. He's open, and honest, and straightforward about
4 things.
5 Q. Were you there with him when he did the
6 inspection of 2130 Payette?
7 A. I don't recall. I think I was the one who let
8 him unlocked the door. I believe that's how it went. I
9 generally do not accompany inspectors. I have been at a
10 property with Todd that where I spent the entire eight
11 hours with him, because the seller requested it. But
12 normally we give them the opportunity to do their work
13 without staring over the shoulder.
14 Q. Do you recall whether you were there at this
15 time? I'm not trying to trick you?
16 A. I seem to recall letting him in. I have this
17 mental image of his truck parked in the drive and giving
18 access to the property, yes.
19 Q. And my understanding is you went into the
20 crawlspace with him; true?
21 A. That was after the fact.
22 Q. Oh.
23 A. So after we -- after the inspection, there
24 were several repair requests, and I asked Todd to
25 accompany me to point out exactly what it was we need to

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1 fix. And one of the issues was a gas line under the
2 crawlspace, that had not been capped according to the
3 code. So I wanted to make sure I knew which part of the
4 line we were talking about. So Todd took me down there,
5 pointed it out, and I took the repairman down there
6 pointed it out for repair.
7 Q. Were you there when they were doing the
8 repair?
9 A. Yes.
10 Q. Were you there when the phone was off and
11 pulled them out and water came out?
12 A. Which repair?
13 Q. The repair for the gas line.
14 A. I think you are mixing them up. The one with
15 A-1 Heating, he correctly capped the gas line. This is
16 first I heard of water coming out of a phone.
17 Q. So this is something you don't have any
18 knowledge of?
19 A. No. No.
20 Q. Okay. Fine. Okay. You said you have a
21 memory of Todd's truck out in front and maybe letting
22 him in to do his inspection, it was April 17th, 2012;
23 does that sound right to you?
24 A. April 17th.
25 Q. Yeah.

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1 A. Let me go back.
2 Q. Let's see.
3 A. Of course, I don't have my file now.
4 Q. Oh, do I have it?
5 A. I have it.
6 Q. I'm sorry. Here you go.
7 A. I can probably determine closer to the file.
8 I mean, our original closing date was April 20th. He
9 wouldn't have been out there on the 17th.
10 Q. Here we go. You know, I can help with this if
11 you turn to tab 5?
12 A. (Witness complying.)
13 MS. FOSTER: We'll put a sticker on this for
14 Exhibit 49. It's a one page document Bates labeled
15 Gentry-Boyd First Responses 239.
16 (Exhibit 49 marked.)
17 Q. (BY MS. FOSTER) And then there is an email
18 halfway this email discusses doing the final walk
19 through. Oh, what am I talking about. Okay. You are
20 right. I did it wrong, the April 17th.
21 A. Yes, it was March 18th.
22 Q. So March 18th, you said?
23 A. March 18th.
24 Q. 2012. Okay. We'll get to this in a minute
25 then. How much snow was on the deck that day?

1 A. I don't recall there was snow I don't know how
2 much.
3 Q. Did you walk around on the deck?
4 A. I didn't know.
5 Q. You did not?
6 A. I did not.
7 Q. Did you observe Todd walking around on the
8 deck?
9 A. I did not.
10 Q. Do you recall where you were?
11 A. I basically let him in and then I turned him
12 loose I don't know if I stayed. I don't remember if I
13 stayed. I generally in a situation like that I don't.
14 Todd will call me when he's finishing up and I'll come
15 back and secure the home.
16 Q. And did you do that day?
17 A. That's what I recall. I did not stay I gave
18 Todd access to the house make sure he could access all
19 the various portions of the house and let him do his
20 work.
21 Q. And you went to lock up?
22 A. I went to lock up.
23 Q. Did you have to lock the french doors that
24 day?
25 A. I don't remember. And the only door I can

1 A. Well, generally, we've only got about three up
2 here. There are Boise people. And my typical
3 recommendation is you can use an inspector of your
4 choice. You can bring up building contractors, roofing
5 contractors, anybody else you want to complete your
6 inspection. Here are three reputable inspectors or you
7 may choose an inspector of your preference.
8 Q. Okay.
9 A. Again, that's best practices. I don't want to
10 recommend a specific inspector.
11 Q. Is it relevant to you whether the in
12 inspectors that you list as potentials are bonded or
13 insured?
14 A. It's never been a question I've asked.
15 Q. Okay.
16 A. I when I used to run my business. I was
17 personally bonded and insured. So I guess I assumed
18 they would be. But it's never come up.
19 Q. Okay. Did you read Todd McKenna's inspection
20 report in this case?
21 A. Only the portions released to us.
22 Q. Does that include the portions discussing the
23 ants and the water in the crawlspace?
24 A. As I said, they have -- I have as an exhibit
25 in here, what was given to us. And it is the only

1 remember locking was the one I went out.
2 Q. The front door?
3 A. Yes, I always use the side door on the side of
4 the garage more accessible one.
5 Q. Okay.
6 A. I would have went through and verified
7 everything was locked. But as to remembering whether I
8 had to lock doors. Of course, Todd generally walk
9 through and lock everything as well. He was very good
10 at that, but I still had the obligation to secure the
11 door the home.
12 Q. When you hire a home inspector -- I'm
13 sorry -- let me rephrase that, because I know you are
14 not the one that secures them.
15 When you are representing the buyer, do you
16 give them names of home inspector?
17 A. I give them a list of three.
18 Q. Why do you give them three?
19 A. I don't want to cherry pick, and I don't want
20 to recommend a specific -- I include in my email they
21 are not listed in any specific order. I do generally do
22 them alphabetically just so it's clear I was not. And
23 generally, what happens a lot of times the first guy
24 that calls back, gets the job.
25 Q. How do you pick the three names to provide?

1 portion. So, for example, it starts at section 4, 5, 6,
2 that was what was released to us (indicating).
3 Q. Okay.
4 A. So I don't know if it deals with that. Even
5 though those pages are released to us we still only deal
6 with those requests that are contractual when they make
7 the inspection response.
8 Q. Okay.
9 A. So oftentimes there are pictures there that
10 are not related to what's being asked for but because
11 the report is designed this way. They come with it.
12 Q. So if I show you what is the fifth loose page
13 of what you handed me labeled 28 of 31. These are five
14 pictures showing ant signs past, moisture signs, and
15 water signs?
16 A. Right.
17 Q. And do you remember seeing those pictures?
18 A. I do.
19 Q. And did you have an opinion as to what caused
20 the ants and the moisture that was shown here?
21 A. I do not. And I am not qualified to give such
22 an opinion.
23 Q. As a real estate agent do you generally look
24 at the inspection report pictures that are provided?
25 A. I generally do, but specifically those that

1 pertain to a requested repair.
 2 Q. Okay.
 3 A. So I understand what's being asked for.
 4 Q. And is this the sort of have you seen pictures
 5 in other cases I say cases I mean other home sales,
 6 showing ants or wall or moisture in the crawlspace?
 7 A. Yes.
 8 Q. Okay. That's something you've seen before?
 9 A. I tell buyers if you want to look for moisture
 10 in the crawlspace it will be.
 11 Q. In this country?
 12 A. In generally there will be water under the
 13 advice confine in the crawlspace.
 14 Q. This does not alert you?
 15 A. This is not a red flag if you had a water line
 16 halfway of the stem wall, you know, where there was
 17 standing water. Moisture here coming up on the Visqueen
 18 is pretty normal.
 19 Q. Okay. I think I'm almost done with you. The
 20 last thing I want to ask you about is the final walk
 21 through, I kept trying to talk about April 17th, 2012,
 22 and that is Tab 5.
 23 A. Okay.
 24 Q. So the final walk through was done by Kevin
 25 Batchelor on April 17th, 2012; is that right?

1 going to be included or excluded.
 2 Q. That's what you remember?
 3 A. That was a hassle that's what I remember.
 4 This I know happened. I have a recollection of Kevin
 5 requesting a final walk through. I don't remember any
 6 more detail about it.
 7 Q. So you don't remember if you were there to
 8 lock up after he left?
 9 A. I don't. Again, going on best practices as I
 10 did with Todd, and everyone else, I would assume that I
 11 came out and secured the property after Kevin was done.
 12 But I have no memory of it.
 13 Q. Okay. You have no memory of it. Is it
 14 possible that you left early and Kevin was left to lock
 15 up?
 16 A. That is a possibility. Generally when we're
 17 dealing with a fellow agent it's not unusual to hand
 18 them the keys to a property ask allow them to do a walk
 19 through unaccompanied. If there is an alarm involved
 20 and other issues in general we're going to be involved.
 21 I just don't remember. In most of our lake fronts our
 22 best practice is we unlock it and we lock it. Were
 23 responsible. We'll grant an agent or inspector or
 24 repairmen's access were responsible for lock the homes
 25 ourselves.

1 A. Yes.
 2 Q. Were you present for that?
 3 A. I again, best practice, I don't really
 4 remember this. But I believe either Jean or I would
 5 have been out and gave him access.
 6 Q. Okay. But you don't recall?
 7 A. I don't. I don't recall.
 8 Q. And do you recall Kevin having trouble locking
 9 the french doors?
 10 A. No.
 11 Q. After his walk through?
 12 A. I have no recollection of that.
 13 Q. You didn't discuss that with him at any time?
 14 A. No that didn't come up. Not that I can
 15 remember.
 16 Q. Okay. And do you remember if you so I guess
 17 you just don't remember if you were there or not?
 18 A. I really don't. I my recollections were
 19 previous to this involving personal -- what I'll call
 20 furnishings that would remain?
 21 Q. Right.
 22 A. And there was some issue of what was being
 23 taken and what was left. And it was all contractual I
 24 know that either Jean and I perhaps both and either
 25 Kevin went out to photograph all the things that we're

1 Q. You don't remember if you did that here?
 2 A. I don't remember if I did that here.
 3 Q. Okay. And do you did there come a time when
 4 you went back out the house in 2013 or 2014?
 5 A. We did. We arranged Nancy and I to go out
 6 after the wall had been stripped to see what was going
 7 on.
 8 Q. Was this, approximately, April of 2014?
 9 A. I'm going to say, approximately. I don't -- I
 10 don't remember the exact date.
 11 Q. And who was there?
 12 A. I remember myself, Nancy, and Mike Longmire.
 13 Q. Was anyone there from disaster response or pro
 14 request out response out there Eric Wait?
 15 A. I don't recall him out there, no.
 16 Q. And what did you observe?
 17 A. We walked out on the deck. Came on the
 18 outside of the doors we've been talking about. The
 19 fascia of rock work had been removed and we could see
 20 extensive dry rot on the lower portion of that wall.
 21 Q. And how do you know it's dry rot?
 22 A. That's my amateur opinion of what I was
 23 seeing.
 24 Q. Okay. And what was said?
 25 A. Well, after we viewed it, Nancy turned to Mike

1 Longmire and said, well, how would I have known that was
 2 there. And Mike said, you wouldn't. I then turned to
 3 Nancy and said, you'll want to remember this
 4 conversation, because I thought that was accurate.
 5 Nancy, there was no visible issues that house was
 6 pristine inside and out. There was nothing even the
 7 doors looked beautiful. So to me that kind of spelled
 8 it out. Nancy would not have known based on any visual
 9 clues that there was any problem like that under the
 10 surface.
 11 Q. And were you thinking at that time about what
 12 Nancy knew or didn't know?
 13 A. I was thinking about the fact that there was
 14 no way she could have known.
 15 Q. Why were you thinking about that?
 16 A. Because I didn't know. I had seen the outside
 17 I had seen the inside. I saw no evidence of any damage
 18 in the home. Nancy made the same contention she had no
 19 idea that was going on inside the walls.
 20 Q. Did you say at that time, he had time to find
 21 this during due diligence if you remember?
 22 A. I don't remember her saying that.
 23 Q. Did you say that?
 24 A. I don't remember saying that.
 25 Q. What else do you remember besides remember

1 A. I'm not going to hold it against Mike, no.
 2 Q. Okay. Any other time you've been out to the
 3 house?
 4 A. That was the last time I was out to the house
 5 with Nancy, that I recall. That I went out there
 6 specifically so that she could see what it was that we
 7 had been talking about in emails.
 8 Q. Had you have you had any other conversations
 9 with Nancy about this lawsuit or the doors at any time?
 10 A. I don't recall anything after that visit. And
 11 obviously I was aware that this was happening. I don't
 12 recall because again I was not directly involved in this
 13 issue between two parties. It was dealing with things I
 14 had no knowledge of. So, no, I don't from that point
 15 forward I don't have any memory of being directly
 16 involved.
 17 Q. Or talking with Nancy?
 18 A. Yeah.
 19 Q. How about Ed Petrus? Have you talked with Ed
 20 about this case or the doors?
 21 A. Again, I don't have any recollection. As I
 22 said, Ed reached out to me.
 23 Q. Aside from the conversations we've discussed?
 24 A. With the emails here, I seem to recall one,
 25 perhaps two phone calls, but I think prior to that,

1 this conversation Nancy?
 2 A. That I have a distinct memory the others, no.
 3 I don't know if the conversation went beyond that.
 4 Q. Do you know Mike Longmire well?
 5 A. Yes, I've had Mike do work for me in my own
 6 home.
 7 Q. Is he trustworthy in your experience?
 8 A. He is, yes.
 9 Q. And is he a truthful?
 10 A. I believe he is.
 11 Q. And he says, he didn't say that to Nancy. Do
 12 you have any explanation for that differing
 13 recollection?
 14 A. It may not have registered with him. My
 15 comment, my aside to Nancy was not spoken. So he may
 16 have heard it and it may have been a throw away comment
 17 for him. But I distinctly remember the comment, and
 18 making that comment to Nancy.
 19 Q. Right. He doesn't remember saying, you
 20 couldn't have known this, Nancy?
 21 A. Well --
 22 Q. You have no explanation for the differing
 23 recollection on that one either?
 24 A. My memory has been pretty poor today, too.
 25 Q. You are doing great.

1 sometime between August and March; August of 2012.
 2 Q. '12?
 3 A. To March of 2013. I don't have recollection
 4 about some recollection of the phone calls. But I seem
 5 to remember on at least one occasion, Ed had called me
 6 up about something.
 7 Q. But you don't remember what was said?
 8 A. Un-huh. Sorry.
 9 Q. And how about with Chris Kirk? Have you
 10 spoken with Chris Kirk about this case or the doors?
 11 A. Again, I have no recollection. But clearly in
 12 June around the 19th, I must have reached out to Chris
 13 to get some information, so I could contact the
 14 manufacturer.
 15 Q. Right. Putting aside that contact, anything
 16 else you can remember?
 17 A. Nothing.
 18 Q. And how about Todd McKenna? Any conversations
 19 with Todd McKenna about the doors or this case?
 20 A. I've -- Todd's actually done some work
 21 recently, and we did have a brief conversation about it,
 22 about a week ago.
 23 Q. What was said?
 24 A. Basically that he felt sorry for me ask sorry
 25 I got drug in. And that, you know, in looking back on

1 it, he was glad that he had referenced that picture
2 showing the water intrusion. And that was -- I was
3 referring -- I had asked him for an inspection we're
4 doing on a current contract and I wanted him to pay
5 particular attention to a couple portions of the home,
6 because a particular seller doesn't want any issues. I
7 said, you know, I know sometimes you don't want to get
8 up on the roof I want you to get up on this roof, and I
9 want you to take pictures.

10 So, yes, we had a brief conversation about
11 that. And it was in general that he was just happy that
12 he had included those photos.

13 Q. Did he say, why?

14 A. Well, at the time, he wasn't sure what he was
15 looking at. But he was glad he had referenced the fact
16 that might want to do more investigation.

17 Q. Anything else?

18 A. That's all I recall.

19 Q. What did you say?

20 A. I don't recall talking too much about him. I
21 mean I'm assuming at this point I think he told me he
22 had been deposed. And I think we were talking more
23 about the current job I had for him than this one. But
24 we did touch on this briefly. I don't think I made
25 any -- expressed any opinions on who was right or wrong.

1 But she understands, she knows the broad overview of
2 what's happening, and she knows where I am today.

3 MS. FOSTER: Okay. I don't have any further
4 questions for you. Thank you. I don't know if other
5 folks do.

6 MR. MILLEMANN: I do.

7 EXAMINATION

8 QUESTIONS BY MR. MILLEMANN:

9 Q. For the record, Steve Millemann. Michael,
10 you've been involved in the real estate business in
11 McCall since 2004?

12 A. That's correct.

13 Q. This may seem like an obvious question, but I
14 am going to ask it any way. Over that period of time,
15 can you give me a ballpark estimate of how many homes
16 you have been in your capacity as a real estate agent
17 either to show on behalf of a seller or show on behalf
18 of a buyer?

19 A. Literally hundreds.

20 Q. And over that period of time -- I'm going to
21 ask you some more questions about, quote, unquote,
22 "sticky doors," and I want to at least have you
23 understand my definition when I use that term. When I
24 use the term "sticky door" I mean a door that will open
25 and close, but does not do so completely smoothly.

1 Q. So nothing else that was said about the home
2 or the doors or the lawsuit other than what you've told
3 me?

4 A. I think the only thing I had mentioned to Todd
5 that I remember him taking me into the crawlspace to see
6 the thing.

7 Q. The gas line?

8 A. And he says, well, I thought I took Ed down
9 there for that. So I don't know if his memory or my
10 memory is wrong. But I remember him taking me down
11 there so I would know what to tell the repair guy and I
12 think we did discuss that in our conversation.

13 Q. And did you see anything the crawlspace when
14 you were down there, that you noted or that alerted you?

15 A. No, I mean, I was there for the purpose of
16 completing repair so I wanted him to show me what it was
17 we were dealing with.

18 Q. Okay. I'm looking at my phone, because that's
19 where my notes are. I'm not trying to be rude.

20 And finally, have you spoken with Jean Odmark
21 about the lawsuit or home or?

22 A. Only to the extent to let her know I won't be
23 reachable for a couple hours. No, she was not involved.
24 She was not the one that made the comments that have
25 been questioned. She wasn't out there with Ed Petrus.

1 Okay?

2 A. Okay.

3 Q. Okay. In your experience, and over the period
4 in question, and being in and out of hundreds of homes,
5 would you consider encountering a sticky door to be
6 typical or atypical?

7 A. Typical.

8 Q. And in your experience, can a sticky door be
9 caused by anything other than hardware problems?

10 A. Sure.

11 Q. What other things in your experience could
12 cause a door to stick?

13 A. Solar heating, I mean, just heat expansion on
14 a warm summer day, if it's in direct sunlight. Poor
15 alignment, just sagging, at the hinges just because
16 these are heavy, and gradually over time the metal
17 doesn't hold them as secure in align as they would want
18 to be. Just humidity, if exterior stone is blown up
19 against the snow, and leaning on it in the winter, that
20 can cause problems.

21 Q. Okay.

22 A. I should amend that, too. That over time,
23 hardware wears, and the tolerances become sloppy and
24 then sometimes internal hardware breaks. I've
25 experienced all of those things.

1 Q. Thank you. So I want to you've been correctly
2 careful to point out that you don't have personal
3 knowledge as to exactly what Nancy Gentry experienced
4 with the french doors in question; correct?

5 A. Correct.

6 Q. I want to ask you a hypothetical, because you
7 were asked quite a lot by counsel as to when, and what
8 circumstances you would prefer that a seller discloses a
9 fact. And you've referenced the term material fact.

10 So my hypothetical is as follows: If the
11 evidence in this case were to show that Nancy Gentry on
12 one or more occasions encountered a sticky door on those
13 french doors, during the winter or wet months, that
14 resolved during the dry months, would you have an
15 opinion whether it was common for her to write that
16 comment down on disclosure?

17 MS. FOSTER: Objection; form and speculation.

18 THE WITNESS: As a hypothetical, if you put
19 yourself in the mind of the seller, and they been used
20 to living in the home. They become used to so many
21 things, that they find normal and an outsider would find
22 objectionable. And I would not be surprised if a seller
23 did not feel that rose to the level of disclosure.

24 Q. (BY MR. MILLEMANN) And hypothetically, again,
25 if the evidence in this case were to show that Nancy

1 Q. Has Nancy Gentry ever made any statement to
2 you which suggests that she was aware of that?

3 A. Could you be more precise?

4 Q. Yes. You've testified that you did not see
5 any signs or evidence to suggest that moisture had made
6 its way under the doors in question, or inside the
7 veneer of the walls. Has Nancy Gentry ever made any
8 statement to you to indicate that she was aware of
9 either of those?

10 A. No.

11 Q. When you were in the home, did you have any
12 protocol that you followed as you departed the home?

13 A. I did. And that was to go from room to room,
14 and circle the entire house upstairs, downstairs, and
15 the garage, and make sure all the doors were secured and
16 all the windows were secured.

17 Q. Did the home have an alarm system?

18 A. I believe it did, but I can't remember.

19 Q. So you don't remember whether you armed the
20 alarm system as part of your protocol?

21 A. I, you know, again, it's one of those things,
22 I just don't remember.

23 Q. Yeah.

24 A. I believe there was an alarm pad right by the
25 back door, and I believe it -- and it would not arm if

1 Gentry on one or more occasion encountered stickiness
2 with those doors in the winter, that she had Chris Kirk
3 come inspect the door, and it resulted in adjustments
4 that resolved the problems. Would you have any opinion
5 as to whether it was improper for her to write that out
6 on a comment on a disclosure form?

7 MS. FOSTER: The same objection.

8 THE WITNESS: See, again, that would seem like
9 normal maintenance. And it would not -- making repairs
10 to the home, whether it is the dead bolt, or the hinge
11 hardware or the locking mechanisms would not rise to the
12 level of disclosure, in my mind.

13 Q. (BY MR. MILLEMANN) How many times do you
14 estimate you were in the Gentry home prior to the
15 closing of the sale to Mr. Petrus?

16 A. Probably less than a dozen times.

17 Q. Did you ever observe anything inside or
18 outside of the home that caused you any concern or
19 suspicion that there was water intrusion in the home?

20 A. No.

21 Q. Did you ever observe anything on the doors,
22 themselves, to suggest that water or moisture had found
23 its way under the doors in the manner which was later
24 disclosed?

25 A. No.

1 we had a door not secured. But my mind is -- my memory
2 is not there.

3 Q. Your best recollection, is there was an alarm
4 system, and that you would not have been able to arm it
5 if you had a door that wasn't locked?

6 A. Right.

7 Q. Did you ever encounter that?

8 A. I -- I never had an experience where I
9 couldn't secure the home. I mean, I really don't
10 remember the alarm system. I seem to think there was
11 one. There is a pad right by that door, but I
12 don't -- I don't have a specific memory.

13 Q. And you've testified that there was one
14 occasion, I believe you said, that you were called upon
15 to close on, and lock the french doors in question after
16 a potential buyer had gone out through them?

17 A. Yes.

18 Q. And you testified you were able to do so;
19 correct?

20 A. Correct.

21 Q. But you testified that you had to kind of
22 tinker with the door, as you put it, to get the
23 alignment right, so it would lock?

24 A. Yes.

25 Q. Based on your experience, is that something

1 that you think should have been disclosed on the
 2 property condition disclosure report?
 3 A. I would have to say, no, because it didn't
 4 rise to a level of concern to me. I didn't point that
 5 out to Nancy, because it's not -- it's typical to
 6 encounter that.
 7 Q. Okay. At any time after the closing of the
 8 sale to Mr. Petrus, did you understand that you were
 9 acting as Nancy Gentry's agent?
 10 A. No.
 11 (Exhibit 50 marked.)
 12 Q. (BY MR. MILLEMANN) Michael, showing you
 13 what's been marked as Exhibit 50. Are you able to
 14 identify that?
 15 A. Yes.
 16 Q. And can you do so for the record, please?
 17 A. It's an exclusive seller's representation
 18 agreement between Bill McMurray and Nancy Gentry-Boyd
 19 for the listing of her home.
 20 MS. FOSTER: Counsel, have these been
 21 produced?
 22 MR. MILLEMANN: We received these from
 23 Mr. Wood as part of the documents he provided today.
 24 MS. FOSTER: When?
 25 MR. MILLEMANN: I think Mr. Wood dropped the

1 original listing expired December 30th, 2009. And we
 2 were now extending it through until September 15th,
 3 2010, which indicates there was a lapse between the time
 4 it expired and the time it was renewed.
 5 (Exhibit 52 marked.)
 6 Q. (BY MR. MILLEMANN) Michael, showing you
 7 Exhibit 52. Are you able to identify that for the
 8 record?
 9 A. For the record, this is a new seller's
 10 representation agreement between Nancy Gentry Boyd and
 11 Michael Anderson, broker of McCall Real Estate Company,
 12 dated February 2nd, 2011.
 13 Q. Did that reinstitute or continue the exclusive
 14 representation agreement between Michael Anderson and
 15 Nancy Gentry-Boyd?
 16 A. It reinstated it. Obviously, it had been
 17 taken off the market. It was put back on the market
 18 that day.
 19 Q. And what happened on that?
 20 A. It was set to expire, this agreement,
 21 September 1st, 2011.
 22 Q. And you already testified, and I believe it's
 23 marked as an exhibit, at the time of the transaction in
 24 question here, you were operating pursuant to an RE-12
 25 compensation agreement; is that correct?

1 packet by about a week ago.
 2 MS. FOSTER: Okay.
 3 (Exhibit 51 marked.)
 4 Q. (BY MR. MILLEMANN) Michael, can you look at
 5 what's been marked as Exhibit 51. And tell me if you
 6 identify it, please?
 7 MS. FOSTER: This here?
 8 MR. MILLEMANN: You have it here.
 9 THE WITNESS: This is addendum No. 1 to the
 10 exclusive seller's agreement. The agreement was dated
 11 5-10, 2009, for the sell of 2130 Payette Drive for Nancy
 12 Gentry-Boyd.
 13 Q. And what is the second page of that?
 14 A. That is Addendum No. 2, for the same
 15 transaction. This is when we moved from Community Real
 16 Estate back to McCall Real Estate Company, and we
 17 transferred the listing agreement from one brokerage to
 18 the other.
 19 Q. And what would have been the affect to the two
 20 addenda, which are referenced in Exhibit 51?
 21 A. The first addenda extends the term of the
 22 listing agreement. The other adjusts the purchase price
 23 to 1,950,000.
 24 Q. And for what term was it extended?
 25 A. I would have to go back to Exhibit 50. The

1 A. That's correct.
 2 Q. Was there any RE-16 seller representation
 3 agreement in effect at that time?
 4 A. No.
 5 Q. And from your perspective after closing was
 6 there any written agreement in effect after about
 7 between your company and Nancy Gentry-Boyd to your
 8 office?
 9 A. There was no written agreement.
 10 MR. MILLEMANN: 53, please, that's four pages.
 11 (Exhibit 53 marked.)
 12 Q. (BY MR. MILLEMANN) Michael, showing you
 13 what's been marked as Exhibit 53. Could you take a
 14 moment, and review all the pages of that and tell me if
 15 you are able to identify it?
 16 MS. FOSTER: Are these the Manatron pages?
 17 MR. MILLEMANN: I believe so.
 18 THE WITNESS: Okay. Yeah, these are tax
 19 records for 2130 Payette Drive referencing tax
 20 assessments.
 21 Q. (BY MR. MILLEMANN) How many pages, Michael?
 22 A. There are four pages, and covering the period
 23 of two years.
 24 Q. And I'm reading correctly, they are covering
 25 the period of 2010 and 2011?

EXHIBIT 4

Michael: we are running out of time. The doors MUST be re-installed and it takes 6 weeks to get the parts and new doors. That will mean we will be forking on they this winter which will increase the cost for your client. Doing repairs of this nature in the winter always increases the costs. Please advise what if anything your client wants to do about replacing the doors. Thank you ED Petrus

From: Michael Wood <michael.mccallrealtor@gmail.com>
Date: Friday, August 3, 2012 11:35 AM
To: Microsoft Office User <eapetrus@me.com>
Subject: Re: Door instillation/water intrusion

Ed, the seller will be contacting the builder to obtain cost information on the repair you are requesting. She will get back to me as soon as she has consulted with Chris Kirk.

On Aug 2, 2012, at 1:07 PM, Ed Petrus wrote:

Michael: We are moving forward and it is apparent that the doors will have to totally re-installed. Have you spoken to your client Nancy Boyd about the matters we discussed? In addition to the matters we discussed— it is apparent that CTR was contacted by your client about the problem with the doors but was never contracted to fix or repair it. Once lawyers get involved the costs will multiply. I would like to keep lawyers out of this as best as we can. This is a pretty straight forward case of non-disclosure. Those doors have clearly been a problem for Nancy for years and the duc-tape she used would not fix true problem. Please advise of how Nancy would like to proceed. Thank you Ed Petrus

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

This message may contain confidential or proprietary information intended only for the use of the addressee(s) named above or may contain information that is legally privileged. If you are not the intended addressee, or the person responsible for delivering it to the intended addressee, you are hereby notified that reading, disseminating, distributing or copying this message is strictly prohibited. If you have received this message by mistake, please immediately notify me by replying to the message and delete the original message and any copies immediately thereafter.

Thank you.

*

Michael Wood
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michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

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Thank you.

*

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

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Thank you.

*

EXHIBIT 10

Angela Jenkins

From: Ed Petrus <eapetrus@me.com>
Sent: Wednesday, April 03, 2013 12:45 PM
To: McCall Cathy and Kevin Batchelor
Subject: FW: Door instillation/water intrusion

Kevin: Below is Michael's email to me that Nancy was talking to Chris Kirk about the issue. They are giving us the same story looks as if they are delaying.

From: Michael Wood <michael.mccallrealtor@gmail.com>
Date: Monday, August 13, 2012 1:57 PM
To: Microsoft Office User <eapetrus@me.com>
Subject: Re: Door instillation/water intrusion

Former owner is working with the Builder Chris Kirk to facilitate this. I have given Chris the info he requested. Am waiting for marching orders.

On Aug 13, 2012, at 2:46 PM, Ed Petrus wrote:

Michael: we are running out of time. The doors MUST be re-installed and it takes 6 weeks to get the parts and new doors. That will mean we will be forking on they this winter which will increase the cost for your client. Doing repairs of this nature in the winter always increases the costs. Please advise what if anything your client wants to do about replacing the doors. Thank you ED Petrus

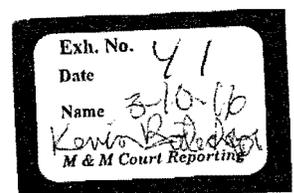
From: Michael Wood <michael.mccallrealtor@gmail.com>
Date: Friday, August 3, 2012 11:35 AM
To: Microsoft Office User <eapetrus@me.com>
Subject: Re: Door instillation/water intrusion

Ed, the seller will be contacting the builder to obtain cost information on the repair you are requesting. She will get back to me as soon as she has consulted with Chris Kirk.

On Aug 2, 2012, at 1:07 PM, Ed Petrus wrote:

Michael: We are moving forward and it is apparent that the doors will have to totally re-installed. Have you spoken to your client Nancy Boyd about the matters we discussed? In addition to the matters we discussed—it is apparent that CTR was contacted by your client about the problem with the doors but was never contracted to fix or repair it. Once lawyers get involved the costs will multiply. I would like to keep lawyers out of this as best as we can. This is a pretty straight forward case of non-disclosure. Those doors have clearly been a problem for Nancy for years and the duc-tape she used would not fix true problem. Please advise of how Nancy would like to proceed. Thank you Ed Petrus

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
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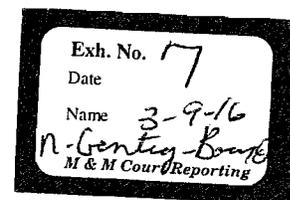
Thank you.

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

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Thank you.

EXHIBIT 11



Begin forwarded message:

From: Ed Petrus <eapetrus@me.com>
Subject: Re: Door instillation/water intrusion
Date: March 18, 2013 at 5:29:42 PM MDT
To: Michael Wood <michael.mccallrealtor@gmail.com>

Thank you Michael

Sent from my iPhone

On Mar 18, 2013, at 4:26 PM, Michael Wood <michael.mccallrealtor@gmail.com> wrote:

I will forward to seller once bid is delivered. Thanks!
On Mar 18, 2013, at 5:08 PM, Ed Petrus wrote:

Michael: Kevin or someone in his office will be dropping off for you and your client a copy of the estimate to replace the defective doors. Please provide a copy to Nancy at your earliest convenience. Although we could not replace the doors during the winter, this matter has dragged on far to long. I would like to see if we can get this matter resolved without attorneys since your client clearly knew she had problems and water intrusion coming from the doors. Thank you ED Petrus

From: Michael Wood <michael.mccallrealtor@gmail.com>
Date: Friday, August 3, 2012 11:35 AM
To: Microsoft Office User <eapetrus@me.com>
Subject: Re: Door instillation/water intrusion

Ed, the seller will be contacting the builder to obtain cost information on the repair you are requesting. She will get back to me as soon as she has consulted with Chris Kirk.

On Aug 2, 2012, at 1:07 PM, Ed Petrus wrote:

Michael: We are moving forward and it is apparent that the doors will have to totally re-installed. Have you spoken to your client Nancy Boyd about the matters we discussed? In addition to the matters we discussed—it is apparent that CTR was contacted by your client about the problem with the doors but was never contracted to fix or repair it. Once lawyers get involved the costs will multiply. I would like to keep lawyers out of this as best as we can. This is a pretty straight forward case of non-disclosure. Those doors have clearly been a problem for Nancy for years and the duc-tape she used would not fix true problem. Please advise of how Nancy would like to proceed. Thank you Ed Petrus

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
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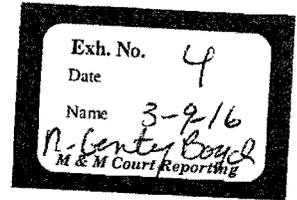
Thank you.

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
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Thank you.

EXHIBIT 12



STEVEN J. MILLEMANN, ISB NO. 2601
 GREGORY C. PITTENGER, ISB NO. 1828
 MILLEMANN, PITTENGER & PEMBERTON, LLP
 ATTORNEYS AT LAW
 POST OFFICE BOX 1066
 706 NORTH FIRST STREET
 MCCALL, IDAHO 83638
 TELEPHONE (208) 634-7641
 FACSIMILE (208) 634-4516
 EMAIL: sjm@mpmplaw.com
 EMAIL: gcp@mpmplaw.com

Attorneys for Defendant Nancy Gentry-Boyd

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

PETRUS FAMILY TRUST DATED MAY 1, 1991, and EDMOND A. PETRUS, JR., individually and as Co-Trustee of the Petrus Family Trust Dated May 1, 1991,

Plaintiffs,

v.

NANCY GENTRY-BOYD; CHRIS KIRK d/b/a KIRK ENTERPRISES; TODD MCKENNA d/b/a HOMECRAFT HOME INSPECTIONS; and DOES 1-4

Defendants.

CASE NO. CV-2014-71-C

DEFENDANT NANCY GENTRY-BOYD'S
 RESPONSES TO PLAINTIFF'S FIRST SET
 OF INTERROGATORIES AND REQUESTS
 FOR PRODUCTION OF DOCUMENTS

COMES NOW the Defendant, Nancy Gentry-Boyd (hereinafter identified by name or as "Defendant"), and answers Plaintiff's First Set of Interrogatories and Requests for Production of Documents as follows:

STATEMENT COMMON TO ALL ANSWERS AND RESPONSES

Defendant has not completed her discovery in this case. It is anticipated that, as discovery proceeds, additional facts and documents may be discovered which may be responsive

DEFENDANT NANCY GENTRY-BOYD'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS - 1

to the following Interrogatories and Requests. Defendant reserves the right to supplement the following Answers and Responses as additional information becomes available and to introduce at trial any facts and documents which are discovered in the continuing discovery process.

INTERROGATORIES

INTERROGATORY NO. 1: Please identify each person who assisted in the preparation of your answers to these Interrogatories, and all documents used in the preparation of your answers to these Interrogatories, or which evidence, refer, or relate to the matters covered in these Interrogatories.

ANSWER:

Nancy Gentry-Boyd
c/o Millemann, Pittenger & Pemberton, LLP

Greg Pittenger
c/o Millemann, Pittenger & Pemberton, LLP

INTERROGATORY NO. 2: Please identify each and every person known to you who has knowledge of any of facts or occurrences which support, refute, or relate in any way to any of the claims made in the Amended Complaint or any of the allegations and/or defenses contained in your Answer thereto, and state the substance of the facts and/or opinions which constitute such person's knowledge.

ANSWER:

1. Nancy Gentry-Boyd
c/o Millemann, Pittenger & Pemberton, LLP

Defendant has knowledge concerning the construction and sale of the Home as well as knowledge and information regarding the condition and appearance of the home during her ownership and at the time of sale.

2. Jan Loff
634-3704;
P.O. Box 1564
McCall, Idaho 83638

Mrs. Loff was Mrs. Gentry-Boyd's housekeeper and has knowledge regarding the condition of the Home during the period of Ms. Boyd's ownership of the home.

3. Chris Kirk

c/o Arkoosh Law Offices

Pending the conduct of discovery, Defendant cannot state with specificity what knowledge of the facts Mr. Kirk may have. It is assumed that Mr. Kirk has knowledge regarding the construction of the Home and the extent of Mrs. Gentry-Boyd's involvement in that process, as well as the condition and appearance of the home during the period of Mrs. Gentry-Boyd's ownership thereof.

4. Todd McKenna

c/o Mike Pierce Law Offices

Mr. McKenna did a pre-sale inspection of the Home and has knowledge of its condition, as summarized in his Report.

5. Michael Wood and Jean Odmark

McCall Real Estate Company

301 East Lake Street

McCall, Idaho 83638

(208) 634-2100

Mr. Wood and Ms. Odmark were Defendant's realtors and may have knowledge relating to the condition of the Home during the period of Defendant's ownership thereof.

6. All persons named by Plaintiff in Plaintiff's Answer to Mrs. Gentry-Boyd's Interrogatory No. 1.

INTERROGATORY NO. 3: Please identify each person who has in any way investigated the claims made in the Amended Complaint, and whether each has made a written record of the investigation, and state the substance or result of their investigation and identify any documents or communications relating to such investigation.

ANSWER: See Answer to Interrogatory No.5.

INTERROGATORY NO. 4: Please identify each person you may call as a witness at trial in this action, and for each person, identify the substance of that witness's testimony and that witness's name and address.

ANSWER: Defendant has not yet decided who she will call as a witness in this matter. Defendant will provide information on witnesses in accordance with the established pre-trial deadlines and will supplement this Answer as necessary.

INTERROGATORY NO. 5: Please identify each person retained or specially employed by you as an expert in anticipation of this litigation or in preparation for the trial of this action who you do not expect to call as a witness at trial, and identify all reports made to you by the expert.

ANSWER: Steve Lacey, c/o Millemann, Pittenger & Pemberton, LLP, has been retained as an expert in this matter. It is not currently anticipated that he will be called as a witness at trial. However, Defendant has not completed her discovery in this case, including but not limited to the discovery of the opinions held by Plaintiff's expert witness and the basis therefor. The results of such discovery process may affect this Answer. In such case, Defendant reserves the right to supplement this Answer as may be required. Defendant objects to the remainder of this Interrogatory as being beyond the scope of permissible discovery of an expert not expected to testify.

INTERROGATORY NO. 6: Please identify each person whom you intend to call as an expert witness at the trial of this action, and for each such person, provide the following:

- the subject matter on which the expert is expected to testify;
- a complete statement of all opinions to be expressed and the basis and reasons therefor;
- the facts, data, and/or other information considered by the witness in forming the opinions;
- each report, memorandum, exhibit, or other document to be used as a summary of or support for the opinions;
- any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- the compensation to be paid for the testimony; and

- a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

ANSWER: Defendant has not yet identified an expert who will be called as a witness at trial. However, Defendant has not completed her discovery in this case, including but not limited to the discovery of the opinions held by Plaintiff's expert witness and the basis therefor. Defendant may elect after the completion of such discovery to retain and/or designate an expert who will testify at trial. This Answer will be supplemented in such event.

INTERROGATORY NO. 7: Please separately identify each exhibit which you may offer into evidence at the trial of this action.

ANSWER: Defendant has not yet determined what exhibits will be introduced at trial. Exhibits shall be identified in accordance with the established pre-trial deadlines. This Answer will be timely supplemented, as needed.

INTERROGATORY NO. 8: Please identify each meeting or communication between you and Plaintiff Ed Petrus, Defendant Kirk, or Defendant McKenna relating in any way to the Home or the Premises or any of the allegations in the Amended Complaint. With respect to each such meeting or communication, identify each document memorializing or relating in any way to each such meeting or communication.

ANSWER: Defendant objects to this Interrogatory as being overly broad and unnecessarily burdensome. Without waiving this objection, Defendant answers that she had numerous meetings, conversations and telephone calls with Chris Kirk before and during the construction of the Home, the specific dates and contents of which Defendant does not independently recall. Defendant does not have documents memorializing such conversations. Defendant has never met Mr. Petrus or Mr. McKenna or had any meetings or communications with them.

INTERROGATORY NO. 9: Please identify each written communication between you and Plaintiff Ed Petrus, Defendant Kirk, or Defendant McKenna relating in any way to the Home or the Premises or any of the allegations in the Amended Complaint.

ANSWER: Defendant objects to this Interrogatory as being overly broad and unnecessarily burdensome. Defendant may have had written communication with Chris Kirk before, during and/or after the completion of the construction of the Home. However, she has no recollection of any such written communication nor does she have any records or copies of such

written communications. Defendant has never met Mr. Petrus or Mr. McKenna or had any written communication with them.

INTERROGATORY NO. 10: Please identify each document provided or sent to you by Plaintiff Ed Petrus, Defendant Kirk, or Defendant McKenna and each document provided or sent by you to such persons relating in any way to the Home or the Premises or any of the allegations in the Amended Complaint.

ANSWER: Defendant objects to this Interrogatory as being overly broad and unnecessarily burdensome. Defendant may have had Home construction documents sent to her by Chris Kirk before and during the construction of the Home but she has no recollection of any such documents nor does she have any records or copies of such documents, other than those produced in response to Request for Production No. 1. Defendant has never met Mr. Petrus or Mr. McKenna or had documents sent to her by either of them

INTERROGATORY NO. 11: Please identify any and all written communications between you and any of your attorneys, insurers, investigators, agents, agencies, employees, officers, directors, predecessors, trustees, successors, and independent contractors and/or experts relating to the design, construction, and/or sale of the Home.

ANSWER: Defendant objects to this Interrogatory to the extent that it seeks communications between Defendant and her attorneys, which are clearly privileged. Defendant further objects on the basis that this Interrogatory is overly broad and unnecessarily burdensome. Without waiving either objection, Defendant answers that Defendant has no record of or copies of any documents which might be responsive to this request, except for the documents being produced in response to Request for Production No. 12.

INTERROGATORY NO. 12: Please identify any documents in your possession, custody, or control relating to the sale of the Home to Plaintiffs, including but not limited to documents relating to the sale of the Home or used in the marketing of the Home.

ANSWER: Defendant has no documents relating to the sale or marketing of the Home other than those produced in response to Request for Production No. 13.

INTERROGATORY NO. 13: Please identify any insurance agreement(s) under which any insurance business may be liable to satisfy part or all of any judgment which may be entered against you in this action, or to indemnify or reimburse you for payments made to satisfy the judgment, including in your answer the amount and limits of any such insurance coverage.

ANSWER: None exist. Defendant's home owner's insurance policy was provided by Auto-Owners; but, it does not provide coverage for any of the claims asserted by Plaintiff against Defendant (Auto-Owners Homeowners Policy # 48-457-825-00).

INTERROGATORY NO. 14: Please identify each person who performed any work relating to the initial construction of the home, including but not limited to any design, construction, or repair work, or who performed any design, construction, or repair work on the Home subsequent to its initial construction, and for each such person, state the date on which the work was performed and describe the nature of work performed by such person.

ANSWER: Chris Kirk was the general contractor on the Home. Defendant does not know the identity of other persons who may have worked on the construction. McCall Design and Planning was the architectural firm. Both Andrew Laidlaw, at 121 commerce Street, Suite A McCall, Idaho (208) 634-5707 and Clair Remsberg, at 116N. 3rd Street, Suite 4, McCall, Idaho 83638, (208) 634-4990 participated in the design of the Home. Defendant has no record of when any subsequent work or repairs were made.

INTERROGATORY NO. 15: With respect to each person identified in your response to the previous Interrogatory, please identify each and every document and/or written communication provided or sent to you by such persons or provided or sent by you to such persons.

ANSWER: Please see Answer to Interrogatory No.10. Defendant has not retained any copies of any documents which may have been provided by McCall Design and Planning.

INTERROGATORY NO. 16: Please identify each document in your possession, custody, or control relating to the design and construction of the Home, including but not limited to any written communications, photographs, drawings, sketches, blueprints, plans, specifications, proposals, estimates, bids, receipts, invoices, and the like.

ANSWER: Please see Response to Request for Production No. 1.

INTERROGATORY NO. 17: Please identify each document in your possession, custody, or control relating to any permits requested, applied for, or issued from any state or local authorities or any other governmental entity relating to the design and construction of the home.

ANSWER: Defendant has no such documents.

INTERROGATORY NO. 18: Please identify any person you employed or otherwise engaged to perform work on or related to the Home and who may have knowledge relating to the condition of the Home, including but not limited to caterers, maids, caretakers, cleanup and restoration workers, or the like.

ANSWER: Please see information relating to Jan Loff in Answer to Interrogatory No.1.

INTERROGATORY NO. 19: Please identify any person who inspected the Home during or after construction and prior to the date on which you first occupied the Home, and identify each and every document, including but not limited to written communications, reports, invoices, photographs, notes, and the like, provided or sent by such persons to you or which you provided or sent to such persons.

ANSWER: Defendant has no knowledge concerning any person who inspected the Home during or after construction but prior to occupancy by Defendant.

INTERROGATORY NO. 20: Identify each document or written communication in your possession, custody, or control reflecting or relating to payments made to any person who performed any work relating to the design and construction of the Home.

ANSWER: See Response to Request for Production No. 1.

INTERROGATORY NO. 21: Please identify the person who made, authorized, directed, or approved final decisions relating to the design and construction of the Home, including but not limited to approval of design plans and selection of materials to be used in the construction of the Home.

ANSWER: Defendant objects to this Interrogatory as being overly broad. Without waiving this objection, Defendant answers that Defendant did not select or approve construction material for the Home or methods or manner of construction, nor was Defendant responsible for decisions regarding the construction materials or method or manner of construction. Defendant relied on her architect and general contractor to design and construct the home in compliance with all applicable building codes and standards. Defendant did not possess the expertise to make such decisions. Defendant approved the architect's design of the Home and she selected interior decor and finishes.

INTERROGATORY NO. 22: Please identify the person responsible for payment of costs, fees, or other expenses incurred in the design and construction of the Home, including but not limited to payment of architects, general contractors, and subcontractors who performed

work on the Home, and costs relating to the purchase of materials, supplies, or products used in construction of the Home.

ANSWER: Defendant paid the architect's and general contractor's fees. The general contractor paid subcontractors and other costs relating to the Home's construction.

INTERROGATORY NO. 23: If you contend that a person other than yourself owned the Home during the time you occupied the Home, please identify such person and any documents or written communications in your possession, custody, or control supporting your contention.

ANSWER: Defendant owned the Home during the time she occupied the Home.

INTERROGATORY NO. 24: If you contend that a person other than yourself was responsible for the design and construction of the Home, please identify such person and any documents or written communications in your possession, custody, or control supporting your contention.

ANSWER: Defendant objects to this Interrogatory as being redundant and repetitive. Please see Answer to Interrogatory No. 14.

INTERROGATORY NO. 25: Please describe any damage, defects, or other problems related to the design, construction, repair, or operation of Home, including but not limited to any warping of the Doors or air or water intrusion around the Doors, of which you became aware of prior to Plaintiffs' purchase of the Home (regardless of whether such damage or defects were repaired), and identify any documents in your possession, custody, or control relating to such damage, defects, or problems.

ANSWER: In the second year after the Home was completed, Defendant noticed that some doors would stick in the winter. Chris Kirk contacted the door installers. On one occasion, there was a draft coming through an exterior dining room door.

INTERROGATORY NO. 26: With respect to any damage, defects, or other problems identified in the previous Interrogatory, please describe any repairs you made or caused to be made (if any) to remedy such damage or defects, identify the persons who performed such repairs, and identify any all documents relating to such damage, defects, and/or repairs, including but not limited to any written communications, photographs, drawings, sketches, blueprints, plans, specifications, proposals, estimates, bids, receipts, invoices, and the like.

ANSWER: The draft from the door in the dining room was blocked with duct tape. Defendant believes the door installers remedied the sticking door problem. Defendant has no documents or written communications regarding these “repairs”.

INTERROGATORY NO. 27: Please identify each and every communication between you and Defendant Kirk or any other person relating to the design, installation, and/or repair of the Doors and the structure of the Home in the immediate vicinity of the Doors, including but not limited to communications relating to whether the Doors should open to the outside of the Home rather than the inside.

ANSWER: Defendant does not recall any discussion with Chris Kirk regarding the way the doors opened or regarding the design or installation of doors, except for when Defendant mentioned the sticky doors.

INTERROGATORY NO. 28: Please state the basis for affirmative defense or claim asserted in your Answer to the Amended Complaint and identify each and every document which you contend supports any such defenses or assertions.

ANSWER: Defendant objects to the form of this Interrogatory and is unable to discern what information Plaintiff is seeking. Without waiving this objection, Defendant answers that Defendant’s discovery is not completed and is ongoing and Defendant will supplement this Answer as additional facts become available. Pending receipt of such additional information, Defendant answers further as follows.

INTERROGATORY NO. 29: Please state the facts in support of the assertions contained in paragraph 4 of your Answer to the Amended Complaint and identify any documents in your possession, custody, or control relating to such assertions.

ANSWER: Defendant objects to the Interrogatory as being vague. Without waiving this objection, Defendant answers as follows. To the extent Plaintiff seeks by this Interrogatory to elicit facts in support of Defendant’s denial that she is or was a “owner-builder”, Defendant has never been engaged in the business of building homes, she has never acted as a general contractor or subcontractor, she does not possess any expertise in or related to residential construction or the business of residential construction, she does not possess any expertise related to construction of any kind, and she was not in any respect the “builder” of the home here in question. The builder of this home was Chris Kirk.

INTERROGATORY NO. 30: Please state the facts in support of the assertions contained in paragraph 66 of your Answer to the Amended Complaint and identify any documents in your possession, custody, or control relating to such assertions.

ANSWER: Defendant was provided a total of ten (10) calendar days to arrange for and conduct an inspection of the home. Plaintiff was unexpectedly present when Defendant's agent arrived for the inspection, and was belligerent and otherwise uncooperative.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO.1: Please produce copies of all documents, items, or things to which you referred in answering the above Interrogatories, including all documents that contain a part or all of each such answer, and all documents that you identified in such answers.

RESPONSE:

1. Boyd Budget December 2004: Bates No. 001 to 003.
2. January 2005 Billing from Chris Kirk to Bill and Nancy Boyd: Bates No. 004 to 009.
3. June 2005 Billing from Chris Kirk to Bill and Nancy Boyd: Bates No. 010 to 014.

REQUEST FOR PRODUCTION NO.2: Please produce copies of any insurance agreement(s) under which any insurance business may be liable to satisfy part or all of any judgment which may be entered against you in this action, or to indemnify or reimburse you for payments made to satisfy the judgment, including in your answer the amount and limits of any such insurance coverage.

RESPONSE: Auto-Owners Homeowners declarations and policy: Bates No. 015 to 056.

REQUEST FOR PRODUCTION NO.3: Please produce any and all photographs, videos, drawings, notes, or other documents within your possession, custody, or control depicting or relating in any way to the Home and/or any inspection you performed of the Home.

RESPONSE: Photographs of Home taken by Defendant on or about April, 15, 2014: Bates No. 057 to 071.

REQUEST FOR PRODUCTION NO.4: Please produce copies of any all inspection reports (including drafts thereof) relating to the Home and/or any inspection you performed of the Home.

RESPONSE: None.

REQUEST FOR PRODUCTION NO.5: To the extent not already produced in response to another Request, please produce copies of all written communications between you and Kevin Batchelor.

RESPONSE: Emails between Defendants realtors and Kevin Batchelor: Bates No. 072 to 242.

REQUEST FOR PRODUCTION NO.6: Please produce any and all communications between you and your insurer regarding the facts and circumstances alleged in the Amended Complaint.

RESPONSE: See Bates No. 243 to 247.

REQUEST FOR PRODUCTION NO.7: Please produce copies of all documents relating to any appraisals or mortgage applications or other loan documents relating to the Home.

RESPONSE: None.

REQUEST FOR PRODUCTION NO.8: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 7.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.9: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 8.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.10: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 9.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.11: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 10.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.12: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 11.

RESPONSE: Emails between Defendant and her realtors: Bates No. 248 to 275.

REQUEST FOR PRODUCTION NO.13: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 12.

RESPONSE: Documents relating to the sale of the Home: Bates No. 276 to 366.

REQUEST FOR PRODUCTION NO.14: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 13.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.15: This Request was blank.

REQUEST FOR PRODUCTION NO.16: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 15.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.17: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 16.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.18: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 17.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.19: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 20.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.20: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 23.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.21: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 24.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.22: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 25.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.23: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 26.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.24: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 27.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.25: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 28.

RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.26: Please produce copies of all documents identified or referred to in your answer to Interrogatory No. 29.

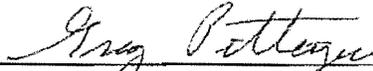
RESPONSE: Please see Response to Request for Production No.1.

REQUEST FOR PRODUCTION NO.27: To the extent not already produced in response to another Request, please produce any and all communications between you and any party to this litigation, or their attorneys, insurers, investigators, agents, agencies, employees, officers, directors, predecessors, trustees, successors, and independent contractors and/or experts, relating in any way to the subject matter of this litigation

RESPONSE: None.

DATED this 29TH day of August, 2015.

MILLEMANN, PITTENGER &
PEMBERTON, LLP

By: 
STEVEN J. MILLEMANN
GREGORY C. PITTENGER
Attorneys for Defendant

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

VERIFICATION

STATE OF CALIFORNIA,)
) ss
County of San Diego)

NAB

I, Nancy Gentry-~~Boyd~~, being first duly sworn upon oath depose and say:

That I am the Defendant in the above-entitled action; that I have read the foregoing *Defendant's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents* and acknowledge that the contents therein are true and correct to the best of my knowledge and belief.

Nancy Gentry NAB

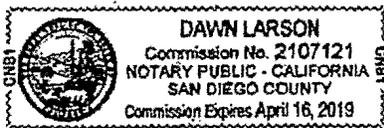
NANCY GENTRY-~~BOYD~~

SUBSCRIBED AND SWORN to before me this 28th day of August, 2015.

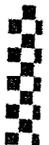
Dawn Larson

NOTARY PUBLIC FOR California

My Commission Expires: 4-16-19



DEFENDANT NANCY GENTRY-BOYD'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS - 18



CERTIFICATE OF SERVICE

I HERBY CERTIFY THAT on the 28TH day of August, 2015, I caused to be served a true and correct copy of this *Defendant Nancy Gentry-Boyd's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents*, on the following, by the method and at the address indicated below:

By US Mail to:

Thomas A. Banducci Jason J. Rudd Anderson Banducci PLLC 101 S. Capitol Blvd., Suite 1600 Boise, Idaho 83702	C. Tom Arkoosh Daniel A. Nevala Arkoosh Law Office P.O. Box 2900 Boise, Idaho 83701	Michael G. Pierce Attorney at Law P.O. Box 1019 Cascade, Idaho 83611
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MILLEMANN, PITTENGER &
PEMBERTON, LLP

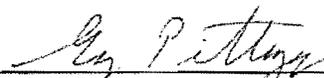
By: 
STEVEN J. MILLEMANN
GREGORY C. PITTENGER
Attorneys for Defendant

EXHIBIT 13

From: Michael Wood <michael.mccallrealtor@gmail.com>
Subject: Re: 2130 Payette-Door maintenance
Date: June 19, 2012 1:04:08 PM MDT
To: Nancy Gentry-Boyd <gentryboyd.nancy@gmail.com>



Thank you. I will call Kris.
On Jun 19, 2012, at 12:59 PM, Nancy Gentry-Boyd wrote:

Michael:

Kris Kirk will know who supplied the doors. I do not. Also, Kris Kirk would know the name of the painting contractor. The doors sometimes stick after the winter. If you keep them locked, they will dry out and function again.

Thank you,

Nancy

On Tue, Jun 19, 2012 at 10:50 AM, Michael Wood <michael.mccallrealtor@gmail.com> wrote:

Nancy, the buyer contacted me to inquire about the company that supplied the doors and hardware for the lakefront home. The double doors in the nook beside the kitchen have malfunctioned and are missing weather stripping. Do you recall who supplied the doors or who you used for maintenance on the doors and hardware? Also, which painting contractor did you use for the exterior painting. Thanks

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

This message may contain confidential or proprietary information intended only for the use of the addressee(s) named above or may contain information that is legally privileged. If you are not the intended addressee, or the person responsible for delivering it to the intended addressee, you are hereby notified that reading, disseminating, distributing or copying this message is strictly prohibited. If you have received this message by mistake, please immediately notify me by replying to the message and delete the original message and any copies immediately thereafter.

Thank you.
.....

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

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Thank you.
.....

EXHIBIT 14

Exh. No. 9
Date
Name 3-11-16
300510 Value
M & M Court Reporting

VALUE DEPO EXH #9



EXHIBIT 15

From: Chris Kirk
To: Dan Newble
Subject: FW: door top/ edge finishing question
Date: Thursday, July 16, 2015 8:08:50 PM
Attachments: image003.png

Here is the message from the factory.
If you have any questions please let me know
Chris

From: Mark Birrer [mailto:mark@nuvuglass.com]
Sent: Thursday, October 02, 2014 10:14 AM
To: Chris Kirk
Subject: FW: door top/ edge finishing question

Here you go Chris. As we discussed, I did the research and the answer from the Weather Shield folks is that they do indeed seal the edges of the door!

Mark Birrer, Sales Rep.
Nu-Vu Glass Inc.
(208) 859-8501 cell
www.nuvuglass.com

From: Judnic, Julie [mailto:Julie.Judnic@weathershield.com]
Sent: Thursday, October 02, 2014 10:04 AM
To: Mark Birrer
Subject: RE: door top/ edge finishing question

The door plant says they do seal the edges of the door.

Julie

Julie Judnic
Customer Relations Contact
Weather Shield Windows & Doors
715-748-2100 Ext.3117(Office)
877-352-0085 (Fax)

This is a transmission from Weather Shield and may contain information that is privileged and/or confidential. If you are not the intended addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this transmission in error, please destroy it and notify the sender immediately at the phone or address listed above.

From: Mark Birrer [mailto:mark@nuvuglass.com]
Sent: Thursday, October 02, 2014 9:42 AM
To: Judnic, Julie
Subject: FW: door top/ edge finishing question

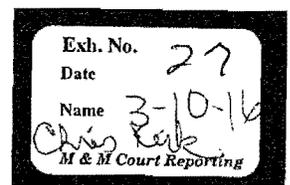
Re-sending this as I have not received an answer. Please reply.

Mark Birrer, Sales Rep.
Nu-Vu Glass Inc.
(208) 859-8501 cell
www.nuvuglass.com

From: Mark Birrer
Sent: Tuesday, September 30, 2014 2:25 PM
To: 'Judnic, Julie'
Subject: door top/ edge finishing question

In visiting with a contractor on a project yesterday, he is telling me that my competition informs him that their French swing doors are sealed on the top and edges etc. from the factory—since most painters don't reach up and do the tops of the doors. So, this way, their doors are already protected against wet weather. I am wondering if Weather Shield does this on their doors? Please advise.

Mark Birrer, Sales Rep.
Nu-Vu Glass Inc.
(208) 859-8501 cell
www.nuvuglass.com



KIRK00043

Nu=Vu1ogo



!SIG:55a863b040371183858858!

EXHIBIT 16

From: Michael Wood <michael.mccallrealtor@gmail.com>
Subject: **2130 Payette Inspection**
Date: April 3, 2013 1:24:15 PM MDT
To: Nancy Gentry-Boyd <gentryboyd.nancy@gmail.com>
Bcc: "jean@jeanodmark.com Odmark" <jean@jeanodmark.com>
▶ 1 Attachment, 801 KB



Nancy, I am sending you the original inspection contingency release and attached exhibits that I received from the buyer's agent on March 18, 2012. The buyer's agent chose not to share the full report, but only those pages that addressed issues that the inspector had flagged as needing attention.

While we are not in possession of the full report, these pages represent those inspection findings that the buyer wanted corrected prior to closing.

|



DOC008.pdf (801 KB)
Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

This message may contain confidential or proprietary information intended only for the use of the addressee(s) named above or may contain information that is legally privileged. If you are not the intended addressee, or the person responsible for delivering it to the intended addressee, you are hereby notified that reading, disseminating, distributing or copying this message is strictly prohibited. If you have received this message by mistake, please immediately notify me by replying to the message and delete the original message and any copies immediately thereafter.

Thank you.
.....

EXHIBIT 17

From: Michael Wood <michael.mccallrealtor@gmail.com>
Subject: **Re: 2130 Payette Drive Addenda file**
Date: April 4, 2013 11:50:47 AM MDT
To: Nancy Gentry-Boyd <gentryboyd.nancy@gmail.com>



Okay, will do.
On Apr 4, 2013, at 11:32 AM, Nancy Gentry-Boyd wrote:

Hi Michael:

I received the documents. Thank you. In comparing what was in the Amerititle documents with what you sent, the Addendum #5 as you sent which is signed by both parties, is not included. Either way, Nancy fulfilled the requirements of that addendum.

Will you please let Mr. Petrus know that Nancy will be responding to him by the end of next week? Thank you for your help.

Kind regards,

Maura

From: Michael Wood [mailto:michael.mccallrealtor@gmail.com]
Sent: Thursday, April 04, 2013 10:15 AM
To: Nancy Gentry-Boyd
Subject: 2130 Payette Drive Addenda file

Nancy, I have attached the addenda to purchase and sale agreement for 2130 Payettte Drive.

Michael Wood
Associate Broker
McCall Real Estate Company
michael.mccallrealtor@gmail.com
Cell: 208-634-6544
Fax: 208-634-3719

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Thank you.
.....

EXHIBIT 18

Begin forwarded message:

From: Ed Petrus <eapetrus@me.com>
Subject: Re: 2130 Payette Drive McCall, Idaho
Date: April 9, 2013 at 12:20:08 PM MDT
To: Nancy Gentry-Boyd <gentryboyd.nancy@gmail.com>
Cc: Bob Kolodny <rkolodny@kolodnypressman.com>, "pete@potentelaw.com" <pete@potentelaw.com>, "sjm@mpmplaw.com" <sjm@mpmplaw.com>, Colleen Cole <colleenc@ameri-title.com>, Michael Wood <michael.mccallrealtor@gmail.com>

Due diligence does not apply to things that you had a duty to disclose, etc. We will proceed with litigation and service of process of the complaint upon you which will be very expensive for you and me.

Sent from my iPhone

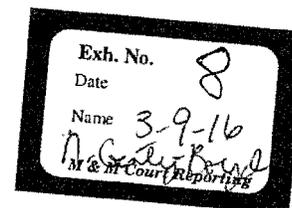
On Apr 9, 2013, at 12:02 PM, Nancy Gentry-Boyd <gentryboyd.nancy@gmail.com> wrote:

Dear Mr. Petrus:

Your due diligence was completed prior to the closing of escrow. You closed escrow. I have no further responsibilities.

Sincerely,

Nancy Gentry Boyd



8/21/2014

PETRUS000194

EXHIBIT 19

ALL FIELDS DETAIL



MLS #	428620	Bedrooms	Four
Status	ACTIVE	Baths	4.5
Type	Residential Water Front	Age	1 - 5
Address	2130 Payette Drive	Construction	Frame
County	Valley	Levels	Two
City	McCall	View	Lake
State	ID	Garage	Two
Zip	83638	Access To	Lake
Area	McCall - West		
Class	Residential		
Asking Price	\$2,800,000		
Sale/Rent	For Sale		
IDX Include	Yes		

GENERAL

VOW Include	Yes	VOW Address	Yes
VOW Comment	Yes	VOW AVM	Yes
Agent	Jean Odmark - Cell: (208) 634-9280	ListOffice1	Community Real Estate Company - Main: (208) 634-7778
Owner	Boyd	Subdivision	Pay Lk Cot Site
Lot #	36	AppxAcre	0.50
AppxSqFt	4001-4500	DateListed	5/11/2009
Directions	Warren Wagon Road to Squirrel Lane to Payette Drive	Excluded from Sale	Seller's personal property
HOA (Y/N)	No	HOA Amount/Yr \$	0.00
Legal	Amended Payette Lakes Cottage Sites Lot 36, Valley County Idaho	ListAgent2	Michael S Wood - Cell: (208) 634-6544
ListOffice2	Community Real Estate Company - Main: (208) 634-7778	Original Price	\$2,800,000
Associated Document Count	0	Selling Commission	2.5%
Showing Instructions	List Agt Accomp	Source of Square Footage	Public Records
State Lease Y/N	Y	State Lease/Yr \$	28000.00
State Lease #	R-5067-9	Taxes/Yr	4,561/08
HO Exmp Inc (Y/N)	No	Winter Access Y/N	Y
Short Sale	No	REO	No

FEATURES

Additional Features	Electric	Paved Streets	Sewer
Alarm System	Underground	No	PLSWD
Air Cond	Foundation	Phone	Siding
Fuel Tank Above Ground	Concrete	Yes	Shingle
Sprinkler System	Heat	Power	Topography
Vaulted Ceilings	Elec Baseboard	110V/220V	Sloped
Adjacent To	Elec Forced Air	Propane Tank	Surveyed
Lake	Fireplace Insert	Yes	Water Front
Basement	Included In Sale	Owned	Wooded
No	Dishwasher	Road Maintenance	Water
Garage	Disposal	County	Well
Two	Dryer	Roof	Water Proximity
Color	Freezer	Composition/Shingle	Payette Lake
Grey	Microwave		Zone
Dock Type	Refrigerator		Res - 4 Homes/Ac
Private Dock/Slip	Satellite Dish		
	Trash Compactor		
	Washer		
	Window Treatments		

REMARKS

Located on the West side of Payette Lake with 100' of lake front and private dock and boat slip. Newer home with high end finishes including 2 fireplaces, w bar, upstairs apartment, large deck/outdoor entertainment area.

ALL FIELDS DETAIL

MLS #	428620	Bedrooms	Four
Status	ACTIVE	Baths	4.5
Type	Residential Water Front	Age	1 - 5
Address	2130 Payette Drive	Construction	Frame
County	Valley	Levels	Two
City	McCall	View	Lake
State	ID	Garage	Two
Zip	83638	Access To	Lake
Area	McCall - West		
Class	Residential		
Asking Price	\$2,800,000		
Sale/Rent	For Sale		
IDX Include	Yes		

GENERAL

VOW Include	Yes	VOW Address	Yes
VOW Comment	Yes	VOW AVM	Yes
Agent	Jean Odmark - Cell: (208) 634-9280	ListOffic1	Community Real Estate Company - Main: (208) 634-7778
Owner	Boyd	Subdivision	Pay Lk Cot Site
Lot #	36	AppxAcre	0.50
AppxSqFt	4001-4500	DateListed	5/11/2009
Directions	Warren Wagon Road to Squirrel Lane to Payette Drive	Excluded from Sale	Seller's personal property
HOA (Y/N)	No	HOA Amount/Yr \$	0.00
Legal	Amended Payette Lakes Cottage Sites Lot 36, Valley County Idaho	ListAgent2	Michael S Wood - Cell: (208) 634-6544
ListOffic2	Community Real Estate Company - Main: (208) 634-7778	Original Price	\$2,800,000
Associated Document Count	0	Selling Commission	2.5%
Showing Instructions	List Agt Accomp	Source of Square Footage	Public Records
State Lease Y/N	Y	State Lease/Yr \$	28000.00
State Lease #	R-5087-9	Taxes/Yr	4,561/08
HO Exmp Inc (Y/N)	No	Winter Access Y/N	Y
Short Sale	No	REO	No

FEATURES

Additional Features	Electric	Paved Streets	Sewer
Alarm System	Underground	No	PLSWD
Air Cond	Foundation	Phone	Siding
Fuel Tank Above Ground	Concrete	Yes	Shingle
Sprinkler System	Heat	Power	Topography
Vaulted Ceilings	Elec Baseboard	110V/220V	Sloped
Adjacent To	Elec Forced Air	Propane Tank	Surveyed
Lake	Fireplace Insert	Yes	Water Front
Basement	Included in Sale	Owned	Wooded
No	Dishwasher	Road Maintenance	Water
Garage	Disposal	County	Well
Two	Dryer	Roof	Water Proximity
Color	Freezer	Composition/Shingle	Payette Lake
Grey	Microwave		Zone
Dock Type	Refrigerator		Res - 4 Homes/Ac
Private Dock/Slip	Satellite Dish		
	Trash Compactor		
	Washer		
	Window Treatments		

REMARKS

Located on the West side of Payette Lake with 100' of lake front and private dock and boat slip. Newer home with high end finishes including 2 fireplaces, we bar, upstairs apartment, large deck/outdoor entertainment area.

DISCLAIMER

This information is deemed reliable, but not guaranteed.

5/08/09 TAX MASTER INQUIRY - VALLEY COUNTY

PMPKEY: XR 001910000360 A YEAR 2008
TXPKEY: XR001910000360A
NAME BOYD, NANCY GENTRY

BILL# 24694

BILLED TO: BOYD, NANCY GENTRY
CODE AREA 70-0000 ACCT TYP
BANK FLB OWNER PUP

ADDRESS 2325 AVENIDA DE LA PLAYA

LA JOLLA CA 92037

LEGAL AMENDED
PAYETTE LAKES COTTAGE SITES
LOT 36
STATE LEASE HR-5067-9

MARKET VALUE 1,692,670
HARDSHIP
HOMEOWNER
NET MARKET 1,692,670
TAX AMOUNT 168.64
LESS: CIRCUIT
PLUS: SPECIALS
NET TAX BILLED 168.64
TAX PAYMENTS 84.32
TAX CANCELLED
SPEC CANCELLED
REMAINING TAX DUE 84.32

NEXT PARCEL# RP _____ A OR NEXT BILL# RP _____ 2008
F3=EXIT F2=PRT SCREEN F5=PAYMNTS F6=TRANSACTIONS F24=MORE

WOOD000368

ORIGINAL

DOUGLAS A. MILLER, CLERK
By Alvarez Deputy
JUN 12 2015

Alyson A. Foster (ISB #9719)
Jason J. Rudd (ISB #9406)
**ANDERSEN SCHWARTZMAN
WOODARD BRAILSFORD, PLLC**
101 S. Capitol Blvd., Suite 1600
Boise, Idaho 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455
aaf@aswblaw.com
jjr@aswblaw.com

Case No. _____
File No. _____

Attorneys for Plaintiffs

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

v.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT REALTY;
KEVIN BATCHELOR; and DOES 1-4

Defendants.

Case No. CV-2014-71-C

**DECLARATION OF MICHAEL
LONGMIRE IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

Pursuant to Idaho Code § 9-1406, I, Michael Longmire, depose and say that the following
facts are true and correct:

1. Edmond A. Petrus ("Petrus") hired me in or around May 2012 to maintain and
oversee his home at 2130 Payette Drive. I make this declaration based upon my personal
knowledge.

**DECLARATION OF MICHAEL LONGMIRE IN OPPOSITION TO DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT - 1**

2. Shortly after he hired me, Petrus asked me to install a grill/barbecue in the area next to the French doors on the southeastern corner of the deck next to the dining room. I hired a local company, Valley County A-1 Heat, to install a gas line in the crawlspace underneath the French Doors. To accomplish this, Valley County A-1 Heat drilled a hole through the insulation foam in the crawlspace underneath the French doors. Water came out of the hole and the insulation was saturated.

3. Within a week, I hired an insulation company, Energy Seal, to investigate. They removed a portion of the wet foam insulation underneath the French doors. I looked where the foam had been removed and observed that the floor joists underneath the French doors and the corner post were rotten.

4. On August 21, 2013, Chris Kirk inspected the home. I was present. He was allowed as much time as he wanted to conduct his inspection. He went into the crawlspace. He told me there was something about the “water diversion channel” under the French doors but I did not understand what he meant. He was there for approximately two hours.

5. In April 2014, while Disaster Response conducted its remediation work, Nancy Gentry-Boyd (“Gentry”) and her real estate agent, Michael Wood (“Wood”), visited the home to observe the damage. I was present. I heard Gentry say to Wood something to the effect of “they had five days to find it, and they didn’t.” I understood from this comment that she was referring to Petrus’s failure to find the damage during the due diligence or inspection period when he bought the house.

6. I am responsible for maintaining the home while Petrus is away and have been since approximately May 2012. In the winter, I am responsible for shoveling snow off of the deck and away from the home. I have done this regularly every winter since 2012. Snow does

not ever pile up against the walls of the home for very long, because the overhang reduces buildup and because the radiant heat of the home melts the snow that is up against the home.

7. In my experience with the home, snow does not ever build up against the French doors on the southeastern corner of the deck next to the dining room. That side does not directly face the lake. I keep the barbecue and the snow removal equipment on that corner of the deck. I would not do that if snow built up there.

8. Since I assumed my role as home caretaker, and putting aside any remediation work performed by Disaster Response, no one has installed screws in any door threshold, removed weather-stripping around any doors, removed foam insulation in the crawlspace (except as described above), removed or reinstalled the locking mechanism in the French doors, or attempted to pry open the locking mechanism on any door.

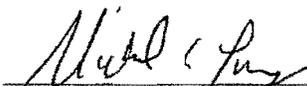
9. All doors were re-keyed shortly after Petrus bought the home.

10. Attached as **Exhibit 1** is a true and correct copy of an email from Mark Birrer, the sales representative for the French doors. This email confirmed to me that the French doors were the original ones installed in the home. Neither I nor anyone replaced the French doors after Petrus moved into the home until it was replaced as part of the repairs by Disaster Response.

I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

6/9/2016

DATE

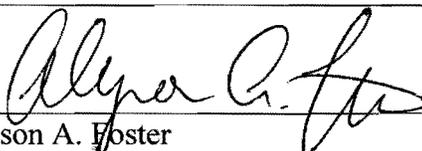


SIGNATURE

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2016, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

<p>C. Tom Arkoosh Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, ID 83701 <i>Attorneys for Chris Kirk d/b/a Kirk Enterprises</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 343-5456 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: tom.arkoosh@arkoosh.com; dan.nevala@arkoosh.com</p>
<p>Michael G. Pierce MICHAEL PIERCE LAW P.O. Box 1019 489 West Mountain Road Cascade, ID 83611 <i>Attorney for Todd McKenna d/b/a Homecraft Home Inspections</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-382-3783 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: michael@michaelpiercelaw.com</p>
<p>Steven. J. Millemann Gregory C. Pittenger MILLEMAN, PITTENGER, MCMAHAN & PEMBERTON LLP 706 North First Street P.O. Box 1066 McCall, ID 83638 <i>Attorneys for Defendant Nancy Gentry-Boyd</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-634-4516 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: sjm@mpmplaw.com; gcp@mpmplaw.com</p>
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 Alyson A. Foster

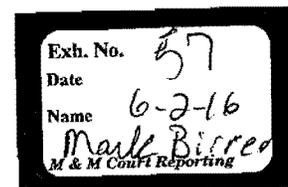
EXHIBIT 1

Alyson A. Foster

From: on behalf of Mark Birrer
Sent: Wednesday, June 06, 2012 11:00 AM
To: 'mlongmire@frontiernet.net'
Subject: Weather Schield door

That number correctly identified the original order and I got a copy of it yesterday. I have identified the door in question on this order and have sent in a request for quote to the factory for the replacement door slab. As soon as I hear back from them, I will be back in correspondence with you.

Mark Birrer, Sales Representative
Cell phone: (208) 859-8501
Fax: (208) 639-0458



DOUGLAS A. MILLER, CLERK

By: G. Meyer, Deputy

JUN 11 2016

Case No. _____
File No. _____

ORIGINAL



Alyson A. Foster (ISB #9719)
Jason J. Rudd (ISB #9406)
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Attorneys for Plaintiffs

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

v.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT REALTY;
KEVIN BATCHELOR; and DOES 1-4

Defendants.

Case No. CV-2014-71-C

**DECLARATION OF BEAU VALUE
IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

Pursuant to Idaho Code § 9-1406, I, Beau Value, depose and say that the following facts
are true and correct:

1. I am the President, Chief Executive Officer, and owner of Disaster Response, f/k/a Restoration Pro. Disaster Response (then Restoration Pro) was hired by Edmond A. Petrus (“Petrus”) in October 2013 to perform remediation work on his home at 2130 Payette Drive in McCall, Idaho. I make this declaration based upon my personal knowledge.

2. I also have been designated as Plaintiff’s expert witness in this matter. I have provided my expert opinion in deposition on March 11, 2016, and provide additional expert opinions below.

Background and Qualifications

3. I have been in the construction industry for twenty years. I have experience in the areas of residential construction of projects ranging in price up to \$10,500,000, construction estimating, planning & scheduling, subcontractor management, project management, contract negotiation, and business management.

4. I have the following memberships, certifications, and honors:

- Idaho Contractor’s License RCE41
- IICRC Certified Technician, Water Damage Restoration
- Certified by BPI as a Building Analyst Professional and Envelope Professional
- Member of the BBB with A+ Rating
- Member of the NFIB
- Top 5 Innovator, McCall Magazine, July 2007
- Outstanding Performance, Tamarack Resort, October 2006 (top performing building contractor for quality, management and overall customer satisfaction)
- Registered Master Builder, Idaho Building Contractors Association, 2006-2009

5. From 2002 to 2010 I owned Everest Custom Builders, a high-end home builder with projects ranging in size from 500,000 to \$10,000,000. Everest Custom Builders completed over 20 custom design build homes at the Tamarack Resort.

6. Since 2011, I have been the President, CEO, and owner of Disaster Response (f/k/a Restoration Pro). Disaster Response specializes in property damage cleanup and repair helping families and businesses get back to normal after a water, fire, storm, mold, or other catastrophic occurrence that results in property damage. Disaster Response has a team of certified professionals who bring years of experience and training to respond to a property damage event and to minimize losses and loss of use of property. We work with homeowners and insurance carriers to put a home or business back to the way it was. Disaster Response also does remodels and additions. Our service area covers Idaho and Eastern Oregon and we have offices in McCall Idaho, Fruitland Idaho and Rexburg Idaho. In 2015, Disaster Response made the top 500 Remodeler of 2015 for all of the United States, coming in at #318, the highest ranking of only three companies that made the list from the state of Idaho.

Work Performed at 2130 Payette Drive

7. In October 2013, Petrus hired Disaster Response to perform remediation work at 2130 Payette Drive. In my deposition, I explained the process of uncovering and remediating the damage we found, and provided my opinion on the cause of the damage. In sum, we found extensive dry rot around the French doors on the southeastern side of the deck next to the dining room. The rot was around the frame of the doors, in the joists, the sub-floor, and on the wall around the corner from the doors and along the lake-facing side of the home underneath the stone veneer.

8. As I explained in my deposition, there were three causes of this damage: (i) improper framing of the French doors, which created a space under the French doors for water to gather and “perch”; (ii) improper flashing sizing and application techniques along the area where the deck meets the wall; and (iii) improper application of moisture barrier along that same area and along the south-facing wall. Given the extent of the damage we uncovered, these defects had existed for years. These defects allowed moisture to penetrate the building envelope and to rot the OSB boards, joists, and sub-floors.

9. Attached as **Exhibit 1** are photographs depicting true and accurate representations of the damages we observed, including around the French doors themselves.

10. I was asked in my deposition about the building codes in effect in McCall at the time 2130 Payette was built in 2004-2005. Since my deposition, I reviewed the 2003 International Residential Code. A true and correct copy of the section “Chapter 7 – Wall Covering,” Section R703 “Exterior Covering,” is attached as **Exhibit 2**.

11. R703.8, “Flashing,” states:

Approved corrosion-resistive flashing shall be provided in the exterior wall envelope in such a manner as to prevent entry of water into the wall cavity or penetration of water to the building structural framing components. The flashing shall extend to the surface of the exterior wall finish and shall be installed to prevent water from reentering the exterior wall envelope. Approved corrosion-resistant flashings shall be installed at all of the following locations:

1. At top of all exterior window and door openings in such a manner as to be leakproof, except that self-flashing windows having a continuous lap of not less than 1¹/₈ inches (28 mm) over the sheathing material around the perimeter of the opening, including corners, do not require additional flashing; jamb flashing may also be omitted when specifically approved by the building official.
2. At the intersection of chimneys or other masonry construction with frame or stucco walls, with projecting lips on both sides under stucco copings.

3. Under and at the ends of masonry, wood or metal copings and sills.
4. Continuously above all projecting wood trim.
5. Where exterior porches, decks or stairs attach to a wall or floor assembly of wood-frame construction. (emphasis added)
6. At wall and roof intersections.
7. At built-in gutters.

This requires that flashing “be installed to prevent water from reentering the exterior wall envelope.” The flashing used here was 1 1/4 inches tall, less than 2 inches, and not sufficient to prevent water from reentering the exterior wall envelope, particularly on the south-facing, lakeside wall facing the elements. In my opinion, the flashing did not comply with this code.

12. R703.2, “Weather-resistant sheathing paper,” states:

Asphalt-saturated felt free from holes and breaks, weighing not less than 14 pounds per 100 square feet (0.683 kg/m²) and complying with ASTM D 226 or other approved weather-resistant material shall be applied over studs or sheathing of all exterior walls as required by Table R703.4. Such felt or material shall be applied horizontally, with the upper layer lapped over the lower layer not less than 2 inches (51 mm). Where joints occur, felt shall be lapped not less than 6 inches (152 mm).

This requires felt or material to overlap the lower layer not less than 2 inches. Here, the home was constructed using flashing that was only 1 ¼ inches and therefore the felt could not lap the lower layer by at least 2 inches. Indeed, as I explained in my deposition, in some places the felt did not overlap the flashing at all and rested above it. Accordingly, in my opinion, this did not comply with either the flashing code or the weather-resistant sheathing paper code.

Mold v. Dry Rot

13. I have been asked to explain the difference between mold and dry rot. In the home construction and building industry, there is a significant difference between mold and dry rot and the terms are not interchangeable.

14. Mold is a growth of fungus or other microorganisms that appears on the surface of wood or other natural materials. Mold may be remedied through sanding and the application of a surface microbial treatment.

15. Dry rot is a structural degradation of wood or other natural materials, caused by exposure to moisture or fungus, that results in destruction or decay of the material. Dry rot affects the structural integrity of a building. Mold does not. Dry rot may be remedied only through replacement of the damaged materials.

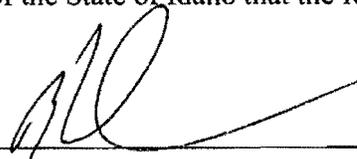
16. While mold and rot both may arise from exposure to moisture, they are very different conditions that require different methods of repair and remediation at significantly different cost. Mold treatment is relatively quick and inexpensive. Remediation of dry rot may be more extensive and expensive, as it requires removal and replacement of materials, often with rebuilding to address degradation of structural integrity.

17. In my experience and opinion, although mold and dry rot both may exist in a home, they are not the same thing and do not always arise from the same causes. In my experience and opinion, the terms "mold" and "microorganisms," by themselves, do not include "dry rot"; and, the term "dry rot", by itself, does not necessarily include "mold" or "microorganisms."

I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

6/9/16

DATE

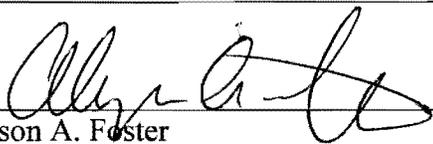


SIGNATURE

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2016, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

<p>C. Tom Arkoosh Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, ID 83701 <i>Attorneys for Chris Kirk d/b/a Kirk Enterprises</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 343-5456 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: tom.arkoosh@arkoosh.com; dan.nevala@arkoosh.com</p>
<p>Michael G. Pierce MICHAEL PIERCE LAW P.O. Box 1019 489 West Mountain Road Cascade, ID 83611 <i>Attorney for Todd McKenna d/b/a Homecraft Home Inspections</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-382-3783 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: michael@michaelpiercelaw.com</p>
<p>Steven. J. Millemann Gregory C. Pittenger MILLEMAN, PITTENGER, MCMAHAN & PEMBERTON LLP 706 North First Street P.O. Box 1066 McCall, ID 83638 <i>Attorneys for Defendant Nancy Gentry-Boyd</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-634-4516 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: sjm@mpmplaw.com; gcp@mpmplaw.com</p>
<p>Phillip J. Collaer ANDERSON, JULIAN & HULL LLP C.W. Moore Plaza 250 South Fifth Street, Suite 700 P.O. Box 7426 Boise, ID 83702 <i>Attorneys for Re/Max Resort Realty and Kevin Batchelor</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-344-5510 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: pcollaer@ajhlaw.com</p>



 Alyson A. Foster

EXHIBIT 1

















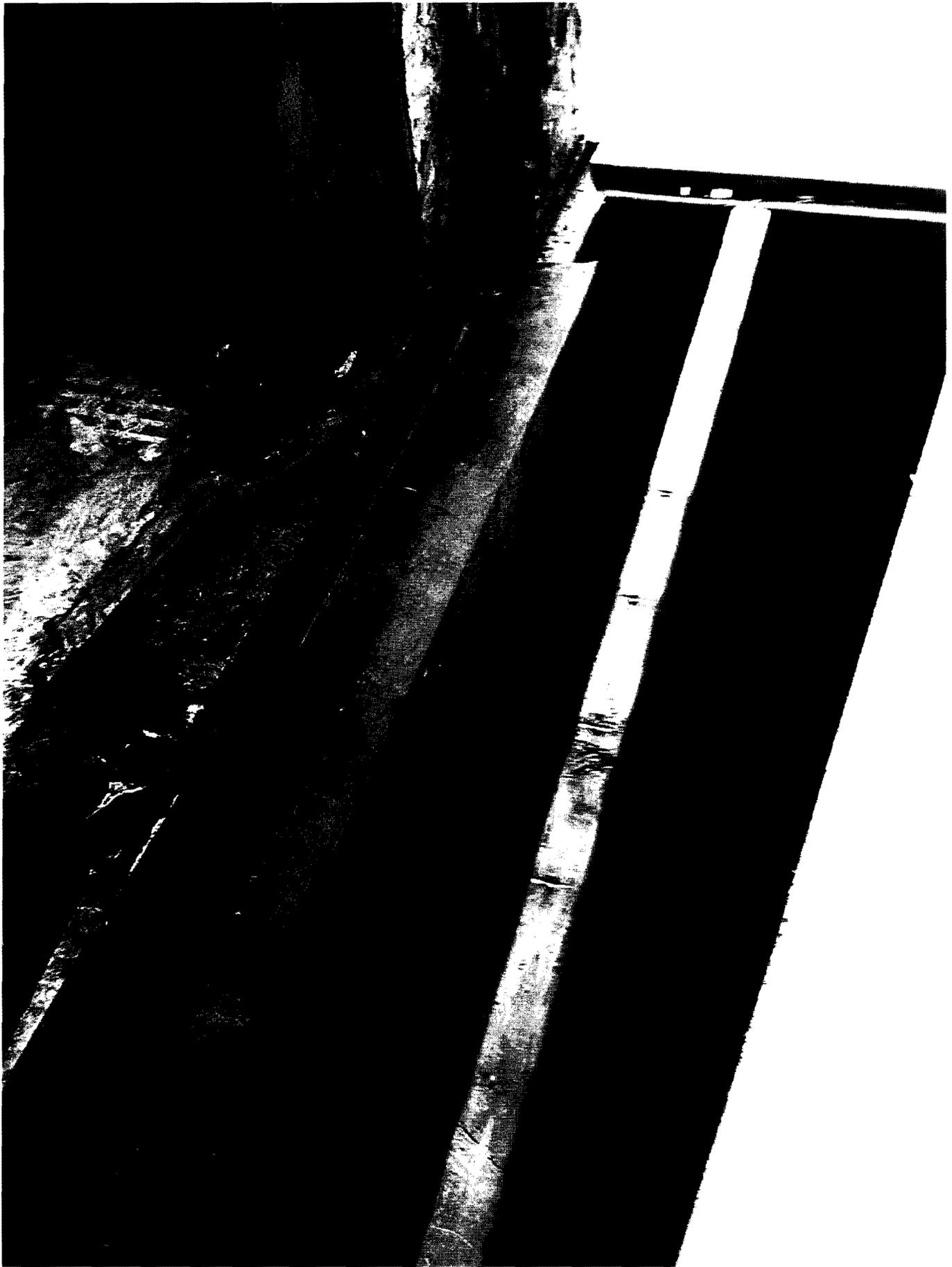






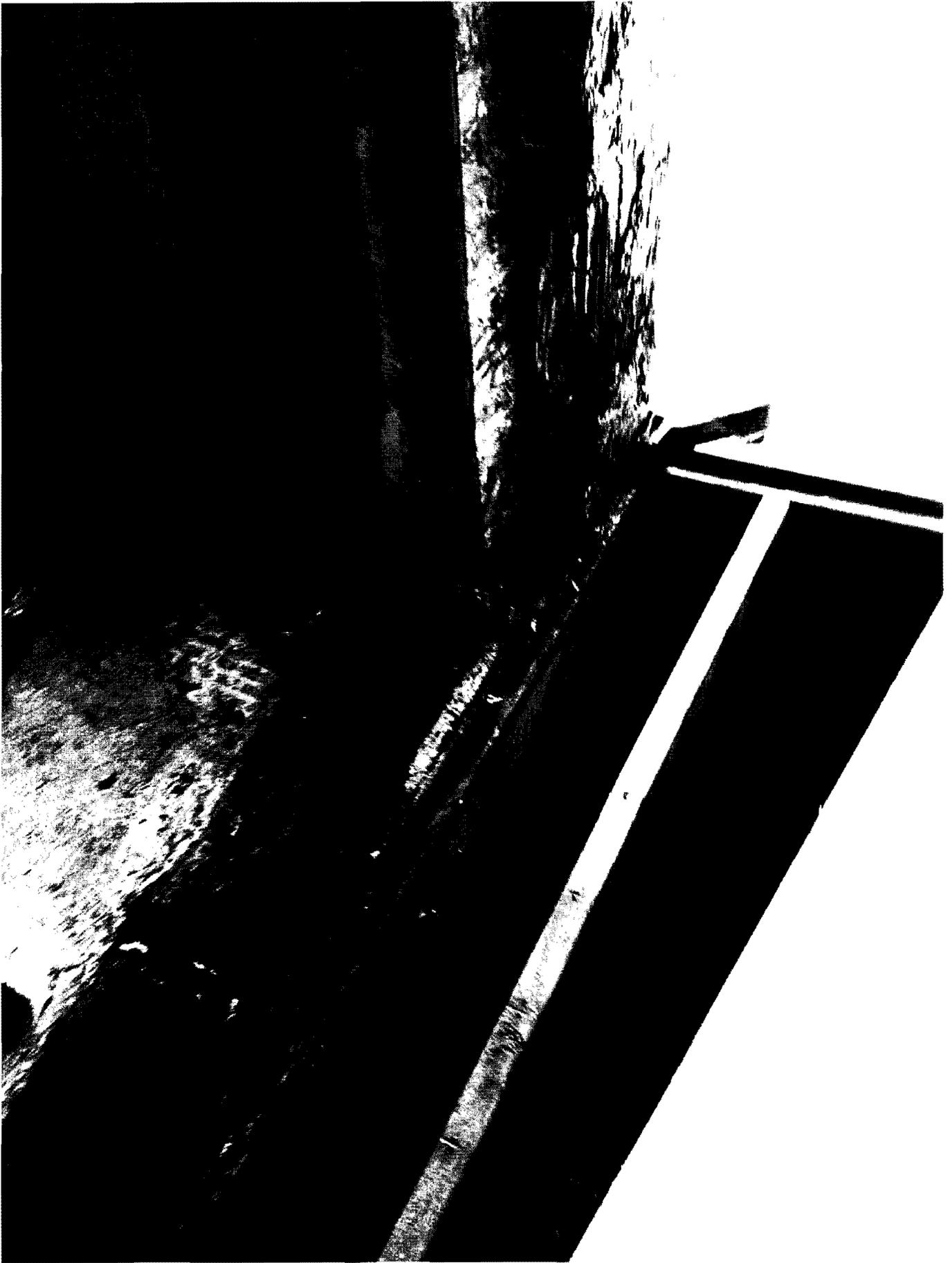




















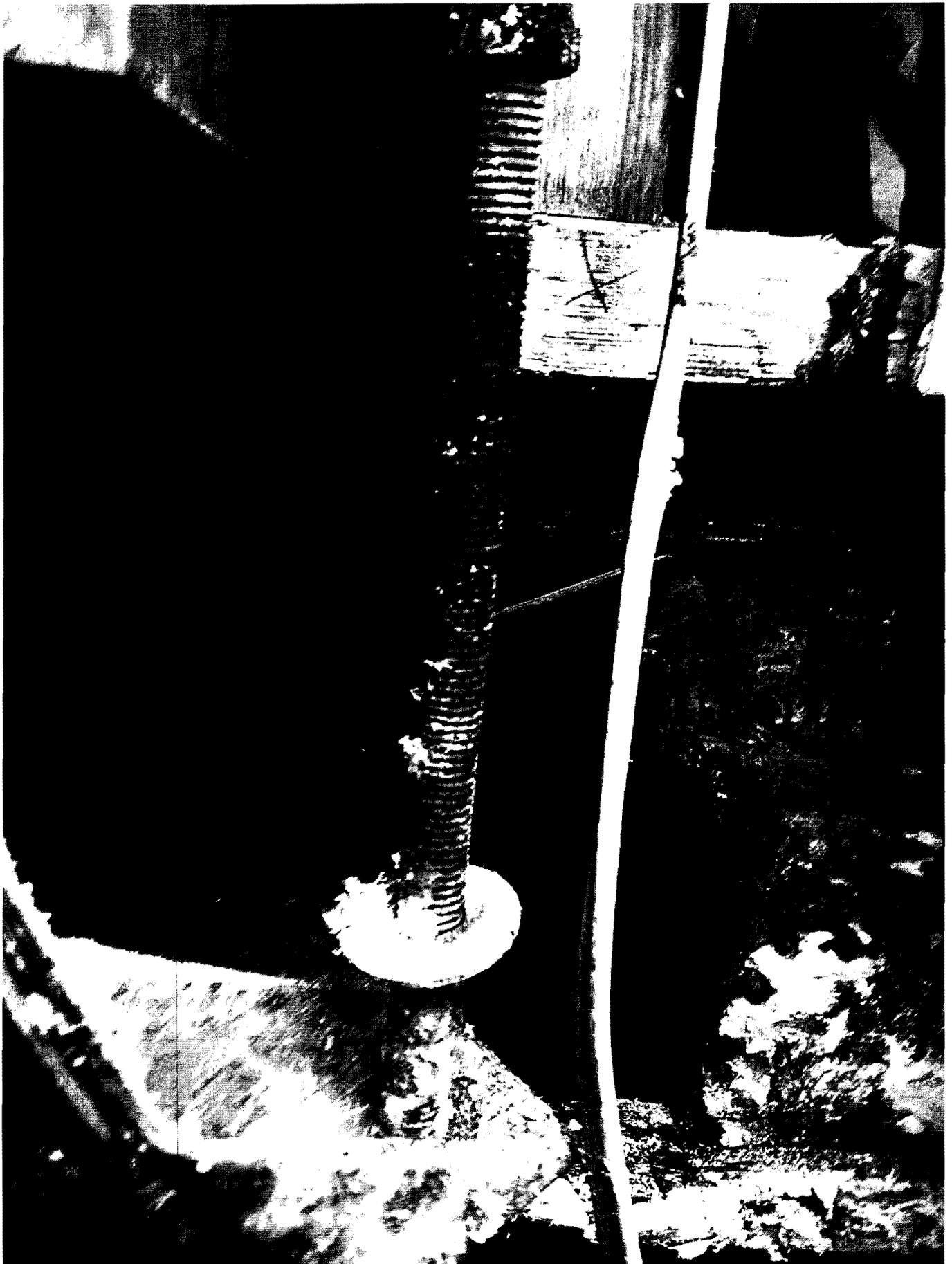






EXHIBIT 2



- International Residential Code for One- and Two-Family Dwellings

- Chapter 7 - Wall Covering
 - SECTION R701 GENERAL
 - SECTION R702 INTERIOR COVERING
 - SECTION R703 EXTERIOR COVERING

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R703.2 Weather-resistant sheathing paper.

R703.3 Wood, hardboard and wood structural panel siding.

R703.4 Attachments.

R703.5 Wood shakes and shingles.

R703.6 Exterior plaster.

R703.7 Stone and masonry veneer, general.

R703.8 Flashing.

R703.9 Exterior insulation finish systems, general.

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R703.9 Exterior insulation finish systems, general.

R703.10 Fiber cement siding.

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R703.1 General.

Exterior walls shall provide the building with a weather-resistant exterior wall envelope. The exterior wall envelope shall include flashing as described in Section R703.8. The exterior wall envelope shall be designed and constructed in such a manner as to prevent the accumulation of water within the wall assembly by providing a water-resistive barrier behind the exterior veneer as required by Section R703.2.

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[R703.10 Fiber cement siding.](#)

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R703.2 Weather-resistant sheathing paper.

Asphalt-saturated felt free from holes and breaks, weighing not less than 14 pounds per 100 square feet (0.683 kg/m²) and complying with ASTM D 226 or other approved weather-resistant material shall be applied over studs or sheathing of all exterior walls as required by Table R703.4. Such felt or material shall be applied horizontally, with the upper layer lapped over the lower layer not less than 2 inches (51 mm). Where joints occur, felt shall be lapped not less than 6 inches (152 mm).

Exception: Such felt or material is permitted to be omitted in the following situations:

1. In detached accessory buildings.
2. Under panel siding with shiplap joints or battens.
3. Under exterior wall finish materials as permitted in Table R703.4.
4. Under paperbacked stucco lath.

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R703.3 Wood, hardboard and wood structural panel siding.

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R703.4 Attachments.

Unless specified otherwise, all wall coverings shall be securely fastened in accordance with Table R703.4 or with other approved aluminum, stainless steel, zinc-coated or other approved corrosion-resistive fasteners.

TABLE R703.4 WEATHER-RESISTANT SIDING ATTACHMENT AND MINIMUM THICKNESS

SIDING MATERIAL		NOMINAL THICKNESS ^a (inches)	JOINT TREATMENT	SHEATHING PAPER REQUIRED	TYPE OF SUPPORTS FOR THE SIDING MATERIAL AND FASTENERS ^{b,c,d}					Number or spacing of fasteners
					Wood or wood structural panel sheathing	Fiberboard sheathing into stud	Gypsum sheathing into stud	Foam plastic sheathing into stud	Direct to studs	
Horizontal aluminum ^e	Without insulation	0.019 ^f	Lap	No	0.120 nail 1½" long	0.120 nail 2" long	0.120 nail 2" long	0.120 nail ^z	Not allowed	Same as stud spacing
		0.024	Lap	No	0.120 nail 1½" long	0.120 nail 2" long	0.120 nail 2" long	0.120 nail ^z	Not allowed	
	With insulation	0.019	Lap	No	0.120 nail 1½" long	0.120 nail 2½" long	0.120 nail 2½" long	0.120 nail ^z	0.120 nail 1½" long	
Brick veneer		2	Section R703	Yes (Note m)	See Section R703 and Figure R703.7 ^h					
Concrete masonry veneer		2								
Hardboard ^l Panel siding-vertical		7/16	Note g	See R703.2	Note o	Note o	Note o	Note o	Note o	6 ² panel edges 12 ² inter. sup. ^p
Hardboard ^l Lap-siding-horizontal		7/16	Note r	Yes	Note q	Note q	Note q	Note q	Note q	Same as stud spacing 2 per bearing
					0.113 nail 1¼"	0.113 nail	0.113 nail 2½"	0.113		Same as

Steel ⁱ	29 ga.	Lap	No	Staple- 1 3/4"	2 3/4" Staple- 2 1/2"	Staple- 2 1/4"	nail ^z Staple ^z	Not allowed	stud spacing
Stone veneer	2	Section R703	Yes (Note m)	See Section R703 and Figure R703.7 ^h					
Particleboard panels	3/8 - 1/2	Note g	Note g	6d box nail	6d box nail	6d box nail	box nail ^z	6d box nail, 3/8 not allowed	6" panel edge 12" inter. sup.
	5/8	Note g	Note g	6d box nail	8d box nail	8d box nail	box nail ^z	6d box nail	
Plywood panel ^j (exterior grade)	3/8	Note g	Note g	0.099 nail-2"	0.113 nail- 2 1/2"	0.099 nail-2"	0.113 nail ^z	0.099 nail-2 ²	6" on edges
Vinyl siding ⁿ	0.035	Lap	No	0.120 nail 1 1/2" Staple- 1 3/4"	0.120 nail 2" Staple- 2 1/2"	0.120 nail 2" Staple- 2 1/2"	0.120 nail ^z Staple ^z	Not allowed	Same as stud spacing
Wood ^k Rustic, drop	3/8 Min	Lap	No	Fastener penetration into stud-1 ²				0.113 nail-2 1/2" Staple- 2"	Face nailing up to 6 ² widths, 1 nail per bearing; 8" widths and over, 2 nails per bearing
Shiplap	19/32 Average	Lap	No						
Bevel	7/16	Lap	No						
Butt tip	3/16	Lap	No						
Fiber cement panel siding ^s	5/16	Note t	Yes Note y	6d corrosion resistant nail ^u	6d corrosion resistant nail ^u	6d corrosion resistant nail ^u	—	4d corrosion resistant nail ^v	6" oc on edges, 12" oc on intermed. studs
Fiber cement lap siding ^s	5/16	Note w	Yes Note y	6d corrosion resistant nail ^u	6d corrosion resistant nail ^u	6d corrosion resistant nail ^u	—	6d corrosion resistant nail ^x	Note x

For SI: 1 inch = 25.4 mm.

- a. Based on stud spacing of 16 inches on center. Where studs are spaced 24 inches, siding shall be applied to sheathing approved for that spacing.
- b. Nail is a general description and shall be T-head, modified round head, or round head with smooth or deformed shanks.
- c. Staples shall have a minimum crown width of 7/16-inch outside diameter and be manufactured of minimum No. 16 gage wire.
- d. Nails or staples shall be aluminum, galvanized, or rust-preventive coated and shall be driven into the studs for fiberboard or gypsum backing.
- e. Aluminum nails shall be used to attach aluminum siding.
- f. Aluminum (0.019 inch) shall be unbacked only when the maximum panel width is 10 inches and the maximum flat area is 8 inches. The tolerance for aluminum siding shall be +0.002 inch of the nominal dimension.
- g. If boards or panels are applied over sheathing or a weather-resistant membrane, joints need not be treated. Otherwise, vertical joints shall occur at studs and be covered with battens or be lapped.
- h. All attachments shall be coated with a corrosion-resistive coating.
- i. Shall be of approved type.

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R703.5 Wood shakes and shingles.

Wood shakes and shingles shall conform to CSSB *Grading Rules for Wood Shakes and Shingles*.

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R703.7 Stone and masonry veneer, general.

All stone and masonry veneer shall be installed in accordance with this chapter, Table R703.4 and Figure R703.7. Such veneers installed over a backing of wood or cold-formed steel shall be limited to the first story above grade and shall not exceed 5 inches (127 mm) in thickness.

Exceptions:

1. In Seismic Design Categories A and B, exterior masonry veneer with a backing of wood or cold-formed steel framing shall not exceed 30 feet (9144 mm) in height above the noncombustible foundation, with an additional 8 feet (2348 mm) permitted for ends.
2. In Seismic Design Category C, exterior masonry veneer with a backing of wood or cold-formed steel framing shall not exceed 30 feet (9144 mm) in height above the noncombustible foundation, with an additional 8 feet (2348 mm) permitted for gabled ends. In other than the topmost story, the length of bracing shall be 1.5 times the length otherwise required in Chapter 6.
3. For detached one- or two-family dwellings with a maximum nominal thickness of 4 inches (102 mm) of exterior masonry veneer with a backing of wood frame located in Seismic Design Category D₁, the masonry veneer shall not exceed 20 feet (6096 mm) in height above a noncombustible foundation, with an

additional 8 feet (2438 mm) permitted for gabled ends, or 30 feet (9144 mm) in height with an additional 8 feet (2438 mm) permitted for gabled ends where the lower 10 feet (3048 mm) has a backing of concrete or masonry wall, provided the following criteria are met:

3.1. Braced wall panels shall be constructed with a minimum of $\frac{7}{16}$ inch (11.1 mm) thick sheathing fastened with 8d common nails at 4 inches (102 mm) on center on panel edges and at 12 inches (305 mm) on center on intermediate supports.

3.2. The bracing of the top story shall be located at each end and at least every 25 feet (7620 mm) on center but not less than 45% of the braced wall line. The bracing of the first story shall be as provided in Table R602.10.1.

3.3. Hold down connectors shall be provided at the ends of braced walls for the second floor to first floor wall assembly with an allowable design of 2100 lbs. (952.5 kg). Hold down connectors shall be provided at the ends of each wall segment of the braced walls for the first floor to foundation assembly with an allowable design of 3700 lbs. (1678 kg). In all cases, the hold down connector force shall be transferred to the foundation.

3.4. Cripple walls shall not be permitted.

4. For detached one- and two-family dwellings with a maximum actual thickness of 3 inches (76 mm) of exterior masonry veneer with a backing of wood frame located in Seismic Design Category D₂, the masonry veneer shall not exceed 20 feet (6096 mm) in height above a noncombustible foundation, with an additional 8 feet (2438 mm) permitted for gabled ends, or 30 feet (9144 mm) in height with an additional 8 feet (2438 mm) permitted for gabled ends where the lower 10 feet (3048 mm) has a backing of concrete or masonry wall, provided the following criteria are met:

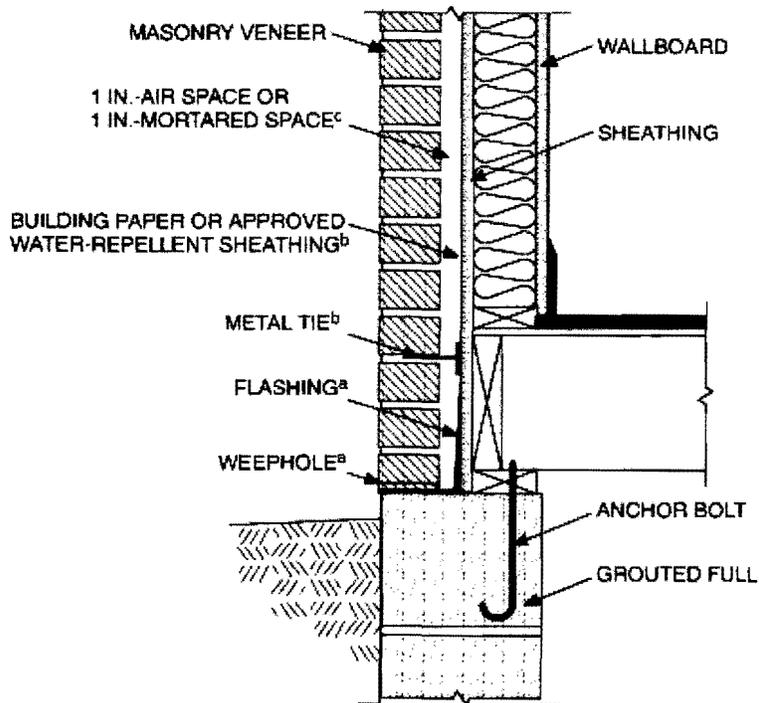
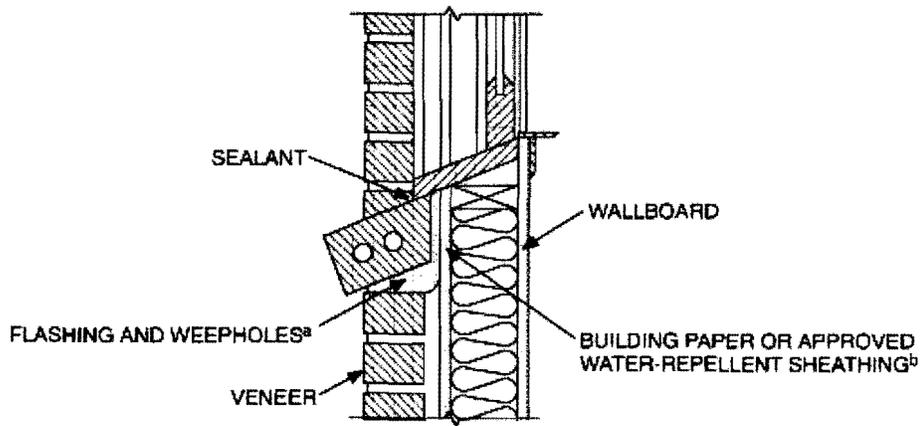
4.1. Braced wall panels shall be constructed with a minimum of $\frac{7}{16}$ inch (11.1 mm) thick sheathing fastened with 8d common nails at 4 inches (102 mm) on center on panel edges and at 12 inches (305 mm) on center on intermediate supports.

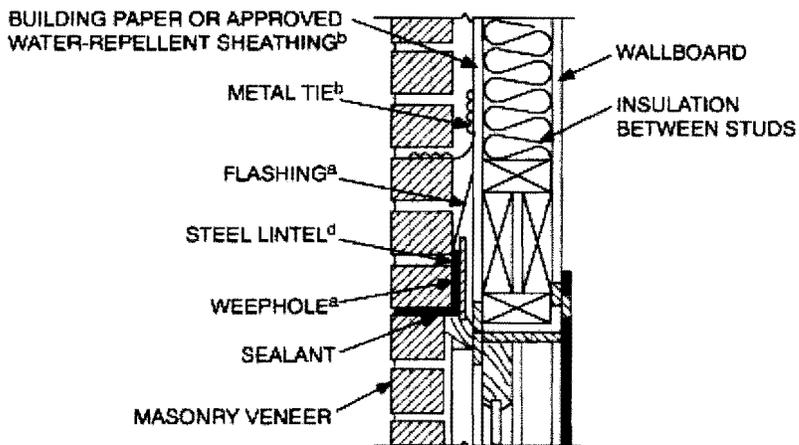
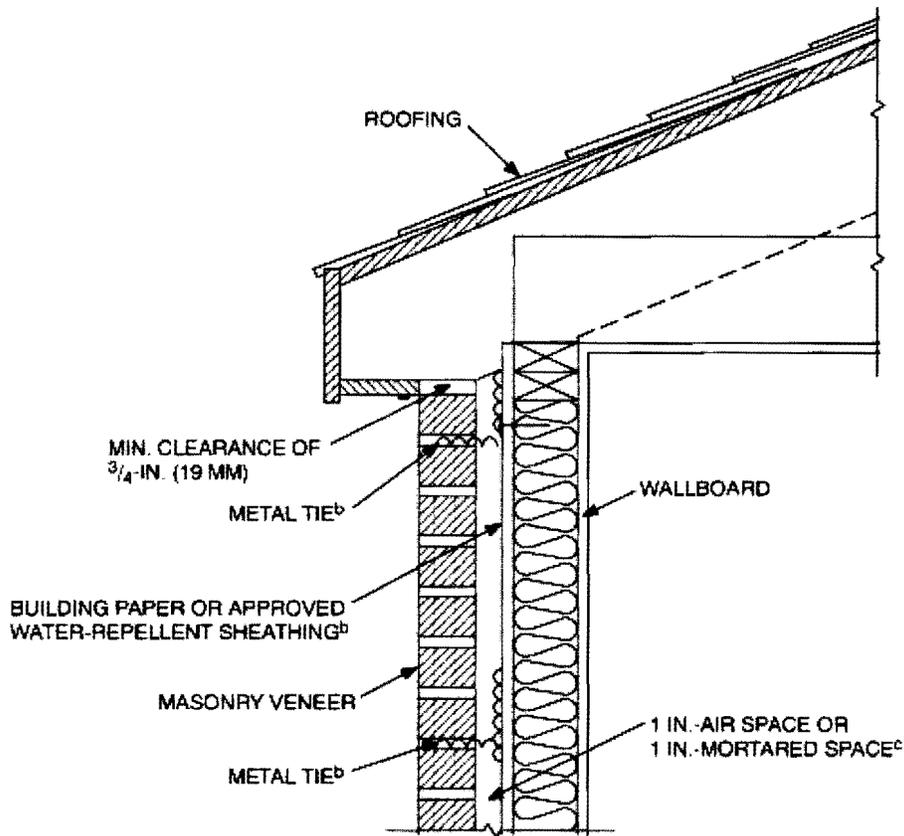
4.2. The bracing of the top story shall be located at each end and at least every 25 feet (7620 mm) on center but not less than 55% of the braced wall line. The bracing of the first story shall be as provided in Table R602.10.1.

4.3. Hold down connectors shall be provided at the ends of braced walls for the second floor to first floor wall assembly with an allowable design of 2300 lbs. (1043 kg). Hold down connectors shall be provided at the ends of each wall segment of the braced walls for the first floor to foundation assembly with an allowable design of 3900 lbs. (1769 kg). In all cases, the hold down connector force shall be transferred to the foundation.

4.4. Cripple walls shall not be permitted.

FIGURE R703.7 MASONRY VENEER WALL DETAILS





For SI: 1 inch = 25.4 mm.

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R703.8 Flashing.

Approved corrosion-resistive flashing shall be provided in the exterior wall envelope in such a manner as to prevent entry of water into the wall cavity or penetration of water to the building structural framing components. The flashing shall extend to the surface of the exterior wall finish and shall be installed to prevent water from reentering the exterior wall envelope. Approved corrosion-resistant flashings shall be installed at all of the following locations:

1. At top of all exterior window and door openings in such a manner as to be leakproof, except that self-flashing windows having a continuous lap of not less than $1\frac{1}{8}$ inches (28 mm) over the sheathing material around the perimeter of the opening, including corners, do not require additional flashing; jamb flashing may also be omitted when specifically approved by the building official.
2. At the intersection of chimneys or other masonry construction with frame or stucco walls, with projecting lips on both sides under stucco copings.
3. Under and at the ends of masonry, wood or metal copings and sills.
4. Continuously above all projecting wood trim.

5. Where exterior porches, decks or stairs attach to a wall or floor assembly of wood-frame construction.
6. At wall and roof intersections.
7. At built-in gutters.

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R703.9 Exterior insulation finish systems, general.

All Exterior Insulation Finish Systems (EIFS) shall be installed in accordance with the manufacturer's installation instructions and the requirements of this section. Decorative trim shall not be face nailed through the EIFS. The EIFS shall terminate not less than 6 inches (152 mm) above the finished ground level.

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1. I am Plaintiff Edmond A. Petrus and am the trustee of Plaintiff Petrus Family Trust Dated May 1, 1991. I make this declaration based on my personal knowledge.

Representation by Kirk Batchelor and Re/Max Resort Realty

2. When searching for a home to purchase in McCall, I hired Kevin Batchelor (“Batchelor”) and Re/Max Resort Realty to represent me as my agent. On January 3, 2012, I entered into an exclusive written representation agreement. A true and correct copy of that agreement is attached as **Exhibit 1**.

3. When I was asked about that agreement in my deposition on March 15, 2016, I could not recall whether the representation agreement I was shown was among the numerous other documents I signed in 2012 in connection with my search for and purchase of my home located at 2130 Payette Drive in McCall, Idaho. But, I know that I entered this agreement with Batchelor, and I always understood that I had entered a written agreement with Batchelor.

4. As I explained in my deposition, Batchelor never provided me with a list of names of potential home inspectors. Rather, he informed me by email that Todd McKenna, d/b/a Homecraft Inspections, would perform my inspection. I asked Batchelor whether McKenna was qualified, reputable, and insured/bonded. Batchelor assured me he was. I relied exclusively on the fact that Batchelor selected McKenna as the home inspector because McKenna was a good choice and would do a thorough, professional job.

5. From his deposition testimony, I now know that Batchelor had never before recommended or selected McKenna as a home inspector and this was the first time. I also learned from Batchelor’s deposition testimony that Batchelor had only been involved in approximately five home sales in which McKenna was the home inspector. I also learned from other contractors and real estate agents/brokers in the McCall community that McKenna has a

reputation as a “yes man” home inspector who will gloss over problems in order to get a sale approved, but was hired because his services were cheap and he could get houses sold. I also learned in this litigation that McKenna is neither bonded nor insured.

6. Had I known that McKenna was unqualified, did not have professional liability insurance, and had a poor reputation in the community, and had I known that Batchelor had never before recommended or selected McKenna as a home inspector, I would have insisted on hiring another home inspector.

7. In my deposition, I explained that I spoke with Defendant McKenna prior to the home inspection. However, I am not a real estate or construction expert, and do not have experience interviewing or selecting home inspectors. I relied on Batchelor’s representation that Defendant McKenna was “excellent,” insured, and “the best person for the job.”

8. A true and correct copy of the Inspection Report, March 18, 2012, that I received from McKenna is attached as **Exhibit 2**.

9. After I received the report from McKenna, I asked him about the photos showing water seepage in the crawl space and ants. I was concerned about what this might mean. McKenna told me this is normal seepage from spring runoff, and that there was nothing to be concerned about and no action to be taken. He mentioned it in his report because wanted me to be aware of and monitor future runoff. He told me the ants were normal and I might have to get an exterminator. Based on this, I understood that there were no immediate problems from moisture or water in or around the crawlspace, and that, at most, ant extermination may be necessary. I therefore did not ask Gentry to make any repairs to the crawlspace, and I assumed responsibility for any ant extermination.

10. We closed on purchasing 2130 Payette Drive on April 20, 2012. Before closing, I knew I would be out of town for the final walkthrough so I asked Batchelor to conduct it. I asked him to check everything thoroughly on the walkthrough and make sure that all doors were locked because I wasn't going to be returning for several weeks and I did not want anything stolen or worse. Batchelor agreed that he would do so. The locks had not yet been changed nor had the security system been changed over to me. After the walkthrough, I called Batchelor to see how the walkthrough went and to be sure the house was locked. Batchelor told me he thoroughly checked the house and he locked all the doors as "tight as a drum." I trusted Batchelor and relied on him to safeguard my home and possessions.

11. After I moved in, I observed immediately that the French Doors could not be locked. This means that if Batchelor checked it as he said he would, he did not disclose to me that they were not locked. Or, he did not check to make sure it was locked at all. Either way, he violated his duty to me.

Problems with the French Doors

12. Shortly after I moved into the home in May or June 2012, I discovered the French doors on the southeast corner of the deck next to the dining room could not open or close properly, were swollen with water, and could not be locked. The doors did not work. Attached as **Exhibit 3** is a photograph that is a true, correct, and accurate representation of the doors at the time I moved into the house. Prior to moving in, I had never tried to open those doors during any of my visits to the home.

13. I asked Batchelor to come to my home so I could show him the problems with the doors. I told him that I was frustrated that McKenna had never tried the doors. Batchelor told me "I gave you a letter and you chose McKenna." I told him that was not true, that he never sent

me such a letter, and that he himself chose and hired McKenna after I told Batchelor I wanted a competent inspector with insurance. Batchelor did not respond to those statements.

14. At that time, I considered Batchelor to be a good friend. I therefore met him for lunch and told him I thought he should not use McKenna again as a home inspector because McKenna was not competent and glossed over defects just to get a house sold and was not insured or bonded. Batchelor acknowledged that he had heard that reputation about McKenna many times. But, he thought it did not matter who we had for a home inspector because the house had been built by Chris Kirk, “one of the best builders on the lake,” so the house would not have any problems and “we could have used a blind man” for the home inspector. Batchelor also said McKenna was available and inexpensive.

15. I asked McKenna to come to my home so I could show him the problems I found with the doors. He came to my house and observed the problems I was having with the doors. He admitted to me he had never tried to open the French doors during his inspection.

16. Also around this time (May or June 2012), I asked Nancy Gentry-Boyd’s (“Gentry’s”) real estate agent, Michael Wood (“Wood”), to come see the doors as well. I demonstrated for him the problems with opening, closing, and locking the doors. Wood said that they always had experienced problems with the door closing properly and that most of the time it could not be locked. He told me that Gentry had always known about problems with the doors.

17. I showed Wood where on the doors duct tape had been—along the seams—and where there were still signs/remnants of the tape. He told me he would ask Gentry about it.

18. Wood then called me and said that Gentry had taped the door because cold air came into the home while she was playing bridge. I pointed out to Wood that the bridge table

was on the opposite side of the room from the door and that if air was getting in, so was water. He agreed that if air was getting in, so would the water.

Reliance on Disclosure

19. Before closing on the home, I received and reviewed the Property Disclosure Form provided by Gentry. I understood that form to include all problems and defects that Gentry knew about. The form did not disclose any problems with water or moisture, water-logging, or opening/closing/locking problems with the French doors. I relied on this information when I decided what items to address in the inspection contingency and when I decided to close on purchasing the house.

20. I did not know when I received this Property Disclosure Form that Gentry had experienced problems with the French doors, much less that those problems had prompted her to call the builder to come out and investigate.

21. Had I known before closing that Gentry had experienced problems with closing, opening, and locking the French doors, or with water-logging, or with a draft that required duct tape to address, I would have wanted these problems fully investigated and fixed before closing on the deal. In my experience, when a draft comes through, so does moisture. I would have had the entire door removed for inspection and seen the rotten areas around the sides of the door.

22. This is consistent with my character and my prior conduct with this case. For example, a dispute with the neighbors regarding the covering over the heating unit caused concern for me so I hired an attorney to investigate it. If there is a problem, I want to get to the bottom of it.

Inspection by Chris Kirk

23. On August 7, 2013, my attorney sent a letter to Chris Kirk to provide notice under the Notice and Opportunity to Repair Act. A true and correct copy of that letter is attached as **Exhibit 4**.

24. On August 11, 2013, Kirk responded to my attorney and requested to inspect the door. A true and correct copy of that letter is attached as **Exhibit 5**.

25. On August 15, 2013, my attorney scheduled Kirk's inspection for August 20, 2013. A true and correct copy of that letter is attached as **Exhibit 6**.

26. On August 30, 2013, my attorney received a letter from Kirk's attorney stating that "Kirk exercised his right to inspect the property on August 21, 2013," and setting forth what Kirk claims to have observed. A true and correct copy of that letter is attached as **Exhibit 7**. I do not recall being present when Kirk performed that inspection.

27. In April 2014, Kirk came to inspect the doors again. I was present. He told me that they would try to get the doors fixed for me. I overheard him talking to whomever he had with him, saying that he had told Gentry that out-swinging doors, as opposed to in-swinging doors, are a problem because they do not keep water out and that he had advised her not to use them. However, she had insisted on those doors anyway. Kirk was at the house for over an hour.

28. At some point, Kirk requested to go on the roof. I was uncomfortable with him going on the roof, both for liability reasons and because I was concerned he might harm something. There was no rot or problems on the roof. I therefore told Kirk I did not want him to go on the roof and asked him to leave.

Homeowners' Insurance

29. I filed a claim under my homeowners' insurance policy, AIG Insurance Co., for the damages I incurred. The insurance company, AIG, sent Rimkus Consulting Group, Inc. to my home to investigate the damage. A true and correct copy of their report is attached as Exhibit 8.

30. AIG denied the claim in total.

Modifications after I Moved In

31. Since I took ownership of the home, neither I nor anyone else to my knowledge did any of the following things (putting aside any repairs made by Disaster Response): installed screws in any door threshold; replaced the French door; removed or reinstalled the locking mechanism of any door; attempted to pry open the locking mechanism on the French doors; or removed weather stripping from any doors.

32. After I moved in, I had all the doors rekeyed.

I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

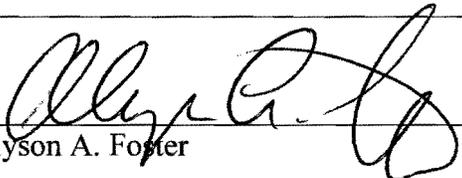
6/9/16
DATE


SIGNATURE

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2016, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

<p>C. Tom Arkoosh Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, ID 83701 <i>Attorneys for Chris Kirk d/b/a Kirk Enterprises</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 343-5456 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: tom.arkoosh@arkoosh.com; dan.nevala@arkoosh.com</p>
<p>Michael G. Pierce MICHAEL PIERCE LAW P.O. Box 1019 489 West Mountain Road Cascade, ID 83611 <i>Attorney for Todd McKenna d/b/a Homecraft Home Inspections</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-382-3783 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: michael@michaelpiercelaw.com</p>
<p>Steven. J. Millemann Gregory C. Pittenger MILLEMAN, PITTENGER, MCMAHAN & PEMBERTON LLP 706 North First Street P.O. Box 1066 McCall, ID 83638 <i>Attorneys for Defendant Nancy Gentry-Boyd</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-634-4516 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: sjm@mpmplaw.com; gcp@mpmplaw.com</p>
<p>Phillip J. Collaer ANDERSON, JULIAN & HULL LLP C.W. Moore Plaza 250 South Fifth Street, Suite 700 P.O. Box 7426 Boise, ID 83702 <i>Attorneys for Re/Max Resort Realty and Kevin Batchelor</i></p>	<p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile: 208-344-5510 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: pcollaer@ajhlaw.com</p>



 Alyson A. Foster

EXHIBIT 1



RE-14 BUYER REPRESENTATION AGREEMENT (EXCLUSIVE RIGHT TO REPRESENT)

JULY 2011 EDITION
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Idaho Association of REALTORS®
The Voice for Real Estate in Idaho

THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.
IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

1 DATE: 01/03/2012

AGENT: Kevin Batchelor

Acting as Agent for the Broker

2
3 1. BUYER Mr. E. Petrus

4
5 retains Kevin Batchelor Broker of RE/MAX Resort Realty

6 as exclusive Buyer Broker (hereinafter referred to as Broker), where the BUYER is represented by one agent only for time herein
7 set forth and for the express purpose of Representing BUYER in the purchase, lease, or optioning of real property. Further,
8 BUYER agrees, warrants and acknowledges that BUYER has not and shall not enter into any buyer representation agreement
9 with another broker in the state of Idaho as a broker for BUYER during the effective term of this agreement, unless otherwise
10 agreed to in writing by BUYER and above-listed Broker. BUYER agrees to indemnify and hold the above-listed Broker harmless
11 from any claim brought by any other broker or real estate salesperson for compensation claimed or owed during the effective
12 term of this agreement. By appointing Broker as BUYER'S exclusive agent, BUYER agrees to conduct all negotiations for
13 property through Broker, and to refer to Broker all inquiries received in any form from real estate brokers, salespersons,
14 prospective sellers, or any other source, during the time this Buyer Representation Agreement is in effect. BUYER desires to
15 purchase, lease, or option the following real estate: Type of property:

16
17 Residential Residential Income Commercial Vacant Land Other

18 Applicable City(s) McCall, Idaho; Applicable Zip Codes 83638

19 Applicable County(s) Valley

20 Other Description: (i.e., geographical area, price, etc.) _____

21
22 2. **TERM OF AGREEMENT:** This BUYER REPRESENTATION AGREEMENT (herein after referred to as Agreement) is in force from
23 date 01/03/2012 and will expire at 11:59 p.m. on date 08/31/2012, or upon closing of escrow of such property purchased
24 through this agreement.

25
26 3. **BROKER REPRESENTATIONS AND SERVICES:** The Broker and Broker's agent representing a BUYER are agents of the BUYER.
27 Broker will use reasonable efforts as BUYER'S agent to locate property as described in Section One hereof from the information available
28 in the Multiple Listing Service (MLS) and from other sources for unlisted property that the Broker may be aware of when applicable as set
29 forth in Section One. The Broker's duty to locate property for the BUYER is limited to the properties that the Broker is aware of and does
30 not include a duty to discover every unlisted property that may be privately advertised. Broker shall make submissions to BUYER
31 describing and identifying properties that substantially meet the criteria set forth in Section One, for consideration of the BUYER and Broker
32 agrees to negotiate acceptance of any offer to purchase or lease such property.

33
34 4. **TRANSACTION RELATED SERVICES DISCLAIMER:** BUYER understands that Broker is qualified to advise BUYER on general
35 matters concerning real estate, but is not an expert in matters of law, tax, financing, surveying, structural conditions, property inspections,
36 hazardous materials, or engineering. BUYER acknowledges that Broker advises BUYER to seek expert assistance for advice on such
37 matters. Broker cannot warrant the condition of property to be acquired, or guarantee that all material facts are disclosed by the Seller.
38 Broker will not investigate the condition of any property including without limitation the status of permits, zoning, location of property lines,
39 square footage, possible loss of views and/or compliance of the property with applicable laws, codes or ordinances and BUYER must
40 satisfy themselves concerning these issues by obtaining the appropriate expert advice. The Broker or Broker's agent may, during the course
41 of the transaction, identify individuals or entities who perform services including **BUT NOT LIMITED TO** the following; home inspections,
42 service contracts, appraisals, environmental assessment inspections, code compliance inspections, title insurance, closing and escrow
43 services, loans and refinancing services, construction and repairs, legal and accounting services, and/or surveys. The BUYER understands
44 that the identification of service providers is solely for BUYER'S convenience and that the Broker and its agent are not guaranteeing or
45 assuring that the service provider will perform its duties in accordance with the BUYER'S expectations. BUYER has the right to make
46 arrangements with any entity BUYER chooses to provide these services. BUYER hereby releases and holds harmless the Broker and
47 Broker's agent from any claims by the BUYER that service providers breached their agreement, were negligent, misrepresented
48 information, or otherwise failed to perform in accordance with the BUYER'S expectations. In the event the BUYER requests Broker to
49 obtain any products or services from outside sources, BUYER agrees to pay for them immediately when payment is due. For example:
50 surveys or engineering, environmental and/or soil tests, title reports, home or property inspections, appraisals, etc.

51
52 5. **FINANCIAL INFORMATION:** BUYER agrees to provide Broker and/or Broker's agent with certain pertinent financial information
53 necessary to prove ability to purchase desired property.

54
55 6. **OTHER POTENTIAL BUYERS:** BUYER understands that other potential buyers may consider, make offers on, or purchase through
56 Broker the same or similar properties as BUYER is seeking to acquire. BUYER consents to Broker's representation of such other potential
57 buyers before, during, and after the expiration of this Agreement and further releases Broker of any conflicting Agency duties.

BUYER'S Initials (RP)

Date: 1/3/12

Exh. No. 27

Date 1/3/12

Petrus

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JULY 2011 EDITION

RE-14 BUYER REPRESENTATION AGREEMENT

PETRUS000267

Page 1 of 3

BUYER'S NAME(S) Mr. E. Petrus

58 **7. LIMITS OF CONFIDENTIALITY OF OFFERS:** BUYER understands that an offer submitted to a seller, and the terms thereof may not be
59 held confidential by such seller or seller's representative unless such confidentiality is otherwise agreed to by the parties.

60
61 **8. CONSENT TO LIMITED DUAL REPRESENTATION AND ASSIGNED AGENCY:** The undersigned BUYER(S) have received, read and
62 understand the Agency Disclosure Brochure (prepared by the Idaho Real Estate Commission). The undersigned BUYER(S) understand
63 that the brokerage involved in this transaction may be providing agency representation to both the BUYER(S) and the Seller. The
64 undersigned BUYER(S) each understands that, as an agent for both BUYER/client and Seller/client, a brokerage will be a limited dual
65 agent of each client and cannot advocate on behalf of one client over another, and cannot legally disclose to either client certain
66 confidential client information concerning price negotiations, terms or factors motivating the BUYER/client to buy or the Seller/client to sell
67 without specific written permission of the client to whom the information pertains. The specific duties, obligations and limitations of a limited
68 dual agent are contained in the Agency Disclosure Brochure as required by § 54-2085, Idaho Code. The undersigned BUYER(S) each
69 understands that a limited dual agent does not have a duty of undivided loyalty to either client.

70
71 The undersigned BUYER(S) further acknowledge that, to the extent the brokerage firm offers assigned agency as a type of agency
72 representation, individual sales associates may be assigned to represent each client to act solely on behalf of the client consistent with
73 applicable duties set forth in § 54-2087, Idaho Code. In an assigned agency situation, the designated broker (the broker who supervises the
74 sales associates) will remain a limited dual agent of the client and shall have the duty to supervise the assigned agents in the fulfillment of
75 their duties to their respective clients, to refrain from advocating on behalf of any one client over another, and to refrain from disclosing or
76 using, without permission, confidential information of any other client with whom the brokerage has an agency relationship.

77
78 **BUYER NOTIFICATION AND CONSENT TO RELEASE FROM CONFLICTING AGENCY DUTIES:** BUYER acknowledges that Broker
79 as named above has disclosed the fact that at times Broker acts as agent(s) for other BUYERS and for Sellers in the sale of the property.
80 BUYER has been advised and understands that it may create a conflict of interest for Broker to introduce BUYER to a Seller Client's
81 property because Broker could not satisfy all of its Client duties to both BUYER Client and Seller Client in connection with such a showing
82 or any transaction which resulted. **Based on the understandings acknowledged, BUYER makes the following election.**
83 (Make one election only)

84
85
86 EP
87 Initials
88 **Limited Dual Agency**
89 **and/or**
90 **Assigned Agency**

BUYER DOES WANT to be introduced to Seller client's property and hereby agrees to relieve Broker of conflicting agency duties, including the duty to disclose confidential information known to the Broker at the time and the duty of loyalty to either party. Relieved of all conflicting agency duties, Broker will act in an unbiased manner to assist the BUYER and Seller in the introduction of BUYER to such Seller client's property and in the preparation of any contract of sale which may result. BUYER authorizes Broker to act in a **limited dual agency** capacity. Further, BUYER agrees that Broker may offer, but is not obligated to offer, **assigned agency** representation, and if offered by the Broker, BUYER authorizes Broker to act in such capacity.

93 **OR**

94
95
96 /
97 Initials
98 **Single Agency**

BUYER DOES NOT WANT to be introduced to Seller client's property and hereby releases Broker from any responsibility or duty under the agency agreement. Broker shall be under no obligation or duty to introduce the BUYER to any Seller client's property.

101 **9. NON-DISCRIMINATION:** The parties agree not to discriminate against any prospective Seller or Lessor because of race, religion,
102 creed, color, sex, marital status, national origin, familial, or handicapped status of such person.

104 **10. SEVERABILITY CLAUSE:** In the case that any one or more of the provisions contained in this Agreement, or any application thereof,
105 shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way
106 be affected or impaired thereby.

108 **11. SINGULAR AND PLURAL** terms each include the other, when appropriate.

110 **12. DEFAULT / ATTORNEY'S FEES:** In the event of default by BUYER under this Agreement, Broker shall be entitled to the Fee that
111 Broker would have received had no default occurred, in addition to other available legal remedies. In the event of any suit or other
112 proceeding arising out of this Agreement, the prevailing party shall be entitled to its reasonable attorney's fees and all costs incurred
113 relative to such suit or proceeding. Venue of any action arising out of this Agreement shall be in the court of the county in which Broker's
114 office is located.

BUYER'S Initials EP () () Date: 1/3/12

BUYER'S NAME(S) Mr. E. Petrus

3. COMPENSATION OF BROKER: In consideration of the services to be performed by the Broker, BUYER agrees that broker may be compensated in any of the following ways: Check all that apply.

A. If the property is subject to a listing agreement with the Broker's Company or a cooperating Broker through the Multiple Listing Service (MLS) or otherwise, the fee will be the amount equal to the compensation offered by the aforementioned Brokers but not less than 3 % of the selling price. BUYER agrees to pay to the Broker any difference between the amount received from the aforementioned Brokers and the stated minimum.

B. If the property is not subject to a Listing Agreement, such as a For Sale By Owner, the BUYER agrees that the Broker will be paid a fee of not less than 3 % of selling price or \$ _____. The Broker shall first seek to obtain this fee through the transaction paid by the Seller. If the fee cannot be obtained through the Seller, the BUYER will be responsible for such fee stated above.

C. If the property is not subject to a Listing Agreement, such as a Custom Build Job, the BUYER agrees that the Broker will be paid a fee of not less than 3 % of selling price or \$ _____. The Broker shall first seek to obtain this fee through the transaction paid by the Seller. If the fee cannot be obtained through the Seller, the BUYER will be responsible for such fee stated above.

D. Retainer Fee. BUYER will pay Broker a non-refundable retainer fee of \$ _____ due and payable upon signing of this Agreement. Retainer fee shall shall not be credited against any compensation set forth in paragraph A or B.

E. Hourly rate. BUYER will pay Broker at the rate of \$ _____ per hour for the time spent by Broker pursuant to this Agreement to be paid when billed whether or not BUYER acquires or leases property. The fee shall shall not be credited against any compensation as set forth in paragraph A, B, or C.

This compensation shall apply to transactions made for which BUYER enters into a contract during the original term of this Agreement or during any extension of such original or extended term, and shall also apply to transactions for which BUYER enters into a contract within 90 calendar days (ninety [90] if left blank) after this Agreement expires or is terminated, if the property acquired by the BUYER was submitted in writing to the BUYER by Broker pursuant to Section One hereof during the original term or extension of the term of this Agreement. Unless otherwise indicated herein the Broker's fee shall be paid in cash at closing.

In the event BUYER purchases any property without using the representation of the Broker named above within the time this agreement remains in force, above stated BUYER shall be liable to Broker for a cancellation fee equal to 0 % of the contract or purchase price of the property acquired or \$ _____.

14. OTHER TERMS AND CONDITIONS: Standard Escrow Closing Fees and any other fees associated with the purchase of property.

15. TRANSMISSION OF DOCUMENTS: Facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency, the BUYER and SELLER will confirm facsimile or electronic transmitted signatures by signing an original document.

16. AUTHORITY OF SIGNATORY: If BUYER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER.

17. TIME IS OF THE ESSENCE IN THIS AGREEMENT: The terms hereof constitute the entire agreement and supersede all prior agreements, negotiations and discussions between parties. This agreement may be modified only by a written agreement signed by each of the parties.

Buyer Signature Edmond Petrus Date 01/03/2012 Agent or Broker (on behalf of Brokerage) Signature [Signature] Date 01/03/2012

Buyer Signature _____ Date _____ 1101 E. Lake St Brokerage Address

Address _____ McCall ID 83638 City State Zip

City State Zip (208) 634-5400 Brokerage Phone (208) 634-5428 Brokerage Fax

Phone Fax kevinb@remax.net Brokerage Email

mail kevinb@remax.net Agent/Broker Email

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EXHIBIT 2

INSPECTION
COMPANY

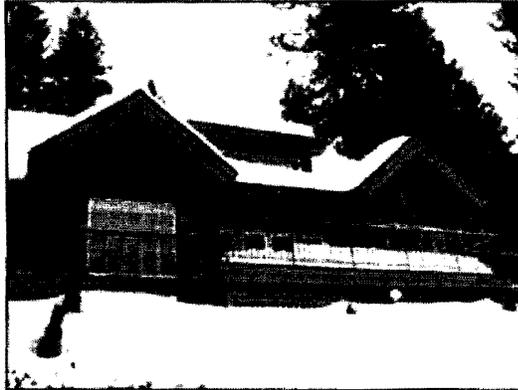
Inspection Report

Ed Petrus

Property Address:
2130 Payette Dr.
McCall ID 83638



2130 Payette Dr.



2130 Payette Dr

Homecraft Home Inspections

Todd McKenna
P.O. Box 1264, McCall ID., 83638

Home

5-1-2012

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3 Garage

4 Interiors

5 Structural Components

6 Plumbing System

7 Electrical System

8 Heating / Central Air Conditioning

9 Insulation and Ventilation

10 Built-In Kitchen Appliances

General Summary

Invoice

Agreement

Date: 3/15/2012	Time:	Report ID: S-0312004
Property: 2130 Payette Dr. McCall ID 83638	Customer: Ed Petrus	Real Estate Professional: Kevin Batchelor RE/MAX Resort Realty

Comment Key or Definitions

The following definitions of comment descriptions represent this inspection report. All comments by the inspector should be considered before purchasing this home. Any recommendations by the inspector to repair or replace suggests a second opinion or further inspection by a qualified contractor. All costs associated with further inspection fees and repair or replacement of item, component or unit should be considered before you purchase the property.

Inspected (IN) = I visually observed the item, component or unit and if no other comments were made then it appeared to be functioning as intended allowing for normal wear and tear.

Not Inspected (NI) = I did not inspect this item, component or unit and made no representations of whether or not it was functioning as intended and will state a reason for not inspecting.

Not Present (NP) = This item, component or unit is not in this home or building.

Repair or Replace (RR) = The item, component or unit is not functioning as intended, or needs further inspection by a qualified contractor. Items, components or units that can be repaired to satisfactory condition may not need replacement.

In Attendance:
Inspector

Type of building:
Single Family (2 story)

Approximate age of building:
Under 10 Years

Temperature:
Below 50

Weather:
Light Rain

Ground/Soil surface condition:
Frozen

Rain in last 3 days:
Yes

Radon Test:
No

Water Test:
No

4 Roofing

The home inspector shall observe: Roof covering; Roof drainage systems; Flashings; Skylights, chimneys, and roof penetrations; and Signs of leaks or abnormal condensation on building components. The home inspector shall: Describe the type of roof covering materials, and Report the methods used to observe the roofing. The home inspector is not required to: Walk on the roofing, or Observe attached accessories including but not limited to solar systems, antennas, and lightning arrestors

		IN	NI	NP	RR	Styles & Materials
1.0	ROOF COVERINGS		X			3-Tab fiberglass
1.1	FLASHINGS		X			Viewed roof covering from:
1.2	SKYLIGHTS, CHIMNEYS AND ROOF PENETRATIONS		X			Unable due to snow
1.3	ROOF DRAINAGE SYSTEMS				X	Sky Light(s): Two Chimney (exhaust): Rock

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

Comments:

- 1.0 I was unable to inspect due to snow cover
- 1.1 I was unable to inspect due to snow cover.
- 1.2 I was unable to inspect due to snow cover.

The roof of the home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. Roof coverings and skylights can appear to be leak proof during inspection and weather conditions. Our inspection makes an attempt to find a leak but sometimes cannot. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

2. Exterior

The home inspector shall observe: Wall cladding, flashings, and trim; Entryway doors and a representative number of windows; Garage door operators, Decks, balconies, stoops, steps, areaways, porches and applicable railings; Eaves, soffits, and fascias; and Vegetation, grading, drainage, driveways, patios, walkways, and retaining walls with respect to their effect on the condition of the building. The home inspector shall: Describe wall cladding materials; Operate all entryway doors and a representative number of windows; Operate garage doors manually or by using permanently installed controls for any garage door operator; Report whether or not any garage door operator will automatically reverse or stop when meeting reasonable resistance during closing; and Probe exterior wood components where deterioration is suspected. The home inspector is not required to observe: Storm windows, storm doors, screening, shutters, awnings, and similar seasonal accessories; Fences; Presence of safety glazing in doors and windows; Garage door operator remote control transmitters; Geological conditions, Soil conditions; Recreational facilities (including spas, saunas, steam baths, swimming pools, tennis courts, playground equipment, and other exercise, entertainment, or athletic facilities); Detached buildings or structures, or Presence or condition of buried fuel storage tanks. The home inspector is not required to: Move personal items, panels, furniture, equipment, plant life, soil, snow, ice or debris that obstructs access or visibility.

		IN	NI	NP	RR	Styles & Materials
2.0	WALL CLADDING FLASHING AND TRIM	X				Insulated glass Rock and Mortar shakes
2.1	DOORS (Exterior)	X				sidney wallboard
2.2	WINDOWS	X				Wood Stone
2.3	DECKS, BALCONIES, STOOPS, STEPS, AREAWAYS, PORCHES, PATIO/ COVER AND APPLICABLE RAILINGS	X				insulated and double Wood Insulated glass
2.4	VEGETATION, GRADING, DRAINAGE, DRIVEWAYS, PATIO FLOOR, WALKWAYS AND RETAINING WALLS (With respect to their effect on the condition of the building)			X		Insulated Deck
2.5	EAVES, SOFFITS AND FASCIAS	X				insulated Unable to inspect due to snow cover

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

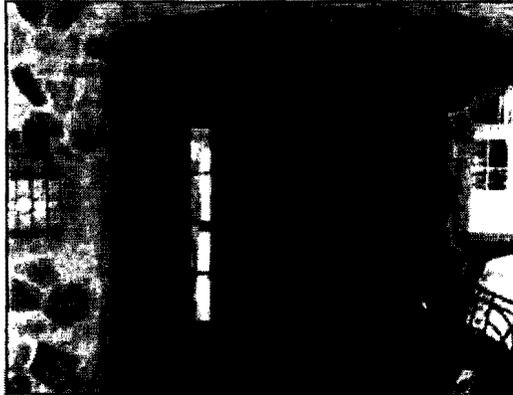
Comments

2.0 .



2.0 Picture 1 Stone work

2.1 .



2.1 Picture 1 Front door

2.3 A lot of the deck was covered with snow so I was unable to inspect, what I was able to inspect checked out fine.



2.3 Picture 1 Back deck

2.4 I was unable to inspect due to snow cover.

The exterior of the home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

3. Garage

		IN	NI	NP	RR	Styles & Materials
3.0	GARAGE CEILINGS	X				Garage Door Type: Two automatic
3.1	GARAGE WALLS (INCLUDING FIREWALL SEPARATION)	X				Garage Door Material: Metal
3.2	GARAGE FLOOR	X				Wood
3.3	GARAGE DOOR (S)	X				Auto-opener Manufacturer: OVERHEAD DOOR
3.4	OCCUPANT DOOR FROM GARAGE TO INSIDE HOME	X				
3.5	GARAGE DOOR OPERATORS (Report whether or not doors will reverse when met with resistance)	X				
		IN	NI	NP	RR	

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

Comments:

3.1 .



3.1 Picture 1 Garage

4 Interiors

The home inspector shall observe: Walls, ceiling, and floors; Steps, stairways, balconies, and railings; Counters and a representative number of installed cabinets; and A representative number of doors and windows. The home inspector shall: Operate a representative number of windows and interior doors; and Report signs of abnormal or harmful water penetration into the building or signs of abnormal or harmful condensation on building components. The home inspector is not required to observe: Paint, wallpaper, and other finish treatments on the interior walls, ceilings, and floors; Carpeting; or Draperies, blinds, or other window treatments.



Kitchen



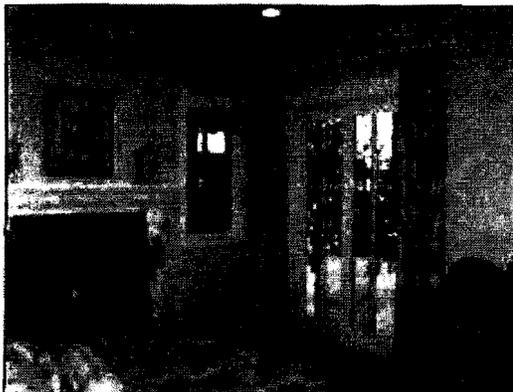
Dining area



Living room



Study



Master bedroom

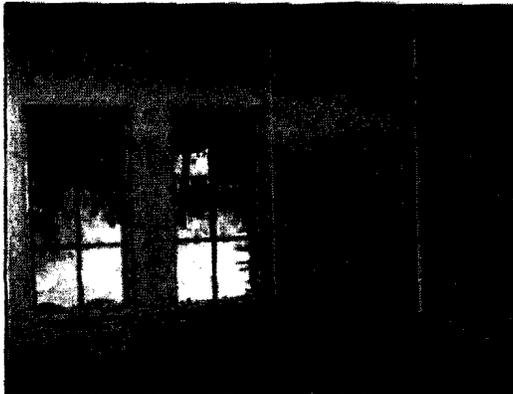


Master bathroom

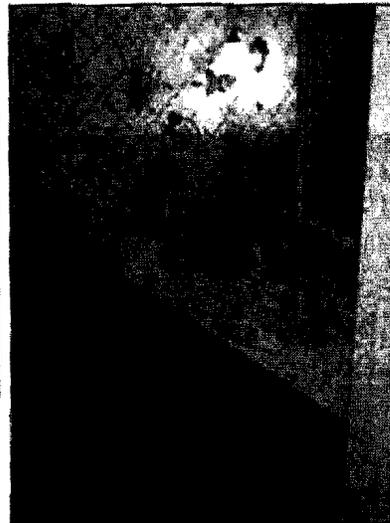


Laundry room

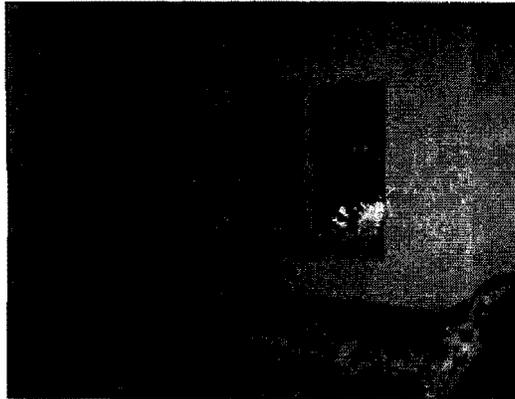
Upstairs family room



Guest bedroom



Guest bathroom



Guest bedroom



Guest bathroom



Upstairs master bedroom



Upstairs master bathroom

		IN	NI	NP	RR	Styles & Materials
4.0	CEILINGS	X				Painting Materials Drywall
4.1	WALLS	X				Wall Material Wallpaper Drywall
4.2	FLOORS	X				Hardwood Carpet
4.3	STEPS, STAIRWAYS, BALCONIES AND RAILINGS	X				Hardwood T&G Tile
4.4	COUNTERS AND A REPRESENTATIVE NUMBER OF CABINETS	X				Interior Doors Solid
4.5	DOORS (REPRESENTATIVE NUMBER)	X				
4.6	WINDOWS (REPRESENTATIVE NUMBER)	X				

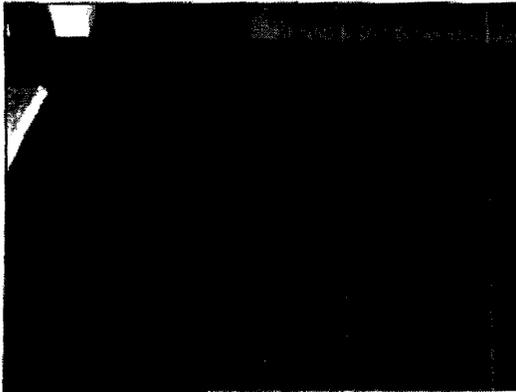
IN=inspected, NI=Not inspected, NP=Not Present, RR=Repair or Replace

Raised panel
Wood
Window Types:
Thermal/Insulated
Casement
Window Manufacturer:
WEATHER SHIELD
Cabinetry:
Wood
Countertop:
Tile
Granite
Marble

Comments:

4.1 There are some settling cracks throughout the home, which is typical for the age of the home. Some of the cracks though are large enough that they should be addressed, such as the crack in the upstairs master bedroom. Also the doorway leading to the apartment bedroom has had the drywall pull completely away from the post allowing daylight to shine through, that will need to be addressed. All in all the drywall is in very good shape beyond the typical settling cracks.

4.2 .



4.2 Picture 1 Hardwood flooring



4.2 Picture 2 Tile flooring

4.3



4.3 Picture 1 Stairway

4.4



4.4 Picture 1 Kitchen Island

The interior of the home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. The inspection did not involve moving furniture and inspecting behind furniture, area rugs or areas obstructed from view. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

5. Structural Components

The Home Inspector shall observe structural components including foundations, floors, walls, columns or piers, ceilings and roof. The home inspector shall describe the type of Foundation, floor structure, wall structure, columns or piers, ceiling structure, roof structure. The home inspector shall: Probe structural components where deterioration is suspected; Enter under floor crawl spaces, basements, and attic spaces except when access is obstructed, when entry could damage the property, or when dangerous or adverse situations are suspected; Report the methods used to observe under floor crawl spaces and attics; and Report signs of abnormal or harmful water penetration into the building or signs of abnormal or harmful condensation on building components. The home inspector is not required to: Enter any area or perform any procedure that may damage the property or its components or be dangerous to or adversely affect the health of the home inspector or other persons.

		IN	NI	NP	RR	Styles & Materials
5.0	FOUNDATIONS, BASEMENTS AND CRAWLSPACES (Report signs of abnormal or harmful water penetration into the building or signs of abnormal or harmful condensation on building components.)				X	Foundation Poured concrete Method used to observe:
5.1	WALLS (Structural)	X				Crawlspace: Crawled
5.2	COLUMNS OR PIERS	X				Floor Structure:
5.3	FLOORS (Structural)	X				2 X12
5.4	ROOF STRUCTURE AND ATTIC		X			Engineered floor joists Wall Structure: Wood

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

Comments:

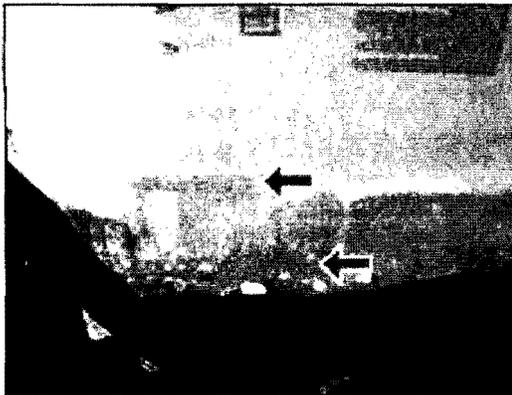
5.0 There are signs of ant intrusion that should be addressed(Picture 1-3). I would recommend a certified exterminator be contacted. There is also some signs of spring run off in the crawlspace(Picture 4,5), which is typical for the area. It should be monitored each spring to see if a sump needs to be installed.



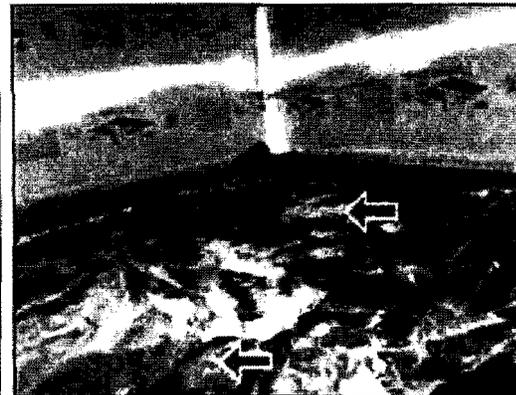
5.0 Picture 1 Ant signs



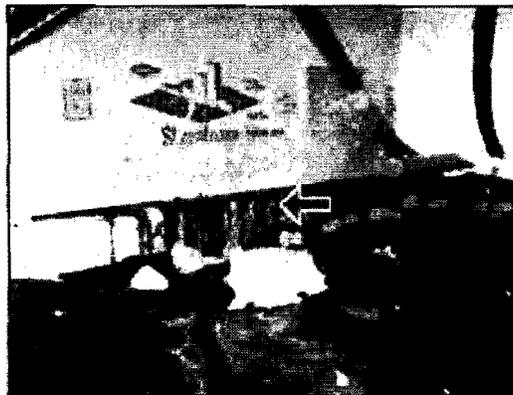
5.0 Picture 2 Ant signs



5.0 Picture 3 Ant signs

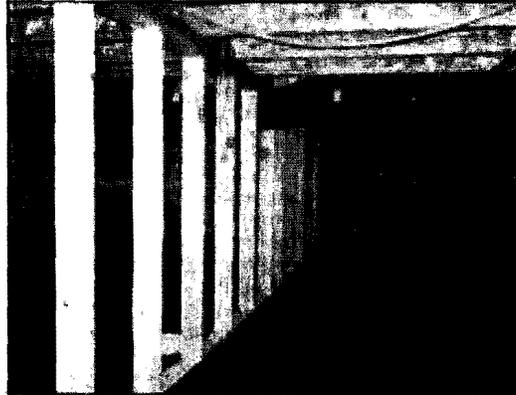


5.0 Picture 4 Past moisture signs



5.0 Picture 5 Water signs

5.2 .



5.2 Picture 1 Footing and pony wall

5.4 Due to design restraints, I was unable to access any part of the attic space.

The structure of the home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

6. Plumbing System

The home inspector shall observe interior water supply and distribution system, including: piping materials, supports, and insulation, fixtures and faucets, functional flow, leaks, and cross connections, interior drain, waste, and vent system, including: traps; drain, waste, and vent piping; piping supports and pipe insulation; leaks, and functional drainage; Hot water systems including: water heating equipment, normal operating controls, automatic safety controls, and chimneys, flues, and vents; Fuel storage and distribution systems including: interior fuel storage equipment, supply piping, venting, and supports; leaks; and Sump pumps. The home inspector shall describe: Water supply and distribution piping materials, Drain, waste, and vent piping materials, Water heating equipment, and Location of main water supply shutoff device. The home inspector shall operate all plumbing fixtures, including their faucets and all exterior faucets attached to the house, except where the flow end of the faucet is connected to an appliance. The home inspector is not required to: State the effectiveness of anti-siphon devices, Determine whether water supply and waste disposal systems are public or private, Operate automatic safety controls; Operate any valve except water closet flush valves, fixture faucets, and hose faucets; Observe: Water conditioning systems, Fire and lawn sprinkler systems, On-site water supply quantity and quality; On-site waste disposal systems, Foundation irrigation systems, Spas, except as to functional flow and functional drainage, Swimming pools, Solar water heating equipment; or Observe the system for proper sizing, design, or use of proper materials

		IN	NI	NP	RR	Styles & Materials
6.0	PLUMBING DRAIN, WASTE AND VENT SYSTEMS	X				Water Source: Well
6.1	PLUMBING WATER SUPPLY AND DISTRIBUTION SYSTEMS AND FIXTURES	X				Plumbing Water Supply Into Room:
6.2	HOT WATER SYSTEMS, CONTROLS, CHIMNEYS, FLUES AND VENTS	X				Poly Plumbing Water Distribution Inside Room:
6.3	MAIN WATER SHUT-OFF DEVICE (Describe location)	X				PEX Water Heater Size
6.4	FUEL STORAGE AND DISTRIBUTION SYSTEMS (Interior fuel storage, piping, venting, supports, leaks)				X	2" Diameter
6.5	MAIN FUEL SHUT OFF (Describe Location)	X				Plumbing Waste:
6.6	SUMP PUMP			X		ABS

IN NI NP RR

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

Water Heater Power Source:
Electric
Water Heater Capacity:
80 Gallon (plenty)
Two units
Manufacturer:
RHEEM
Water Heater Location:
Exterior Closet

Comments:

6.2



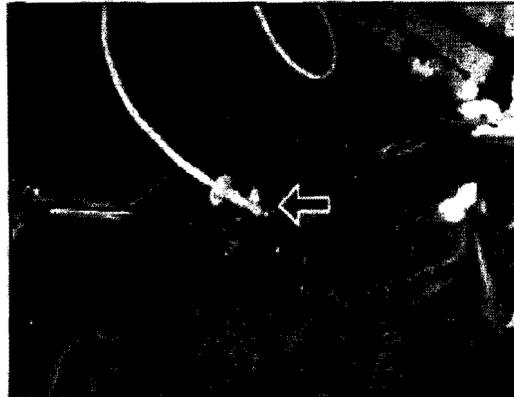
6.2 Picture 1 Water heaters

6.3 Located in the crawlspace.



6.3 Picture 1 Water shut off

6.4 There is what appears to be a line for an exterior gas BBQ that is laying in the crawspace. It should be capped off properly.



6.4 Picture 1 Needs proper cap

6.6 Located on the side of the garage.



6.5 Picture 1 Propane shut off

The plumbing in the home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. Washing machine drain line for example cannot be checked for leaks or the ability to handle the volume during drain cycle. Older homes with galvanized supply lines or cast iron drain lines can be obstructed and barely working during an inspection but then fails under heavy use. If the water is turned off or not used for periods of time (like a vacant home waiting for closing) rust or deposits within the pipes can further clog the piping system. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

Electrical Systems

The home inspector shall observe: Service entrance conductors; Service equipment, grounding equipment, main over current device, and main and distribution panels; Amperage and voltage ratings of the service. Branch circuit conductors, their over current devices, and the compatibility of their impedances and voltages. The operation of a representative number of installed ceiling fans, lighting fixtures, switches and receptacles located inside the house, garage, and on the dwelling's exterior walls. The polarity and grounding of all receptacles within six feet of interior plumbing fixtures, and all receptacles in the garage or carport, and on the exterior of inspected structures. The operation of ground fault circuit interrupters, and Smoke detectors. The home inspector shall describe: Service amperage and voltage; Service entry conductor materials; Service type as being overhead or underground; and Location of main and distribution panels. The home inspector shall report any observed aluminum branch circuit wiring. The home inspector shall report on presence or absence of smoke detectors, and operate their test function, if accessible, except when detectors are part of a central system. The home inspector is not required to insert any tool, probe, or testing device inside the panels. Test or operate any over current device except ground fault circuit interrupters. Dismantle any electrical device or control other than to remove the covers of the main and auxiliary distribution panels, or Observe: Low voltage systems, Security system devices, heat detectors, or carbon monoxide detectors; Telephone, security, cable TV, intercoms, or other ancillary wiring that is not a part of the primary electrical distribution system, or Built-in vacuum equipment.

IN NI NP RR **Styles & Materials**

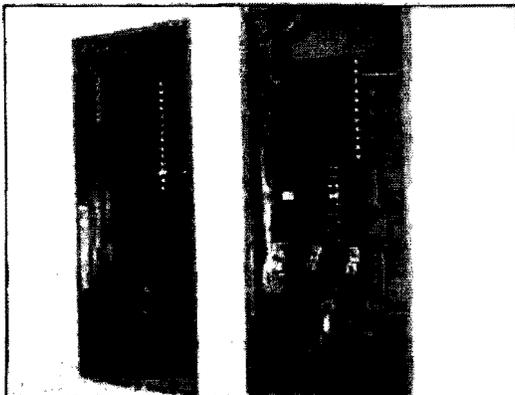
7.0	SERVICE ENTRANCE CONDUCTORS	X			
7.1	SERVICE AND GROUNDING EQUIPMENT, MAIN OVERCURRENT DEVICE, MAIN AND DISTRIBUTION PANELS	X			
7.2	BRANCH CIRCUIT CONDUCTORS, OVERCURRENT DEVICES AND COMPATIBILITY OF THEIR AMPERAGE AND VOLTAGE	X			
7.3	CONNECTED DEVICES AND FIXTURES (Observed from a representative number operation of ceiling fans, lighting fixtures, switches and receptacles located inside the house, garage, and on the dwelling's exterior walls)	X			
7.4	POLARITY AND GROUNDING OF RECEPTACLES WITHIN 6 FEET OF INTERIOR PLUMBING FIXTURES, AND ALL RECEPTACLES IN GARAGE, CARPORT, EXTERIOR WALLS OF INSPECTED STRUCTURE	X			
7.5	OPERATION OF GFCI (GROUND FAULT CIRCUIT INTERRUPTERS)	X			
7.6	LOCATION OF MAIN AND DISTRIBUTION PANELS	X			
7.7	SMOKE DETECTORS	X			
7.8	CARBON MONOXIDE DETECTORS	X			

Electrical Service
 Conductors
 Below ground
 600 AMP
 Circuit breakers
 SQUARE D
 Copper
 Romax

IN NI NP RR

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

7.6 Main panel is located in the garage. Two subs are located in the garage(Picture 1) and one sub is located in the entryway closet(Picture 2).



7.6 Picture 1 Garage subs



7.6 Picture 2 Entry closet sub

The electrical system of the home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. Outlets were not removed and the inspection was only visual. Any outlet not accessible (behind the refrigerator for example) was not inspected or accessible. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

8. Heating / Central Air Conditioning

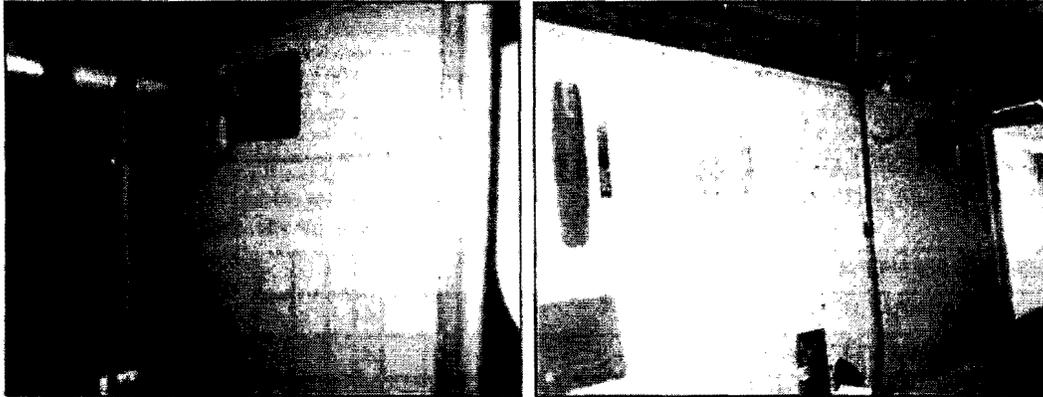
The home inspector shall observe permanently installed heating and cooling systems including: Heating equipment; Cooling Equipment that is central to home; Normal operating controls; Automatic safety controls; Chimneys, flues, and vents, where readily visible; Solid fuel heating devices; Heat distribution systems including fans, pumps, ducts and piping, with supports, insulation, air filters, registers, radiators, fan coil units, convectors, and the presence of an installed heat source in each room. The home inspector shall describe: Energy source, and Heating equipment and distribution type. The home inspector shall operate the systems using normal operating controls. The home inspector shall open readily openable access panels provided by the manufacturer or installer for routine homeowner maintenance. The home inspector is not required to: Operate heating systems when weather conditions or other circumstances may cause equipment damage; Operate automatic safety controls; Ignite or extinguish solid fuel fires; or Observe: The interior of flues; Fireplaces insert flue connections; Humidifiers; Electronic air filters; or The uniformity or adequacy of heat supply to the various rooms.

		IN	NI	NP	RR	Styles & Materials
8.0	HEATING EQUIPMENT	X				Heat Type: Forced Air
8.1	NORMAL OPERATING CONTROLS	X				Wall Cadets
8.2	AUTOMATIC SAFETY CONTROLS	X				Energy Source: Electric
8.3	DISTRIBUTION SYSTEMS (including fans, pumps, ducts and piping, with supports, insulation, air filters, registers, radiators, fan coil units and convectors)	X				Flowing in all rooms Equipment type: Two
8.4	PRESENCE OF INSTALLED HEAT SOURCE IN EACH ROOM	X				Flowing in all rooms TRANE
8.5	CHIMNEYS, FLUES AND VENTS (for fireplaces, gas water heaters or heat systems)	X				Flowing Insulated
8.6	SOLID FUEL HEATING DEVICES (Fireplaces, Woodstove)	X				Flowing 20x25
8.7	GAS/LP FIRELOGS AND FIREPLACES	X				Flowing None
8.8	COOLING AND AIR HANDLER EQUIPMENT	X				Flowing Air conditioner unit
8.9	NORMAL OPERATING CONTROLS	X				Flowing Electricity Flowing in all rooms TRANE Flowing in all rooms Two

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

Comments:

8.0 Furnaces operated fine.



8.0 Picture 1 Furnace

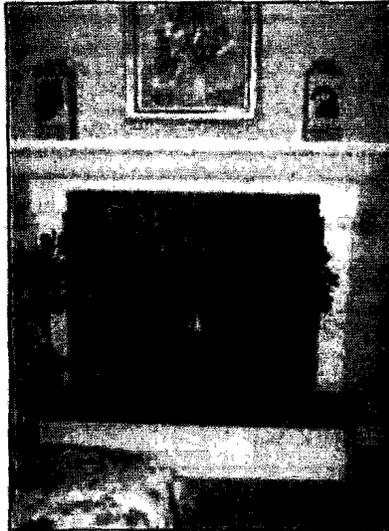
8.0 Picture 2 Furnace

8.6 Fireplace checked out fine. I would recommend a certified chimney sweep clean before use.



8.6 Picture 1 Fireplace

8.7.



8.7 Picture 1 Propane fireplace

8.8 A/C units operated fine. The enclosure that is built over them allows for very little ventilation which could cause them to operate inefficiently. I would recommend a certified HVAC specialist make sure that the venting is sufficient.



8.8 Picture 1 A/C units

The heating and cooling system of this home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. The inspection is not meant to be technically exhaustive. The inspection does not involve removal and inspection behind service door or dismantling that would otherwise reveal something only a licensed heat contractor would discover. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

9. Insulation and Ventilation

The home inspector shall observe: insulation and vapor retarders in unfinished spaces; Ventilation of attics and foundation areas; Kitchen, bathroom, and laundry venting systems; and the operation of any readily accessible attic ventilation fan, and, when temperature permits, the operation of any readily accessible thermostatic control. The home inspector shall describe: insulation in unfinished spaces; and Absence of insulation in unfinished space at conditioned surfaces. The home inspector shall: Move insulation where readily visible evidence indicates the need to do so; and Move insulation where chimneys penetrate roofs, where plumbing drain/waste pipes penetrate floors, adjacent to earth filled stoops or porches, and at exterior doors. The home inspector is not required to report on: Concealed insulation and vapor retarders, or Venting equipment that is integral with household appliances

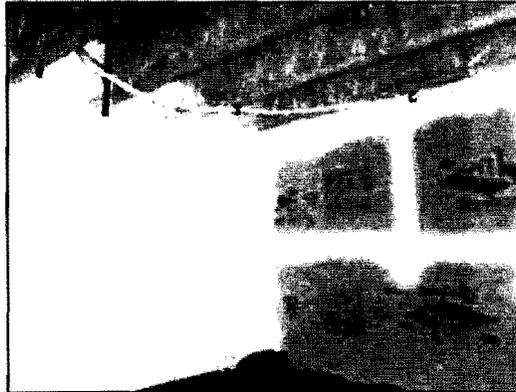
		IN	NI	NP	RR	Styles & Materials
9.0	INSULATION IN ATTIC		X			Attic Insulation: Unknown
9.1	INSULATION UNDER FLOOR SYSTEM	X				Ventilation: Gable vents Ridge vents Soft Vents Thermostatically controlled fan
9.2	VAPOR RETARDERS (ON GROUND IN CRAWLSPACE OR BASEMENT)	X				Exhaust Fans: Fan only Dryer Power Source: 220 Electric Dryer Vent: Flexible Metal
9.3	VENTILATION OF ATTIC AND FOUNDATION AREAS	X				Floor System Insulation: Foam
9.4	VENTING SYSTEMS (Kitchens, baths and laundry)	X				

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

Comments

9.0 Due to design restraints, I was unable to access any part of the attic space.

9.1 Crawlspace has been insulated well.



9.1 Picture 1 Crawlspace insulation

9.2



9.2 Picture 1 Vapor barrier

The insulation and ventilation of the home was inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. Venting of exhaust fans or clothes dryer cannot be fully inspected and bends or obstructions can occur without being accessible or visible (behind wall and ceiling coverings). Only insulation that is visible was inspected. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

10. Built-In Kitchen Appliances

The home inspector shall observe and operate the basic functions of the following kitchen appliances: Permanently installed dishwasher, through its normal cycle; Range, cook top, and permanently installed oven; Trash compactor; Garbage disposal; Ventilation equipment or range hood; and Permanently installed microwave oven. The home inspector is not required to observe: Clocks, timers, self-cleaning oven function, or thermostats for calibration or automatic operation; Non built-in appliances, or Refrigeration units. The home inspector is not required to operate: Appliances in use; or Any appliance that is shut down or otherwise inoperable.

		IN	NI	NP	RR	Styles & Materials
10.0	DISHWASHER	X				Dishwasher Brand: GENERAL ELECTRIC
10.1	RANGES/OVENS/COOKTOPS	X				Disposer Brand: IN SINK ERATOR
10.2	TRASH COMPACTOR			X		Exhaust/Range hood: DAYCOR
10.3	FOOD WASTE DISPOSER	X				Range/Oven: DAYCOR
10.4	MICROWAVE COOKING EQUIPMENT	X				Built in Microwave: GENERAL ELECTRIC
						Trash Compactors: KITCHEN AIDE

IN=Inspected, NI=Not Inspected, NP=Not Present, RR=Repair or Replace

10.1

10.2 Trash compactor will not operate until half full.

The built-in appliances of the home were inspected and reported on with the above information. While the inspector makes every effort to find all areas of concern, some areas can go unnoticed. Please be aware that the inspector has your best interest in mind. Any repair items mentioned in this report should be considered before purchase. It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report.

Prepared Using HomeGauge <http://www.homegauge.com> : Licensed To Homecraft Home Inspections

General Summary

INSPECTION COMPANY

Homecraft Home Inspections

P.O. Box 1264, McCall ID., 83638

Customer
Ed Petrus

Address
2130 Payette Dr.
McCall ID 83638

The following items or discoveries indicate that these systems or components do not function as intended or adversely affects the habitability of the dwelling; or warrants further investigation by a specialist, or requires subsequent observation. This summary shall not contain recommendations for routine upkeep of a system or component to keep it in proper functioning condition or recommendations to upgrade or enhance the function or efficiency of the home. This Summary is not the entire report. The complete report may include additional information of concern to the customer. It is recommended that the customer read the complete report.

5. Structural Components

5.0 FOUNDATIONS, BASEMENTS AND CRAWLSPACES (Report signs of abnormal or harmful water penetration into the building or signs of abnormal or harmful condensation on building components.)

Repair or Replace

There are signs of ant intrusion that should be addressed(Picture 1-3). I would recommend a certified exterminator be contacted. There is also some signs of spring run off in the crawlspace(Picture 4,5), which is typical for the area. It should be monitored each spring to see if a sump needs to be installed.

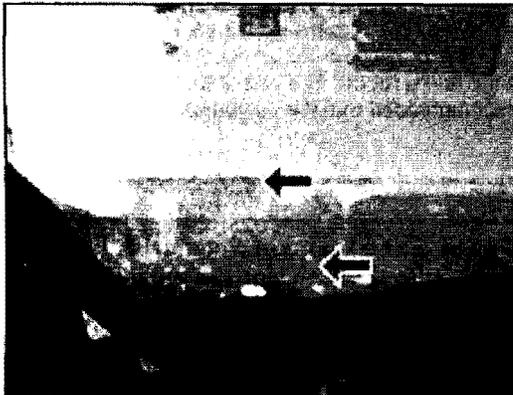
5. Structural Components



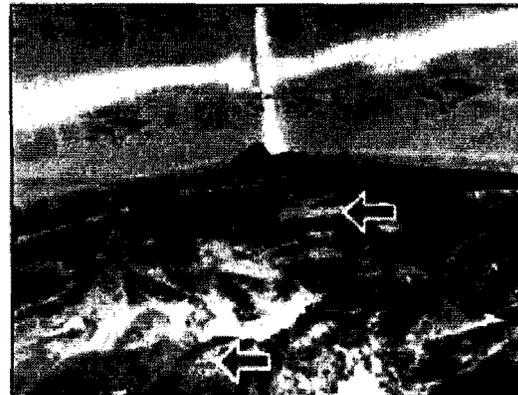
5.0 Picture 1 Ant signs



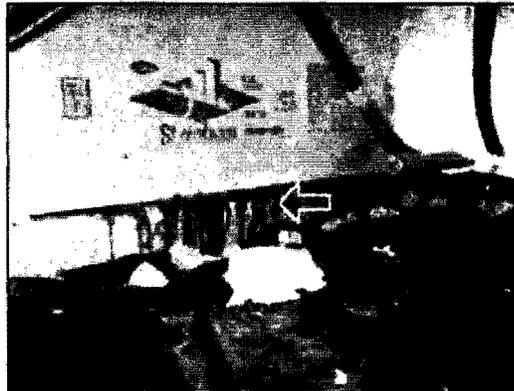
5.0 Picture 2 Ant signs



5.0 Picture 3 Ant signs



5.0 Picture 4 Past moisture signs



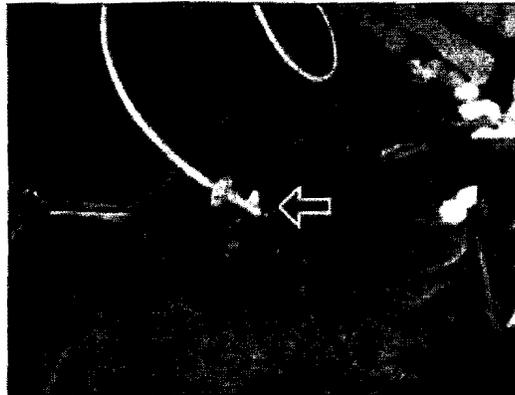
5.0 Picture 5 Water signs

6 Plumbing System

6.4 FUEL STORAGE AND DISTRIBUTION SYSTEMS (interior fuel storage, piping, venting, supports, leaks)

Repair or Replace

There is what appears to be a line for an exterior gas BBQ that is laying in the crawlspace. It should be capped off properly



6.4 Picture 1 Needs proper cap

Home inspectors are not required to report on the following: Life expectancy of any component or system; The causes of the need for a repair; The methods, materials, and costs of corrections; The suitability of the property for any specialized use; Compliance or non-compliance with codes, ordinances, statutes, regulatory requirements or restrictions; The market value of the property or its marketability; The advisability or inadvisability of purchase of the property; Any component or system that was not observed; The presence or absence of pests such as wood damaging organisms, rodents, or insects; or Cosmetic items, underground items, or items not permanently installed. Home inspectors are not required to: Offer warranties or guarantees of any kind; Calculate the strength, adequacy, or efficiency of any system or component; Enter any area or perform any procedure that may damage the property or its components or be dangerous to the home inspector or other persons; Operate any system or component that is shut down or otherwise inoperable; Operate any system or component that does not respond to normal operating controls; Disturb insulation, move personal items, panels, furniture, equipment, plant life, soil, snow, ice, or debris that obstructs access or visibility; Determine the presence or absence of any suspected adverse environmental condition or hazardous substance, including but not limited to mold, toxins, carcinogens, noise, contaminants in the building or in soil, water, and air; Determine the effectiveness of any system installed to control or remove suspected hazardous substances; Predict future condition, including but not limited to failure of components; Since this report is provided for the specific benefit of the customer(s), secondary readers of this information should hire a licensed inspector to perform an inspection to meet their specific needs and to obtain current information concerning this property.

Prepared Using HomeGauge <http://www.HomeGauge.com> : Licensed To Homecraft Home Inspections

**INSPECTION
COMPANY**

INVOICE

**Homecraft Home Inspections
P.O. Box 1264, McCall ID, 83638
Inspected By: Todd McKenna**

**Inspection Date: 3/15/2012
Report ID: S-0312004**

Customer Info:	Inspection Property:
Ed Petrus	2130 Payette Dr. McCall ID 83638
Customer's Real Estate Professional: Kevin Batchelor RE/MAX Resort Realty	

Inspection Fee:

Service	Price	Amount	Sub-Total
Standard Inspection	475.00	1	475.00
			Tax \$0.00
			Total Price \$475.00

**Payment Method:
Payment Status:
Note:**

IMPORTANT READ:

First, we have a tour that will help you decide whether or not you want to use the:

1. Agreement File 1, 2
2. Disclaim File
3. Misc button the attach agreement.

Watch this tour to eliminate confusion:

<http://www.homegauge.com/tours/agreement.html>

Explanation below:

Your client contract agreement can be placed by you in one of the above files and it depends on how you want to use it in the report as to which file you should use.

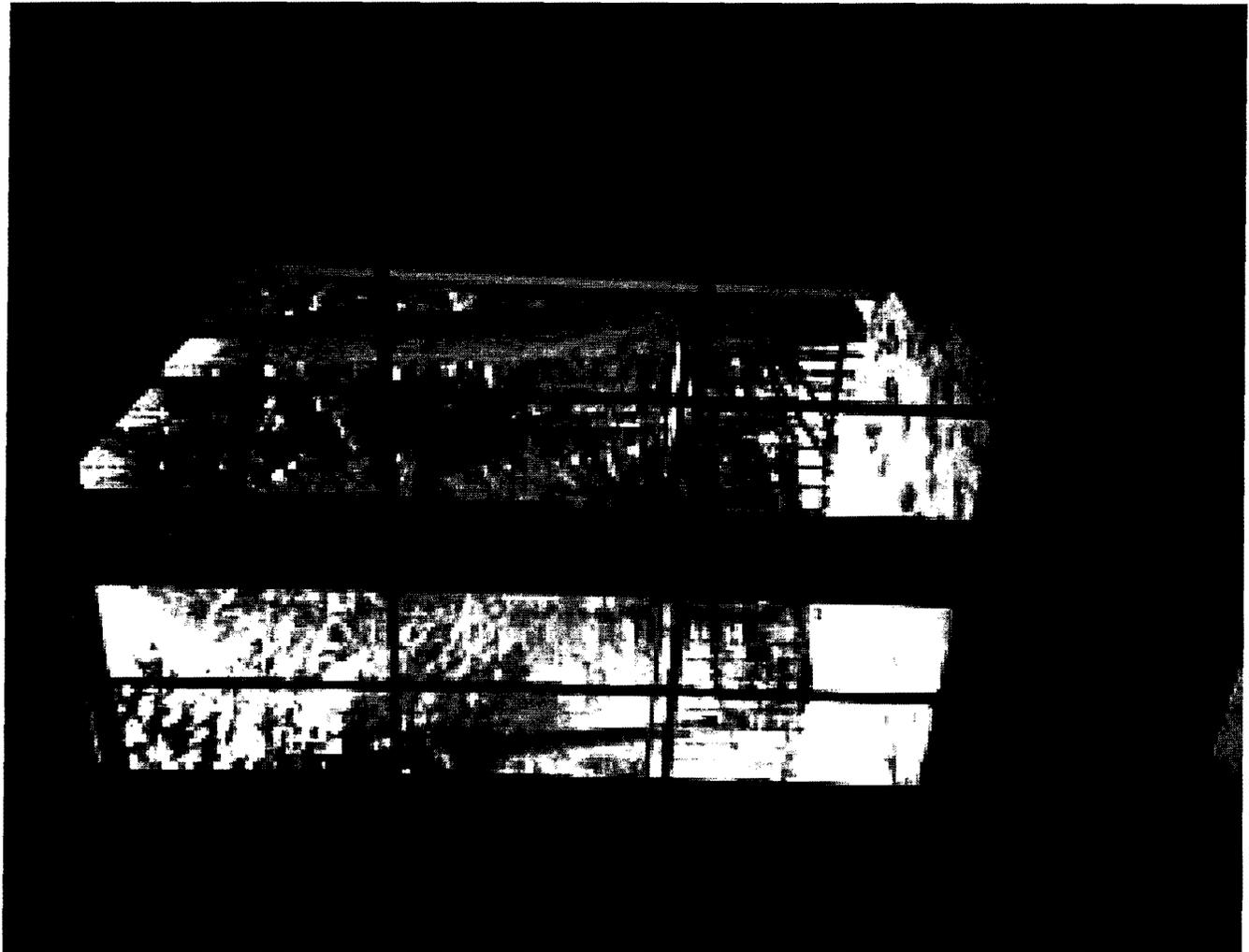
1. Disclaim File: If you place your contract agreement in the Disclaim file it will:
 - a. Automatically populate the customer info for you
 - b. Automatically insert the agreement in-line inside the report.
 - c. Use this Disclaim file if you plan to use the "Force Agreement" online at our uploaded report.
2. Agreement File 1 or 2: If you place your client agreement in the "Agreement" File (1 or 2)
 - a. You will select it each inspection under the MISC button in the software and click ATTACH.
 - b. When you have multiple contract agreements (i.e. Commercial, Mold etc) You will need to attach at each inspection (under MISC button) which file you want for that inspection.

NOTE: If you choose "Disclaim" file for your commonly used agreement (preferred) then when you have an inspection requiring a different agreement and attach it under MISC button it will override the Disclaim file and the Disclaim file will not be used or displayed for that report, which is intentional as you are wanting a different agreement for that report.

Inspection Agreement

This inspection was performed in accordance with and under the terms of a Pre-Inspection Agreement. The agreement was signed and agreed upon before the preparation of this report and a signed copy of the agreement is available upon request. An unsigned copy of the agreement may be attached to this report for your information or it may also be available on the company web site.

EXHIBIT 3



PETRUS 000318

Exh. No.	3
Date	
Name	3-9-16
<i>A. Centurion</i>	
M & M Court Reporting	

EXHIBIT 4

Jason R. Mau
jmau@greenerlaw.com
(208) 319-2600

ALFA® INTERNATIONAL
The Global Legal Network

August 7, 2013

VIA CERTIFIED MAIL

Chris Kirk
Kirk Enterprises
P.O. Box 846
McCall, ID 83638

Re: **NOTICE OF CONSTRUCTION DEFECT**
2130 Payette Dr., McCall, Idaho 83638
GBSO File No. 19456-002

Dear Mr. Kirk:

We represent and write on behalf of Ed Petrus, the current owner of the home located at 2130 Payette Drive in McCall ("Home"). This letter is being sent directly to you to assure that all requirements for notice under the Notice and Opportunity to Repair Act are satisfied.

We are notifying you of continuing problems with the construction of the Home and assert a construction defect claim. Mr. Petrus, the claimant, asserts these claims as a "homeowner" pursuant to Idaho Code section 6-2502(5), which includes a subsequent purchaser of a residence from a person who contracts with a construction professional for the construction of a residence. Mr. Petrus purchased the Home from Nancy Boyd in April, 2012.

The claim regards the south-facing French Doors ("Doors") that open out to the deck on the lake side of the Home. Mr. Petrus became aware of problems with the Doors when he first occupied the Home. Mr. Petrus hired others to further review the problems with the Doors, which unveiled evidence of water intrusion.

A detailed inspection of the Doors disclosed the presence of excessive water in the foam insulation on the stem wall under the Doors. Energy Seal was hired to remove the insulation, and after removing the insulation, further water intrusion and damage was discovered. This damage includes, but is not limited to, damage to the lakeside load point next to the Doors as well as damage to the floor sheeting. Also, it was discovered that ice and water shield was applied/flushed to the interior side of the rim joist instead of the exterior side, which undoubtedly has contributed to the water damage. This damage was observed by Mr. Petrus' maintenance man/property caretaker, Mike Longmire, and confirmed by other construction personnel. We have reviewed the cost of repair by one contractor, which we believe you have reviewed as well, and which states that repairs will require the reinstallation of new Doors, repair of the water damaged rim and floor joists, and replacement and refinishing of the portions of the deck and floor near the Doors' threshold.

PETRUS000218

August 7, 2013
Page 2

At this time, it is anticipated that the necessary repairs will commence in early- to mid-September.

Pursuant to I.C. §6-2503, we are providing you with the opportunity to remedy the construction defect. Our general understanding of the damage per the findings to date suggests that the damage has been caused by the improper installation of flashing in the area of the Doors. This general characterization of the damage and current claim is subject to modification upon further investigation.

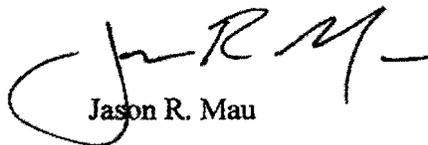
If you want to take advantage of the opportunity to perform the work, or be involved in the direction of the work, and be given the opportunity to cure the identified problems that are your responsibilities, you must notify Mr. Petrus, via the undersigned, within twenty-one (21) days from the date of this letter. Upon receipt of that written notification, Mr. Petrus will assess your response, have it reviewed and analyzed by his consultants and contractors, and determine if any remedial work you agree to perform is acceptable and can be accomplished this fall. You may be assured we will be prompt in so advising you. Mr. Petrus will also cooperate per I.C. § 6-2503(2)(a) should you wish to inspect the extent of damage to the Doors.

Failing a timely response that is adequate and reasonable, Mr. Petrus will have no alternative but to do what is reasonable and necessary to mitigate his damages and cure the aforementioned deficiencies. Should this occur, Mr. Petrus reserves his right to seek recompense from you or others for the cost of the repairs, plus attorney's fees and cost of suit.

If you have not already done so, we urge you to provide a copy of this letter to your insurance carrier. We look forward to your response within the statutory timeframe.

Very truly yours,

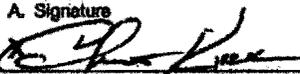
GREENER BURKE SHOEMAKER OBERRECHT P.A.



Jason R. Mau

JRM/krt
cc: Client
Nancy Boyd
(590719)

PETRUS000219

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> ■ Complete Items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> 
<p>1. Article Addressed to:</p> <p>Chris Kirk Kirk Enterprises PO Box 846 McCall, ID 83638</p>	<p>B. Received by (Printed Name) C. Date of Delivery</p> <p>Chris Kirk 2-7-03</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>2. Article Number (Transfer from service label)</p>	<p>3. Service Type:</p> <p><input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p style="text-align: center;">7012 3050 0000 7639 6151</p>	

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

PETRUS000220

EXHIBIT 5

RECEIVED
AUG 13 2013
GREENER BURKE
SHOEMAKER OBERRECHT

Chris Kirk
P.O. Box 846
McCall, ID. 83638

August 11, 2013

Mr. Jason Mau
Greener/Burke/Shoemaker/Oberrecht
950 W. Bannock St.
Boise, ID. 83702

RE: GBSO File No. 19456-002

Dear Mr. Mau:

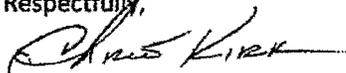
Under the Notice and Opportunity to Repair Act, I would like to inspect the South facing door.
Per Section 6-2503(2)(a).

I am available at any time to meet with any representative you wish.

The best way to reach me is by my cell phone, (208-630-3275).

Looking forward to your call to inspect the door.

Respectfully,



Chris Kirk

Exh. No.	26
Date	
Name	3-10-16
	Chris Kirk
	M & M Court Reporting

PETRUS000221

EXHIBIT 6

Jason R. Mau
jmau@greenerlaw.com
(208) 319-2600

ALFA® INTERNATIONAL
The Global Legal Network

August 15, 2013

VIA EMAIL AND US MAIL

Chris Kirk
Kirk Enterprises
P.O. Box 846
McCall, ID 83638

Re: *2130 Payette Dr., McCall, Idaho 83638*
GBSO File No. 19456-002

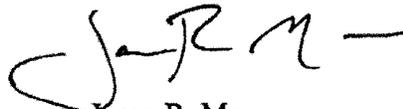
Dear Chris:

This confirms our phone conversation today, in which we scheduled the inspection of Mr. Petrus' south-facing French doors to take place on Tuesday, August 20, at 2:00 p.m. We plan to have Mike Longmire on site to assist you with any questions.

If you have any questions or concerns, feel free to continue to contact me by email at jmau@greenerlaw.com.

Very truly yours,

GREENER BURKE SHOEMAKER OBERRECHT P.A.



Jason R. Mau

JRM/krt
cc: Client
(595404)

PETRUS000226

EXHIBIT 7

ARKOOSH LAW OFFICES

Daniel A. Nevala
dan.nevala@arkoosh.com

August 29, 2013

RECEIVED

AUG 30 2013

GREENER BURKE
SHOEMAKER OBERRECHT

Jason Mau
950 W. Bannock Street, Ste. 950
Boise, ID 83702

Re: 2130 Payette Drive, McCall, ID 83638

Dear Jason:

It was nice talking to you on the phone. As I mentioned, my firm has been retained by Chris Kirk to respond to the Notice of Construction Defect you sent on behalf of your client, Ed Petrus, for a residential home located at 2130 Payette Drive in McCall.

I have reviewed the claim with Mr. Kirk. The claim alleges the following:

1. The presence of excessive water in the foam insulation on the stem wall under the south-facing French Doors.
2. Water damage to the lakeside load point next to the French Doors.
3. Damage to the floor sheeting.
4. Improper installation of an ice and water shield applied/flushed to the interior side of the rim joist instead of the exterior side that open out to the deck on the lake side of the home.

Mr. Kirk exercised his right to inspect the property on August 21, 2013 and was accompanied during the inspection by Mr. Petrus and Mr. Petrus' property caretaker, Mr. Longmire. During his cursory inspection of the property, and specifically the French Doors, Mr. Kirk discovered the following:

1. The locking mechanism on the operable door had been removed and reinstalled in an inappropriate manner.
2. The locking mechanism on the stationary door appeared to have been pried upon to the extent that it was not functional.
3. Markings on the overhead trim board indicated that the locking mechanism was engaged to lock when someone had tried to close the door.
4. Weather stripping on the astragal of the operable door had been completely removed.

5. Weather stripping on the bottom of the operable door had been trimmed and was not intact.
6. The weather stripping on the stationary door could not be verified or inspected because the door would not open.
7. Screws were installed into the threshold that were not factory and were not installed in the correct area.
8. Several screws had been added to the threshold, especially in the weep channel.
9. The ice and water shield installed in the crawl space had been altered and displaced.
10. Foam insulation had been removed.

The inspection revealed to Mr. Kirk that the property had been severely altered and damaged to a level that would cause the water damage referenced in the claim. Do Mr. Petrus or any of his agents have information about who may have caused this damage or performed these alterations to the doors?

In my visiting with Mr. Kirk about the construction of the home, I learned that he has intimate personal knowledge of how the home was constructed, how the doors were installed, and what products were used in the installation. He has over 24 years of experience building custom homes. Mr. Kirk also observed the condition of the doors since construction was completed during social events hosted by the home's prior owner in 2005, 2006, and 2007.

At the time construction of the home was completed, the doors were fully functional and properly installed, flashed, and weatherproofed. None of the damage revealed by the inspection existed at the completion of construction or during any of Mr. Kirk's subsequent visits. Based on this personal knowledge, coupled with what he witnessed during the property inspection, Mr. Kirk is confident that the problems Mr. Petrus complains of are not a construction defect, but are rather a combination of misuse, neglect, damage, and alteration. Mr. Kirk also believes that it is very possible that once the damage and alterations occurred, the elements could have quickly exacerbated the problems.

Based on this, Mr. Kirk respectfully disputes the claim and denies any liability for a construction defect. Mr. Kirk is fully prepared to defend this position if necessary but is hopeful that Mr. Petrus realizes that the problems are not the result of improper construction or a construction defect, but rather improper actions by a third party.

To that end, if Mr. Petrus and his construction advisors conclude that fault does not lie with Mr. Kirk, but rather some third party, Mr. Kirk would testify to the construction and condition of the property at the completion of construction, during the years he observed the property, and currently.

Given the above explanation, I am hopeful that you and Mr. Petrus will reconsider taking legal action against Mr. Kirk. Please call or email me if there are any questions that we can address, or if we can provide any further explanation to what Mr. Kirk discovered during his inspection of the property.

Page - 3
August 29, 2013

Sincerely,

ARKOOSH LAW OFFICES

D. Nevala Black, for

Daniel A. Nevala

DAN/ems
Cc: Client

RP000087

881

EXHIBIT 8



Rimkus Consulting Group, Inc.
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(855) 249-6668 Telephone
(702) 304-1498 Facsimile

THE ORIGINAL OF THIS REPORT, SIGNED AND SEALED BY THE PROFESSIONAL WHOSE NAME APPEARS ON THIS PAGE, IS RETAINED IN THE FILES OF RIMKUS CONSULTING GROUP, INC.

Report of Findings

PETRUS WATER LEAK INVESTIGATION

Date of Loss: 10/15/2013

Claim No: 550204

DOCUMENT TYPE: INVEST - ENGINEERING REPORTS

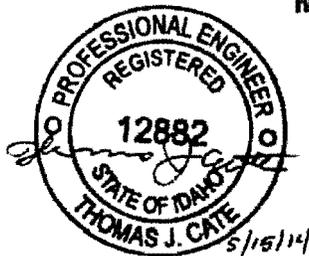
RCG File No: 01206226

Prepared For:

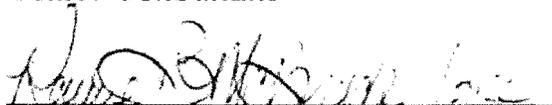
AIG PRIVATE CLIENT GROUP
10 NORTH MARTINGALE ROAD, STE. 600
SCHAUMBURG, IL 60173

Attention:

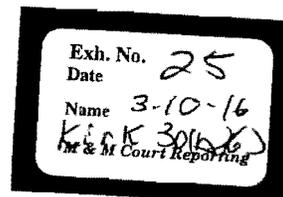
MR. DOUG BELLAH



Thomas J. Cate, P.E.
Engineering Number 12882
Senior Consultant


Ronnie B. McBryde
Principal Consultant

May 15, 2014



RP000001

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May 15, 2014

RP000002

Section I
INTRODUCTION

Mr. Edmund Petrus reported that on October 15, 2013, his residence was damaged by moisture intrusion. The Petrus residence was located at 2130 Payette Drive in McCall, Idaho.

Rimkus Consulting Group, Inc. (Rimkus) was retained to determine the cause and origin of the reported damage.

This report was prepared for the exclusive use of AIG Private Client Group, and was not intended for any other purpose. Our report was based on the information available to us at this time, as described in the **Basis of Report**. Should additional information become available, we reserve the right to determine the impact, if any, the new information may have on our opinions and conclusions, and to revise our opinions and conclusions if necessary and warranted.

Section II
CONCLUSIONS

1. Decay and deterioration of the deck framing, floor framing and wall sheathing at the southeast corner of the dining area was caused by moisture intrusion due to improper construction:
 - a) Proper flashing had not been installed at the deck ledger board.
 - b) Weep holes were not installed at the base of the stone veneer.
 - c) Gutters were not provided at the eaves.

Section III DISCUSSION

General Description

The Petrus residence was a single story, conventionally wood-framed, single-family dwelling with habitable attic space. The residence was founded on concrete foundation walls with a crawl space. The exterior walls were clad with wood siding and stone veneer. The interior walls and ceilings were covered with painted gypsum board. The front of the residence faced northwest, and, for purposes of this report, is referenced as the west side (**Photographs 1 and 2**).

Interview

During the course of the site inspection, Mr. Beau Value of Restoration Pro, the contractor, was interviewed. It was understood:

- They had been hired to repair rot and moisture damage to the residence at the rear deck surrounding the door at the southeast corner.
- Upon removal of the stone veneer they found rotted wall sheathing.
- They found rotted rim board, wood door jamb, and floor sheathing in the vicinity.
- The damaged members had been removed and replaced.
- The copper gutters were not part of the original construction. They had been installed approximately two years ago.
- They had also treated the floor joists and underside of the floor sheathing at the crawl space for mold. No mold testing or analysis was completed.

Observations

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RP000005

During the course of the site inspection the following items and conditions were observed:

- Deck boards, stone veneer, and some deck framing had been removed at the southeast corner of the dining area (**Photographs 3 and 4**).
- A new door, new ice and water shield, and new house wrap had been installed at the southeast wall of the dining area (**Photograph 5**).
- Hardwood flooring had been removed at the southeast end of the dining area. New floor sheathing had been installed (**Photograph 6**).
- Existing flashing at the deck ledger consisted of a single metal angle covering the top of the ledger and extending approximately 1-1/4 inches up the wall. No moisture barrier was installed between the deck ledger and the wall sheathing (**Photograph 7**).
- The stone veneer had been installed over a single layer of asphalt impregnated felt paper (**Photograph 8**).
- New floor joists had been installed next to the existing floor joists at the dining area floor (**Photograph 9**).
- The moisture content of the existing floor joists measured 17%. The moisture content of the new floor joists measured 7%.
- The temperature in the crawl space was 59 degrees. The relative humidity measured 40%. The dew point measured 37 degrees. No foundation vents were installed at the crawl space. A powered heating unit drew a portion of its air from outside.
- Rot and deterioration was visible at the sill and lower portions of the trim at the door frame that was removed from the dining area (**Photograph 10 and 11**).

Pictures were provided for our review by Restore Pro, the contractor. They indicated that the pictures were taken prior to, and during construction. The pictures showed:

- Rot and decay were present on the wall sheathing at the sides of the dining area door (**Photograph 12**).

- Floor sheathing and framing below the door were rotted (**Photograph 13**).
- The rim board and floor joists beneath the door were rotted (**Photographs 14 and 15**).

Analysis

Research and data from the APA – The Engineered Wood Association (APA) shows that decay of wood materials occurs when moisture content of the wood is in the range of 20% to 25%. The APA recommends that specific measures be taken to protect wood from elevated moisture levels through the use of flashings, membranes, and sealants. Section 703 of the 2003 edition of the International Residential Code (IRC) (the governing code at the time the Petrus residence was constructed) requires that flashings be installed where decks attach to wall framing at wood frame construction and that flashing be installed directly below the first course of veneer. The flashings are to be installed in such a manner as to prevent water from entering the exterior wall envelope. The code further requires that weather resistant material be installed over the wall sheathing. The IRC also requires that weep holes be installed at the base of masonry veneer directly above the flashing.

The observed conditions at the Petrus residence demonstrated that flashing installed at the deck ledger at the time of original construction was not adequate to protect the exterior wall envelope. The top of the flashing was at the same elevation as the top of the deck boards. Subsequently, any snow accumulation against, or water splashing onto the wall would have been above the top of the flashing.

The stone veneer at the residence was not a waterproof covering. The stone and the mortar were porous materials through which water could penetrate. Snow accumulation and water splashing against the wall would have penetrated through the stone veneer. Weep holes were not installed at the base of the veneer. Any water which penetrated through and drained down the backside of the veneer would have been trapped between the veneer and the wall. The felt paper material did not appear to extend

behind the deck ledger. This gave any moisture that penetrated a direct path to the wall sheathing and floor framing behind the ledger.

Two roof slopes intersected in a valley above the door at the southeast corner of the dining area. The lack of rain gutters for the first several years following construction allowed all of the runoff from the two roof surfaces to splash onto the deck and wall at the doorway below.

The above conditions allowed water to penetrate into the wood wall sheathing, floor sheathing, and floor joists, elevating their moisture contents to the extent that decay occurred. The extent of decay indicated that the moisture had been present in the materials for an extended period of time. These items led to the conclusion that decay and deterioration of the deck framing, floor framing and wall sheathing at the southeast corner of the dining area was caused by moisture intrusion due to improper construction. Proper flashing had not been installed at the deck ledger board. Weep holes were not installed at the base of the stone veneer. Gutters were not provided at the eaves.

Section IV
BASIS OF REPORT

1. Thomas J. Cate, P.E. inspected the Petrus residence on May 7, 2014. Notes, measurements, and photographs were recorded.
2. Thomas J. Cate, P.E. interviewed Mr. Beau Value of Restoration Pro on May 7, 2014.
3. Photographs of the Petrus residence provided by Restoration Pro were reviewed.
4. Thomas J. Cate, P.E. recorded temperature, moisture, and humidity measurements using an Extech MX850 meter on May 7, 2014.
5. APA – The Engineered Wood Association, "Decay of Engineered Wood Products", 2002.
6. International Code Council, International Residential Code for One and Two-Family Dwellings, 2003 Edition.

Section V
ATTACHMENTS

- A. Photographs
- B. Curriculum Vitae

Section V
ATTACHMENT A

Photographs

Photographs taken during our inspection, which were not included in this report, were retained in our files and are available to you upon request.

May 15, 2014
RCG File No. 01206226

RP000011

Photograph 1
West (front) elevation of the residence



Photograph 2
East (rear) elevation of the residence



May 15, 2014
RCG File No. 01206226

RP000012

Photograph 3

Deck boards and some framing removed at the southeast side of the dining area



Photograph 4

Deck boards and stone veneer removed at the east side of the dining area



May 15, 2014
RCG File No. 01206226

RP000013

Photograph 5

New door, ice and water shield, and house wrap installed at the southeast of the dining area



Photograph 6

Hardwood flooring removed and new sheathing installed at the dining area



May 15, 2014

RCG File No. 01206226

RP000014

Photograph 7
Existing flashing at the deck ledger board



Photograph 8
Single layer of felt paper between the existing stone veneer and the wall sheathing



May 15, 2014
RCG File No. 01206226

RP000015

Photograph 9

New floor joists installed adjacent to existing floor joists at the dining area



May 15, 2014

RCG File No. 01206226

RP000016

Photograph 10
Rot and decay at the sill of the removed door



May 15, 2014
RCG File No. 01206226

RP000017

Photograph 11
Rot and decay at the sill and side trims of the removed door frame



Photograph 12
Photo from contractor showing rot and decay on the wall sheathing at the sides of the dining area door



May 15, 2014
RCG File No. 01206226

RP000018

Photograph 13

Photo from contractor showing rotted and decayed sheathing and framing below the door at the dining area



May 15, 2014
RCG File No. 01206226

RP000019

Photograph 14

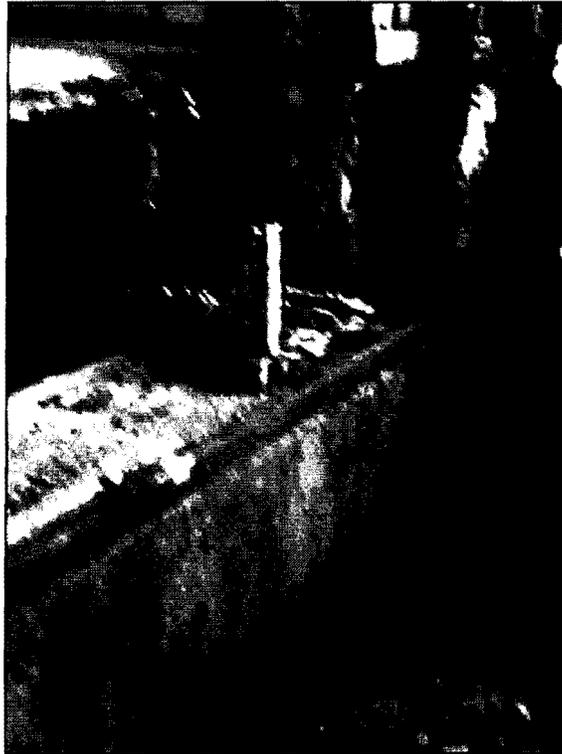
Photo from contractor showing rotted rim board and floor joists



May 15, 2014
RCG File No. 01206226

RP000020

Photograph 15
Photo from contractor showing rotted floor joists



May 15, 2014
RCG File No. 01206226

RP000021

**Section V
ATTACHMENT B**

Curriculum Vitae

May 15, 2014
RCG File No. 01206226

RP000022



**THOMAS (TJ) CATE, P.E., S.E.
SENIOR CONSULTANT**

Mr. TJ Cate studied Mechanical Engineering and Managerial Economics at Utah State University until 1999 when he transferred to the University of Utah and completed a Bachelor of Science degree in Civil Engineering with a structural engineering emphasis in 2001

Mr. Cate has broad and extensive experience in design, engineering and construction. He is skilled in a wide and diverse range of projects including single-family residential, commercial, institutional, and industrial projects. Residential projects include condominium resorts, large scale townhomes, Housing and Urban Development affordable housing apartments, university student housing, large custom homes and builder tract housing. Institutional projects range from charter schools and elementary schools to high schools and university buildings. Commercial project types include office buildings, parking structures, retail, amusement parks and hotels. Industrial projects include bottling plants, and specialty structures.

Mr. Cate has over 10 years of professional experience as an engineer. In 2010 he started his own engineering firm, and added a general contracting branch to his already successful swimming pool design company. Mr. Cate is skilled in the structural design of wood, light gage steel, structural steel, reinforced masonry, reinforced concrete, and fiber reinforced plastic (frp). He has particular skill in structural design in high seismic risk zones

Mr. Cate has extensive experience performing seismic evaluations and seismic rehabilitations and upgrades to structures. He recently completed training with the Department of Homeland Security in rapid response Post Earthquake Safety Evaluation of Buildings. He has investigated fire-damaged structures, structural collapses, retaining wall failures, construction vibration, foundation movement and failure, roof failures, and swimming pool deficiencies. Mr. Cate has provided structural engineering peer review services for municipalities and private entities. Local health departments routinely utilize Mr. Cate's expertise in swimming pool and waterpark design, construction, and operation.

EDUCATION AND PROFESSIONAL ASSOCIATIONS

- Licensed Professional Structural Engineer:** UT, NV, LA
- Licensed Professional Civil Engineer:** CA, CO, ID, FL, IL, NY, MO
- Licensed Contractor:** UT (B100 General and S380 Swimming Pool)
- Bachelor of Science in Civil Engineering:** University of Utah 2001
- Professional Organizations:** American Society of Civil Engineers (ASCE), Structural Engineers Institute (SEI), National Recreation and Parks Association (NRPA), Association of Pool and Spa Professionals (APSP)

EMPLOYMENT HISTORY

- 2011 – Present** Rimkus Consulting Group, Inc.: Senior Consultant
- 2004 - Present** AquaCate, Inc.: President
- 2011 – 2013** C3 Engineering: Managing Engineer
- 2008 - 2010** Daedalus USA: Structural Engineer, Construction Manager
- 2002 - 2008** L. R. Nelson Consulting Engineers: Structural Engineer
- 2001 - 2002** The Sear – Brown Group: Staff Engineer



RON B. McBRYDE, P.E.
PRINCIPAL CONSULTANT

Mr. McBryde is a licensed Professional Engineer with experience in civil and structural engineering analysis, design, failure analysis, and construction services. He is experienced as a civil/structural consultant in the evaluation of industrial, public, commercial and residential facilities relative to civil (paving and drainage) and structural (framing, settlement, design errors, construction defects, construction disputes and construction vibration) issues.

PROPERTY:

Foundation and Soil Movement: Extensive experience in evaluating cause and origin of foundation failures and damages to industrial, commercial and residential structures caused by differential foundation movement.

Structural Integrity Analysis: Proficient in STAAD with substantial experience in modeling and analysis of steel and concrete structures for industrial, commercial and public works facilities such as hotels, sports facilities/stadiums, retail stores, bridges, warehouses, hospitals, water treatment facilities, industrial buildings and production facilities, wharves and schools.

Pavement Analysis: Condition assessment and evaluation of material and installation defects.

CONSTRUCTION CLAIMS - DEFECTS, DELAYS AND DISPUTES:

Evaluation of cause and origin of damage, evaluation of construction documents, extent of damage determination, code compliance review, evaluation of allegations and cost to repair estimates for facilities such as hotels/resorts, light/commuter rail, bridges, office buildings, condominiums and residential housing.

CONSTRUCTION VIBRATION:

Post-construction evaluation of damage patterns and Peak Particle Velocity estimates for C & O determination of commercial and residential structures. Pre-construction condition assessments and documentation.

A & E ERRORS & OMISSIONS:

Evaluation of E&O allegations for public buildings and residences.

EDUCATION AND PROFESSIONAL ASSOCIATIONS

- B.S. – Civil Engineering (with Structural Emphasis) 1972 – University of Texas at Austin
- P.E. - Licensed Professional Engineer: CO, FL, NM, NC, SC, TX, UT
- P.E. - Licensed Civil Engineer: AZ, CA, NV, ID

EMPLOYMENT HISTORY

2003 – Present	Rimkus Consulting Group, Inc.
2001 - 2003	LaurenKamtech, Inc.
1998 - 2001	G & W Engineers, Inc.
1994 - 1997	Farmers Insurance Group
1987 - 1993	Boyle Engineering Corporation
1983 - 1986	Cunningham-Graves, Inc., Engineers
1978 - 1982	SBC Communications, Inc.
1973 – 1977	Lockwood, Andrews & Newnam, Inc., Engineers-Architects

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DOUGLAS A. MILLER, CLERK
 By Galvopp Deputy

JUN 17 2016

Case No. _____ Inst. No. _____
 Filed _____ A.M. _____ P.M.

Attorneys for Chris Kirk d/b/a Kirk Enterprises

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

PETRUS FAMILY TRUST DATED)
 MAY 1, 1991, and EDMOND A.)
 PETRUS, JR., individually and as Co-)
 Trustee of the Petrus Family Trust Dated)
 May 1, 1991,)
 Plaintiffs,)

Case No. CV-2014-71-C

**REPLY MEMORANDUM IN
 SUPPORT OF DEFENDANT CHRIS
 KIRK D/B/A KIRK ENTERPRISES'
 MOTION FOR SUMMARY
 JUDGMENT**

v.)
)
)

NANCY GENTRY-BOYD; CHRIS)
 KIRK d/b/a KIRK ENTERPRISES;)
 TODD MCKENNA d/b/a HOMECRAFT)
 HOME INSPECTIONS; RE/MAX)
 RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
 Defendants.)

Through undersigned counsel, Defendant Chris Kirk d/b/a Kirk Enterprises, ("Kirk") submits this reply memorandum in support of his motion for summary judgment and respectfully requests this Court to grant summary judgment and dismiss Plaintiff Petrus' claims for civil conspiracy and breach of implied warranty of habitability. Petrus' failure to respond to the

arguments presented in our opening brief on the civil conspiracy claim, combined with the total lack of evidence supporting such a claim, indicates a concession of the claim and admission that the claim is unsupported. Regarding the breach of implied warranty of habitability claim, the parties disagree on the law, not the facts, and a proper application of the law favors granting Kirk's motion.

I. ARGUMENT

A. **The Question Of Which Statute Of Limitations Applies To An Implied Warranty Of Habitability Claim Brought Against Residential Home Builder For Latent Defects Was Recently Answered In An Idaho Sister Court.**

In 2012, Idaho District Court Judge for the First Judicial District, Kootenai County, John Mitchell, addressed and analyzed the statute of limitations question as it relates to express and implied warranty, contract, and tort claims against a residential builder for latent defects in a case very factually similar to the case at bar. On summary judgment, Judge Mitchell concluded that the contract statute of limitations applied equally to the warranty claims and that the statute of limitations had expired, since more than five years had passed since construction was completed. *See Smith v. The Lighthouse Group, Inc.*, 2012 WL 1378570.

Smith involved a residential home in Cataldo, Idaho, owned by Ken and Debbie Smith. The home was built in 2003. In 2010, the Smiths claimed to have discovered a variety of latent defects in their home that included: improper wall and window ratio calculations, improper foundation venting in the concrete stem wall, lack of fire breaks, inadequate sizing of the mechanical room, absence of footings for structural support posts for the deck and stairs, stairs and deck supports not constructed of treated material and on improper footings under the stairs, beams supporting the composite deck not made from treated material nor flashed, resulting in water penetration and decay of the beams, and structural failure. *Id.* Coincidentally, Petrus

complains of similar defects related to improper flashing, water penetration, and decay.

When the Smiths filed suit, they sued their builder, engineer, and designer under eight distinct legal theories. Against the builder, they alleged five: (1) breach of contract, (2) negligent construction, (3) negligent supervision, (4) breach of implied warranty of habitability, and (5) breach of express warranty. *Id.* In analyzing which statute of limitations to apply to the breach of contract and warranty claims, Judge Mitchell looked to I.C. §§ 5-241 and 5-216 and the Idaho Supreme Court's holding in *Twin Falls Clinic & Hospital Bldg v. Hamill*, 103 Idaho 19, 23, 644 P.2d 341, 345 (1982).

“Contract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement.” I.C. § 5-241(b). Once construction is complete, Idaho Code § 5-216 requires an action based on contract to be brought within five (5) years. This has been upheld by the Idaho Supreme Court and distinguished from the tort causes of actions discussed *infra*.” See *Twin Falls Clinic & Hospital Bldg v. Hamill*, 103 Idaho 19, 23, 644 P.2d 341, 345 (1982). *Smith v. The Lighthouse Group, Inc.*, 2012 WL 1378570.

He then applied a short analysis to the critical dates involved in the case, calculating the time from the completion of construction forward five years to determine the date the contract statute of limitations ran on both the contract and warranty claims and concluded that all were barred by the applicable contract statutes of limitations. *Id.* In *Smith* the court concluded that construction was completed on the home in 2003, the statute of limitations ran in 2008, and the action was filed in 2011. *Id.*

In our case, it is undisputed that Kirk completed construction of the home he built for Gentry-Boyd by September 2005, that Gentry-Boyd lived in the home from 2005 without issue, that Gentry-Boyd sold the home to Petrus in April 2012, and that Petrus filed suit in March 2014. Nowhere in the record, or in Petrus' opposition papers, are these facts disputed. Applying the analysis employed in *Smith*, the implied warranty claim expired at the latest, in September 2010, five years after Kirk completed construction.

B. The Arizona Court Relied On By The Idaho Supreme Court In *Tusch* Also Held That A Contract Statute Of Limitations Applies To An Implied Warranty Claim.

Petrus points out that the Idaho Supreme Court relied heavily on the Arizona Supreme Court for guidance in deciding whether to abolish the privity requirement for an implied warranty claim between a subsequent purchaser and a builder. *See* Memorandum in Opposition, p. 16. The Arizona Supreme Court case quoted and cited was *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427 (1984), decided in January 1984. If we look to the same Arizona court for additional guidance on the question of which statute of limitations applies to an implied warranty claim, we find that the Arizona Supreme Court took the opportunity to clearly answer that question nine months after deciding *Richards*. In *Woodward v. Chirco Constr. Co., Inc.*, 141 Ariz. 514, 687 P.2d 1269 (1984), the Arizona Supreme Court held that the fact that an implied warranty of habitability and workmanlike performance is imposed by law does not transform the builder-vendor's duty from a duty arising out of contract into a duty based on tort principles, and that the six-year statute of limitations applicable to an action founded upon contract in writing [Ariz. Rev. Stat. § 12548] was therefore the applicable statute of limitations.

Id. The *Woodward* court went on to explain:

Our statement in *Richards, supra*, that the implied warranty of workmanlike performance and habitability "is imposed by law" was not meant to transform the duty arising out of the contract into one based on tort principles alone; instead, it was meant to inform buyers and sellers that the law imputes the warranty into the contract for the construction and sale of the residence. We then held that the warranty runs to subsequent purchasers of the residence. If the warranty did not arise out of the contract and provide for a cause of action in contract, we would have had no cause to be concerned about the absence of privity between *Richards* and *Powercraft Homes, Inc.* It is the fact that the implied warranty at issue here provides for a cause of action in contract that calls into question the relevance of privity. Since the cause of action based on the implied warranty of workmanlike

performance and habitability was based on the contract between the Woodwards and Chirco, the Court of Appeals properly concluded that the six-year statute of limitations should apply. *Woodward v. Chirco Const. Co.*, 141 Ariz. 514, 516, 687 P.2d 1269, 1271 (1984).

In its decision, the *Woodard* court cited the Colorado Supreme Court which also held that the implied warranty of habitability arises from the contractual relation between a builder and the purchaser. *Woodward v. Chirco Const. Co.*, 141 Ariz. 514, 516, 687 P.2d 1269, 1271 (1984) (citing *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo.1983)).

Following our Idaho Supreme Court's lead in looking to the Arizona Supreme Court for guidance, we end up in the same place as Judge Mitchell did in the Kootenai County *Smith* case, with the conclusion that the statute of limitations on an implied warranty of habitability claim expired at the latest in the fall of 2010, five years after Kirk completed construction.

C. Any Defect Not Included In The Notice and Opportunity to Repair Act Letter Should Be Barred.

The Notice and Opportunity to Repair Act ("NORA"), I.C. § 6-2503 acts to confine a claimants causes of action in a lawsuit to the defects properly noticed and served under NORA. Permitting a claimant to pursue a legal action for a defect which the claimant did not provide any notice is to circumvent the very purpose of NORA-to allow a construction professional the opportunity to inspect and remedy a defect prior to a lawsuit.

Kirk received a NORA letter that generally described a problem with water intrusion around the home's French doors. Kirk exercised his right to inspect the doors and responded with a laundry list of damage and alterations that he witnessed. None of what he witnessed constituted a construction defect or anything that he or his agents were responsible for during construction of the home and installation of the doors so he denied responsibility. Kirk was never put on notice that Petrus claimed the home was structurally unsound or that it was riddled with mold or dry rot. If that had been the case, certainly Kirk would have investigated further and made a great effort

to determine if he or his subcontractors had somehow created the purported defects. However, because Petrus never complained to Kirk about any problems in the front corners of the house facing the lake, Kirk was not on notice to look at these problems. This, coupled with the facts that during the second attempt to inspect, Petrus kicked Kirk off the property preventing him from looking at the roof and gutters, both possible sources of water intrusion and probable design flaws, and Kirk's third visit was made after demolition of the home had commenced, makes these two visits irrelevant for purposes of statutory compliance. The practical consequence to Petrus' actions should be dismissal of the claim without prejudice until the claimant complies with NORA. However, because the home has been fully repaired and there is nothing left to inspect or repair, the net effect of this practical consequence is that the cause of action for breach of implied warranty of habitability against Kirk for anything more than what was included in the first notice should be barred.

Additionally, recent deposition testimony of the door manufacturer's representative, Mark Birrer, indicated that Petrus' caretaker, Mike Longmire, informed Mark that they [presumably Mike and/or Petrus] had pried and forced the door open and damaged it. The testimony read as follows:

Question: So your earlier testimony was that you got a call from Mike Longmire asking if you would be willing to look at potentially getting replacement product for the door in question. Do you remember generally what your conversations were about?

A. No.

Q. Did he explain to you why he wanted a replacement product?

A. Yes.

Q. And what did he say?

A. As I recall, there had been snow, as a lack of maintenance, that had built up on the exterior of that door panel. And they attempted to open that door that was forced shut by the snow and elements. And I remember something about the handle set becoming disengaged, and they tried to pry and force that door open, and damaged that panel.

Q. Did Mike Longmire tell you that?

A. That was the communication I had with Mike Longmire.

Q. He told you they tried to pry open the door?

A. I don't know who tried to pry open the door.

Q. And how did you reach the conclusion that there had been snow piled up due to a lack of maintenance, and that the door had been forced shut, and that someone had tried to pry it open?

A. That was the information that was provided to me.

See Deposition of Mark Birrer., p. 40:18-25 and 41:1-20.

This testimony, from an independent witness, indicates that Petrus, or his agent, not only knew about the damage to the door, but that they in fact caused it.

VI. CONCLUSION

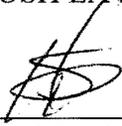
The timeline of critical facts is undisputed. Kirk finished building the home in the fall of 2005. Gentry-Boyd sold the home to Petrus in 2012. Petrus filed suit in 2014. Eight and a half years is three and a half years too late to bring an implied warranty of habitability claim against a builder for a construction defect claim. Petrus' claim is time barred. Further, the warranty claim fails because the undisputed facts show that the *Complaint* was filed without full compliance of the statutory requirements of the Notice and Opportunity to Repair Act. Under the statute, Petrus absolutely needed to allow Kirk the chance to conduct a full inspection of the home a second time if he was going to insist that the expanded damage was caused by a construction defect. Third, the damage to the door that Kirk witnessed was in fact real, and was caused by Petrus or his agent.

Based upon the foregoing argument and authorities cited herein, the Court should grant Defendant Kirk's *Motion for Summary Judgment*, dismissing in their entirety Counts VI, and VII of the *Second Amended Complaint* against Kirk on the basis that no genuine issues of material fact exist regarding these claims and Kirk is entitled to judgment as a matter of law.

Respectfully Submitted,

DATED this 17th day of June, 2016.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

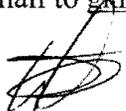
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17th day of June, 2016, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Alyson A. Foster	_____	U.S. Mail, Postage Prepaid
Jason J. Rudd	_____	Overnight Courier
ANDERSEN SCHWARTSMAN	<u> X </u>	Hand Delivered
WOODARD BRAILSFORD, PLLC	_____	Facsimile (208) 342-4455
101 S. Capitol Blvd., Suite 1600	<u> X </u>	E-mail aaf@aswblaw.com
Boise, ID 83702		jjr@aswblaw.com
<i>Attorney for Plaintiffs</i>		
Michael G. Pierce	<u> X </u>	U.S. Mail, Postage Prepaid
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Cascade, ID 83611	_____	Facsimile (208) 382-3783
<i>Attorney for Defendant Todd</i>	<u> X </u>	E-mail
<i>McKenna d/b/a Homecraft Home</i>		michael@michaelpiercelaw.com
<i>Inspections</i>		
Steven J. Millemann	_____	U.S. Mail, Postage Prepaid
George C. Pittenger	_____	Overnight Courier
MILLEMANN, PITTENGER,	<u> X </u>	Hand Delivered
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<i>Gentry-Boyd</i>		
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<i>Attorneys for Defendant Re/Max</i>		
<i>Resort Realty & Kevin Batchelor</i>		

Courtesy Copy:
Honorable Jason D. Scott

Via e-mail to gknapp@co.valley.id.us



Daniel A. Nevala

law in Idaho and am a member of Arkoosh Law Offices. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct courtesy copy of a Memorandum Decision and Order on Cross Motions for Summary Judgment captioned *Smith v. The Lighthouse Group, Inc.*, 2012 WL 1378570 (Idaho Dist.) (Trial Order).

3. Attached hereto as **Exhibit 2** is a true and correct copy of the deposition transcript of Mark Birrer.

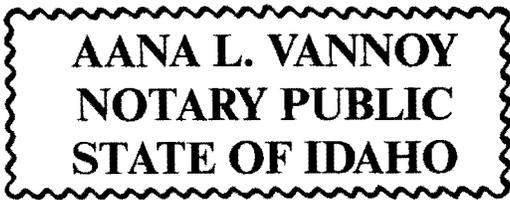
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 17th day of June, 2016.



Daniel Nevala

SUBSCRIBED AND SWORN to before me this 17th day of June, 2016.



Anna L Vannoy
Notary Public for State of Idaho
Residing at MCCALL
My Commission Expires: 7/10/18

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17th day of June, 2016, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Alyson A. Foster	_____	U.S. Mail, Postage Prepaid
Jason J. Rudd	_____	Overnight Courier
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<i>Attorney for Plaintiffs</i>		

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<i>Gentry-Boyd</i>		

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<i>Attorneys for Defendant Re/Max</i>		
<i>Resort Realty & Kevin Batchelor</i>		

Courtesy Copy:
Honorable Jason D. Scott

Via e-mail to gknapp@co.valley.id.us



Daniel A. Nevala

EXHIBIT 1

Original Image of 2012 WL 1378570 (PDF)

2012 WL 1378570 (Idaho Dist.) (Trial Order)
 Idaho District Court,
 First Judicial District,
 Kootenai County

Ken SMITH and Debbie Smith, husband and wife, Plaintiffs,

v.

THE LIGHTHOUSE GROUP, INC., an Idaho Corporation, d/b/a
 Crescent Homes, et al, Defendants.

No. CV 2011 5105.

March 14, 2012.

**Memorandum Decision and Order on Cross Motions for Summary
 Judgment**

John T. Mitchell, District Judge.

I. PROCEDURAL HISTORY AND BACKGROUND.

On August 15, 2003, plaintiffs Ken and Debbie Smith (Smiths) received a "certificate of occupancy" for their residence at 15170 S. Bull Run Road in Cataldo, Idaho. Affidavit of Ken Smith in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 4. Smiths' residence was constructed pursuant to a contract entered into with defendant Crescent Homes, a.k.a Lighthouse Group, Inc.(Lighthouse). Complaint, p. 2, ¶ 2.2-3. Defendant Wallace Lucas, d.b.a. Lucas Design Group (Lucas) produced "plans" for this residence. Lucas Answer, p. 2, ¶ 4. Defendant Tate Engineering (Tate) provided engineering services for the residence and affixed an engineer seal on certain construction drawings. Tate Answer, p. 3, ¶ 11.

On June 24, 2011, Smiths filed this lawsuit asserting the following causes of action against the following parties:

CLAIM	DEFENDANT
1. Breach of Contract	Crescent Homes (Lighthouse Group)
2. Negligent Construction	Crescent Homes (Lighthouse Group)
3. Negligent Supervision	Crescent Homes (Lighthouse Group)
4. Breach of Implied Warranty	Crescent Homes (Lighthouse Group)
5. Breach of Express Warranty	Crescent Homes (Lighthouse Group)
6. Professional Malpractice	Tate Engineering
7. Negligent Engineering	Tate Engineering
8. Negligent Design	Wallace Lucas d.b.a. Lucas Design Group

Complaint, pp. 4-9. Smith claims he discovered a variety of latent construction, design and engineering defects in the home in late winter or early spring of 2010. Affidavit of Ken Smith Filed in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3. Smiths' engineer found engineering-related defects of: total window-wall ratio and related shear wall calculations, absence of foundation vents in the concrete stem wall, lack of fire breaks, the size of the mechanical room may be inadequate relative to the needs of the systems occupying the space, absence of footings for structural support posts for the deck and stairs, stairs and deck supports not constructed of treated material and on absence of footings under the stairs, and sistered beams supporting the composite deck were neither made from treated material nor flashed, resulting in water penetration and decay of the beams, and structural failure. Affidavit of Jeffrey D. Block, P.E. Filed in Support of Plaintiff's Motion for Summary Judgment and Response in Opposition to Defendants' Cross-Motions for Summary Judgment, p. 2, ¶ 6 (1)-(g).

All three defendants listed multiple affirmative defenses to the above claims in their respective Answers. One defense found in all three Answers is that Smiths may be barred from bringing the above claims pursuant to the applicable statute of limitations found in Idaho Code §§ 5-216- 219 and 5-241. *See* Lucas Answer, p. 2, ¶ 8; Tate Answer, p. 10; Lighthouse Answer, p. 8.

On December 2, 2011, Smiths proactively filed a motion for summary judgment on the question of the application of the statute of limitations. On January 17, 2012, Lighthouse filed its response to Smiths' motion and filed a cross motion for summary judgment as to both the economic loss rule and the statute of limitations. On January 20, 2012, Tate filed a response to Smiths' motion and filed a cross motion for summary judgment on two grounds: (1) the statute of limitations as it relates to the Notice and Opportunity to Repair Act (NORA) and (2) Smiths' inability "to establish an essential element of their malpractice and negligence claims" against Tate. Tate Engineering Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 2. On January 30, 2012, Smiths filed a separate reply and response to both Lighthouse's and Tate's cross motions for summary judgment. On February 7, 2012, Lighthouse filed a reply memorandum in support of its cross motion, and on February 8, 2012, Tate filed a reply memorandum in support of its cross motion.

On February 10, 2012, the parties filed a Stipulation for Dismissal of Defendant Wallace E. Lucas d.b.a. Lucas Design Group Without Prejudice.

On February 14, 2012, oral argument on the cross motions for summary judgment was held, following which the Court took the matters under advisement.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982).

Evidentiary rulings, such as ones on the motion to strike before the Court, are reviewed under an abuse of discretion standard. *Perry v. Magic Valley Reg'l. Med. Ctr.*, 134 Idaho 46, 50, 995 P.2d 816, 820 (2000). Reviewing Courts apply the abuse of discretion standard when evaluating whether testimony offered in connection with a motion for summary judgment is admissible. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 72, 177 (2007) (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)). In Idaho, a party may wait until hearing on a summary judgment motion to object to an opposing party's affidavits. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782-83, 839 P.2d 1192, 1196-97 (1992). In *Shane v. Blair*, 139 Idaho 126, 75 P.3d 180 (2003), the Idaho Supreme Court wrote:

We have held that the question of admissibility of affidavits under Idaho Rule of Civil Procedure 56(e) is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment. *Rhodehouse v. Stutts*, 125

Idaho 2008-01, 868 P.2d 1224, 12227 (1994). The trial court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible. *Dulaney v. St. Alphonsus Regional Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2009). When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard. *Sulaney*, 137 Idaho at 163-64, 45 P.3d at 819-20.

139 Idaho 126, 128, 75 P.3d 180, 182. Rule 56(e) requires affidavits be made upon personal knowledge, "shall set forth such facts as would be admissible in evidence", and affirmatively show the affiant is competent to testify to the matters stated. I.R.C.P. 56(e).

III. ANALYSIS.

Smiths' claims can be broken up and considered in three categories as they relate to the statute of limitations. First, contract claims, including breach of an implied and/or express warranty will be considered in light of I.C. §§ 5-216 and 5-241. Next, tort claims will be considered in light of I.C. §§ 5-219 and 5-241. Finally, the claim against Tate for professional malpractice will be considered under I.C. § 6-2503.

However, before examining the applicability of the statute of limitations, this court must rule on two motions to strike.

A. Motions to Strike.

First, Tate moves to strike portions of the Affidavit of Jeffrey Block ¶¶ 6(a)-(g); 7-10, Exhibit A. Memorandum of Tate in Support of Motion to Strike, p. 2. Next, Smiths move to strike portions of the Affidavit of Jae Enos ¶¶ 3-4. Memorandum of Smiths in Support of Motion to Strike, pg. 3. Neither of these motions will affect the overall outcome of the statute of limitation analysis, as the matters testified to do not involve the timeliness of actions or filings.

Tate objects to the admissibility of Exhibit A of the Affidavit of Jeffery Block because of lack of foundation, failure to authenticate and hearsay. Memorandum of Tate in Support of Motion to Strike, p. 3. Block is the professional engineer hired by Smiths to give testimony in this lawsuit. Block gives an opinion as to the liability of Tate Engineering. Affidavit of Jeffrey Block p. 2, ¶ 5. He then immediately refers to Exhibit A, the plans Tate signed as professional engineer, as a specific example supporting his conclusion. *Id.*, p. 2, ¶ 6. This amounts to "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). However, an expert "may testify thereto in the form of an opinion or otherwise." I.R.E. 702.

In regard to ¶¶ 6(a)-(g) and 7-10 of Block's Affidavit, Tate argues that there has not been adequate foundation laid to warrant the opinions of Jeffrey Block. Memorandum of Tate in Support of Motion to Strike, pg. 3. In his Affidavit, Block states he is a registered professional engineer who has gained personal knowledge through inspection of the residence, has reviewed the applicable plans and reviewed the notice of defect. Based on this foundation the testimony is admissible. *See Dulaney v. St. Alphonsus Regional Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2009). Tate's motion to strike must be denied.

Second, Smiths move to strike portions of the Affidavit of Jae Enos as conclusory, speculative, lacking in foundation and hearsay. Plaintiffs' Motion to Strike Portions of the Affidavit of J. Jae Enos Files in Opposition to Plaintiffs' Motion for Summary Judgment, and in Support of Defendant Crescent Home's Cross-Motion for Summary Judgment, pp. 2-4. Enos states, "at the time of the contract, Crescent Homes was not primarily known as a builder of 'custom homes' ... in fact, there were at that time more than a few builders in the Coeur d'Alene area whose recognized specialty was large custom homes." Affidavit of Jae Enos, pg. 2, ¶ 3. Enos goes on to state an opinion of what a Kootenai County records search would reveal as to the number of homes

constructed at the time in Kootenai County "...in that price range or higher." *Id.*, pg. 2, ¶ 4. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." I.R.E. 602. There is nothing to dispute that Enos had knowledge of other builders and building activity in the area. Affidavit of Jae Enos, pp. 1-2. Enos' affidavit shows that Enos is currently the president of The Lighthouse Group, Inc., and that back in 2003, Enos was an employee of Crescent Homes. Thus, Enos has the foundation to testify about what Crescent Homes did. However, nothing in Enos' affidavit establishes the basis of his knowledge about the building in Kootenai County in general in 2003. Accordingly, the motion to strike filed by Smith as to Enos' statement that "at the time of the contract, Crescent Homes was not primarily known as a builder of 'custom homes' " is denied. The motion to strike filed by Smiths as to Enos' statement "... in fact, there were at that time more than a few builders in the Coeur d'Alene area whose recognized specialty was large custom homes", and "...I am certain that a search of county records would show that there were a substantial number of homes being constructed during that time period in that price range or higher", is granted, as lacking in foundation, speculative and conclusory.

B. Are the Smiths' Claims for Breach of Contract, Breach of Implied Warranty, and Breach of Express Warranty Timely?

Smiths' memorandum in support of their motion for summary judgment only addressed the statute of limitations as it related to five of the eight claims -- Smiths did not address the statute of limitations pertaining to the breach of contract, breach of implied warranty, or breach of express warranty claims. *See Memorandum in Support of Plaintiff's Motion for Summary Judgment*, pp. 5-12. In its response brief, Lighthouse also addressed the statute of limitations for contract actions. *See Memorandum in Response to Plaintiff's Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment* pp. 3-7. In Smiths' reply to Lighthouse's response, Smiths still failed to address the statute of limitations for these three contract claims.

"Contract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement." I.C. § 5-241(b). Once construction is complete, Idaho Code § 5-216 requires an action based on contract to be brought within five (5) years. This has been upheld by the Idaho Supreme Court and distinguished from the tort causes of actions discussed *infra*. *See Twin Falls Clinic & Hospital Bldg v. Hamill*, 103 Idaho 19, 23, 644 P.2d 341, 345 (1982).

In the case at bar, the completion of the construction occurred no later than August 15, 2003. *See Affidavit of Ken Smith in Support of Plaintiff's Motion for Summary Judgment*, p. 2, ¶ 4. No evidence in the record contradicts this date. The contract statute of limitations ran on August 15, 2008. Because there are no remaining issues of material fact on this issue and due to the fact that this action was not filed until June 24, 2011, the claims for Breach of Contract, Breach of Implied Warranty and Breach of Express Warranty are barred by the applicable statutes of limitations. Based on Smiths' memoranda and oral argument, Smiths appear to have conceded this issue.

C. Are the Smiths' Claims for Negligent Construction, Negligent Supervision, Negligent Engineering, and Negligent Design Timely, and, if Timely, are those Claims Barred by the Economic Loss Rule?

The Idaho legislature has distinguished the time period within which tort claims accrue from the time period within which breach of contract claims accrue. *See I.C. § 5-241*. This distinction allows for a "limited discovery exception in the area of 'tort' liability arising out of the design or construction of improvements to real property ... It is to be noted that such exemption would only be applicable to *latent* defects since *patent* defects by definition would be those which should have been discovered." *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 23, 644 P.2d 341, 345 (1982), *emphasis added*.

Tort actions, if not previously accrued, shall accrue and the applicable

limitation statute shall *begin to run* six (6) years after the final completion of construction of such an improvement.

I.C. § 5-241(a), *emphasis added*. “This section provides a limited discovery rule for tort claims arising out of the design or construction of improvements to real property.” *Hibbler v. Fisher*, 109 Idaho 1007,1012, 712 P.2d 708,713 (1985). Once the period of time provided by I.C. § 5-241 has expired, either because of notice of defect or the expiration of six (6) years, then “an action for relief [not explicitly provided for by statute] must be commenced within four (4) years after the cause of action shall have accrued.” I.C. § 5-224. These statutes are considered together when applied to latent defects. *Hibbler*, 109 Idaho 1007,1012, 712 P.2d 708,713. Therefore, the maximum amount of time for an action in tort relating to the design or construction of property is ten (10) years

The nature of the damage at issue in the present case presents questions of material fact: a) whether that damage is latent or patent, and b) when was the damage noticed. Construing the facts in the light most favorable to Smiths, the Court notes, “Plaintiffs discovered the latent construction defects [on] or about August of 2010.” Complaint, p. 3, ¶ 2.17. Tate's argument that some or all of the defects are patent would bar a summary judgment motion. See Affidavit of Tate pg. 4-7, ¶¶ 20-44. As to patent defects, the statute of limitation expired well before Smiths filed this lawsuit.

As to latent defects, Idaho law provides Smiths with a six (6) year limitation provided by I.C. 5-241, with an additional possible timeframe of four (4) years provided by I.C. § 5-224. Thus, Smiths would have ten (10) years from the completion of construction to bring a claim in tort before statute of limitations expires on August 15, 2013. See Affidavit of Ken Smith in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 4. Smiths' negligence claims as they relate to latent defects are timely.

However, in Lighthouse's response to Smiths' motion for summary judgment, Lighthouse raises the issue of the economic loss rule as applied to negligence actions. See Memorandum of Lighthouse in Opposition to Plaintiff's Motion for Summary Judgment, p. 4-5. Idaho courts have held “that the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another.” *Blahd v. Smith*, 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005). “Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction.” *Id.*, 141 Idaho 296, 300, 108 P.3d 996, 1000. The Idaho Supreme Court has held:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the ‘luck’ of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm....

Tusch Enterprises v. Coffin, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987), citing *Clark v. International Harvester Co.*, 99 Idaho 326, 335, 581 P.2d 784, 792 (1978) (plaintiffs sought recovery for damages arising out of purchase of a defective tractor). This economic loss rule is not limited to manufacturing. *Tusch Enterprises* involved a suit by a purchaser against a developer and seller of a defective residential duplex. *Tusch Enterp.*, 113 Idaho 37, 40, 740 P.2d 1022, 1025. One month after purchase, the plaintiff noticed extensive damage which was determined to have resulted from the defendant's constructing the residential duplex on improper fill dirt. *Id.* “Economic loss includes the costs of repair and replacement of defective property which is the subject of the transaction....” *Brian and Christie, Inc. v. Leishman Elec. Inc.*, 150 Idaho 22, 26, 244 P.2d 166, 170 (2010), citing *Salmon River Sportsman Camps, Inc.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975). The Idaho Supreme Court explained that “the economic loss rule limits the actor's duty so that there is no cause of action in negligence ... The seller

has no duty under the law of negligence to design, manufacture, or sell property that will conform to the buyer's economic expectations." *Brian and Christie, Inc.*, 150 Idaho 22, 28, 244 P.2d 166, 172.

At oral argument, Smiths posited that the house is not the subject of the transaction, but rather the subject of the transaction is the services rendered to construct the house. Smiths rely on *Brian and Christie, Inc.*, to demonstrate that the subject of the transaction in question is service. *Brain and Christie, Inc.* involved a claim for damages resulting from upgrades and/or repairs made to an existing building by a subcontractor. 150 Idaho 22, 24, 244 P.2d 166, 168. In that case, the Idaho Supreme Court examined numerous cases in which it had applied this general rule of economic loss and distinguished the facts of the case before it by pointing out that the electrician did not sell defective property. 150 Idaho 22, 26, 244 P.2d 166, 170. The Idaho Supreme Court then held:

The restaurant was not defective property. It did not spontaneously combust. Rather, [Brian and Christie, Inc.'s] claim is that Subcontractor's negligence in connecting the signs to electrical power caused a fire that extensively damaged the restaurant and its contents. In this case, there was no defective property which was the subject of the transaction.

Id.

The subject of the transaction in *Brian and Christie, Inc.* was the repair service to the existing building. This is distinguishable from the case at bar. The subject of a transaction can involve service. For instance, service is involved in making and selling an aircraft engine, yet the subject of the transaction is the engine itself not the construction of the engine. See *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975) (economic loss rule barred recovery). Similarly, it may require service to make a tractor, yet the tractor itself is the subject of the transaction. See *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

Again, in *Tusch*, the "service" involved was both the leveling of the improper fill material upon which duplexes were later built, and the construction of the duplexes (113 Idaho 37, 40, 740 P.2d 1022, 1025); yet, in *Tusch*, the "subject of the transaction" was construction of the duplexes. 113 Idaho 37, 41, 740 P.2d 1002, 1026. This is consistent with the earlier case of *State v. Mitchell Const. Co.*, 108 Idaho 335, 699 P.2d 1349 (1984). In *Mitchell*, the State of Idaho contracted with Mitchell Construction for an office building to house the State of Idaho Department of Agriculture. 108 Idaho 335, 336 699 P.2d 1349, 1350. The constructed building had a defective roof so the State of Idaho sued Mitchell Construction. *Id.* The Idaho Supreme Court held the claim was barred by economic loss rule because the building, not the construction service, was the subject of the transaction. *Id.*

In the case at bar, similar to *Tusch* and *Mitchell*, the subject of the transaction is the building. Unlike *Brian and Christie, Inc.*, in the present case Smiths did not hire the defendants to repair a small portion of an existing building. Rather, the contract was for the construction of the entire home. The construction of Smiths' residential building included services, similar to the construction of an engine, tractor, residence or roof of a state office building as shown in the examples above, but the end goal of the transaction was the construction of a residence. Once this distinction is made, it becomes clear that the subject of the transaction in question is the residence. Therefore, unless an exception applies, the economic loss rule will bar tort recovery.

The Court has set out only two exceptions to the economic loss rule: 1) the special relationship exception, and 2) the unique circumstances exception. See *Blaht v. Richard B. Smith, Inc.*, 141 Idaho 296, 301-02, 108 P.3d 996, 1001-02 (2005).

The term "special relationship," ... refers to those situations where the relationship between the parties is such that it would be equitable to impose such a duty. In other words, there is an extremely limited group of

cases where the law of negligence extends its protections to a party's economic interest.

141 Idaho 296, 301, 108 P.3d 996, 1001, citing *Duffin v. Idaho Crop Improvement Assoc.*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995).

The Idaho Supreme Court noted in *Blahd* that there have only been two cases in which Idaho Courts have recognized a *special relationship* exception: 1) a case involving an insurance agent who knowingly led plaintiffs to inadequate coverage (*McAlvain v. General Ins. Co. of America*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976), where a professional relationship already existed prior to the time the insured expressly requested his insurance agent provide complete insurance coverage on all of the insured's inventory; the agent failed to do so, and a fire later destroyed the inventory) and 2) a case involving the Idaho Crop Improvement Association (ICIA), which was the sole entity authorized to certify seed potatoes in Idaho. 141 Idaho 296, 301, 108 P.3d 996, 1001, citing *Duffin v. Idaho Crop Improvement Association*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995). In *Blahd*, Mr. and Mrs. Blahd purchased a home which was constructed on improper fill material. 141 Idaho 296, 299, 108 P.3d 996, 999. The Idaho Supreme Court stated that even though the developers were experienced and may arguably be deemed "quasi-professionals" in the construction field, "there [was] no evidence showing the [developers] performed a personal service for the Blahds or held themselves out as having a special and unique expertise." 141 Idaho 296, 301, 108 P.3d 996, 1001. The complete analysis by the Idaho Supreme Court is as follows:

As real estate developers of the lot in question, the Smith Entities may arguably be considered quasi-professional. Even if they are, there is no evidence showing the Smith Entities performed a personal service for the Blahds or held themselves out as having a special and unique expertise. Furthermore, even if the Smith Entities marketed the lot in question to the general public, there is no indication in the record that the Blahds relied on those representations. Accordingly, there is no special relationship between the Blahds and the Smith Entities.

The Smith Entities hired Jones to supervise the lot preparation and provide geotechnical services. The Gyslins also hired Jones to inspect the soil on the lot and determine whether it was adequate for residential construction. There is no indication in the record that the Blahds relied upon or were even aware of Jones' services regarding the lot. Like the lack of evidence regarding inducement of reliance by the Federal-State Inspection Service in *Duffin*, there is no evidence in the record showing Jones actively sought to induce the Blahds to rely on its services. Therefore, the special relationship exception does not apply to Jones.

141 Idaho 296, 301-02, 108 P.3d 996, 1001-02. Similarly, in the present case, Smiths have not alleged a performance of a personal service outside of the design and construction of the residence that would indicate the existence of a special relationship exception to the economic loss rule.

Regarding the exception to economic loss for *unique circumstances*, the *Blahd* Court first made clear that the exception has never been applied in Idaho; then, the Idaho Supreme Court refused to apply it to the facts of that case. 141 Idaho 296, 302, 108 P.3d 996, 1002. "The purchase of a residential house is an everyday occurrence and does not create the type of unique circumstances required to justify a different allocation of risk .." 141 Idaho 296, 302, 108 P.3d 996, 1002. The Smiths have asserted that "the construction of a million dollar three-story, 8,600 square foot custom river-front home, with an elevator, and in-ground swimming pool is hardly an everyday occurrence." Memorandum of Plaintiff in Reply to Defendant Crescent Homes Response to Plaintiff's Motion for Summary Judgment, p. 7. However, the individual characteristics of a given home do not make this a unique circumstance for purposes of an exception to the economic loss rule, particularly when Idaho Courts have never before applied this exception.

In the instant case, as to latent defects, the statute of limitations for Smiths' negligence

claims has not. Discovery of the defects did not occur until 2010, as set forth by Smiths. Affidavit of Ken Smith in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 5. However, Smiths' claims do not allege personal injury. Instead, they "includ[e] costs of repair and replacement of defective property which is the subject of the transaction" (*Blahd v. Smith*, 141 Idaho 296, 300, 108 P.3d 996, 1000), which is prohibited under the economic loss rule. The present case is similar to *Blahd* and *Tusch* in that the subject of the transaction is the house. The Idaho Supreme Court has used the two exceptions to the economic loss rule very sparingly. The facts of the instant case do not amount to a special relationship or unique circumstance within the meaning of those exceptions as set forth in *Blahd*. Therefore, the claims of negligence, arising out of the construction of real property, are barred by the economic loss rule.

D. Is Smiths' Claim for Professional Malpractice Timely?

Similar to the actions sounding in tort discussed above, an action for professional malpractice must be made within six years of completion of construction. I.C. § 5-241(a). However, an action to recover damages resulting from professional malpractice has an additional two year statute of limitation. I.C. § 5-219(4). Therefore:

[a] cause of action founded in professional malpractice arising out of the design or construction of improvements to real property must be brought within two years of discovery of the alleged malpractices and in no event later than eight years following the completion of the construction.

Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 24, 644 P.2d 341, 346 (1982).

In addition, Idaho has adopted the Notice and Opportunity to Repair Act (NORA), which in part establishes a process for providing notice to the construction professional and allowing that professional a chance to respond, correct or deny any claims. I.C. § 6-2503.

If a written notice of claim is served under this section within the time prescribed for the filing of an action under this chapter, the statute of limitations for construction-related claims is tolled until sixty (60) days after the period of time during which the filing of an action is barred.

I.C. § 6-2503(1). Smiths had a six (6) year limitation, provided by I.C. § 5-241, with an additional two (2) years provided by I.C. § 5-219(4). Smiths would have eight (8) years from the completion of construction to bring a professional malpractice claim before the statute of limitations ran. Here, because a notice of defect was sent to Tate, the additional sixty (60) days provided by I.C. § 6-2503 would require filing of Smiths' action on or about prior to October 15, 2011. Smiths met that deadline as their Complaint was filed on June 24, 2011.

In its response, Tate argues the notice from Smith, on June 2, 2011, did not comply with NORA. See Memorandum of Tate in Response to Plaintiff's Motion for Summary Judgment, pp. 11-17. The Idaho Supreme Court addressed the issue of compliance with NORA by stating that the notice of defect must reasonably relate to the particulars of the deficiency. *Mendenhall v. Aldous*, 146 Idaho 434, 437 196 P.3d 352, 355 (2008). In *Mendenhall*, a dispute arose over unfinished work on a house as well as a leaky roof. 146 Idaho 434, 435 196 P.3d 352, 354. Written communication was initiated by the defendant builder (Aldous) addressing possible solutions to the unfinished work. *Id.* Mendenhall's response did not address the proposed solutions, but rather complained about the unfinished work and the leaky roof. *Id.* When Aldous sent another letter asking Mendenhall to address the proposed solutions, Mendenhall sent the builder a demand letter for \$29,496.74. *Id.* This demand letter ended communication between the parties. *Id.* One year after communication stopped, Mendenhall brought a civil action against the builder. *Id.*

The district court granted summary judgment to Aldous for failure by Mendenhall to meet NORA requirements. *Id.* 146 Idaho 434, 436 196 P.3d 352, 354. In examining the

district court's decision, the Idaho Supreme court explained that the purpose of NORA is to "give contractors the opportunity to fix construction defects before a lawsuit is filed." *Id.* The court went on to say:

NORA's notice requirement does not require claimants to describe alleged defects with excessive particularity. Instead, the "reasonable detail" requirement is satisfied when a claimant provides a builder with enough information to identify the general nature and location of the defect.

Id. 146 Idaho 434, 437 196 P.3d 352, 355. The Idaho Supreme Court found that even though the letter only complained of unfinished work and a leaky roof, it "surely provided enough detail and pertinent information to permit the Aldouses to inspect the home and determine 'the general nature of the defect [s].'" *Id.* "If the construction professional disputes the claim or does not respond to the claimant's notice of claim within [21 days], the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice." I.C. § 6-2503(3)(a). The *Mendenhall* court held that because of Aldous' failure to respond to Mendenhall's demand letter, Mendenhall was free to pursue civil action. 146 Idaho 434, 438 196 P.3d 352, 356.

The facts of the present case are similar to those in *Mendenhall*. On June 2, 2011, Smith sent Tate a letter describing in reasonable detail the nature and type of deficiencies regarding the home. See Affidavit of Tate, Exhibit 1. This letter "surely provided enough detail and pertinent information to permit [Tate] to inspect the home and determine 'the general nature of the defect [s].'" *Mendenhall*, 146 Idaho 434, 437 196 P.3d 352, 355. On June 22, 2011, Tate sent a response which "notified the Smiths that Smiths' Notice of Claim did not describe any of Tate Engineering's engineering services, therefore the Smiths claim was reasonably denied." Memorandum of Tate in Response to Plaintiff's Summary Judgment Motion, pg. 5, ¶ 14, *emphasis added*. Tate responded to Smiths' letter within 21 days by disputing responsibility for Smiths' claim. Because Tate disputed the claim, "the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice." I.C. § 6-2503(3)(a). Because of Tate's denial of Smiths' Notice of Claim, Smiths are not barred from bringing this claim under NORA, pursuant to Idaho Code § 6-2503(3)(a).

Tate alleges Smiths' Notice of Claim was served upon Tate via standard mail, not certified mail as is required by Idaho Code § 6-2502(8). Tate Engineering's Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment RE: Statute of Limitations and in Support of Tate Engineering's Motion for Summary Judgment, p. 15; Affidavit of Robert M. Tate, p. 3, ¶ 17. Tate admits his attorneys received Smiths' Notice of Construction /Engineering Defects in Smith Residence 15170 Bull Run Road, Cataldo, Idaho 83810. *Id.*, ¶ 16. Smith argues that while the notice was sent first class mail, but not certified, the Smiths have substantially complied with the notice requirement, the purposes of the notice requirement were satisfied, and that Tate cannot claim any prejudice because he in fact received notice. Plaintiffs' Reply to Defendant Tate Engineering's Response in Opposition to Plaintiffs' Motion for Summary, and Plaintiffs' Response in Opposition to Defendant Tate Engineering's Cross Motion for Summary Judgment, pp. 2-5. This Court agrees. As correctly noted by Smiths, "substantial compliance" has been recognized in other areas (contractor labor and material claims, *School Dist. 91, Bonneville Co. for Use and Benefit of Idaho Concrete Products, Inc. v. Taysom*, 94 Idaho 599, 603, 495 P.2d 5, 9 (1972); and the Idaho Tort Claims Act, *Sysco Intermountain Food Service v. City of Twin Falls*, 109 Idaho 88, 705 P.2d 548 (1985); *Huff v. Uhl*, 103 Idaho 274, 276, 647 P.2d 730, 732 (1982); and *Avila V. Wahlquist*, 126 Idaho 745, 748, 890 P.2d 331, 334 (1995)). *Id.* This Court finds it appropriate to apply "substantial compliance" to the NORA requirements. The Court also finds Smiths "substantially complied" with those requirements as Tate actually received timely notice and can demonstrate no prejudice.

Tate argues the scope of its work with Crescent Homes (Lighthouse) was very limited in general, and specifically, regarding the Smiths' home, was limited to beam sizing, shear

wall calculations, replace footing detail, site plan analysis, providing elevation certification and a site review for the deck encroachment on a setback. Tate Engineering's Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment RE: Statute of Limitations and in Support of Tate Engineering's Motion for Summary Judgment, p. 14. Tate also argues that none of the defects claimed in the Smiths' Notice of Claim were related to the services Tate provided. *Id.*, pp. 14-15. Smiths claim Tate, as the engineer of record in stamping the plans prepared by Lucas Group (who was not a licensed architect, and thus, the plans needed Tate's engineering stamp), approves the plans and Tate's claim that the scope of his work were limited are thus, of no consequence. Plaintiffs' Reply to Defendant Tate Engineering's Response in Opposition to Plaintiffs' Motion for Summary, and Plaintiffs' Response in Opposition to Defendant Tate Engineering's Cross Motion for Summary Judgment, p. 9. At the present time, this Court finds there is a material issue of fact in dispute as the scope of the work. This Court also finds a legal issue exists as to the significance of the engineer's stamp, whether liability extends to any deficiency in the plan or whether the scope of the work can limit such liability, and the significance, if any of Kootenai County Building Ordinances 221A and 221B.

IV. CONCLUSION AND ORDER.

The statute of limitation for the claims arising out of contract has expired since more than five (5) years has passed since construction was completed.

The economic loss rule applies to bar the negligence claims - even though action was commenced within the statute of limitations for tort actions. The narrow exceptions to the economic loss rule have been narrowly construed and seldom used by the Idaho Supreme Court. Those cases do not indicate that either of those exceptions apply to the instant case.

The claim for professional malpractice against Tate is both timely and is in compliance with NORA. Of Smiths' claims in their Complaint set forth above, the only remaining claim is the professional malpractice claim against Tate. To summarize:

CLAIM	OUTCOME
1 Breach of Contract (Lighthouse)	> Dismiss, Statute of Limitations
2 Negligent Construction (Lighthouse)	> Timely, but Dismiss, Economic Loss Rule
3 Negligent Supervision (Lighthouse)	> Timely, but Dismiss, Economic Loss Rule
4 Breach of Implied Warranty (Lighthouse)	> Dismiss, Statute of Limitations
5 Breach of Express Warranty	> Dismiss, Statute of Limitations
6 Professional Malpractice	> *** TIMELY ***
7 Negligent Engineering	> Timely, but Dismiss, Economic Loss Rule
8 Negligent Design	> Timely, but Dismiss, Economic Loss Rule

IT IS HEREBY ORDERED the Motion for Summary Judgment filed by plaintiffs Smiths is DENIED.

IT IS FURTHER ORDERED the Motion for Summary Judgment filed by Crescent Homes (Lighthouse Group, Inc.) is GRANTED.

IT IS FURTHER ORDERED the Motion for Summary Judgment filed by Tate Engineering is DENIED as pertains to Smiths' claims of professional malpractice, and GRANTED as pertains to Smiths' claims of negligence.

IT IS FURTHER ORDERED counsel for the respective parties are ordered to prepare a Judgment consistent with this Memorandum Decision and Order on Cross Motions for Summary Judgment.

Dated this 14th day of March, 2012.

John T. Mitchell, District Judge

End of Document

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EXHIBIT 2

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY
 PETRUS FAMILY TRUST DATED MAY 1,)
 1991, and EDMOND A. PETRUS, JR.,) Case No.
 individually and as Co-Trustee of) CV-2014-71-C
 the Petrus Family Trust Dated May)
 1, 1991,)
 Plaintiffs,)
 vs.)
 NANCY GENTRY-BOYD, CHRIS KIRK d/b/a)
 KIRK ENTERPRISES; TODD MCKENNA)
 d/b/a HOMECRAFT HOME INSPECTIONS;)
 RE/MAX RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
 Defendants.)
 _____)

DEPOSITION OF MARK BIRRER

June 2, 2016

REPORTED BY:

COLLEEN P. ZEIMANTZ, CSR 345

Notary Public

1 THE DEPOSITION OF MARK BIRRER, was taken on
2 behalf of the Plaintiffs, at the offices of Andersen
3 Schwartzman Woodard Brailsford, PLLC, located at 101 S.
4 Capitol Boulevard, Suite 1600, Boise, Idaho, commencing
5 at 10:00 a.m., on June 2, 2016, before Colleen P.
6 Zeimantz, Certified Shorthand Reporter and Notary Public
7 within and for the State of Idaho, in the above-entitled
8 matter.

9 APPEARANCES:

10 For the Plaintiffs:

11 ANDERSEN SCHWARTZMAN WOODARD BRAILSFORD, PLLC
12 BY MR. JASON J. RUDD
13 BY MS. ALYSON A. FOSTER
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17 For the Defendant Nancy Gentry-Boyd:

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1 APPEARANCES (Continued):

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9 For the Defendant Chris Kirk and Kirk Enterprises:

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1 I N D E X

2	TESTIMONY OF MARK BIRRER	PAGE
3	Examination by Mr. Rudd	5
4	Examination by Mr. Millemann	65
5	Examination by Mr. Nevala	72

7 E X H I B I T S

8	DESCRIPTION	PAGE
9	Exh 55 - Copy of Weather Shield Order	10
10	550906192 to Nu-Vu Glass, 9/15/2013, 2 pages	
11	Exh 56 - Copy of West Pac Bid to Kirk	23
12	Enterprises, June 18, 2004, Kirk 01276	
13	Exh 57 - Copy of Email to Longmire from Mark	49
14	Birrer, Subject: Weather Shield Door,	
15	06/06/2012, Petrus_Longmire 000001	
16	Exh 58 - Copy of Email to Longmire from Mark	54
17	Birrer, Subject: Petrus, 06/27/2012,	
18	Petrus_Longmire 000009	
19	Exh 59 - Copy of Email to Ed Petrus from	60
20	Longmire, Subject: Weather Shield, including	
21	Weather Shield Warranty, 03/18/2014,	
22	Petrus_Longmire 000019	
23	Exh 60 - Copy of Email to Birrer from	62
24	Longmire, Subject: Weather Shield,	
25	05/02/2014, Petrus_Longmire 000025	

1 MARK BIRRER,

2 first duly sworn to tell the truth relating to said
3 cause, testified as follows:

4 EXAMINATION

5 QUESTIONS BY MR. RUDD:

6 Q. All right. Good morning Mr. Birrer.

7 A. Good morning.

8 Q. I'm Jason Rudd. I represent the Plaintiff's
9 in this matter, and it's Ed Petrus, and the Petrus
10 Family Trust.

11 How would you like for me to refer to you
12 today, Mark?

13 A. My name is Mark.

14 Q. Okay. You can call me Jason.

15 Have you ever had your deposition taken
16 before?

17 A. Not to my knowledge, no.

18 Q. So you see we have a court reporter here. She
19 just swore you in. You are under oath. She's here to
20 make a record of your testimony. And you'll have a
21 chance to review that once we finish it to make any
22 changes, and review for it for accuracy.

23 But because we have a court reporter here,
24 there are a few ground rules we need to cover at the
25 beginning. One is that, if we don't give audible

1 answers, it's difficult for her to make a clear record
2 of that. So, "yes," "no," those kind of answers are
3 easy for her to transcribe, versus shrugs, or "uh-huh,"
4 things like that. And also, along with that, it's
5 important that we let each other finish. If we're
6 talking over each other, she'll have a hard time keeping
7 up. So we'll make her life easier. And I'll let you
8 finish, and you let me finish, and we will just go nice
9 and easy.

10 If at any point, there is a question you don't
11 understand, or something is unclear, feel free to stop
12 me, and ask me to clarify, and I'll do my best to
13 rephrase it, and help you understand where I'm coming
14 from. And if you don't ask me to clarify, or explain
15 the question, I'll just assume that you understood it.
16 Fair enough?

17 A. I understand.

18 Q. All right. Also, during the course of the
19 questioning, you may hear one of the other attorneys
20 raise an objection. That's to preserve their objections
21 on the record. And unless you are instructed otherwise
22 not to answer, I'll just ask you to please answer.
23 Sound good?

24 A. Understand.

25 Q. All right. Are you on any medications today

1 A. Yes.

2 Q. And have you reviewed any documents prior to
3 your deposition today?

4 A. Prior to the deposition?

5 Q. Have you reviewed your files to identify any
6 documents or communications that were requested in the
7 subpoena?

8 A. Yes.

9 Q. And did you locate any documents that were
10 responsive to these questions?

11 A. I have nothing in my files, because as you
12 guys have already been informed, I am no longer employed
13 by Nu-Vu Glass. So I reached out to them, not knowing
14 that they had also been subpoenaed to provide their
15 information. They've provided to me, I believe, it is
16 the same copy of what they have already sent to you
17 guys.

18 Q. Okay. So you just referred to a document, and
19 I see another one over there. Are these the two
20 documents that you've brought with you today?

21 A. Correct. So the first one, Jason, that I
22 referred to is a copy of correspondences of emails
23 between myself and Chris Kirk, in regards to finishing
24 the edges of the doors. The correspondence dated back
25 in October of 2014.

1 that would affect your ability to testify accurately or
2 truthfully?

3 A. No.

4 Q. Is there any other reason you may have
5 difficulty answering or understanding questions?

6 A. No.

7 Q. Okay. I want to hand you this binder. This
8 binder contains some documents that we may or may not
9 refer to today. But for the ease of your reference, I'm
10 going to give that to you, and then we may direct your
11 attention to certain documents in there today.

12 I want to start by going to the first document
13 in this binder, which we won't mark it then. This is
14 the amended deposition subpoena duces tecum to Mark
15 Birrer. Do you recognize this document?

16 A. Yes.

17 Q. And this is the subpoena that was served on
18 you that's brought you here today; correct?

19 A. Correct, the amended one.

20 Q. The amended subpoena, correct. And have you
21 had a chance to review this prior to coming in today?

22 A. I've read it, yes.

23 Q. Okay. I just want to turn, if you will, to
24 page -- let's start at page 5, where it says, documents
25 to be produced. Have you reviewed this section?

1 Q. Okay. Let's take that real quick, and I just
2 want to confirm something with you. If you could turn
3 to tab 4 in the binder I've provided?

4 MR. MILLEMANN: Excuse me, Counsel, you have
5 not made copies of them for us?

6 MS. FOSTER: Oh, no, we have copies of
7 everything.

8 MR. RUDD: I'm getting to that.

9 Q. (BY MR. RUDD) Do you recognize the document
10 that's been marked as Exhibit 27 to Mr. Kirk's
11 deposition?

12 A. That is the same document I have here, Jason,
13 yes.

14 Q. That is my question. And thank you for
15 confirming that.

16 And I notice you've brought another document
17 with you.

18 A. I reached out to Weather Shield, the
19 manufacturer of the door in question that I was involved
20 in selling to the project. And this is September of
21 2013. And this is just a reference from Weather Shield
22 as to what the product was.

23 Q. Do you mind if I take a look at that?

24 A. (Witness complying.)

25 Q. Thank you.

1 MS. FOSTER: I'm going to make some copies.
 2 I'll be right back.
 3 (Pause in proceeding.)
 4 MR. RUDD: Let's go off the record real quick.
 5 (Discussion held off the record.)
 6 MR. RUDD: We can go back on the record.
 7 Q. (BY MR. RUDD) Say that again, please.
 8 A. We were looking at Tab 4.
 9 Q. We are looking at Tab 4, which were the email
 10 exchanges between you and Chris Kirk and Julie Judnic.
 11 Can you confirm that that is the same document you've
 12 brought with you today?
 13 A. Yes.
 14 Q. So we'll go ahead and mark this second
 15 document you've provided, which is just an order detail;
 16 is that correct?
 17 A. Correct.
 18 MR. RUDD: We'll mark this as Exhibit 55.
 19 (Exhibit 55 marked.)
 20 Q. (BY MR. RUDD) So you reached out to Weather
 21 Shield, you said?
 22 A. Correct.
 23 Q. When you received the subpoena?
 24 A. Yes.
 25 Q. What did you ask them for?

1 A. I simply was trying to get a copy of this
 2 order so that I could refresh myself as to the product
 3 that was sold to that Petrus project.
 4 Q. And did you ask them for any additional
 5 information?
 6 A. No.
 7 Q. Okay. And do you have any personal
 8 communications with either, like documents, evidence of
 9 communications between Kirk, or Petrus, or Boyd, or any
 10 of these parties? Let me rephrase that.
 11 Did you search for any communications between
 12 any of these parties?
 13 A. Correct. What I did do, Jason, upon being
 14 subpoenaed, as I mentioned, I reached out to Nu-Vu Glass
 15 to get copies of any of the documents that they had.
 16 They provided them documents, which you have is document
 17 4. That's the only document they provided to me. I
 18 then went into my email systems that I have had current
 19 since my time at Nu-Vu Glass, to see if there was any
 20 other correspondences to any of the parties in question,
 21 and there is not.
 22 Q. And that's your personal email?
 23 A. Correct.
 24 Q. Did you have a separate work email at Nu-Vu?
 25 A. A separate work one?

1 Q. Yes, a work email account from which you would
 2 email clients and customers?
 3 A. The one that I have is marked at Nu-Vu Glass,
 4 which the email address was that information that Tab 4
 5 came from.
 6 Q. Got it. Okay. Thank you. And to the best of
 7 your knowledge, are these two documents the only
 8 documents that you have that would be responsive to this
 9 subpoena?
 10 A. Yes.
 11 Q. Did you do anything else to prepare for this
 12 deposition today?
 13 A. No.
 14 Q. Have you spoken with either Nancy Boyd, or her
 15 attorney, or Chris Kirk, or his attorney, prior to this
 16 deposition, or in preparation for this deposition?
 17 A. There is nothing in writing. There has been
 18 some phone calls, but there is no correspondences in
 19 writing that document this information.
 20 Q. Fair enough. So since you received the
 21 subpoena, I think I could be wrong on this date. But I
 22 believe it was early May when you first received the
 23 original subpoena; is that correct?
 24 A. The facts speak for themselves. I don't
 25 recall the exact day. You will have to reference that,

1 Jason.
 2 Q. I don't have the original, but I think we
 3 served you on the 24th of May. If you look to page 8 of
 4 the subpoena.
 5 A. This is a copy of the original subpoena, and
 6 it's dated the 10th of May.
 7 Q. Okay. Thank you.
 8 A. It was not served to me on that day, I do not
 9 believe. I believe it came a couple of days later, but
 10 I do not know for sure.
 11 Q. Okay. That's fine. Since that time, have you
 12 had any oral communications with Nancy Boyd or her
 13 attorney?
 14 A. Not Nancy Boyd. There have been phone calls
 15 from attorneys, including yours, that I have had since
 16 that subpoena.
 17 Q. And who else have you spoken to?
 18 A. I don't have any names. I don't know.
 19 Q. Have you spoken to any attorneys, besides me
 20 about this case?
 21 A. I had a call that came from the other party
 22 asking a couple of questions similar to yours.
 23 Q. Do you remember who that was?
 24 A. No.
 25 Q. Did they identify themselves?

1 A. Let me explain. There was nothing in writing,
 2 Jason. So I don't know who they are. The questions
 3 that came down would have been generic questions similar
 4 to yours. So until this paperwork came, I researched
 5 it. There is nothing in writing. Anything would have
 6 been verbal, and I don't have any records of who they
 7 are.
 8 Q. I understand that. So the documents are one
 9 thing. And this is kind of a separate question. If
 10 you've spoken with anybody in preparation for this
 11 deposition?
 12 A. Not from me in preparation, no. If the calls
 13 came in, they came in unsolicited by me. Similar to
 14 your phone calls, asking me questions about this door
 15 that I sold to the Petrus property.
 16 Q. Okay. Fair enough. But you don't remember,
 17 specifically, what you talked about?
 18 A. No.
 19 Q. Okay. Do you remember if you spoke with
 20 Mr. Millemann?
 21 A. I don't know.
 22 Q. Okay.
 23 A. Oh, no. No.
 24 Q. What about Mr. Nevala?
 25 A. Those names do not seem familiar to me, no.

1 A. I've provided that information.
 2 Q. When did you first start with Nu-Vu Glass?
 3 A. I have to go back along here, because I worked
 4 for them for, approximately, four years through October
 5 of 2014.
 6 Q. So you started sometime around 2010; does that
 7 sound right?
 8 A. That would be correct. I do not know the
 9 official date. I didn't know that was important.
 10 Q. And who did you work for prior to Nu-Vu?
 11 A. Western Pacific Building Materials, and also
 12 outside as a territory manager for Weather Shield.
 13 Q. But that wasn't simultaneously; was it?
 14 A. After each other, they were consecutively.
 15 Q. So if I understand it correctly, going in
 16 reverse chronological order, you worked for Nu-Vu Glass
 17 from maybe 2010, 2014, sometime in there. And prior to
 18 that, you worked for Western Pacific?
 19 A. Weather Shield.
 20 Q. So you worked for Weather Shield prior to
 21 that. Do you remember the approximate time frames you
 22 worked for Weather Shield?
 23 A. 2009, January until the start with Nu-Vu.
 24 Q. Okay.
 25 A. I would bring a resume, and then I could

1 Q. Okay. That's fine. I'm just trying to get an
 2 idea of what you've done to prepare, to respond to the
 3 subpoena, and also for your deposition. So thank you.
 4 A. Let me answer that. Your subpoena says, any
 5 correspondences in writing. So that's why I went back,
 6 and I looked at my email systems. So that if there was
 7 something that was provided by the other parties, as
 8 just like this one, from Nu-Vu Glass, that no one would
 9 say, you provided this.
 10 I looked, Jason, as per what you just asked me
 11 to look for. There was no other correspondences in any
 12 of my email systems. Nothing that was written that I
 13 could provide. The only one, as I said, was from Nu-Vu
 14 Glass. That one, and the one that I reached out to
 15 Weather Shield, so I could refresh myself as to what the
 16 product was.
 17 Q. Okay. And what was your understanding as to
 18 why you are here today?
 19 A. To answer questions about the door that I sold
 20 to Petrus.
 21 Q. Okay. So my first question, and I'll stop
 22 beating this dead horse. Aside from the subpoena, my
 23 first question in that regard, was communications you've
 24 had with any of the parties or attorneys regarding this
 25 matter?

1 answer all that for you.
 2 Q. I guess we should have included that in the
 3 subpoena.
 4 A. That would have been nice.
 5 Q. And just for your information, I'm just trying
 6 to get a general idea of your background and experience.
 7 And the general time frames are okay. If you can
 8 remember the exact months, that's even better. But I'm
 9 trying to get a good idea of your work history.
 10 A. April of '99, April 1 of '99, with Western
 11 Pacific, and I know that day, because it was an April
 12 Fools Day. And I worked for those guys until December
 13 of -- I was there almost ten years. So then there was a
 14 couple month period where I was unemployed before I
 15 started for Weather Shield.
 16 Q. Got it. And could you tell me, again, your
 17 position with Weather Shield?
 18 A. I was a territory manager.
 19 Q. And what does that job entail?
 20 A. Territory manager is the overseer in that
 21 region to the dealers that are selling -- the
 22 distributors that are selling that line of windows.
 23 Q. So did you oversee a particular line, or all
 24 sales for Weather Shield within your territory?
 25 A. Weather Shield, and at that point in time,

1 Peach Tree, which were two companies owned by Weather
2 Shield. And Peach Tree was owned by Weather Shield. I
3 was the manufacturer's representative, is another
4 wording for that, for those products to the dealers in
5 that region.

6 Q. The reason I ask is because you said, that
7 line of windows. So I was curious as to whether you
8 were the manufacturer's representative for the entire
9 Weather Shield line, and all their products, and
10 whatever was being sold within that territory, or
11 whether it was limited to a sort of product class or
12 category?

13 A. Weather Shield is the manufacturer. And their
14 line of windows is called Weather Shield, so it can be
15 very confusing. So at that point in time, they did not
16 have the expansive product lines that they currently
17 have. That's why I said, Weather Shield lines. But
18 Weather Shield lines at that time, included at that
19 point in time, Weather Shield, Pro Shield, Visions, all
20 of the Weather Shield lines.

21 Q. And they were all windows, or did they also
22 manufacture doors?

23 A. Windows and patio doors. Patio doors in our
24 industry are called windows products.

25 Q. Okay. That is good to know. Thank you. That

1 Q. And what sort of geographic area did the Boise
2 operation cover? Is that unclear?

3 A. We're not bound by where we could sell product
4 to. I had a very large geographic area. I could sell
5 into California, Oregon, Washington, Montana, Idaho
6 Nevada, Canada.

7 Q. And then after, you were with Nu-Vu, you said
8 four years?

9 A. Correct.

10 Q. So about October 2014. What were the
11 circumstances of your departure from Nu-Vu?

12 A. I had the opportunity to go to work for
13 Johnson Brothers, which is a corporate-based company out
14 of Idaho Falls, with a regional distribution office in
15 Boise; and therefore, I would not have to travel as much
16 to Twin Falls and Burley, which was part of the
17 obligation with Nu-Vu Glass, in which of where they were
18 based out of.

19 Q. And what do you do now?

20 A. I'm the outside sales manager. I do the same
21 thing I've been doing for the last X years, selling
22 windows and doors to new home and remodel construction.

23 Q. So it sounds like you've said, you've been
24 doing the same thing more or less since you started with
25 Western Pacific, in April of '99, selling windows and

1 clarifies my confusion.

2 And what was your territory?

3 A. When I worked for Weather Shield?

4 Q. Yes.

5 A. Most of Idaho, eastern Oregon, eastern
6 Washington, and up into Canada, originally. It was
7 expanded to include Montana.

8 Q. Okay. So during that time that you were a
9 Weather Shield rep, was Nu-Vu Glass in Idaho one of your
10 distributors?

11 A. It was one of my dealers that distributed the
12 product, correct.

13 Q. And what was your position at Western Pacific?

14 A. What timeline? I was there ten years, Jason.

15 Q. Start at the beginning.

16 A. At the beginning, I was just a salesperson.

17 Q. Okay. And after that?

18 A. Branch manager.

19 Q. And after that?

20 A. Branch manager.

21 Q. Okay. That was your final position?

22 A. Correct.

23 Q. And what was your role as branch manager?

24 A. Overseeing the entire Boise operation for
25 Western Pacific.

1 doors; correct?

2 A. And before then.

3 Q. Before then?

4 A. Yes.

5 Q. And what did you do before then, as well?

6 A. I was the territory manager for Sierra Pacific
7 Windows.

8 Q. Approximately when was that?

9 A. Approximately two years; from '97 to '99.

10 Q. And before Sierra Pacific?

11 A. I was involved in retail sales of floor
12 covering. The same industry, but a different product.

13 Q. So since 1997, you've been selling windows and
14 doors?

15 A. Correct.

16 Q. And do you advise customers and clients on
17 issues related to the installation of these products?

18 A. Absolutely.

19 Q. Is it typical for you to be involved, say,
20 with a builder from the beginning of a project to
21 provide advice on products that you can provide?

22 A. Yes.

23 Q. And how would you characterize your
24 involvement in, say, a residential real estate
25 construction project?

1 A. I'm a little unclear what you are asking
2 there, Jason.
3 Q. Fair enough. Are you typically approached by
4 a builder at the beginning of a project? How do you get
5 involved in a project? That's my question.
6 A. I'm an outside salesperson, typically. I am
7 not a store employee. So I'm always reaching out to
8 architects, builders, potential homeowners, building
9 permits, the entire realm taking a proactive approach to
10 provide my product to construction.
11 Q. And how do you do that? Is that cold calls?
12 Are you out --
13 A. There is no such thing as a cold call in my
14 industry. I reach out to a customer that's building a
15 new house. I reach out to architects. I'll call on
16 builders. I'll look in phone books, research on the
17 internet. So when I reach out to a contractor, an
18 architect, or a homeowner, that call has already been
19 warmed up. It is not a cold call as far as I am
20 concerned to, to provide products for their potential
21 project, whether it be remodel construction,
22 multi-family construction, I work the entire well.
23 Q. How did you get involved in the home at issue
24 in this case, the home at 2130 Payette in McCall?
25 A. Which time?

1 A. This would have been when the proposal was
2 made. Typically before that, there were blueprints,
3 takeoffs, proposals entered into the computer. This
4 would be at one point in time when a proposal was
5 presented to the potential customer.
6 Q. And do you recall seeing any of those
7 blueprints or takeoffs in connection with this proposal?
8 A. No.
9 Q. And this was prepared by you; correct?
10 A. Correct.
11 Q. That's your signature at the bottom?
12 A. Yes.
13 Q. Is it?
14 A. Yes.
15 Q. Sorry. I didn't hear your answer.
16 And what is the product package that this is
17 proposing?
18 A. The product is Whether Shield windows and
19 french doors.
20 Q. And do you know if that would be for the whole
21 home, or if that is part of the home?
22 A. It's usually the entire home. If it's broke
23 down by areas, that would have usually been bid as
24 alternates, et cetera. From this, I would suggest
25 that's the bid package for the home.

1 Q. When was the first time you got involved with
2 this project?
3 A. I provided the window and door package to Kirk
4 Enterprises for the original owner of that house.
5 Q. And do you remember, approximately, when that
6 was?
7 A. No, I don't. But you can tell me, because
8 it's in your records, I'm sure.
9 Q. Can you please turn to Tab 2 of the binder
10 I've provided you?
11 A. (Witness complying.)
12 MR. RUDD: We'll mark this document as Exhibit
13 56.
14 (Exhibit 56 marked.)
15 Q. (BY MR. RUDD) Do you recognize this document,
16 Mr. Birrer?
17 A. A typical format that I would use to present a
18 proposal to a contractor, or potential customer of
19 windows and doors.
20 Q. And who is the customer provided in this
21 document?
22 A. The customer is Kirk Enterprises.
23 Q. This is June 18th, 2004. Does that sound
24 about right for the time when you got involved in the
25 project, or would it have been prior to that?

1 Q. The total package?
2 A. Correct.
3 Q. And are you familiar with the door at issue in
4 this case?
5 A. The second door that was provided.
6 Q. Well, are you familiar with its location in
7 the home?
8 A. Yes.
9 Q. And where is it located?
10 A. I would say, the back right of the house, kind
11 of in the center to the right maybe, that would be the
12 south elevation off of a dining room, or a living room.
13 Q. And that's the french doors; right?
14 A. That's one french door.
15 Q. Okay. I want to turn now to Tab 3. And this
16 document has already been entered as Exhibit 29 to Chris
17 Kirk's deposition. This is a fax, actually, there is,
18 it looks like, two faxes in this exhibit. If you could
19 turn to the page labeled Kirk 00759?
20 A. (Witness complying.)
21 Q. Do you recognize this document?
22 A. No.
23 Q. Okay. This is a fax to Chris Kirk from Claire
24 Remsberg. And do you see where you are cc'd on here?
25 A. I do.

1 Q. And this is for the project at the Boyd
2 residence; correct?
3 A. It's referenced that way, yes.
4 Q. And then the next page -- well, sorry. Let's
5 stay here. This is discussing window changes. Then the
6 next page 772, references a door change. And under
7 comments, it says, "Please change the south exterior
8 door at dining nook (#40) to an out-swing, clad french
9 door 6-0 9-0, with the west leaf (near kitchen) active
10 and hinged at the jamb."
11 And then it says, "Please see attached floor
12 plan," and you are cc'd on this, as well? If you turn
13 the page, it shows a floor plan. Does the floor plan
14 look familiar?
15 A. That partial floor plan, in my recollection,
16 is the door in question, yes.
17 Q. Okay. This fax that we're looking at right
18 now is dated September 13th, 2004. Going back to the
19 previous exhibit, which was your proposal that was dated
20 June 18th, 2004. So during this time, had you had
21 communications with Chris Kirk regarding design elements
22 at the home, or products that you would have been
23 provided?
24 A. I do not know.
25 Q. Do you recall any conversations with Chris

1 Kirk regarding changes to the doors, or which doors he
2 wanted installed in the home?
3 A. No.
4 Q. What about -- did you have any communications
5 with Nancy Boyd?
6 A. No.
7 Q. So you say you don't recall any conversations
8 with Chris Kirk. Are you referring to you don't have a
9 specific recollection of conversations?
10 A. Let me help with that, Jason.
11 Q. Yes.
12 A. As I alluded to, when you first brought up,
13 this proposal. You asked if there was any previous
14 communication. It is typical in this industry, for
15 providing product, to have numerous correspondences
16 between myself and the potential customer, whether that
17 be through the builder, the architect, framers, concrete
18 people, there is a realm.
19 It's not atypical to have a numerous series of
20 changes, colors considerations, wood, product. Very
21 rarely do we receive a set of blueprints, make a
22 takeoff, provide the proposal, and order the product.
23 So there can oftentimes be changes that are ongoing
24 before the final order is placed.
25 So to answer your particular question, I do

1 not recall on that particular door or project in
2 question, any communication clear back to 2004, about
3 any potential changes that potentially transpired on
4 that project.
5 Q. But it's fair to say then, given what you just
6 told me, that you had been in contact with multiple
7 people regarding the design elements of this house,
8 whether it's with Chris Kirk, the builder, the
9 architect, the framers, it wouldn't be atypical for you
10 to have communications with any of these people?
11 A. Your statement said that I referred that I had
12 communication on this project. I said not atypical in
13 the industry. So specifically, on this project, Jason,
14 I do not know if there was any other communication,
15 other than these documents that you have provided to me.
16 I said that in the industry, it's very typical for those
17 communications to transpire on projects before a final
18 order is placed.
19 Q. So do you think it's possible that you had
20 those types of communications, other communications
21 regarding design elements, that were reduced to writings
22 or proposals on this project?
23 A. Jason, I said it's typical.
24 Q. And I asked is it possible you had those
25 communications on this project?

1 A. Everything is possible.
2 Q. But you don't recall any specific
3 conversations with Chris Kirk, or anybody else on this
4 project?
5 A. Back to 2004, I do not recall if there was any
6 other correspondences in reference to this order. If
7 there are, and you have copies of them, I would be glad
8 to detail those for you.
9 Q. And just so you understand, I'm not trying to
10 trip you up. I'm not sitting on a bunch of documents
11 that I want to pull out and make you look foolish. I'm
12 generally curious in your recollection. And you
13 mentioned back to 2004 a few times. Are you able to
14 remember 2004?
15 MR. MILLEMANN: It came right after 2003.
16 THE WITNESS: I think before -- Jason, what
17 specific question can I answer with that?
18 Q. (BY MR. RUDD) Okay. We'll get into some
19 specifics. I just want to know if you have any general
20 recollection, or specific recollections of conversations
21 regarding changes that were going to be made to this
22 home?
23 A. Not on this project, or any of the numerous
24 homes and projects that I've worked on on a continuing
25 basis. Without specifically looking at these documents,

1 I have no knowledge of any other communication on that,
 2 or any of my other projects back in 2004, '05, '03, '07,
 3 or '10.
 4 Q. Okay. So you mentioned that you've been in
 5 this business a long time selling windows and doors, and
 6 providing consultation to potential customers regarding
 7 products that you sell; is that correct?
 8 A. That's correct.
 9 Q. You say you have no specific recollection of
 10 this document we've been looking at, that's Exhibit 29
 11 to Chris Kirk's deposition. But taking a look at page
 12 marked 772, right down at the bottom, it says Kirk 0072
 13 under Tab 3?
 14 A. (Witness complying.)
 15 Q. Do you see that?
 16 A. I am looking at 772.
 17 Q. Okay. It says, "Please change the south
 18 exterior door at dining nook to an out-swing, clad
 19 french door."
 20 Do have you have any recollection of what the
 21 plan would be?
 22 A. No.
 23 Q. And you say you don't remember seeing this.
 24 But if you were to receive a fax like this from the
 25 designer requesting a change to an out-swing french

1 conversation I would have with the customer about my
 2 product.
 3 Q. Now, and being caught by the wind, is that
 4 while it is closed, it can be caught by the wind, or in
 5 terms of --
 6 A. Only when it's in the open stage.
 7 Q. And what about in terms of being able to seal
 8 out water?
 9 A. Not on those doors. If it was a lift and
 10 slide type of door, that's a different situation. But
 11 not on what we are going to call french swing doors.
 12 Q. So are you saying, there is no difference in
 13 the ability to seal out water and wind between an
 14 out-swing and in-swing?
 15 A. I wouldn't say there is no difference. But
 16 when it comes to design pressure, and that performance,
 17 there is charts that the manufacturers will provide that
 18 can answer that question. That's in the design of the
 19 product, typically not something that I would get
 20 involved with.
 21 Q. Does Weather Shield offer in-swing french
 22 doors?
 23 A. Yes.
 24 Q. And so with the Weather Shield french door
 25 line, we'll call it. Is there, in your experience, a

1 door, would you have any reservations about providing
 2 that product, about providing an out-swing french door
 3 in McCall?
 4 A. No.
 5 Q. Is it typical to have out-swing french doors
 6 installed in places that receive, you know, a high
 7 amount of snowfall, like McCall?
 8 A. Yes.
 9 Q. Is there any difference between an out-swing,
 10 and in-swing french door in terms of weather resistance?
 11 A. The construction is different in terms of
 12 protection against that, yes.
 13 Q. And how so?
 14 A. Out-swing french doors, when they close, are
 15 closing against the sill. And in-swing french doors
 16 open away from the sill.
 17 Q. And is there a difference? Is one better than
 18 the other, in terms of keeping out the elements?
 19 A. The biggest difference that you mentioned that
 20 I consult people on, is that an out-swing door, it's
 21 usually done so we can have pathway, flow in the
 22 interior area, furniture placement, and walking. The
 23 concern that I always point out to customers is the
 24 out-swing door is subject to being picked up by wind.
 25 Because of the potential, that would be the only

1 difference between those two models in the ability to
 2 seal out balance?
 3 A. No.
 4 Q. So in your time at Western Pacific and Nu-Vu,
 5 I imagine you sold a number of Weather Shield products;
 6 is that correct?
 7 A. That's correct.
 8 Q. Do you have any recollection of sales of
 9 out-swing or in-swing french doors of Weather Shield
 10 out-swing and in-swing french doors?
 11 A. Not specific to a particular project, no.
 12 Q. Did you sell any of those products?
 13 A. I'm sure I did. Jason, every house that has
 14 patio doors are either going to be slider or swing
 15 doors. If they are swing doors, are patio doors part of
 16 the window package, they are either going to be
 17 out-swing or in-swing. So if you go back and look at
 18 all the projects that I have sold over my history in
 19 this industry, I'm sure you will find several doors both
 20 in-swing and out-swing sold, Weather Shield, as well as
 21 the other companies I have sold for.
 22 Q. Fair enough. And in your time as -- well, I
 23 guess this would include Weather Shield, too. So your
 24 time at Western Pacific, Weather Shield, and Nu-Vu, have
 25 you ever received any complaints from customers to whom

1 you sold doors, or customers who had Weather Shield
 2 products, who experienced problems with their doors?
 3 A. What type of problems?
 4 Q. Let me rephrase it. Was there any type of
 5 problem that was more common than another?
 6 A. Yes.
 7 Q. And what would that be?
 8 A. Sill failures.
 9 Q. Can you explain that to me?
 10 A. Seal failure is the fail of the seal around
 11 the insulated glass unit that allows moisture from
 12 getting into the two panes of glass.
 13 Q. But did that allow moisture into the home?
 14 A. No.
 15 Q. Just the glass?
 16 A. Just the two panes of glass. So you will see
 17 that foggy appearance in between the two panes of glass.
 18 In the industry, that's called a seal failure.
 19 Q. And that's the most common failure or problem?
 20 A. That I have had, yes.
 21 Q. And what's other typical problems that you
 22 have encountered with customers?
 23 A. None.
 24 Q. Have you ever encountered problems with water
 25 absorption in the door body, itself? So not in between

1 that is a situation where I will work with my customers
 2 on maintenance of the product.
 3 Q. Okay. And I think your answer just helps
 4 clarify my thinking on this. But my question will be a
 5 little more precise. When I ask about problems with the
 6 products, it sounds to me like you are looking at it
 7 from a warranty perspective, rather than just the
 8 factual problem with the door.
 9 So I'm asking about any problems you've
 10 experienced, that customers have experienced, that
 11 you've been aware of, with their doors, whether it's a
 12 maintenance issue on their end, whether they, you know,
 13 drain their hot tub on to their patio, and the door sat
 14 in water for a week, or any kind of issue like that?
 15 A. No.
 16 Q. Now, are you aware of any other instances
 17 where a customer has complained of water intrusion into
 18 their home through Weather Shield french doors?
 19 A. No.
 20 Q. Or other french doors?
 21 A. No.
 22 Q. Is it possible, in your opinion, to have a
 23 situation where a customer could experience water
 24 intrusion through french doors, whether that's through
 25 improper installation or maintenance?

1 the panes of glass, but problems with the door, itself,
 2 absorbing water?
 3 A. No.
 4 Q. That's never been a problem that you've come
 5 across?
 6 A. Not from the door absorbing moisture, no.
 7 Q. And maybe I'm phrasing that wrong. I'm sorry.
 8 I have a very limited background in construction. I
 9 think I built a dog house, so...
 10 A. Let me help then.
 11 Q. Yes. Thank you.
 12 A. If we get condensation build-up on the panes
 13 of glass, which is typically a maintenance situation if
 14 the customer is not properly maintaining their product.
 15 If we have cold on the exterior, and warm on the
 16 interior, we can get condensation build up. And we can
 17 get ice that is built-up on the interior of the glass.
 18 And if that is not taken care of properly, and it melts,
 19 it will go into the door or window probably.
 20 So that condensation situation is a
 21 maintenance, and not necessarily a performance
 22 situation. And I have had instances, because I sell a
 23 ton of product to McCall, where we have had condensation
 24 issues that may appear to be a problem of the product,
 25 but it is a problem of maintenance by the customer. So

1 A. That is possible.
 2 Q. But you haven't run across that?
 3 A. If there has been an isolated case, Jason,
 4 over the years specifically, no.
 5 Q. So it's possible, but you just don't have a
 6 specific recollection?
 7 A. Correct.
 8 Q. Other than this home, of course?
 9 A. I'm not -- this door was not ever, to my
 10 knowledge, of the nature of what you just said. It was
 11 not brought to my attention, because of moisture coming
 12 into the home, which is what you were iterating to. So,
 13 no.
 14 Q. And how did this problem come to your
 15 attention?
 16 A. What problem?
 17 Q. When did you first learn that there were
 18 problems in general, at the home in McCall, at 2130
 19 Payette, of relating to these french doors in question?
 20 A. I got a call from Mike Longmire, asking if I
 21 would be willing to look at potentially get replacement
 22 product for that door in question.
 23 Q. Do you remember when about that was?
 24 A. Not exactly, Jason, but it would, obviously,
 25 be sometime before September of 2013.

1 Q. Okay. And had you received any calls or
2 communications from either Chris Kirk or Nancy Boyd
3 prior to that, that September 2013, regarding these
4 doors?

5 A. Not to my knowledge, no.

6 Q. So it's your testimony then, that after you
7 sold the doors to Boyd to be installed in the home, they
8 were installed in the home?

9 MR. MILLEMANN: Object to the form of the
10 question. The question is not that the doors were sold
11 to Boyd.

12 Q. (BY MR. RUDD) Okay. Who did you sell the
13 doors to?

14 A. If memory serves me correct, the product was
15 sold to Kirk Enterprises.

16 Q. After the doors were sold to Kirk Enterprises
17 for use in the home, had you received any communications
18 between then, which was if we're going by the proposal
19 we looked at, sometime in 2004 and 2005, between then
20 and 2013, did you receive any communications from Kirk
21 or Boyd regarding the condition of the doors?

22 A. Not that I recall, no.

23 Q. Give me one second. In 2013, you were
24 contacted by Mike Longmire; correct?

25 A. It was prior to September of 2013.

1 Q. Okay. But you don't remember the date, or the
2 date in which you were first contacted?

3 A. I do not know the actual time.

4 Q. Let's take a look, if we may, at Tab 5. If
5 you could please turn to that?

6 A. (Witness complying.)

7 Q. Do you recognize this email?

8 A. No.

9 Q. Okay. So I'll represent to you that this is
10 an email provided to us by Mike Longmire. And it was
11 from you, but it's printed out on Alyson's letterhead,
12 because that's how we received it. This appears to be
13 an email from you to Mike Longmire, dated June 6th,
14 2012.

15 A. It doesn't look like an email that I sent.
16 Like you said, it looks like it was typed up on Alyson
17 Foster's letterhead or something.

18 Q. Looking at the subject -- or not the subject,
19 the body of the email. Can you read that, please?

20 A. It says, from on behalf of Mark Birrer.

21 Q. I'm sorry. The body of the email, where it
22 says, "The number correctly identified." Can you read
23 that?

24 A. Everyone has copies of it. It says, that
25 number correctly identified the original order. And I

1 got a copy of it yesterday.

2 Q. I just wanted you to actually read it?

3 A. I've read it.

4 Q. Do you recognize this as an email that you
5 sent?

6 A. No.

7 Q. Do you have any reason to believe that you did
8 not send this email to Mike Longmire?

9 A. No.

10 Q. But you don't recall having this communication
11 with Mike?

12 A. As I've stated earlier, prior to that order,
13 September of 2013, there was communications between
14 myself and Mike Longmire in regards to that door in
15 question. I don't recall this specific correspondence.
16 But, yes, there was correspondence between myself and
17 Mike Longmire.

18 Q. So your earlier testimony was that you got a
19 call from Mike Longmire asking if you would be willing
20 to look at potentially getting replacement product for
21 the door in question. Do you remember generally what
22 your conversations were about?

23 A. No.

24 Q. Did he explain to you why he wanted a
25 replacement product?

1 A. Yes.

2 Q. And what did he say?

3 A. As I recall, there had been snow, as a lack of
4 maintenance, that had built up on the exterior of that
5 door panel. And they attempted to open that door that
6 was forced shut by the snow and elements. And I
7 remember something about the handle set becoming
8 disengaged, and they tried to pry and force that door
9 open, and damaged that panel.

10 Q. Did Mike Longmire tell you that?

11 A. That was the communication I had with Mike
12 Longmire.

13 Q. He told you they tried to pry open the door?

14 A. I don't know who tried to pry open the door.

15 Q. And how did you reach the conclusion that
16 there had been snow piled up due to a lack of
17 maintenance, and that the door had been forced shut, and
18 that someone had tried to pry it open?

19 A. That was the information that was provided to
20 me.

21 Q. And did Chris Kirk contact you about problems
22 with this door?

23 A. No.

24 Q. Has Chris Kirk ever contacted you about
25 problems with this door?

1 A. Not to my knowledge.
 2 MS. FOSTER: Can we take a quick break? Let's
 3 take a quick five-minute break.
 4 (A recess was had.)
 5 (Mr. Millemann not present.)
 6 Q. (BY MR. RUDD) Okay. Go back on the record.
 7 Mark, I appreciate you bearing with us. We'll try not
 8 to keep you here too much longer today. I think I just
 9 have a few more questions. So you mentioned --
 10 A. Where did we leave off, Jason. Let's answer
 11 that, because we were in the process of discussion, and
 12 then it stopped. So can we pick up where we left off?
 13 Q. You bet. I'm going to catch up right now.
 14 A. Thank you.
 15 Q. So we started out talking about the
 16 circumstances and the facts around the regular
 17 installation of the door, and the sell of the doors to
 18 Kirk for installation of the home.
 19 And now we've moved on to after my clients
 20 bought the house in 2012. Sometime after that, you
 21 discussed being contacted by Mike Longmire regarding
 22 problems with the doors.
 23 A. And then you asked me if there was any
 24 communication with Kirk after that. And I had said, no.
 25 But, obviously, I mean, we know that this existed. So

1 out or in.
 2 Q. So you said you went out to the site?
 3 A. I met him at the house.
 4 Q. Is that common?
 5 A. Absolutely.
 6 Q. So you would typically travel then -- wait.
 7 Let me just back up.
 8 At this point, you were with Nu-Vu?
 9 A. That's correct.
 10 Q. And it was typical for you to travel to job
 11 sites anywhere within your sales territory?
 12 A. Correct.
 13 Q. So you go out to the site. What did you
 14 observe?
 15 A. I remember meeting Mike at the project,
 16 because he was inquiring as to purchasing product. So I
 17 was there potentially to sell him additional product.
 18 So this email that you were referencing as Tab 5, I'll
 19 explain when I say what was -- if I typed this one,
 20 which it looks like, I had said earlier, that I could
 21 have.
 22 Q. Okay.
 23 A. With Weather Shield, on the air space, which
 24 is the seal between the two panes of glass, they use
 25 after a certain time period, a spacer identification

1 if there was anything else, I do not recall any
 2 communications, specifically on that door to Kirk, on
 3 that door. But, I mean, I don't even remember sending
 4 this. But, obviously, in my day-to-day work, that was
 5 requested and sent, and that copy has been produced.
 6 Q. Fair enough. So going back to when you first
 7 learned about problems with the doors. You said Mike
 8 Longmire contacted you. And that he told you that there
 9 had been issues with the door. And what did he tell you
 10 the problems they had experienced were?
 11 A. As I recall, Jason, as I stated, when I met
 12 Mike at the job site to look at replacing the door
 13 panels, my memory tells me that he told me that there
 14 had been snow built up against the door. They couldn't
 15 get the door open. In the process of trying to trigger
 16 the multi-point lockset, which there is bolts that go up
 17 and down on a multi-panel lockset. And if you engage
 18 the handle correctly, it will pull those pins down so
 19 that the door can swing open.
 20 There is typically three points of contact.
 21 The top and bottom pins that go into the heads, and into
 22 the threshold. The third point of contact goes into the
 23 astragal at the stationary secondary panel. So that
 24 handle set engages those three points of contact, so
 25 that the active panel can swing open, whether that be

1 number that correctly identifies that particular project
 2 in question. So it is a very handy tool. So if I am
 3 going to do an addition on that house, and order
 4 additional product. If there was a question in that
 5 case of replacing that, we can correctly identify it, so
 6 we're getting the correct replacement product for the
 7 item in question.
 8 Now, I remember on this one, because it was
 9 abnormal. You cannot always see those codes in the air
 10 space. And I remember crawling around on the kitchen
 11 sink, because it was abnormal, which is why I remember.
 12 Because on some of the windows, you can see the code,
 13 where on others, for whatever reason, because they are
 14 never in the same place. They are never in the same
 15 spot, and sometimes they are hard to read.
 16 So as I would go out to projects, and have
 17 companies that have such an identification system in
 18 place, I remember crawling around on the kitchen sink,
 19 looking through the spacer to see the number. And then
 20 I can measure product, reference that number to the
 21 factory, and then can correctly identify the item in
 22 question. Which is if I did send this email, now you
 23 understand where that came from.
 24 (Mr. Millemann joined the deposition.)
 25 Q. (BY MR. RUDD) Yes.

1 A. Because the process I would use would be to go
2 to the field, grab the information, send it into the
3 company, and correctly identify, and I can get copies of
4 the order, so I would be able to with that system get
5 copy of the original order.

6 And the way I always did it, I would label
7 each of those items, dining room to the south, kitchen
8 to the west. So that if I ever needed to service, or
9 add to the sale, I have a way to correctly identify that
10 item in question. Which is what I am referencing in
11 terms of the identification spacer code.

12 Q. Thank you that was actually very informative.
13 And I think that really helps us understand.

14 Now, is that code for the product, or does it
15 give you like the product, itself, just the door, does
16 it give you -- does it reference the project?

17 A. References the original order, and the item on
18 that order.

19 Q. Okay. So you went to the house then, and you
20 verified that the door that you were inspecting, or
21 observing was the same door that was originally
22 installed?

23 A. That's not why I was there. I mean --

24 Q. Sorry. Let me interrupt you. I'm sorry. I
25 know that's not why you were there. But while you were

1 remember looking at that, because if we could find the
2 correspondence, I would suspect when I sent in the
3 request for identification to the factory, it was based
4 off of that window, and then got a -- I would suggest
5 either I told them there was a door next to it, such and
6 such a size. Or typically, I would get a copy of the
7 original order, white it out, so they don't give
8 dollars, and that's how I, basically, got this off the
9 door that was replaced in question. So that enabled me
10 to identify the original door.

11 Now, I have no idea, to answer your question,
12 if the door that was in there was the original door.
13 But it surely appeared to, based off the information
14 that came back. And at that point in time, I was
15 working with Longmire to provide -- originally, they
16 were looking at just replacing the door panels, not the
17 entire door pre-hung with frame. And that's why I went
18 and got this (indicating), so I could remember exactly
19 what we sold them.

20 But I don't remember originally, for whatever
21 reason, why they didn't do it? I don't know. But they
22 did not replace just the door panels. They replaced the
23 entire door system. And it wasn't even sold to
24 Longmire. It was sold to Chuck, with C&S Construction,
25 I remember that.

1 there, did you observe that it was the same door that
2 was originally installed?

3 A. I could not identify on the door, the spacer
4 code. I remember having difficulty. That's why I said,
5 I crawled around on the kitchen sink, because I always
6 labeled a specific way around the house. And I would
7 know that if I could get the code off of the next
8 adjacent item in question -- in fact, if you will go
9 back and help me, you had provided a floor plan, a
10 partial floor plan of the area in question. Now, tell
11 me what that is. Because I can answer your question,
12 specifically, if you'll do that, please.

13 Q. Okay. Let's turn to Tab 3, Kirk 00737?

14 A. 737.

15 Q. Do you see it?

16 A. So as I was just reiterating, I remember going
17 into the kitchen right around the corner from that door
18 in question, and crawling over the kitchen to identify
19 the code in that window over the kitchen sink. The
20 reason I remember that is because that is abnormal. And
21 things that are abnormal, I remember.

22 And I know we were having difficulty seeing in
23 the door, which is not atypical. A lot of times, I
24 can't see it. So I will learn to go to the next
25 adjacent, because the way I have it labeled. And I

1 Q. And just to confirm. When you went out to the
2 site, was this June of 2012?

3 A. I don't know.

4 Q. And if you are emailing with Longmire, you
5 said you probably sent this?

6 A. What time, again, are we at, Jason?

7 Q. Tab 5.

8 A. As I told you, obviously, it was before the
9 order, which was then. And, yeah, so it was that
10 correspondence. And this looks like it would have been,
11 based off of what I am reading, the first one to
12 Longmire. Because after we had been to the project,
13 pulled the identification, I always try to keep my
14 potential customer in the loop. At that point in time,
15 I was referencing to Longmire, who was going to be my
16 customer to purchase the product. So I said, hey, I'm
17 on it. I'm in correspondence with you.

18 Q. Okay. So thank you. So that answers this
19 email on Tab 5, which I don't think we have entered it.

20 MR. RUDD: So let's mark that June 6th, 2012
21 email from Longmire to you as Exhibit 57.
22 (Exhibit 57 marked.)

23 THE WITNESS: You just said from Longmire to
24 me, but I believe the other way around.

25 MR. RUDD: I'm sorry. It's my mistake.

1 MR. MILLEMANN: Is there a Bates number on
 2 that?
 3 MR. RUDD: There is. It is Petrus_Longmire
 4 000001.
 5 MR. MILLEMANN: Thanks.
 6 Q. (BY MR. RUDD) So that explains that email,
 7 and the number that's referenced there. That was one of
 8 my questions for you.
 9 I want to go back to your site visit, and have
 10 you walk me through what you observed. You go out, and
 11 this would have been in, sometime around June 2012?
 12 A. Correct.
 13 Q. And who was there when you got to the home?
 14 A. I met Mike at the project.
 15 Q. Was there anybody else there?
 16 A. Not to my knowledge.
 17 Q. Okay. And then what happened?
 18 A. We went in, went to the area in question. And
 19 like I had told Mike, I need to get identification,
 20 which is why I go to the project. Unless a customer has
 21 a copy of the original order that they can provide to
 22 me, and then I don't have to do my extra work. I have
 23 to, in order to sell additional, and/or replacement
 24 product to the job, I have to correctly identify it.
 25 And that was the process. So we went into the home,

1 Q. Okay. So in identifying or helping the
 2 customer to understand, in this case, Mike Longmire,
 3 what product he would need, did you observe the door to
 4 see if he only needed the panels, or if he needed the
 5 whole pre-hung package? Did you observe the door to
 6 make any recommendation in that regard?
 7 A. Not that I recall. Jason, I believe, the
 8 question came in, that they had already determined that
 9 the panels were damaged, and needed to be replaced. So
 10 I went to the project. I'm looking to sell the
 11 replacement panels to that opening.
 12 Q. Did you see any damage on the product?
 13 A. I don't recall.
 14 Q. Did you remember what you recommended in terms
 15 of proper replacement product for them?
 16 A. I know that we had originally, like I had
 17 said, started by quoting replacement door panels. But I
 18 know in looking at this situation, and recalling what
 19 transpired after that, I know that I actually sold an
 20 order to C&S Construction for an entire door system, not
 21 just door panels.
 22 Q. So do you have any opinion as to what damage
 23 was present on the doors?
 24 A. No opinion.
 25 Q. And what is your understanding, if any, as to

1 went straight to that door, began to look for the spacer
 2 code. Again, I couldn't find it. In the way we do it,
 3 look up into the kitchen counter, looked, see, get the
 4 number. That's what we provided.
 5 Q. You look at the window. You get the number
 6 that you need to properly reference the original order.
 7 And then did you look at the door, itself?
 8 A. I'm sure I took some dimensions off of it. I
 9 don't recall exactly what. But in line with what I do,
 10 so that I make sure that if I have a question, I'll
 11 typically measure glass. What we call DLO, just a
 12 couple things like that. To make sure that once I
 13 identify it, because even if I can see the number off of
 14 it, sometimes those numbers, because they are digitally
 15 printed off that spacer code, they are a little harder
 16 to read. So therefore, I will take some, as I
 17 mentioned, backup information. So if the number is
 18 provided to Weather Shield, they will provide the order.
 19 Then I can look at the order, and say, okay.
 20 I believe it's this door. In my case, it would have
 21 said, dining room to the south, or whatever elevation,
 22 numeration on that door. And then I could say, okay,
 23 that makes sense, the glass size, and such that helps to
 24 correctly identify it. But that's what I typically go
 25 through.

1 what the damage to the doors was?
 2 A. As I had stated earlier, it was told to me
 3 that there was snow built up on the exterior of those
 4 door panels. That when they, whoever "they" was, were
 5 attempting to open the door, and attempting to engage
 6 the three-point lockset, and forcing that door open, it
 7 damaged that mortise lock, which is that three point,
 8 and couldn't get into it. And then therefore, they
 9 pried it open, and damaged that panel.
 10 Q. Okay. And who told you that?
 11 A. Mike Longmire.
 12 Q. And do you know what a "diversion channel" is
 13 in connection with the door? Does that term sound
 14 familiar to you?
 15 A. Absolutely.
 16 Q. Can you tell me what that is?
 17 A. In any door window, there is a system to allow
 18 moisture to dissipate from, in that particular case, the
 19 channels in the tract. So that channels in the tract,
 20 moisture builds up, and that it will allow it to
 21 dissipate from the threshold or sill.
 22 Q. And do you recall if there was a diversion
 23 channel installed with these doors?
 24 A. Most of the time that is an integral part of
 25 the system.

1 Q. Do you recall if it was present here?
 2 A. I don't have any recollection on it at all.
 3 Q. Do you recall seeing any modifications to the
 4 door or the frame on your visit?
 5 A. No.
 6 Q. How many times did you go out to the site?
 7 A. To look at that door in question? The one
 8 time I met Mike Longmire, in sometime, obviously, in
 9 June, or there before that, of 2012.
 10 Q. Is that the only time you've ever been to 2130
 11 Payette?
 12 A. At that point in time.
 13 Q. How about in the last 20 years?
 14 A. It is typical that I will go to a project when
 15 it is being installed, or to measure rough openings
 16 during the assistance of the sale. But any particular
 17 time to that particular project, not that I recall.
 18 Q. Okay. Mark, if you could please turn to Tab
 19 9, I just have a few more questions here.
 20 A. (Witness complying.)
 21 MR. RUDD: And we'll go ahead and mark this as
 22 58.
 23 (Exhibit 58 marked.)
 24 Q. (BY MR. RUDD) And again, I'll represent to
 25 you, this is an email from you to Mike Longmire, in the

1 another person involved with this but just wanted you to
 2 know this."
 3 Do you know to whom that was referring?
 4 A. No.
 5 Q. This is June 27, 2012. Do you remember being
 6 contacted by anybody, besides Mike around this time?
 7 A. As I stated earlier, I know that the door was
 8 sold to C&S Construction, who is another
 9 contractor -- let me say that differently. Who is a
 10 contractor up there. Because I had never worked with
 11 Mike Longmire before. So I don't even know what his
 12 position is.
 13 Normally, I work with contractors. I know at
 14 some point in time, Chuck with C&S Construction, who I
 15 had worked with in the past, had gotten involved in this
 16 same project, because the door that was sold was sold to
 17 him.
 18 Q. Okay. So I just want to back up real quickly.
 19 You said that you went out to meet Mike at the project
 20 sometime around June of 2012. And that you don't recall
 21 being to the site prior to that is that; correct?
 22 A. I do not recall any particular instances to
 23 that site prior to that, yes.
 24 Q. Have you been to the site since that first
 25 visit with Mike in 2012?

1 same format as the last email we were looking at. Go
 2 ahead and take a minute to read it over?
 3 A. (Witness complying.) I have.
 4 Q. Okay. This is dated June 27th, 2012. And it
 5 says that, "I just got the quote for both of the
 6 replacement door slabs plus a quote on the Q-lon
 7 weatherstrip as well."
 8 What is a Q-Lon weatherstrip?
 9 A. Q-Lon is the weatherstrip that secures the
 10 door onto the frame.
 11 Q. So if they were going to order the whole
 12 assembly package, instead of just the door slabs, but
 13 the entire assembly, would that include the Q-Lon?
 14 A. Yes.
 15 Q. So at this point, the order is just for the
 16 slabs?
 17 A. Part, yes, just two door panels and slabs, and
 18 the Q-Lon weatherstrip around the perimeter.
 19 Q. Got it. And the last paragraph, do you see
 20 that?
 21 A. Uh-huh.
 22 Q. "I think that you should be aware that I was
 23 contacted by another contractor who was researching this
 24 same job! I told him that I was already working with
 25 you on this project. Not sure why the homeowner had

1 A. No.
 2 Q. And did Mike Longmire discuss with you a
 3 warranty claim for this door?
 4 A. I do vaguely recall a question about a
 5 warranty situation. But specifically, no.
 6 Q. And can you tell me about how the process
 7 works? So you were working at Nu-Vu, and a customer
 8 calls up with a potential warranty claim. Are you the
 9 customer contact? Are you the liaison between the
 10 customer and Weather Shield?
 11 A. Oftentimes, yes.
 12 Q. So the customer wouldn't typically deal
 13 directly with Weather Shield?
 14 A. They can.
 15 Q. They can. And do you recall the warranty
 16 discussions regarding these doors?
 17 A. No.
 18 Q. Do you recall contacting Weather Shield
 19 regarding a potential warranty claim?
 20 A. No.
 21 MR. RUDD: Let's take a quick break, and then
 22 we'll finish up.
 23 (A recess was had.)
 24 MR. RUDD: Back on the record.
 25 Q. (BY MR. RUDD) Mark, I just want to turn to

1 these string of emails that you brought with you today.
2 They have already been entered into as Exhibit 27 to
3 Chris Kirk's deposition. It's a little small. Can you
4 read it?

5 A. Yes.

6 Q. Starting with the first email there, it looks
7 like Tuesday, September 30th, 2014, from you to Julie
8 Judnic. Who is Julie Judnic?

9 A. She was a customer service person for Weather
10 Shield.

11 Q. Why did you contact her?

12 A. It looks like there was a question that I had
13 asked them about finishing the door edges.

14 Q. And who told you to contact Weather Shield?

15 A. No one.

16 Q. Did Kirk ask you to contact Weather Shield?

17 A. If looking at the correspondences here, the
18 question -- this was provided to me, but Kirk would have
19 asked that question. So I would have followed up with
20 Weather Shield in response to, if they do seal the door
21 edges, and the answer, obviously, came back that they
22 do. And so, obviously, on October 2nd, that answer was
23 forwarded on to Chris Kirk, that said, obviously, as we
24 discussed, I did the research and the answer from
25 Weather Shield folks is that they do indeed seal the

1 the Q-Lon weatherstrip, where you were presented in that
2 one document, if that number gets such that the entire
3 product would be cost effective to potentially to get
4 whole new, instead of trying to repair damage. Then the
5 numbers might suggest entire replacement, instead of
6 just parts and pieces.

7 Q. Okay. Any other reason that you know of in
8 this case?

9 A. No.

10 Q. I want to turn to Tab 12.

11 A. (Witness complying.)

12 Q. Which is Petrus Longmire 19.

13 MR. MILLEMANN: Thank you.

14 MR. RUDD: And we'll go ahead and mark this as
15 59.

16 (Exhibit 59 marked.)

17 Q. (BY MR. RUDD) And this is an email and an
18 attachment that were sent from you to Mike Longmire.
19 And if you look at the next page, document 20. It says,
20 "Weather Shield Limited Warranty."

21 Do you know why you would have sent this to
22 Mike Longmire?

23 A. You had asked me earlier if there was
24 communication on warranty between Mike Longmire, and I
25 said I did not know. So, obviously, you knew the answer

1 edges of the door.

2 Q. So has Chris Kirk asked you anything else
3 about this case?

4 A. Not to my knowledge.

5 Q. Do you know why he would have contacted you in
6 2014, ten years after the home was built, asking about
7 these doors?

8 A. No.

9 Q. And do you know if Weather Shield has always
10 sealed these doors, or has this been their practice as
11 long as you've been associated with their product?

12 A. I didn't even know that answer, Jason. So,
13 obviously, that's why I asked that of Weather Shield, so
14 that they could provide that answer to me.

15 Q. Okay. And moving off of this. Do you know
16 why the entire door assembly was replaced, rather than
17 just the slabs?

18 A. No.

19 Q. Do you have any opinion as to why?

20 A. If the numbers would be there that you can buy
21 parts that are more costly than -- pieces and parts with
22 Weather Shield are more costly than product. So it
23 would be in line with, for example, a window, if I'm
24 replacing the sash, versus the entire window, the part,
25 i.e., in this case the door panels, the two of them with

1 because there it is. So, yes, it would be typical in a
2 situation where a customer, representative of a
3 customer, contractor, homeowner is questioning anything
4 to do with a warranty, I simply either provide a written
5 copy of it, or a link to the manufacturer's web. In
6 this particular case, I obviously made a copy of the
7 warranty, and it emailed it to, it says, "eapetrus."
8 But if you're suggesting it went to Longmire to Petrus
9 after I had sent it through. So that is, obviously, the
10 situation.

11 Q. Yes, and this is the email here, and this is
12 the forward. And where did you obtain this warranty
13 document?

14 A. With Weather Shield, I have a pad that has
15 them on it.

16 Q. Okay.

17 A. But like I said, whether I have a hard copy,
18 which we typically did in the past. Nowadays, it's
19 typical for that to be an electronic, PDF, or accessed
20 on their web page. At that time, I, obviously, peeled
21 off, and printed and mailed to them, obviously, as a
22 PDF. Otherwise, I will send a link referencing the
23 electronic version of that warranty.

24 Q. Okay. So seeing this, do you remember if in
25 dealing with this warranty issue, if you contacted

1 Weather Shield directly? Well, did you contact Weather
2 Shield directly about this warranty?

3 A. I had no knowledge, I did that. That's why I
4 said, you knew that answer. If you are going to tell
5 me, if you have another sheet of contacting them, Jason,
6 I do not recall. In this industry of providing
7 correspondence, we are representing the product, not the
8 warranty. The warranty is from the manufacturer.

9 So in that case, I would typically refer that
10 to either the territory manager's rep, and/or directly
11 to the customer support, and/or warranty division.
12 Because we are the middle man in selling the product.
13 We do not enforce the warranty.

14 MR. RUDD: So in looking at the next tab,
15 which is Petrus Longmire 25. This is an email, and we
16 will mark it as Exhibit 60.

17 (Exhibit 60 marked.)

18 Q. (BY MR. RUDD) The email says, "Mike please
19 call Weather Shield direct." So it looks like you are
20 directing them directly to Weather Shield. My question
21 was, did you also contact them?

22 A. Not to my knowledge.

23 Q. All right.

24 A. So if we go back to Tab 12, which is the email
25 dated March 18th, which I had sent the copy of the

1 to page 9?

2 A. (Witness complying.)

3 Q. There is a section labeled "Interrogatory 25."
4 Do you see that?

5 A. I do.

6 Q. Go ahead and take a minute to read through
7 that question, and Nancy's answer, please.

8 A. (Witness complying.) I've read it.

9 Q. Do you see the answer where it says, "In the
10 second year after the home was completed, defendant,"
11 that's Nancy Gentry-Boyd, "noticed that some doors would
12 stick in the winter. Chris Kirk contacted the door
13 installers."

14 Would that be you that Chris Kirk contacted?

15 A. No.

16 Q. And why do you say that?

17 A. I'm not a door installer.

18 Q. Do you have any recollection of being
19 contacted by Kirk?

20 A. No.

21 Q. In 2012?

22 A. We have this correspondence where I've gone on
23 record and said, that's what I have from Chris Kirk. So
24 this email that was in 2015, I do not have any knowledge
25 of correspondence between Chris Kirk and myself in 2012.

1 Weather Shield warranty. And now, we are May of 2014.
2 Obviously, from this you would expect that the
3 question -- because it doesn't say in this email of May
4 2, Jason. Obviously, there was a question proposed to
5 me from Mike Longmire about that warranty. And,
6 obviously, I then refer them to go directly to Weather
7 Shield with that warranty question.

8 Q. But you don't recall --

9 A. No.

10 Q. -- talking to Weather Shield?

11 A. No.

12 Q. Do you have any idea what happened to this
13 warranty claim?

14 A. No.

15 Q. Or what the outcome was?

16 A. No.

17 Q. Okay. I just want to show you one more
18 document. This has been already entered in as Exhibit 4
19 to Nancy Gentry-Boyd's deposition. It's in Tab 17 for
20 you.

21 A. (Witness complying.)

22 Q. And in case you are not familiar with what
23 this is, it is a set of questions that we issued to
24 Nancy Boyd in connection with this lawsuit, and her
25 answers. Okay? And if you could turn in this document

1 Q. Okay. Do you know who installed the doors?

2 A. No.

3 MR. RUDD: I think that's all I have.

4 MR. NEVALA: I have a few questions.

5 EXAMINATION

6 QUESTIONS BY MR. NEVALA:

7 Q. Mark, my name is Dan Nevala. I represent
8 Chris Kirk in this case. I just have a few questions
9 about the door, Mark. I want to try and understand how
10 this door operates. My understanding, it's a pretty
11 complex door.

12 Can you please tell me, or explain how to
13 properly close this door, and lock this door, and open
14 this door? And tell me, I guess, the follow-up to that
15 will be, how the door handle works?

16 A. The copy of the order that I brought in today,
17 what are we going to reference it?

18 Q. Can we talk about the first door, the original
19 door?

20 A. I do not exactly recall, Dan, what the
21 original door was.

22 Q. Okay.

23 A. The reason I was referencing this particular
24 order that I brought in, to my knowledge, is an exact
25 duplicate of the original door. If you can provide me a

1 copy of the original door, I can be specific to it. I
 2 can only be specific to this door, because I have
 3 knowledge of what it is.
 4 Q. Fair enough. So the replacement door, and the
 5 original door, to the best of your knowledge, are the
 6 same?
 7 A. Correct.
 8 Q. Okay. Let's talk about the replacement door
 9 then. Can you tell me how the lock on that door works?
 10 A. Okay. As you look at this document, and
 11 again, it's Order 550906192. So if you'll look on page
 12 1 of 2, as you are looking at that diagram, that's
 13 showing the elevation, as we call it, of the door. Does
 14 everybody see what I'm talking about?
 15 That picture shows from the outside looking
 16 in, a view of this replacement door in question. From
 17 the outside looking in, the panel that's on the left, is
 18 listed as the active panel. This is a french double
 19 out-swing door. Both door panels will swing out. The
 20 active panel is the one that is activated first. The
 21 secondary panel is then activated to then be able to
 22 open in this case to the out-swing position, such that
 23 both doors will now be open. To answer your specific
 24 question about the hardware. On the active panel, as I
 25 have explained, if this was a three-point lockset -- and

1 2012; is that right? Do you remember?
 2 A. As far as the statement goes, yes.
 3 Q. Do you remember looking or trying the lock
 4 when you went out there?
 5 A. No.
 6 Q. Do you remember inspecting the door at all?
 7 A. Dan, not really, other than trying to
 8 determine that spacer code. The reason I was there was
 9 to sell replacement door panels.
 10 Q. Okay.
 11 A. Or in the case, replacement door panel, one.
 12 Q. I think I know the answer to this, but I'm
 13 going to go through it with you anyway. I'm going to
 14 represent to you that my client, Chris Kirk, went out
 15 and visited the site almost a year and two months later.
 16 He went out in August of 2013. And he looked at the
 17 doors pretty carefully. And he identified a number of
 18 things that from his perspective were, either out of
 19 place, or damaged, or somehow inappropriate with the
 20 door.
 21 And the big thing that he looked at first was
 22 both the operable door, and the stationary door as he,
 23 that's his language, your language I guess from Weather
 24 Shield is, active and maybe inactive. He looked at it,
 25 and said the locking mechanism on the operable door had

1 I'm going to look at something here. Okay.
 2 On the bottom right-hand side of the
 3 description of this product. It says "shoot/flush bolts
 4 with handle activated shootbolts." So what we were
 5 talking about, as I described earlier, on the active
 6 panel, we have a locking mechanism that is a three-point
 7 lock of contact. The shoot bolts are the bolts that are
 8 inside the actual door panel on the astragal edge that
 9 go up and down on the top and bottom of the sill and
 10 threshold. The third point of contact is the latch that
 11 goes into, in this case, the secondary panel.
 12 So there is your three-points of contact.
 13 That's what that says about panel activated shootbolts.
 14 So you trigger the handle to engage or disengage the
 15 shootbolts, so that the primary panel can be opened.
 16 Does that answer your question?
 17 Q. So the is shootbolts are top and bottom. And
 18 where the door handle is that's the third point of
 19 contact. Do all three work only at the same time?
 20 A. Yes.
 21 Q. Okay. It's not that important. I just want
 22 to try and understand it in the event we have to try to
 23 explain this to someone else. So I think your testimony
 24 was, that you went and made your site visit when
 25 Longmire asked you to come out there, around June of

1 been removed and reinstalled in an inappropriate manner.
 2 So there is almost a year and two months that had gone
 3 on between the time you were there, and he was there.
 4 Did you observe anything like that when you
 5 were there?
 6 A. No.
 7 Q. Do you remember?
 8 A. No.
 9 Q. Anything to do with the locking mechanism
 10 that -- I know you said something about Longmire told
 11 you that someone had pried the door. Did you see any
 12 pry marks on the door?
 13 A. We already had gone on the record, and I said,
 14 I did not inspect the door.
 15 Q. Fair enough.
 16 A. So, no.
 17 Q. I'm going to leave it at that. I'm going to
 18 ask about, on this limited warranty shield, Weather
 19 Shield Limited Warranty page that we marked as Exhibit
 20 59. I see language in here, and I'll read it to you so
 21 you can understand it. "Warpage or air/water
 22 infiltration on any swing door with a call-out height of
 23 greater than 6 foot 10 inches unless Weather Shield's
 24 multi-point lock system is used with the door." It's a
 25 noncoverage item.

1 Can you opine as to the reason that has to
 2 have the three-point lock system simply because of the
 3 size of the door? Is that why that six foot ten inch
 4 requirement is in there? Any opinion on that?
 5 A. That would be a question for Weather Shield.
 6 Q. Okay. Can you give me an opinion as to
 7 whether or not you thought the -- when you went out in
 8 June, and looked at the door, June of 2012, did it
 9 appear that there was something more than normal wear
 10 and tear to the door?
 11 A. Two answers. It was, obviously, before June
 12 of 2012, because that email was dated June of 2012.
 13 Dan, I do not know how long it took me to get that
 14 answer. My job site visit, obviously, was before that
 15 one email. So to go on record, I do not know what day
 16 that was.
 17 But when I was there in the time prior to that
 18 email of June of 2012, I did not inspect any further
 19 damage to the door. I was simply there to identify, and
 20 to sell a replacement panel.
 21 Q. Okay. Do you remember talking to Chuck
 22 Thielst about this door, the replacement door?
 23 A. I know the sell was made to C&S Construction.
 24 I've already said that. Obviously, there was
 25 communication between myself and C&S Construction, who

1 have on record with that correspondence.
 2 Q. So I know you talked with Mike Longmire. Did
 3 you ever talk to Ed Petrus about any of this?
 4 A. Not to my knowledge.
 5 MR. NEVALA: That's all I have. Thank you,
 6 Mark.
 7 THE WITNESS: Yes.
 8 EXAMINATION
 9 QUESTIONS BY MR. MILLEMANN:
 10 Q. Mark, we met at the beginning before the
 11 deposition started. Mark, my name is Steve Millemann,
 12 and I represent Nancy Gentry-Boyd, and for whom Chris
 13 Kirk constructed the home. I just have a couple of
 14 questions.
 15 On this order you are referring to, which I
 16 think is marked as Exhibit 55.
 17 A. This document (indicating)?
 18 Q. Yes. You've noted that the diagram is looking
 19 at the subject french doors from the outside; correct?
 20 A. That's correct.
 21 Q. And the active door would be to the left,
 22 looking in from the outside?
 23 A. Correct.
 24 Q. So if I was operating the active door from the
 25 inside, it would be the right of the two doors?

1 is Chuck Thielst. I do not recall anything else or
 2 specific discussions, other than the fact that the sell
 3 was completed to him.
 4 Q. Do you remember talking to a guy named Beau
 5 Value?
 6 A. No.
 7 Q. Eric Wait?
 8 A. No.
 9 Q. Anyone from Restoration Pro or Restoration
 10 Response?
 11 A. If we go to the one email that was referenced
 12 earlier, that I had alerted Mike Longmire that somebody
 13 else had contacted me. There, obviously, was a person
 14 who had contacted me. I do not know, Dan, who that was
 15 at that point in time.
 16 So someone else was involved in there. Was it
 17 C&S? Was it one of those other people, or someone else?
 18 I was trying to protect my customer that I'm not going
 19 to get involved in a situation -- I've already been
 20 involved with Mike Longmire. When someone else, whoever
 21 that was, who contacted me as professional, I didn't get
 22 involved in that. My sale was going to Mike Longmire.
 23 He was the one that brought the sale to me. Someone
 24 else got involved in that, and I simply wanted Mike to
 25 be notified of that situation. Who that was, we do not

1 A. Let's go back and look at that floor plan that
 2 you had provided, Jason, and that will help answer that
 3 question if somebody has a visual on it. Was that in
 4 Tab 3?
 5 MR. RUDD: Tab 3.
 6 Q. (BY MR. MILLEMANN) It was part of Kirk, I
 7 think, Exhibit 29.
 8 A. It's Tab 3, labeled 773.
 9 Q. That's it, Kirk 773.
 10 A. So that, obviously, this is drawn showing the
 11 active panel being opened first. And where it's labeled
 12 "fixed," is really not a fixed door panel. That's what
 13 we would call the secondary door panel. That in this
 14 operation, the primary, and/or active panel is opened
 15 first.
 16 So the drawing in the order that you just
 17 referenced, is referencing from the outside, looking in.
 18 But the floor plan gives a much better view of that
 19 particular door. So the active panel is showing there
 20 with the leaf in its open position. The secondary
 21 panel, the one that is labeled as "fixed," really is not
 22 fixed. It is stationary until the active panel is open.
 23 The secondary panel then can be operated to have both
 24 panels open.
 25 Q. Thank you. So if I'm departing the home,

1 going through these doors, and opening the active panel.
 2 I would be opening the right of the two panels; correct?
 3 A. From the inside looking out, that is correct.
 4 Q. And you described, Mark, how that panel of the
 5 door in question in Exhibit 55 would be operated. Is
 6 the other panel then, do you refer to that as the
 7 inactive panel?
 8 A. Or secondary panel.
 9 Q. Or secondary panel. Is that operated any
 10 differently?
 11 A. If you will go back to the order that I
 12 referenced.
 13 Q. Yes.
 14 A. Where I read about the shoot and flush bolt.
 15 So if you go up a little bit, ten lines, it says, "dummy
 16 handle set in the industry for double doors." We can
 17 have the secondary panel operating a couple of ways. In
 18 this particular case, being that it says that it has a
 19 dummy handle set. On the active panel, we've discussed
 20 the operation of how that handle works. The handle
 21 engages and disengages the three-point locking system.
 22 So on this particular door, the way this one
 23 was sold, the active panel is operated first. The panel
 24 that is the secondary, or inactive panel, has the dummy
 25 handle set. It looks just like the active handle set,

1 manually release two pins?
 2 A. After the first door is already opened, that
 3 is correct.
 4 Q. Right. And you mentioned to me, Mark, if I've
 5 got it correctly. The early order, or discussion about
 6 order for replacement was only that one panel; is that
 7 correct?
 8 A. Looking at the paperwork, and the email
 9 correspondence provided that I had with Longmire, it
 10 looked like the suggestion was, we were only going to
 11 replace one panel. Yes, that is correct.
 12 Q. Do you know, or can you tell by looking at
 13 that document, which panel was being discussed for
 14 replacement?
 15 A. I cannot tell. But it would reason that it
 16 would be the active panel. Because if again memory
 17 serves me, that is the door panel that was damaged. And
 18 it would make sense, because you can't open that panel
 19 before you open the other one. So it would stand to
 20 reason, that the active panel was the one in question
 21 that would be, if we were only looking to replace one,
 22 that would be the panel originally proposed to be
 23 replaced.
 24 Q. And if you say, Mark, if memory serves me
 25 again, that's based on what Mr. Longmire told you, not

1 but it is, indeed, a dummy. It is a non-operable.
 2 In this case, we have a secondary panel that
 3 is not flush bolt operated. On the side of the panel,
 4 there will be pins typically at the top and bottom of
 5 the side of the door at the astragal area, which is the
 6 center of where the two doors meet. At the top and
 7 bottom there will be pins, that are manually operated,
 8 that you reach up and pull the pin down, and it likewise
 9 hits the bottom. You reach into the side of that door
 10 style, and engage that lever, which opens up the second
 11 panel.
 12 Q. Perfect. So would I be correct in
 13 understanding that to operate the doors, if I wanted to
 14 depart from the house, go out on to the deck, or come
 15 from the deck into the house, I would not need to open
 16 both panels; would I?
 17 A. That's correct.
 18 Q. I could solely use the active panel; right?
 19 A. That's correct.
 20 Q. And of the two, that would certainly be the
 21 more user friendly one to open, because all I have to is
 22 turn the handle; correct?
 23 A. You have to open that door first, before you
 24 can open up and operate the secondary panel.
 25 Q. And to open up the secondary panel, I have to

1 on your own inspection?
 2 A. Defining what?
 3 Q. When you say, if memory serves me, the panel
 4 in question that was going to be replaced was the active
 5 panel. Upon what is your memory based? Is it a
 6 conversation with Mr. Longmire, or something else?
 7 A. It would only stand to reason that typically,
 8 if we had one panel that's being replaced, it would be
 9 the active panel. Because that one would be the one
 10 that was damaged if someone was trying to open the door.
 11 The other one wouldn't be affected necessarily with that
 12 operation. The first door has to be opened before the
 13 second door can be opened.
 14 Q. And hypothetically speaking, would it be
 15 possible for the hardware in the secondary door to be
 16 damaged in some form or another, but for the active
 17 panel to still operate normally?
 18 A. Not normally.
 19 Q. So hypothetically speaking, if, for example,
 20 the secondary door had been forced, or pushed in some
 21 way that somehow slightly bent either of those pins,
 22 would the active door still operate?
 23 A. You lost me there. State that again.
 24 Q. Yes. Let me back up. You answered my first
 25 question as to whether there was any hardware damage to

1 the secondary door, whether the active door could still
 2 operate? And you said, not normally. Can you explain
 3 what you meant by that?
 4 A. In order for the secondary panel to operate,
 5 we've already established that the first panel has to be
 6 opened. Then the secondary panel has to be operated.
 7 So you typically cannot operate the inactive panel,
 8 until the first door panel is opened.
 9 So to specifically answer your question, no,
 10 it would not be normal that the inactive panel, trying
 11 to open it, would damage the active panel. Because the
 12 points of contact are all going to be engaged. And you
 13 cannot get that secondary panel to operate, until the
 14 primary panel has been released, exposing in that case,
 15 the side edge pin bolts to release the secondary panel.
 16 Q. And I probably wasn't clear on my question.
 17 Let me make sure, and I'll try to be more clear. If
 18 there was some damage of some type to the hardware on
 19 the secondary panel, is it still possible that the
 20 active panel could be operated; open and closed?
 21 A. It could be possible.
 22 Q. Okay.
 23 A. Not normal, is what I answered.
 24 Q. Yes. Okay. I understand. I think you were
 25 reversing my question, and I was asking it in that

1 sense.
 2 When you went out and met with Mr. Longmire at
 3 the site, on or before June of 2012, do you have any
 4 recollection of any statements made to you on that visit
 5 by Mr. Longmire?
 6 A. I know that we discussed, and I've gone on
 7 record and stated, I was there to replace the door
 8 panel. And he had stated to me that the door looked
 9 like it had snow built up on the exterior. Somebody
 10 tried to open the door, and that's what created the
 11 damage with the hardware.
 12 Q. Okay. And in your presence, did Mr. Longmire
 13 try to demonstrate to you any problems with the door by
 14 trying to open it or close it?
 15 A. We've already stated, I don't recall if we
 16 opened or closed the door while I was there.
 17 MR. MILLEMANN: That's all I have. Thank you,
 18 Mark.
 19 MS. FONTAINE: I don't have any questions.
 20 MR. RUDD: That's it.
 21 (Deposition concluded at 12:20 p.m.)
 22 (Signature requested.)
 23
 24
 25

1 CERTIFICATE OF WITNESS
 2 I, MARK BIRRER, being first duly sworn, depose
 3 and say:
 4 That I am the witness named in the foregoing
 5 deposition, Volume I, consisting of pages 1 through 80;
 6 that I have read said deposition and know the contents
 7 thereof; that the questions contained therein were
 8 propounded to me; and that the answers contained therein
 9 are true and correct, except for any changes that I may
 10 have listed on the Change Sheet attached hereto:
 11 DATED this ____ day of _____, _____.
 12
 13
 14 MARK BIRRER
 15
 16 SUBSCRIBED AND SWORN to before me this ____ day
 17 of _____, 20__.
 18
 19
 20 NAME OF NOTARY PUBLIC _____
 21
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

1 ERRATA SHEET FOR MARK BIRRER
 2 Page ____ Line ____ Reason for Change _____
 3 Reads _____
 4 Should Read _____
 5
 6 Page ____ Line ____ Reason for Change _____
 7 Reads _____
 8 Should Read _____
 9
 10 Page ____ Line ____ Reason for Change _____
 11 Reads _____
 12 Should Read _____
 13
 14 Page ____ Line ____ Reason for Change _____
 15 Reads _____
 16 Should Read _____
 17
 18 Page ____ Line ____ Reason for Change _____
 19 Reads _____
 20 Should Read _____
 21
 22 Page ____ Line ____ Reason for Change _____
 23 Reads _____
 24 Should Read _____
 25
 26 You may use another sheet if you need more room.
 27 WITNESS SIGNATURE _____

REPORTER'S CERTIFICATE

1
2 I, COLLEEN P. ZEIMANTZ, CSR No. 345, Certified
3 Shorthand Reporter, certify:

4 That the foregoing proceedings were taken
5 before me at the time and place therein set forth, at
6 which time the witness was put under oath by me;

7 That the testimony and all objections made were
8 recorded stenographically by me and transcribed by me or
9 under my direction;

10 That the foregoing is a true and correct record
11 of all testimony given, to the best of my ability;

12 I further certify that I am not a relative or
13 employee of any attorney or party, nor am I financially
14 interested in the action.

15 IN WITNESS WHEREOF, I set my hand and seal this
16 7th day of June, 2016.

17
18
19
20



21 COLLEEN P. ZEIMANTZ, CSR 345
22 Notary Public
23 P.O. Box 2636
24 Boise, Idaho 83701-2636
25 My commission expires September 7, 2017.

75:4,7,9 bought (1) 42:20 bound (1) 20:3 Boyd (11) 11:9;12:14;13:12,14;26:1; 27:5;38:2,7,11,21;63:24 Branch (3) 19:18,20,23 break (3) 42:2,3;57:21 bring (1) 16:25 broke (1) 24:22 Brothers (1) 20:13 brought (10) 7:18;8:20;9:16;10:12;27:12; 37:11;58:1;65:16,24;71:23 build (1) 35:16 builder (4) 21:20;22:4;27:17;28:8 builders (2) 22:8,16 Building (3) 16:11;22:8,14 builds (1) 53:20 build-up (1) 35:12 built (6) 35:9;41:4;43:14;53:3;59:6; 79:9 built-up (1) 35:17 bunch (1) 29:10 Burley (1) 20:16 business (1) 30:5 buy (1) 59:20	12:18;13:14;14:12,14;22:11; 38:1;57:8 came (12) 12:5;13:9,21;14:3,4,13,13; 29:15;45:23;48:14;52:8;58:21 can (53) 5:14;10:6,11;17:7;18:14; 21:21;23:7,9;27:23;29:17; 31:21;32:4,18;34:9;35:16,16; 39:19,22;42:2,12;43:19,25; 45:5,12,20,21;46:3;47:11; 50:21;51:13,19;53:16;57:6,14, 15;58:3;59:20;65:12,18,25; 66:1,2,9;67:15;69:21;70:1,6; 73:23;74:16;75:24;76:12; 77:13;78:2 Canada (2) 19:6;20:6 care (1) 35:18 carefully (1) 68:17 case (21) 13:20;22:24;25:4;37:3;45:5; 51:20;52:2;53:18;59:3,25;60:8; 61:6;62:9;63:22;65:8;66:22; 67:11;68:11;74:18;75:2;78:14 catch (1) 42:13 category (1) 18:12 caught (2) 32:3,4 cause (1) 5:3 cc'd (2) 25:24;26:12 center (2) 25:11;75:6 certain (2) 7:11;44:25 certainly (1) 75:20 CERTIFICATE (1) 80:1 cetera (1) 24:24 chance (2) 5:21;7:21 change (5) 26:6,7;30:17,25;80:10 changes (8) 5:22;26:5;27:1,20,23;28:3; 29:21;80:9 channel (2) 53:12,23 channels (2) 53:19,19 characterize (1) 21:23 charts (1) 32:17 Chris (24)	8:23;10:10;12:15;25:16,23; 26:21,25;27:8;28:8;29:3;30:11; 38:2;41:21,24;58:3,23;59:2; 64:12,14,23,25;65:8;68:14; 72:12 chronological (1) 16:16 Chuck (4) 48:24;56:14;70:21;71:1 circumstances (2) 20:11;42:16 clad (2) 26:8;30:18 claim (4) 57:3,8,19;63:13 Claire (1) 25:23 clarifies (1) 19:1 clarify (3) 6:12,14;36:4 class (1) 18:11 clear (4) 6:1;28:2;78:16,17 client (1) 68:14 clients (3) 12:2;21:16;42:19 close (3) 31:14;65:13;79:14 closed (3) 32:4;78:20;79:16 closing (1) 31:15 code (9) 45:12;46:11,14;47:4,7,19; 51:2,15;68:8 codes (1) 45:9 cold (4) 22:11,13,19;35:15 colors (1) 27:20 coming (3) 6:13;7:21;37:11 comments (1) 26:7 COMMISSION (1) 80:24 common (3) 34:5,19;44:4 communication (10) 27:14;28:2,12,14,30:1;40:10; 41:11;42:24;60:24;70:25 communications (18) 8:6;11:8,9,11;13:12;15:23; 26:21;27:4;28:10,17,20,20,25; 38:2,17,20;40:13;43:2 companies (3) 18:1;33:21;45:17 company (2) 20:13;46:3	complained (1) 36:17 complaints (1) 33:25 completed (2) 64:10;71:3 complex (1) 65:11 complying (11) 9:24;23:11;25:20;30:14; 39:6;54:20;55:3;60:11;63:21; 64:2,8 computer (1) 24:3 concern (1) 31:23 concerned (1) 22:20 concluded (1) 79:21 conclusion (1) 41:15 concrete (1) 27:17 condensation (4) 35:12,16,20,23 condition (1) 38:21 confirm (3) 9:2;10:11;49:1 confirming (1) 9:15 confusing (1) 18:15 confusion (1) 19:1 connection (3) 24:7;53:13;63:24 consecutively (1) 16:14 considerations (1) 27:20 consisting (1) 80:5 constructed (1) 72:13 construction (13) 20:22;21:25;22:10,21,22; 31:11;35:8;48:24;52:20;56:8, 14;70:23,25 consult (1) 31:20 consultation (1) 30:6 contact (16) 28:6;41:21;43:20,22,24;57:9; 58:11,14,16;62:1,21;67:7,10, 12,19;78:12 contacted (15) 38:24;39:2;41:24;42:21; 43:8;55:23;56:6;59:5;61:25; 64:12,14,19;71:13,14,21 contacting (2)
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Case No. _____ Inst. No. _____
Filed 1045 A.M. _____ P.M.

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

Case No. CV-2014-71-C

MEMORANDUM DECISION AND ORDER

Plaintiff Petrus Family Trust Dated May 1, 1991 and its co-trustee Plaintiff Edmond A. Petrus, Jr. (collectively, "Petrus") bought a home from Defendant Nancy Gentry-Boyd ("Gentry") in 2012. Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk") had built the home for Gentry seven years earlier. Defendant Todd McKenna d/b/a Homecraft Home Inspections ("McKenna") inspected the home for Petrus as part of that transaction. He was recommended to Petrus by Petrus's real-estate agents, Defendants ReMax Resort Realty and Kevin Batchelor (collectively, "Batchelor"): Despite McKenna's pre-closing inspection, Petrus discovered after closing the transaction that the home suffered from extensive dry rot.

In this action, Petrus sued Gentry for not disclosing alleged problems with the home's French doors. Petrus says that, had she disclosed those problems, the water intrusion that caused the dry rot would have been discovered before the closing. Petrus also sued McKenna for failing to discover either the problems with the French doors or the water intrusion during the inspection. Petrus sued Batchelor for recommending McKenna. Finally, Petrus sued Kirk for allegedly building the home in a way that allowed the water intrusion to happen.

Gentry, Batchelor, and Kirk all move for summary judgment. In addition, Petrus moves for permission to expand his claims against Batchelor to include claims based on the theory that Batchelor should have discovered, and disclosed to Petrus, the alleged problems with the French doors that Gentry did not disclose. These motions were argued on June 20, 2016. With one exception, they were taken under advisement at that time. The exception is Batchelor's motion for summary judgment, which was taken under advisement one week later, upon submission of post-hearing briefs relating to it. For the reasons that follow, full summary judgment is granted to Kirk, partial summary judgment is granted to Batchelor and Gentry, and Petrus is denied permission to expand his claims against Batchelor.

I.

BACKGROUND

Kirk built the home at issue in this action. (Kirk Aff. ¶ 4.) He built it under an oral contract with Gentry. (Kirk Aff. ¶ 5.) Construction began in June 2004 and was substantially completed in August 2005, with final billing in September 2005. (Kirk Aff. ¶ 6.)

Nearly seven years later, in April 2012, Petrus bought the home from Gentry. (Petrus Decl. filed June 12, 2016, ¶ 10.) Petrus did so under an RE-21 Real Estate Purchase and Sale Agreement ("the PSA"). (Pittenger Aff. Ex. 1.)

The PSA required Gentry to provide to Petrus a property condition disclosure form. (Pittenger Aff. Ex. 1 § 14.) Gentry did so, providing to Petrus an RE-25 Seller's Property Condition Disclosure Form in or about February or March of 2012 (Pittenger Aff. Ex. 2), well before the April 2012 closing. On the form, Gentry answered "No" to a question asking if there had been "any water intrusion or moisture related damage to any portion of the property." (Pittenger Aff. Ex. 2 at 2.) Additionally, Gentry made no disclosures in response to the form's directive to list "any other existing problems that you know of concerning the property." (Pittenger Aff. Ex. 2 at 3.)

Edmond Petrus moved into the home in May or June of 2012. (Petrus Decl. filed June 12, 2016, ¶ 12.) Shortly after doing so, he discovered that the home's French doors were swollen with water, could not open or close properly, and could not be locked. (Id.) He told Gentry's real-estate agent, Michael Wood, about these problems. (Petrus Decl. filed June 12, 2016, ¶ 16.) Wood relayed the concern to Gentry via e-mail. (Foster Decl. filed June 12, 2016, Ex. 13.) Gentry stated in response e-mail dated June 19, 2012, that "[t]he doors sometimes stick after the winter. If you keep them locked, they will dry out and function again." (Id.)

No such problem with the French doors was disclosed by Gentry on the RE-25 Seller's Property Condition Disclosure Form. And no such problem was detected by McKenna, who had inspected the home for Petrus in March 2012, before the closing. (Pittenger Aff. Ex. 3.) Batchelor had recommended McKenna as Petrus's home inspector, and Petrus allegedly hired McKenna based at least partly on Batchelor's representations about McKenna's qualifications. (Collaer Aff. filed May 13, 2016, Ex. 1 at 217:11-16; Foster Decl. filed June 12, 2016, Ex. 2; Petrus Decl. filed June 12, 2016, ¶ 4.)

In or about October 2013—about a year and a half after the closing—a remediation contractor hired by Petrus discovered extensive dry rot in the structure of the home near the French doors. (Value Decl. ¶ 7.) Petrus contends the dry rot resulted from years of water intrusion facilitated by construction defects. (Value Decl. ¶ 8.) Petrus further contends that, had any problems with the home’s French doors come to light prior to the closing, Petrus would have insisted on removing the French doors for inspection, which would have revealed rotting wood around the sides of them. (Petrus Decl. filed Jun 12, 2016, ¶ 21.) In other words, knowing about what might outwardly have seemed like a fairly small problem supposedly would have led to uncovering a large one. That said, he seemingly does not accuse Gentry of knowing about water intrusion into the home (aside from the French doors themselves becoming wet), nor of knowing that the home suffered from dry rot.

Petrus filed this action on March 11, 2014. Nearly six months later, without ever serving the original complaint, Petrus filed (and then served) a first amended complaint. It included claims against Gentry, Kirk, and McKenna. Against Gentry, Petrus asserted seven claims: Count I, for violation of the Idaho Property Condition Disclosure Act, I.C. §§ 55-2501 to -2518; Count II, for violation of the Idaho Consumer Protection Act, I.C. §§ 48-601 to -619; Count III, for fraud; Count IV, for breach of the PSA; Count V, for breach of the covenant of good faith and fair dealing that is implied by law into the PSA; Count VI, for breach of the implied warranty of habitability; and Count VII, for conspiracy to defraud. (First Am. Compl. ¶¶ 10-73.) Counts VI and VII also were asserted against Kirk. (First Am. Compl. ¶¶ 59-73.) No other claims were asserted against Kirk. Against McKenna, Petrus asserted three claims: Count VIII, for negligence; Count IX, for fraud; and Count X, for violation of the Idaho Consumer Protection Act. (First Am. Compl. ¶¶ 74-101.)

A scheduling order was entered on March 12, 2015. Trial originally was set to begin on February 1, 2016. (Scheduling Order ¶ 1.) Notably, motions to amend the pleadings came due not later than 120 days after the date on which the scheduling order was entered. (Scheduling Order ¶ 4(A).) Thus, the deadline for motions to amend the pleadings was July 10, 2015.

On the deadline, Petrus moved for permission to file a second amended complaint that would add Batchelor to the list of defendants. Against Batchelor, Petrus proposed asserting a negligence claim and a claim for violation of the Idaho Consumer Protection Act. The motion was unopposed, and it was granted. On September 21, 2015, Petrus filed a second amended complaint. The second amended complaint reasserted the ten claims previously asserted in the first amended complaint, and it asserted the two proposed claims against Batchelor, but it mistakenly numbered them both “Count IX.” (Second Am. Compl. ¶¶ 103-121.) The Court will refer to the negligence claim against McKenna as “Count XI” and to the claim against McKenna for violation of the Idaho Consumer Protection Act as “Count XII,” as that is how they should have been numbered.

On October 5, 2015, shortly after becoming part of this action, Batchelor moved to continue the looming trial date of February 1, 2016. That motion was unopposed, and it was granted. On November 16, 2015, trial was reset to begin on August 16, 2016. All parties agreed to the new trial date. But, as trial neared, Petrus moved for another trial continuance. That motion (filed on May 27, 2016) was opposed by all defendants except McKenna. It was denied in an oral ruling made on June 20, 2016, for reasons that need not be reiterated.

Also argued on June 20 were motions for summary judgment by Kirk, Gentry, and Batchelor, as well as a motion by Petrus to file a third amended complaint that would change the

claims against Batchelor.¹ Petrus's motion to amend was filed on May 17, 2016—about three months before the August 16 trial date. Petrus proposes expanding the two existing claims, and adding two new claims, against Batchelor. The proposed new claims are Count XIII, for violation of the Idaho Real Estate Brokerage Representation Act (“Brokerage Representation Act”), I.C. §§ 54-2082 to -2097, and Count XIV, for negligence *per se*. The proposed amendments center on the assertion that, at the end of the pre-closing walkthrough, Kevin Batchelor was responsible for locking the home Petrus had agreed to purchase from Gentry, but failed to actually do so. (Proposed Third Am. Compl. ¶¶ 103-159.) Petrus postulates that, had he locked the home, Kevin Batchelor would have discovered that the home's French doors did not work properly, leading to an investigation by Petrus in which the alleged problems with the French doors were discovered before the closing. The potential for pursuing this theory of liability first occurred to Edmond Petrus in the wake of his March 2016 deposition, and he apparently concluded it was a viable theory after conducting some sort of an investigation into the walkthrough during April 2016. (Petrus Decl. filed May 17, 2016, ¶¶ 2-4.)

In any event, the defendants' motions for summary judgment and Petrus's motion to amend are ready for decision.

¹ Setting the motions for summary judgment for hearing on June 20, a Monday, required an adjustment to the scheduling order. Its deadline for hearing those motions was sixty days before trial—Friday, June 17, 2016, given the trial date of August 16, 2016. (Scheduling Order ¶ 4(B).) Gentry, Kirk, and Batchelor all moved to extend the deadline by one court day to June 20. The litigation schedule would not be disrupted by such a short extension, and there is good cause under I.R.C.P. 16(a)(3) for it because the last available hearing date before the June 17 deadline was eleven days earlier, June 6, 2016. The motions to extend therefore are granted.

II.

LEGAL STANDARDS

A. The defendants' motions for summary judgment

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). If the movant is seeking summary judgment against a claim or defense asserted by the nonmovant, the movant carries its burden by showing that the evidence does not support an element of the challenged claim or defense. *E.g., McHugh v. Reid*, 156 Idaho 229, 303, 324 P.3d 998, 1002 (Ct. App. 2014). The movant’s showing can take either (or both) of two forms: (i) affirmative evidence disproving the element at issue; or (ii) a showing that the nonmovant is unable to offer admissible evidence proving that element. *Id.*; *see also* I.R.C.P. 56(c)(1).

If the movant carries its burden, the burden shifts to the nonmovant to prove that a genuine factual dispute must be resolved before judgment can be awarded to the movant. *E.g., Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 104, 294 P.3d 1111, 1116 (2013). To carry that ultimate burden, the nonmovant “may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Id.* (quotation marks omitted). The record must be construed in the light most favorable to the nonmovant, and all reasonable inferences must be drawn in the nonmovant’s favor. *Id.* Nevertheless, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient” for the nonmovant to avoid summary judgment. *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 163, 307 P.3d 176, 180 (2013).

B. Petrus's motion to amend the complaint

Permission to amend a pleading should be “freely give[n] . . . when justice so requires.” I.R.C.P. 15(a)(2). Whether Rule 15(a)(2)'s liberal standard is met is a matter of discretion. *E.g., Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 612, 114 P.3d 974, 982 (2005), *abrogated on other grounds, Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 591, 329 P.3d 368, 373 (2014). That said, permission to amend should be given unless (i) there is undue delay, bad faith, or a dilatory motive on the movant's part, (ii) the movant has repeatedly failed to cure deficiencies in its pleadings by amending them, (iii) the amendment unduly prejudices the nonmovant, or (iv) the amendment is futile. *E.g., id.* A proposed new claim is futile if the supporting factual allegations are insufficient to state a claim for relief. *E.g., id.*

Rule 15(a)(2) does not, however, operate by itself if the movant failed to meet the scheduling order's deadline for pleadings amendments. In that situation, Rule 16(a)(3) also applies. It requires the movant to show “good cause” for amending the scheduling order in order to allow an otherwise-untimely pleadings amendment. *See* I.R.C.P. 16(a)(3); *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 882, 42 P.3d 672, 675 (2002) (affirming the district court's disallowance of a late amendment partly because the movant “did not contend that it had good cause for failing to file its motion within the time period set in the scheduling order”). Whether “good cause” has been shown is a matter of discretion. *E.g., Camp v. E. Fork Ditch Co., Ltd.*, 137 Idaho 850, 859, 55 P.3d 304, 313 (2002).

Accordingly, if there is “good cause” for amending the scheduling order to permit an otherwise-untimely amendment, then the amendment should be allowed if it passes muster under Rule 15(a)(2)'s liberal amendment standard.

III.

ANALYSIS

A. Kirk

Kirk seeks summary judgment on Petrus's two claims against him. One is Count VI, for breach of the implied warranty of habitability. The other is Count VII, for conspiracy to defraud. During the summary-judgment hearing, Petrus's counsel conceded that summary judgment on Count VII is appropriate because evidentiary support for Count VII is lacking. The Court appreciates concessions when they are appropriate and, in accordance with Petrus's concession, enters summary judgment against Count VII. Count VI remains to be addressed.

Kirk makes several arguments for summary judgment on Count VI. His frontline argument is that Count VI is barred by the statute of limitations. As the Court will go on to explain, that argument demonstrates Kirk's entitlement to summary judgment. Because it is dispositive, the Court need not and will not address Kirk's other arguments.

Kirk built the home at issue in this action. (Kirk Aff. ¶ 4.) He built it under an oral contract with Gentry. (Kirk Aff. ¶ 5.) Construction began in June 2004 and was substantially completed in August 2005, with final billing in September 2005. (Kirk Aff. ¶ 6.) Petrus purchased the home from Gentry in April 2012 (Petrus Decl. filed June 12, 2016, ¶ 10), a few months shy of seven years later. Petrus contends that, because the home suffered from latent construction defects discovered soon after the purchase, the home was uninhabitable, making Kirk liable to him for breach of the implied warranty of habitability.

"[W]hen builder-vendors sell newly constructed buildings there is an implied warranty that the buildings will be habitable." *Tusch Enters. v. Coffin*, 113 Idaho 37, 47, 740 P.2d 1022, 1032 (1987). Idaho law has recognized the implied warranty of habitability for fifty years. See *Bethlahmy v. Bechtel*, 91 Idaho 55, 67-68, 415 P.2d 698, 710-11 (1966). And it has been clear

for nearly thirty years that the implied warranty of habitability extends not only to a home's original purchaser but also to subsequent purchasers. *See Tusch*, 113 Idaho at 50-51, 740 P.2d at 1035-36 (“[S]ubsequent purchasers of residential dwellings . . . may maintain an action against the builder . . . of the dwelling based upon the implied warranty of habitability despite the fact that no privity of contract exists between the two.”). Thus, as Kirk recognizes, he isn't immune from liability to Petrus simply because he sold the home to Gentry, not Petrus. But the implied warrant of habitability isn't everlasting, and therein lies the rub.

Kirk and Petrus disagree as to when purchasers of the home Kirk built for Gentry lost the ability to sue Kirk for breach of the implied warranty of habitability. They do agree, though, that the controlling statute is I.C. § 5-241. That statute addresses the accrual of “actions against any person by reason of his having performed or furnished the design, planning, supervision or construction of an improvement to real property.” I.C. § 5-241. Importantly, it sets different parameters for the accrual of contract actions than for the accrual of tort actions.

Section 5-241 establishes a bright-line rule that “[c]ontract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of . . . an improvement [to real property].” I.C. § 5-241(b). Thus, under section 5-241(b), all contract actions against Kirk arising from his construction of the home accrued when it was completed in or about August or September of 2005. The contract between Kirk and Gentry was oral. A four year limitations period applies to actions on oral contracts. I.C. § 5-217. Consequently, the limitations period for contract actions against Kirk expired in August or September of 2009, four years after construction was completed, long before Petrus had purchased the home. Kirk contends Petrus's claim for breach of the implied warranty of habitability is a time-barred contract action.

By contrast, under section 5-241, “[t]ort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.” I.C. § 5-241(a). Petrus contends his claim for breach of the implied warranty of habitability is a tort action. He says it is subject to Idaho’s “catch-all” statute of limitations, which sets a four year limitations period for actions not subject to more specific statutes of limitations. I.C. § 5-224. He adds this four year limitations period to the six year accrual period and contends Idaho law gives a home purchaser up to ten years to sue the builder for breach of the implied warranty of habitability, making his claim timely.

Kirk has the better half of the argument. Petrus’s claim for breach of the implied warranty of habitability is a contract action, not a tort action.

That much is clear, or at least readily inferable, from *Tusch*—the 1987 case in which the Idaho Supreme Court extended to subsequent home purchasers the right to sue builders for breach of the implied warranty of habitability. There, Coffin built duplexes for the Vander Boeghs. The Vander Boeghs soon sold the duplexes to Tusch Enterprises. Later, Tusch Enterprises discovered that the duplexes suffered from major structural defects. Tusch Enterprises sued Coffin for both negligent construction and breach of the implied warranty of habitability. The court held that the negligence claim was barred by the “economic loss rule,” which prohibits recovering purely economic losses—a category into which the damage to the duplexes fell—on a negligence theory. 113 Idaho at 40-41, 740 P.2d at 1025-26. Having done so, the court went on to hold that the absence of privity of contract between Tusch Enterprises and Coffin would not doom Tusch Enterprises’ claim for breach of the implied warranty of habitability. *Id.* at 50, 740 P.2d at 1035. In not requiring privity, the court didn’t suggest privity need not be required because the claim wasn’t contractual in nature. To the contrary, the court

plainly regarded the claim as contractual in nature. In that regard, the court observed, first, that the purpose of the “economic loss rule” is “to allow the law of contracts to resolve disputes concerning economic losses” and, second, that “[i]f . . . in the area of pure economic losses, negligence is to be preempted by contract principles, . . . then contract principles must be given a freer hand to deal with injuries the law has typically redressed.”² *Id.* (emphasis added).

Thus, by not requiring privity, the court deliberately made a contract action available to “deal with” injuries for which there was no tort remedy in light of the “economic loss rule.” The court’s intention to authorize a contract action is made quite clear in the opinion’s footnote 8. There, the court quoted the recommendation in the venerable treatise *The Law of Torts* by Prosser and Keeton to eliminate the privity requirement in order to allow “recovery on a contract-warranty theory”:

Historically, . . . the only tort action available to a disappointed purchaser suffering intangible commercial loss has been the tort action of deceit for fraud and the only contract action has been for breach of a warranty, express or implied. This remains the generally accepted view. A few courts in recent years have permitted either a tort action for negligence or one in strict liability. Usually, the reason for so doing has been to escape the requirement of privity of contract as a prerequisite to recovery on a warranty theory. But the elimination of this requirement for recovery on a contract-warranty theory would seem to constitute the more satisfactory technique.”

Tusch, 113 Idaho at 50 n.8, 740 P.2d at 1035 n.8 (quoting Prosser & Keeton, *The Law of Torts*, § 101 (5th ed. 1984) (footnotes omitted)). The court characterized this treatise as “respected authority” and indisputably followed its recommendation. *Id.*

² The Idaho Supreme Court recently characterized as “dicta” some of this language from *Tusch. Am. W. Enters., Inc. v. CNH, LLC*, 155 Idaho 746, 751, 316 P.3d 662, 667 (2013). But, in doing so, the court did not call into question the proposition for which *Tusch* is cited here: that warranty claims sound in contract, not in tort.

In support of their respective positions, Kirk and Petrus cite out-of-state cases addressed to whether claims for breach of the implied warranty of habitability sound in contract or in tort. There is no need to analyze those cases in discerning Idaho's law on the point. Under *Tusch*, Petrus's claim for breach of the implied warranty of habitability sounds in contract.³ Hence, Petrus's claim is subject to section 5-241(b)'s completion-of-construction accrual rule and to section 5-217's four year limitations period. Under those statutes, the claim is time-barred. Kirk therefore is entitled to summary judgment against Count VI.

B. Gentry

Gentry seeks summary judgment on all seven claims—Counts I through VII—asserted against her. During the summary-judgment hearing, Petrus acceded to the entry of summary judgment on Counts II, VI, and VII. Accordingly, summary judgment is entered for Gentry on those counts. Counts I, III, IV, and V remain to be addressed. Count I alleges Gentry violated the Idaho Property Condition Disclosure Act by failing to disclose any problems with the home's French doors on the RE-25 Seller's Property Condition Disclosure Form. Count III alleges Gentry committed fraud by failing to disclose those problems. Count IV alleges Gentry breached the PSA—the agreement under which Petrus purchased the home from her—by failing to disclose those problems. Finally, Count V alleges that the same failure of disclosure was a breach the covenant of good faith and fair dealing that is implied by law into the PSA.

1. Count I: violation of Property Condition Disclosure Act

The Court begins with Count I. The Idaho Property Condition Disclosure Act required Gentry, as a seller of residential real property, to “complete all applicable items in a property

³ If that claim instead sounded in tort, it seemingly would be analogous to a claim for negligent construction—a more apt analogy to some other tort isn't immediately apparent—and therefore would be barred by the “economic loss rule” in any event.

disclosure form.” I.C. § 55-2504. An appropriate disclosure form is set forth in I.C. § 55-2508. The RE-25 Seller’s Property Condition Disclosure Form completed by Gentry and provided to Petrus (Pittenger Aff. Ex. 2) is substantially the same as the section 55-2508 exemplar. The exemplar is designed, and any permissible alternative form also must be designed, to facilitate disclosure of “material matters relating to the physical condition of the property to be transferred including, but not limited to, . . . the condition of the structure of the property including the roof, foundation, walls and floors . . .” I.C. § 55-2506 (emphasis added). As the form must recite, the disclosure required is only of matters “actually known” by the seller. I.C. § 55-2507(1). Indeed, the seller is not liable for failing to disclose conditions “not within the [seller’s] personal knowledge.” I.C. § 55-2511(1); *Lindberg v. Roseth*, 137 Idaho 222, 229, 46 P.3d 518, 525 (2002). Although the seller must complete the form in good faith, meaning “honesty in fact,” I.C. § 55-2516, the seller does not warrant the absence of undisclosed conditions. I.C. § 55-2507(3). Accordingly, the form Gentry provided to Petrus says it “is not a warranty of any kind by the SELLER” but instead contains “the representations of the SELLER regarding the condition of the property.” (Pittenger Aff. Ex. 2 at 1, 4.) Gentry is, however, liable for any damages Petrus suffered because of any willful or negligent failure on her part to make legally required disclosures. *See* I.C. § 55-2517.

With respect to Count I, the dispute between Gentry and Petrus is whether Gentry was required to include on the form a disclosure about the home’s French doors. It bears noting that Petrus isn’t contending Gentry knew about, and therefore was required to disclose, the extensive dry rot from which the home evidently suffered. Instead, Petrus contends Gentry knew, and was required to disclose, that the French doors sometimes took on moisture and did not operate

properly. Had Petrus known as much, the argument goes, Petrus would have investigated and discovered the dry rot before closing the purchase.

In any event, Petrus says a disclosure about the French doors should have been made in two different places on the form. (Pls.' Opp'n Gentry's Mot. Summ. J. 18-19.) One was in response a question asking whether there has been "any water intrusion or moisture related damage to any portion of the property." (Pittenger Aff. Ex. 2 at 2.) Gentry answered "No." (Pittenger Aff. Ex. 2 at 2.) The other was in response to the form's "catch-all" requirement that the seller "list any other existing problems that you know of concerning the property . . . that are not already listed." (Pittenger Aff. Ex. 2 at 3.) There, Gentry made no disclosure. (Pittenger Aff. Ex. 2 at 3.)

Beginning with the former, the Court concludes the record demonstrates that there is a genuine factual dispute about whether Gentry knew of any "water intrusion or moisture related damage" to the property. The strongest evidence Petrus has in that regard is Gentry's e-mail of June 19, 2012—two months after the closing—to Michael Wood, her real-estate agent.⁴ Wood had e-mailed her to relay some questions Petrus had about the French doors, which reportedly had malfunctioned. (Foster Decl. filed June 12, 2016, Ex. 13.) Gentry's response stated that "[t]he doors sometimes stick after the winter. If you keep them locked, they will dry out and

⁴ Petrus also offers evidence of statements allegedly made by Wood to Edmund Petrus, to the effect that Gentry had told Wood about continual problems with the French doors, including that they usually could not be locked. (Petrus Decl. filed June 12, 2016, ¶ 16.) Gentry objects to these statements as hearsay. Petrus contends they are non-hearsay admissions of a party-opponent under I.R.E. 801(d)(2)(D). For them to so qualify, Wood must have made the statements as Gentry's agent. Because the statements need not be considered in deciding Gentry's motion for summary judgment, the Court will not resolve this dispute. If the statements are offered through Edmund Petrus at trial, it will be Petrus's burden to lay the requisite foundation for fitting these statements within Rule 801(d)(2)(D). From the evidence and arguments presented so far, the Court is skeptical Petrus can do so.

function again.” (Id.) This e-mail plainly suggests Gentry believed the French doors seasonally took on at least some water or moisture, causing them not to work until they dried out after the weather changed. Her use of the term “dry out” is consistent with water or moisture intrusion affecting the French doors, and her use of the phrase “function again” is suggestive that the French doors were not merely “sticky” (meaning that they did not open and close smoothly) but instead seasonally were inoperable. Thus, the e-mail is evidence that Gentry had personal knowledge that water or moisture seasonally caused the French doors not to work. A reasonable jury seemingly could conclude, on that basis, that Gentry should have answered the question “Yes” rather than “No.”

In that regard, the Court notes that one might infer from the tenor of Gentry’s e-mail that this seasonal problem with the French doors was insignificant to her. Assuming that to be the case, the problem’s insignificance to Gentry is not dispositive of whether disclosure was required. The Idaho Property Condition Disclosure Act is intended to ensure disclosure of “material” conditions affecting property to be sold. I.C. § 55-2506. The seller is not the arbiter of a condition’s materiality. A matter’s materiality is determined either objectively, by whether a reasonable person would attach importance to it, or subjectively, by whether the person in Gentry’s position should know the person in Petrus’s position attaches importance to it. *James v. Mercea*, 152 Idaho 914, 919, 277 P.3d 361, 366 (2012); *Restatement (Second) of Torts* § 538(2) (1977). The Court cannot conclude as a matter of law that a reasonable person would regard seasonal inoperability of the French doors as immaterial. As already noted, the Idaho Property Condition Disclosure Act imposes liability for damages resulting from either willful or negligent failures to make legally required disclosures. I.C. § 55-2517. A subjective belief on Gentry’s part that the problem with the French doors was not material may tend to negate the notion that a

willful disclosure violation occurred. It has a lesser tendency to negate the notion that a negligent disclosure violation occurred, as arguably she should have realized that the problem might be material to a buyer even if insignificant to her.

On much the same analysis, the Court concludes that there is also a genuine factual dispute about whether Gentry was required to disclose the problem with the French doors in response to the form's "catch-all" requirement to list any other known problems with the property. The e-mail is evidence that Gentry knew the French doors were seasonally inoperable. While seasonal stickiness seemingly is immaterial and would not have to be disclosed, seasonal inoperability cannot be deemed immaterial as a matter of law.

Having concluded that there is a genuine factual dispute about whether disclosure was required by law, the Court must consider Gentry's next argument: that, even if there were a disclosure violation, Petrus agreed to hold Gentry harmless for the damages allegedly resulting from it. That argument is based on the PSA's section 12, which provides as follows:

12. MOLD DISCLAIMER: BUYER is hereby advised that mold and/or other microorganisms may exist at the Property. Upon closing BUYER acknowledges and agrees to accept full responsibility and risk for any matters that may result from mold and/or other microorganisms and to hold SELLER . . . harmless from any liability or damages (financial or otherwise) relating to such matters.

(Pittenger Aff. Ex. 1 § 12 (emphasis omitted).) Petrus contends the home he purchased from Gentry suffered from extensive dry rot. (Value Decl. ¶ 7.) Gentry doesn't dispute that assessment. To the contrary, she embraces it, contending dry rot is caused by mold or other microorganisms, bringing Petrus's claimed damages within the ambit of section 12.

The fundamental problem with Gentry's argument is the absence of evidence that dry rot in fact is caused by mold or other microorganism. While that may indeed be true, it is not established as a matter of law by the record in this case. Gentry has not offered expert testimony

or other admissible evidence as to what causes dry rot,⁵ either as a general matter or in the instance of this particular home. Instead of evidence, Gentry relies on a dictionary definition of the term “dry rot,” which indicates that it is caused by a fungus, as well as a dictionary definition of the term “microorganism,” which indicates that “some fungi” are microorganisms. (Mem. Supp. Gentry’s Mot. Summ. J. 14 n.58-59.) These definitions do not establish that the particular fungus species that cause dry rot are microorganisms.

Perhaps concerned about shortcomings in her evidence on the point, Gentry points to the declaration of Petrus’s expert witness, Beau Value. He says dry rot is “caused by exposure to moisture or fungus” and that “mold is a growth of fungus.” (Value Decl. ¶¶ 14-15.) The first of these statements is at least partly consistent with Gentry’s dictionary definition of “dry rot.” But both statements, taken together, fall well short of proof as a matter of law that dry rot is invariably caused by mold or other microorganisms. They suggest (correctly or not) that dry rot is sometimes, but not always, caused by fungus. And, while they might be taken to suggest that mold is a type of fungus, they do so without demonstrating that mold is the only type of fungus that causes dry rot. Thus, Value’s declaration does not help Gentry across the finish line.

For these reasons, summary judgment on Count I is denied.

2. Count III: fraud

In Count III, Petrus claims that Gentry committed fraud in the sale of her home to him. That claim’s elements are as follows: “(1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that there be reliance; (6) the hearer’s ignorance of the falsity of the statement; (7) reliance by the hearer; (8)

⁵ The reply affidavit of Gentry’s counsel includes three printouts of Internet articles that attribute dry rot, at least in some instances, to a mold species called *serpula lacrymans*. (Millemann Aff. filed June 17, 2016, Exs. 2-4.) These articles are hearsay. They will not be considered.

justifiable reliance; and (9) resultant injury.” *Lindberg*, 137 Idaho at 226, 46 P.3d at 522. In her opening memorandum, Gentry contended Petrus cannot prove the fourth element: that she knowingly made false representations to Petrus or, alternatively, that she knowingly failed to disclose matters she had a duty to disclose.⁶ (Mem. Supp. Gentry’s Mot. Summ. J. 16-18.)

In analyzing Count I above, the Court concluded that there is evidence Gentry knew and had a duty to disclose to Petrus, but did not disclose to him, that on a seasonal basis water or moisture caused the home’s French doors not to work. This is the same evidence Petrus points to in an effort to keep his fraud claim alive for trial. (Pls.’ Opp’n Gentry’s Mot. Summ. J. 23-25.) This evidence is sufficient to demonstrate the existence of a genuine factual dispute as to the fourth element, insofar as Petrus is proceeding with his fraud claim on the theory that Gentry fraudulently failed to disclose to Petrus that water or moisture caused the home’s French doors not to work. Summary judgment on Count III is denied to the extent Petrus is pursuing that particular fraud theory.

Count III was pleaded much more broadly than that. (See Second Am. Compl. ¶¶ 34-45.) Henceforth, it is limited to that particular fraud theory. That is because, in opposing Gentry’s motion for summary judgment on Count III, Petrus points to no evidence of other intentional failures to disclose or intentional misrepresentations on her part. Count III’s broader allegations are unsubstantiated and therefore do not survive for trial. Summary judgment on Count III is granted to the extent Petrus’s theory is anything other than that Gentry fraudulently failed to disclose to Petrus that water or moisture caused the home’s French doors not to work.

⁶ Of course, fraud may be established not only by affirmative misrepresentations, but also by silence when there is a duty to speak. *E.g.*, *James*, 152 Idaho at 918, 277 P.3d at 365.

3. Count IV: breach of the PSA's express terms

Turning to Count IV, Petrus claims Gentry's failure to disclose alleged problems with the home's French doors was a breach of the PSA's express terms. The PSA's section 14 is the provision Gentry allegedly breached. (Pls.' Opp'n Gentry's Mot. Summ. J. 19-20.) Section 14 provides as follows:

14. SELLER'S PROPERTY CONDITION DISCLOSURE FORM: If required by Title 55, Chapter 25 Idaho Code SELLER shall within ten (10) calendar days after execution of this Agreement provide to BUYER or BUYER's agent, "Seller's Property Condition Disclosure Form" or other acceptable form. . . .

(Pittenger Aff. Ex. 1 § 14 (emphasis omitted).) Gentry performed this obligation by providing the RE-25 Seller's Property Condition Disclosure Form to Petrus. (Pittenger Aff. Ex. 2.) Petrus's dispute with Gentry is not that she failed to provide the form, but instead that the form's content was inadequate in that the alleged problems with the home's French doors were not disclosed. Section 14, however, does not regulate the form's content. It simply requires the form to be provided, which it undisputedly was. Consequently, there is no evidentiary support for the proposition that Gentry breached section 14, even assuming the form she provided did not, as Petrus contends, make all appropriate disclosures. Summary judgment on Count IV is warranted for this reason.

Moreover, even assuming section 14 incorporates the RE-25 Seller's Property Condition Disclosure Form into the PSA, as Gentry contends, the form states that it "is not a warranty of any kind by the SELLER" and that "SELLER in no way warrants or guarantees the above information regarding the property." (Pittenger Aff Ex. 2 at 1, 4.) Instead, the form merely contains "the representations of the SELLER regarding the condition of the property." (Pittenger Aff. Ex. 2 at 4.) Thus, the form distinguishes between "warranties" and "representations" and says that Gentry's statements on the form are the latter, not the former. Were Gentry's

statements on the form “warranties,” a failure of those statements to be true would be actionable in contract as a breach of warranty. *See, e.g., Lewis v. CEDU Educ. Servs., Inc.*, 135 Idaho 139, 145, 15 P.3d 1147, 1153 (2000) (“[B]reach of express warranty sounds in contract.”). Since those statements instead are “representations,” their failure to be true would make them misrepresentations. As misrepresentations that allegedly played a role in Petrus’s decision to close the purchase of Gentry’s home, they could be actionable in tort on a fraud theory (as Petrus claims they are in Count III), but they are not actionable as a breach of contract because their correctness was not warranted or guaranteed as a term of the PSA. Thus, it appears to the Court that Petrus is, in this instance, impermissibly attempting to pursue on a contract theory what is, in substance, an alleged tort. This is another reason summary judgment is warranted on Count IV.

4. Count V: breach of the PSA’s implied terms

That brings the Court to Count V, which accuses Gentry of breaching the covenant of good faith and fair dealing that is implied by law into the PSA. Here as well, the alleged breach lies in the content of the RE-25 Seller’s Property Condition Disclosure Form; Petrus contends the form was inadequate because it did not disclose problems with the home’s French doors. The Court has just given two reasons for entering summary judgment against the similar Count IV. If Idaho law required Gentry to disclose on the form the problems with the French doors, those reasons do not extend to Count V. A reasonable jury could find that good-faith performance of Gentry’s obligations under the PSA’s section 14 entailed providing to Petrus a form that discloses all conditions Idaho law required to be disclosed on the form. Summary judgment on Count V therefore is denied.

C. Batchelor

Counts XI and XII of Petrus's complaint are asserted against Petrus's real-estate agent, Batchelor. The claim in Count XI is that Batchelor was negligent in recommending McKenna as the home inspector. And in Count XII, the claim is that Batchelor violated the Idaho Consumer Protection Act by allegedly misrepresenting that McKenna was qualified to perform a proper home inspection. Batchelor seeks summary judgment against these two claims. Petrus, however, seeks to amend his existing complaint to, among other things, add two new claims against Batchelor: (i) Count XIII, for violation of the Brokerage Representation Act; and (ii) Count XIV, for negligence *per se*. These proposed new claims are based on the notion that Batchelor was responsible for locking the home after the final walkthrough before Petrus closed the purchase and, in doing so, should have discovered that the French doors did not close and lock properly. The Court first addresses Batchelor's motion for summary judgment and then turns to Petrus's motion to amend.

1. Batchelor's motion for summary judgment

In analyzing Batchelor's motion for summary judgment, the Court begins with an artificial dispute between the parties as to whether a representation agreement was signed for Batchelor to serve as Petrus's real-estate agent. During his deposition, Kevin Batchelor testified that a representation agreement was signed. (Collaer Aff. filed May 13, 2016, Ex. 2.) Likewise, during his deposition, Edmond Petrus testified that a representation agreement was in place. (Collaer Aff. filed May 13, 2016, Ex. 1 at 194:13-16.) But when Batchelor's counsel showed Edmond Petrus the document Batchelor contended to be the representation agreement, he hedged, saying that the initials and the signature on the document did not appear to be his. (Collaer Aff. filed May 13, 2016, Ex. 1 at 194:20 - 195:25.)

In his moving papers, Batchelor tried to make hay out of Petrus's hedging. Without a written representation agreement, Petrus would have been a mere "customer" owed a lesser quantum of duties under the Brokerage Representation Act than are owed to a full-fledged "client" with a written representation agreement. *Compare* I.C. § 54-2086 (listing duties owed to "customers") *with* I.C. § 54-2087 (listing duties owed to "clients"). Realizing as much, Batchelor argued that Petrus had disavowed the representation agreement and therefore was stuck with the Brokerage Representation Act's lesser set of protections.

In response, Edmond Petrus filed a declaration in which he essentially admitted he was mistaken during his deposition. (Petrus Decl. filed June 12, 2016, ¶¶ 2-3.) He unequivocally stated he had signed a representation agreement with Batchelor, and he attached a copy of it to his declaration. (Petrus Decl. filed June 12, 2016, ¶ 3 & Ex. 1.) It is the same document he was shown by Batchelor's counsel during his deposition. (Compare Petrus Decl. filed June 12, 2016, Ex. 1 with Collaer Aff. filed May 13, 2016, Ex. 1 at Ex. 27.)

Accordingly, the record makes perfectly clear that the representation agreement attached to Edmond Petrus's declaration was signed by Kevin Batchelor and Edmond Petrus. Batchelor's opportunism notwithstanding, there is no genuine factual dispute on that point. That means Petrus was a "client," and not a mere "customer," under the Brokerage Representation Act. *See* I.C. § 54-2083(5). Batchelor's arguments for summary judgment, to the extent based on Petrus's supposed "customer" status, are rejected.

Because Petrus was a "client," Batchelor owed Petrus the obligation to perform the duties set forth in I.C. § 54-2087. Among them is the duty "[t]o exercise reasonable skill and care." I.C. § 54-2087(2). That is the duty at issue in Count XI—Petrus's negligence claim. Petrus

claims Batchelor breached that duty by negligently recommending McKenna as the home inspector. (See Second Am. Compl. ¶¶ 108-110.)

Batchelor says this claim fails because the Brokerage Representation Act does not require real-estate agents to investigate the backgrounds of the service providers, such as home inspectors, they recommend to their clients. In fact, the Brokerage Representation Act imposes no duty on real-estate agents to recommend particular service providers at all; the duty it imposes is “when appropriate, [to] advis[e] the client to obtain professional inspections of the property or to seek appropriate tax, legal and other professional advice or counsel.” I.C. § 54-2087(4)(d). This is a duty to tell the client when professional assistance should be sought, not a duty to recommend the particular service providers from which it should be sought. A real-estate agent who takes the unrequired step of recommending a particular service provider does so subject to the general statutory duty to exercise reasonable skill and care. For that reason, summary judgment cannot be granted against Count XI on Batchelor’s theory that real-estate agents have no duty to know anything whatsoever about the particular service providers they choose to recommend to their clients.

The next challenge to Count XI is the notion that any negligence on Batchelor’s part was not a proximate cause of Petrus’s damages. More particularly, the argument is that Batchelor’s negligence, if any, did not proximately cause those damages because it merely set the stage for McKenna’s negligence, which more directly caused the damages. “[T]rue proximate cause focuses on whether legal policy supports responsibility being extended to the consequences of conduct. . . . That is, whether it was reasonably foreseeable that such harm would flow from the negligent conduct.” *Cramer v. Slater*, 146 Idaho 868, 875, 204 P.3d 508, 515 (2009) (quotation marks and citations omitted). Proximate causation is almost always an issue for the jury to

decide. *Id.* Batchelor's argument is problematic because Petrus's negligence theory is one of negligent referral, and it is easily foreseeable that an alleged failure to use reasonable skill and care in recommending a home inspector would result in an incompetently performed inspection. Summary judgment therefore cannot be granted on this basis.

Another challenge to Count XI (and, for that matter, to Count XII) is based on section 12 of the PSA between Petrus and Gentry. Batchelor argues that, under the PSA's section 12, Petrus assumed the risk of problems with mold or other microorganisms, which Batchelor says were to blame for the home's dry rot. It is unclear to the Court exactly how Batchelor is entitled to invoke a provision of the PSA—an agreement to which he is not a party—as a bar to claims against him. Even assuming Batchelor may do so, however, he is not entitled to summary judgment on this basis. As already explained in this decision's section III(B)(1), which addresses Gentry's motion for summary judgment, the evidence falls short of establishing as a matter of law that Petrus's claimed damages stem from mold or other microorganisms.

Batchelor's final challenge to Count XI is that Petrus released the claim embodied in Count XI through the representation agreement's section 4. Section 4 provides as follows:

4. TRANSACTION RELATED SERVICES DISCLAIMER: BUYER understands that Broker is qualified to advise BUYER on general matters concerning real estate, but is not an expert in matters of law, tax, financing, surveying, structural conditions, *property inspections*, hazardous materials, or engineering. BUYER acknowledges that Broker advises BUYER to seek expert assistance for advice on such matters. Broker cannot warrant the condition of property to be acquired, or guarantee that all material facts are disclosed by the Seller. Broker will not investigate the condition of any property including without limitation the status of permits, zoning, location of property lines, square footage, possible loss of views and/or compliance of the property with applicable laws, codes or ordinances and BUYER must satisfy themself [sic] concerning these issues by obtaining the appropriate expert advice. The Broker or Broker's agent may, during the course of the transaction, identify individuals or entities who perform services including BUT NOT LIMITED TO the following; *home inspections* The BUYER understands that the identification of service providers is solely for BUYER'S convenience and that the Broker and its agent

are not guaranteeing or assuring that the service provider will perform its duties in accordance with the BUYER'S expectations. BUYER has the right to make arrangements with any entity BUYER chooses to provide these services. *BUYER hereby releases and holds harmless the Broker and Broker's agent from any claims by the BUYER that service providers breached their agreement, were negligent, misrepresented information, or otherwise failed to perform in accordance with the BUYER'S expectations. . . .*

(Petrus Decl. filed June 12, 2016, Ex. 1 § 4 (italics added) (bolding and underscoring in original).) The concluding sentence of section 4, if it alone governed here, would result in a release of the claim embodied in Count XI. But, along with the other duties for which section 54-2087 provides, the duty to exercise reasonable skill and care is “mandatory and may not be waived or abrogated, either unilaterally or by agreement.” I.C. § 54-2087(8). For that reason, section 4 cannot be construed to bar a claim that, like Count XI, is based on a breach of the statutory duty to exercise reasonable skill and care.

For all of these reasons, summary judgment is denied as to Count XI.

The Court now turns to Count XII—Petrus's claim for breach of the Idaho Consumer Protection Act. While the representation agreement's section 4 does not bar Count XI, it does bar Count XII. Generally speaking, persons have freedom of contract, including the freedom to contract away legal rights and remedies. *E.g., Steiner Corp. v. Am. Dist. Tel.*, 106 Idaho 787, 791, 683 P.2d 435, 439 (1984). Although exculpatory clauses are disfavored and are construed against the party relying on them, especially if that party prepared the agreement that contains the clause, “a party may eliminate or restrict its liability under a contract if the language is unambiguous as to the nature of the excused liability.” *Boise Mode*, 154 Idaho at 107, 294 P.3d at 1119. Language is unambiguous if it isn't subject to more than one reasonable interpretation. *See, e.g., id.* Under section 4, Petrus unambiguously agreed that Batchelor might recommend a home inspector as a courtesy to Petrus, but whom to hire was Petrus's decision and Batchelor would take no responsibility for whether the home inspector's work lived up to Petrus's

expectations. More importantly, Petrus unambiguously agreed not to pursue any claims against Batchelor arising from the notion that any home inspector recommended by Batchelor failed to perform in accordance with its contract with Petrus, performed its work negligently, made misrepresentations to Petrus, or otherwise failed to live up to Petrus's expectations. Count XII is exactly that sort of claim.

Indeed, McKenna's negligence is integral to Count XII. A factual premise of Count XII is that McKenna "failed to perform a professional and thorough home inspection, failed to disclose the true, defective condition of the [home], [and] failed to thoroughly inspect the [home's French doors]." (Second Am. Compl. ¶ 117.) Count XII's other major factual premise is that Batchelor misrepresented McKenna's qualifications, resulting in McKenna's hiring, which set the stage for his allegedly incompetent work and, in that way, contributed to Petrus's damages. (Second Am. Compl. ¶¶ 116, 118, 120.) Let us assume for the moment that the proof at trial will show that McKenna performed his work competently. On that assumption, Petrus could not possibly prove Count XII; Batchelor cannot be liable to Petrus for recommending a home inspector who performed a competent inspection, even if Batchelor misstated the home inspector's qualifications. That is because a theoretically "bad" recommendation would have caused Petrus no harm if the result turned out to be a competent inspection.⁷ The need to discern whether Batchelor made a "bad" recommendation arises only if the inspection were incompetent—in other words, if McKenna were negligent, as Petrus alleges. Only in that event might Batchelor's alleged misrepresentations about McKenna's qualifications be consequential.

⁷ Indeed, Petrus says "[t]he legal question is . . . whether, at the time Batchelor selected and referred McKenna, it was reasonably foreseeable that Batchelor's negligence of selecting an incompetent and uninsured home inspector could result in a negligent home inspection." (Pls.' Opp'n Batchelor's Mot. Summ. J. 18.)

This shows that negligence on McKenna's part is essential to Count XII. But Petrus agreed, in section 4 of the representation agreement, to release Batchelor and hold Batchelor harmless from claims that are based on McKenna's negligence. Since Count XII is not premised on alleged violations of duties imposed by the Brokerage Representation Act, there is no apparent legal bar to giving effect to the representation agreement's section 4 in the context of Count XII, as there is in the context of Count XI. Thus, summary judgment is entered against Count XII.

2. Motion to amend complaint

Petrus moves to amend the complaint to assert new claims against Batchelor for violation of the Brokerage Representation Act and for negligence *per se*, as well as to broaden the two already-asserted claims against Batchelor (which are addressed above). The main thrust of the proposed amendments is that Batchelor, ostensibly having had responsibility for locking the home after the final walkthrough before Petrus closed the purchase, should have discovered that the French doors did not close and lock properly and is liable for failing to do so.

Edmond Petrus apparently has known all along that Batchelor participated in the walkthrough, but he says that questioning during his March 2016 deposition made him want to investigate the walkthrough. (Petrus Decl. filed May 17, 2016, ¶¶ 2-3.) And he says that in April 2016 he learned that Batchelor took responsibility for locking the home at the end of the walkthrough. (Petrus Decl. filed May 17, 2016, ¶ 4.) Petrus then proceeded to file his motion to amend on May 17, 2016. During those two months from the deposition to the motion's filing, the trial date was rapidly approaching. It is entirely unclear why that process took two months, especially at a late stage of litigation, when time was growing more precious by the day. And it is equally unclear why this new theory of liability was not conceived and investigated much earlier in the course of the litigation. Petrus has not so much as suggested that Batchelor somehow hid the ball, preventing him from learning the relevant facts at an earlier date.

The timing of the motion is no small matter. Trial is set to begin on August 16, 2016. Petrus's motion was filed only three months before the trial date, just as the deadline for filing motions for summary judgment was arriving and only about a month before the discovery deadline. (Scheduling Order ¶¶ 3, 4(B).) The scheduling order that governs this action was entered on March 12, 2015.⁸ It set a deadline for motions to amend the pleadings. Those motions were due within 120 days after the date the scheduling order was entered. (Scheduling Order ¶ 4(A).) Thus, the deadline for motions to amend the pleadings came and went in July 2015. The purpose of a reasonably early deadline for motions to amend the pleadings is to fix the claims and defenses that are being litigated before the major litigation deadlines arrive, so that the litigation can proceed in an orderly way and the trial date can be maintained.

Petrus plainly was aware of this deadline, having filed a timely prior motion to bring Batchelor—who wasn't an original defendant—into this action in the first place. This motion, though, missed the deadline by ten months. That lapse of time isn't harmless. It impedes Batchelor from having a full and fair opportunity to defend against the new theories of liability, as there was essentially no time for him to conduct discovery or seek summary judgment on them. That opportunity, to which Batchelor is entitled, cannot be extended without vacating the trial date. But there is no compelling reason to vacate the trial date. This action will have been on file for two years and five months when the existing trial date arrives. The parties have had plenty of time to develop their claims and defenses and prepare to present them at trial. The time for revisiting those basic litigation parameters has passed.

Having missed the scheduling order's deadline for motions to amend the pleadings, Petrus must show "good cause" for amending the scheduling order in order to allow an

⁸ The trial and pretrial conference dates set in the scheduling order were later reset.

otherwise-untimely pleadings amendment. *See* I.R.C.P. 16(a)(3); *Silver Creek*, 136 Idaho at 882, 42 P.3d at 675. As already noted, whether “good cause” has been shown is a matter of discretion. *E.g.*, *Camp*, 137 Idaho at 859, 55 P.3d at 313. For the reasons already noted, the Court determines in its discretion that Petrus has not shown “good cause.” His motion to amend his complaint therefore is denied.⁹

Accordingly,

IT IS ORDERED that the motions of Kirk, Gentry, and Batchelor to extend the scheduling order’s deadline for summary-judgment hearings by one court day from June 17 to June 20 of 2016 are granted.

IT IS FURTHER ORDERED that Kirk’s motion for summary judgment is granted.

IT IS FURTHER ORDERED that Batchelor’s motion for summary judgment is granted as to Count XI but is denied as to Count XII.

IT IS FURTHER ORDERED that Petrus’s motion to amend the complaint to assert additional claims against Batchelor is denied.

IT IS FURTHER ORDERED that Gentry’s motion for summary judgment is granted as to Counts II, IV, VI, and VII and denied as to Counts I and V. Additionally, that motion is granted in part and denied in part as to Count III. Petrus may proceed to trial on Count III only

⁹ Alternatively, even if Rule 16(a)(3)’s “good cause” standard did not apply here, the Court would deny the motion under Rule 15(a)(2). Rule 15(a)(2) counsels liberality in granting permission to amend pleadings, but it does not require granting leave to amend when there is undue delay in seeking leave to amend. *E.g.*, *Maroun*, 141 Idaho at 612, 114 P.3d at 982, *abrogated on other grounds*, *Wandering Trails*, 156 Idaho at 591, 329 P.3d at 373. Petrus’s delay is undue. Petrus waited until shortly before trial to investigate a subject that could have been investigated much earlier, even before bringing Batchelor into this litigation in July 2015. And even after deciding to investigate, Petrus did not act promptly enough, in light of the fast-approaching trial date, in seeking leave to amend.

on the theory that Gentry fraudulently failed to disclose to Petrus that water or moisture caused the home's French doors not to work.

Dated this 7th day of July, 2016.



Jason D. Scott
DISTRICT JUDGE

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I certify that on July 7th, 2016, I served a copy of this document as follows:

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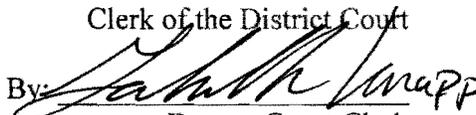
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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

DOUGLAS A. WILLIAMS, CLERK
By _____ Deputy

NOV 15 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:15 P.M.

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

Case No. CV-2014-71-C

ORDER

Plaintiff Petrus Family Trust Dated May 1, 1991 and its co-trustee Plaintiff Edmond A. Petrus, Jr. (collectively, "Petrus") bought a home from Defendant Nancy Gentry-Boyd ("Gentry") in 2012. Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk") had built the home for Gentry seven years earlier. Defendant Todd McKenna d/b/a Homecraft Home Inspections ("McKenna") inspected the home for Petrus as part of that transaction. He was recommended to Petrus by Petrus's real-estate agents, Defendants ReMax Resort Realty and Kevin Batchelor (collectively, "Batchelor"). Despite McKenna's pre-closing inspection, Petrus discovered after closing the transaction that the home suffered from extensive dry rot.

In this action, Petrus sued Gentry for not disclosing alleged problems with the home's French doors. Petrus says that, had she disclosed those problems, the water intrusion that caused the dry rot would have been discovered before the closing. Petrus also sued McKenna for failing to discover either the problems with the French doors or the water intrusion during the inspection. Petrus sued Batchelor for recommending McKenna. Finally, Petrus sued Kirk for allegedly building the home in a way that allowed the water intrusion to happen.

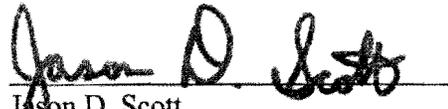
Trial was set to begin on August 16, 2016. On July 7, 2016, the Court granted summary judgment to Kirk. Petrus's claims against the other defendants remained on for trial. About three weeks before trial, however, the Court was informed that Petrus and the other defendants had reached settlements. As a result, the Court agreed to vacate the August 16 trial date. Petrus subsequently stipulated to dismissal as to Gentry and McKenna. But no stipulation as to Batchelor has been forthcoming, despite that nearly four months have passed since the announcement of the settlement.

Petrus is given until November 30, 2016, to present either (i) a stipulation for dismissal of Petrus's claims against Batchelor, or (ii) a status report explaining the delay in presenting one, describing the steps to be taken before one can be presented, and stating the timeframe within which those steps are expected to be taken.

Additionally, the entry of final judgment in Kirk's favor shouldn't continue to await completion of the settlement documentation as to Batchelor. For that reason, a final judgment in Kirk's favor will be entered under I.R.C.P. 54(b) without further delay.

IT IS SO ORDERED.

Dated this 15th day of November, 2016.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on November 15th, 2016, I served a copy of this document as follows:

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DOUGLAS A. MILLER
Clerk of the District Court

By: Candice White
Deputy Court Clerk

DOUGLAS A. MILLER, CLERK
By _____ Deputy

NOV 15 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:17 P.M.

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

PETRUS FAMILY TRUST DATED MAY 1,
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individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

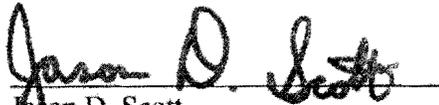
Case No. CV-2014-71-C

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

The claims of Plaintiff Petrus Family Trust Dated May 1, 1991 and its co-trustee Plaintiff Edmond A. Petrus, Jr. (collectively, "Petrus") against Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk") are dismissed with prejudice, with no award of relief to Petrus.

Dated this 15th day of November, 2016.


Jason D. Scott
DISTRICT JUDGE

RULE 54(b) CERTIFICATE

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

Dated this 15th day of November, 2016.



Jason D. Scott
DISTRICT JUDGE

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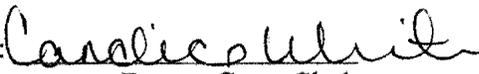
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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

NOV 28 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

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

PETRUS FAMILY TRUST DATED MAY
1, 1991, and EDMOND A. PETRUS, JR.,
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Plaintiffs,

v.

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d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4

Defendants.

Case No. CV-2014-71-C

**MOTION FOR RECONSIDERATION
OF ORDER GRANTING SUMMARY
JUDGMENT TO CHRIS KIRK D/B/A
KIRK ENTERPRISES**

On July 26, 2016, this Court entered its Memorandum Decision and Order ("Order") in which, among other things, the Court granted Defendant Chris Kirk (d/b/a Kirk Enterprises') Motion for Summary Judgment. This Court entered Judgment in Kirk's favor on November 15, 2016.

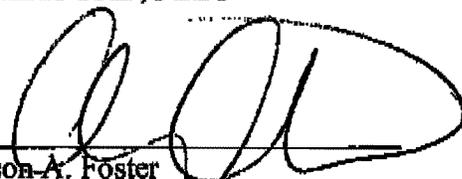
PLAINTIFFS' MOTION TO RECONSIDER ORDER GRANTING SUMMARY JUDGMENT
TO CHRIS KIRK D/B/A KIRK ENTERPRISES - 1

Pursuant to Idaho Rule of Civil Procedure 11.2(b)(1), Plaintiffs file this Motion for Reconsideration of Order Granting Summary Judgment to Chris Kirk d/b/a Kirk Enterprises ("Motion"). This Motion is supported by Plaintiffs' Memorandum in Support filed herewith. For the reasons set forth therein, Plaintiffs respectfully request that the Court reconsider its Order and rule that the statute of limitations does not bar Plaintiffs' claim for the implied warranty of habitability against Kirk.

DATED this 28th day of November 2016.

Respectfully submitted,

ANDERSEN SCHWARTZMAN WOODARD
BRAILSFORD, PLLC



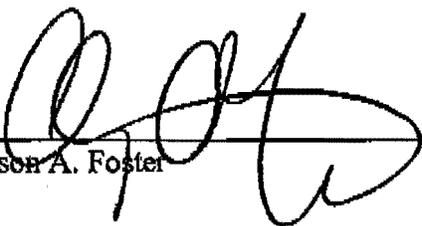
Alyson A. Foster
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November 2016, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

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Alyson A. Foster

NOV 29 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 2:04 _____ P.M.

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

PETRUS FAMILY TRUST DATED MAY
1, 1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

v.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4

Defendants.

Case No. CV-2014-71-C

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
RECONSIDERATION OF ORDER
GRANTING SUMMARY JUDGMENT
TO CHRIS KIRK D/B/A KIRK
ENTERPRISES**

On July 26, 2016, this Court entered its Memorandum Decision and Order ("Order") in which, among other things, the Court granted Defendant Chris Kirk d/b/a Kirk Enterprises' ("Kirk's") Motion for Summary Judgment ("Motion"). This Court entered Judgment in Kirk's favor on November 15, 2016.

Pursuant to Idaho Rule of Civil Procedure 11.2(b)(1), Plaintiffs respectfully request this Court reconsider its holding that the implied warranty of habitability is subject to the statute of limitations for actions in contract, and conclude instead that the statute of limitations has not expired for that claim against Defendant Kirk. Specifically, Plaintiffs request that the Court hold that (i) because the implied warranty of habitability claim is neither wholly a tort claim nor wholly a contract claim, it is subject to Idaho Code’s “catchall” statute of limitations provision, § 5-224; and (ii) an implied warranty of habitability (“IWH”) claim does not accrue before the cause of action can be brought, i.e. until a remote purchaser has purchased the dwelling and latent defects have manifested, in accordance with *Tusch* and general principles of claim accrual under Idaho law.

INTRODUCTION

Plaintiffs brought a claim against Kirk for breach of the IWH (and other claims) for damages Plaintiffs suffered as a result of Kirk’s failure to adhere to construction industry standards, and the Valley County building code, when building the residential dwelling at 2130 Payette Drive, McCall, Idaho. As demonstrated in Plaintiffs’ Opposition To Defendant Chris Kirk d/b/a Kirk Enterprises’ Motion For Summary Judgment (“Opposition”), Plaintiffs purchased the home in 2013—approximately eight years after construction completed—and discovered extensive wood and structural rot around a set of French deck doors, the deck, and adjoining walls that resulted from construction defects in those areas. The rot occurred as a result of Kirk’s faulty construction. First, Kirk framed the doors improperly and installed inadequate flashing underneath the doors; as a result, water did not drain properly away from the Doors and created a trough of water under the doors. (Opp. at 10.) Second, improperly sized flashing was used along the bottom of the exterior wall, which allowed water to rise up vertically

and seep through to the walls. (*Id.*) Third, the amount and placement of the moisture barrier along the wall was inadequate and below industry standards. (*Id.*) All of this created a lack of waterproofing that allowed water to enter the structure and create rot. (*Id.*) In addition to being below industry standard, the flashing size and felt application violated the International Residential Code of 2003 then in effect, which required that flashing "be installed to prevent water from reentering the exterior wall envelope." (*Id.*) In addition, the Code required felt or material to overlap the lower layer not less than two inches. (*Id.*) Kirk did not comply with either the flashing code or the weather-resistant sheathing paper code. (*Id.*)

On July 7, 2016, the Court entered a Memorandum Decision and Order granting Kirk's Motion on statute of limitations grounds. The Court ruled that Plaintiffs' IWH claim accrued in or around 2005 upon completion of Kirk's construction of 2130 Payette Drive, McCall, Idaho (the "Property"). The Court concluded that the IWH claim is a contract action, not a tort action, and thus is subject to the accrual provision of § 5-241(b). The Court interpreted *Tusch* to hold that the IWH claim is a contract action, and that *Tusch* simply eliminated the privity requirement so that a remote purchase may bring an IWH claim (and, correlatively, builders cannot avoid liability under the IWH with sham first sales). Thus, the Court concluded, any IWH claim expired in 2009—before Petrus purchased the home and before the latent defects manifested or caused damage.

As set forth below, Plaintiffs respectfully request the Court reconsider this decision and deny Kirk's Motion.

LEGAL STANDARD

Rule 11.2(b)(1) provides that "[a] motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a

final judgment.” Final judgment was entered with respect to claims against Kirk on November 16, 2016, so this Motion is timely.

On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. *Fragnella v. Petrovich*, 153 Idaho 266, 276 (2012). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468 (Ct. App. 2006). The decision to grant or deny a request for reconsideration rests in the sound discretion of the trial court. *Campbell v. Reagan*, 144 Idaho 254, 258 (2007).

ARGUMENT

1. The Court’s Decision Conflicts with *Tusch*

As a threshold matter, the Court’s decision conflicts with the Idaho Supreme Court’s decision in *Tusch* that an IWH claim does not require privity. In *Tusch*, the court abolished the requirement of privity that, historically, had been required for an IWH claim. In *Salmon Rivers Sportsman Camps v. Cessna Aircraft Co.*, 97 Idaho 348, 353 (1975), the Idaho Supreme Court held that, where there is no privity, “liability to the consumer must be in tort and not in contract.” The *Salmon Rivers* Court likewise indicated that an implied warranty claim accrues upon discovery of damage, per *Tomita v. Johnson*, 49 Idaho 643, 290 P. 395, 396 (1930). As set forth in Plaintiffs’ original Opposition at pp. 14-18, the Supreme Court’s decisions in *Tusch*, *Salmon Rivers*, and *Tomita* can best be unified by concluding that the IWH claim sounds more naturally in tort than contract, and that claims accrue upon discovery. In its Order, this Court does not address *Salmon River’s* holding that, when privity is not required, a claim sounds in tort; nor does it address *Salmon River’s* indication that an implied warranty claim may accrue upon

discovery, per *Tomita*. To avoid repetition, Plaintiffs will not reiterate their arguments here, and instead request the Court to reconsider those arguments.

The Court also should reconsider the *Tusch* court's enunciation of the cause of action itself: "subsequent purchasers of residential dwellings, who suffer purely economic losses from latent defects manifesting themselves within a reasonable time, may maintain an action against the builder (or builder-developer, as the case may be,) of the dwelling based upon the implied warranty of habitability despite the fact that no privity of contract exists between the two." 113 Idaho at 50-51. Most pertinent to the issue of claim accrual, this central holding of *Tusch* establishes that a claim for breach of the IWH does not even exist until a latent defect has manifested within a reasonable time. Before the latent defect manifests, there is simply no cause of action to bring. Under the plain language of this decision, a claim for breach of the IWH does not exist, and therefore does not accrue, before the latent damage at issue has manifested (so long as it manifests "within a reasonable time"). This accords with the general principle of Idaho law that a claim cannot be brought before the aggrieved party suffers some damage. For example, a cause of action in tort "accrues when the tort is completed, an event that corresponds with the first objectively ascertainable occurrence of some damage." *Minnick v. Hawley Troxell Ennis & Hawley, LLP*, 157 Idaho 863, 867 (2015).

Justice Bakes reached this same conclusion in his concurring and dissenting opinion in *Tusch*. With respect to claim accrual, Justice Bakes presciently noted that, as a result of the majority's opinion, confusion would arise regarding the applicable limitations period for a claim for breach of the IWH. Most importantly, Justice Bakes observed: "A limitation period which commences only upon the appearance of 'latent defects manifesting themselves within a reasonable time' will prove to be the most elusive part of the Court's opinion today." 113 Idaho

at 52 (Bakes, J., concurring and dissenting). Justice Bakes understood the majority opinion to create a cause of action that does not accrue before the latent defects manifest themselves. As noted above, this interpretation accords with the general principle of Idaho law that a claim cannot be brought before the aggrieved party suffers some damage. *Minnick*, 157 Idaho at 867.

This interpretation also accords with Justice Bakes's further observation: that the majority opinion in *Tusch* may have created an action in tort (that is not barred by the economic loss rule).

It is a sheer contradiction for the Court today to hold that a subsequent buyer has a cause of action against a builder "upon the implied warranty of habitability" and then state that no privity of contract need exist between the two. I agree with Chief Justice Shepard that the Court's action today is not based upon the well established and understood cause of action in contract for breach of implied warranty, but has created a new cause of action in tort.

113 Idaho at 51-52 (Bakes, J., concurring and dissenting). Specifically, Justice Bakes opined that, by eliminating privity, the Court may have created cause of action in tort. *See also id.* at 52-53 (Shepard, C.J., dissenting) ("The majority of this Court continues its recent trend in creating new causes of action where none had previously existed.").

In sum, this Court should reconsider the *Tusch* opinion in light of the concurring and dissenting opinions of Justice Bakes and Chief Justice Shepard. Their observations accord with the decision in *Salmon Rivers* that, without privity, a claim sounds in tort, not contract; with Idaho law providing that a cause of action does not accrue until damage occurs; and with the majority's enunciation of a cause of action that does not even exist until damage has "manifested." In light of these interpretations, this Court should conclude that Plaintiff's cause of action did not accrue until the latent defects "manifested," which did not occur until after Petrus assumed ownership of the home. By holding that the IWH claim is a contract claim, the Court

reimports the concept of privity in violation of *Tusch*'s elimination of that requirement and ignores *Tusch*'s holding that the claim does not exist until latent defects have manifested.

2. **The IWH Claim Is Neither Wholly Tort Nor Wholly Contract**

The Court should reconsider its characterization of the IWH claim as a “contract” claim in light of the true nature of the claim, as well as well-established Idaho law governing the distinction between tort and contract. In their original Opposition, Plaintiffs provided precedential Idaho Supreme Court caselaw demonstrating that the IWH claim is a “hybrid” claim that cannot rightly be characterized as wholly tort or wholly contract. Opp. at 14-15. The Court should reconsider its decision in light of that and the following authority.

a. *The Catchall Statute of Limitations Should Apply*

The Idaho Supreme Court long has recognized that “[t]he fundamental difference between tort and contract lies in the nature of the interests protected.” *Just’s, Inc. v. Arrington Const. Co.*, 99 Idaho 462 (1978). A tort requires the wrongful invasion of an interest protected by the law, not merely an invasion of an interest created by the agreement of the parties.” *Id.* In *Just’s*, the Court explained that tort duties arise from duties imposed by the law, whereas contract duties arise from specific party consent:

Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.

Just’s, Inc. v. Arrington Const. Co., 99 Idaho 462, 468 (1978) (quoting W. Prosser, Handbook of the Law of Torts, § 92 at 613 (4th ed. 1971)).

The IWH claim bears fundamental characteristics of both contract and tort. From the builder's perspective, the IWH claim is more like a contract claim: the builder voluntarily entered into an agreement to build a house; the scope of the builder's undertakings, i.e. duties, are created by that agreement. The agreement is not with the remote purchaser, however, and the agreement therefore does not create a duty running to that purchaser. Nonetheless, as a matter of social policy, courts have created a duty running from the builder to the remote purchaser in a narrow set of unique circumstances: "when latent damages manifest within a reasonable time." Thus, from the remote purchaser's perspective, this claim is more like a tort claim. That purchaser does not have a relationship or agreement with the builder, but has suffered damages as a result of the builder's conduct nonetheless. Social policy, not contract, creates a duty of the builder to the second-in-time purchaser. The purchaser then has the right to hold the builder liable for harm caused by the builder's breach of that duty.

In sum, while the scope of undertakings arises from the builder's contract, the duty to the remote purchaser arises from social policy. The IWH claim simply does not fit neatly into one category (contract) or another (tort), and instead reflects aspects of both. Ultimately, Kirk's responsibility to Petrus arises not from the contract between Kirk and Gentry-Boyd, but from the "social policy" of the IWH claim that a builder is best-situated to prevent such harm to a future homeowner. By holding that the IWH claim is a contractual one, the Court ignores the function of tort law and, effectively, establishes Petrus as a sort of successor-in-interest to, or assignee of, Gentry's contract rights against Kirk. This is a strained, unnatural use of law. A more effective and accurate interpretation of *Tusch* is to acknowledge, as Chief Justice Shepard and Justice Bakes did, that *Tusch* created a new cause of action for a remote purchaser and thus, here, the creation of a duty from Kirk to Petrus as a matter of social policy. The contract between Kirk and

Gentry-Boyd may inform the bounds of Kirk's duty, but it does not create it. The Court's Order thus conflicts with the true nature of the IWH claim created in *Tusch*: a hybrid of tort and contract that does not fit neatly into either claim category.

This dual nature of the IWH claim is critical to understanding what statute of limitations applies to such a claim and when such a claim accrues. The Idaho Supreme Court recently explained that the application of the statute of limitations depends on the nature of the claim. In *Doe v. Boy Scouts of Am.*, 159 Idaho 103, 105 (2015), the Court held: "Under Idaho law, in determining which statute of limitations applies to a cause of action, courts must focus on the substance, rather than the form of a plaintiff's allegations." To provide guidance in applying this standard, the Court explained that "the focus in Idaho is not on the remedy sought or the type of damages, but on the source of the damages." *Id.* n.3.

Here, the source of Petrus's damages is Kirk's failure to prevent a latent construction defect and thus to ensure that the structure is "fit for habitation." *Tusch*, 117 Idaho at 46 (the implied warranty of habitability means "that the structure will be fit for habitation," which in turn depends on "whether the buyer has received that which he bargained for," "the quality of the dwelling delivered," and "the expectations of the parties"). The nature of the IWH claim is dual. The contract statute of limitations does not apply. Accordingly, the Court should apply the catchall four-year statute of limitations set forth in Idaho Code § 5-224.

b. The Claim Does Not Accrue Before Purchase of the Home or Manifestation of Latent Defect

Moreover, because this claim is neither wholly tort nor wholly contract, the accrual provisions of § 5-241 do not neatly apply. At a minimum, the accrual provision of § 5-241(b) cannot apply: Under Idaho law, a cause of action cannot accrue before it exists. *Galbraith v.*

Vargas, Inc., 103 Idaho 912, 915, 655 P.2d 119, 122 (Ct. App. 1982) (“The cause of action accrues, and the statute of limitation begins to run, when a party may sue another.”).

Tusch created a new (narrow) cause of action that does not exist until the home is purchased by the aggrieved party: an implied warranty of habitability claim for subsequent purchasers of residential dwellings who suffer purely economic losses caused by latent defects manifesting themselves within a reasonable time. Under *Tusch*, the cause of action does not even exist for the purchaser until he purchases the home. If Section 5-241(b) applied, then the statute of limitations for a *Tusch* IWH claim can expire before the claim even exists. This is the result of the Court’s Order and an interpretation of *Tusch* that treats the IWH claim as a transfer, or assignment, from the original home purchaser. But *Tusch* explicitly creates a claim for the remote purchaser, not a transfer of rights; that claim cannot expire before the remote purchaser has even purchase the home containing the latent defect. *Cf. Green v. Brennan*, 136 S. Ct. 1769, 1776, 195 L. Ed. 2d 44 (2016) (under federal law, “a cause of action does not become ‘complete and present’ for limitations purposes”, and thus does not accrue, “until the plaintiff can file suit and obtain relief”) (citations omitted).

For the same reason, the cause of action cannot accrue before the latent defect manifests itself. Again, as part of the cause of action IWH, the *Tusch* court requires a latent defect that manifests itself within a reasonable time. In other words, there is no cause of action under *Tusch* absent manifested latent defects. The cause of action cannot expire it exists. This accords with the general principle of Idaho law that, at least in the area of torts, a cause of action cannot accrue until there has been some damage. *Minnick*, 175 Idaho at 867. In *Minnick*, for example, the Idaho Supreme Court held that a legal malpractice action based on the failure of a law firm to subordinate a deed of trust “could not have begun accruing until the IRS raised subordination in

the underlying tax court proceedings.” Thus, even though the subordination advice had been rendered years previously, the failure to obtain the subordination did not become an actionable tort until the “first objectively ascertainable occurrence of some damage.”¹

Here, the cause of action cannot have accrued until the cause of action was “complete”: when a subsequent purchaser suffers economic loss caused by latent defects manifesting themselves within a reasonable time. *Tusch*, 113 Idaho at 47. Until there is a subsequent purchaser, and until latent defects have manifested themselves, the cause of action cannot accrue. Thus, at the earliest, the cause of action accrued when Petrus purchased the home. He brought this lawsuit within two years and thus his claim should not be barred.

3. The Court’s Ruling is Inconsistent with Valley County Code

Application of this accrual rule is also consistent with the Valley County building code (the “Building Code”) adopted in 2011. Section 6-1-16 of the Building Code provides:

Section 6-1-16. Civil Action: Notwithstanding any other remedies available, any person in an individual capacity, damaged as a result of a violation of this chapter, or the codes enumerated herein or promulgated pursuant to this chapter, has a cause of action in any court of competent jurisdiction against the person who committed the violation, and if such damaged person prevails, he shall be entitled to a reasonable attorney fee to be determined by the court, together with court cost.

Valley County Ord. 11-2, adopted 4-11-2011.

¹ *Cf. Swendsen v. Corey*, No. 1:09-CV-229-BLW, 2011 WL 1458441, at *4 (D. Idaho Apr. 15, 2011) (applying Idaho law to claims) (“Recognizing ‘it is inequitable to bar someone ... from seeking redress’ who is unaware he has been harmed, the courts generally recognize application of the ‘discovery rule.’ Under this rule, the statute of limitations begins to run only upon a plaintiff’s knowledge ‘of the critical facts that he has been hurt and who has inflicted the injury.’”) (citations omitted).

The Building Code provides that *any* person—not just an initial or subsequent purchaser of a home—damaged as a result of a builder’s violation of the Building Code has a cause of action against the builder. The Building Code does not provide a limitations period for such claims. Thus, Valley County has determined that a builder’s liability for latent defects resulting from code violations does not diminish simply because a latent defect may take years to manifest. Although this provision postdates Kirk’s construction of the home in 2005, this provision nonetheless demonstrates that the regulatory body (in Valley County) more familiar with the realities of home construction has determined that a builder in Valley County should not escape liability through the exigencies of latency. To square this code provision with Idaho case law, the IWH claim at a minimum cannot accrue before the affected homeowner even has purchased the property.

4. The Economic Loss Rule Does Not Bar the IWH Claim

In its Order, the Court suggested that, if the IWH claim sounded in tort, it would be barred by the economic loss rule. Order at 13 n.3. As set forth above, Plaintiffs urge application of the discovery rule, but treatment of the claim as a hybrid one. *Tusch* made clear that the economic loss rule does not bar an IWH claim even though, like a tort, there is no contract between the parties that would set forth the economic expectations of either. The economic loss rule prohibits recovery of purely economic losses in a negligence action “because there is no duty to prevent economic losses to another.” *Blaht v. Richard B. Smith, Inc.*, 141 Idaho 296, 300 (2005). The Court’s footnote implies that, because the *Tusch* court held that the economic loss rule does not apply to the implied warranty of habitability claim, that claim cannot be one that sounds in tort. But that reasoning incorrectly assumes that all tort claims are barred by the economic loss rule. That is not the law or the purpose of the economic loss rule.

The rule exists because, in tort law, there is no duty to protect economic harm to another. *Blahd*, 141 Idaho at 300. Tort claims arise only when the defendant owes a duty to the plaintiff and breaches that duty. In the tort context, the duty arises from social policy rather than from the parties' intentional undertakings toward another. *Just 's*, 99 Idaho at 468 (“torts are based upon social policy, and not necessarily upon the will or intention of the parties”). Thus, historically, parties' economic expectations are not protected by tort law; they are protected by contract. *Clark v. Int'l Harvester Co.*, 99 Idaho 326, 335-36, 581 P.2d 784, 793-94 (1978)

On the other hand, parties may freely enter contracts in which they agree to undertakings designed, at a minimum, to prevent economic harm to each other (if not to improve each other's economic situation). Courts traditionally honor the distinction between tort and contract based on this salient difference: social policy does not require prevention of economic harm to another; intentional undertakings may create that requirement.

Thus, at its core, the economic loss rule serves to protect this traditional approach to duty, and to allow the law of tort to maintain its purpose of protecting person and property rather than economic security.

But the rule is not absolute. Idaho courts recognize many exceptions to the rule: intentional torts, i.e. not based on negligence; torts arising where there is a “special relationship” between the parties, *Blahd*, 141 Idaho at 301; torts arising where economic loss exists but is parasitic to property damage or personal injury, *Brian & Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 28 (2010); and torts where there are “unique circumstances requiring a different allocation of risk,” *Blahd*, 141 Idaho at 302. Overall, these exceptions represent situations where the parties have undertaken a relationship with each other that, while not contractual in nature, implicate a potential duty to prevent economic harm to the other.

Here, the Court in *Tusch* explicitly held that the economic loss rule does not bar the IWC claim. This holding dovetails with historical precedent recognizing that, in cases where the parties enter non-contractual relationships that inherently shift risk of economic loss, the economic loss rule does not bar recovery of such losses. The social policy underlying the creation of an IWH claim for a remote purchaser represents precisely such a situation.

The same policy considerations that lead to [our adoption of the implied warranty of habitability for sales of new homes]—that house-building is frequently undertaken on a large scale, that builders hold themselves out as skilled in the profession, that modern construction is complex and regulated by many governmental codes, and that homebuyers are generally not skilled or knowledgeable in construction, plumbing, or electrical requirements and practices—are equally applicable to subsequent homebuyers. Also, we note that the character of our society is such that people and families are increasingly mobile. Home builders should anticipate that the houses they construct will eventually, and perhaps frequently, change ownership. The effect of latent defects will be just as catastrophic on a subsequent owner as on an original buyer and the builder will be just as unable to justify improper or substandard work. Because the builder-vendor is in a better position than a subsequent owner to prevent occurrence of major problems, the cost of poor workmanship should be his to bear.

Tusch, 113 Idaho at 59 (quoting *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984)).

Accordingly, the Court's interpretation of the IWH claim as a hybrid one does not require application of the economic loss rule—which *Tusch* prohibits.

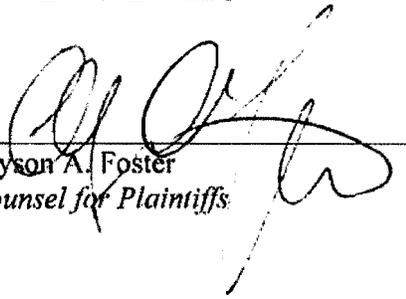
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reconsider its Order and rule that the statute of limitations does not bar Plaintiffs' claim for the implied warranty of habitability against Kirk.

DATED this 28th day of November 2016.

Respectfully submitted,

ANDERSEN SCHWARTZMAN WOODARD
BRAILSFORD PLLC


Alyson A. Foster
Counsel for Plaintiffs

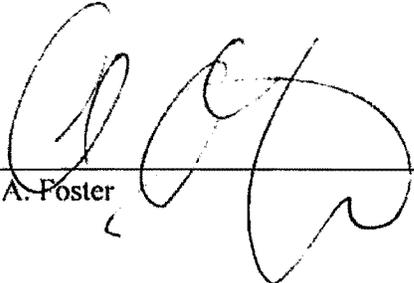
CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November 2016, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

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Alyson A. Foster



This motion is made and based upon the *Memorandum of Costs and Fees* and *Memorandum in Support of Motion for Attorney Fees and Costs* filed in support of said motion, which are both filed contemporaneously herewith and incorporated herein by reference. Oral argument is requested.

DATED this 29th day of November, 2016.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

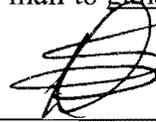
I HEREBY CERTIFY that on the 29th of November, 2016, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

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 By [Signature] Deputy

NOV 29 2016

Case No. _____ Inst. No. _____
 Filed _____ A.M. 2:21 P.M.

Attorneys for Chris Kirk d/b/a Kirk Enterprises

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

PETRUS FAMILY TRUST DATED)
 MAY 1, 1991, and EDMOND A.)
 PETRUS, JR., individually and as Co-)
 Trustee of the Petrus Family Trust Dated)
 May 1, 1991,)
 Plaintiffs,)
 v.)
 NANCY GENTRY-BOYD; CHRIS)
 KIRK d/b/a KIRK ENTERPRISES;)
 TODD MCKENNA d/b/a HOMECRAFT)
 HOME INSPECTIONS; RE/MAX)
 RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
 Defendants.)

Case No. CV-2014-71-C

**MEMORANDUM IN SUPPORT OF
 MOTION FOR ATTORNEY FEES
 AND COSTS**

COMES NOW Defendant Chris Kirk d/b/a Kirk Enterprises (“Kirk”), by and through his counsel of record, Arkoosh Law Offices, and respectfully submits this *Memorandum in Support of Motion for Attorney Fees and Costs*.

1. Introduction

Plaintiffs initiated this litigation in the spring of 2014 by filing a nine-count complaint

against Defendants Gentry-Boyd, Kirk, and McKenna. Against Kirk, Plaintiffs initially alleged negligence, asserting that Kirk negligently constructed a home and negligently installed doors and flashing. In the fall of 2014, Plaintiffs changed counsel and amended their complaint, disregarding the negligence claim against Kirk, and instead alleging two new theories: (1) breach of an implied warranty of habitability, and (2) conspiracy to commit fraud. After extensive written discovery and multiple days of depositions, Plaintiffs failed to unearth any facts supporting either of these claims against Kirk. Further, after researching the legal issues, it became clear that the law was not on their side. Resultantly, Kirk filed for summary judgment and prevailed in full.

The Court heard oral argument on Kirk's summary judgment motion on June 20, 2016, and issued its *Memorandum Decision and Order* on July 7, 2016, awarding summary judgment to Kirk on both counts. In its decision, the Court properly concluded that the statute of limitations barred Plaintiffs' implied warranty of habitability claim and properly acknowledged that Plaintiffs' counsel conceded the conspiracy claim during oral argument after failing to offer any supporting evidence or rebuttal to Kirk's briefing.

On November 15, 2016, the Court entered its *Judgment* accompanied by an I.R.C.P 54(b) Certificate declaring the *Judgment* final. With this, the Court fully resolved all issues in this lawsuit between Plaintiffs and Kirk in favor of Kirk. As the prevailing party, Kirk is entitled to his attorney fees against Plaintiffs under I.C. §§ 12-120(3) and 121. As the prevailing party, Kirk is also entitled to his costs as a matter of right under I.R.C.P. Rule 54(d)(1).

Kirks seeks an award of \$144,893.72 for attorney fees and costs pursuant to I.C. §§ 12-120(3), 121, and I.R.C.P. Rule 54. This motion is based on the Court's *Memorandum Decision and Order*, the *Judgment* entered on November 15, 2016, and the *Memorandum of Costs and Fees* filed in support hereof. Kirk seeks an award of attorney fees incurred in this case in the amount of

\$140,315.00. Kirk also seeks an award of costs in the amount of \$4,578.72. To the best of Kirk's knowledge and belief, the fees and costs claimed are correct and were reasonable and necessary to the successful defense of this lawsuit.

2. Discussion and Analysis

A. Kirk Meets the Threshold Requirements Necessary For an Award of Costs and Fees.

In ruling on a claim for attorney fees, a court should begin its analysis by asking a series of threshold questions to determine whether fees can or should be considered. Those include: (1) Are there proper parties for the award of attorney fees, i.e., can attorney fees be awarded for one party against the opposing party? (2) Is there any underlying basis for the award of attorney fees? (3) Have all of the requirements for attorney fees been met under a statute, rule, or contract? (4) Is there a prevailing party? Once these questions have been satisfied, the inquiry becomes: (5) What amount of attorney fees should be awarded? *See Walters, A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. Vol. 1, 1-88, at pp. 11.

B. As a Prevailing Party, Kirk is Entitled to an Award of Fees.

Starting with the first and fourth threshold questions, because Kirk was a party to the lawsuit who successfully defended the claims against him on summary judgment, he is both a proper party for a fee award and a prevailing party. If a statute provides for attorney fees in an action, there is a right to attorney fees to the defendant who successfully defends in that action. *Boise Truck & Equip., v. Hafer Logging*, 107 Idaho 824, 825, 693 P.2d 470, 471 (Ct. App. 1984). Therefore, if the court determines that the plaintiff would have been entitled to attorney fees under a statute if he prevailed, the defendant or third party defendant would likewise be entitled to attorney fees if he successfully defends the action. *Griggs v. Nash*, 116 Idaho 228, 234-35, 775 P.2d 120, 126-27 (1989); *Spidell v. Jenkins*, 111 Idaho 857, 860, 727 P.2d 1285, 1288 (Ct. App.

1986). I would point out that in Plaintiffs' original complaint and all subsequent amendments, they claim entitlement to attorney fees under I.C. §§ 12-120(3) and 12-121.

Pursuant to Rule 54(d)(1)(A), I.R.C.P., "costs shall be allowed as a matter of right to the prevailing party or parties." In addition, Rule 54(e)(1), I.R.C.P., provides, "the court may award reasonable attorney fees ... to the prevailing party . . . when provided for by any statute or contract." *See, Torix v. Allred*, 100 Idaho 905, 911, 606 P.2d 1334 (1980) ("As prevailing parties ... the respondent was entitled to attorney fees as a matter of statutory right under I.C. § 12-120(2) [now § 12-120(3)] and not merely in the court's discretion."). The attorney fee rule, I.R.C.P. 54(e)(1), incorporates the prevailing party definition of the cost rule found in I.R.C.P. 54(d)(1)(B). This cost rule outlines the definition and legal standard applicable to the determination of a prevailing party.

Together, the two rules read as follows:

In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.

I.R.C.P. 54(e)(1)

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B).

Thus, the Court should look its summary judgment decision in Kirk's favor coupled with the final *Judgment* and determine in its discretion that Kirk is the prevailing party. This determination is a matter of the Court's discretion. *Lettunich v. Lettunich*, 141 Idaho 425, 434-35, 111 P.3d 110, 119-20 (2005); *Idaho Military Historical Society, Inc. v. Holbrook Maslen, et al.*,

156 Idaho 624, 630, 329 P.3d 1072, 1078 (2014).

C. As the Prevailing Party, Kirk is Entitled to Recovery His Attorney Fees From Plaintiffs under I.C. § 12-120(3).

As the prevailing party, Kirk is entitled to attorney fees against Plaintiffs under two separate statutory provisions, I.C. §§ 12-120(3) and 12-121. Beginning with I.C. § 12-120(3), it provides:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and **in any commercial transaction** unless otherwise provided by law, **the prevailing party shall be allowed a reasonable attorney's fee** to be set by the court, to be taxed and collected as costs.

Idaho Code § 12-120(3) [Emphasis added].

This code provision entitles the prevailing party in any civil action arising from a commercial transaction to recover attorney fees. *Frontier Development Group, LLC v. Caravella*, 157 Idaho 589, 338 P.3d 1193, 1203 (2014). As mentioned above, Plaintiffs repeatedly cited this code section in their complaint and subsequent amendments as a basis for Plaintiffs to recover fees. Idaho Code § 12-120(3) provides for a mandatory award of attorney fees to a prevailing party in an action involving a commercial transaction. *Meyers v. Hansen*, 148 Idaho 283, 292, 221 P.3d 81, 91 (2009); *Bream v. Benscoter*, 139 Idaho 364, 370, 79 P.3d 723, 729 (2003).

Kirk is entitled to fees under section I.C. § 12-120(3) because 12-120(3) applies to a claim by Plaintiffs where the claim arises out of a commercial transaction and the commercial transaction is the gravamen of the complaint. Under I.C. § 12-120(3), “the term ‘commercial transaction’ is defined to mean **all transactions except transactions for personal or household purposes.**” *Id.* [Emphasis added]. The transactions at issue in this case were not for personal or household purposes and were, therefore, commercial in nature. In fact, the case was not only commercial in nature, but arose out of a commercial transaction in which Plaintiffs purchased a home on Lake

Payette for investment and recreational purposes, a home Plaintiffs have now listed for sale for nearly \$3 million dollars.

As pointed out in the summary judgment briefing, no contractual privity existed between Kirk and Plaintiffs. However, this is not a requirement for I.C. § 12-120(3) to apply. *University of Idaho Foundation, Inc. v. Civic Partners, Inc.*, 146 Idaho 527, 541, 199 P.3d 102, 116 (2008). In *Civic Partners*, the Idaho Supreme Court stated that I.C. § 12-120 “does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction.” *Id.* In awarding fees in *Civic Partners*, the Supreme Court focused on the fact that the relationships amongst the parties, though not one of contractual privity, was so intertwined that they were all part of the same transaction. *Id.*

Here, the relationships between Plaintiffs, Kirk, Gentry-Boyd, and all other defendants were intertwined within the same commercial transaction. That transaction was the construction and sale of the property built by Kirk, sold by Gentry-Boyd, and purchased by Plaintiffs. The other defendants assisted in the process of helping to locate the property and inspect the property for closing.

Against Kirk, Plaintiffs first sought to prove that he breached an implied warranty (a contract theory) because of how he constructed the property. Next, Plaintiffs sought to prove that Kirk conspired with Defendant Gentry-Boyd to defraud Plaintiffs by intentionally building a substandard home with substandard materials. Against the other defendants, Plaintiffs’ theories ranged from failure to disclose, violation of the consumer protection act, fraud/misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence, but were all related to the commercial transaction, which was the purchase of a piece of real estate by Plaintiffs.

After determining that a commercial transaction exists, the analysis consists of two steps: (1) the commercial transaction must be integral to the claim, and (2) the commercial transaction must constitute the basis on which the party is attempting to recover. *Sims v. Jacobson*, 157 Idaho 980, 342 P.3d 907, 912 (2015). Was a commercial transaction the gravamen of the complaint? The Idaho Supreme Court recently defined what it means for something to be the “gravamen” of a complaint: A gravamen is “the material or significant part of a grievance or complaint.” *Merriam Webster's Collegiate Dictionary* 509 (10th ed. 1993). Here, the quality and nature of the property Plaintiffs purchased is what surrounds the complaint. From that, Plaintiffs have chosen to allege multiple theories of recovery against multiple defendants. The complaint surrounds a commercial transaction, commercial contracts, and the various party defendants’ roles in the transaction. Had Kirk never built the property for Gentry-Boyd, and had Gentry-Boyd never entered into and closed on a sale contract with Plaintiffs, there would have been no basis for Plaintiffs’ lawsuit. Therefore, the answers to the second and third threshold questions are yes, there is an underlying basis to award Kirk fees and, yes, Kirk has met all of the requirements under I.C. § 12-120(3).

D. Kirk is Also Entitled to Attorney Fees Under I.C. § 12-121.

I.C. § 12-121 provides that a judge may award reasonable attorney fees to the prevailing party. The fact that a court “may” award attorney fees under I.C. § 12-121 is limited by I.R.C.P. Rule 54(e)(1), which provides that such fees “may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation.”

Plaintiffs brought and pursued their case against Kirk unreasonably and without foundation. On a substantive basis, Plaintiffs never advanced a valid or even colorable claim against Kirk. The unsupported contentions that Kirk and Gentry-Boyd “agreed and combined to

use and install in a substandard manner an exterior envelope that did not meet the applicable building codes and standard of care, in a manner that would be concealed from a general inspection of the home, to intentionally cut costs in the construction of the home and defraud the subsequent purchaser” (see, *Second Amended Complaint*, ¶ 71) were never reasonable or with good foundation. Plaintiffs offered no evidence of any conversation or plan between Kirk and Gentry-Boyd to defraud anyone. In continuing to pursue this lawsuit, Plaintiffs ignored the fact that Gentry-Boyd sold the home at a loss, and ignored the records and receipts Kirk produced in discovery showing the high quality and price of the building materials used in the construction of the home.

Plaintiffs own expert testified that no substandard materials were used in the construction of the home and that none of the conditions he discovered and fixed would have affected the habitability of the home because they were in the crawlspace and exterior of the home. He also testified that Petrus never suggested that the conditions deprived him of the ability to use the home. See Value Dep. 145:12 – 146:18; 194:7-14. Because the home was never uninhabitable or unlivable, (see Waite Dep. 61:1-6) and because the warranty claim was untimely and barred by the statute of limitations, both of the claims against Kirk were brought and pursued unreasonably and without foundation. Thus, Kirk is also entitled to attorney fees under I.C. § 12-121.

E. Amount of Fees Requested.

Having established that Kirk is entitled to fees under I.C. §§ 12-120(3) and 12-121, the final question turns to the amount of fees to which Kirk is entitled. Again, the determination of the proper amount is with Court’s discretion, but the Court in exercising its discretion is required to consider the specific factors outlined in I.R.C.P. Rule 54(e)(3), plus any other factor which the Court deems appropriate. All of these specific factors are addressed in the accompanying

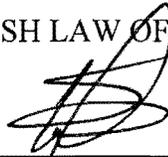
Memorandum of Costs and Fees filed concurrently herewith, along with an exhibit chronicling the detailed time records of the costs and fees incurred by Kirk in this matter.

3. Conclusion

Kirk is the prevailing party on summary judgment on both counts filed against him. The gravamen of the complaint was the commercial transaction that occurred between Plaintiffs and Defendant Gentry-Boyd when Plaintiffs purchased the property on Lake Payette that Kirk built. Kirk is entitled to fees under I.C. § 12-120(3) on the same basis Plaintiffs alleged they were entitled to fees (I.C. § 12-120(3)) and under I.C. § 12-121 based on Plaintiffs unreasonable and foundationless filing and pursuit of this case against Kirk.

DATED this 29th day of November, 2016.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

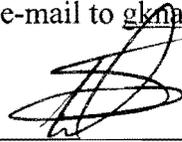
I HEREBY CERTIFY that on the 29th of November, 2016, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Alyson A. Foster
Jason J. Rudd
ANDERSEN SCHWARTSMAN
WOODARD BRAILSFORD, PLLC
101 S. Capitol Blvd., Suite 1600
Boise, ID 83702
Attorney for Plaintiffs

_____ U.S. Mail, Postage Prepaid
_____ Overnight Courier
_____ X Hand Delivered
_____ Facsimile (208) 342-4455
_____ X E-mail aaf@aswblaw.com
jjr@aswblaw.com

Courtesy Copy:
Honorable Jason D. Scott

Via e-mail to gknapp@co.valley.id.us



Daniel A. Nevala

C. Tom Arkoosh, ISB No. 2253
 Daniel A. Nevala, ISB No. 6443
 ARKOOSH LAW OFFICES
 802 W. Bannock Street, Suite 900
 P.O. Box 2900
 Boise, ID 83701
 Telephone: (208) 343-5105
 Facsimile: (208) 343-5456
tom.arkoosh@arkoosh.com
dan.nevala@arkoosh.com

DOUGLAS A. MILLER, CLERK
 By [Signature] Deputy

NOV 29 2016

Case No. _____ Inst. No. _____
 Filed _____ A.M. 2:21 P.M.

Attorneys for Chris Kirk d/b/a Kirk Enterprises

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

PETRUS FAMILY TRUST DATED)
 MAY 1, 1991, and EDMOND A.)
 PETRUS, JR., individually and as Co-)
 Trustee of the Petrus Family Trust Dated)
 May 1, 1991,)

Case No. CV-2014-71-C

**MEMORANDUM OF COSTS AND
 FEES**

Plaintiffs,)

v.)

NANCY GENTRY-BOYD; CHRIS)
 KIRK d/b/a KIRK ENTERPRISES;)
 TODD MCKENNA d/b/a HOMECRAFT)
 HOME INSPECTIONS; RE/MAX)
 RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)

Defendants.)

COMES NOW, Daniel A. Nevala, deposes and says that to the best of his knowledge and belief the following items are correct and the costs and fees claimed below are in compliance with the Idaho Rules of Civil Procedure:

A. PREVAILING PARTY

1. That I am the attorney of record for Chris Kirk d/b/a Kirk Enterprises (“Kirk”) in

this case and have personal knowledge of the facts contained in this memorandum.

2. That Kirk prevailed on summary judgment in this case as determined by the Court in its *Memorandum Decision and Order* of July 7, 2016, and final *Judgment*, dated November 15, 2016.

3. That Kirk is entitled to an award of reasonable and necessary costs incurred in this case as a matter of right under I.R.C.P. 54(d)(1)(C) and to discretionary costs incurred in this case under I.R.C.P. 54(d)(1)(D).

4. That Kirk is entitled to an award of reasonable attorney fees under I.C. §§ 12-120(3) and 12-121 and Idaho Rule of Civil Procedure 54(e)(1).

B. COSTS AND ATTORNEY FEES

5. I have attached to this memorandum as **Exhibit A**, and incorporated by reference herein, a true copy of the hours and costs billed for service on the specific dates provided. A description of the basis for each billing is also contained within **Exhibit A**.

Pursuant to Rule 54(d)(1)(C), I.R.C.P., *Costs as a Matter of Right*, the following specific information is provided:

- Total costs as a matter of right incurred by Kirk were \$4,531.69 consisting of court filing fees of \$139, copy charges for copies of records from the Valley County Clerk of \$13, copy charges for the preparation of 900 pages of exhibits admitted into evidence in a summary judgment hearing of \$135, and charges for one copy of each deposition transcript totaling \$4,244.69.

Pursuant to Rule 54(d)(1)(D), I.R.C.P., *Discretionary Costs*, the following specific information is provided:

- Total discretionary costs incurred by Kirk were \$47.03 consisting of a \$30.24

charge for mileage charged to him for the purpose of travel to the Valley County Courthouse for the filing of a motion for summary judgment with 900 pages of exhibits, and for postage fees for mailing pleadings and correspondence to the clerk and counsel of \$16.79.

Pursuant to Rule 54(e)(3), I.R.C.P., the following specific information is provided:

- **Dates.** The dates that the services were provided are set forth within **Exhibit A**. Our office file regarding this dispute was opened in August 2013, upon receipt from Kirk of a letter he received from Plaintiffs' counsel entitled, "Notice of Construction Defect." Work has continued regularly thereafter.
- **Services Rendered.** The services rendered on the dates in question are described within **Exhibit A**. Some of the major categories of services rendered include: (a) litigation planning, (b) marshaling and reviewing documents, (c) litigation coordination, (d) witness discovery, interviews, and preparation, (e) issue identification and development, (f) written discovery and preparation and attendance of expert and lay witness depositions, including all parties, (g) legal research and preparation of a dispositive motion, (h) mediation and trial preparation, and (i) additional services directly related to this litigation, including the acquisition, review, selection, use and coordination of litigation documents; intensive discovery and motion practice.
- **Hourly Rate.** C. Tom Arkoosh's work on this case was billed at \$300 per hour. Daniel Nevala's work on this case was billed at \$250 per hour. The work of other attorneys on this case was billed at \$125 to \$200 per hour. Paralegal work was billed at \$75 per hour. I hereby state that the total amount of attorney and

paralegal fees, as outlined in detail in **Exhibit A**, and incurred by my client is \$140,315.00.

6. The total cost incurred by my client is \$4,578.72, with the Non-Discretionary Costs being \$4,531.69 and the Discretionary Costs of \$47.03. These costs are outlined in detail in **Exhibit A**. The entries listed under "Cam Purchase," our office manager, are not time entries, but rather cost entries. These amounts reflect \$4,436.94 of the costs. The remaining costs of \$141.78 were incurred in September and October of 2014 and are also reflected in **Exhibit A**. The difference in our recordkeeping is due to a change in our billing software.

7. We respectfully make reference to the factors identified in I.R.C.P. 54(e)(3) regarding evaluation of the amount of attorney fees to be awarded:

- a. **Time and labor required:** Plaintiffs' insistence upon pursuing this action against Kirk by alleging that Kirk conspired with defendant Gentry-Boyd intentionally in a manner to harm Plaintiffs required that defendant meet this challenge with some vigor. Further, Plaintiffs' insistence upon pursuing a warranty theory on a home that Kirk constructed in 2005 required legal research and the filing of a summary judgment motion. Finally, Plaintiffs' reluctance to discuss settlement and threat of seeking punitive damages against defendants required a zealous defense.
- b. **Novelty and difficulty of questions:** This case involved multiple defendants and a very expensive custom-built lake home on Lake Payette in McCall. There were commercial contracts and accompanying legal relationships involved with the sale of the home. Plaintiffs initiated the suit alleging numerous claims against numerous defendants. Against Kirk, Plaintiffs initially alleged construction

negligence, but later amended to allege breach of implied warranty and conspiracy to commit fraud. Throughout the course of the litigation, Plaintiffs were very reluctant to discuss settlement or disclose the amount of damages they were seeking.

- c. **The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law:** Fair apportionment of this consideration results from the following consideration: I have been actively practicing real estate and construction law, and have been actively engaged in commercial litigation for over 15 years previous to this case. My senior partner, C. Tom Arkoosh, has been actively practicing construction law and been engaged in commercial litigation for over 36 years previous to this case. Both areas of combined experience were necessary to perform the legal service properly.
- d. **The prevailing charges for like work:** The rates of \$250-300 per hour are moderate for like work given the experience of counsel and the existing market. The rates charged are consistent with the rates charged by other lawyers for construction litigation/trial work. A reasonable hourly rate for attorney fees for work of this nature is usually between \$200 and \$400 per hour. To the extent other attorneys in our firm worked on this case, their time was billed at \$125 to \$200 per hour. Our paralegal rate of \$75 is lower than the market rate. The client has been billed the amount found in **Exhibit A** and has paid the full amount. I expect any November billing will be paid in December and reserve the right to file an amended memorandum outlining any additional costs or fees incurred.
- e. **Whether the fee was fixed or contingent:** The fee agreement between the

undersigned and defendant was at the rates provided in the accompanying **Exhibit A**. The fee was an hourly rate.

f. The time limitations imposed by the client or the circumstances of the case:

My client is a custom-home builder in McCall and has lived in McCall nearly his entire life. He has built his career and reputation on constructing high quality homes on Lake Payette and in the McCall area for customers he considers friends. It was very important to my client to manage this litigation in an effective and efficient manner so as to minimize its impact on his reputation and vigorously defend himself because he felt he was wrongly sued. The time limitations in this matter were consistent with past cases against Plaintiffs' counsel's firm.

g. The amount involved and the results obtained: Plaintiffs and their counsel

were not forthcoming with the amount of damages they sought to recover or with the cost of the repairs they incurred, but maintained the threat of amending their pleadings to seek punitive damages. It was not until depositions, which occurred shortly before the summary judgment hearing and approximately four months before trial, that we learned the true amount of the actual damages incurred by the Plaintiffs. Had Plaintiffs been forthcoming with these amounts, it is possible that the amount of defense fees and costs expended could have been mitigated.

h. The undesirability of the case: Because Plaintiff Ed Petrus was a wealthy and

experienced California litigator, and Kirk was an Idaho homebuilder with zero litigation experience, Kirk viewed this as the definition of an undesirable case. Because Kirk had never been involved in litigation before and felt the claims asserted against him were baseless, he was understandably anxious and worried.

However, it was important that Kirk receive the best possible defense he could, which is why this case was important to our firm. Neither I nor Kirk had any interest in prolonged litigation. However, given Plaintiffs' litigious nature and unwillingness to negotiate toward settlement, it became exceedingly difficult to extract our client from what appeared to be Plaintiffs' desire for a costly and time consuming fight. Having litigated with Plaintiffs' counsel's firm in the past, I understood that this defense would be time consuming and costly, which it was.

i. The nature and length of the professional relationship with the client:

Counsel has represented the client since the summer of 2013.

j. Awards in similar cases: An award of defendant's fees incurred would be consistent with awards in similar cases.

k. Computer assisted research costs: The reasonable cost of automated legal research devoted to this case was incurred by the firm and not separately billed to the client. No extraordinary research costs were incurred.

l. Other factors: One additional factor that the Court may take into consideration is the fact that counsel has offices in both McCall and Boise. This served our client's interest well and assisted in keeping travel costs to a minimum during the course of this litigation.

C. CERTIFICATION

8. Pursuant to Rule 54(d)(1)(C), I.R.C.P., I hereby state that the costs and attorney fees contained herein were reasonably incurred, were not incurred for purposes of harassment or delay, were not incurred in bad faith and were not incurred for the purpose of increasing the costs of attorney fees to any other party in this litigation.

9. Pursuant to Rule 54(e)(3), I.R.C.P., as well as Idaho Code, §§ 12-120(3) and 12-121, I hereby state that the total amount of costs and attorney fees incurred by my client is \$144,893.72. I further state that said attorney fees were incurred at a reasonable rate and in accordance with attorney fees charged by attorneys in the central Idaho area with similar skill and experience. I further state that, taking into account the time and labor required, the novelty and difficulty of the legal and factual questions presented, the skill requisite to perform the legal services properly, the experience and the ability of the attorneys in question, the prevailing charges for like work, the hourly charge for said work, the time limitations imposed by the circumstances of the case, the amount involved and the results obtained, the total amount of attorney fees is reasonable and was necessarily incurred.

DATED this 29th day of November, 2016.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

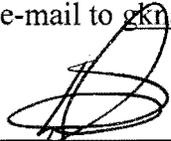
I HEREBY CERTIFY that on the 29th of November, 2016, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Alyson A. Foster
Jason J. Rudd
ANDERSEN SCHWARTSMAN
WOODARD BRAILSFORD, PLLC
101 S. Capitol Blvd., Suite 1600
Boise, ID 83702
Attorney for Plaintiffs

_____ U.S. Mail, Postage Prepaid
_____ Overnight Courier
 X Hand Delivered
_____ Facsimile (208) 342-4455
 X E-mail aaf@aswblaw.com
jjr@aswblaw.com

Courtesy Copy:
Honorable Jason D. Scott

Via e-mail to gknapp@co.valley.id.us



Daniel A. Nevala

EXHIBIT A

Arkoosh Law Offices, PLLC
802 W. Bannock, Suite 900
Post Office Box 2900
Boise, ID 83701

Invoice submitted to:
Chris Kirk
Kirk Enterprises
Post Office Box 846
McCall, ID 83638

August 15, 2016

In Reference To: Construction Defense

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
8/20/2013 Obtain, review and scan correspondence from client and client documents to file.	0.30 75.00/hr	22.50
8/21/2013 Communications with client.	0.50 250.00/hr	125.00
Obtain, review and scan correspondence from client re: Inspection.	0.20 75.00/hr	15.00
8/22/2013 Communications with client.	0.40 250.00/hr	100.00
Obtain, review and scan correspondence from client; Review and scan correspondence to client; Update Contacts.	0.20 75.00/hr	15.00
8/27/2013 Legal Research (Notice and Opportunity to Repair Act) and drafting.	0.50 250.00/hr	125.00
8/28/2013 Draft response letter to J. Mau.	0.80 250.00/hr	200.00
Call with opposing counsel.	0.30 250.00/hr	75.00
Review letter to Jason Mau; Notes to counsel.	0.20 75.00/hr	15.00
8/29/2013 Meeting with client to review response letter to J. Mau.	0.20 250.00/hr	50.00

	<u>Hrs/Rate</u>	<u>Amount</u>
8/29/2013 Lunch meeting.	0.70 250.00/hr	NO CHARGE
8/30/2013 Review and finalize letter to Jason Mau; Assembly of documents for mailing; Draft correspondence to client; Notes to counsel.	0.40 75.00/hr	30.00
Review and collate file.	0.10 75.00/hr	7.50
9/4/2013 Conference with opposing counsel.	0.50 250.00/hr	125.00
9/12/2013 Review, scan and save correspondence to client.	0.20 75.00/hr	15.00
Phone call with DAN regarding case, construction defect claim. Legal research for DAN regarding statutory defenses and statute of limitations in construction defect cases.	2.40 125.00/hr	300.00
9/16/2013 Legal Research regarding SOL and construction defect cases in Idaho.	0.80 125.00/hr	100.00
9/17/2013 Drafted a memo to DAN regarding statutory defenses and SOL.	0.50 125.00/hr	62.50
9/23/2013 Communications with client.	0.10 250.00/hr	NO CHARGE
4/3/2014 Obtain, review and scan correspondence from Jason Mau; Update calendar; Copy to client; Notes to counsel.	0.20 75.00/hr	15.00
Receive and review letter from opposing counsel re: invitation to inspect property prior to lawsuit. Call with client.	0.30 250.00/hr	75.00
4/4/2014 Receive and review Complaint.	0.50 250.00/hr	125.00
4/7/2014 Review Complaint. Preliminary research regarding defenses to negligent construction claim.	1.30 250.00/hr	325.00
4/11/2014 Communications with opposing counsel re: site visit.	0.30 250.00/hr	75.00
Accompany client to project site to conduct property inspection and photograph damage. Call with opposing counsel.	1.50 250.00/hr	375.00
4/14/2014 Communications with client. Review photographs taken during site visit.	0.30 250.00/hr	75.00
4/21/2014 Meeting with client to review Complaint.	0.50 250.00/hr	125.00

	<u>Hrs/Rate</u>	<u>Amount</u>
4/21/2014 Communications with client and opposing counsel.	0.30 250.00/hr	75.00
5/7/2014 Receive and review communications from plaintiff's counsel. Advise staff. Communications with client.	0.30 250.00/hr	75.00
Obtain, review and scan correspondence from Jason Mau; Notes to counsel; Copy to client.	0.30 75.00/hr	22.50
5/12/2014 Communications with client.	0.20 250.00/hr	50.00
5/16/2014 Conference with client. Review insurance policy and correspondence from agent re: coverage.	0.70 250.00/hr	175.00
5/19/2014 Research related to coverage question.	0.40 250.00/hr	100.00
5/30/2014 Review and scan insurance policy documents to file; notes to counsel.	0.30 75.00/hr	22.50
6/5/2014 Obtain, review and scan correspondence from Jason Mau; Notes to counsel.	0.20 75.00/hr	15.00
9/5/2014 Communications with client, communications with staff.	0.30 250.00/hr	75.00
Communications with counsel for plaintiff.	0.30 250.00/hr	75.00
9/8/2014 Prepare for and attend conference with client.	0.70 250.00/hr	175.00
Obtain, review and scan Summons, First Amended Complaint and Demand for Jury Trial, proposed Acceptance of Service, and correspondence from Andersen Banducci; Communications with counsel and Andersen Banducci.	0.40 75.00/hr	30.00
Initial review of amended complaint and comparison to prior complaint.	1.50 250.00/hr	375.00
Initial research related to new causes of action.	2.00 250.00/hr	500.00
Communications with counsel	0.40 250.00/hr	100.00
9/10/2014 Communications with client.	0.30 250.00/hr	75.00
9/11/2014 Research re: implied warranty of habitability and privity requirement with third party successor in interest.	2.00 250.00/hr	500.00

	<u>Hrs/Rate</u>	<u>Amount</u>
9/18/2014 Draft Answer to Amended Complaint.	1.30 250.00/hr	325.00
9/22/2014 Review pleadings.	0.20 300.00/hr	60.00
Review Amended Complaint and discuss defense and pleading strategy with CTA.	1.00 250.00/hr	250.00
9/24/2014 Review first amended complaint; analysis of implied warranty of habitability claim.	0.50 300.00/hr	150.00
Review documents.	0.10 300.00/hr	30.00
9/25/2014 Communications with client.	0.30 250.00/hr	75.00
Call with client.	0.80 250.00/hr	200.00
9/26/2014 Legal Research related to Plaintiff's causes of action and applicable affirmative defenses. Draft Answer.	3.00 250.00/hr	750.00
9/29/2014 Review, revise, file and serve Answer; Copy to client; Assemble documents for mailing; Notes to counsel.	0.50 75.00/hr	37.50
Final review and edits to Answer. Advise staff re: filing and service to J. Neville.	0.40 250.00/hr	100.00
Call with client.	0.40 250.00/hr	100.00
9/30/2014 Draft interrogatories and requests for production.	1.70 250.00/hr	425.00
Draft First Interrogatories and Requests for Production of Documents to Plaintiffs and Notice of Service; Notes to counsel.	0.40 75.00/hr	30.00
Review pleadings and documents.	0.30 300.00/hr	90.00
10/1/2014 Draft and edit discovery requests.	2.00 250.00/hr	500.00
Review, revise 1st discovery requests; notes to counsel and correspondence to client.	0.60 75.00/hr	45.00
10/2/2014 Review and finalize First Interrogatories and Requests for Production of Documents to Plaintiffs and Notice of Service; Draft letter to clerk; Assembly of documents for mailing and service; Copy to client; Notes to counsel.	0.40 75.00/hr	30.00

	<u>Hrs/Rate</u>	<u>Amount</u>
10/3/2014 Communications with Steve Milleman.	0.10 75.00/hr	7.50
10/7/2014 Obtain, review and scan conformed copy of Notice of Service.	0.10 75.00/hr	7.50
10/8/2014 Review and collate file.	0.10 75.00/hr	7.50
For professional services rendered	<u>39.00</u>	<u>\$8,232.50</u>
Additional Charges :		
9/29/2014 Filing Fee		139.00
10/2/2014 Postage - pleadings to clerk and counsel, return envelope,		2.78
Total additional charges		<u>\$141.78</u>

Arkoosh Law Offices - Client Summary

Date Start: 10/1/2014 | Date End: 8/15/2016 | Clients: Kirk, Chris | Matters: Construction Defense | Users: | Account Managers: All

Date	Matter	Description	Rate/ Unit Price	Labor Time/ Quantity	Billable Time/ Cost Price	Bill Amt/ Sell Price
Kirk, Chris						
G. Tom Arkoosh						
12/08/2014	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.40	0.40	\$120.00
03/13/2015	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.30	0.30	\$90.00
03/14/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.20	0.20	\$60.00
03/16/2015	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.30	0.30	\$90.00
03/20/2015	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.40	0.40	\$120.00
06/19/2015	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.50	0.50	\$150.00
06/22/2015	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.50	0.50	\$150.00
07/08/2015	Construction Defense	Strategy session with counsel.	\$300.00 hr	0.40	0.40	\$120.00
07/08/2015	Construction Defense	Communications with counsel; Review documents.	\$300.00 hr	0.20	0.20	\$60.00
07/10/2015	Construction Defense	Communications with counsel, Review pleadings.	\$300.00 hr	0.30	0.30	\$90.00
07/15/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
07/22/2015	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.30	0.30	\$90.00
07/23/2015	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.60	0.60	\$180.00
07/24/2015	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.30	0.30	\$90.00
07/27/2015	Construction Defense	Review pleadings and documents,	\$300.00 hr	0.20	0.20	\$60.00
07/28/2015	Construction Defense	Research elements of implied covenants.	\$300.00 hr	0.80	0.80	\$240.00
08/05/2015	Construction Defense	Communications with counsel; Review pleadings and documents.	\$300.00 hr	0.30	0.30	\$90.00
08/10/2015	Construction Defense	Review of implied warranty.	\$300.00 hr	0.40	0.40	\$120.00
08/12/2015	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.40	0.40	\$120.00
08/12/2015	Construction Defense	Communication with counsel re status/strategy. Review record; research.	\$300.00 hr	2.40	2.40	\$720.00
08/16/2015	Construction Defense	Review discovery re defenses.	\$300.00 hr	1.00	1.00	\$300.00
08/21/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
08/28/2015	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.20	0.20	\$60.00
08/31/2015	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.40	0.40	\$120.00
08/31/2015	Construction Defense	Review discovery responses.	\$300.00 hr	0.30	0.30	\$90.00
09/09/2015	Construction Defense	Review pleadings & documents.	\$300.00 hr	0.20	0.20	\$60.00
09/10/2015	Construction Defense	Investigation re: experts. Research availability of affirmative defenses.	\$300.00 hr	1.20	1.20	\$360.00
09/10/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.60	0.60	\$180.00
09/14/2015	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.20	0.20	\$60.00
09/16/2015	Construction Defense	Litigation planning.	\$300.00 hr	0.70	0.70	\$210.00
09/17/2015	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.20	0.20	\$60.00
09/22/2015	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.40	0.40	\$120.00
09/24/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.30	0.30	\$90.00
09/25/2015	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.20	0.20	\$60.00

09/25/2015	Construction Defense	Scheduling; discussions with counsel; review new pleading.	\$300.00 hr	0.60	0.60	\$180.00
09/28/2015	Construction Defense	Communications with counsel; Review documents.	\$300.00 hr	0.20	0.20	\$60.00
09/30/2015	Construction Defense	Communications with counsel; Review documents and pleadings.	\$300.00 hr	1.20	1.20	\$360.00
09/30/2015	Construction Defense	Amended answer review.	\$300.00 hr	0.50	0.50	\$150.00
10/01/2015	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.20	0.20	\$60.00
10/05/2015	Construction Defense	Communications and pleading review regarding scheduling.	\$300.00 hr	0.40	0.40	\$120.00
10/05/2015	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.30	0.30	\$90.00
10/08/2015	Construction Defense	Communications with counsel; Review pleadings and documents.	\$300.00 hr	0.50	0.50	\$150.00
10/09/2015	Construction Defense	Review pleadings.	\$300.00 hr	0.40	0.40	\$120.00
10/09/2015	Construction Defense	Communications with counsel; Review pleadings and documents.	\$300.00 hr	0.70	0.70	\$210.00
10/12/2015	Construction Defense	Communications with counsel and review pleadings.	\$300.00 hr	0.40	0.40	\$120.00
10/16/2015	Construction Defense	Communications with counsel; Review documents and pleadings.	\$300.00 hr	0.80	0.80	\$240.00
10/16/2015	Construction Defense	Scheduling and review motion. Strategy with firm.	\$300.00 hr	0.30	0.30	\$90.00
10/19/2015	Construction Defense	Communications with counsel; review documents and pleadings.	\$300.00 hr	1.00	1.00	\$300.00
10/20/2015	Construction Defense	Communications with counsel and review documents.	\$300.00 hr	0.40	0.40	\$120.00
10/26/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
10/27/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
10/28/2015	Construction Defense	Communications with counsel; Review pleadings and documents.	\$300.00 hr	0.50	0.50	\$150.00
10/29/2015	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.40	0.40	\$120.00
10/30/2015	Construction Defense	Review documents and pleadings; Communications with counsel.	\$300.00 hr	1.00	1.00	\$300.00
11/02/2015	Construction Defense	Communications with counsel; Review pleadings and documents.	\$300.00 hr	1.30	1.30	\$390.00
11/12/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.40	0.40	\$120.00
11/13/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.30	0.30	\$90.00
11/18/2015	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.20	0.20	\$60.00
11/18/2015	Construction Defense	Discussions with counsel.	\$300.00 hr	0.50	0.50	\$150.00
11/24/2015	Construction Defense	Communications with counsel.	\$300.00 hr	0.30	0.30	\$90.00
11/24/2015	Construction Defense	Review facts with counsel.	\$300.00 hr	0.50	0.50	\$150.00
11/25/2015	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.20	0.20	\$60.00
11/30/2015	Construction Defense	Review documents and pleadings; Communications with counsel.	\$300.00 hr	0.60	0.60	\$180.00
12/03/2015	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.40	0.40	\$120.00
12/04/2015	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.20	0.20	\$60.00
01/07/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.40	0.40	\$120.00
01/08/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.50	0.50	\$150.00
01/12/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
01/13/2016	Construction Defense	Communications with counsel; review pleadings.	\$300.00 hr	0.20	0.20	\$60.00
01/14/2016	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.30	0.30	\$90.00
01/19/2016	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.40	0.40	\$120.00
01/28/2016	Construction Defense	Communications with counsel; review pleadings.	\$0 hr	0.20	0.20	\$0.00
02/17/2016	Construction Defense	Communications with counsel.	\$0 hr	0.20	0.20	\$0.00
02/18/2016	Construction Defense	Communications with counsel.	\$0 hr	0.20	0.20	\$0.00

02/22/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
02/23/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
02/26/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	1.20	1.20	\$360.00
02/29/2016	Construction Defense	Communications with counsel; Review pleadings and documents.	\$300.00 hr	1.20	1.20	\$360.00
03/01/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	1.70	1.70	\$510.00
03/02/2016	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.50	0.50	\$150.00
03/03/2016	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.60	0.60	\$180.00
03/08/2016	Construction Defense	Communications with counsel; review documents.	\$300.00 hr	1.20	1.20	\$360.00
03/10/2016	Construction Defense	Communications with counsel; Review documents.	\$300.00 hr	0.20	0.20	\$60.00
04/07/2016	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.30	0.30	\$90.00
04/13/2016	Construction Defense	Review documents.	\$300.00 hr	0.20	0.20	\$60.00
05/10/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.30	0.30	\$90.00
05/16/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.60	0.60	\$180.00
05/17/2016	Construction Defense	Communications with counsel; Review pleadings and documents.	\$300.00 hr	0.80	0.80	\$240.00
05/18/2016	Construction Defense	Communications with counsel; Review pleadings and documents.	\$300.00 hr	2.10	2.10	\$630.00
05/19/2016	Construction Defense	Review MSJ draft.	\$300.00 hr	1.30	1.30	\$390.00
05/19/2016	Construction Defense	Review Summary Judgment.	\$300.00 hr	1.00	1.00	\$300.00
05/20/2016	Construction Defense	Review pleadings and documents.	\$300.00 hr	0.70	0.70	\$210.00
05/24/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.30	0.30	\$90.00
05/25/2016	Construction Defense	Communications with counsel; Review documents and pleadings.	\$300.00 hr	0.60	0.60	\$180.00
05/27/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	1.10	1.10	\$330.00
05/28/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
05/30/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.20	0.20	\$60.00
05/31/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
05/31/2016	Construction Defense	Communications with counsel; Review documents and pleadings.	\$300.00 hr	1.50	1.50	\$450.00
06/01/2016	Construction Defense	Communications with counsel; Review documents.	\$300.00 hr	0.20	0.20	\$60.00
06/03/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.30	0.30	\$90.00
06/07/2016	Construction Defense	Review documents.	\$300.00 hr	0.50	0.50	\$150.00
06/08/2016	Construction Defense	Communications with counsel; Review documents and pleadings.	\$300.00 hr	0.70	0.70	\$210.00
06/10/2016	Construction Defense	Communications with counsel; Review documents and pleadings.	\$300.00 hr	1.00	1.00	\$300.00
06/16/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.60	0.60	\$180.00
06/17/2016	Construction Defense	Communications with counsel; Review pleadings.	\$300.00 hr	0.30	0.30	\$90.00
06/20/2016	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.90	0.90	\$270.00
06/23/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
06/24/2016	Construction Defense	Counsel with Dan.	\$300.00 hr	0.80	0.80	\$240.00
06/27/2016	Construction Defense	Communications with counsel; review documents and pleadings.	\$300.00 hr	0.60	0.60	\$180.00
06/29/2016	Construction Defense	Review documents and pleadings.	\$300.00 hr	0.20	0.20	\$60.00
06/30/2016	Construction Defense	Communications with counsel.	\$300.00 hr	0.10	0.10	\$30.00
07/12/2016	Construction Defense	Communications with counsel; Review documents and pleadings.	\$300.00 hr	0.40	0.40	\$120.00
07/14/2016	Construction Defense	Communications with counsel; Review documents.	\$300.00 hr	0.30	0.30	\$90.00

07/18/2016	Construction Defense	Review pleadings; Communications with counsel.	\$300.00 hr	0.70	0.70	\$210.00
07/20/2016	Construction Defense	Review documents and pleadings.	\$300.00 hr	1.20	1.20	\$360.00
07/22/2016	Construction Defense	Review opinion and advise re mediation.	\$300.00 hr	0.70	0.70	\$210.00
Total Labor For C. Tom Arkoosh				60.30	60.30	\$17,910.00
Total Expense For C. Tom Arkoosh					\$0.00	\$0.00
Total For C. Tom Arkoosh						\$17,910.00

Cam Purchase

08/12/2015	Construction Defense	Pleadings to clerk and return envelope.	\$1.19 ea	1.00	\$1.19	\$1.19
09/30/2015	Construction Defense	Pleadings to counsel	\$3.53 ea	1.00	\$3.53	\$3.53
10/20/2015	Construction Defense	Letter to all counsel	\$1.94 ea	1.00	\$1.94	\$1.94
03/23/2016	Construction Defense	Deposition of Kevin Batchelor on March 10, 2016	\$338.07 ea	1.00	\$338.07	\$338.07
03/23/2016	Construction Defense	Deposition of Nancy Gentry-Boyd on March 9, 2016	\$606.32 ea	1.00	\$606.32	\$606.32
03/25/2016	Construction Defense	Deposition of Chris Kirk on March 10, 2016	\$445.20 ea	1.00	\$445.20	\$445.20
03/28/2016	Construction Defense	Deposition of Todd McKenna on March 11, 2016	\$380.75 ea	1.00	\$380.75	\$380.75
03/28/2016	Construction Defense	Deposition of Eric Waite on March 14, 2016	\$279.31 ea	1.00	\$279.31	\$279.31
03/28/2016	Construction Defense	Deposition of Beau Value on March 11, 2016	\$750.69 ea	1.00	\$750.69	\$750.69
03/30/2016	Construction Defense	Deposition of Michael Longmire on March 14, 2016	\$238.18 ea	1.00	\$238.18	\$238.18
03/31/2016	Construction Defense	Deposition of Edmond Petrus, Jr. on March 15, 2016	\$700.55 ea	1.00	\$700.55	\$700.55
05/13/2016	Construction Defense	Copy of records from Valley County Clerk	\$13.00 ea	1.00	\$13.00	\$13.00
05/20/2016	Construction Defense	Mileage from McCall to Valley County Courthouse to file MSJ.	\$30.24 ea	1.00	\$30.24	\$30.24
05/20/2016	Construction Defense	900 pages of exhibits for MSJ Motion	\$135.00 ea	1.00	\$135.00	\$135.00
05/20/2016	Construction Defense	Postage	\$7.35 ea	1.00	\$7.35	\$7.35
06/01/2016	Construction Defense	Deposition of Michael Wood	\$311.16 ea	1.00	\$311.16	\$311.16
06/02/2016	Construction Defense	Deposition of Mark Birrer	\$194.46 ea	1.00	\$194.46	\$194.46
Total Labor For Cam Purchase				0.00	0.00	\$0.00
Total Expense For Cam Purchase					\$4,436.94	\$4,436.94
Total For Cam Purchase						\$4,436.94

Dan Nevins

10/27/2014	Construction Defense	Communication with Plaintiff's counsel.	\$250.00 hr	0.10	0.10	\$25.00
10/29/2014	Construction Defense	Communications with plaintiff's counsel to discuss discovery and settlement.	\$250.00 hr	0.50	0.50	\$125.00
10/31/2014	Construction Defense	Review Answer and defenses filed by (McKenna/Homecraft).	\$250.00 hr	0.50	0.50	\$125.00
11/13/2014	Construction Defense	Email from plaintiff's counsel.	\$250.00 hr	0.10	0.10	\$25.00
11/17/2014	Construction Defense	Emails with plaintiff's counsel.	\$250.00 hr	0.20	0.20	\$50.00
12/02/2014	Construction Defense	Email to client.	\$250.00 hr	0.10	0.10	\$25.00
12/08/2014	Construction Defense	Communications with Counsel.	\$250.00 hr	0.30	0.30	\$75.00
12/10/2014	Construction Defense	Analyze discovery responses from plaintiff.	\$250.00 hr	1.50	1.50	\$375.00
12/10/2014	Construction Defense	Review motion to compel and sanction rules and caselaw for evasive or incomplete answers in discovery.	\$250.00 hr	0.60	0.60	\$150.00
01/06/2015	Construction Defense	Comm with client.	\$250.00 hr	0.10	0.10	\$25.00
01/22/2015	Construction Defense	Communications with client. Attend status conference.	\$250.00 hr	0.50	0.50	\$125.00
02/19/2015	Construction Defense	Communications with counsel (S. Millmann).	\$250.00 hr	0.30	0.30	\$75.00
03/12/2015	Construction Defense	Attend scheduling conference; communications with client.	\$250.00 hr	0.80	0.80	\$200.00
03/16/2015	Construction Defense	Reviewing correspondence and discovery responses from Plaintiff to Boyd.	\$250.00 hr	0.80	0.80	\$200.00

03/19/2015	Construction Defense	Review scheduling order from court; conference with staff regarding discovery, experts, and other calendaring issues; conference with counsel regarding trial and defense strategy; notes to file.	\$250.00 hr	0.90	0.90	\$225.00
03/20/2015	Construction Defense	Review correspondence and documents received from opposing counsel; conference with staff regarding discovery and calendaring; conference with counsel regarding motion to compel and judge Scott.	\$250.00 hr	0.70	0.70	\$175.00
04/16/2015	Construction Defense	Discuss discovery and motion for summary judgment defense strategy with counsel; review Plaintiff's responses to our initial discovery requests; outline possible requests for admissions to plaintiff for use in motion for summary judgment.	\$250.00 hr	1.70	1.70	\$425.00
06/20/2015	Construction Defense	Initial review and annotation of written discovery requests received from opposing counsel.	\$250.00 hr	1.30	1.30	\$325.00
06/22/2015	Construction Defense	Communications with client.	\$250.00 hr	0.10	0.10	\$25.00
07/07/2015	Construction Defense	Review documents; begin drafting responses to Plaintiff's first discovery requests.	\$250.00 hr	2.00	2.00	\$500.00
07/08/2015	Construction Defense	Meeting with client; Initial review of client documents.	\$250.00 hr	3.00	3.00	\$750.00
07/09/2015	Construction Defense	Review documents; prepare discovery responses; communications with client.	\$250.00 hr	2.70	2.70	\$675.00
07/14/2015	Construction Defense	Meeting with staff re discovery documents.	\$250.00 hr	0.40	0.40	\$100.00
07/15/2015	Construction Defense	Communication with opposing counsel re discovery; communications with staff re discovery and calendaring.	\$250.00 hr	0.30	0.30	\$75.00
07/20/2015	Construction Defense	Calls with M. Pierce and G. Pittenger.	\$250.00 hr	0.30	0.30	\$75.00
07/21/2015	Construction Defense	Communications with defense counsel Pierce.	\$250.00 hr	0.10	0.10	\$25.00
07/22/2015	Construction Defense	Receive and review notice of non-opposition for Gentry-Boyd.	\$250.00 hr	0.10	0.10	\$25.00
07/22/2015	Construction Defense	Communications with counsel.	\$250.00 hr	0.20	0.20	\$50.00
07/22/2015	Construction Defense	Communications with defense counsel.	\$250.00 hr	0.20	0.20	\$50.00
07/22/2015	Construction Defense	Communication with client; communication with opposing counsel.	\$250.00 hr	0.30	0.30	\$75.00
07/23/2015	Construction Defense	Communications with opposing counsel re: Motion to Amend; communications with client and counsel re: same.	\$250.00 hr	0.30	0.30	\$75.00
07/23/2015	Construction Defense	Communications with counsel.	\$250.00 hr	0.30	0.30	\$75.00
07/24/2015	Construction Defense	Receive and review Memorandum and Affidavit in support of Motion for Leave to Amend Complaint.	\$250.00 hr	0.20	0.20	\$50.00
07/27/2015	Construction Defense	Receive and review Notice of Non-Opposition from M. Pierce.	\$250.00 hr	0.10	0.10	\$25.00
08/05/2015	Construction Defense	Receive and review Plaintiff's expert witness disclosure.	\$250.00 hr	0.10	0.10	\$25.00
08/10/2015	Construction Defense	Review discovery documents; finalize drafting of responses to Plaintiff's 1st discovery requests; communications with staff; communications with client.	\$250.00 hr	3.60	3.60	\$900.00
08/12/2015	Construction Defense	Communications with staff and counsel; communications with client re: discovery.	\$250.00 hr	0.40	0.40	\$100.00
08/13/2015	Construction Defense	Communications with McCall P&Z re code amendments; review ordinance; review 2000 residential code re: exterior envelope language.	\$250.00 hr	0.60	0.60	\$150.00
08/17/2015	Construction Defense	Communications with counsel re: strategy; research waiver argument; research intended third party beneficiary argument; research Indemnification argument.	\$250.00 hr	1.70	1.70	\$425.00
08/18/2015	Construction Defense	Review documents; research failure to mitigate by waiving warranty insurance argument.	\$250.00 hr	1.30	1.30	\$325.00
08/21/2015	Construction Defense	Communication with counsel; litigation planning.	\$250.00 hr	0.60	0.60	\$150.00
08/28/2015	Construction Defense	Communication with counsel.	\$250.00 hr	0.30	0.30	\$75.00
08/31/2015	Construction Defense	Communication with counsel.	\$250.00 hr	0.40	0.40	\$100.00
09/10/2015	Construction Defense	Review pleadings; research additional affirmative defenses; research motion to dismiss; call judge's clerk re: order granting plaintiff's motion to amend.	\$250.00 hr	2.50	2.50	\$625.00
09/10/2015	Construction Defense	Communications with client.	\$250.00 hr	0.10	0.10	\$25.00
09/10/2015	Construction Defense	Communications with counsel.	\$250.00 hr	0.20	0.20	\$50.00
09/10/2015	Construction Defense	Communications (interviewing) with possible expert witnesses.	\$250.00 hr	0.60	0.60	\$150.00
09/16/2015	Construction Defense	Litigation planning; research grounds for motion for summary judgment and motion to dismiss; research elements of fraud count and conspiracy count.	\$250.00 hr	3.50	3.50	\$875.00

09/17/2015	Construction Defense	Review discovery documents and outline possible arguments for dismissal and or summary judgment.	\$250.00 hr	3.50	3.50	\$875.00
09/18/2015	Construction Defense	Continued review discovery documents and outline possible arguments for dismissal and or summary judgment.	\$250.00 hr	2.00	2.00	\$500.00
09/22/2015	Construction Defense	Review pleadings; communications with counsel.	\$250.00 hr	0.70	0.70	\$175.00
09/24/2015	Construction Defense	Review correspondence from opp counsel re deposition dates for October.	\$250.00 hr	0.10	0.10	\$25.00
09/25/2015	Construction Defense	Review correspondence from counsel (Millemann and Pierce).	\$250.00 hr	0.20	0.20	\$50.00
09/25/2015	Construction Defense	Review correspondence from counsel (Millemann).	\$250.00 hr	0.10	0.10	\$25.00
09/28/2015	Construction Defense	Communications with counsel for plaintiff.	\$250.00 hr	0.10	0.10	\$25.00
09/29/2015	Construction Defense	Review various emails from counsel re scheduling, depositions, and pre-trial deadlines; review scheduling order re pre-trial deadlines; review Second Amended Complaint and draft revised Answer to add additional affirmative defenses.	\$250.00 hr	1.60	1.60	\$400.00
09/30/2015	Construction Defense	Finalize Answer to Second Amended Complaint; advise staff.	\$250.00 hr	0.70	0.70	\$175.00
09/30/2015	Construction Defense	Communications with counsel for Remax.	\$250.00 hr	0.40	0.40	\$100.00
10/01/2015	Construction Defense	Review Answer (Remax).	\$250.00 hr	0.50	0.50	\$125.00
10/01/2015	Construction Defense	Communications with counsel for Boyd.	\$250.00 hr	0.30	0.30	\$75.00
10/01/2015	Construction Defense	Communications with all counsel re: scheduling and vacating trial.	\$250.00 hr	0.40	0.40	\$100.00
10/01/2015	Construction Defense	Communications with client.	\$250.00 hr	0.40	0.40	\$100.00
10/19/2015	Construction Defense	Communications with client; communications with counsel; correspondence to counsel.	\$250.00 hr	0.90	0.90	\$225.00
10/27/2015	Construction Defense	Receive and review motion and proposed order.	\$250.00 hr	0.20	0.20	\$50.00
10/29/2015	Construction Defense	Receive and review plaintiff's discovery responses to McKenna.	\$250.00 hr	0.50	0.50	\$125.00
10/30/2015	Construction Defense	Receive and review correspondence from Collier to Rudd.	\$250.00 hr	0.10	0.10	\$25.00
10/30/2015	Construction Defense	Receive and review plaintiff's discovery requests to Re/Max.	\$250.00 hr	0.70	0.70	\$175.00
11/02/2015	Construction Defense	Communications with counsel re hearing and deposition scheduling.	\$250.00 hr	0.30	0.30	\$75.00
11/15/2015	Construction Defense	Review prior communications between counsel re deposition scheduling.	\$250.00 hr	0.30	0.30	\$75.00
11/16/2015	Construction Defense	Attend hearing on motion to continue trial; communications with counsel re deposition scheduling; advise staff and counsel re scheduling.	\$250.00 hr	1.20	1.20	\$300.00
11/16/2015	Construction Defense	Communications with counsel; review deposition outlines; review discovery documents; review authority for msj motion.	\$250.00 hr	4.30	4.30	\$1,075.00
11/17/2015	Construction Defense	Communications with client.	\$250.00 hr	0.90	0.90	\$225.00
11/18/2015	Construction Defense	Review documents; deposition prep; communications with counsel.	\$250.00 hr	6.00	6.00	\$1,500.00
11/19/2015	Construction Defense	Review documents; deposition prep.	\$250.00 hr	5.50	5.50	\$1,375.00
11/19/2015	Construction Defense	Deposition prep.	\$250.00 hr	4.50	4.50	\$1,125.00
11/20/2015	Construction Defense	Review documents; deposition prep; communications with counsel.	\$250.00 hr	6.30	6.30	\$1,575.00
11/20/2015	Construction Defense	Receive and review new trial order; confer with staff re calendaring.	\$250.00 hr	0.20	0.20	\$50.00
11/23/2015	Construction Defense	Deposition prep.	\$250.00 hr	5.50	5.50	\$1,375.00
11/23/2015	Construction Defense	Meeting with J. Powell; communications with counsel.	\$250.00 hr	1.30	1.30	\$325.00
11/24/2015	Construction Defense	Communications with opposing counsel regarding cancellation of all previously noticed depositions; communications with counsel; communications with staff and client.	\$250.00 hr	0.70	0.70	\$175.00
11/24/2015	Construction Defense	Communications with counsel re: known and unknown facts and theories.	\$250.00 hr	0.50	0.50	\$125.00
12/10/2015	Construction Defense	Review draft of memos and affidavits supporting motion; communications with counsel re same.	\$250.00 hr	2.50	2.50	\$625.00
01/07/2016	Construction Defense	Communications with counsel.	\$250.00 hr	0.20	0.20	\$50.00
01/08/2016	Construction Defense	Emails with all counsel re: deposition dates and planning; communications with counsel.	\$250.00 hr	0.70	0.70	\$175.00

01/12/2016	Construction Defense	Conference call with all counsel re: deposition dates and planning; communications with counsel and staff re: scheduling and planning.	\$250.00 hr	0.80	0.80	\$200.00
01/18/2016	Construction Defense	Review discovery requests from ReMax to plaintiff.	\$250.00 hr	0.50	0.50	\$125.00
01/28/2016	Construction Defense	Receive and review Subpoena DT to NuVu Glass.	\$250.00 hr	0.20	0.20	\$50.00
02/17/2016	Construction Defense	Communications with opposing counsel re: scheduling.	\$250.00 hr	0.20	0.20	\$50.00
02/22/2016	Construction Defense	Communications with counsel; review depo notices.	\$250.00 hr	0.20	0.20	\$50.00
02/23/2016	Construction Defense	Communications with counsel	\$250.00 hr	0.20	0.20	\$50.00
02/24/2016	Construction Defense	Review Remax and Batchelor discovery responses; notes to file re same.	\$250.00 hr	3.00	3.00	\$750.00
02/26/2016	Construction Defense	Communications with counsel; receive and review pleadings/notices from plaintiff (5); communications with staff.	\$250.00 hr	0.40	0.40	\$100.00
02/26/2016	Construction Defense	Communications with counsel; receive and review pleadings/notices from Millemann (5); Communications with staff.	\$250.00 hr	0.40	0.40	\$100.00
02/29/2016	Construction Defense	Review Notice of Service.	\$250.00 hr	0.10	0.10	\$25.00
02/29/2016	Construction Defense	Receive and review Plaintiff's Responses to Remax and Batchelor's Discovery (Petrus 1-301).	\$250.00 hr	2.50	2.50	\$625.00
03/01/2016	Construction Defense	Receive and review Plaintiff's Second Supplemental Responses to Gentry-Boyd's requests.	\$250.00 hr	0.20	0.20	\$50.00
03/01/2016	Construction Defense	Review Notice of Service.	\$250.00 hr	0.10	0.10	\$25.00
03/03/2016	Construction Defense	Communications with client; communications with L. Vannoy; communications with counsel (Millemann); deposition prep and review of discovery.	\$250.00 hr	6.50	6.50	\$1,625.00
03/07/2016	Construction Defense	Review documents and prepare for depositions; communications with counsel.	\$250.00 hr	8.00	8.00	\$2,000.00
03/08/2016	Construction Defense	Meeting with client re: upcoming depositions; review documents and prepare for depositions; communications with counsel.	\$250.00 hr	8.00	8.00	\$2,000.00
03/09/2016	Construction Defense	Attend deposition of N. Gentry-Boyd; review documents and prepare for client deposition.	\$250.00 hr	8.00	8.00	\$2,000.00
03/10/2016	Construction Defense	Prepare for and attend depositions (client and Batchelor). Additional deposition prep (Value).	\$250.00 hr	11.00	11.00	\$2,750.00
03/13/2016	Construction Defense	Review transcripts; communication with client.	\$250.00 hr	2.50	2.50	\$625.00
03/13/2016	Construction Defense	Prepare for and attend depositions (Value and McKenna).	\$250.00 hr	11.00	11.00	\$2,750.00
03/14/2016	Construction Defense	Prepare for and attend depositions (Walte and Longmire).	\$250.00 hr	7.50	7.50	\$1,875.00
03/15/2016	Construction Defense	Prepere for and attend deposition (Plaintiff).	\$250.00 hr	9.00	9.00	\$2,250.00
03/16/2016	Construction Defense	Organize and review deposition notes and exhibits; advise staff re: drafts of deposition transcripts; begin reviewing and summarizing deposition transcripts.	\$250.00 hr	5.50	5.50	\$1,375.00
03/21/2016	Construction Defense	Communications with counsel.	\$250.00 hr	0.30	0.30	\$75.00
03/22/2016	Construction Defense	Receive and review draft/condensed deposition transcripts of N. Gentry-Boyd and K. Batchelor; give cursory review; communications with staff re: same.	\$250.00 hr	0.60	0.60	\$150.00
03/22/2016	Construction Defense	Communications with client.	\$250.00 hr	0.20	0.20	\$50.00
03/23/2016	Construction Defense	Receive and review final deposition transcripts of K. Batchelor and N. Gentry-Boyd; communications with staff re: witness files.	\$250.00 hr	0.30	0.30	\$75.00
03/25/2016	Construction Defense	Receive and review condensed draft version of client deposition; review same; advise staff.	\$250.00 hr	0.40	0.40	\$100.00
03/28/2016	Construction Defense	Receive and review depo transcript (McKenna); advise staff.	\$250.00 hr	0.30	0.30	\$75.00
03/28/2016	Construction Defense	Receive and review depo transcript (Walte); advise staff.	\$250.00 hr	0.30	0.30	\$75.00
03/28/2016	Construction Defense	Receive and review defendant's expert witness disclosure.	\$250.00 hr	0.10	0.10	\$25.00
03/28/2016	Construction Defense	Receive and review draft depo transcript (Value); advise staff.	\$250.00 hr	0.30	0.30	\$75.00
03/29/2016	Construction Defense	Receive and review final deposition transcripts (McKenna, Walte, Value, and Chris); advise staff; prepare to file expert disclosure.	\$250.00 hr	0.40	0.40	\$100.00
03/29/2016	Construction Defense	Communications with client.	\$250.00 hr	0.80	0.80	\$200.00
03/30/2016	Construction Defense	Receive and review expert disclosures.	\$250.00 hr	0.10	0.10	\$25.00
03/30/2016	Construction Defense	Receive and review deposition transcript (Longmire); advise staff.	\$250.00 hr	0.30	0.30	\$75.00

03/31/2016	Construction Defense	Research builder-vendor liability to purchaser and subsequent purchaser of dwelling for breach of Implied warranty.	\$250.00 hr	3.50	3.50	\$875.00
03/31/2016	Construction Defense	Communications with court reporter re: deposition exhibits; receive and review deposition transcript (Petrus); communication with staff re: casemap.	\$250.00 hr	0.70	0.70	\$175.00
03/31/2016	Construction Defense	Review corrected deposition transcripts (Petrus and Chris).	\$250.00 hr	0.30	0.30	\$75.00
04/01/2016	Construction Defense	Communications with court reporter re: deposition exhibits.	\$250.00 hr	0.10	0.10	\$25.00
04/07/2016	Construction Defense	Communications from court reporter with Longmire certificate.	\$250.00 hr	0.10	0.10	\$25.00
04/08/2016	Construction Defense	Communications with counsel (Collaer).	\$250.00 hr	0.50	0.50	\$125.00
04/11/2016	Construction Defense	Review discovery.	\$250.00 hr	6.50	6.50	\$1,625.00
04/12/2016	Construction Defense	Review discovery; start reviewing deposition transcripts and notes.	\$250.00 hr	5.50	5.50	\$1,375.00
04/13/2016	Construction Defense	Receive and review K. Batchelor's change sheet to his deposition transcript.	\$250.00 hr	0.20	0.20	\$50.00
04/13/2016	Construction Defense	Review and analyze deposition transcripts.	\$250.00 hr	4.00	4.00	\$1,000.00
04/14/2016	Construction Defense	Review and analyze deposition transcripts and exhibits.	\$250.00 hr	5.00	5.00	\$1,250.00
04/15/2016	Construction Defense	Review and analyze deposition transcripts and exhibits.	\$250.00 hr	5.00	5.00	\$1,250.00
04/18/2016	Construction Defense	Research and outline summary judgment facts, introduction, and argument.	\$250.00 hr	5.00	5.00	\$1,250.00
04/19/2016	Construction Defense	Research and draft summary judgment argument.	\$250.00 hr	3.50	3.50	\$875.00
04/22/2016	Construction Defense	Receive and review correspondence from K. Campopiano re: (Value and Waite).	\$250.00 hr	0.10	0.10	\$25.00
05/03/2016	Construction Defense	Communications with defense counsel; advise staff re: hearing date; review documents, research, and drafting (MSJ).	\$250.00 hr	6.60	6.60	\$1,650.00
05/04/2016	Construction Defense	Review docs, research, and drafting (MSJ).	\$250.00 hr	5.60	5.60	\$1,400.00
05/09/2016	Construction Defense	Research and drafting (MSJ).	\$250.00 hr	1.50	1.50	\$375.00
05/10/2016	Construction Defense	Research and drafting (MSJ).	\$250.00 hr	3.30	3.30	\$825.00
05/10/2016	Construction Defense	Communications with counsel.	\$250.00 hr	0.30	0.30	\$75.00
05/10/2016	Construction Defense	Receive and review deposition subpoena DT of Michael Wood; review previous deposition transcripts re: M. Wood.	\$250.00 hr	0.50	0.50	\$125.00
05/10/2016	Construction Defense	Receive and review deposition subpoena DT of Mark Birrer; review previous deposition transcripts re: Mark Birrer.	\$250.00 hr	0.40	0.40	\$100.00
05/11/2016	Construction Defense	Research and drafting (MSJ).	\$250.00 hr	1.40	1.40	\$350.00
05/11/2016	Construction Defense	Communications with counsel.	\$250.00 hr	0.20	0.20	\$50.00
05/12/2016	Construction Defense	Research and drafting (MSJ).	\$250.00 hr	2.00	2.00	\$500.00
05/12/2016	Construction Defense	Review correspondence and copy of MSJ memo (Collaer).	\$250.00 hr	1.00	1.00	\$250.00
05/12/2016	Construction Defense	Review correspondence from counsel.	\$250.00 hr	0.10	0.10	\$25.00
05/13/2016	Construction Defense	Research and drafting (MSJ).	\$250.00 hr	1.60	1.60	\$400.00
05/13/2016	Construction Defense	Review MSJ memo (Collaer).	\$250.00 hr	1.30	1.30	\$325.00
05/16/2016	Construction Defense	Research and drafting (MSJ).	\$250.00 hr	4.50	4.50	\$1,125.00
05/16/2016	Construction Defense	Receive and review Plaintiff's motion for leave to amend complaint with supporting memo and declarations; call with counsel re: same.	\$250.00 hr	0.90	0.90	\$225.00
05/17/2016	Construction Defense	Research and drafting (MSJ); meeting with client.	\$250.00 hr	6.50	6.50	\$1,625.00
05/17/2016	Construction Defense	Receive and review MSJ memo (Gentry-Boyd).	\$250.00 hr	0.30	0.30	\$75.00
05/18/2016	Construction Defense	Research and drafting (MSJ).	\$250.00 hr	6.30	6.30	\$1,575.00
05/18/2016	Construction Defense	Receive and review MSJ memo (Gentry-Boyd).	\$250.00 hr	1.50	1.50	\$375.00
05/19/2016	Construction Defense	Draft and finalize MSJ memo, affidavits, motions; communications with client; communications with staff.	\$250.00 hr	8.00	8.00	\$2,000.00
05/20/2016	Construction Defense	Assemble affidavits, memo, motions, and noh; make copies, secure signatures and notaries, file, deliver to counsel.	\$0 hr	1.00	0.00	\$0.00
05/20/2016	Construction Defense	Final review and final edits to MSJ memo.	\$250.00 hr	1.50	1.50	\$375.00

05/24/2016	Construction Defense	Receive and review Amended Depo Subpoenas (Birrer) and (Wood); advise staff re: calendaring revised dates and notifying client.	\$250.00 hr	0.20	0.20	\$50.00
05/25/2016	Construction Defense	Receive and review correspondence from counsel (Rudd).	\$250.00 hr	0.10	0.10	\$25.00
05/25/2016	Construction Defense	Communications with all counsel re: scheduling.	\$250.00 hr	0.20	0.20	\$50.00
05/25/2016	Construction Defense	Receive and review correspondence from counsel and defendant Remax's joinder in motion to extend time to hear msj.	\$250.00 hr	0.10	0.10	\$25.00
05/26/2016	Construction Defense	Conference call with all counsel; advise staff re: scheduling matters.	\$250.00 hr	0.40	0.40	\$100.00
05/26/2016	Construction Defense	Additional communications with counsel.	\$250.00 hr	0.30	0.30	\$75.00
05/26/2016	Construction Defense	Additional communications with counsel.	\$250.00 hr	0.60	0.60	\$150.00
05/26/2016	Construction Defense	Communications with client.	\$250.00 hr	0.80	0.80	\$200.00
05/27/2016	Construction Defense	Conference call with counsel.	\$250.00 hr	0.30	0.30	\$75.00
05/27/2016	Construction Defense	Receive and review Pl's: (1) motion to amend scheduling order and continue trial; (2) memo in support; (3) declaration of counsel in support; (4) motion to continue hearing date on msj; (5) memo in support; (6) declaration of counsel in support; review record; review procedural rules; outline opposition argument.	\$250.00 hr	2.50	2.50	\$625.00
05/27/2016	Construction Defense	Receive and review correspondence from counsel re: MSJ and Trial scheduling opposition.	\$250.00 hr	0.20	0.20	\$50.00
05/30/2016	Construction Defense	Receive and review affidavit of S. Millemann in opposition to pl's motion to continue.	\$250.00 hr	0.30	0.30	\$75.00
05/31/2016	Construction Defense	Prepare for and attend Pl's emergency hearing for continuance of MSJ hearing.	\$250.00 hr	1.70	1.70	\$425.00
05/31/2016	Construction Defense	Receive and review correspondence from pl's counsel re: building plans and supplemental production; discuss same with client.	\$250.00 hr	0.20	0.20	\$50.00
05/31/2016	Construction Defense	Receive and review NOH and Amended NOH from pl's counsel.	\$250.00 hr	0.10	0.10	\$25.00
06/01/2016	Construction Defense	Review, prepare for, and attend deposition of M. Wood; conference with counsel; communications with client and staff.	\$250.00 hr	4.00	4.00	\$1,000.00
06/01/2016	Construction Defense	Communications with counsel re: document and email production.	\$250.00 hr	0.30	0.30	\$75.00
06/01/2016	Construction Defense	Receive and analyze document production Petrus_Longmire 1-48 from pl's counsel; communications with staff.	\$250.00 hr	1.30	1.30	\$325.00
06/01/2016	Construction Defense	Receive and analyze document production RP 280-451.	\$250.00 hr	2.00	2.00	\$500.00
06/01/2016	Construction Defense	Communications with pl's counsel's office re: discovery production; coordinate with staff.	\$250.00 hr	0.20	0.20	\$50.00
06/01/2016	Construction Defense	Communications with client.	\$250.00 hr	0.40	0.40	\$100.00
06/02/2016	Construction Defense	Review, prepare for, and attend deposition of M. Birrer; conference with counsel; communications with counsel, client, and staff.	\$250.00 hr	6.00	6.00	\$1,500.00
06/02/2016	Construction Defense	Communications with client.	\$250.00 hr	0.90	0.90	\$225.00
06/03/2016	Construction Defense	Communications with counsel re: mediation.	\$250.00 hr	0.20	0.20	\$50.00
06/03/2016	Construction Defense	Receive and review documents from pl's counsel.	\$250.00 hr	0.50	0.50	\$125.00
06/07/2016	Construction Defense	Receive and review deposition transcript of M. Wood.	\$250.00 hr	0.70	0.70	\$175.00
06/08/2016	Construction Defense	Receive and review deposition transcript of M. Birrer.	\$250.00 hr	0.90	0.90	\$225.00
06/08/2016	Construction Defense	Receive and review correspondence from counsel and opposition to pl's motion to file third amended complaint.	\$250.00 hr	0.60	0.60	\$150.00
06/08/2016	Construction Defense	Communications with all counsel re: choice of mediators.	\$250.00 hr	0.40	0.40	\$100.00
06/09/2016	Construction Defense	Additional communications with counsel re: choice of mediators.	\$250.00 hr	0.20	0.20	\$50.00
06/10/2016	Construction Defense	Receive and review of pl's oppositions to all three defendant's msj.	\$250.00 hr	4.50	4.50	\$1,125.00
06/11/2016	Construction Defense	Receive and review language and exhibits of declarations filed by pl in support of MSJ oppositions.	\$250.00 hr	3.50	3.50	\$875.00
06/12/2016	Construction Defense	Analyze pl's opposition briefs; msj research.	\$250.00 hr	6.30	6.30	\$1,575.00
06/13/2016	Construction Defense	MSJ research; msj drafting.	\$250.00 hr	4.60	4.60	\$1,150.00
06/14/2016	Construction Defense	MSJ research; msj drafting; communications with counsel.	\$250.00 hr	5.00	5.00	\$1,250.00
06/16/2016	Construction Defense	MSJ research; msj drafting.	\$250.00 hr	7.00	7.00	\$1,750.00

06/17/2016	Construction Defense	MSJ drafting and editing.	\$250.00 hr	4.50	4.50	\$1,125.00
06/18/2016	Construction Defense	Receive and review Gentry-Boyd msj reply brief.	\$250.00 hr	2.50	2.50	\$625.00
06/18/2016	Construction Defense	Receive and review Remax reply brief and supplemental affidavit.	\$250.00 hr	2.00	2.00	\$500.00
06/18/2016	Construction Defense	MSJ research; MSJ hearing prep; communications with counsel.	\$250.00 hr	2.30	2.30	\$575.00
06/19/2016	Construction Defense	MSJ hearing prep.	\$250.00 hr	3.50	3.50	\$875.00
06/20/2016	Construction Defense	Prepare for and attend MSJ hearing; communications with counsel and client.	\$250.00 hr	7.00	7.00	\$1,750.00
06/21/2016	Construction Defense	Communications with counsel.	\$250.00 hr	0.60	0.60	\$150.00
06/22/2016	Construction Defense	Communications with counsel and client.	\$250.00 hr	0.80	0.80	\$200.00
06/22/2016	Construction Defense	Review and organize MSJ argument notes and file; notes to file re: mediation and trial.	\$250.00 hr	1.60	1.60	\$400.00
06/23/2016	Construction Defense	Communications with opposing counsel; communications with client.	\$250.00 hr	0.30	0.30	\$75.00
06/24/2016	Construction Defense	Review deposition testimony and exhibits; mediation/trial prep.	\$250.00 hr	4.50	4.50	\$1,125.00
06/27/2016	Construction Defense	Communications with counsel; communications with client.	\$250.00 hr	0.60	0.60	\$150.00
06/27/2016	Construction Defense	Review correspondence and documents from counsel (Pierce).	\$250.00 hr	0.20	0.20	\$50.00
06/27/2016	Construction Defense	Communications with counsel; review supplemental briefing filed by P. Collaer.	\$250.00 hr	0.70	0.70	\$175.00
06/28/2016	Construction Defense	Settlement communications with opposing counsel.	\$250.00 hr	0.10	0.10	\$25.00
06/28/2016	Construction Defense	Communications with all counsel re: mediation scheduling.	\$250.00 hr	0.30	0.30	\$75.00
06/28/2016	Construction Defense	Review deposition testimony and exhibits; mediation/trial prep.	\$250.00 hr	2.00	2.00	\$500.00
06/29/2016	Construction Defense	Communications with client.	\$250.00 hr	0.30	0.30	\$75.00
06/29/2016	Construction Defense	Review deposition testimony and exhibits; mediation/trial prep.	\$250.00 hr	1.70	1.70	\$425.00
06/30/2016	Construction Defense	Review deposition testimony and exhibits; mediation/trial prep.	\$250.00 hr	2.60	2.60	\$650.00
07/01/2016	Construction Defense	Communications with client.	\$250.00 hr	0.20	0.20	\$50.00
07/01/2016	Construction Defense	Review deposition testimony and exhibits; mediation/trial prep.	\$250.00 hr	1.40	1.40	\$350.00
07/01/2016	Construction Defense	Communications with opposing counsel.	\$250.00 hr	0.10	0.10	\$25.00
07/02/2016	Construction Defense	Review deposition testimony and exhibits; mediation/trial prep.	\$250.00 hr	1.70	1.70	\$425.00
07/03/2016	Construction Defense	Communications with counsel.	\$250.00 hr	0.10	0.10	\$25.00
07/05/2016	Construction Defense	Communications with counsel.	\$250.00 hr	0.20	0.20	\$50.00
07/05/2016	Construction Defense	Review deposition testimony and exhibits; mediation/trial prep.	\$250.00 hr	3.00	3.00	\$750.00
07/07/2016	Construction Defense	Communications with counsel; communications with staff.	\$250.00 hr	0.20	0.20	\$50.00
07/07/2016	Construction Defense	Communications with client.	\$250.00 hr	0.20	0.20	\$50.00
07/07/2016	Construction Defense	Mediation/trial prep.	\$250.00 hr	2.30	2.30	\$575.00
07/07/2016	Construction Defense	Conference call with all counsel re: scheduling.	\$250.00 hr	0.40	0.40	\$100.00
07/08/2016	Construction Defense	Communications with client; communications with counsel.	\$250.00 hr	0.60	0.60	\$150.00
07/12/2016	Construction Defense	Receipt and review of court's MSJ decision; communications with client; communications with counsel; communications with staff.	\$250.00 hr	4.60	4.60	\$1,150.00
07/14/2016	Construction Defense	Fee recovery research.	\$250.00 hr	1.80	1.80	\$450.00
07/14/2016	Construction Defense	Communications with mediator's office.	\$250.00 hr	0.10	0.10	\$25.00
07/14/2016	Construction Defense	Receive and review witness and exhibit lists from A. Foster and S. Millemann.	\$250.00 hr	0.30	0.30	\$75.00
07/14/2016	Construction Defense	Receive and review witness and exhibit lists from P. Collaer.	\$250.00 hr	0.10	0.10	\$25.00
07/18/2016	Construction Defense	Receive and review motions in limine.	\$250.00 hr	0.30	0.30	\$75.00
07/18/2016	Construction Defense	Communications with counsel re: client as witness.	\$250.00 hr	0.10	0.10	\$25.00

07/20/2016	Construction Defense	Communication with counsel re: common exhibits.	\$250.00 hr	0.20	0.20	\$50.00
07/28/2016	Construction Defense	Review supplemental briefing filed by A. Foster.	\$250.00 hr	0.60	0.60	\$150.00
			Total Labor For Dan Nevala	392.40	391.40	\$97,850.00
			Total Expense For Dan Nevala		\$0.00	\$0.00
			Total For Dan Nevala			\$97,850.00

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10/23/2014	Construction Defense	Communications with Andersen Banducci regarding discovery requests.	\$75.00 hr	0.10	0.10	\$7.50
12/08/2014	Construction Defense	Communications with client; Upload discovery documents produced by Plaintiffs; Notes to counsel.	\$75.00 hr	0.30	0.30	\$22.50
03/13/2015	Construction Defense	Update calendar.	\$75.00 hr	0.10	0.10	\$7.50
06/22/2015	Construction Defense	Obtain, review & scan Notice of Service; Plaintiffs' First Set of Interrogatories and Requests for Production of Documents to Chris Kirk, Todd McKenna and Nancy Gentry-Boyd; Copy to client; Calendar deadline to respond; Notes to counsel.	\$75.00 hr	0.30	0.30	\$22.50
07/14/2015	Construction Defense	Obtain, review & scan client documents.	\$75.00 hr	3.40	3.40	\$255.00
07/15/2015	Construction Defense	Obtain, review & scan client documents; Update calendar with extended deadline to respond to discovery.	\$75.00 hr	1.40	1.40	\$105.00
07/27/2015	Construction Defense	Obtain, review & scan Notice of Non-Opposition; Notes to counsel; Copy to client.	\$75.00 hr	0.20	0.20	\$15.00
08/05/2015	Construction Defense	Obtain, review & scan Plaintiff's Expert Witness Disclosure; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
08/11/2015	Construction Defense	Communications with counsel; Review, revise Responses to Plaintiffs' First Interrogatories and Requests for Production; Bates Stamp documents for production; Communications with client.	\$75.00 hr	0.80	0.80	\$60.00
08/12/2015	Construction Defense	Assemble binder of Plaintiffs' discovery responses; Finalize Responses to Plaintiff's 1st INT & RFP; Copy to client; Notes to counsel.	\$75.00 hr	0.40	0.40	\$30.00
09/28/2015	Construction Defense	Obtain, review and scan correspondence from Jason Rudd.	\$75.00 hr	0.10	0.10	\$7.50
09/30/2015	Construction Defense	Review, revise Answer to Second Amended Complaint; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
09/30/2015	Construction Defense	Revise, finalize, fax file and serve Answer to Second Amended Complaint; Assemble documents for mailing; Copy to client; Notes to counsel.	\$75.00 hr	0.60	0.60	\$45.00
10/09/2015	Construction Defense	Obtain, review and scan Notice of Non-Opposition and Amended Certificate of Service; Draft, fax file and serve Notice of Non-Opposition; Copy to client; Notes to counsel.	\$75.00 hr	0.50	0.50	\$37.50
10/13/2015	Construction Defense	Obtain, review and scan Notice of Errata and Notice of Non-Opposition from Plaintiffs; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
10/19/2015	Construction Defense	Obtain, review and scan correspondence from Jason Rudd and Steven Milleman, Notice of Deposition of Nancy Gentry-Boyd, Notice of 30(b)(6) Depositions of Chris Kirk and Re/Max Resort Realty; Copy to client; Update calendar; Notes to counsel.	\$75.00 hr	0.40	0.40	\$30.00
10/20/2015	Construction Defense	Review, revise and finalize letter to all counsel; Assemble documents for emailing and mailing; Copy to client; Notes to counsel; Obtain, review and scan correspondence from Jason Rudd and Michael Pierce; Update service list.	\$75.00 hr	0.50	0.50	\$37.50
10/27/2015	Construction Defense	Review and scan notes.	\$75.00 hr	0.10	0.10	\$7.50
10/29/2015	Construction Defense	Obtain, review and scan Notice of Service of Discovery, Plaintiffs' First Interrogatories, Requests for Production and Requests for Admission to Defendant Re/Max Resort Realty, and Plaintiffs' First Interrogatories, Requests for Production and Requests for Admission to Defendant Kevin Batchelor; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
10/30/2015	Construction Defense	Obtain, review and scan correspondence from Michael Pierce and McKenna's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
11/02/2015	Construction Defense	Obtain, review and scan Notices of Taking Deposition of Beau Value, Disaster Response LLC, Edward Petrus Jr., and Eric Waite, Subpoenas for Beau Value, Eric Waite and Disaster Response LLC; Update calendar; Copy to client; Notes to counsel; Review correspondence between counsel re: Hearing date.	\$75.00 hr	0.40	0.40	\$30.00
11/13/2015	Construction Defense	Obtain, review and scan correspondence from counsel; Update calendar.	\$75.00 hr	0.20	0.20	\$15.00
11/20/2015	Construction Defense	Update calendar with new deadlines per new pretrial and trial dates; Notes to counsel.	\$75.00 hr	0.50	0.50	\$37.50
11/24/2015	Construction Defense	Obtain, review and scan correspondence from opposing counsel; Update calendar; Notes to counsel.	\$75.00 hr	0.10	0.10	\$7.50

12/03/2015	Construction Defense	Obtain, review and scan Notices of Vacating Depositions of Nancy Gentry-Boyd, Chris Kirk and ReMax; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
01/12/2016	Construction Defense	Communications with counsel; Update calendar.	\$75.00 hr	0.10	0.10	\$7.50
02/08/2016	Construction Defense	Obtain, review and scan Subpoena Duces Tecum to Nu-Vu Glass, Inc.	\$75.00 hr	0.10	0.10	\$7.50
02/29/2016	Construction Defense	Obtain, review and scan Notice of Deposition of Nancy Gentry-Boyd; Notice of Deposition of Chris Kirk; Notice of IRCP Rule 30(b)(6) Deposition of Chris Kirk d/b/a Kirk Enterprises; Notice of Deposition of Kevin Batchelor; Notice of Deposition of Todd McKenna; Notice Duces Tecum of Taking Deposition of Mike Longmire; Notice of Taking Deposition of Beau Value; Notice of Taking Deposition of Eric Waite; Notice of Taking Deposition of Edmond A. Petrus Jr.; Rule 30(b)(6) Notice of Taking Deposition of Disaster Response, LLC (formerly Disaster Pro LLC); Copy to client; Update calendar; Notes to counsel.	\$75.00 hr	0.30	0.30	\$22.50
03/02/2016	Construction Defense	Obtain, review and scan Plaintiffs' Second Supplemented Responses to Defendant Gentry-Boyd's First Interrogatories and Requests for Production, Plaintiffs' Responses to Defendants ReMax Resort Realty and Kevin Batchelor's First Set of Interrogatories and Requests for Production, and two Notices of Service; Copy to client; Notes to counsel.	\$75.00 hr	0.30	0.30	\$22.50
03/08/2016	Construction Defense	Obtain, review and scan discovery documents from Plaintiffs' counsel; Notes to counsel.	\$75.00 hr	0.40	0.40	\$30.00
03/09/2016	Construction Defense	Communications with counsel re: discovery.	\$75.00 hr	0.10	0.10	\$7.50
03/22/2016	Construction Defense	Obtain, review and scan rough drafts of depositions of Kevin McKenna, Kevin Batchelor, Chris Kirk, Nancy Gentry-Boyd, and Beau Value.	\$75.00 hr	0.30	0.30	\$22.50
03/23/2016	Construction Defense	Obtain, review and scan Deposition of Kevin Batchelor and Deposition of Nancy Gentry-Boyd; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
03/29/2016	Construction Defense	Obtain, review and scan deposition of Beau Value, Eric Waite, Todd McKenna and Chris Kirk; Draft Amended Expert Witness Disclosure; Fax file and serve and email to all counsel and Judge; Copy to client; Notes to counsel.	\$75.00 hr	0.70	0.70	\$52.50
03/30/2016	Construction Defense	Obtain, review and scan deposition of Michael Longmire; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
03/31/2016	Construction Defense	Obtain, review and scan corrected deposition of Chris Kirk and deposition of Edmond A. Petrus; Copy to client; notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
04/07/2016	Construction Defense	Obtain, review and scan correspondence M&M Court Reporting and signed certificate to deposition of Michael Longmire; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
04/13/2016	Construction Defense	Obtain, review and scan exhibits to witness depositions and signed certificate of deposition for Kevin Batchelor; upload to Dropbox for copying to client; Communications with court reporter; Notes to counsel.	\$75.00 hr	0.60	0.60	\$45.00
04/22/2016	Construction Defense	Obtain, review and scan correspondence from M&M Court Reporting and signature pages for Eric Waite and Beau Value depositions; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
05/02/2016	Construction Defense	Communications with counsel and clerk re: setting motion for summary judgment hearing.	\$75.00 hr	0.10	0.10	\$7.50
05/04/2016	Construction Defense	Communications with clerk and counsel re: Setting hearing for motion for summary judgment; Update calendar.	\$75.00 hr	0.30	0.30	\$22.50
05/11/2016	Construction Defense	Obtain, review and scan Notice of Firm Name Change and correspondence from M&M Court Reporting; Copy to client; Notes to counsel; Update service list.	\$75.00 hr	0.40	0.40	\$30.00
05/17/2016	Construction Defense	Obtain, review and scan Defendant Gentry Boyd's Motion for Summary Judgment; Memorandum in Support of Defendant Gentry Boyd's Motion for Summary Judgment; Affidavit of Greg Pittenger in Support of Defendant Gentry Boyd's Motion for Summary Judgment; Notice of Hearing for Defendant Gentry Boyd's Motion for Summary Judgment; Copy to client; Update calendar; Notes to counsel.	\$75.00 hr	0.30	0.30	\$22.50
05/18/2016	Construction Defense	Obtain, review and scan Deposition Subpoena Duces Tecum to Mark Birrer and Michael Wood; Copy to client; notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
05/19/2016	Construction Defense	Review, revise Affidavit of Chris Kirk in Support of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment; Notes to counsel; Obtain, review and scan Notice of Construction Defect letter; Obtain, review and scan Defendant Nancy Gentry-Boyd's Motion to Extend Time to Hear Summary Judgment Motion, Notice of Hearing on Defendant Nancy Gentry-Boyd's Motion to Extend Time to Hear Summary Judgment Motion, and Proposed Order Granting Defendant Nancy Gentry-Boyd's Motion to Extend Time to Hear Summary Judgment Motion; Update calendar; Copy to client; Notes to counsel.	\$75.00 hr	3.50	3.50	\$262.50
05/20/2016	Construction Defense	Finalize Motion for Summary Judgment, Memorandum in Support, Affidavit of Daniel Nevala and Chris Kirk in Support; Draft and finalize Notice of Hearing and Joinder in	\$75.00 hr	1.70	1.70	\$127.50

Date	Case Type	Description	Rate	Hours	Amount	Balance
		Defendant Gentry-Boyd's Motion for Extension of Time to Hear Summary Judgment Motion; Obtain, review and scan Notice of Hearing on Plaintiff's Motion for Leave to Amend Complaint, Petrus Native Photos; Assemble documents for hand delivery and mailing to counsel; Copy to client; Notes to counsel.				
05/25/2016	Construction Defense	Obtain, review and scan Amended Deposition Subpoenas to Mark Birrer and Michael Wood, correspondence from Phil Collaer, Joinder to Defendants Nancy Gentry-Boyd and Chris Kirk's Motion to Extend Time to Hear Summary Judgment Motion; Update calendar; Copy to client; Notes to counsel.	\$75.00 hr	0.40	0.40	\$30.00
05/31/2016	Construction Defense	Review correspondence from counsel and clerk; Update calendar; Obtain, review and scan Plaintiffs' Motion to Amend Scheduling Order and Continue Trial, Plaintiffs' Memorandum in Support of Motion to Amend Scheduling Order and Continue Trial, Declaration of Alyson A. Foster in Support of Plaintiffs' Motion to Amend Scheduling Order and Continue Trial, Plaintiffs' Motion to Continue Hearing Date on Motions for Summary Judgment, Plaintiffs' Memorandum in Support of Motion to Continue Hearing Date on Motions for Summary Judgment, Affidavit of Alyson A. Foster in Support of Plaintiffs' Motion to Continue Hearing Date on Motions for Summary Judgment, Notice of Hearing, Amended Notice of Hearing; Update calendar; Copy to client; Notes to counsel.	\$75.00 hr	0.70	0.70	\$52.50
06/01/2016	Construction Defense	Communications with counsel.	\$75.00 hr	0.20	0.20	\$15.00
06/07/2016	Construction Defense	Obtain, review and scan transcripts for deposition of Mark Birrer and Michael Wood and correspondence and invoices from M&M Court Reporting; Copy to client; Notes to counsel	\$75.00 hr	0.30	0.30	\$22.50
06/08/2016	Construction Defense	Obtain, review and scan correspondence from Phil Collaer's office enclosing the Defendants ReMax Resort Realty and Kevin Batchelor's Opposition to Plaintiffs' Motion for Leave to File Third Amended Complaint and additional discovery from plaintiffs; Copy to client; Notes to counsel.	\$75.00 hr	0.30	0.30	\$22.50
06/10/2016	Construction Defense	Obtain, review and scan Plaintiffs' Opposition to Defendant Gentry-Boyd's Motion for Summary Judgment, Plaintiffs' Opposition to Defendant Kirk's Motion for Summary Judgment, Plaintiffs' Opposition to Defendant Re/Max's Motion for Summary Judgment, Declaration of Michael Longmire, Edmond Petrus, Beau Value and Alyson Foster in Opposition to Defendants' Motions for Summary Judgment; Copy to client; Notes to counsel.	\$75.00 hr	0.40	0.40	\$30.00
06/20/2016	Construction Defense	Review correspondence from counsel re: Reply Brief and Supplemental Affidavit; OCR scan both documents; Communications with counsel re: file stamped copies; Obtain, review and scan Reply Memorandum in Support of Defendants' Motion for Summary Judgment (Re/Max & Batchelor); Supplemental Affidavit of Phillip J. Collaer in Support of Defendants' Motion for Summary Judgment (Re/Max & Batchelor); Plaintiffs' Reply in Support of Motion for Leave to File Third Amended Complaint; Notice of Errata Regarding Plaintiffs' Motion for Leave to File Third Amended Complaint; Defendant McKenna's Supplemental Answers to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents; Notice of Service of Supplemental Responses to Discovery Requests; Defendant Nancy Gentry-Boyd's Reply Memorandum in Support of Motion for Summary Judgment; Affidavit of Steven J. Millemann in Support of Defendant Nancy Gentry-Boyd's Motion for Summary Judgment; Copy to client; Notes to counsel.	\$75.00 hr	0.60	0.60	\$45.00
06/22/2016	Construction Defense	Review correspondence between counsel re: Mediation dates; Update calendar.	\$75.00 hr	0.10	0.10	\$7.50
06/23/2016	Construction Defense	Obtain, review and scan correspondence from client re: Physician visits.	\$75.00 hr	0.10	0.10	\$7.50
06/27/2016	Construction Defense	Obtain, review and scan correspondence from Michael Pierce with Todd McKenna's Verizon bill; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
06/27/2016	Construction Defense	Obtain, review and scan correspondence from Phillip Collaer and Re/Max Defendants' Supplemental Briefing in Support of Motion for Summary Judgment; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
06/29/2016	Construction Defense	Obtain, review and scan Order Amending Case Schedule; Copy to client; Update calendar; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
07/05/2016	Construction Defense	Review and scan counsel's counteroffer email to Alyson Foster.	\$75.00 hr	0.10	0.10	\$7.50
07/07/2016	Construction Defense	Communications with counsel; Update calendar; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
07/12/2016	Construction Defense	Communications with counsel re: depositions of Mark Birrer and Michael Wood; Obtain, review and scan Memorandum Decision and Order and deposition exhibits to depositions of Birrer and Wood; Copy to client; notes to counsel.	\$75.00 hr	0.40	0.40	\$30.00
07/14/2016	Construction Defense	Review and scan counsel's email to Sherry Montosa re: mediation and summary judgment prevailment.	\$75.00 hr	0.10	0.10	\$7.50

07/18/2016	Construction Defense	Obtain, review and scan correspondence from Phillip Collaer, exhibit and witness lists; Copy to client; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
07/20/2016	Construction Defense	Obtain, review and scan Correspondence from M&M Court Reporting; Correspondence from Phillip Collaer; Motion for Reconsideration Re: Re/Max Resort Realty and Kevin Batchelor; Memorandum in Support of Defendants Re/Max Resort Realty and Kevin Batchelor's Motion for Reconsideration; Notice of Hearing; Plaintiffs' Motion in Limine to Bar Questioning, Argument and Evidence Regarding Impermissible Character Evidence and Irrelevant or Prejudicial Topics; Notice of Hearing; Defendant Nancy Gentry-Boyd's First Set of Motions in Limine; Memorandum in Support of Defendant Nancy Gentry-Boyd's First Set of Motions in Limine; Notice of Hearing on Defendant Nancy Gentry-Boyd's First Set of Motions in Limine; Common exhibits spreadsheet; Copy to client (x2); Update calendar; Notes to counsel.	\$75.00 hr	0.70	0.70	\$52.50
07/25/2016	Construction Defense	Obtain, review and scan Amended Notice of Hearing; Copy to client; Update calendar; Notes to counsel.	\$75.00 hr	0.20	0.20	\$15.00
07/26/2016	Construction Defense	Obtain, review and scan Re/Max Defendants' First Set of Motions in Limine and Memorandum in Support of Re/Max Defendants' First Set of Motions in Limine and Defendant Nancy Gentry-Boyd's Memorandum in Response to Plaintiffs' Motion in Limine to Bar Questioning, Argument, and Evidence Regarding Impermissible Character Evidence and Irrelevant or Prejudicial Topics and Invoice from Disaster Response; Copy to client; Notes to counsel.	\$75.00 hr	0.40	0.40	\$30.00
07/27/2016	Construction Defense	Obtain, review and scan correspondence from Heather Potts; Copy to client; Notes to counsel.	\$75.00 hr	0.10	0.10	\$7.50
Total Labor For Erin Cecil				28.10	28.10	\$2,107.50
Total Expense For Erin Cecil					\$0.00	\$0.00
Total For Erin Cecil						\$2,107.50

James Stoll

09/16/2015	Construction Defense	Litigation strategy meeting.	\$200.00 hr	0.70	0.70	\$140.00
09/17/2015	Construction Defense	Review Plaintiff's responses to Boyd's first discovery requests.	\$200.00 hr	1.20	1.20	\$240.00
10/28/2015	Construction Defense	Review Plaintiff's responses to written discovery.	\$200.00 hr	0.50	0.50	\$100.00
11/02/2015	Construction Defense	Review Plaintiff's first discovery requests to K. Batchelor.	\$200.00 hr	0.60	0.60	\$120.00
11/02/2015	Construction Defense	Review Plaintiff's first discovery requests to Re/Max Resort Realty.	\$200.00 hr	0.60	0.60	\$120.00
11/02/2015	Construction Defense	Review multiple notice pleadings received from Plaintiffs' counsel.	\$200.00 hr	0.20	0.20	\$40.00
11/04/2015	Construction Defense	Strategy meeting re: litigation/deposition preparation and motion practice.	\$200.00 hr	0.50	0.50	\$100.00
11/05/2015	Construction Defense	Deposition preparation for Plaintiff's expert witness.	\$200.00 hr	5.00	5.00	\$1,000.00
11/06/2015	Construction Defense	Draft deposition outline re: B. Value.	\$200.00 hr	1.60	1.60	\$320.00
11/06/2015	Construction Defense	Review pleadings/documents in preparation for depositions.	\$200.00 hr	2.40	2.40	\$480.00
11/06/2015	Construction Defense	Review relevant case law re: limitations to implied warranty of habitability.	\$200.00 hr	2.00	2.00	\$400.00
11/10/2015	Construction Defense	Draft deposition outline re: Plaintiff's expert.	\$200.00 hr	3.80	3.80	\$760.00
11/11/2015	Construction Defense	Research Idaho case law re: fraud or civil conspiracy cause of action.	\$200.00 hr	2.80	2.80	\$560.00
11/11/2015	Construction Defense	Cont. drafting outline for expert deposition.	\$200.00 hr	1.30	1.30	\$260.00
11/12/2015	Construction Defense	Review legal standards and relevant case law re: motion for summary judgment.	\$200.00 hr	5.00	5.00	\$1,000.00
11/13/2015	Construction Defense	Review correspondence from opposing counsel re: deposition dates.	\$200.00 hr	0.20	0.20	\$40.00
11/13/2015	Construction Defense	Outline motion for summary judgment arguments.	\$200.00 hr	3.40	3.40	\$680.00
11/16/2015	Construction Defense	Draft motion for partial summary judgment.	\$200.00 hr	3.30	3.30	\$660.00
11/17/2015	Construction Defense	Research Idaho case law re: fraudulent concealment.	\$200.00 hr	4.00	4.00	\$800.00
11/17/2015	Construction Defense	Cont. drafting memorandum in support of motion for partial summary judgment.	\$200.00 hr	2.20	2.20	\$440.00
11/17/2015	Construction Defense	Draft deposition outline re: Petrus.	\$200.00 hr	3.00	3.00	\$600.00
11/18/2015	Construction Defense	Draft deposition outline for Petrus.	\$200.00 hr	3.00	3.00	\$600.00
11/19/2015	Construction Defense	Review discovery documents for purposes of deposition outline re: Petrus.	\$200.00 hr	2.20	2.20	\$440.00
11/20/2015	Construction Defense	Cont. drafting deposition outline.	\$200.00 hr	2.40	2.40	\$480.00

11/20/2015	Construction Defense	Cont. drafting memorandum in support of partial summary judgment re: fraud.	\$200.00 hr	2.00	2.00	\$400.00
11/25/2015	Construction Defense	Review correspondence from opposing counsel re: cancellation of depositions.	\$200.00 hr	0.10	0.10	\$20.00
11/25/2015	Construction Defense	Meeting re: cancellation of depositions.	\$200.00 hr	0.10	0.10	\$20.00
12/07/2015	Construction Defense	Review relevant Idaho case law re; legal standards for dismissal on basis that Plaintiff failed to state a valid claim.	\$200.00 hr	2.50	2.50	\$500.00
12/07/2015	Construction Defense	Outline argument re: dismissal on basis that Plaintiff failed to state a valid claim.	\$200.00 hr	2.00	2.00	\$400.00
12/07/2015	Construction Defense	Draft arguments re: motion to dismiss for failure to state claim.	\$200.00 hr	2.50	2.50	\$500.00
12/08/2015	Construction Defense	Outline and draft Kirk affidavit.	\$200.00 hr	2.30	2.30	\$460.00
12/08/2015	Construction Defense	Review Defendant McKenna's answer to second amended complaint.	\$200.00 hr	0.30	0.30	\$60.00
12/08/2015	Construction Defense	Review Defendant Gentry-Boyd's answer to second amended complaint.	\$200.00 hr	0.30	0.30	\$60.00
12/08/2015	Construction Defense	Revise memorandum in support of motion to dismiss and or for partial summary judgment.	\$200.00 hr	2.50	2.50	\$500.00
12/08/2015	Construction Defense	Outline and draft affidavit of Gentry-Boyd in support of motion to dismiss and or for partial summary judgment.	\$200.00 hr	0.70	0.70	\$140.00
12/28/2015	Construction Defense	Review Re/Max Resort Realty and K. Batchelor's responses to Pitt's first discovery requests, and review of documents disclosed.	\$200.00 hr	2.00	2.00	\$400.00
Total Labor For James Stoll				69.20	69.20	\$13,840.00
Total Expense For James Stoll					\$0.00	\$0.00
Total For James Stoll						\$13,840.00

Morgan Skyles						
10/30/2014	Construction Defense	Obtain, review & scan; Copy to Client	\$75.00 hr	0.10	0.10	\$7.50
12/08/2014	Construction Defense	Obtain, review & scan; Copy to client	\$75.00 hr	0.20	0.20	\$15.00
12/30/2014	Construction Defense	Obtain, review & scan; copy to client	\$75.00 hr	0.10	0.10	\$7.50
03/16/2015	Construction Defense	obtained, reviewed & scanned discovery responses; CC: client	\$75.00 hr	0.20	0.20	\$15.00
03/19/2015	Construction Defense	obtain, review and scan scheduling order, CC to Client; schedule deadlines	\$75.00 hr	0.60	0.60	\$45.00
04/29/2015	Construction Defense	Obtain Review and Scan Order Resetting Pretrial; Schedule Deadlines; copy to client	\$75.00 hr	0.20	0.20	\$15.00
07/13/2015	Construction Defense	obtain, review and scan Motion for Leave to Amend Complaint; copy to client	\$75.00 hr	0.10	0.10	\$7.50
07/24/2015	Construction Defense	Obtain, review and scan Memorandum ISO Motion for Leave to Amend Complaint; Affidavit of Jason Rudd ISO Motion for Leave to Amend Complaint; copy to client.	\$75.00 hr	0.20	0.20	\$15.00
08/12/2015	Construction Defense	Prepare Notice of Service; Print and Assemble Discovery Responses and Notice of Service for Signature; Upload Discovery Responses onto CD; hand deliver Discovery Responses to Andersen Banducci.	\$75.00 hr	0.40	0.40	\$30.00
08/31/2015	Construction Defense	Obtain, review, and scan Defendant Nancy Gentry Boyd's Responses to Plaintiff's First Set of INT, & RFP; Notice of Service; upload disk to file; copy to client.	\$75.00 hr	0.10	0.10	\$7.50
09/09/2015	Construction Defense	Obtain, review and scan Defendant's Nancy Gentry-Boyd's Expert Witness Disclosure; copy to client	\$75.00 hr	0.10	0.10	\$7.50
09/14/2015	Construction Defense	Communication with counsel; prepare and finalize Defendant's Expert Witness Disclosure; fax file and serve to opposing counsel; copy to client.	\$75.00 hr	0.30	0.30	\$22.50
09/17/2015	Construction Defense	Obtain, review and scan Order Granting Plaintiffs' Motion for leave to Amend Complaint; copy to client.	\$75.00 hr	0.10	0.10	\$7.50
09/22/2015	Construction Defense	Obtain, review and scan Second Amended Complaint and Demand for Jury Trial; Summons- Kevin Batchelor; Summons- Re/Max Resort Realty; Copy to Client	\$75.00 hr	0.20	0.20	\$15.00
09/25/2015	Construction Defense	Obtain, review and scan Notice of Appearance; copy to client	\$75.00 hr	0.10	0.10	\$7.50
09/28/2015	Construction Defense	Communication w/ opposing counsel regarding conference call; update calendar; communications w/ counsel.	\$75.00 hr	0.20	0.20	\$15.00
10/01/2015	Construction Defense	Obtain, review and scan Answer and Demand for Jury Trial; copy to client	\$75.00 hr	0.10	0.10	\$7.50
10/05/2015	Construction Defense	Obtain, review and scan Motion to Continue Trial & Schedule Status Conference; Affidavit of Phillip Collier ISO Defendants' Motion to Continue Trial & Schedule Status Conference; copy to client	\$75.00 hr	0.10	0.10	\$7.50
10/08/2015	Construction Defense	Obtain, review and scan Notice of Non Opposition; copy to client.	\$75.00 hr	0.10	0.10	\$7.50
10/16/2015	Construction Defense	Obtain, review and scan Motion to Request Telephonic Hearing to Continue Trial & Schedule Status Conference; Proposed Order Re Motion to Request Telephonic Hearing to Continue Trial & Schedule Status Conference; copy to client.	\$75.00 hr	0.10	0.10	\$7.50

10/28/2015	Construction Defense	Obtain, review and scan Petrus's Answers to McKenna; copy to client.	\$75.00 hr	0.10	0.10	\$7.50
11/05/2015	Construction Defense	Obtain, review and scan Notice of Telephonic Hearing to Continue Trial and Schedule Status Conference; update calendar; copy to client	\$75.00 hr	0.20	0.20	\$15.00
11/18/2015	Construction Defense	Obtain review and scan Order Resetting Trial and Pretrial; copy to client; update calendar	\$75.00 hr	0.20	0.20	\$15.00
11/19/2015	Construction Defense	Obtain, review and scan Amended Notice of Taking Deposition of Edmond Petrus Jr.; copy to client; update calendar	\$75.00 hr	0.10	0.10	\$7.50
11/30/2015	Construction Defense	Obtain, review and scan Nancy Gentry-Boyd's Answer to Second Amended Complaint and Demand for Jury Trial; copy to client.	\$75.00 hr	0.10	0.10	\$7.50
12/04/2015	Construction Defense	Obtain, review and scan Todd McKenna's Answer to Second Amended Complaint and Demand for Jury Trial; copy to client.	\$75.00 hr	0.10	0.10	\$7.50
12/23/2015	Construction Defense	Obtain, review and scan Defendant's ReMax & Kevin Bachelors Responses; communication w/ counsel.	\$75.00 hr	0.20	0.20	\$15.00
01/14/2016	Construction Defense	Obtain review and scan Notice of Service and Defendant ReMax & Kevin Bachelor's First Set of Interrogatories and Request for Production of Documents to Plaintiffs; copy to client.	\$75.00 hr	0.20	0.20	\$15.00
01/19/2016	Construction Defense	Obtain review and scan Notice of Service, and Defendant's Supplemental Answers and Responses to Plaintiff's 1st Interrogatories, Requests for Production and Requests for Admissions; copy to client	\$75.00 hr	0.10	0.10	\$7.50
01/20/2016	Construction Defense	Obtain, review and scan Notice of Discovery; ReMax's & Kevin Bachelor's Supplemental INT, RFA, RFP; copy to client.	\$75.00 hr	0.10	0.10	\$7.50
Total Labor For Morgan Skyles				5.00	5.00	\$375.00
Total Expense For Morgan Skyles					\$0.00	\$0.00
Total For Morgan Skyles						\$375.00
Total Labor For Kirk, Chris				555.00	554.00	\$132,082.50
Total Expense For Kirk, Chris					\$4,436.94	\$4,436.94
Total For Kirk, Chris						\$136,519.44
Grand Total Labor				555.00	554.00	\$132,082.50
Grand Total Expenses					\$4,436.94	\$4,436.94
Grand Total						\$136,519.44

of habitability Kirk gave when he built the home and sold it to Gentry had already expired when Petrus purchased the home from Gentry about seven years after its completion. Based on that ruling, judgment was entered for Kirk on November 15, 2016.

Petrus filed a timely motion to reconsider on November 28, 2016, as well as a supporting memorandum the next day, and Petrus arranged with the Clerk of Court for a hearing on that motion at 1:30 p.m. January 9, 2017. The Court's usual practice with respect to motions to reconsider, however, is to act on them without a hearing if the moving papers do not cause the Court to doubt the correctness of its ruling. That way, the parties, who already incurred the expense of one round of briefing and argument on an issue, are spared the expense of a second round that won't change the outcome. This approach is, of course, permitted by rule. *See* I.R.C.P. 7(b)(3)(F) ("If oral argument has been requested on any motion, the court may deny oral argument by written or oral notice from the court at least 1 day prior to the hearing."). It is the approach the Court will take here because, after carefully considering Petrus's arguments for reconsideration, the Court is not persuaded that there is reason to do so.

Petrus's first argument for reconsideration is that the Court's ruling conflicts with the holding in *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987), that privity of contract with the builder isn't required for a secondary purchaser of a home to assert a claim against the builder for breach of the implied warranty of habitability. (Mem. Supp. Mot. Reconsider 4.) In fact, however, the Court followed that holding. (Mem. Decision & Order 10.) Petrus's claim failed not because privity of contract with Kirk was absent, but instead because the claim was time-barred. (Mem. Decision & Order 10-13.) Petrus's beef is with the Court's treatment of the claim as a contract claim, using the accrual rule and statute of limitations that apply to contract claims in the construction context, despite the absence of privity. As the Court

previously explained, that approach is in keeping with *Tusch*, as the *Tusch* court plainly regarded the newly recognized claim as sounding in contract. (Mem. Decision & Order 11-12.) Indeed, for the express purpose of giving “contract principles . . . a freer hand” in this setting, the *Tusch* court followed the advice of Prosser and Keeton for ““elimination of [the privity-of-contract] requirement for recovery on a contract-warranty theory.””¹ *Id.* at 50 & n.8, 740 P.2d at 1035 & n.8 (quoting Prosser & Keeton, *The Law of Torts* § 101 (5th ed. 1984)). Had the *Tusch* court’s intention been to recognize a new tort claim, eliminating the privity requirement wouldn’t have been necessary, as privity of contract isn’t a requirement of tort law.²

Petrus also argues that *Tusch* contains accrual language that is inconsistent with the completion-of-construction accrual rule set forth in I.C. § 5-241(b), and that the Court’s ruling

¹ Similar to *Tusch*, Article 2 of the Uniform Commercial Code (the sale-of-goods article) makes breach-of-warranty claims available to some people who lack privity of contract with the seller. I.C. § 28-2-318. These people may sue in contract to enforce the warranties, despite the absence of privity of contract between them and the seller. I.C. § 28-2-318 cmt. 2 (“The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to ‘privity.’ It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller’s warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used [A]ny beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.”). Thus, breach-of-warranty claims sounding in contract, even when available in the absence of privity of contract, isn’t a novel concept.

² Petrus incorrectly suggests that Justice Bakes’ dissent in *Tusch* shows he understood the newly recognized claim to sound in tort. (Mem. Supp. Mot. Reconsider 6.) To the contrary, Justice Bakes began his dissent by stating his understanding that the majority “holds, in effect that a builder is liable in a contract action to a remote purchaser of housing even though no contract exists between the two persons.” *Tusch*, 113 Idaho at 51, 740 P.2d at 1036 (emphasis added) (Bakes, J., concurring in part and dissenting in part). He went on to lament the creation of “a contract cause of action for breach of implied warranty with its privity requirement removed.” *Id.* at 52, 740 P.2d at 1037 (emphasis added) (Bakes, J., concurring in part and dissenting in part). The language on which Petrus relies reflects Justice Bakes’ view that a contract action without a privity requirement is a contradiction in terms, so any such action is really a tort action. It doesn’t reflect his view of what the majority intended to accomplish.

improperly provides for expiration of the implied warranty of habitability before Petrus even purchased the home. (Mem. Supp. Mot. Reconsider 5, 9-11.) First, there is no definitive inconsistency. There is only an arguable one, as the *Tusch* language to which Petrus points is vague. Regardless, even if that language were definitively inconsistent with I.C. § 5-241(b), it is mere dictum, as *Tusch* wasn't decided based on the statute of limitations and didn't involve determining when the secondary buyer's claim accrued. If Petrus's claim indeed is a contract claim, as the Court holds, I.C. § 5-241(b) supplies the accrual rule as a matter of its plain language. The statute controls, irrespective of any inconsistent dictum. Second, the legislature has the power to provide for accrual of contract claims upon completion of construction, even though in other contexts accrual awaits the suffering of damage, and even though that means the implied warranty of habitability given by Kirk to owners of the home he built for Gentry had expired before Petrus purchased it. The legislature has the power to adopt an accrual rule having the effect of rendering implied-warranty-of-habitability claims unavailable to secondary purchasers purchasing homes several years after completion of construction.

Petrus also argues that it is "strained" and "unnatural" to treat a secondary home purchaser as the mere transferee of the implied warranty of habitability given by the builder to the original home purchaser, as opposed to the recipient of a new and distinct implied warranty of habitability. (Mem. Supp. Mot. Reconsider 7-9.) The Court disagrees. Reasonable people might disagree about the length of time the implied warranty of habitability should last, but there is no good reason its length should vary based on whether a home changes hands after its construction is completed. Gentry kept the home throughout the four-year duration of the implied warranty of habitability produced by the combination I.C. § 5-241(b)'s completion-of-construction accrual rule and I.C. § 5-217's four year limitations period for oral contracts, so it

expired before Petrus purchased the home. Had Petrus instead purchased the home during the warranty period, Petrus would have been, in effect, the transferee of the remaining warranty, given the *Tusch* court's decision to extend the warranty to secondary purchasers. This regime reasonably gives builders certainty as to when their warranty obligations expire, irrespective of whether and when the homes they build are resold by the original buyers.

Petrus next argues that section 6-1-16 of the Valley County Building Code, which creates a cause of action for persons damaged by Building Code violations, undermines the Court's ruling that claims like his are subject to I.C. § 5-241(b)'s completion-of-construction accrual rule. (Mem. Supp. Mot. Reconsider 11-12.) Petrus's argument on this point isn't sensible. As Petrus acknowledges, that ordinance hadn't yet been enacted when Kirk built Gentry's home. For that and other reasons, Petrus hasn't established that section 6-1-16 of the Building Code has any application to this situation. Indeed, Petrus didn't assert a claim under section 6-1-16 or any other portion of the Building Code; he asserted a common-law claim for breach of the implied warranty of habitability. That cause of action is available to home purchasers throughout the State of Idaho, not just to those in Valley County. The applicable accrual rule shouldn't be determined by reference to county ordinances, as that approach would senselessly create the potential for different accrual rules in different counties.

Finally, Petrus takes issue with a footnote in which the Court observed that, if a claim for breach of the implied warranty of habitability sounded in tort rather than in contract, it would be barred by the "economic loss rule." (Mem. Supp. Mot. Reconsider 12-14.) That conclusion readily follows from the *Tusch* court's holding that the secondary home purchaser's claim against the builder for negligent design and construction was barred by the "economic loss rule." 113 Idaho at 40-41, 740 P.2d at 1025-26. If Petrus's claim for breach of the implied warranty of

habitability sounds in tort, as Petrus contends, the claim is analogous to the negligent-design-and-construction claim asserted in *Tusch*, so it seemingly would have to suffer the same fate. Petrus suggests that isn't the case because, in *Tusch*, the secondary home purchaser's claim for breach of the implied warranty of habitability survived the "economic loss rule." Of course it did; the "economic loss rule" is inapplicable to contract claims, and a contract claim is exactly what the *Tusch* court intended to allow. Again, for the express purpose of giving "contract principles . . . a freer hand" in this setting, the *Tusch* court followed the advice of Prosser and Keeton for "elimination of [the privity-of-contract] requirement for recovery on a contract-warranty theory." *Id.* at 50 & n.8, 740 P.2d at 1035 & n.8 (quoting Prosser & Keeton, *The Law of Torts* § 101 (5th ed. 1984)). Thus, as the Court originally observed, the "economic loss rule" comes into play here—and dooms Petrus's claim—only if that claim is deemed to sound in tort.

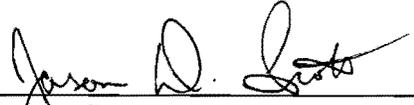
In sum, as the Court originally held, Petrus's claim fails under the statute of limitations because it is a contract claim, but if it were a tort claim it would fail under the "economic loss rule" anyway. There is no "hybrid" category into which the claim can be placed, so as to avoid giving it either a "contract" label or a "tort" label that implicates these legal difficulties.

Accordingly,

IT IS ORDERED that the hearing on Petrus's motion to reconsider scheduled for 1:30 p.m. on January 9, 2017, is vacated.

IT IS FURTHER ORDERED that Petrus's motion to reconsider is denied.

Dated this 5th day of December, 2016.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on December 6th, 2016, I served a copy of this document as follows:

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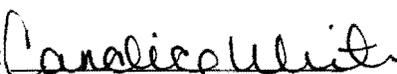
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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

DEC 13 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 12:51 P.M.

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Attorneys for Plaintiffs

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

PETRUS FAMILY TRUST DATED MAY
1, 1991, et al.,

Plaintiffs,

v.

NANCY GENTRY-BOYD, et al.,

Defendants.

Case No. CV-2014-71-C

**PLAINTIFFS' OBJECTION TO
DEFENDANT KIRK'S MOTION FOR
ATTORNEY FEES AND COSTS**

Pursuant to Rule 54(d)(5) of the Idaho Rules of Civil Procedure, Plaintiffs Petrus Family Trust dated May 1, 1991 and Edmond A. Petrus, Jr., individually and as Co-Trustee of the Petrus Family Trust (collectively, "Petrus"), hereby object to the Motion for Attorney Fees and Costs filed by Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk").

INTRODUCTION

Kirk's Motion fails to show that he is entitled to attorney fees and costs under the statutory provisions and rule he cites, I.C. §§ 12-120(3), 12-121, and I.R.C.P. 54. First, assuming that Kirk is a "prevailing party," Kirk cannot meet the requirements of these provisions: the sale of a residential home is not a "commercial transaction" within the meaning of 12-120(3); and, Petrus's claims were not pursued frivolously, unreasonably, or without foundation, as required by I.C. § 12-121 and Rule 54(e). Second, and in all events, the total amount of fees incurred by

Kirk is unreasonable, given the nature and needs of this straightforward construction defect case. As demonstrated below, Kirk's Motion should be denied.

ARGUMENT

I. Section 12-120(3) does not apply because Petrus's claims against Kirk do not arise from a "commercial transaction."

Under § 12-120(3), a party may recover attorney fees in an action arising from a property transaction only if the transaction is commercial. *Id.* A commercial transaction is defined as "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). The Idaho Supreme Court has held that, "in order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 756 (2012) (emphasis added); *see also Frontier Dev. Grp., LLC v. Caravella*, 157 Idaho 589, 599 (2014), *reh'g denied* (Sept. 25, 2014). The touchstone inquiry is whether the transaction had a symmetry of purpose such that both parties entered it for commercial reasons. *Carillo*, 152 Idaho at 756; *see also Goodspeed v. Shippen*, 154 Idaho 866, 874 (2013).

As between Petrus and Kirk, there is no "commercial transaction" that could justify the recovery of fees in this case. Petrus purchased the property at issue for personal residential use. The Idaho Supreme Court and the Idaho Court of Appeals have repeatedly held that a purchase of residential property for personal reasons is not a "commercial transaction" within the meaning of I.C. § 12-120(3). For example, in *Frontier*, the Supreme Court held that Section 12-120(3) does not allow recovery of attorneys' fees in an action arising out of a sale of a residential home because the "purpose for entering into the agreement with [plaintiffs] was to construct a house for their personal use; therefore the transaction was not commercial." 157 Idaho at 599. Similarly, in *Goodspeed*, the Court held that I.C. § 12-120(3) does not apply to an action by purchasers of a home against the sellers for breach of the implied warranty of habitability because the sale of the residential home was not "commercial." As another example, in *Karterman v. Jameson*, 132 Idaho 910, 917 (Ct. App. 1999), the Idaho Court of Appeals held explicitly that, "because the lease-option agreement at issue here involves the lease and purchase

of a dwelling for residential purposes, attorney fees cannot be awarded pursuant to this section.” *Id.* In sum, under Idaho law, “a transaction involving the sale and purchase of personal residential property is not a ‘commercial transaction’ within the meaning of the statute.” *Id.*

Here, it is undisputed that Petrus’s purchase of the home from Boyd was personal, rather than commercial, in nature. Petrus did not buy the home as a representative of a commercial entity or for commercial purposes, and Kirk cites no evidence or testimony showing that Petrus’s purchase of the home was for anything other than his personal household use. Kirk generally asserts the transaction was commercial in nature on pages 5-6 of his Motion, but provides no basis or evidence supporting this averment. Indeed, Petrus’s testimony on the topic directly contradicts Kirk’s baseless assertion. Specifically, when asked in his deposition whether he owned any “commercial properties”—i.e., “anything other than a single family residence”—Petrus testified that he did not.¹

Although the record is clear that Petrus did not consider his purchase of the home to be a commercial transaction, Kirk nevertheless attempts to find a commercial transaction where none exists by alleging—again, with no citation to the record—that Petrus purchased the home for “investment and recreation purposes.” Motion at 6. They point to no evidence whatsoever that Petrus purchased the home for “investment purposes.”² The evidence demonstrates that Petrus lived in the home for vacation and holiday purposes for many years. These are quintessentially personal, non-commercial purposes. The fact that he has listed the property for sale recently—after several years of use—is, contrary to Kirk’s insinuation, irrelevant: personal homes are sold frequently without making the transaction a “commercial” one. In that sense, all purchases of residential property may be considered an “investment” in that real property typically

¹ See Petrus Depo at 29:2-5, attached as Exhibit 1 to the Affidavit of Phillip J. Collaer in Support of Defendant Re/Max’s Motion for Summary Judgment filed May 12, 2016.

² Compare *Cannon v. Perry*, 144 Idaho 728, 731-32 (2007) (holding that while the property in question was residential in nature, the buyers purchased it solely for investment purposes (solely to rent and then then sell to the renters at a higher value) and not personal uses, and therefore the transaction was commercial).

appreciates, particularly lakefront property in McCall. But Idaho case law uniformly holds that purchase of a home for personal purposes is not a “commercial transaction” within the meaning of 12-120(3). *See Karterman*, 132 Idaho at 917. (To the extent the Court finds relevant the listing of the home for sale, it was unlisted on December 3, 2016 and currently is the only home that Petrus owns. *See Declaration of Edmond Petrus, Jr.*, ¶¶ 2-3, filed herewith.)

Kirk’s assertion that Petrus purchased the home for “recreational purposes” is even less persuasive, and, in fact, actually supports Petrus’s position that the home was for personal use. Recreational use of a single family residence is an inherently personal use, as it would be for the recreation of owner and his household and guests, and not for commercial recreation. Thus, to the extent Petrus purchased the home for recreational use, such use does not change the nature of the underlying transaction from inherently personal to commercial. *See Frontier*, 157 Idaho at 599; *Goodspeed*, 154 Idaho at 874; *Karterman*, 132 Idaho at 917; *see also, e.g., Stone v. Sinclair Oil Corp.*, No. CV-01-7527, 2004 WL 5623323 (Id. 5th Dist. 2004) (“Purchasing a ski pass is done for personal recreational purposes and therefore falls within a specific exception to a commercial transaction detailed in . . . 12-120(3).”).

Finally, Kirk argues that Petrus also brought claims against other parties that may have involved commercial transactions, but those are irrelevant to determining whether the cause of action against Kirk arose from a commercial transaction. *See, e.g., Cannon v. Perry*, 144 Idaho 728, 731 (2007) (affirming different fee awards where transactions among some parties were commercial, and among other parties were not). The only other transaction from which Petrus’s claims against Kirk arguably arose was the construction agreement between Gentry-Boyd and Kirk. Again, though, that agreement was not a commercial transaction because, undisputedly, Gentry-Boyd hired Kirk to build a residential property for her to own personally and for personal, not commercial, use.³ *See Frontier*, 157 Idaho at 599 (“the Caravellas’ purpose for

³ *See* Deposition of Nancy Gentry-Boyd (“Boyd Depo.”) at 45:18-46:4, attached as Exhibit 7 to the Affidavit of Gregory C. Pittenger in Support of Defendant Nancy Gentry-Boyd’s Motion for Summary Judgment filed May 17, 2016; Real Estate Purchase & Real Estate Agreement (reflecting that Boyd owned property in personal capacity, not through a corporation or other

entering into the agreement . . . was to construct a house for their personal use; therefore the transaction was not commercial [under] 12-120(3)”; *Carrillo* 152 Idaho at 756 (“in order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose.”).

Finally, Kirk suggests that I.C. § 12-120(3) applies because Petrus referenced I.C. § 12-120(3) in his prayer for relief. But Petrus simply cited I.C. § 12-120(3) in his prayer for relief to protect his interests were he to prevail against a defendant for claims arising out of a transaction that was found to be commercial (e.g. agreement with Re/Max). Presumably, if Petrus had prevailed, Kirk would have raised the same arguments in opposition to a motion for fees: that there is no “commercial transaction” underlying Petrus’s claims against Kirk. In any case, whether or not § 12-120(3) was referenced in the pleadings is immaterial, because, as the Idaho Supreme Court and Court of Appeals have repeatedly held, a transaction involving the sale and purchase of personal residential property is not a “commercial transaction” within the meaning of the statute. *See Frontier*, 157 Idaho at 599; *Goodspeed*, 154 Idaho at 874, *Karterman*, 132 Idaho at 917.

II. Section 12-121 and Rule 54(e)(1) do not apply because Petrus brought claims in good faith and did not pursue them frivolously, unreasonably or without foundation.

Under Rule 54(e)(1), a court may award fees to a prevailing party pursuant to I.C. § 12-121 “only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation” “When deciding whether attorney fees should be awarded under I.C. § 12–121, the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation.” *Michalk v. Michalk*, 148 Idaho 224, 235 (2009). Fee

commercial entity), attached as Exhibit 1 to the Affidavit of Gregory C. Pittenger in Support of Defendant Nancy Gentry-Boyd’s Motion for Summary Judgment, filed May 17, 2016; Boyd Depo. at 82:20-83:24 (not including 2130 Payette as a “commercial property” when asked at deposition for a list of such properties).

awards under these provisions are not granted as a matter of right, but rather as a matter of discretion. *Id.*; *Noble v. Fisher*, 126 Idaho 885, 891, 894 P.2d 118, 124 (1995) (reversing award of fees where the court made no finding that Noble’s defense was frivolous or without foundation).

Overarchingly, Petrus amassed significant admissible evidence, including expert evidence, demonstrating that Kirk used substandard materials and construction methods, and that the internal rot discovered around the door, walls, and deck resulted from construction defects by Kirk and his subcontractors. This evidence is set forth in detail on pages 9 to 13 (paragraphs 26-37) of the Opposition to Kirk’s Motion for Summary Judgment, which for the sake of brevity will not be repeated in detail here. These issues were exhaustively briefed and argued at the summary judgment stage. Indeed, Kirk conceded at that stage that material issues existed regarding construction defects. For this reason alone, the record wholly belies Kirk’s suggestion that Petrus pursued this action against Kirk unreasonably, frivolously, or without foundation.

With respect to Kirk’s individual complaints set forth on pages 7-8 of his Motion, none warrants a finding of frivolousness, unreasonableness, or lack of foundation.

(1) Petrus advanced a valid, more-than-colorable claim against Kirk based on the breach of the implied warranty of habitability. As demonstrated in the summary judgment briefing, overwhelming evidence indicated that Kirk’s faulty construction caused the defects and damages at issue. Kirk even admitted in his deposition that he was “shocked” by some of the photos demonstrating the lack of appropriate building materials in the damaged area. The expert testimony of Beau Value, as well as Kirk’s own admission, demonstrate that Petrus’s claims were not frivolous, unreasonable, or lacking foundation.

(2) At the time he filed the complaint, Petrus’s interactions with Kirk and Gentry-Boyd during the months-long repair process indicated to him that Kirk and Gentry-Boyd had each known about problems with the French Doors prior to

sale and hid those problems from him. Those suspicions bore out in discovery, as each admitted they knew of certain problems with the doors before the house was sold. But, ultimately, Petrus determined there was insufficient evidence to pursue a conspiracy claim at trial, and that his efforts were better spent pursuing an implied warranty claim. This does not mean his case was frivolous, unreasonable, or without foundation—simply that, as discovery progressed, he tailored his legal theories for presentation at trial. That is a normal function and result of litigation and not indicative of a basis for a Rule 54(e) award of fees.

- (3) The fact that Gentry-Boyd sold the home at a loss, and that the home was generally of high quality, are irrelevant to, and do not contradict, the overwhelming evidence of construction defects and resultant damages around the French Doors. By arguing otherwise, Kirk attempts to elevate a few discrete factual assertions into an evidentiary record of frivolousness. This is not persuasive or accurate, and does not support an award of fees.
- (4) Petrus's expert witness, Beau Value, testified extensively that the damages resulted from improperly sized flashings and other construction defects. As demonstrated in the summary judgment briefing, under applicable law, the implied warranty of habitability may be breached even though individuals technically can continue living in the home.
- (5) Finally, with respect to the statute of limitations, Plaintiffs argued in good faith for an interpretation of applicable statute of limitations based on a reasonable reading of *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The Supreme Court will not award attorney fees, under a statute authorizing award of attorney fees to prevailing party, if the losing party brought the appeal in good faith and presented a genuine issue of law.

Firmage v. Snow, 158 Idaho 343, 351 (2014) (citation omitted); *Martin v.*

Twin Falls School Dist. No. 411, 138 Idaho 146, 150 (2002) (school district was not entitled to an award of attorney fees in negligence action brought by parent of students injured when struck by a truck at an unguarded intersection located two blocks from school, because parent made a good faith argument for the extension of existing law).

In sum, Petrus filed the Amended Complaint in good faith based on the information available to Petrus at the time he filed that pleading, and pursued his case against Kirk in good faith and on good bases. Kirk's motion should be denied.

III. The attorneys' fees claimed are unreasonable.

I.R.C.P. 54(e)(3) requires the Court to consider numerous factors in determining the amount of attorney fees that may be awarded in a civil action. I.R.C.P. 54(e)(3). "While the district court does not have to 'address all of the I.R.C.P. 54(e)(3) factors in writing, the record must clearly indicate the court considered all of the factors.'" *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 23, 278 P.3d 415, 425 (2012) (quoting *Lee v. Nickerson*, 146 Idaho 5, 11, 189 P.3d 467, 473 (2008)). Here, as discussed above, Kirk fails to clear the threshold hurdles required for the Court to consider awarding attorney fees. However, even if that were not the case, after consideration of the relevant factors, Kirk is not entitled to \$140,315.00 in attorneys' fees.

A. Time and labor required. A careful analysis of the billing records provided by Kirk's attorneys reveals that they have included inappropriate categories of fees as well as incurred exorbitant amounts of time given the nature of the case and the task involved.

- For example, Kirk's attorneys charged approximately \$1,472.50 in fees before Petrus even filed the complaint. This amount should not be charge to Petrus because they were not incurred in defending against the complaint.
- Kirk's attorneys charged over \$10,747.50 to read documents or manage the file and approximately \$17,235.00 simply for communicating with other counsel or with the client. These are exorbitant amounts and not reasonably tailored to the needs of the case.

- Kirk's attorneys charged approximately \$5,230.00 for a mediation that Kirk did not even attend (or even prepare a mediation statement for). These amounts are not reasonable, were not reasonably incurred, and should not be taxed to Mr. Petrus.
- Kirk's attorneys charged over \$35,000.00 for attorney work performed on eight depositions, comprising over 150 hours in attorney time; yet, cumulatively, Kirk's counsel only defended one five-hour deposition and spent less than a total of two hours asking questions of other witnesses. This amount is not proportional to the needs of the case and not reasonable to be taxed to Mr. Petrus.
- Kirk's attorneys charged \$39,307.50 for a single summary judgment motion based primarily on legal arguments. Again, that amount is too high given the needs of the case.
- Kirk's attorneys and staff charged over \$4,000 for file management and assisting other defendants *after* July 7, 2017, the date on which the parties received the Court's Order granting summary judgment in Kirk's favor. Those costs are not part of the defense and should not be taxed to Mr. Petrus.
- Finally, although it is minimal, there is a charge on June 23, 2016, for checking Mr. Kirk's medical records; as this is not a personal injury case, this charge should not be taxed to Mr. Petrus.

Kirk wrongly argues that, had Petrus entertained settlement earlier in the case, some of the time and labor could have been avoided. This is incorrect: Petrus remained ready to discuss settlement throughout 2016. Petrus provided Kirk with copies of receipts demonstrating the amount damages on December 5, 2014, and March 8, 2016, which was even before depositions commenced. Yet, Kirk did not propose mediation or settlement at any time. Indeed, it was Petrus, not Kirk, who commenced settlement discussions in June 2016. Had Kirk approached Petrus sooner, much of the attorneys' fees could have been avoided.

B. Novelty and difficulty of the questions. This was a straightforward construction defect case involving routine factual issues, undisputed expert testimony, and a low actual damage amount, approximately \$62,313.68. Kirk's attorneys claim to be experienced construction litigation attorneys and thus should not require extensive time to understand the straightforward factual and legal issues presented. The only relatively novel question presented was a legal issue—the applicable statute of limitations for an implied warranty of habitability claim. On that issue, however, there are fewer than five cases that required consultation for briefing and analysis. In sum, there is nothing novel or difficult in this matter justifying an award of \$140,315.00 in attorneys' fees incurred prior to trial.

C. Skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law. This case did not involve a specialized area of law, such as securities law, and presented routine issues faced regularly in construction defect cases. This factor does not justify an award of \$140,315.00 in attorneys' fees incurred prior to trial.

D. The prevailing charges for like work. The attorney rates of \$200 to \$300 per hour are generally within the reasonable range in this region. The time spent, not the rates, are unreasonable.

E. Whether the fee is fixed or contingent. The fees were charged at fixed rates, which is an acceptable practice.

F. The time limitations imposed by the client or the circumstances of the case. Although there were multiple parties to this litigation, all of the defendants, including Kirk, made settlement offers on the eve of trial, which could have been made far earlier in the case.

G. The amount involved and the results obtained. The total damages incurred by Petrus, for which Kirk, as the builder, bore significant responsibility, were approximately \$60,000. Kirk could have easily avoided incurring his substantial legal fees by reasonably pursuing an early settlement, which contrary to Kirk's counsel's assertions, Petrus would have happily entertained. However, rather than pursuing settlement, Kirk and the other defendants dug

in their heels until shortly before trial. As a result, Kirk incurred over \$140,000 in legal fees to defend against a claim he could have settled for a fraction of that cost, had he been willing to discuss settlement earlier.

H. The undesirability of the case. All cases are undesirable to defendants who, like Kirk, are sued for damages they caused. This factor does not justify an award of \$140,315.00 in attorneys' fees incurred prior to trial.

I. The nature and length of the professional relationship with the client. Kirk's counsel has represented Kirk only since the inception of this litigation. This factor is neutral.

J. Awards in similar cases. As discussed at length above, the Idaho Supreme Court and Court of Appeals have routinely held that personal real estate sales like the one at the heart of this litigation do not warrant an award of attorney fees under IC 12-120(3). Kirk has failed to show that Petrus pursued his claims frivolously or without foundation. Thus, the six-figure award of fees is unrealistically exorbitant in the face of Idaho law which disallows completely the recovery of attorney fees in cases such as this.

K. The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case. Kirk did not incur costs for automated legal research. This factor is irrelevant.

IV. No objection to costs.

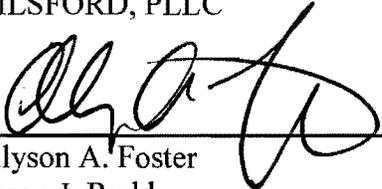
Finally, Petrus does not object to the amounts incurred as costs.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Kirk's Motion for Attorney Fees and Costs.

DATED THIS 12th day of December 2016.

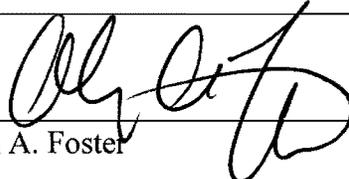
ANDERSEN SCHWARTZMAN WOODARD
BRAILSFORD, PLLC

By  _____
Alyson A. Foster
Jason J. Rudd
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December 2016, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

<p>C. Tom Arkoosh Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, ID 83701 <i>Attorneys for Chris Kirk d/b/a Kirk Enterprises</i></p>	<p><input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Facsimile: 343-5456 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: tom.arkoosh@arkoosh.com; dan.nevala@arkoosh.com</p>
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Alyson A. Foster

3. I recently sold my residence in San Diego, California. Currently, the only home I own is 2130 Payette Drive, McCall, Idaho.

I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

12/12/16
DATE


SIGNATURE

DECLARATION OF EDMOND A. PETRUS, JR., IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANT KIRK'S MOTION FOR ATTORNEY FEES AND COSTS - 2

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2016, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

<p>C. Tom Arkoosh Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, ID 83701 <i>Attorneys for Chris Kirk d/b/a Kirk Enterprises</i></p>	<p><input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Facsimile: 343-5456 <input type="checkbox"/> Overnight Courier <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: tom.arkoosh@arkoosh.com; dan.nevala@arkoosh.com</p>
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Jason J. Rudd

NOTICE IS HEREBY GIVEN THAT:

1. Plaintiffs and Appellants, PETRUS FAMILY TRUST DATED MAY 1, 1991, and EDMOND A. PETRUS, JR. (together "Petrus"), hereby appeal against Respondent, CHRIS KIRK d/b/a KIRK ENTERPRISES ("Kirk"), to the Idaho Supreme Court from the Memorandum Decision and Order entered on July 7, 2016, the Judgment entered on November 15, 2016, and the Order Denying Motion to Reconsider entered on December 6, 2016, as well as any and all orders relating to the preliminary statement of issues set forth in paragraph 3 below, the Honorable Jason D. Scott presiding. A copy of the orders from which Petrus appeals are attached to this notice.

2. Petrus has a right to appeal to the Idaho Supreme Court, and the orders described in paragraph 1, above, are appealable orders under and pursuant to Idaho Appellate Rule 11(a)(3).

3. Petrus intends to assert the following issue on appeal (although he reserves his right to later assert issues not described in this preliminary statement): whether the District Court erred in finding that Petrus's implied warranty of habitability claim is time barred by a four-year statute of limitations, despite the fact that the asserted defect was latent, meaning no cause of action could have accrued until after the supposed statute of limitations had already run.

4. Petrus requests the preparation of the following portions of the Reporter's Transcript in electronic format:

a. Hearing on Motion for Summary Judgment (06/20/16).

5. Petrus requests the following documents be included in the Clerk's Record:

a. Complaint (03/11/14);

b. First Amended Complaint and Demand for Jury Trial (09/08/14);

c. Answer (09/29/14);

d. Second Amended Complaint and Demand for Jury Trial (09/21/15);

e. Answer to Second Amended Complaint and Demand for Jury Trial

- (09/30/15);
- f. Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (05/20/16);
 - g. Memorandum in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (05/20/16);
 - h. Affidavit of Chris Kirk in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (05/20/16);
 - i. Affidavit of Daniel Nevala in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (05/20/16);
 - j. Plaintiffs' Opposition to Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (06/12/16);
 - k. Declaration of Alyson A. Foster in Opposition to Defendant's Motion for Summary Judgment (06/12/16);
 - l. Declaration of Michael Longmire in Opposition to Defendant's Motion for Summary Judgment (06/12/16);
 - m. Declaration of Beau Value in Opposition to Defendant's Motion for Summary Judgment (06/12/16);
 - n. Declaration of Edmond A. Petrus in Opposition to Defendant's Motion for Summary Judgment (06/12/16);
 - o. Reply Memorandum in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (06/17/16);
 - p. Supplemental Affidavit of Daniel Nevala in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (06/17/16);
 - q. Memorandum Decision and Order (07/07/16);
 - r. Judgment (11/15/16);
 - s. Motion for Reconsideration of Order Granting Summary Judgment to Chris Kirk d/b/a Kirk Enterprises (11/28/16);
 - t. Memorandum in Support of Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment to Chris Kirk d/b/a Kirk Enterprises (11/29/16); and
 - u. Order Denying Motion to Reconsider (12/05/16).

6. No portion of the record in this matter has been sealed pursuant to court order.

7. I certify:

a. That a copy of this Notice of Appeal has been served on the court reporter, Brooke Bohr, at the address set forth in the certificate of service (attached);

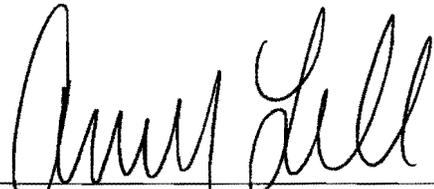
b. That the court reporter has been paid the estimated fee of \$419.75 for preparation of the Reporter's Transcript;

c. That a deposit of \$100 for preparation of the Clerk's Record has been paid;

d. That the appellate filing fee in the amount of \$129 has been paid; and

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

Dated: January 13, 2017

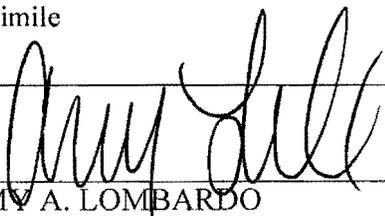
By: 

JOHN MORRIS, ESQ.
RACHEL E. MORFITT, ESQ.
AMY A. LOMBARDO, ESQ.
Attorneys for Plaintiffs / Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January 2017, I served true and correct copies of the foregoing documents upon each of the following individuals in the manner indicated below:

<p>Nancy Gentry-Boyd Steven J. Millemann / George C. Pittenger MILLEMANN PITTENGER & PEMBERTON LLP 706 N. First Street P.O. Box 1066 McCall, Idaho 83638</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Chris Kirk d/b/a Kirk Enterprises C. Tom Arkoosh / Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, Idaho 83701</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Todd McKenna d/b/a Homecraft Home Inspections Michael G. Pierce 489 West Mountain Road P.O. Box 1019 Cascade, Idaho 83611</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Re/Max Resort Realty / Kevin Batchelor Phillip J. Collaer ANDERSON JULIAN & HULL LLP C.W. Moore Plaza 250 S. Fifth Street, Suite 700 P.O. Box 7426 Boise, Idaho 83707</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Brooke Bohr Tucker & Associates 605 Fort Street Boise, ID 83702</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>



AMY A. LOMBARDO

EXHIBIT 1

DOUGLAS A. [Signature], CLERK
By _____ Deputy

JUL 07 2016

Case No. _____ Inst. No. _____
Filed 1045 A.M. _____ P.M.

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

Case No. CV-2014-71-C

MEMORANDUM DECISION AND ORDER

Plaintiff Petrus Family Trust Dated May 1, 1991 and its co-trustee Plaintiff Edmond A. Petrus, Jr. (collectively, "Petrus") bought a home from Defendant Nancy Gentry-Boyd ("Gentry") in 2012. Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk") had built the home for Gentry seven years earlier. Defendant Todd McKenna d/b/a Homecraft Home Inspections ("McKenna") inspected the home for Petrus as part of that transaction. He was recommended to Petrus by Petrus's real-estate agents, Defendants ReMax Resort Realty and Kevin Batchelor (collectively, "Batchelor"): Despite McKenna's pre-closing inspection, Petrus discovered after closing the transaction that the home suffered from extensive dry rot.

In this action, Petrus sued Gentry for not disclosing alleged problems with the home's French doors. Petrus says that, had she disclosed those problems, the water intrusion that caused the dry rot would have been discovered before the closing. Petrus also sued McKenna for failing to discover either the problems with the French doors or the water intrusion during the inspection. Petrus sued Batchelor for recommending McKenna. Finally, Petrus sued Kirk for allegedly building the home in a way that allowed the water intrusion to happen.

Gentry, Batchelor, and Kirk all move for summary judgment. In addition, Petrus moves for permission to expand his claims against Batchelor to include claims based on the theory that Batchelor should have discovered, and disclosed to Petrus, the alleged problems with the French doors that Gentry did not disclose. These motions were argued on June 20, 2016. With one exception, they were taken under advisement at that time. The exception is Batchelor's motion for summary judgment, which was taken under advisement one week later, upon submission of post-hearing briefs relating to it. For the reasons that follow, full summary judgment is granted to Kirk, partial summary judgment is granted to Batchelor and Gentry, and Petrus is denied permission to expand his claims against Batchelor.

I.

BACKGROUND

Kirk built the home at issue in this action. (Kirk Aff. ¶ 4.) He built it under an oral contract with Gentry. (Kirk Aff. ¶ 5.) Construction began in June 2004 and was substantially completed in August 2005, with final billing in September 2005. (Kirk Aff. ¶ 6.)

Nearly seven years later, in April 2012, Petrus bought the home from Gentry. (Petrus Decl. filed June 12, 2016, ¶ 10.) Petrus did so under an RE-21 Real Estate Purchase and Sale Agreement ("the PSA"). (Pittenger Aff. Ex. 1.)

The PSA required Gentry to provide to Petrus a property condition disclosure form. (Pittenger Aff. Ex. 1 § 14.) Gentry did so, providing to Petrus an RE-25 Seller's Property Condition Disclosure Form in or about February or March of 2012 (Pittenger Aff. Ex. 2), well before the April 2012 closing. On the form, Gentry answered "No" to a question asking if there had been "any water intrusion or moisture related damage to any portion of the property." (Pittenger Aff. Ex. 2 at 2.) Additionally, Gentry made no disclosures in response to the form's directive to list "any other existing problems that you know of concerning the property." (Pittenger Aff. Ex. 2 at 3.)

Edmond Petrus moved into the home in May or June of 2012. (Petrus Decl. filed June 12, 2016, ¶ 12.) Shortly after doing so, he discovered that the home's French doors were swollen with water, could not open or close properly, and could not be locked. (Id.) He told Gentry's real-estate agent, Michael Wood, about these problems. (Petrus Decl. filed June 12, 2016, ¶ 16.) Wood relayed the concern to Gentry via e-mail. (Foster Decl. filed June 12, 2016, Ex. 13.) Gentry stated in response e-mail dated June 19, 2012, that "[t]he doors sometimes stick after the winter. If you keep them locked, they will dry out and function again." (Id.)

No such problem with the French doors was disclosed by Gentry on the RE-25 Seller's Property Condition Disclosure Form. And no such problem was detected by McKenna, who had inspected the home for Petrus in March 2012, before the closing. (Pittenger Aff. Ex. 3.) Batchelor had recommended McKenna as Petrus's home inspector, and Petrus allegedly hired McKenna based at least partly on Batchelor's representations about McKenna's qualifications. (Collaer Aff. filed May 13, 2016, Ex. 1 at 217:11-16; Foster Decl. filed June 12, 2016, Ex. 2; Petrus Decl. filed June 12, 2016, ¶ 4.)

In or about October 2013 --about a year and a half after the closing—a remediation contractor hired by Petrus discovered extensive dry rot in the structure of the home near the French doors. (Value Decl. ¶ 7.) Petrus contends the dry rot resulted from years of water intrusion facilitated by construction defects. (Value Decl. ¶ 8.) Petrus further contends that, had any problems with the home’s French doors come to light prior to the closing, Petrus would have insisted on removing the French doors for inspection, which would have revealed rotting wood around the sides of them. (Petrus Decl. filed Jun 12, 2016, ¶ 21.) In other words, knowing about what might outwardly have seemed like a fairly small problem supposedly would have led to uncovering a large one. That said, he seemingly does not accuse Gentry of knowing about water intrusion into the home (aside from the French doors themselves becoming wet), nor of knowing that the home suffered from dry rot.

Petrus filed this action on March 11, 2014. Nearly six months later, without ever serving the original complaint, Petrus filed (and then served) a first amended complaint. It included claims against Gentry, Kirk, and McKenna. Against Gentry, Petrus asserted seven claims: Count I, for violation of the Idaho Property Condition Disclosure Act, I.C. §§ 55-2501 to -2518; Count II, for violation of the Idaho Consumer Protection Act, I.C. §§ 48-601 to -619; Count III, for fraud; Count IV, for breach of the PSA; Count V, for breach of the covenant of good faith and fair dealing that is implied by law into the PSA; Count VI, for breach of the implied warranty of habitability; and Count VII, for conspiracy to defraud. (First Am. Compl. ¶¶ 10-73.) Counts VI and VII also were asserted against Kirk. (First Am. Compl. ¶¶ 59-73.) No other claims were asserted against Kirk. Against McKenna, Petrus asserted three claims: Count VIII, for negligence; Count IX, for fraud; and Count X, for violation of the Idaho Consumer Protection Act. (First Am. Compl. ¶¶ 74-101.)

A scheduling order was entered on March 12, 2015. Trial originally was set to begin on February 1, 2016. (Scheduling Order ¶ 1.) Notably, motions to amend the pleadings came due not later than 120 days after the date on which the scheduling order was entered. (Scheduling Order ¶ 4(A).) Thus, the deadline for motions to amend the pleadings was July 10, 2015.

On the deadline, Petrus moved for permission to file a second amended complaint that would add Batchelor to the list of defendants. Against Batchelor, Petrus proposed asserting a negligence claim and a claim for violation of the Idaho Consumer Protection Act. The motion was unopposed, and it was granted. On September 21, 2015, Petrus filed a second amended complaint. The second amended complaint reasserted the ten claims previously asserted in the first amended complaint, and it asserted the two proposed claims against Batchelor, but it mistakenly numbered them both “Count IX.” (Second Am. Compl. ¶¶ 103-121.) The Court will refer to the negligence claim against McKenna as “Count XI” and to the claim against McKenna for violation of the Idaho Consumer Protection Act as “Count XII,” as that is how they should have been numbered.

On October 5, 2015, shortly after becoming part of this action, Batchelor moved to continue the looming trial date of February 1, 2016. That motion was unopposed, and it was granted. On November 16, 2015, trial was reset to begin on August 16, 2016. All parties agreed to the new trial date. But, as trial neared, Petrus moved for another trial continuance. That motion (filed on May 27, 2016) was opposed by all defendants except McKenna. It was denied in an oral ruling made on June 20, 2016, for reasons that need not be reiterated.

Also argued on June 20 were motions for summary judgment by Kirk, Gentry, and Batchelor, as well as a motion by Petrus to file a third amended complaint that would change the

claims against Batchelor.¹ Petrus's motion to amend was filed on May 17, 2016—about three months before the August 16 trial date. Petrus proposes expanding the two existing claims, and adding two new claims, against Batchelor. The proposed new claims are Count XIII, for violation of the Idaho Real Estate Brokerage Representation Act (“Brokerage Representation Act”), I.C. §§ 54-2082 to -2097, and Count XIV, for negligence *per se*. The proposed amendments center on the assertion that, at the end of the pre-closing walkthrough, Kevin Batchelor was responsible for locking the home Petrus had agreed to purchase from Gentry, but failed to actually do so. (Proposed Third Am. Compl. ¶¶ 103-159.) Petrus postulates that, had he locked the home, Kevin Batchelor would have discovered that the home's French doors did not work properly, leading to an investigation by Petrus in which the alleged problems with the French doors were discovered before the closing. The potential for pursuing this theory of liability first occurred to Edmond Petrus in the wake of his March 2016 deposition, and he apparently concluded it was a viable theory after conducting some sort of an investigation into the walkthrough during April 2016. (Petrus Decl. filed May 17, 2016, ¶¶ 2-4.)

In any event, the defendants' motions for summary judgment and Petrus's motion to amend are ready for decision.

¹ Setting the motions for summary judgment for hearing on June 20, a Monday, required an adjustment to the scheduling order. Its deadline for hearing those motions was sixty days before trial—Friday, June 17, 2016, given the trial date of August 16, 2016. (Scheduling Order ¶ 4(B).) Gentry, Kirk, and Batchelor all moved to extend the deadline by one court day to June 20. The litigation schedule would not be disrupted by such a short extension, and there is good cause under I.R.C.P. 16(a)(3) for it because the last available hearing date before the June 17 deadline was eleven days earlier, June 6, 2016. The motions to extend therefore are granted.

II.

LEGAL STANDARDS

A. The defendants' motions for summary judgment

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). If the movant is seeking summary judgment against a claim or defense asserted by the nonmovant, the movant carries its burden by showing that the evidence does not support an element of the challenged claim or defense. *E.g., McHugh v. Reid*, 156 Idaho 229, 303, 324 P.3d 998, 1002 (Ct. App. 2014). The movant’s showing can take either (or both) of two forms: (i) affirmative evidence disproving the element at issue; or (ii) a showing that the nonmovant is unable to offer admissible evidence proving that element. *Id.*; *see also* I.R.C.P. 56(c)(1).

If the movant carries its burden, the burden shifts to the nonmovant to prove that a genuine factual dispute must be resolved before judgment can be awarded to the movant. *E.g., Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 104, 294 P.3d 1111, 1116 (2013). To carry that ultimate burden, the nonmovant “may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Id.* (quotation marks omitted). The record must be construed in the light most favorable to the nonmovant, and all reasonable inferences must be drawn in the nonmovant’s favor. *Id.* Nevertheless, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient” for the nonmovant to avoid summary judgment. *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 163, 307 P.3d 176, 180 (2013).

B. Petrus's motion to amend the complaint

Permission to amend a pleading should be “freely give[n] . . . when justice so requires.” I.R.C.P. 15(a)(2). Whether Rule 15(a)(2)'s liberal standard is met is a matter of discretion. *E.g.*, *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 612, 114 P.3d 974, 982 (2005), *abrogated on other grounds*, *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 591, 329 P.3d 368, 373 (2014). That said, permission to amend should be given unless (i) there is undue delay, bad faith, or a dilatory motive on the movant's part, (ii) the movant has repeatedly failed to cure deficiencies in its pleadings by amending them, (iii) the amendment unduly prejudices the nonmovant, or (iv) the amendment is futile. *E.g.*, *id.* A proposed new claim is futile if the supporting factual allegations are insufficient to state a claim for relief. *E.g.*, *id.*

Rule 15(a)(2) does not, however, operate by itself if the movant failed to meet the scheduling order's deadline for pleadings amendments. In that situation, Rule 16(a)(3) also applies. It requires the movant to show “good cause” for amending the scheduling order in order to allow an otherwise-untimely pleadings amendment. *See* I.R.C.P. 16(a)(3); *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 882, 42 P.3d 672, 675 (2002) (affirming the district court's disallowance of a late amendment partly because the movant “did not contend that it had good cause for failing to file its motion within the time period set in the scheduling order”). Whether “good cause” has been shown is a matter of discretion. *E.g.*, *Camp v. E. Fork Ditch Co., Ltd.*, 137 Idaho 850, 859, 55 P.3d 304, 313 (2002).

Accordingly, if there is “good cause” for amending the scheduling order to permit an otherwise-untimely amendment, then the amendment should be allowed if it passes muster under Rule 15(a)(2)'s liberal amendment standard.

III.
ANALYSIS

A. Kirk

Kirk seeks summary judgment on Petrus's two claims against him. One is Count VI, for breach of the implied warranty of habitability. The other is Count VII, for conspiracy to defraud. During the summary-judgment hearing, Petrus's counsel conceded that summary judgment on Count VII is appropriate because evidentiary support for Count VII is lacking. The Court appreciates concessions when they are appropriate and, in accordance with Petrus's concession, enters summary judgment against Count VII. Count VI remains to be addressed.

Kirk makes several arguments for summary judgment on Count VI. His frontline argument is that Count VI is barred by the statute of limitations. As the Court will go on to explain, that argument demonstrates Kirk's entitlement to summary judgment. Because it is dispositive, the Court need not and will not address Kirk's other arguments.

Kirk built the home at issue in this action. (Kirk Aff. ¶ 4.) He built it under an oral contract with Gentry. (Kirk Aff. ¶ 5.) Construction began in June 2004 and was substantially completed in August 2005, with final billing in September 2005. (Kirk Aff. ¶ 6.) Petrus purchased the home from Gentry in April 2012 (Petrus Decl. filed June 12, 2016, ¶ 10), a few months shy of seven years later. Petrus contends that, because the home suffered from latent construction defects discovered soon after the purchase, the home was uninhabitable, making Kirk liable to him for breach of the implied warranty of habitability.

"[W]hen builder-vendors sell newly constructed buildings there is an implied warranty that the buildings will be habitable." *Tusch Enters. v. Coffin*, 113 Idaho 37, 47, 740 P.2d 1022, 1032 (1987). Idaho law has recognized the implied warranty of habitability for fifty years. See *Bethlahmy v. Bechtel*, 91 Idaho 55, 67-68, 415 P.2d 698, 710-11 (1966). And it has been clear

for nearly thirty years that the implied warranty of habitability extends not only to a home's original purchaser but also to subsequent purchasers. See *Tusch*, 113 Idaho at 50-51, 740 P.2d at 1035-36 (“[S]ubsequent purchasers of residential dwellings . . . may maintain an action against the builder . . . of the dwelling based upon the implied warranty of habitability despite the fact that no privity of contract exists between the two.”). Thus, as Kirk recognizes, he isn't immune from liability to Petrus simply because he sold the home to Gentry, not Petrus. But the implied warrant of habitability isn't everlasting, and therein lies the rub.

Kirk and Petrus disagree as to when purchasers of the home Kirk built for Gentry lost the ability to sue Kirk for breach of the implied warranty of habitability. They do agree, though, that the controlling statute is I.C. § 5-241. That statute addresses the accrual of “actions against any person by reason of his having performed or furnished the design, planning, supervision or construction of an improvement to real property.” I.C. § 5-241. Importantly, it sets different parameters for the accrual of contract actions than for the accrual of tort actions.

Section 5-241 establishes a bright-line rule that “[c]ontract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of . . . an improvement [to real property].” I.C. § 5-241(b). Thus, under section 5-241(b), all contract actions against Kirk arising from his construction of the home accrued when it was completed in or about August or September of 2005. The contract between Kirk and Gentry was oral. A four year limitations period applies to actions on oral contracts. I.C. § 5-217. Consequently, the limitations period for contract actions against Kirk expired in August or September of 2009, four years after construction was completed, long before Petrus had purchased the home. Kirk contends Petrus's claim for breach of the implied warranty of habitability is a time-barred contract action.

By contrast, under section 5-241, “[t]ort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.” I.C. § 5-241(a). Petrus contends his claim for breach of the implied warranty of habitability is a tort action. He says it is subject to Idaho’s “catch-all” statute of limitations, which sets a four year limitations period for actions not subject to more specific statutes of limitations. I.C. § 5-224. He adds this four year limitations period to the six year accrual period and contends Idaho law gives a home purchaser up to ten years to sue the builder for breach of the implied warranty of habitability, making his claim timely.

Kirk has the better half of the argument. Petrus’s claim for breach of the implied warranty of habitability is a contract action, not a tort action.

That much is clear, or at least readily inferable, from *Tusch*—the 1987 case in which the Idaho Supreme Court extended to subsequent home purchasers the right to sue builders for breach of the implied warranty of habitability. There, Coffin built duplexes for the Vander Boeghs. The Vander Boeghs soon sold the duplexes to Tusch Enterprises. Later, Tusch Enterprises discovered that the duplexes suffered from major structural defects. Tusch Enterprises sued Coffin for both negligent construction and breach of the implied warranty of habitability. The court held that the negligence claim was barred by the “economic loss rule,” which prohibits recovering purely economic losses—a category into which the damage to the duplexes fell—on a negligence theory. 113 Idaho at 40-41, 740 P.2d at 1025-26. Having done so, the court went on to hold that the absence of privity of contract between Tusch Enterprises and Coffin would not doom Tusch Enterprises’ claim for breach of the implied warranty of habitability. *Id.* at 50, 740 P.2d at 1035. In not requiring privity, the court didn’t suggest privity need not be required because the claim wasn’t contractual in nature. To the contrary, the court

plainly regarded the claim as contractual in nature. In that regard, the court observed, first, that the purpose of the “economic loss rule” is “to allow the law of contracts to resolve disputes concerning economic losses” and, second, that “[i]f . . . in the area of pure economic losses, negligence is to be preempted by contract principles, . . . then contract principles must be given a freer hand to deal with injuries the law has typically redressed.”² *Id.* (emphasis added).

Thus, by not requiring privity, the court deliberately made a contract action available to “deal with” injuries for which there was no tort remedy in light of the “economic loss rule.” The court’s intention to authorize a contract action is made quite clear in the opinion’s footnote 8. There, the court quoted the recommendation in the venerable treatise *The Law of Torts* by Prosser and Keeton to eliminate the privity requirement in order to allow “recovery on a contract-warranty theory”:

Historically, . . . the only tort action available to a disappointed purchaser suffering intangible commercial loss has been the tort action of deceit for fraud and the only contract action has been for breach of a warranty, express or implied. This remains the generally accepted view. A few courts in recent years have permitted either a tort action for negligence or one in strict liability. Usually, the reason for so doing has been to escape the requirement of privity of contract as a prerequisite to recovery on a warranty theory. But the elimination of this requirement for recovery on a contract-warranty theory would seem to constitute the more satisfactory technique.”

Tusch, 113 Idaho at 50 n.8, 740 P.2d at 1035 n.8 (quoting Prosser & Keeton, *The Law of Torts*, § 101 (5th ed. 1984) (footnotes omitted)). The court characterized this treatise as “respected authority” and indisputably followed its recommendation. *Id.*

² The Idaho Supreme Court recently characterized as “dicta” some of this language from *Tusch*. *Am. W. Enters., Inc. v. CNH, LLC*, 155 Idaho 746, 751, 316 P.3d 662, 667 (2013). But, in doing so, the court did not call into question the proposition for which *Tusch* is cited here: that warranty claims sound in contract, not in tort.

In support of their respective positions, Kirk and Petrus cite out-of-state cases addressed to whether claims for breach of the implied warranty of habitability sound in contract or in tort. There is no need to analyze those cases in discerning Idaho's law on the point. Under *Tusch*, Petrus's claim for breach of the implied warranty of habitability sounds in contract.³ Hence, Petrus's claim is subject to section 5-241(b)'s completion-of-construction accrual rule and to section 5-217's four year limitations period. Under those statutes, the claim is time-barred. Kirk therefore is entitled to summary judgment against Count VI.

B. Gentry

Gentry seeks summary judgment on all seven claims—Counts I through VII—asserted against her. During the summary-judgment hearing, Petrus acceded to the entry of summary judgment on Counts II, VI, and VII. Accordingly, summary judgment is entered for Gentry on those counts. Counts I, III, IV, and V remain to be addressed. Count I alleges Gentry violated the Idaho Property Condition Disclosure Act by failing to disclose any problems with the home's French doors on the RE-25 Seller's Property Condition Disclosure Form. Count III alleges Gentry committed fraud by failing to disclose those problems. Count IV alleges Gentry breached the PSA—the agreement under which Petrus purchased the home from her—by failing to disclose those problems. Finally, Count V alleges that the same failure of disclosure was a breach the covenant of good faith and fair dealing that is implied by law into the PSA.

1. Count I: violation of Property Condition Disclosure Act

The Court begins with Count I. The Idaho Property Condition Disclosure Act required Gentry, as a seller of residential real property, to “complete all applicable items in a property

³ If that claim instead sounded in tort, it seemingly would be analogous to a claim for negligent construction—a more apt analogy to some other tort isn't immediately apparent—and therefore would be barred by the “economic loss rule” in any event.

disclosure form.” I.C. § 55-2504. An appropriate disclosure form is set forth in I.C. § 55-2508. The RE-25 Seller’s Property Condition Disclosure Form completed by Gentry and provided to Petrus (Pittenger Aff. Ex. 2) is substantially the same as the section 55-2508 exemplar. The exemplar is designed, and any permissible alternative form also must be designed, to facilitate disclosure of “material matters relating to the physical condition of the property to be transferred including, but not limited to, . . . the condition of the structure of the property including the roof, foundation, walls and floors . . .” I.C. § 55-2506 (emphasis added). As the form must recite, the disclosure required is only of matters “actually known” by the seller. I.C. § 55-2507(1). Indeed, the seller is not liable for failing to disclose conditions “not within the [seller’s] personal knowledge.” I.C. § 55-2511(1); *Lindberg v. Roseth*, 137 Idaho 222, 229, 46 P.3d 518, 525 (2002). Although the seller must complete the form in good faith, meaning “honesty in fact,” I.C. § 55-2516, the seller does not warrant the absence of undisclosed conditions. I.C. § 55-2507(3). Accordingly, the form Gentry provided to Petrus says it “is not a warranty of any kind by the SELLER” but instead contains “the representations of the SELLER regarding the condition of the property.” (Pittenger Aff. Ex. 2 at 1, 4.) Gentry is, however, liable for any damages Petrus suffered because of any willful or negligent failure on her part to make legally required disclosures. *See* I.C. § 55-2517.

With respect to Count I, the dispute between Gentry and Petrus is whether Gentry was required to include on the form a disclosure about the home’s French doors. It bears noting that Petrus isn’t contending Gentry knew about, and therefore was required to disclose, the extensive dry rot from which the home evidently suffered. Instead, Petrus contends Gentry knew, and was required to disclose, that the French doors sometimes took on moisture and did not operate

properly. Had Petrus known as much, the argument goes, Petrus would have investigated and discovered the dry rot before closing the purchase.

In any event, Petrus says a disclosure about the French doors should have been made in two different places on the form. (Pls.' Opp'n Gentry's Mot. Summ. J. 18-19.) One was in response a question asking whether there has been "any water intrusion or moisture related damage to any portion of the property." (Pittenger Aff. Ex. 2 at 2.) Gentry answered "No." (Pittenger Aff. Ex. 2 at 2.) The other was in response to the form's "catch-all" requirement that the seller "list any other existing problems that you know of concerning the property . . . that are not already listed." (Pittenger Aff. Ex. 2 at 3.) There, Gentry made no disclosure. (Pittenger Aff. Ex. 2 at 3.)

Beginning with the former, the Court concludes the record demonstrates that there is a genuine factual dispute about whether Gentry knew of any "water intrusion or moisture related damage" to the property. The strongest evidence Petrus has in that regard is Gentry's e-mail of June 19, 2012—two months after the closing—to Michael Wood, her real-estate agent.⁴ Wood had e-mailed her to relay some questions Petrus had about the French doors, which reportedly had malfunctioned. (Foster Decl. filed June 12, 2016, Ex. 13.) Gentry's response stated that "[t]he doors sometimes stick after the winter. If you keep them locked, they will dry out and

⁴ Petrus also offers evidence of statements allegedly made by Wood to Edmund Petrus, to the effect that Gentry had told Wood about continual problems with the French doors, including that they usually could not be locked. (Petrus Decl. filed June 12, 2016, ¶ 16.) Gentry objects to these statements as hearsay. Petrus contends they are non-hearsay admissions of a party-opponent under I.R.E. 801(d)(2)(D). For them to so qualify, Wood must have made the statements as Gentry's agent. Because the statements need not be considered in deciding Gentry's motion for summary judgment, the Court will not resolve this dispute. If the statements are offered through Edmund Petrus at trial, it will be Petrus's burden to lay the requisite foundation for fitting these statements within Rule 801(d)(2)(D). From the evidence and arguments presented so far, the Court is skeptical Petrus can do so.

function again.” (Id.) This e-mail plainly suggests Gentry believed the French doors seasonally took on at least some water or moisture, causing them not to work until they dried out after the weather changed. Her use of the term “dry out” is consistent with water or moisture intrusion affecting the French doors, and her use of the phrase “function again” is suggestive that the French doors were not merely “sticky” (meaning that they did not open and close smoothly) but instead seasonally were inoperable. Thus, the e-mail is evidence that Gentry had personal knowledge that water or moisture seasonally caused the French doors not to work. A reasonable jury seemingly could conclude, on that basis, that Gentry should have answered the question “Yes” rather than “No.”

In that regard, the Court notes that one might infer from the tenor of Gentry’s e-mail that this seasonal problem with the French doors was insignificant to her. Assuming that to be the case, the problem’s insignificance to Gentry is not dispositive of whether disclosure was required. The Idaho Property Condition Disclosure Act is intended to ensure disclosure of “material” conditions affecting property to be sold. I.C. § 55-2506. The seller is not the arbiter of a condition’s materiality. A matter’s materiality is determined either objectively, by whether a reasonable person would attach importance to it, or subjectively, by whether the person in Gentry’s position should know the person in Petrus’s position attaches importance to it. *James v. Mercea*, 152 Idaho 914, 919, 277 P.3d 361, 366 (2012); *Restatement (Second) of Torts* § 538(2) (1977). The Court cannot conclude as a matter of law that a reasonable person would regard seasonal inoperability of the French doors as immaterial. As already noted, the Idaho Property Condition Disclosure Act imposes liability for damages resulting from either willful or negligent failures to make legally required disclosures. I.C. § 55-2517. A subjective belief on Gentry’s part that the problem with the French doors was not material may tend to negate the notion that a

willful disclosure violation occurred. It has a lesser tendency to negate the notion that a negligent disclosure violation occurred, as arguably she should have realized that the problem might be material to a buyer even if insignificant to her.

On much the same analysis, the Court concludes that there is also a genuine factual dispute about whether Gentry was required to disclose the problem with the French doors in response to the form's "catch-all" requirement to list any other known problems with the property. The e-mail is evidence that Gentry knew the French doors were seasonally inoperable. While seasonal stickiness seemingly is immaterial and would not have to be disclosed, seasonal inoperability cannot be deemed immaterial as a matter of law.

Having concluded that there is a genuine factual dispute about whether disclosure was required by law, the Court must consider Gentry's next argument: that, even if there were a disclosure violation, Petrus agreed to hold Gentry harmless for the damages allegedly resulting from it. That argument is based on the PSA's section 12, which provides as follows:

12. MOLD DISCLAIMER: BUYER is hereby advised that mold and/or other microorganisms may exist at the Property. Upon closing BUYER acknowledges and agrees to accept full responsibility and risk for any matters that may result from mold and/or other microorganisms and to hold SELLER . . . harmless from any liability or damages (financial or otherwise) relating to such matters.

(Pittenger Aff. Ex. 1 § 12 (emphasis omitted).) Petrus contends the home he purchased from Gentry suffered from extensive dry rot. (Value Decl. ¶ 7.) Gentry doesn't dispute that assessment. To the contrary, she embraces it, contending dry rot is caused by mold or other microorganisms, bringing Petrus's claimed damages within the ambit of section 12.

The fundamental problem with Gentry's argument is the absence of evidence that dry rot in fact is caused by mold or other microorganism. While that may indeed be true, it is not established as a matter of law by the record in this case. Gentry has not offered expert testimony

or other admissible evidence as to what causes dry rot,⁵ either as a general matter or in the instance of this particular home. Instead of evidence, Gentry relies on a dictionary definition of the term “dry rot,” which indicates that it is caused by a fungus, as well as a dictionary definition of the term “microorganism,” which indicates that “some fungi” are microorganisms. (Mem. Supp. Gentry’s Mot. Summ. J. 14 n.58-59.) These definitions do not establish that the particular fungus species that cause dry rot are microorganisms.

Perhaps concerned about shortcomings in her evidence on the point, Gentry points to the declaration of Petrus’s expert witness, Beau Value. He says dry rot is “caused by exposure to moisture or fungus” and that “mold is a growth of fungus.” (Value Decl. ¶¶ 14-15.) The first of these statements is at least partly consistent with Gentry’s dictionary definition of “dry rot.” But both statements, taken together, fall well short of proof as a matter of law that dry rot is invariably caused by mold or other microorganisms. They suggest (correctly or not) that dry rot is sometimes, but not always, caused by fungus. And, while they might be taken to suggest that mold is a type of fungus, they do so without demonstrating that mold is the only type of fungus that causes dry rot. Thus, Value’s declaration does not help Gentry across the finish line.

For these reasons, summary judgment on Count I is denied.

2. Count III: fraud

In Count III, Petrus claims that Gentry committed fraud in the sale of her home to him. That claim’s elements are as follows: “(1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that there be reliance; (6) the hearer’s ignorance of the falsity of the statement; (7) reliance by the hearer; (8)

⁵ The reply affidavit of Gentry’s counsel includes three printouts of Internet articles that attribute dry rot, at least in some instances, to a mold species called *serpula lacrymans*. (Millemann Aff. filed June 17, 2016, Exs. 2-4.) These articles are hearsay. They will not be considered.

justifiable reliance; and (9) resultant injury.” *Lindberg*, 137 Idaho at 226, 46 P.3d at 522. In her opening memorandum, Gentry contended Petrus cannot prove the fourth element: that she knowingly made false representations to Petrus or, alternatively, that she knowingly failed to disclose matters she had a duty to disclose.⁶ (Mem. Supp. Gentry’s Mot. Summ. J. 16-18.)

In analyzing Count I above, the Court concluded that there is evidence Gentry knew and had a duty to disclose to Petrus, but did not disclose to him, that on a seasonal basis water or moisture caused the home’s French doors not to work. This is the same evidence Petrus points to in an effort to keep his fraud claim alive for trial. (Pls.’ Opp’n Gentry’s Mot. Summ. J. 23-25.) This evidence is sufficient to demonstrate the existence of a genuine factual dispute as to the fourth element, insofar as Petrus is proceeding with his fraud claim on the theory that Gentry fraudulently failed to disclose to Petrus that water or moisture caused the home’s French doors not to work. Summary judgment on Count III is denied to the extent Petrus is pursuing that particular fraud theory.

Count III was pleaded much more broadly than that. (See Second Am. Compl. ¶¶ 34-45.) Henceforth, it is limited to that particular fraud theory. That is because, in opposing Gentry’s motion for summary judgment on Count III, Petrus points to no evidence of other intentional failures to disclose or intentional misrepresentations on her part. Count III’s broader allegations are unsubstantiated and therefore do not survive for trial. Summary judgment on Count III is granted to the extent Petrus’s theory is anything other than that Gentry fraudulently failed to disclose to Petrus that water or moisture caused the home’s French doors not to work.

⁶ Of course, fraud may be established not only by affirmative misrepresentations, but also by silence when there is a duty to speak. *E.g.*, *James*, 152 Idaho at 918, 277 P.3d at 365.

3. Count IV: breach of the PSA's express terms

Turning to Count IV, Petrus claims Gentry's failure to disclose alleged problems with the home's French doors was a breach of the PSA's express terms. The PSA's section 14 is the provision Gentry allegedly breached. (Pls.' Opp'n Gentry's Mot. Summ. J. 19-20.) Section 14 provides as follows:

14. SELLER'S PROPERTY CONDITION DISCLOSURE FORM: If required by Title 55, Chapter 25 Idaho Code SELLER shall within ten (10) calendar days after execution of this Agreement provide to BUYER or BUYER's agent, "Seller's Property Condition Disclosure Form" or other acceptable form. . . .

(Pittenger Aff. Ex. 1 § 14 (emphasis omitted).) Gentry performed this obligation by providing the RE-25 Seller's Property Condition Disclosure Form to Petrus. (Pittenger Aff. Ex. 2.) Petrus's dispute with Gentry is not that she failed to provide the form, but instead that the form's content was inadequate in that the alleged problems with the home's French doors were not disclosed. Section 14, however, does not regulate the form's content. It simply requires the form to be provided, which it undisputedly was. Consequently, there is no evidentiary support for the proposition that Gentry breached section 14, even assuming the form she provided did not, as Petrus contends, make all appropriate disclosures. Summary judgment on Count IV is warranted for this reason.

Moreover, even assuming section 14 incorporates the RE-25 Seller's Property Condition Disclosure Form into the PSA, as Gentry contends, the form states that it "is not a warranty of any kind by the SELLER" and that "SELLER in no way warrants or guarantees the above information regarding the property." (Pittenger Aff Ex. 2 at 1, 4.) Instead, the form merely contains "the representations of the SELLER regarding the condition of the property." (Pittenger Aff. Ex. 2 at 4.) Thus, the form distinguishes between "warranties" and "representations" and says that Gentry's statements on the form are the latter, not the former. Were Gentry's

statements on the form “warranties,” a failure of those statements to be true would be actionable in contract as a breach of warranty. *See, e.g., Lewis v. CEDU Educ. Servs., Inc.*, 135 Idaho 139, 145, 15 P.3d 1147, 1153 (2000) (“[B]reach of express warranty sounds in contract.”). Since those statements instead are “representations,” their failure to be true would make them misrepresentations. As misrepresentations that allegedly played a role in Petrus’s decision to close the purchase of Gentry’s home, they could be actionable in tort on a fraud theory (as Petrus claims they are in Count III), but they are not actionable as a breach of contract because their correctness was not warranted or guaranteed as a term of the PSA. Thus, it appears to the Court that Petrus is, in this instance, impermissibly attempting to pursue on a contract theory what is, in substance, an alleged tort. This is another reason summary judgment is warranted on Count IV.

4. Count V: breach of the PSA’s implied terms

That brings the Court to Count V, which accuses Gentry of breaching the covenant of good faith and fair dealing that is implied by law into the PSA. Here as well, the alleged breach lies in the content of the RE-25 Seller’s Property Condition Disclosure Form; Petrus contends the form was inadequate because it did not disclose problems with the home’s French doors. The Court has just given two reasons for entering summary judgment against the similar Count IV. If Idaho law required Gentry to disclose on the form the problems with the French doors, those reasons do not extend to Count V. A reasonable jury could find that good-faith performance of Gentry’s obligations under the PSA’s section 14 entailed providing to Petrus a form that discloses all conditions Idaho law required to be disclosed on the form. Summary judgment on Count V therefore is denied.

C. Batchelor

Counts XI and XII of Petrus's complaint are asserted against Petrus's real-estate agent, Batchelor. The claim in Count XI is that Batchelor was negligent in recommending McKenna as the home inspector. And in Count XII, the claim is that Batchelor violated the Idaho Consumer Protection Act by allegedly misrepresenting that McKenna was qualified to perform a proper home inspection. Batchelor seeks summary judgment against these two claims. Petrus, however, seeks to amend his existing complaint to, among other things, add two new claims against Batchelor: (i) Count XIII, for violation of the Brokerage Representation Act; and (ii) Count XIV, for negligence *per se*. These proposed new claims are based on the notion that Batchelor was responsible for locking the home after the final walkthrough before Petrus closed the purchase and, in doing so, should have discovered that the French doors did not close and lock properly. The Court first addresses Batchelor's motion for summary judgment and then turns to Petrus's motion to amend.

1. Batchelor's motion for summary judgment

In analyzing Batchelor's motion for summary judgment, the Court begins with an artificial dispute between the parties as to whether a representation agreement was signed for Batchelor to serve as Petrus's real-estate agent. During his deposition, Kevin Batchelor testified that a representation agreement was signed. (Collaer Aff. filed May 13, 2016, Ex. 2.) Likewise, during his deposition, Edmond Petrus testified that a representation agreement was in place. (Collaer Aff. filed May 13, 2016, Ex. 1 at 194:13-16.) But when Batchelor's counsel showed Edmond Petrus the document Batchelor contended to be the representation agreement, he hedged, saying that the initials and the signature on the document did not appear to be his. (Collaer Aff. filed May 13, 2016, Ex. 1 at 194:20 - 195:25.)

In his moving papers, Batchelor tried to make hay out of Petrus's hedging. Without a written representation agreement, Petrus would have been a mere "customer" owed a lesser quantum of duties under the Brokerage Representation Act than are owed to a full-fledged "client" with a written representation agreement. *Compare* I.C. § 54-2086 (listing duties owed to "customers") *with* I.C. § 54-2087 (listing duties owed to "clients"). Realizing as much, Batchelor argued that Petrus had disavowed the representation agreement and therefore was stuck with the Brokerage Representation Act's lesser set of protections.

In response, Edmond Petrus filed a declaration in which he essentially admitted he was mistaken during his deposition. (Petrus Decl. filed June 12, 2016, ¶¶ 2-3.) He unequivocally stated he had signed a representation agreement with Batchelor, and he attached a copy of it to his declaration. (Petrus Decl. filed June 12, 2016, ¶ 3 & Ex. 1.) It is the same document he was shown by Batchelor's counsel during his deposition. (Compare Petrus Decl. filed June 12, 2016, Ex. 1 with Collaer Aff. filed May 13, 2016, Ex. 1 at Ex. 27.)

Accordingly, the record makes perfectly clear that the representation agreement attached to Edmond Petrus's declaration was signed by Kevin Batchelor and Edmond Petrus. Batchelor's opportunism notwithstanding, there is no genuine factual dispute on that point. That means Petrus was a "client," and not a mere "customer," under the Brokerage Representation Act. *See* I.C. § 54-2083(5). Batchelor's arguments for summary judgment, to the extent based on Petrus's supposed "customer" status, are rejected.

Because Petrus was a "client," Batchelor owed Petrus the obligation to perform the duties set forth in I.C. § 54-2087. Among them is the duty "[t]o exercise reasonable skill and care." I.C. § 54-2087(2). That is the duty at issue in Count XI Petrus's negligence claim. Petrus

claims Batchelor breached that duty by negligently recommending McKenna as the home inspector. (See Second Am. Compl. ¶¶ 108-110.)

Batchelor says this claim fails because the Brokerage Representation Act does not require real-estate agents to investigate the backgrounds of the service providers, such as home inspectors, they recommend to their clients. In fact, the Brokerage Representation Act imposes no duty on real-estate agents to recommend particular service providers at all; the duty it imposes is “when appropriate, [to] advis[e] the client to obtain professional inspections of the property or to seek appropriate tax, legal and other professional advice or counsel.” I.C. § 54-2087(4)(d). This is a duty to tell the client when professional assistance should be sought, not a duty to recommend the particular service providers from which it should be sought. A real-estate agent who takes the unrequired step of recommending a particular service provider does so subject to the general statutory duty to exercise reasonable skill and care. For that reason, summary judgment cannot be granted against Count XI on Batchelor’s theory that real-estate agents have no duty to know anything whatsoever about the particular service providers they choose to recommend to their clients.

The next challenge to Count XI is the notion that any negligence on Batchelor’s part was not a proximate cause of Petrus’s damages. More particularly, the argument is that Batchelor’s negligence, if any, did not proximately cause those damages because it merely set the stage for McKenna’s negligence, which more directly caused the damages. “[T]rue proximate cause focuses on whether legal policy supports responsibility being extended to the consequences of conduct. . . . That is, whether it was reasonably foreseeable that such harm would flow from the negligent conduct.” *Cramer v. Slater*, 146 Idaho 868, 875, 204 P.3d 508, 515 (2009) (quotation marks and citations omitted). Proximate causation is almost always an issue for the jury to

decide. *Id.* Batchelor's argument is problematic because Petrus's negligence theory is one of negligent referral, and it is easily foreseeable that an alleged failure to use reasonable skill and care in recommending a home inspector would result in an incompetently performed inspection. Summary judgment therefore cannot be granted on this basis.

Another challenge to Count XI (and, for that matter, to Count XII) is based on section 12 of the PSA between Petrus and Gentry. Batchelor argues that, under the PSA's section 12, Petrus assumed the risk of problems with mold or other microorganisms, which Batchelor says were to blame for the home's dry rot. It is unclear to the Court exactly how Batchelor is entitled to invoke a provision of the PSA—an agreement to which he is not a party—as a bar to claims against him. Even assuming Batchelor may do so, however, he is not entitled to summary judgment on this basis. As already explained in this decision's section III(B)(1), which addresses Gentry's motion for summary judgment, the evidence falls short of establishing as a matter of law that Petrus's claimed damages stem from mold or other microorganisms.

Batchelor's final challenge to Count XI is that Petrus released the claim embodied in Count XI through the representation agreement's section 4. Section 4 provides as follows:

4. TRANSACTION RELATED SERVICES DISCLAIMER: BUYER understands that Broker is qualified to advise BUYER on general matters concerning real estate, but is not an expert in matters of law, tax, financing, surveying, structural conditions, *property inspections*, hazardous materials, or engineering. BUYER acknowledges that Broker advises BUYER to seek expert assistance for advice on such matters. Broker cannot warrant the condition of property to be acquired, or guarantee that all material facts are disclosed by the Seller. Broker will not investigate the condition of any property including without limitation the status of permits, zoning, location of property lines, square footage, possible loss of views and/or compliance of the property with applicable laws, codes or ordinances and BUYER must satisfy himself [sic] concerning these issues by obtaining the appropriate expert advice. The Broker or Broker's agent may, during the course of the transaction, identify individuals or entities who perform services including BUT NOT LIMITED TO the following; *home inspections* The BUYER understands that the identification of service providers is solely for BUYER'S convenience and that the Broker and its agent

are not guaranteeing or assuring that the service provider will perform its duties in accordance with the BUYER'S expectations. BUYER has the right to make arrangements with any entity BUYER chooses to provide these services. *BUYER hereby releases and holds harmless the Broker and Broker's agent from any claims by the BUYER that service providers breached their agreement, were negligent, misrepresented information, or otherwise failed to perform in accordance with the BUYER'S expectations. . . .*

(Petrus Decl. filed June 12, 2016, Ex. 1 § 4 (italics added) (bolding and underscoring in original).) The concluding sentence of section 4, if it alone governed here, would result in a release of the claim embodied in Count XI. But, along with the other duties for which section 54-2087 provides, the duty to exercise reasonable skill and care is “mandatory and may not be waived or abrogated, either unilaterally or by agreement.” I.C. § 54-2087(8). For that reason, section 4 cannot be construed to bar a claim that, like Count XI, is based on a breach of the statutory duty to exercise reasonable skill and care.

For all of these reasons, summary judgment is denied as to Count XI.

The Court now turns to Count XII—Petrus's claim for breach of the Idaho Consumer Protection Act. While the representation agreement's section 4 does not bar Count XI, it does bar Count XII. Generally speaking, persons have freedom of contract, including the freedom to contract away legal rights and remedies. *E.g., Steiner Corp. v. Am. Dist. Tel.*, 106 Idaho 787, 791, 683 P.2d 435, 439 (1984). Although exculpatory clauses are disfavored and are construed against the party relying on them, especially if that party prepared the agreement that contains the clause, “a party may eliminate or restrict its liability under a contract if the language is unambiguous as to the nature of the excused liability.” *Boise Mode*, 154 Idaho at 107, 294 P.3d at 1119. Language is unambiguous if it isn't subject to more than one reasonable interpretation. *See, e.g., id.* Under section 4, Petrus unambiguously agreed that Batchelor might recommend a home inspector as a courtesy to Petrus, but whom to hire was Petrus's decision and Batchelor would take no responsibility for whether the home inspector's work lived up to Petrus's

expectations. More importantly, Petrus unambiguously agreed not to pursue any claims against Batchelor arising from the notion that any home inspector recommended by Batchelor failed to perform in accordance with its contract with Petrus, performed its work negligently, made misrepresentations to Petrus, or otherwise failed to live up to Petrus's expectations. Count XII is exactly that sort of claim.

Indeed, McKenna's negligence is integral to Count XII. A factual premise of Count XII is that McKenna "failed to perform a professional and thorough home inspection, failed to disclose the true, defective condition of the [home], [and] failed to thoroughly inspect the [home's French doors]." (Second Am. Compl. ¶ 117.) Count XII's other major factual premise is that Batchelor misrepresented McKenna's qualifications, resulting in McKenna's hiring, which set the stage for his allegedly incompetent work and, in that way, contributed to Petrus's damages. (Second Am. Compl. ¶¶ 116, 118, 120.) Let us assume for the moment that the proof at trial will show that McKenna performed his work competently. On that assumption, Petrus could not possibly prove Count XII; Batchelor cannot be liable to Petrus for recommending a home inspector who performed a competent inspection, even if Batchelor misstated the home inspector's qualifications. That is because a theoretically "bad" recommendation would have caused Petrus no harm if the result turned out to be a competent inspection.⁷ The need to discern whether Batchelor made a "bad" recommendation arises only if the inspection were incompetent—in other words, if McKenna were negligent, as Petrus alleges. Only in that event might Batchelor's alleged misrepresentations about McKenna's qualifications be consequential.

⁷ Indeed, Petrus says "[t]he legal question is . . . whether, at the time Batchelor selected and referred McKenna, it was reasonably foreseeable that Batchelor's negligence of selecting an incompetent and uninsured home inspector could result in a negligent home inspection." (Pls.' Opp'n Batchelor's Mot. Summ. J. 18.)

This shows that negligence on McKenna's part is essential to Count XII. But Petrus agreed, in section 4 of the representation agreement, to release Batchelor and hold Batchelor harmless from claims that are based on McKenna's negligence. Since Count XII is not premised on alleged violations of duties imposed by the Brokerage Representation Act, there is no apparent legal bar to giving effect to the representation agreement's section 4 in the context of Count XII, as there is in the context of Count XI. Thus, summary judgment is entered against Count XII.

2. Motion to amend complaint

Petrus moves to amend the complaint to assert new claims against Batchelor for violation of the Brokerage Representation Act and for negligence *per se*, as well as to broaden the two already-asserted claims against Batchelor (which are addressed above). The main thrust of the proposed amendments is that Batchelor, ostensibly having had responsibility for locking the home after the final walkthrough before Petrus closed the purchase, should have discovered that the French doors did not close and lock properly and is liable for failing to do so.

Edmond Petrus apparently has known all along that Batchelor participated in the walkthrough, but he says that questioning during his March 2016 deposition made him want to investigate the walkthrough. (Petrus Decl. filed May 17, 2016, ¶¶ 2-3.) And he says that in April 2016 he learned that Batchelor took responsibility for locking the home at the end of the walkthrough. (Petrus Decl. filed May 17, 2016, ¶ 4.) Petrus then proceeded to file his motion to amend on May 17, 2016. During those two months from the deposition to the motion's filing, the trial date was rapidly approaching. It is entirely unclear why that process took two months, especially at a late stage of litigation, when time was growing more precious by the day. And it is equally unclear why this new theory of liability was not conceived and investigated much earlier in the course of the litigation. Petrus has not so much as suggested that Batchelor somehow hid the ball, preventing him from learning the relevant facts at an earlier date.

The timing of the motion is no small matter. Trial is set to begin on August 16, 2016. Petrus's motion was filed only three months before the trial date, just as the deadline for filing motions for summary judgment was arriving and only about a month before the discovery deadline. (Scheduling Order ¶¶ 3, 4(B).) The scheduling order that governs this action was entered on March 12, 2015.⁸ It set a deadline for motions to amend the pleadings. Those motions were due within 120 days after the date the scheduling order was entered. (Scheduling Order ¶ 4(A).) Thus, the deadline for motions to amend the pleadings came and went in July 2015. The purpose of a reasonably early deadline for motions to amend the pleadings is to fix the claims and defenses that are being litigated before the major litigation deadlines arrive, so that the litigation can proceed in an orderly way and the trial date can be maintained.

Petrus plainly was aware of this deadline, having filed a timely prior motion to bring Batchelor—who wasn't an original defendant—into this action in the first place. This motion, though, missed the deadline by ten months. That lapse of time isn't harmless. It impedes Batchelor from having a full and fair opportunity to defend against the new theories of liability, as there was essentially no time for him to conduct discovery or seek summary judgment on them. That opportunity, to which Batchelor is entitled, cannot be extended without vacating the trial date. But there is no compelling reason to vacate the trial date. This action will have been on file for two years and five months when the existing trial date arrives. The parties have had plenty of time to develop their claims and defenses and prepare to present them at trial. The time for revisiting those basic litigation parameters has passed.

Having missed the scheduling order's deadline for motions to amend the pleadings, Petrus must show "good cause" for amending the scheduling order in order to allow an

⁸ The trial and pretrial conference dates set in the scheduling order were later reset.

otherwise-untimely pleadings amendment. *See* I.R.C.P. 16(a)(3); *Silver Creek*, 136 Idaho at 882, 42 P.3d at 675. As already noted, whether “good cause” has been shown is a matter of discretion. *E.g.*, *Camp*, 137 Idaho at 859, 55 P.3d at 313. For the reasons already noted, the Court determines in its discretion that Petrus has not shown “good cause.” His motion to amend his complaint therefore is denied.⁹

Accordingly,

IT IS ORDERED that the motions of Kirk, Gentry, and Batchelor to extend the scheduling order’s deadline for summary-judgment hearings by one court day from June 17 to June 20 of 2016 are granted.

IT IS FURTHER ORDERED that Kirk’s motion for summary judgment is granted.

IT IS FURTHER ORDERED that Batchelor’s motion for summary judgment is granted as to Count XI but is denied as to Count XII.

IT IS FURTHER ORDERED that Petrus’s motion to amend the complaint to assert additional claims against Batchelor is denied.

IT IS FURTHER ORDERED that Gentry’s motion for summary judgment is granted as to Counts II, IV, VI, and VII and denied as to Counts I and V. Additionally, that motion is granted in part and denied in part as to Count III. Petrus may proceed to trial on Count III only

⁹ Alternatively, even if Rule 16(a)(3)’s “good cause” standard did not apply here, the Court would deny the motion under Rule 15(a)(2). Rule 15(a)(2) counsels liberality in granting permission to amend pleadings, but it does not require granting leave to amend when there is undue delay in seeking leave to amend. *E.g.*, *Maroun*, 141 Idaho at 612, 114 P.3d at 982, *abrogated on other grounds*, *Wandering Trails*, 156 Idaho at 591, 329 P.3d at 373. Petrus’s delay is undue. Petrus waited until shortly before trial to investigate a subject that could have been investigated much earlier, even before bringing Batchelor into this litigation in July 2015. And even after deciding to investigate, Petrus did not act promptly enough, in light of the fast-approaching trial date, in seeking leave to amend.

on the theory that Gentry fraudulently failed to disclose to Petrus that water or moisture caused the home's French doors not to work.

Dated this 7th day of July, 2016.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on July 7th, 2016, I served a copy of this document as follows:

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DOUGLAS A. MILLER
Clerk of the District Court

By: 151
G. KNAPP
Deputy Court Clerk

EXHIBIT 2

DOUGLAS A. MILLER, CLERK
By _____ Deputy

NOV 15 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:17 P.M.

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

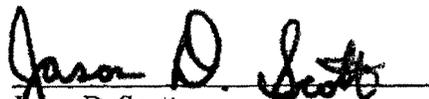
Case No. CV-2014-71-C

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

The claims of Plaintiff Petrus Family Trust Dated May 1, 1991 and its co-trustee Plaintiff Edmond A. Petrus, Jr. (collectively, "Petrus") against Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk") are dismissed with prejudice, with no award of relief to Petrus.

Dated this 15th day of November, 2016.


Jason D. Scott
DISTRICT JUDGE

JUDGMENT - 1

RULE 54(b) CERTIFICATE

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

Dated this 15th day of November, 2016.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on November 15th, 2016, I served a copy of this document as follows:

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DOUGLAS A. MILLER
Clerk of the District Court

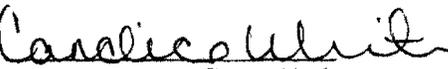
By: 
Deputy Court Clerk

EXHIBIT 3

of habitability Kirk gave when he built the home and sold it to Gentry had already expired when Petrus purchased the home from Gentry about seven years after its completion. Based on that ruling, judgment was entered for Kirk on November 15, 2016.

Petrus filed a timely motion to reconsider on November 28, 2016, as well as a supporting memorandum the next day, and Petrus arranged with the Clerk of Court for a hearing on that motion at 1:30 p.m. January 9, 2017. The Court's usual practice with respect to motions to reconsider, however, is to act on them without a hearing if the moving papers do not cause the Court to doubt the correctness of its ruling. That way, the parties, who already incurred the expense of one round of briefing and argument on an issue, are spared the expense of a second round that won't change the outcome. This approach is, of course, permitted by rule. *See* I.R.C.P. 7(b)(3)(F) ("If oral argument has been requested on any motion, the court may deny oral argument by written or oral notice from the court at least 1 day prior to the hearing."). It is the approach the Court will take here because, after carefully considering Petrus's arguments for reconsideration, the Court is not persuaded that there is reason to do so.

Petrus's first argument for reconsideration is that the Court's ruling conflicts with the holding in *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987), that privity of contract with the builder isn't required for a secondary purchaser of a home to assert a claim against the builder for breach of the implied warranty of habitability. (Mem. Supp. Mot. Reconsider 4.) In fact, however, the Court followed that holding. (Mem. Decision & Order 10.) Petrus's claim failed not because privity of contract with Kirk was absent, but instead because the claim was time-barred. (Mem. Decision & Order 10-13.) Petrus's beef is with the Court's treatment of the claim as a contract claim, using the accrual rule and statute of limitations that apply to contract claims in the construction context, despite the absence of privity. As the Court

previously explained, that approach is in keeping with *Tusch*, as the *Tusch* court plainly regarded the newly recognized claim as sounding in contract. (Mem. Decision & Order 11-12.) Indeed, for the express purpose of giving “contract principles . . . a freer hand” in this setting, the *Tusch* court followed the advice of Prosser and Keeton for “elimination of [the privity-of-contract] requirement for recovery on a contract-warranty theory.”¹ *Id.* at 50 & n.8, 740 P.2d at 1035 & n.8 (quoting Prosser & Keeton, *The Law of Torts* § 101 (5th ed. 1984)). Had the *Tusch* court’s intention been to recognize a new tort claim, eliminating the privity requirement wouldn’t have been necessary, as privity of contract isn’t a requirement of tort law.²

Petrus also argues that *Tusch* contains accrual language that is inconsistent with the completion-of-construction accrual rule set forth in I.C. § 5-241(b), and that the Court’s ruling

¹ Similar to *Tusch*, Article 2 of the Uniform Commercial Code (the sale-of-goods article) makes breach-of-warranty claims available to some people who lack privity of contract with the seller. I.C. § 28-2-318. These people may sue in contract to enforce the warranties, despite the absence of privity of contract between them and the seller. I.C. § 28-2-318 cmt. 2 (“The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to ‘privity.’ It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller’s warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used [A]ny beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.”). Thus, breach-of-warranty claims sounding in contract, even when available in the absence of privity of contract, isn’t a novel concept.

² Petrus incorrectly suggests that Justice Bakes’ dissent in *Tusch* shows he understood the newly recognized claim to sound in tort. (Mem. Supp. Mot. Reconsider 6.) To the contrary, Justice Bakes began his dissent by stating his understanding that the majority “holds, in effect that a builder is liable in a contract action to a remote purchaser of housing even though no contract exists between the two persons.” *Tusch*, 113 Idaho at 51, 740 P.2d at 1036 (emphasis added) (Bakes, J., concurring in part and dissenting in part). He went on to lament the creation of “a contract cause of action for breach of implied warranty with its privity requirement removed.” *Id.* at 52, 740 P.2d at 1037 (emphasis added) (Bakes, J., concurring in part and dissenting in part). The language on which Petrus relies reflects Justice Bakes’ view that a contract action without a privity requirement is a contradiction in terms, so any such action is really a tort action. It doesn’t reflect his view of what the majority intended to accomplish.

improperly provides for expiration of the implied warranty of habitability before Petrus even purchased the home. (Mem. Supp. Mot. Reconsider 5, 9-11.) First, there is no definitive inconsistency. There is only an arguable one, as the *Tusch* language to which Petrus points is vague. Regardless, even if that language were definitively inconsistent with I.C. § 5-241(b), it is mere dictum, as *Tusch* wasn't decided based on the statute of limitations and didn't involve determining when the secondary buyer's claim accrued. If Petrus's claim indeed is a contract claim, as the Court holds, I.C. § 5-241(b) supplies the accrual rule as a matter of its plain language. The statute controls, irrespective of any inconsistent dictum. Second, the legislature has the power to provide for accrual of contract claims upon completion of construction, even though in other contexts accrual awaits the suffering of damage, and even though that means the implied warranty of habitability given by Kirk to owners of the home he built for Gentry had expired before Petrus purchased it. The legislature has the power to adopt an accrual rule having the effect of rendering implied-warranty-of-habitability claims unavailable to secondary purchasers purchasing homes several years after completion of construction.

Petrus also argues that it is "strained" and "unnatural" to treat a secondary home purchaser as the mere transferee of the implied warranty of habitability given by the builder to the original home purchaser, as opposed to the recipient of a new and distinct implied warranty of habitability. (Mem. Supp. Mot. Reconsider 7-9.) The Court disagrees. Reasonable people might disagree about the length of time the implied warranty of habitability should last, but there is no good reason its length should vary based on whether a home changes hands after its construction is completed. Gentry kept the home throughout the four-year duration of the implied warranty of habitability produced by the combination I.C. § 5-241(b)'s completion-of-construction accrual rule and I.C. § 5-217's four year limitations period for oral contracts, so it

expired before Petrus purchased the home. Had Petrus instead purchased the home during the warranty period, Petrus would have been, in effect, the transferee of the remaining warranty, given the *Tusch* court's decision to extend the warranty to secondary purchasers. This regime reasonably gives builders certainty as to when their warranty obligations expire, irrespective of whether and when the homes they build are resold by the original buyers.

Petrus next argues that section 6-1-16 of the Valley County Building Code, which creates a cause of action for persons damaged by Building Code violations, undermines the Court's ruling that claims like his are subject to I.C. § 5-241(b)'s completion-of-construction accrual rule. (Mem. Supp. Mot. Reconsider 11-12.) Petrus's argument on this point isn't sensible. As Petrus acknowledges, that ordinance hadn't yet been enacted when Kirk built Gentry's home. For that and other reasons, Petrus hasn't established that section 6-1-16 of the Building Code has any application to this situation. Indeed, Petrus didn't assert a claim under section 6-1-16 or any other portion of the Building Code; he asserted a common-law claim for breach of the implied warranty of habitability. That cause of action is available to home purchasers throughout the State of Idaho, not just to those in Valley County. The applicable accrual rule shouldn't be determined by reference to county ordinances, as that approach would senselessly create the potential for different accrual rules in different counties.

Finally, Petrus takes issue with a footnote in which the Court observed that, if a claim for breach of the implied warranty of habitability sounded in tort rather than in contract, it would be barred by the "economic loss rule." (Mem. Supp. Mot. Reconsider 12-14.) That conclusion readily follows from the *Tusch* court's holding that the secondary home purchaser's claim against the builder for negligent design and construction was barred by the "economic loss rule." 113 Idaho at 40-41, 740 P.2d at 1025-26. If Petrus's claim for breach of the implied warranty of

habitability sounds in tort, as Petrus contends, the claim is analogous to the negligent-design-and-construction claim asserted in *Tusch*, so it seemingly would have to suffer the same fate. Petrus suggests that isn't the case because, in *Tusch*, the secondary home purchaser's claim for breach of the implied warranty of habitability survived the "economic loss rule." Of course it did; the "economic loss rule" is inapplicable to contract claims, and a contract claim is exactly what the *Tusch* court intended to allow. Again, for the express purpose of giving "contract principles . . . a freer hand" in this setting, the *Tusch* court followed the advice of Prosser and Keeton for "'elimination of [the privity-of-contract] requirement for recovery on a contract-warranty theory.'" *Id.* at 50 & n.8, 740 P.2d at 1035 & n.8 (quoting Prosser & Keeton, *The Law of Torts* § 101 (5th ed. 1984)). Thus, as the Court originally observed, the "economic loss rule" comes into play here—and dooms Petrus's claim—only if that claim is deemed to sound in tort.

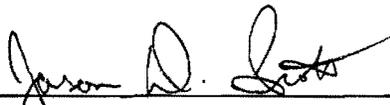
In sum, as the Court originally held, Petrus's claim fails under the statute of limitations because it is a contract claim, but if it were a tort claim it would fail under the "economic loss rule" anyway. There is no "hybrid" category into which the claim can be placed, so as to avoid giving it either a "contract" label or a "tort" label that implicates these legal difficulties.

Accordingly,

IT IS ORDERED that the hearing on Petrus's motion to reconsider scheduled for 1:30 p.m. on January 9, 2017, is vacated.

IT IS FURTHER ORDERED that Petrus's motion to reconsider is denied.

Dated this 5th day of December, 2016.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on December 6th, 2016, I served a copy of this document as follows:

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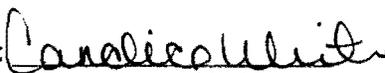
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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

1. Introduction.

Through its pleadings, this case involves a commercial transaction alleged by the plaintiffs. In an attempt to escape the mandatory fee provisions of I.C. § 12-120(3), the Petrus Family Trust and Edmond Petrus, Jr. (collectively, “Petrus”) argue that this is not a “commercial transaction” case that fits under the statute, arguing instead that it is a personal transaction case involving only the sale of a residential home. Petrus cites cases that hold the purchase and sale of a home is not a commercial transaction between the buyer and seller. That argument may apply to Gentry-Boyd, the seller, but not to Kirk. Kirk did not sell the home, he built it. Which is why Petrus sued him.

From Kirk’s perspective, the only reason he was involved in this lawsuit is a commercial transaction. Kirk worked as a custom-home builder and built the home at 2130 Payette Drive (the “Home”). The only reason he built the Home was to earn a living, “in commerce”. Petrus’ theories against Kirk included negligent construction (dropped in the first amended complaint), breach of implied warranty of habitability, and conspiracy to commit fraud, all related to the building of the Home, all brought and pursued against Kirk because he built the Home, and all commercial. To say it another way, but for Kirk’s building of the Home, Petrus would have no basis to try to recover against Kirk. Petrus’ claims against Kirk arose from Kirk’s providing his services as a builder. These services were not for personal or household purposes and because Kirk prevailed, he is entitled to an award of attorney fees under I.C. § 12-120(3). *See, Am. Bank v. BRN Dev., Inc.*, 159 Idaho 201, 208, 358 P.3d 762, 769 (2015).

Further, throughout the course of the lawsuit, Petrus reserved the right to amend his pleadings to seek punitive damages and damages for loss of use. Contrary to the Petrus’ claim that it is “undisputed that Petrus’ purchase of the Home was personal, and not commercial

(Plaintiff's Objection Brief at 3), Petrus testified in his deposition that he rented the Home for cash.¹ While this fact alone doesn't change anything as it relates to the commercial transaction of Kirk's building of the Home, it does show that Petrus understood and took advantage of the fact that the Home could be used to generate income. When Kirk built the Home, he had zero concern whether or not the Home was going to be used as a personal residence, a vacation rental, or both. To Kirk, the building of the Home was a commercial transaction just like every other custom-home he contracted to build.

Additionally, Petrus alleged that he was entitled to a recovery of attorney fees and costs under Idaho Code § 12-120(3) in all three versions of his complaint. As explained below, this allegation is enough to trigger I.C. § 12-120(3), which cuts both ways, and allows a defendant who prevails to collect fees if the plaintiff alleges recovery under I.C. § 12-120(3) and loses.

Petrus clearly viewed this as a case in which I.C. § 12-120(3) applied. It could not have been a mistake to include a request for fees under I.C. § 12-120(3) in three different versions of the complaint, filed by two different law firms. He sued a builder under a conspiracy and warranty theory. He sued a real estate broker who was working for him under a written contract, and he sued a home inspector who was also working for him under a written contract. Commercial transactions make up all of these claims.

Regarding the broad language of I.C. § 12-121, which currently allows a court to award fees to a prevailing party when the other party's case is brought or pursued frivolously, unreasonably, or without foundation, none of the claims brought by Petrus against Kirk were legitimately brought or pursued. The conspiracy claim alleging that Kirk and Gentry-Boyd had conspired to defraud Petrus as a subsequent third party purchaser was clearly without foundation.

¹ See generally, Petrus Dep. at pp. 184-187, attached as Ex. 4 to the Affidavit of Daniel Nevala in Support of Defendant Chris Kirk's Motion for Summary Judgment filed May 20, 2016.

To prevail on that claim, Petrus would be required to show that Kirk and Gentry-Boyd conspired, at the time of the constructing the Home (2004), to defraud a subsequent purchaser, at some point in the future. Not one shred of evidence pointed in that direction. Kirk and Gentry-Boyd both testified that they never had any conversations of this nature, and Petrus offered no evidence whatsoever to support this theory, ultimately abandoning the claim on summary judgment.

Like the negligence claim that was filed in the first complaint, and later dropped in the first amendment, the warranty claim that Petrus pursued against Kirk was time barred and should never have been filed. If adequate research and investigation had been made into the statute of limitations and the timeframe of completion of the Home, Petrus would have realized that he had no viable theory of recovery against Kirk. Resultingly, this case was brought and pursued against Kirk unreasonably and without foundation in hopes that Kirk would settle and write Petrus a check. Because of this, the Court has discretion to award Kirk fees under I.C. § 12-121.

2. The Mere Allegation Of A Commercial Transaction Is Sufficient To Trigger Idaho Code Section 12-120(3).

This lawsuit was not simply about the purchase and sale of a personal residence. The point of this lawsuit was for Petrus to recover money from anyone and everyone involved with the construction, use, marketing, sale, and inspection of the property, including attorney fees for bringing the suit under I.C. § 12-120(3).

The Idaho Supreme Court has held that I.C. § 12-120(3) is triggered by the *allegation* of a commercial transaction which constitutes the gravamen of a claim--not by the actual occurrence of a commercial transaction. *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 758, 331 P.3d 491, 500 (2014). In *DAFCO*, the Idaho Supreme Court held that “even where no commercial transaction occurs between the parties, we have allowed attorney fees to a prevailing

party where the losing party has alleged a commercial transaction between the parties.” *Id* at 758.

Further, in a 2011 case, the Idaho Supreme Court held that allegations in the complaint that the parties had entered into a commercial transaction and that the complaining party is entitled to recovery based on that transaction, are sufficient to trigger the application of I.C. § 12-120(3). *Garner v. Povey*, 151 Idaho 462, 470, 259 P.3d 608, 616 (2011). In short, if a party alleges that they are entitled to fees under section 12-120(3) on a commercial claim and loses, the statute is triggered and the prevailing party is entitled to recover. The Idaho Supreme Court has consistently applied this principle. In *American West Enterprises, Inc. v. CNH, LLC*, consequently, an implied warranty case involving a third party claim against a manufacturer, the court again recited the principle that Idaho courts will consider whether the parties alleged the application of I.C. § 12-120 stating:

Though CNH and American West did not deal directly with each other, **American West alleged CNH breached an implied warranty, which would be a commercial transaction.** This Court has made clear that the failure of a party's claims based on a commercial transaction does not absolve a party of the attorney fees and costs that would be awarded under I.C. § 12-120. American West tried to recover on the commercial nature of a transaction: the breach of an implied warranty. It also sought to assert that it was a third party beneficiary of the commercial agreement between CNH and Pioneer. American West claimed it was entitled to attorney fees pursuant to I.C. § 12-120(3) because this was a commercial transaction. Though American West backtracked after CNH was found not liable on the alleged commercial transaction, that assertion triggered the application of I.C. § 12-120(3). CNH is entitled to attorney fees and costs below and on appeal. *Am. W. Enterprises, Inc. v. CNH, LLC*, 155 Idaho 746, 755, 316 P.3d 662, 671 (2013). (Emphasis added).

Because I.C. § 12-120(3) mandates an award of fees to the prevailing party in a suit involving a commercial transaction, this Court should award Kirk his costs and fees. *Fritts v. Liddle & Moeller Const., Inc.*, 144 Idaho 171, 173, 158 P.3d 947, 949 (2007).

3. I.C. § 12-121 and I.R.C.P. 54 Allow The Court To Award Fees To Kirk, The Prevailing Party.

Kirk rightfully prevailed on summary judgment on all claims. Petrus brought and pursued a warranty theory that was time barred by over three years. Any level of pre-suit investigation could have discovered the time line of when construction on the Home was complete. Yet, Petrus not only brought the claim, he continued to pursue the claim after learning from his own expert that Kirk did not use substandard materials in the construction of the Home and that nothing Kirk did impacted the habitability of the Home.²

Petrus' conspiracy claim against Kirk was even more far-fetched. Petrus claimed that Kirk and Gentry-Boyd agreed and combined to engage in a conspiracy to use and install in a substandard manner an exterior envelope that did not meet applicable building codes and standards of care. None of this ever happened; nor did any facts that would assist Petrus in establishing any of the nine necessary elements needed to prove fraud against Kirk. Petrus did not amass significant evidence against Kirk as he claims. Instead, he brought and pursued unwinnable theories against Kirk in hope that Kirk would agree to settle. That's what drove this lawsuit. Petrus brought and pursued his theories against Kirk without proper investigation or development of the necessary facts in a frivolous and unreasonable manner without foundation, and because of that, he should be held to task. Had *Hoffer v. Shappard* been decided a month earlier, the Court could look to the "when justice so requires" standard and without doubt decide that justice so requires an award of fees under I.C. § 12-121 in this case. *See Hoffer v. Shappard*, 160 Idaho 870, 380 P.3rd 681 (2016). However, the old standard still gets us there.

² *See*, Value Dep. at pp. 145:12 – 146:18; 194:7-14, attached as Ex. 5 to the Affidavit of Daniel Nevala in Support of Defendant Chris Kirk's Motion for Summary Judgment filed May 20, 2016.

4. Conclusion

Petrus filed and pursued the claims against Kirk in bad faith and without any requisite investigation into the facts surrounding the timing of completion of the construction, or the development of any evidence proving or even hinting at a conspiracy to defraud a subsequent purchaser. This gives rise to a fee award under I.C. § 12-121, as the claims were both brought and pursued unreasonably, frivolously, and without foundation.

Petrus sued Kirk because Kirk was the homebuilder, plain and simple. Because the gravamen of the complaint against Kirk was a commercial transaction that occurred when Kirk built the Home. Kirk is entitled to fees on the same basis Petrus alleges he would be entitled to fees, I.C. § 12-120(3).

Based on the conduct and actions of Petrus throughout the course of these proceedings, Kirk respectfully requests that this Court award him reasonable fees and costs.

DATED this 1st day of February, 2017.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 1st of February, 2017, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

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Daniel A. Nevala

FEB 13 2017

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
Case No. _____ Inst. No. _____
Filed _____ A.M. 3:15 P.M.

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

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

Case No. CV-2014-71-C

ORDER AWARDING COSTS AND
ATTORNEY FEES

Plaintiff Petrus Family Trust Dated May 1, 1991 and its co-trustee Plaintiff Edmond A. Petrus, Jr. (collectively, "Petrus") bought a home from Defendant Nancy Gentry-Boyd ("Gentry") in 2012. Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk") had built the home for Gentry about seven years earlier. After closing the transaction, Petrus discovered that the home suffered from extensive dry rot.

On March 11, 2014, Petrus sued Kirk (among others), claiming Kirk negligently constructed the home. (Compl. ¶¶ 49-59.) Petrus filed a first amended complaint on September 8, 2014—before any of the defendants had appeared. In that pleading, Petrus abandoned the negligent-construction claim but asserted two new claims against Kirk. One was a claim that Kirk breached implied warranty of habitability by constructing the home in a way that allowed water infiltration, allegedly causing the dry rot. (First Am. Compl. ¶¶ 59-68.) The other was a

claim that Kirk conspired with Gentry to defraud Petrus by agreeing not to build the home in conformity to applicable building codes and not to divulge the deficiencies to Petrus upon the home's resale to him several years later. (First Am. Compl. ¶¶ 69-73.) Those two claims were reasserted, without change, in Petrus's final pleading: a second amended complaint filed on September 21, 2015. (Second Am. Compl. ¶¶ 60-74.)

Kirk moved for summary judgment on May 20, 2016—a few months short of two years after Petrus first asserted the implied-warranty and conspiracy-to-defraud claims. During the summary-judgment hearing, Petrus acceded to the entry of summary judgment against the conspiracy-to-defraud claim tried to maintain the implied-warranty claim. In a decision issued on July 7, 2016, the Court granted summary judgment to Kirk, finding Petrus's implied-warranty claim to be time-barred. The Court determined that the claim sounds in contract, subjecting it to I.C. § 5-241(b)'s completion-of-construction accrual rule, as well as to I.C. § 5-217's four year limitations period for claims based on oral contracts. As a result, the implied warranty of habitability Kirk gave when he built the home and sold it to Gentry had already expired by the time Petrus purchased the home from Gentry about seven years after its completion.

Based on that ruling, judgment was entered for Kirk on November 15, 2016. Petrus filed a timely motion to reconsider on November 28, 2016, but the Court denied that motion without a hearing on December 5, 2016.

On November 29, 2016, while the motion to reconsider was pending, Kirk filed a timely request for an award of costs and attorney fees. He seeks \$4,578.72 in costs, nearly all of which he contends are awardable as a matter of right. Under I.C. §§ 12-120(3) or 12-121, he seeks \$144,893.72 in attorney fees.

On December 13, 2016, Petrus filed a timely objection to the request for attorney fees. In the objection, Petrus expressly consented to an award of the requested costs. (Pls.' Obj. Def. Kirk's Mot. Attorney Fees & Costs 11.) Under I.R.C.P. 54(d)(5), doing so constitutes a waiver of objections to an award of those costs. The Court construes Petrus's objection to the request for attorney fees as the motion to disallow contemplated by I.R.C.P. 54(d)(5). A hearing on Petrus's motion to disallow was held on February 6, 2017. During the hearing, Petrus conceded that Kirk is the prevailing party and reiterated that his requested costs aren't contested. At the end of the hearing, the Court stated that the requested costs would be awarded, given the absence of objections. Thus, Kirk is awarded \$4,578.72 in costs. The Court took the motion to disallow the request for attorney fees under advisement. That motion is now ready for decision.

The Court begins with Kirk's request for attorney fees under I.C. § 12-120(3). Under that statute, "[i]n any civil action to recover on . . . [a] commercial transaction . . . , the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs." I.C. § 12-120(3) (emphasis added). As the term "shall" denotes, the fee-shifting for which section 12-120(3) provides is mandatory. It is triggered if a commercial transaction is integral to the claim and the basis on which recovery is sought. *E.g., Carrillo v. Boise Tire Co.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012). The term "commercial transaction" means "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). "[I]n order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." *Carrillo*, 152 Idaho at 756, 274 P.3d at 1271 (emphasis added).

There was no transaction between Kirk and Petrus. Instead, Kirk built a home for Gentry, and Gentry sold it to Petrus years later. Those are the two transactions at issue here. Whichever one Kirk contends is the "commercial transaction" that gives rise to fee-shifting

under section 12-120(3) here, his argument fails. As to the first transaction, the evidence doesn't support the conclusion that Gentry had a commercial purpose for hiring Kirk to build a home for her. To the contrary, the evidence shows that she lived in the home, plainly making the transaction one entered into for "personal or household purposes" from her standpoint. As to the second transaction, the evidence doesn't support the conclusion that either Gentry or Petrus had a commercial purpose. Gentry was selling her personal residence, and Petrus was purchasing a vacation property. The evidence doesn't show that Petrus purchased the home primarily for rental purposes or primarily to hold as an investment without substantial personal occupancy during the holding period.

Consequently, even though Kirk undoubtedly had a commercial purpose for building the home for Gentry, there is no "commercial transaction" that triggers section 12-120(3) here. Kirk's request for attorney fees is denied to the extent it is based on section 12-120(3).

The Court now turns to Kirk's request for attorney fees under I.C. § 12-121. Attorney fees are awardable to the prevailing party under section 12-121 in an action that was "brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(2). Whether that is the case is a discretionary determination. *E.g., Idaho Military Historical Soc'y v. Maslen*, 156 Idaho 624, 631-32, 329 P.3d 1072, 1079-80 (2014). That determination need not be made on wholesale basis; instead, it can be made on a claim-by-claim basis, with attorney fees apportioned between frivolous and non-frivolous claims. *Id.* at 632, 329 P.3d at 1080. Thus, the Court will individually analyze the three separate claims Petrus asserted against Kirk.

First is Petrus's short-lived claim for negligent construction, included in the original complaint but excluded from the first amended complaint. Although the record shows that Kirk was aware he had been sued for negligent construction, that he retained counsel, and that he

incurred some attorney fees as a result (Mem. Costs & Fees Ex. A), the record doesn't show that Kirk was ever served with process or ever appeared in the action before the first amended complaint was filed. Consequently, even assuming the negligent-construction claim were frivolous, because Kirk never became obligated to respond to it the Court declines, in its discretion, to award attorney fees in connection with its brief existence.

The Court next addresses Petrus's claim that Kirk conspired with Gentry to defraud Petrus by agreeing not to build the home in conformity to applicable building codes and not to divulge the deficiencies to Petrus when Gentry resold the home to Petrus years later. As already noted, Petrus acceded to the entry of summary judgment against that claim. Petrus has given the Court no reason to believe it was founded on much of anything but conjecture. The idea behind it—that a homebuilder and a homebuyer agreed to skirt building codes to keep costs down, so that the homebuyer could years later sell the “lemon” of a home to an unsuspecting secondary purchaser—borders on preposterous. Fraud shouldn't be lightly alleged, in hopes that evidence will materialize as the litigation proceeds. But that appears to be what happened here. The conspiracy-to-defraud claim was brought and pursued frivolously, unreasonably, and without foundation. Fee-shifting under section 12-121 is appropriate with respect to that claim.

That leaves Petrus's claim for breach of the implied warranty of habitability. As already noted, the Court entered summary judgment against that claim, finding it to be time-barred. Although the Court considers its ruling in that regard to follow from a faithful application and a careful reading of *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987), it is fair to say Petrus presented an issue of first impression as to whether contract or tort accrual rules and limitations periods apply to a secondary purchaser's claim for breach of the implied warranty of habitability. Petrus's position that tort accrual rules and limitations periods apply was decidedly

weaker than Kirk's position that contract accrual rules and limitations periods apply, but it wasn't frivolous. Kirk advanced several other arguments for summary judgment, including the argument that the problems with the home weren't severe enough to implicate the implied warranty of habitability, but those arguments weren't as strong as his statute-of-limitations argument. They therefore don't establish frivolousness. Thus, the Court declines to award attorney fees in connection with the implied-warranty claim.

As a result, the Court will apportion Kirk's attorney fees between Petrus's frivolous conspiracy-to-defraud claim and his other claims and make an award only with respect to the former. The Court's aim, in the apportionment process, is arriving at an award of attorney fees that approximates the amount by which Kirk's attorney fees were increased as a result of Petrus's pursuit of the frivolous conspiracy-to-defraud claim. That approach seems appropriate to the Court, given that Petrus also pursued a non-frivolous claim and section 12-121 does not allow awarding attorney fees with respect to non-frivolous claims.

Of course, a precise apportionment isn't possible. But after carefully reviewing Kirk's itemization of his attorney fees, after reviewing the other pertinent portions of the record, and after considering the factors set forth in I.R.C.P. 54(e)(3), the Court has arrived at one that is reasonable in its judgment. The Court perceives almost all of the work that was necessary to defend against the conspiracy-to-defraud claim to also have been necessary to defend against the implied-warranty claim. Some independent analysis and briefing was necessary with respect to the conspiracy-to-defraud claim, to be sure, and undoubtedly some written discovery requests and some deposition questions focused on conspiracy-to-defraud issues. But most of the work pertained to both claims indivisibly or to the implied-warranty claim in particular. In an exercise

of its discretion, the Court apportions \$10,000.00 of Kirk's attorney fees to the frivolous conspiracy-to-defraud claim. Kirk is awarded attorney fees in that amount.

The Court considers this apportionment justified for an additional reason. Petrus's implied-warranty-claim—the non-frivolous claim—failed based on a statute-of-limitations defense that could've been raised much earlier in the course of litigation and obviated the need to litigate that claim any further. Show-stopping defenses that don't require much discovery, like the successful statute-of-limitations defense here, should be tested early, before substantially all of the attorney fees necessary to get the case trial-ready have been incurred. The Court finds it inequitable to make a six-figures award of attorney fees when an early statute-of-limitations challenge to Petrus's plainly stronger claim might have nipped the litigation in the bud by leaving Petrus with only a pie-in-the-sky conspiracy-to-defraud claim.

Accordingly,

IT IS ORDERED that Petrus's motion to disallow the award of costs and attorney fees requested by Kirk is granted in part and denied in part. Kirk is awarded \$4,578.72 in costs and \$10,000.00 in attorney fees. An amended judgment reflecting this award will be entered. Unlike the original judgment, the amended judgment won't contain a Rule 54(b) certificate of finality because, at this time, no other claims in this action remain to be adjudicated.

Dated this 13th day of February, 2017.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on February 13, 2017, I served a copy of this document as follows:

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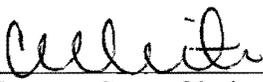
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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

FEB 13 2017

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

Case No. _____ Inst. No. _____
Filed _____ A.M. 3:15 P.M.

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

Case No. CV-2014-71-C

AMENDED JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

The claims of Plaintiffs Petrus Family Trust Dated May 1, 1991 and Edmond A. Petrus, Jr. against Defendant Chris Kirk are dismissed with prejudice, with no award of relief to Petrus.

Further, Chris Kirk is awarded \$14,578.72 against Petrus Family Trust Dated May 1, 1991 and Edmond A. Petrus, Jr., jointly and severally, consisting of an award of \$4,578.72 in costs of court and an award of \$10,000.00 in attorney fees.

Dated this 13th day of February, 2017.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on February 13, 2017, I served a copy of this document as follows:

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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

NOTICE IS HEREBY GIVEN THAT:

1. Plaintiffs and Appellants, PETRUS FAMILY TRUST DATED MAY 1, 1991, and EDMOND A. PETRUS, JR. (together “Petrus”), hereby amend their appeal against Respondent, CHRIS KIRK d/b/a KIRK ENTERPRISES (“Kirk”), to the Idaho Supreme Court from the Memorandum Decision and Order entered on July 7, 2016, the Judgment entered on November 15, 2016, the Order Denying Motion to Reconsider entered on December 6, 2016, the Order Awarding Costs and Attorney Fees entered on February 13, 2017, the Amended Judgment entered on February 13, 2017, as well as any and all orders relating to the preliminary statement of issues set forth in paragraph 3 below, the Honorable Jason D. Scott presiding. A copy of the orders entered since the Notice of Appeal was filed are attached to this Amended Notice.

2. Petrus has a right to appeal to the Idaho Supreme Court, and the orders described in paragraph 1, above, are appealable orders under and pursuant to Idaho Appellate Rule 11(a)(3) and 11(a)(7).

3. Petrus intends to assert the following issue on appeal (although he reserves his right to later assert issues not described in this preliminary statement): whether the District Court erred in finding that Petrus’s implied warranty of habitability claim is time barred by a four-year statute of limitations, despite the fact that the asserted defect was latent, meaning no cause of action could have accrued until after the supposed statute of limitations had already run.

4. Petrus requests the preparation of the following portions of the Reporter’s Transcript in electronic format:

- a. Hearing on Motion for Summary Judgment (06/20/16); and
- b. Hearing on Motion for Attorney Fees (02/06/17).

5. Petrus requests the following documents be included in the Clerk’s Record:

- a. Complaint (03/11/14);
- b. First Amended Complaint and Demand for Jury Trial (09/08/14);
- c. Answer (09/29/14);
- d. Second Amended Complaint and Demand for Jury Trial (09/21/15);
- e. Answer to Second Amended Complaint and Demand for Jury Trial (09/30/15);
- f. Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (05/20/16);
- g. Memorandum in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (05/20/16);
- h. Affidavit of Chris Kirk in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (05/20/16);
- i. Affidavit of Daniel Nevala in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (05/20/16);
- j. Plaintiffs' Opposition to Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (06/12/16);
- k. Declaration of Alyson A. Foster in Opposition to Defendant's Motion for Summary Judgment (06/12/16);
- l. Declaration of Michael Longmire in Opposition to Defendant's Motion for Summary Judgment (06/12/16);
- m. Declaration of Beau Value in Opposition to Defendant's Motion for Summary Judgment (06/12/16);
- n. Declaration of Edmond A. Petrus in Opposition to Defendant's Motion for Summary Judgment (06/12/16);
- o. Reply Memorandum in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (06/17/16);
- p. Supplemental Affidavit of Daniel Nevala in Support of Defendant Chris Kirk d/b/a Kirk Enterprises' Motion for Summary Judgment (06/17/16);
- q. Memorandum Decision and Order (07/07/16);
- r. Judgment (11/15/16);
- s. Motion for Reconsideration of Order Granting Summary Judgment to Chris

Kirk d/b/a Kirk Enterprises (11/28/16);

- t. Memorandum in Support of Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment to Chris Kirk d/b/a Kirk Enterprises (11/29/16);
- u. Order Denying Motion to Reconsider (12/05/16);
- v. Motion for Attorneys' Fees and Costs (11/29/16);
- w. Memorandum in Support of Motion for Attorneys' Fees and Costs (11/29/16);
- x. Memorandum of Costs and Fees (11/29/16);
- y. Plaintiff's Objection to Defendant Kirk's Motion for Attorneys' Fees and Costs (12/13/16);
- z. Declaration of Edmond A. Petrus in Support of Plaintiff's Objection to Defendant Kirk's Motion for Attorney Fees and Costs (12/13/16);
- aa. Reply in Support of Motion for Attorneys' Fees and Costs (02/01/17);
- bb. Order Awarding Attorneys' Fees and Costs (02/13/17); and
- cc. Amended Judgment (02/13/17).

6. No portion of the record in this matter has been sealed pursuant to court order.

7. I certify:

a. That a copy of this Amended Notice of Appeal has been served on each court reporter of whom a request for additional transcript is made, at the address set forth in the certificate of service below;

b. That court reporters have been paid the estimated fees of \$533.50 to date for preparation of the Transcripts; the additional transcript requested within this Amended Notice of Appeal is an estimated additional 35 pages.

c. That a deposit of \$100 for preparation of the Clerk's Record was previously paid;

d. That the appellate filing fee in the amount of \$129 was previously paid; and

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

Dated: March 6, 2017

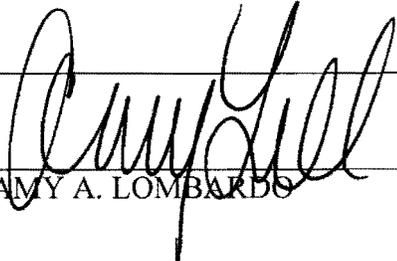
By: 

JOHN MORRIS, ESQ.
RACHEL E. MOFFITT, ESQ.
AMY A. LOMBARDO, ESQ.
Attorneys for Plaintiffs / Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March 2017, I served true and correct copies of the foregoing documents upon each of the following individuals in the manner indicated below:

<p>Nancy Gentry-Boyd</p> <p>Steven J. Millemann / George C. Pittenger MILLEMANN PITTENGER & PEMBERTON LLP 706 N. First Street P.O. Box 1066 McCall, Idaho 83638</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Chris Kirk d/b/a Kirk Enterprises</p> <p>C. Tom Arkoosh / Daniel A. Nevala ARKOOSH LAW OFFICES 802 W. Bannock Street, Suite 900 P.O. Box 2900 Boise, Idaho 83701</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Todd McKenna d/b/a Homecraft Home Inspections</p> <p>Michael G. Pierce 489 West Mountain Road P.O. Box 1019 Cascade, Idaho 83611</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Re/Max Resort Realty / Kevin Batchelor</p> <p>Phillip J. Collaer ANDERSON JULIAN & HULL LLP C.W. Moore Plaza 250 S. Fifth Street, Suite 700 P.O. Box 7426 Boise, Idaho 83707</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>
<p>Brooke Bohr Diane Cromwell</p> <p>Tucker & Associates 605 Fort Street Boise, ID 83702</p>	<p><input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile</p>



 AMY A. LOMBARDO

DOUGLAS A. [Signature], CLERK
By _____ Deputy

FEB 13 2017

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

Case No. _____ Inst. No. _____
Filed _____ A.M. 3:15 P.M.

PETRUS FAMILY TRUST DATED MAY 1,
1991, and EDMOND A. PETRUS, JR.,
individually and as Co-Trustee of the Petrus
Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK
d/b/a KIRK ENTERPRISES; TODD
MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS; RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

Case No. CV-2014-71-C

AMENDED JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

The claims of Plaintiffs Petrus Family Trust Dated May 1, 1991 and Edmond A. Petrus, Jr. against Defendant Chris Kirk are dismissed with prejudice, with no award of relief to Petrus.

Further, Chris Kirk is awarded \$14,578.72 against Petrus Family Trust Dated May 1, 1991 and Edmond A. Petrus, Jr., jointly and severally, consisting of an award of \$4,578.72 in costs of court and an award of \$10,000.00 in attorney fees.

Dated this 13th day of February, 2017.

[Signature]

Jason D. Scott
DISTRICT JUDGE

AMENDED JUDGMENT - 1

CERTIFICATE OF SERVICE

I certify that on February 13th, 2017, I served a copy of this document as follows:

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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

DOUGLAS A. [Signature], CLERK
By _____ Deputy

FEB 13 2017

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

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MCKENNA d/b/a HOMECRAFT HOME
INSPECTIONS: RE/MAX RESORT
REALTY; KEVIN BATCHELOR; and
DOES 1-4,

Defendants.

Case No. CV-2014-71-C

ORDER AWARDING COSTS AND
ATTORNEY FEES

Plaintiff Petrus Family Trust Dated May 1, 1991 and its co-trustee Plaintiff Edmond A. Petrus, Jr. (collectively, "Petrus") bought a home from Defendant Nancy Gentry-Boyd ("Gentry") in 2012. Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk") had built the home for Gentry about seven years earlier. After closing the transaction, Petrus discovered that the home suffered from extensive dry rot.

On March 11, 2014, Petrus sued Kirk (among others), claiming Kirk negligently constructed the home. (Compl. ¶¶ 49-59.) Petrus filed a first amended complaint on September 8, 2014—before any of the defendants had appeared. In that pleading, Petrus abandoned the negligent-construction claim but asserted two new claims against Kirk. One was a claim that Kirk breached implied warranty of habitability by constructing the home in a way that allowed water infiltration, allegedly causing the dry rot. (First Am. Compl. ¶¶ 59-68.) The other was a

ORDER AWARDING COSTS AND ATTORNEY FEES - 1

claim that Kirk conspired with Gentry to defraud Petrus by agreeing not to build the home in conformity to applicable building codes and not to divulge the deficiencies to Petrus upon the home's resale to him several years later. (First Am. Compl. ¶¶ 69-73.) Those two claims were reasserted, without change, in Petrus's final pleading: a second amended complaint filed on September 21, 2015. (Second Am. Compl. ¶¶ 60-74.)

Kirk moved for summary judgment on May 20, 2016—a few months short of two years after Petrus first asserted the implied-warranty and conspiracy-to-defraud claims. During the summary-judgment hearing, Petrus acceded to the entry of summary judgment against the conspiracy-to-defraud claim tried to maintain the implied-warranty claim. In a decision issued on July 7, 2016, the Court granted summary judgment to Kirk, finding Petrus's implied-warranty claim to be time-barred. The Court determined that the claim sounds in contract, subjecting it to I.C. § 5-241(b)'s completion-of-construction accrual rule, as well as to I.C. § 5-217's four year limitations period for claims based on oral contracts. As a result, the implied warranty of habitability Kirk gave when he built the home and sold it to Gentry had already expired by the time Petrus purchased the home from Gentry about seven years after its completion.

Based on that ruling, judgment was entered for Kirk on November 15, 2016. Petrus filed a timely motion to reconsider on November 28, 2016, but the Court denied that motion without a hearing on December 5, 2016.

On November 29, 2016, while the motion to reconsider was pending, Kirk filed a timely request for an award of costs and attorney fees. He seeks \$4,578.72 in costs, nearly all of which he contends are awardable as a matter of right. Under I.C. §§ 12-120(3) or 12-121, he seeks \$144,893.72 in attorney fees.

On December 13, 2016, Petrus filed a timely objection to the request for attorney fees. In the objection, Petrus expressly consented to an award of the requested costs. (Pls.' Obj. Def. Kirk's Mot. Attorney Fees & Costs 11.) Under I.R.C.P. 54(d)(5), doing so constitutes a waiver of objections to an award of those costs. The Court construes Petrus's objection to the request for attorney fees as the motion to disallow contemplated by I.R.C.P. 54(d)(5). A hearing on Petrus's motion to disallow was held on February 6, 2017. During the hearing, Petrus conceded that Kirk is the prevailing party and reiterated that his requested costs aren't contested. At the end of the hearing, the Court stated that the requested costs would be awarded, given the absence of objections. Thus, Kirk is awarded \$4,578.72 in costs. The Court took the motion to disallow the request for attorney fees under advisement. That motion is now ready for decision.

The Court begins with Kirk's request for attorney fees under I.C. § 12-120(3). Under that statute, "[i]n any civil action to recover on . . . [a] commercial transaction . . . , the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs." I.C. § 12-120(3) (emphasis added). As the term "shall" denotes, the fee-shifting for which section 12-120(3) provides is mandatory. It is triggered if a commercial transaction is integral to the claim and the basis on which recovery is sought. *E.g., Carrillo v. Boise Tire Co.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012). The term "commercial transaction" means "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). "[I]n order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." *Carrillo*, 152 Idaho at 756, 274 P.3d at 1271 (emphasis added).

There was no transaction between Kirk and Petrus. Instead, Kirk built a home for Gentry, and Gentry sold it to Petrus years later. Those are the two transactions at issue here. Whichever one Kirk contends is the "commercial transaction" that gives rise to fee-shifting

under section 12-120(3) here, his argument fails. As to the first transaction, the evidence doesn't support the conclusion that Gentry had a commercial purpose for hiring Kirk to build a home for her. To the contrary, the evidence shows that she lived in the home, plainly making the transaction one entered into for "personal or household purposes" from her standpoint. As to the second transaction, the evidence doesn't support the conclusion that either Gentry or Petrus had a commercial purpose. Gentry was selling her personal residence, and Petrus was purchasing a vacation property. The evidence doesn't show that Petrus purchased the home primarily for rental purposes or primarily to hold as an investment without substantial personal occupancy during the holding period.

Consequently, even though Kirk undoubtedly had a commercial purpose for building the home for Gentry, there is no "commercial transaction" that triggers section 12-120(3) here. Kirk's request for attorney fees is denied to the extent it is based on section 12-120(3).

The Court now turns to Kirk's request for attorney fees under I.C. § 12-121. Attorney fees are awardable to the prevailing party under section 12-121 in an action that was "brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(2). Whether that is the case is a discretionary determination. *E.g., Idaho Military Historical Soc'y v. Maslen*, 156 Idaho 624, 631-32, 329 P.3d 1072, 1079-80 (2014). That determination need not be made on wholesale basis; instead, it can be made on a claim-by-claim basis, with attorney fees apportioned between frivolous and non-frivolous claims. *Id.* at 632, 329 P.3d at 1080. Thus, the Court will individually analyze the three separate claims Petrus asserted against Kirk.

First is Petrus's short-lived claim for negligent construction, included in the original complaint but excluded from the first amended complaint. Although the record shows that Kirk was aware he had been sued for negligent construction, that he retained counsel, and that he

incurred some attorney fees as a result (Mem. Costs & Fees Ex. A), the record doesn't show that Kirk was ever served with process or ever appeared in the action before the first amended complaint was filed. Consequently, even assuming the negligent-construction claim were frivolous, because Kirk never became obligated to respond to it the Court declines, in its discretion, to award attorney fees in connection with its brief existence.

The Court next addresses Petrus's claim that Kirk conspired with Gentry to defraud Petrus by agreeing not to build the home in conformity to applicable building codes and not to divulge the deficiencies to Petrus when Gentry resold the home to Petrus years later. As already noted, Petrus acceded to the entry of summary judgment against that claim. Petrus has given the Court no reason to believe it was founded on much of anything but conjecture. The idea behind it—that a homebuilder and a homebuyer agreed to skirt building codes to keep costs down, so that the homebuyer could years later sell the “lemon” of a home to an unsuspecting secondary purchaser—borders on preposterous. Fraud shouldn't be lightly alleged, in hopes that evidence will materialize as the litigation proceeds. But that appears to be what happened here. The conspiracy-to-defraud claim was brought and pursued frivolously, unreasonably, and without foundation. Fee-shifting under section 12-121 is appropriate with respect to that claim.

That leaves Petrus's claim for breach of the implied warranty of habitability. As already noted, the Court entered summary judgment against that claim, finding it to be time-barred. Although the Court considers its ruling in that regard to follow from a faithful application and a careful reading of *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987), it is fair to say Petrus presented an issue of first impression as to whether contract or tort accrual rules and limitations periods apply to a secondary purchaser's claim for breach of the implied warranty of habitability. Petrus's position that tort accrual rules and limitations periods apply was decidedly

weaker than Kirk's position that contract accrual rules and limitations periods apply, but it wasn't frivolous. Kirk advanced several other arguments for summary judgment, including the argument that the problems with the home weren't severe enough to implicate the implied warranty of habitability, but those arguments weren't as strong as his statute-of-limitations argument. They therefore don't establish frivolousness. Thus, the Court declines to award attorney fees in connection with the implied-warranty claim.

As a result, the Court will apportion Kirk's attorney fees between Petrus's frivolous conspiracy-to-defraud claim and his other claims and make an award only with respect to the former. The Court's aim, in the apportionment process, is arriving at an award of attorney fees that approximates the amount by which Kirk's attorney fees were increased as a result of Petrus's pursuit of the frivolous conspiracy-to-defraud claim. That approach seems appropriate to the Court, given that Petrus also pursued a non-frivolous claim and section 12-121 does not allow awarding attorney fees with respect to non-frivolous claims.

Of course, a precise apportionment isn't possible. But after carefully reviewing Kirk's itemization of his attorney fees, after reviewing the other pertinent portions of the record, and after considering the factors set forth in I.R.C.P. 54(e)(3), the Court has arrived at one that is reasonable in its judgment. The Court perceives almost all of the work that was necessary to defend against the conspiracy-to-defraud claim to also have been necessary to defend against the implied-warranty claim. Some independent analysis and briefing was necessary with respect to the conspiracy-to-defraud claim, to be sure, and undoubtedly some written discovery requests and some deposition questions focused on conspiracy-to-defraud issues. But most of the work pertained to both claims indivisibly or to the implied-warranty claim in particular. In an exercise

of its discretion, the Court apportions \$10,000.00 of Kirk's attorney fees to the frivolous conspiracy-to-defraud claim. Kirk is awarded attorney fees in that amount.

The Court considers this apportionment justified for an additional reason. Petrus's implied-warranty-claim—the non-frivolous claim—failed based on a statute-of-limitations defense that could've been raised much earlier in the course of litigation and obviated the need to litigate that claim any further. Show-stopping defenses that don't require much discovery, like the successful statute-of-limitations defense here, should be tested early, before substantially all of the attorney fees necessary to get the case trial-ready have been incurred. The Court finds it inequitable to make a six-figures award of attorney fees when an early statute-of-limitations challenge to Petrus's plainly stronger claim might have nipped the litigation in the bud by leaving Petrus with only a pie-in-the-sky conspiracy-to-defraud claim.

Accordingly,

IT IS ORDERED that Petrus's motion to disallow the award of costs and attorney fees requested by Kirk is granted in part and denied in part. Kirk is awarded \$4,578.72 in costs and \$10,000.00 in attorney fees. An amended judgment reflecting this award will be entered. Unlike the original judgment, the amended judgment won't contain a Rule 54(b) certificate of finality because, at this time, no other claims in this action remain to be adjudicated.

Dated this 13th day of February, 2017.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on February 13, 2017, I served a copy of this document as follows:

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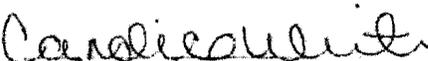
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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

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LATIMER**

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March 6, 2017

DOUGLAS A. MILLER, CLERK
By _____ Deputy

VIA FEDERAL EXPRESS

Valley County Courthouse
Attn: Civil Filing Clerk
219 Main
Cascade, ID 83611

MAR 07 2017

Case No. _____ Inst. No. _____
Filed _____ A.M. _____ P.M.

Re: *Petrus Family Trust Dated May 1, 1991 v. Nancy Gentry-Boyd, et al.,*
Case No.: CV-2014-71-C

Dear Clerk:

Enclosed please find the original and one copy of our Amended Notice of Appeal. Please provide us with a file stamped copy of the Notice of Appeal in the enclosed prepaid, stamped envelope.

Sincerely,

PARSONS BEHLE & LATIMER



Amy A. Lombardo

AAL:cp
Enclosures

MAR 23 2017

Case No. _____ Inst. No. _____
Filed _____ A.M. 2:20 P.M.

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Attorneys for Chris Kirk d/b/a Kirk Enterprises

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

PETRUS FAMILY TRUST DATED MAY 1,)
1991, and EDMOND A. PETRUS, JR.,)
individually and as Co-Trustee of the Petrus)
Family Trust Dated May 1, 1991,)

Case No. CV-2014-71-C

NOTICE OF CROSS-APPEAL

Plaintiffs-Appellants-)
Cross-Respondents,)

v.)

CHRIS KIRK dba KIRK ENTERPRISES,)

Defendant-Respondent-)
Cross-Appellant,)

and)

NANCY GENTRY-BOYD; TODD)
MCKENNA d/b/a HOMECRAFT HOME)
INSPECTIONS; RE/MAX RESORT)
REALTY; KEVIN BATCHELOR; and DOES)
1-4,)

Defendants.)

TO: THE ABOVE-NAMED PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS, PETRUS
FAMILY TRUST DATED MAY 1, 1991, AND EDMOND A. PETRUS, JR., THEIR
ATTORNEYS OF RECORD, JOHN MORRIS AND RACHEL E. MOFFITT, HIGGS

FLETCHER & MACK LLP, 401 WEST "A" STREET, SUITE 2600, SAN DIEGO, CA 92101, AND AMY A. LOMBARDO, PARSONS BEHLE & LATMER, 800 W. MAIN STREET, SUITE 1300, BOISE, ID 83702, AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. Defendant-Respondent-Cross-Appellant, Chris Kirk d/b/a Kirk Enterprises ("Kirk"), hereby cross-appeals against Plaintiffs-Appellants-Cross-Respondents, Petrus Family Trust Dated May 1, 1991, and Edmond A. Petrus, Jr. (together "Petrus"), to the Idaho Supreme Court from the *Order Awarding Costs and Attorney Fees* entered on February 13, 2017, the *Amended Judgment* entered on February 13, 2017, as well as any and all orders relating to the preliminary statement of issues set forth in paragraph 3 below, the Honorable Jason D. Scott presiding. A copy of the orders from which Kirk appeals are attached to this notice.

2. Kirk has a right to cross-appeal to the Idaho Supreme Court, and the orders described in paragraph 1 above are appealable orders under and pursuant to Idaho Appellate Rule 11(a)(1).

3. Kirk intends to assert the following issue on cross-appeal (although he reserves his right to later assert issues not described in this preliminary statement): did the District Court abuse its discretion in its apportionment of attorney fees to Kirk? Additionally, Kirk asserts the following issue on appeal under Idaho Appellate Rules 35(a)(4) and 35(b)(4) as an additional or subsidiary issue raised by Appellants: whether Appellants' appeal is frivolous because, even if successful, Appellants have no valid substantive claim for breach of implied warranty of habitability due to waiver and statutory non-compliance.

4. Kirk requests the preparation of no additional portions of the Reporter's Transcript other than those designated by Petrus in their *Amended Notice of Appeal*.

5. Kirk requests no additional documents be included in the Clerk's Record in addition to those automatically included under Rule 28, I.A.R. and those designated by Petrus in their *Amended Notice of Appeal*.

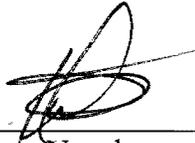
6. No portion of the record in this matter has been sealed pursuant to court order.

7. I certify that:

- a. That the appellate filing fee in the amount of \$129.00 was previously paid;
and
- b. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 23rd day of March, 2017.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 23rd day of March, 2017, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

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Daniel A. Nevala

EXHIBIT 1

DOUGLAS A. WALTER, CLERK
By _____ Deputy

FEB 13 2017

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

Case No. _____ Inst. No. _____
Filed _____ A.M. 3:15 P.M.

RECEIVED
FEB 16 2017

ARKCOSH LAW OFFICES

PETRUS FAMILY TRUST DATED MAY 1, 1991, and EDMOND A. PETRUS, JR., individually and as Co-Trustee of the Petrus Family Trust Dated May 1, 1991,

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK d/b/a KIRK ENTERPRISES; TODD MCKENNA d/b/a HOMECRAFT HOME INSPECTIONS; RE/MAX RESORT REALTY; KEVIN BATCHELOR; and DOES 1-4,

Defendants.

Case No. CV-2014-71-C

ORDER AWARDING COSTS AND ATTORNEY FEES

Plaintiff Petrus Family Trust Dated May 1, 1991 and its co-trustee Plaintiff Edmond A.

Petrus, Jr. (collectively, "Petrus") bought a home from Defendant Nancy Gentry-Boyd ("Gentry") in 2012. Defendant Chris Kirk d/b/a Kirk Enterprises ("Kirk") had built the home for Gentry about seven years earlier. After closing the transaction, Petrus discovered that the home suffered from extensive dry rot.

On March 11, 2014, Petrus sued Kirk (among others), claiming Kirk negligently constructed the home. (Compl. ¶¶ 49-59.) Petrus filed a first amended complaint on September 8, 2014—before any of the defendants had appeared. In that pleading, Petrus abandoned the negligent-construction claim but asserted two new claims against Kirk. One was a claim that Kirk breached implied warranty of habitability by constructing the home in a way that allowed water infiltration, allegedly causing the dry rot. (First Am. Compl. ¶¶ 59-68.) The other was a

ORDER AWARDING COSTS AND ATTORNEY FEES - 1

CC: CLIENT

FEB 16 2017

INITIALS LMC

claim that Kirk conspired with Gentry to defraud Petrus by agreeing not to build the home in conformity to applicable building codes and not to divulge the deficiencies to Petrus upon the home's resale to him several years later. (First Am. Compl. ¶¶ 69-73.) Those two claims were reasserted, without change, in Petrus's final pleading: a second amended complaint filed on September 21, 2015. (Second Am. Compl. ¶¶ 60-74.)

Kirk moved for summary judgment on May 20, 2016—a few months short of two years after Petrus first asserted the implied-warranty and conspiracy-to-defraud claims. During the summary-judgment hearing, Petrus acceded to the entry of summary judgment against the conspiracy-to-defraud claim tried to maintain the implied-warranty claim. In a decision issued on July 7, 2016, the Court granted summary judgment to Kirk, finding Petrus's implied-warranty claim to be time-barred. The Court determined that the claim sounds in contract, subjecting it to I.C. § 5-241(b)'s completion-of-construction accrual rule, as well as to I.C. § 5-217's four year limitations period for claims based on oral contracts. As a result, the implied warranty of habitability Kirk gave when he built the home and sold it to Gentry had already expired by the time Petrus purchased the home from Gentry about seven years after its completion.

Based on that ruling, judgment was entered for Kirk on November 15, 2016. Petrus filed a timely motion to reconsider on November 28, 2016, but the Court denied that motion without a hearing on December 5, 2016.

On November 29, 2016, while the motion to reconsider was pending, Kirk filed a timely request for an award of costs and attorney fees. He seeks \$4,578.72 in costs, nearly all of which he contends are awardable as a matter of right. Under I.C. §§ 12-120(3) or 12-121, he seeks \$144,893.72 in attorney fees.

On December 13, 2016, Petrus filed a timely objection to the request for attorney fees. In the objection, Petrus expressly consented to an award of the requested costs. (Pls.' Obj. Def. Kirk's Mot. Attorney Fees & Costs 11.) Under I.R.C.P. 54(d)(5), doing so constitutes a waiver of objections to an award of those costs. The Court construes Petrus's objection to the request for attorney fees as the motion to disallow contemplated by I.R.C.P. 54(d)(5). A hearing on Petrus's motion to disallow was held on February 6, 2017. During the hearing, Petrus conceded that Kirk is the prevailing party and reiterated that his requested costs aren't contested. At the end of the hearing, the Court stated that the requested costs would be awarded, given the absence of objections. Thus, Kirk is awarded \$4,578.72 in costs. The Court took the motion to disallow the request for attorney fees under advisement. That motion is now ready for decision.

The Court begins with Kirk's request for attorney fees under I.C. § 12-120(3). Under that statute, "[i]n any civil action to recover on . . . [a] commercial transaction . . . , the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs." I.C. § 12-120(3) (emphasis added). As the term "shall" denotes, the fee-shifting for which section 12-120(3) provides is mandatory. It is triggered if a commercial transaction is integral to the claim and the basis on which recovery is sought. *E.g., Carrillo v. Boise Tire Co.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012). The term "commercial transaction" means "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). "[I]n order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." *Carrillo*, 152 Idaho at 756, 274 P.3d at 1271 (emphasis added).

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Consequently, even though Kirk undoubtedly had a commercial purpose for building the home for Gentry, there is no "commercial transaction" that triggers section 12-120(3) here. Kirk's request for attorney fees is denied to the extent it is based on section 12-120(3).

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weaker than Kirk's position that contract accrual rules and limitations periods apply, but it wasn't frivolous. Kirk advanced several other arguments for summary judgment, including the argument that the problems with the home weren't severe enough to implicate the implied warranty of habitability, but those arguments weren't as strong as his statute-of-limitations argument. They therefore don't establish frivolousness. Thus, the Court declines to award attorney fees in connection with the implied-warranty claim.

As a result, the Court will apportion Kirk's attorney fees between Petrus's frivolous conspiracy-to-defraud claim and his other claims and make an award only with respect to the former. The Court's aim, in the apportionment process, is arriving at an award of attorney fees that approximates the amount by which Kirk's attorney fees were increased as a result of Petrus's pursuit of the frivolous conspiracy-to-defraud claim. That approach seems appropriate to the Court, given that Petrus also pursued a non-frivolous claim and section 12-121 does not allow awarding attorney fees with respect to non-frivolous claims.

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of its discretion, the Court apportions \$10,000.00 of Kirk's attorney fees to the frivolous conspiracy-to-defraud claim. Kirk is awarded attorney fees in that amount.

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Accordingly,

IT IS ORDERED that Petrus's motion to disallow the award of costs and attorney fees requested by Kirk is granted in part and denied in part. Kirk is awarded \$4,578.72 in costs and \$10,000.00 in attorney fees. An amended judgment reflecting this award will be entered. Unlike the original judgment, the amended judgment won't contain a Rule 54(b) certificate of finality because, at this time, no other claims in this action remain to be adjudicated.

Dated this 13th day of February, 2017.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on February 13, 2017, I served a copy of this document as follows:

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DOUGLAS A. MILLER
Clerk of the District Court

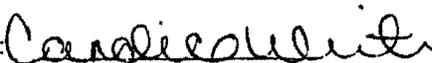
By: 
Deputy Court Clerk

EXHIBIT 2

GOARNED

DOUGLAS A. [Signature] CLERK
By _____ Deputy

FEB 13 2017

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

Case No. _____ Inst. No. _____
Filed _____ A.M. 3:15 P.M.

PETRUS FAMILY TRUST DATED MAY 1, 1991, and EDMOND A. PETRUS, JR., individually and as Co-Trustee of the Petrus Family Trust Dated May 1, 1991.

Plaintiffs,

vs.

NANCY GENTRY-BOYD; CHRIS KIRK d/b/a KIRK ENTERPRISES; TODD MCKENNA d/b/a HOMECRAFT HOME INSPECTIONS; RE/MAX RESORT REALTY; KEVIN BATCHELOR; and DOES 1-4.

Defendants.

Case No. CV-2014-71-C
AMENDED JUDGMENT

RECEIVED
FEB 16 2017
ARKOOSH LAW OFFICES

JUDGMENT IS ENTERED AS FOLLOWS:

The claims of Plaintiffs Petrus Family Trust Dated May 1, 1991 and Edmond A. Petrus, Jr. against Defendant Chris Kirk are dismissed with prejudice, with no award of relief to Petrus.

Further, Chris Kirk is awarded \$14,578.72 against Petrus Family Trust Dated May 1, 1991 and Edmond A. Petrus, Jr., jointly and severally, consisting of an award of \$4,578.72 in costs of court and an award of \$10,000.00 in attorney fees.

Dated this 13th day of February, 2017.

[Signature]
Lisou D. Scott
DISTRICT JUDGE

CC: CLIENT

FEB 16 2017

INITIALS lmc

AMENDED JUDGMENT - 1

CERTIFICATE OF SERVICE

I certify that on February 13th, 2017, I served a copy of this document as follows:

Alyson A. Foster
Jason J. Rudd
Adersen Schwartzman
Woodard Brailsford, PLLC
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Suite 1600
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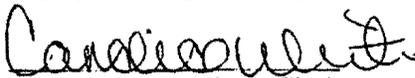
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DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
 IN AND FOR THE COUNTY OF VALLEY

PETRUS FAMILY TRUST DATED MAY 1,)
 1991, and EDMOND A. PETRUS JR.,)
 individually and as Co-trustee of the Petrus)
 Family Trust Dated May 1, 1991,)

Plaintiff,)

-vs-)

CHRIS KIRK, dba KIRK ENTERPRISES,)

and)

NANCY GENTRY-BOYD; TODD MCKENNA)
 dba HOMECRAFT HOME INSPECTIONS;)
 RE/MAX RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)

Defendant.)

SUPREME COURT NO. 44784

Dist. Court No. CV-2014-00071-C

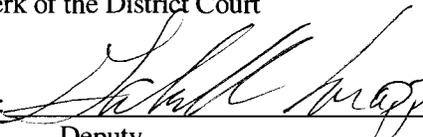
CLERK'S CERTIFICATE
 OF EXHIBITS

I, DOUGLAS A. MILLER, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in
 and for the County of Valley, do hereby certify that the following is a list of the exhibits, offered or admitted
 and which have been lodged with the Supreme Court or retained as indicated:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>OFFER/ADMITTED/RETAINED</u>
------------	--------------------	--------------------------------

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this
4th day of April, 2017.

DOUGLAS A. MILLER,
 Clerk of the District Court

By: 
 Deputy

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
(INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

PETRUS FAMILY TRUST DATED MAY 1,)
1991, and EDMOND A. PETRUS JR.,)
individually and as Co-trustee of the Petrus)
Family Trust Dated May 1, 1991,)

SUPREME COURT NO. 44784

Dist. Court No. CV-2014-00071-C

Plaintiff,)

CLERK'S CERTIFICATE
OF SERVICE

-vs-)

CHRIS KIRK, dba KIRK ENTERPRISES,)

and)

NANCY GENTRY-BOYD; TODD MCKENNA)
dba HOMECRAFT HOME INSPECTIONS;)
RE/MAX RESORT REALTY; KEVIN)
BATCHELOR; and DOES 1-4,)

Defendant.)

TO: Arkoosh Law Offices
Daniel Nevala
PO Box 2900
Boise ID 83701

TO: Parsons Behle & Latimer
Amy Lombardo
800 West Main St Suite 1300
Boise ID 83702

ATTORNEY FOR RESPONDENT

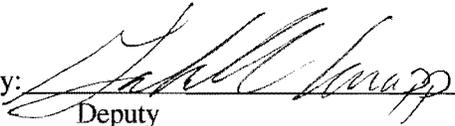
ATTORNEY FOR APPELLANT

YOU ARE HEREBY NOTIFIED:

That the Clerk's Record, Exhibits and Transcripts in the above entitled cause has been lodged with the District Court and copies sent to counsel; that objections to the Clerk's Record and Reporter's Transcript, including any requests for corrections, deletions, or additions, must be filed with the District Court together with a Notice of Hearing within twenty-eight (28) days from the date of this Notice.

DATED this 4th day of April, 2017.

DOUGLAS A. MILLER,
Clerk of the District Court

By: 
Deputy

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
 IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
 (INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

PETRUS FAMILY TRUST DATED MAY 1,)
 1991, and EDMOND A. PETRUS JR.,)
 individually and as Co-trustee of the Petrus)
 Family Trust Dated May 1, 1991,)
)
 Plaintiff,)
)
 -vs-)
)
 CHRIS KIRK, dba KIRK ENTERPRISES,)
)
 and)
)
 NANCY GENTRY-BOYD; TODD MCKENNA)
 dba HOMECRAFT HOME INSPECTIONS;)
 RE/MAX RESORT REALTY; KEVIN)
 BATCHELOR; and DOES 1-4,)
)
 Defendant.)
)

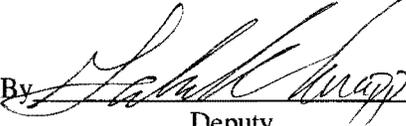
SUPREME COURT NO. 44784
 Dist. Court No. CV-2014-00071-C
 CLERK'S CERTIFICATE
 OF RECORD

I, DOUGLAS A. MILLER, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross-Appeal, and any additional documents requested to be included.

I do further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript and Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 4th day of April 2017.

DOUGLAS A. MILLER
 Clerk of the District Court

By 
 Deputy