8-8-2017

Taylor v. Taylor Appellant's Brief Dckt. 44833

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. Docket No.: 44833
(Consolidated Nez Perce County District Court Case Nos.: CV-08-1150 and CV-13-1075

DONNA TAYLOR,
Plaintiff-Appellant-Cross Respondent,

v.

R. JOHN TAYLOR, CONNIE TAYLOR (aka CONNIE TAYLOR HENDERSON), JAMES BECK, MICHAEL W. CASHMAN SR., and AIA SERVICES CORPORATION, an Idaho corporation,

Defendants-Respondents-Cross Appellants,

APPEAL FROM NEZ PERCE COUNTY DISTRICT COURT
THE HON. JEFF M. BRUDIE, DISTRICT COURT JUDGE, PRESIDING

APPELLANT'S BRIEF

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I. NATURE OF THE CASE AND THE PARTIES[1]

This appeal involves yet two more cases that trace their roots back to the extensive and ongoing corporate malfeasance and mismanagement of the respondent AIA Services Corporation ("AIA Services") through the actions of the respondents R. John Taylor ("John"), Connie Taylor Henderson ("Connie"), James Beck ("Beck") and Michael W. Cashman Sr. ("Cashman") (collectively "Individual Defendants"). Rather than simply paying the appellant Donna J. Taylor ("Donna") for her Series A Preferred Shares in AIA Services as promised (which they should have done by December 2, 2003), AIA Services, through the Individual Defendants, chose to unlawfully use AIA Services' funds, assets and creditworthiness to fund other businesses and pay themselves millions of dollars in compensation—and they have decimated AIA Services in the process.[2]

Indeed, not long after the Individual Defendants avoided liability for their corporate malfeasance in a lawsuit previously brought by Reed Taylor ("Reed"),[3] one would have thought that any rational person (not to mention a corporate fiduciary or an attorney like John or Connie)

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[1] Citations in this Brief to "A." are citations to the attached Appendix. An example is seen below.

[2] For example, John recently unlawfully stipulated to a judgment against AIA Services and AIA Insurance in an amount in excess of $12,000,000 to settle a lawsuit that subjected him to claims of fraud and other torts. (R. 1656-1728, 3141-42, 3585-3612 (A. 104-131).) In classic John style, he once again placed his interests above AIA Services and AIA Insurance to make them suffer before he did (judgment was deferred against John). (R. 3590-91 (A. 109-10).) AIA Services and AIA Insurance's illegal guarantee of that loan was unlawfully authorized by John, Beck, and Connie. (R. 3136-38 (A. 132-34) (the guarantee was later amended to be unlimited and those parties unlawfully executed another guarantee).) In order to know the guarantee was unlawful, this Court need not look farther than a pleading previously filed by former counsel in this lawsuit: "If the California Court ultimately determines that AIA guaranteed the CropUSA loan and the lender pursues the remedies that are available to it under the guaranty, then AIA will have incurred a prohibited indebtedness under subsection 4.2.9(c) [of the amended articles of incorporation]." (R. 2361 (referring to R. 726-28).) Dale Miesen, another AIA Services common shareholder (R. 2225), is seeking to have those guarantees and the subsequent Settlement Agreement obligating AIA to pay over $12,000,000 declared illegal. (*E.g.*, 2017 WL 2712998.)

[3] *See* ***Taylor v. AIA Services Corp.***, 151 Idaho 552, 261 P.3d 829 (2011). This Court is well aware of that case, and the other cases that were spawned from the illegality of Reed's redemption, which have brought significant bread to many insurance defense attorneys in Idaho and Washington. *E.g.*, ***Taylor v. Riley***, 157 Idaho 323, 329, 336 P.3d 256, 261 (2014) ("*Riley I*"); ***Taylor v. Bell***, 340 P.3d 951 (Wash. Ct. App. 2014).

would have sought to put AIA Services' financial house in order, and start properly and legally operating the company. Instead, the opposite occurred—the Individual Defendants continued and even accelerated their tortious conduct of looting millions of dollars from AIA Services in the form of cash, assets and loan guarantees to support themselves and other entities that they own. In addition, the Individual Defendants have illogically and spitefully spent more of AIA Services' money fighting Donna rather than it would have taken to simply pay her. This makes no sense at all. Indeed, the Individual Defendants' unlawful conduct has directly resulted in the filing of numerous lawsuits involving various parties around the country, which has left a trail of carnage.[4]

While apparently ignoring all of the corporate malfeasance and spiteful conduct towards Donna, the district court entered a number of convoluted, inconsistent and erroneous decisions. Specifically, the district court, without citing any authority, erroneously retroactively stripped away over $340,000 in Series A Preferred Shares from the elderly Donna, even though her redemption obligations had ironically been authorized under I.C. § 30-1-6 (unlike Reed's). The district court also erroneously dismissed Donna's fraud claims based on the Economic Loss Rule (which should not apply to fraud) and dismissed her unjust enrichment claim for failure to state a claim (when her complaint more than met minimal pleading standards). There is simply no credible argument to dispute the fact that Donna should hold 41,651.25 Series A Preferred Shares (worth $10 each or $416,512.00, plus accrued interest), rather than the 7,110 Series A Preferred Shares

[4] *E.g., GemCap Lending I, LLC v. CropUSA Insurance Agency, Inc., et al.* (R. 1656-1728, 3141-42, 3585-3612); *GemCap Lending I, LLC v. Quarles & Brady, et al.* (R. 4246-67; 2015 WL 4914399); *GemCap Lending I, LLC v. Scottsdale Insurance Co.* (2017 WL 3252380); *AIA Services Corp. v. Durant, et al.* (R. 863-923, 1881-96); *Missouri Crop, LLC v. CGB Diversified Services, Inc., et al.* (2017 WL 67523); *Miesen v. Henderson, et al.* (Mr. Miesen took the laboring oar and is now the sole plaintiff) (R. 1967-2022; 2017 WL 1458191; 2017 WL 2712998).

(worth $71,110, plus interest) that the district court erroneously determined after "equitably" going back in time almost twenty years and retroactively redeeming more shares than were actually redeemed over that period. This Court should reverse, remand, and award fees and costs to Donna.

II. STATEMENT OF THE FACTS

Donna is 77-years-old, has no high school diploma, and no way to earn a living. (R. 3466-68.) The Series A Preferred Shares issued to Donna is the bulk of her retirement and her divorce settlement. (*Id*.) In the 1960s, Donna and Reed co-founded what is now known as AIA Insurance (f/k/a Agriculture Insurance Administrators), which later became the cash cow subsidiary of AIA Services that generated over $74 million in revenues from 1995 through 2013. (R. 3466-67, 3570-71.) Donna worked hard with Reed building the business, while at the same time she helped raise their children (her children often played under her desk at work). (R. 3466-67.)

On the other side of the equation are John, Beck, Cashman and Connie. John and Connie have both been attorneys for decades and have benefitted from over $2,700,000 in known cash compensation that AIA Services paid John from 1995 through 2013 (this excludes the millions in malfeasance discussed below). (R. 880, 3570.) John has purportedly served as an officer and director of AIA Services since well before 1995. (R. 958-76.) Contrary to what John likes to tell people, he was not a founder of AIA Insurance; rather, Donna and Reed helped pay for John's college and they hired him to work at AIA Insurance (unfortunately for them as they would later learn). (R. 3466-67.) Connie and Beck purportedly served as directors of AIA Services since 2007, and they received $5,000 per quarter, plus shares of common stock (for doing nothing other than assist in the malfeasance committed against AIA Services as will be described below). (R. 958-

963, 1904, 1919-21, 1932, 1934, 1942.) Beck and Cashman are sophisticated insurance company investors from Minnesota. (*Id.*; R. 881, 1813-35, 1898, 2240-43, 3522-23.)

Unfortunately, on September 1, 1984, Reed and Donna were separated. (R. 539.) On December 14, 1987, Donna and Reed executed a Property Settlement Agreement to resolve their divorce (though they remain friends to this day). (R. 532-600.) Under the terms of that Agreement (and to prevent AIA Insurance and AIA Services from being liquidated in the divorce), Reed and Donna contributed their 100% ownership interest in AIA Insurance (their children owned a small stake) and other entities to AIA Services in exchange for it issuing them 200,000 Series A Preferred Shares and 5,963 more common shares. (R. 525-26, 534-35, 564-65, 2350.) The 200,000 Series A Preferred Shares were transferred to Donna. (*Id.*) That Agreement also required that special redemption rights and restrictions pertaining to how AIA Services could conduct business to be included in AIA Services' Amended Articles of Incorporation in order to protect Donna, including the right to have her designee mandatorily appointed to AIA Services' board, that AIA Services could not guarantee loans for other entities, that certain related party transactions were barred and that AIA Services had to maintain certain financial covenants. (R. 574-88, 649-60 (A. 25-36).)

On December 2, 1993, Donna exercised her mandatory right to require AIA Services to repurchase her Series A Preferred Shares; however, AIA Services, instead of making a lump sum payment, voluntarily elected to repurchase her shares over time at the price of $10 per share over 15 years, with interest to accrue at the prime rate minus one and one-half percent (1.5%). (R. 525-26, 652-53 (A. 28-29), 808.) At that time, AIA Services had $3,948,262 in earned surplus to authorize Donna's $2,000,000 redemption. (R. 3308.) **I.C. § 30-1-6** (repealed) (A. 151-52.) As a

result, AIA Services commenced making payments to Donna. (R. 808, 2557-59.)

In early 1995, John, Beck and Cashman sought to take operational and financial control over AIA Services by redeeming Reed's shares in an effort (failed) to take the company public. (R. 1813-35, 1843, 1920-21.) AIA Services agreed, through John, to allow Beck and Cashman the right to approve the terms of Reed's redemption and required him to be bought out and that AIA Services obtain Donna's consent. (R. 1822, 1830.) John, Beck and Cashman also agreed to enter into a voting agreement to ensure that they controlled AIA Services. (R. 2240-43.) They all became the majority and controlling shareholders of AIA Services. (R. 1956, 2225-38, 2941-42.)

In order to obtain Donna's consent to redeem Reed's shares, AIA Services agreed to accelerate the purchase of her Series A Preferred Shares by purchasing them over 10 years with interest accruing at prime plus 1/4%, and these terms would govern, irrespective of whether AIA Services raised enough funds to redeem Reed's shares. (R. 602 (A. 1), 3467-68.) At that time, AIA Services was authorized to use capital surplus under its articles of incorporation to purchase Donna's Series A Preferred Shares as provided in I.C. § 30-1-6, and Donna and AIA Services could agree to modify her terms under the articles. (R. 660 § 4.12 (A. 36), 681 (A. 41).) AIA Services' board of directors and shareholders expressly authorized both the increased interest rate and shorter amortization period (the reorganization plan specifically included Donna's modified redemption terms). (R. 3476-3565.) Notably, had AIA Services timely paid Donna as required, it would have actually saved over $100,000 even though it was paying a higher interest rate. (Compare R. 3328-33 *with* R. 3334-7.)

On March 22, 1995, the terms of the January 11, 1995 Letter Agreement were oddly confirmed again by attorney Richard Riley (Donna's counsel seemed to not trust AIA's counsel, as seen from a dialogue in a board meeting). (R. 606 (A. 5), 3476.) There were other minor modifications to Donna's January 11, 1995 Letter Agreement as reflected in two additional letter agreements dated July 18, 1995 and August 10, 1995, respectively. (R. 608-15 (A. 7-14).) The foregoing three letter agreements dated January 11, 1995, July 18, 1995, and August 10, 1995 are collectively referred to below as the "Letter Agreements" or "January 11, 1995 Letter Agreement" (the amortization and interest rate remained the same).

On July 1, 1996, after AIA Services defaulted on Reed's payment obligations, Donna, AIA Services and Reed executed a Series A Preferred Shareholder Agreement. (R. 617-25 (A. 16-24).) Donna was not represented by counsel while AIA Services was. (R. 623 (A. 22), 2350-51.) AIA Services, through John, confirmed the terms of the January 11, 1995 agreement and further agreed to accelerate payments to Donna through the Series A Preferred Shareholder Agreement by paying her an additional $100,000 every six months after Reed's $1.5 million down payment note was paid (which was paid in full in June 2001), but she never received a single additional $100,000 payment as required. (*Id.*; R. 526-27, 619 (A. 18), 806, 2290-91, 3577-83.)

In the early 2000s, AIA Services launched a new subsidiary later known as CropUSA Insurance Agency, Inc. ("CropUSA") to market crop insurance and, in order to allegedly help fund CropUSA, John lied to Donna in order to get her to defer some of her monthly payments (he lied to Reed, too). (R. 385, 527-28, 627-28.) On May 27, 2004, John wrote back to Donna, after she had complained to him about not being paid as required, and represented to her (falsely again) that

AIA was having difficulties because it was launching CropUSA. (R. 528, 630-31.) The truth was that John already knew that an over $1.5 million bonus check was expected from Trustmark; however, instead of redeeming the last of Donna's shares (her shares should have been fully redeemed over a year earlier), John deposited that $1,510,693 into a checking accounting using John's home address. (R. 2343.) Part of that could have easily paid Donna in full. (R. 2132-36.)

Unbeknownst to Donna or Reed (or the other shareholders), the Individual Defendants had already implemented their plan to steal CropUSA, and this was just one of many unlawful transactions John and the other Individual Defendants would engage in to carry out that plan and to provide funds for themselves and other businesses. (*E.g.*, R. 2342-47, 2846-72; 2017 WL 2712998.) Moreover, John did not think twice about violating the non-compete or non-solicitation provisions in his Executive Officer's Agreement with AIA Services to carry out their plan. (R. 1843-51.)

After AIA Services refused to pay off Reed and Donna (and they began to learn of the malfeasance), she agreed to enter into a Subordination Agreement with Reed effective December 1, 2006, which reversed the previous subordination between them. (R. 602-04 (A. 1-3), 608-12 (A. 7-11), 1040-42.) Reed filed suit and attempted to make things right for him, Donna and the other minority shareholders of AIA Services, but the Individual Defendants were not interested in making things right for anyone but themselves. (R. 1809, 1853-60.) In April 2008, the Individual Defendants (except Cashman) raised the illegality defense to Reed's claims, which ultimately ended Reed's effort to make things right. (*Id.*) ***AIA Services Corp.***, 151 Idaho at 558.

On May 30, 2008, AIA Services, through the Individual Defendants, made its last payment to Donna. (R. 528.) As of May 31, 2008, AIA Services' records showed that it owed Donna the principal sum of $416,512 (plus accrued interest) or she owned 41,651.25 Series A Preferred Shares ($416,512 divided by $10 per share), as later determined by the district court. (R. 2199, 2427.) On June 24, 2008, John wrote to Donna stating that no more payments would be made to her. (R. 633.) Through the last payment, AIA Services had been redeeming Donna's Series A Preferred Shares based on the higher modified interest rate. (R. 2056-2213.)

After the Individual Defendants stopped paying Donna, they accelerated their illegal activities. For example, AIA Services (with John, Beck and Connie as board members) lent Pacific Empire Radio Corp. ("PERC") over $1,900,000, when just a portion of those funds could have paid Donna in full and those loans violated the protective covenants of AIA Services' amended articles of incorporation because no loans could be made to any entities that were not wholly owned subsidiaries (PERC is partially owned by John and Connie).[5] (R. 689-91 (A. 49-51), 726-28 (same restrictions), 2870, 3567, 3614-22 (A. 135-43).) PERC was not even able to pay its employee withholding taxes and it had been sued by another lender for over $6,200,000 during the time that some of the loans were made. (R. 3089-3133.) PERC was not credit worthy. (*Id*.)

Meanwhile, also unbeknownst to Donna, on November 21, 2011, the Individual Defendants also unlawfully had AIA Services and AIA Insurance guarantee a $5,000,000 loan for

[5] ***Hill v. Small***, 183 S.E.2d 752, 753-754 (Ga. 1971) ("'a corporation has only the power conferred upon it by its charter,'" that "'[t]he charter of a corporation is in effect its constitution…[that] are to be strictly construed'" and affirming the trial court's order voiding the issuance of shares because the issuance violated the articles of incorporation) (citations omitted). The Individual Defendants violated AIA Services' articles with no remorse.

CropUSA from GemCap Lending I, LLC ("GemCap"). (R. 1656, 1673, 1709-28.) Connie, John and Beck signed the purported board resolution authorizing the original guarantee, which was subsequently increased to the full $10,000,000 loan (they signed that resolution, too). (R. 3136-38 (A. 132-34).) The GemCap guarantees also violated, *inter alia*, AIA Services' amended articles of incorporation.[6] (R. 89-91 (A. 49-51), 726-28 (same restrictions), 2870.) This point was conceded in a pleading before the district court by former counsel when they apparently misrepresented that GemCap was not pursuing the guarantees, but admitted: "If the California Court ultimately determines that AIA guaranteed the CropUSA loan and the lender pursues the remedies that are available to it under the guaranty, then AIA will have incurred a prohibited indebtedness under subsection 4.2.9(c) [of the amended articles of incorporation]." (R. 2361 (referring to R. 726-28).).

During all of these illegal activities (and others not mentioned herein), the Individual Defendants were also refusing to honor Donna's designees to AIA Services board of directors, as was her unequivocal right under the articles, and they were ignoring other shareholder's demands to inspect records. (R. 689 § 4.2.8 (A. 49), 725 § 4.2.8 (same right), 2351-52, 2835-45, 2870-71.)

In 2012, the Individual Defendants wanted to extract even more pain from AIA Services' innocent minority shareholders by seeking to effectuate an abusive reverse stock split to squeeze them out for nothing when they falsely asserted that the minority shareholders had not complied with Idaho Code. (R. 863-923.) That lawsuit was dismissed by the Hon. Carl Kerrick (who awarded fees to the minority shareholders), and this was another effort (albeit a failed one this

[6] *See* footnote 5.

time) to violate AIA Services' amended articles of incorporation because AIA Services could not purchase any common shares because it was in arrears to its obligations to Donna and the Series C Preferred Shareholders (the 401(k) Plan).[7] (R. 729 § 4.2.9(f), 733 § 4.3.3, 2835-38, 3052 n.5 (over $1 million in accrued unpaid dividends as of 2011), 1881-1896.) The Individual Defendants (except Cashman) never followed through with their representations to this Court (*AIA Services Corp.*, 151 Idaho 552)—there was never an effort to make anything right for any minority shareholders. (*E.g.*, R. 2867-72.)

On February 11, 2013, Donna wrote to AIA Services demanding payment in full and further provided notice of acceleration, to the extent necessary. (R. 528, 635.) Donna's demand was ignored and she has still not received a single payment since May 30, 2008. (R. 528.) All the while Donna was complaining, the Individual Defendants were busy writing hundreds of thousands, if not millions, of dollars in checks to themselves and entities that the controlled from AIA's bank accounts. (R. 3009-40, 2867-72.)

Later in 2013, the Individual Defendants' "Ponzi" scheme collapsed when GemCap sued AIA Services, AIA Insurance, CropUSA, John and others, asserting fraud, conversion and other claims. (R. 1656-1728.) In early 2015, John purportedly executed an illegal Settlement Agreement with GemCap resulting in a $12,126,584.61 judgment against AIA Services and AIA Insurance,

[7] As with the Individual Defendants, this Court will recall that the 401(k) Plan represented on Reed's appeal that it was necessary to have the Stock Redemption Agreement declared illegal for those Plain Participants. They have done nothing for those Plan participants and simply taken the money. (R. 3052 n.5 (noting that over $1 million in accrued dividends were accrued, but unpaid).)

and led to their headquarters being transferred and sold.[8] (R. 3585-3612 (A. 104-31), 3642-44.) As mentioned in footnote 4 above, this had led to numerous other lawsuits involving GemCap and other parties, including the law firm representing CropUSA for the loans, Quarles & Brady. (R. 3146-67; 2015 WL 4914399 (citing the fraud allegations in *Taylor v. AIA Services Corp., et al*.)

In the end, based on the few above examples (there are more), there is no denying that Donna's 41,651.25 Series A Preferred Shares could have easily been redeemed over a decade ago with just a small portion of the funds unlawfully taken from AIA Services. (*E.g.*, R. 2867-72.) Instead, the Individual Defendants increased their majority ownership interest by illegally redeeming over $600,000 in lower-priority common shares (and without providing full disclosure to the sellers of the shares). (*Id*.; R. 729 § 4.2.9(f), 733 § 4.3.3, 2225-38, 3052 n.5, 3237-61.)

III. PROCEDURAL HISTORY

On June 2, 2008, Donna filed suit against John for his personal guarantee of sums owed to her for the redemption of her shares and for other tort claims ("First Lawsuit"). (R. 136-39.) On October 27, 2008, Donna amended her complaint and she also named Connie as a defendant. (R. 159-166.) On November 6, 2009, Donna filed her Second Amended Complaint. (R. 373-83.) John and Connie filed counterclaims requesting John's guarantee be discharged. (R. 172-76, 188-91.)

[8] The Settlement Agreement is illegal for violating the articles of incorporation, restated bylaws and various Idaho Code sections on limitations under articles of incorporation. Moreover, it unlawfully assigns legal malpractice claims and prevents John, AIA Services or AIA Insurance from filing for bankruptcy protection. (R. 3589-91 (A. 108-10), 3605-07 (A. 124-26).) ***St. Luke's Magic Valley Regional Medical Center v. Luciani***, 154 Idaho 37, 43, 293 P.3d 661, 667 (2012); ***In re Cole***, 226 B.R. 647, 651-54 (B.A.P. 9th Cir. 1998); ***Fallick v. Kehr***, 369 F.2d 899, 904 (2d Cir. 1966); ***In re Madison***, 184 B.R. 686, 690 (Bankr. E.D. Pa. 1995). These issues, however, will be litigated against GemCap and others by another shareholder, Dale Miesen, in U.S. District Court of Idaho. (2017 WL 2712998.)

On January 15, 2010, the district court deferred rulings on the motions and stayed the case pending the issuance of this Court's opinion in *Taylor v. AIA Services Corp., et al*. (R. 393-400.) On May 8, 2013, after this Court issued its opinion in *AIA Services Corp.*, 151 Idaho 552, John and Connie moved for partial summary judgment arguing Donna's redemption was illegal. (R. 412-15). Donna submitted opposing affidavits and responded by asserting, *inter alia*, that AIA Services was authorized to use capital surplus to redeem her shares. (R. 503-976.) On July 26, 2013, the district court found genuine issues of material fact, denied Connie and John's motion, and lifted the stay. (R. 1009-14.)

On May 24, 2013 (after no payments had been made since 2008), Donna filed a second lawsuit, which included John and Connie and three newly named defendants: AIA Services, Beck and Cashman ("Second Lawsuit").[9] (R. 11-25.) Donna asserted claims for breaches of contract, breaches of fiduciary duties, aiding and abetting in the breach of fiduciary duties, unjust enrichment, declaratory relief/specific performance and alter-ego/piercing the corporate veil. (*Id*.) The district court consolidated the lawsuits. (R. 26-27, 64-73.) On June 17, 2013, AIA Services filed its answer and asserted a counterclaim, alleging that Donna had breached the 1996 Series A Preferred Shareholder Agreement. (R. 54-63.) On September 23, 2013, John, Connie, Beck and Cashman filed their answer. (R. 74-84.)

[9] Unfortunately, filing a motion to amend to add new parties would not have tolled the statute of limitations because AIA Services, Beck and Cashman were not defendants. **I.C. § 5-216**; **I.C. § 5-238**; ***English v. Taylor***, 160 Idaho 737, 742-745, 378 P.3d 1036, 1041-1044 (2016) (holding that the filing date of a motion to amend does not toll the statute of limitations as to newly named defendants). Thus, Donna filed a new lawsuit.

On March 17, 2014, AIA Services filed a motion to dismiss and a motion for summary judgment, requesting an award of fees under I.C. § 12-121.[10] (R. 1032-89, 1190-1213.) On April 25, 2014, Donna moved for partial summary judgment, including, asserting that the January 11, 1995 Letter Agreement was legal and AIA Services was authorized to use capital surplus at that time. (R. 2049-2308.)

On July 14, 2014, the district court granted both sides' motions in part; ruling that Donna's fraud and fiduciary duty claims were barred by the Economic Loss Rule, that she failed to state a claim for unjust enrichment, that the Series A Preferred Shareholder Agreement was illegal, but that the Letter Agreements were valid and enforceable contracts, and Donna held the number of Series A Preferred Shares indicated in AIA Services' records.[11] (R. 2413-30.) After both sides moved for reconsideration, on August 25, 2014, the district court further granted Donna's motion in part by holding that her breach of fiduciary duty claims were not barred by the Economic Loss Rule. (R. 2601-10.)

On July 21, 2015, Donna filed her Third Amended Complaint in the First Lawsuit. (R. 3367-77.) After AIA Services moved for reconsideration once again and on the very eve of trial, on June 15, 2015, the district court abruptly changed its mind and summarily reversed its earlier decisions, without citing any authority, and ruled that Donna only held 7,110 Series A Shares. (R. 3346-51.) On August 14, 2015, the John and Connie filed their Answer to the First Lawsuit, and

[10] As this Court is well aware, "I.C. § 12-121 applies to cases as a whole and not to individual motions." ***Walker v. Boozer***, 140 Idaho 451, 457, 95 P.3d 69, 75 (2004).

[11] While Donna's expert found minor discrepancies (R. 2293), Donna is not challenging the district court's earlier ruling as to the number of shares in AIA Services' records, so she will use the 41,651.25 Series A Preferred Shares ($416,512) indicated in AIA's records as the appropriate number of shares. (R. 2199, 2477 (A. 77).)

asserted counterclaims for unjust enrichment and abuse of process. (R. 3378-88.)

On January 14, 2016, counsel for AIA Services withdrew. (R. 3389-91.) On September 8, 2016, the district court entered a Rule 54(b) Judgment consistent with its prior rulings. (R. 3438-41.) On September 22, 2016, Donna timely moved for reconsideration and to amend the Rule 54(b) judgment (R. 3442-64), and she submitted additional testimony and evidence (including evidence of yet additional malfeasance and shareholder meeting notices and proxies approving the January 11, 1995 Letter Agreement). (R. 3465-3644.) On October 6, 2016, Donna filed an amended motion to reconsider.[12] (R. 3647-75.) On December 28, 2016, the district court again, without providing any legal analysis or a reasoned explanation, denied Donna's motions in a two-page ruling. (R. 3802-3804.)

On February 8, 2017, Donna timely appealed. (R. 3805-26.) On March 1, 2017, the Individual Defendants cross-appealed. (R. 3827-59.) This appeal followed.

IV. ISSUES PRESENTED ON APPEAL

1. Whether the district court erred when it failed to conduct a full analysis of the illegality doctrine as it pertains to the 1995 Letter Agreements and the 1996 Series A Preferred Shareholder Agreement and whether this Court should do so for the first time on appeal.

2. Whether the district court erred when it ruled that Donna only holds 7,110 Series A Preferred Shares because, at most, it should have left her where it found her if it did not enforce that Agreement (which is holding 41,651.25 shares).

3. Whether the Letter Agreements complied with Idaho Code section 30-1-6 (repealed).

[12] The Individual Defendants moved to strike Donna's amended motion and further sought sanctions against the undersigned counsel (albeit the sanctions were brought under the inapplicable Rule 12.2(a), which applies to successive applications, not motions to reconsider). (R. 3676-86.) After submitting additional briefing on the issues, the district court denied that motion and the request for sanctions. (R. 3690-3773.) That motion perfectly illustrates just one more example of the untenable positions and intransigence caused by the Individual Defendants' actions.

4. Whether the district court erred because the 1995 Letter Agreements and/or the 1996 Series A Preferred Shareholder Agreement are enforceable and unchallengeable contracts for a number of reasons.

5. Whether this Court should overrule prior precedent and allow parties to appeal orders denying summary judgment.

6. Whether the district court erred when it denied Donna's motion for partial summary judgment on the number of Series A Preferred Shares held by her, AIA Services' default on the payment obligations, and the Individual Defendants liability under alter-ego.

7. Whether the district court erred when it ruled that the Economic Loss Doctrine bars Donna's fraud claims and whether this Court should expand and rename that Rule.

8. Whether the district court erred when it dismissed Donna's claim for unjust enrichment.

9. Whether the assignment of a new district court judge on remand would bring a fresh perspective to these cases.

10. Whether Donna is entitled to an award of costs and attorneys' fees on appeal or, in the alternative, reserve the issue of fees for remand after a prevailing party is named.

V. ARGUMENT

A. The Standards of Review Applicable to All Issues.[13]

This appeal arises from the district court's decisions on motions for summary judgment and motions for reconsideration. (R. 2413-30, 2601-10, 3346-51, 3802-04.) The following applies:

> On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion. Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When considering whether the evidence shows a genuine issue of material fact, the trial court must liberally construe the facts, and draw all reasonable inferences in favor of the nonmoving party.

[13] Additional applicable standards of review also be set forth in the following Sections were applicable.

Fragnella v. Petrovich, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012) (citations omitted).

> The district court has no discretion on whether to entertain a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B). On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. However, a motion for reconsideration need not be supported by any new evidence or authority. When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.

Fragnella, 153 Idaho at 276, 281 P.3d at 113 (citations omitted). "This means the Court reviews the district court's denial of a motion for reconsideration de novo." ***Shea v. Kevic Corp.***, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014).

The interpretation of statutes are questions of law over which this Court exercises free review. ***Ada Cnty. Prosecuting Attorney v. 2007 Legendary Motorcycle***, 154 Idaho 351, 353, 298 P.3d 245, 247 (2013). "The burden of proving an affirmative defense, however, rests upon the party who advances the affirmative defense." ***U.S. Bank National Assoc. v. CitiMortgage, Inc.***, 157 Idaho 446, 337 P.3d 605, 610 (2014).[14]

B. <u>The District Court Erred When It Granted AIA Services' Motion for Reconsideration Because Donna Still Holds 41,651.25 Shares, the 1996 Series A Preferred Shareholder Agreement Should Be Enforced, the 1995 Letter Agreements Are Legal, Enforceable and Unchallengeable</u>.

1. Additional Applicable Standards of Review.

> 'An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contract to law or public policy,' and such a contract is 'illegal and unenforceable.' '[W]hen the consideration for a contract explicitly violates a statute, the contract is illegal and unenforceable.' In *Trees v. Kersey*, we explained:

[14] To the extent that additional standards of review also apply to the arguments below, they will be discussed in each of the applicable arguments below.

> …Whether a contract is illegal is a question of law for the court to determine from all the facts and circumstances of each case. An illegal contract is one that rests on illegal consideration of any act or forbearance which is contrary to law or public policy. The general rule is that a contract prohibited by law is illegal and unenforceable. A contract which is made for the purpose of furthering any matter or thing prohibited by statute is void. This rule applies on the ground of public policy to every contract which is founded on a transaction prohibited by statute. The Idaho Court of Appeals has suggested that where a statute intends to prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition or to the ignorance of the parties as to the prohibiting statute.

AIA Services Corp., 151 Idaho at 564-65, 261 P.3d at 841-42 (citations omitted). Contract interpretation begins with the document's language and is interpreted by the plain, ordinary and proper meaning of the contract. ***Knipe Land Co. v. Robertson***, 151 Idaho 449, 259 P.3d 595 (2011). "Interpretation and legal effect of an unambiguous contract are questions of law over which this Court exercises free review." ***Idaho Power Co. v. Cogeneration, Inc.***, 134 Idaho 738, 748, 9 P.3d 1204, 1214 (2000). "When construing corporate organizational documents [i.e., articles of incorporation and bylaws], the general rules of contract interpretation apply." ***Heritage Lake Property Owners Ass'n, Inc. v. York***, 859 N.E.2d 763, 765 (Ind. Ct. App. 2007).

2. The District Court Erred Because Donna Should Still Hold 41,651.25 Series A Preferred Shares Under Any Possible Scenario.

The parties agreed, and the district court correctly ruled, that the 1996 Series A Preferred Shareholder was an illegal and unenforceable contract as to Donna, Reed and AIA Services.[15] (R. 617-25, 2425 (A. 75), 2428 (A. 78).) The district court also correctly ruled the first two times that

[15] Since the 1995 Letter Agreements and the 1996 Series A Preferred Shareholder Agreements were entered into in 1995 and 1996, respectively (R. 602-04, 608-625), the Idaho Business Corporation Act in existence at that time applies to any violations of Idaho Code at those times. *See, e.g.,* **I.C. § 30-1-1703(1)** (repealed); **I.C. § 30-29-1703(1)**.

the Letter Agreements were legal (R. 2425-27 (A. 75-77), 2602-05 (A. 82-85), and when it held that Donna held that "the number of unredeemed shares still held by Donna is the amount shown by AIA's records on the date of the last payment made to Donna." (R. 2427 (A. 77).)

However, almost one year later, the district court then abruptly changed its mind and, without citing any authority, held that the "only equitable remedy for the situation as presented in 2015 that this Court can conceive of is that suggested by AIA: Recalculation of the redemptions made for Donna's Series A Preferred shares at the only lawful interest rate—that established by the Articles of Incorporation…" (R. 3349 (A. 94).) Then, the district court erroneously went back in time to 1995 and retroactively recalculated the payments made and retroactively increased the number of shares redeemed with each payment to find "that all but 7,110 Preferred A Shares owned by Donna have been redeemed." (R. 3350 (A. 95); *Compare* R. 2056-2213 (actual redemptions) *with* 1067-1189 (the recalculation, i.e., what did not happen).) After Donna moved to reconsider, R. 3647-75, the district court denied her motion, again, without citing any authority or providing any authoritative explanation. (R. 3802-04 (A. 1001-03).) Both of those decisions were erroneous.

Once the district court determined that the 1996 Series A Preferred Shareholder Agreement was illegal, then it was required to determine whether that Agreement would be enforced under one of the exceptions to the illegality doctrine. *See generally* ***AIA Services Corp.***, 151 Idaho at 565-67, 261 P.3d at 842-44. If none of the exceptions applied, then the district court must leave Donna and AIA Services where it found them on July 14, 2014, which was Donna holding the same 41,651.25 Series A Preferred Shares that she had held since AIA Services stopped paying her on May 30, 2008. (R. 528 ¶ 13, 633, 817, 2427.) Next, the district court needed to determine

whether Donna's contractual rights were governed by any one or more of the 1995 Letter Agreements or AIA Services' amended articles of incorporation—or both. (R. 602-04, 608-15, 649-738.) When the district court entered its orders on reconsideration, the district court side-stepped this entire analysis and disregarded the facts and authorities (and, indeed, cited no authority) in order to justify the result that it apparently wanted.[16] (R. 3346-51 (A. 91-96), 3802-04 (A. 101-03).) For the following reasons, those decisions were error and the district court had it right the first time. (*Id.*; R. 2425-29 (A. 75-79).)

a. ***This Court Should Conclusively Decide the Legality and Enforceability of the 1995 Letter Agreements and the Enforceability of the 1996 Series A Preferred Shareholder Agreement.***

As explained above, in both of its reconsideration decisions, the district court failed to expressly address whether the 1995 Letter Agreements were legal and enforceable or whether the Series A Preferred Shareholder Agreement was enforceable (it correctly ruled it was illegal) in its earlier decisions. The district court did "not find it necessary to rule" on capital surplus. (R. 3349 n.3 (A. 94 n.3).) Instead, the district court ultimately concluded that the higher interest rate was not "lawful" and held that Donna's contractual rights revert back to the articles of incorporation. (R. 3349-50 (A. 94-95).) This was error, and this Court should address the legality issue now.

Once the issue of illegality of a contract is raised, a district court has the obligation to address the issue. ***Syringa Networks, LLC v. Idaho Dept. of Admin.***, 159 Idaho 813, __, 367 P.3d 208, 218 (2016) ("We affirm the district court's holding that it had a duty to raise the issue of

[16] "Courts decide cases in one of two ways: (a) they apply the law to the facts and thereby arrive at the result or (b) they determine the desired result and then twist the law and/or the facts to justify it." ***Nield v. Pocatello Health Services, Inc.***, 156 Idaho 802, 819, 332 P.3d 714, 731 (2012) (Eismann, J., dissenting).

illegality…"); ***Quiring v. Quiring***, 130 Idaho 560, 566-67, 944 P.2d 695, 701-02 (1997) (the district court "has a duty to raise the issue of illegality, whether pled or otherwise…").

"The illegality of a contract…can be raised at any stage in litigation. The Court has the duty to raise the issue of illegality *sua sponte*." ***Trees v. Kersey***, 138 Idaho 3, 6-7, 56 P.3d 765, 768-69 (2002); *accord*; ***Riley I***, 157 Idaho at 329, 336 P.3d at 261; ***AIA Services Corp.***, 151 Idaho at 564, 261 P.3d at 841.[17]

Thus, this Court should address the applicable illegality issues (alleged) discussed below and it is further appropriate for this Court to do so for the first time on appeal, if necessary.

b. The District Court Erred Because Under All Circumstances Donna Should Still Hold the Same 41,651.25 Series A Preferred Shares that She Held When AIA Services Stopped Paying Her in 2008 Because the Series A Preferred Shareholder Agreement Is an Illegal Contract.

The district court correctly ruled that the Series A Preferred Shareholder Agreement was illegal and unenforceable as to Donna, Reed and AIA Services. (R. 617-25 (A. 16-24), 2425, 2428 (A. 75, 78).) But the district court erred because it disregarded the illegality doctrine and failed to determine whether it was leaving the parties where it found them. (*Id*.; R. 3346-51 (A. 91-96).) In fact, it did erroneously not leave the parties where it found them. (R. 3349-50 (A. 94-95).)

"'If a contract is illegal and void, the court will leave the parties as it finds them and refuse to enforce the contract.'" ***AIA Services Corp.***, 151 Idaho at 565, 261 P.3d at 842 (citation omitted). "[A] court of ***equity*** will not knowingly aid in the furtherance of an illegal transaction; in harmony with this principle, it does not concern itself as to the manner in which the illegality of a matter

[17] Ironically, the district judge here is the same one who ruled *sua sponte* that the Stock Redemption Agreement was illegal. ***AIA Services Corp.***, 151 Idaho 552, 261 P.3d 829.

before it is brought to its attention." ***Id.*** at 564 (citation omitted). Moreover, when responding to a motion for summary judgment, the "nonmoving party cannot rely on speculation." ***Edwards v. Mortgage Electronic Registration Systems, Inc.***, 154 Idaho 511, 519, 300 P.3d 43, 51 (2013).

Here, the district court appears to have left the parties where it found them as a result of the illegal 1996 Series A Preferred Shareholder Agreement because it discusses the Letter Agreements as being the operative agreements on reconsideration (albeit Donna maintains below the Series A Preferred Shareholder Agreement should be enforced). Then, the district court ruled that the higher interest rate was not authorized by shareholders and, consequently, the higher interest rate in the Letter Agreements was not "lawful" (albeit Donna maintains this was error, too, for the reasons discussed below). (R. 3349-50 (A. 94-95), 602 (A. 1).)

Irrespective of whether the district court was implicitly ruling that the Letter Agreements were illegal (another error if it did, as discussed below) or whether it had actually left the parties where it found them as a result of the illegal Series A Preferred Shareholder Agreement, the result must be the same (subject to Donna's other challenges below)—that the district court was required to leave the parties where it found them, which was with Donna holding the same 41,651.25 Series A Preferred Shares that she had held since May 31, 2008 according to AIA Services' records (as it had previously correctly ruled). (R. 2427 (A. 77), 2199.) It was error for the district court to employ an "***equitable remedy***" to reduce the number of Donna's Series A Preferred Shares to 7,110 "[p]ursuant to the recalculation and reamortization as performed by AIA." (R. 3349-50 (A. 94-95) (emphasis added).) This is because "no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore, there is no place for ***equitable considerations***,

presumptions, or estoppels." ***Clark v. Utah Const. Co.***, 51 Idaho 587, 8 P.2d 454, 458 (1932) (emphasis added). Instead, at most, Donna must be left where the district court found her, holding 41,651.25 Series A Preferred Shares, and at the very least her contractual rights for redemption would revert back to the amending articles of incorporation. (R. 725-26.)

Lastly, it should be noted that the "recalculation and reamortization" performed by AIA Services was pure speculation on how it may have wished that it had redeemed Donna's shares, but that was not how her shares were redeemed since 1995 (as the district court noted). (*Compare* R. 2056-2213 (the actual redemptions) *with* R. 1067-1189 (the recalculation and reamortization, i.e., what did not happen and what AIA Services wished had happened).) "Th[is] speculation provides no facts relevant to summary judgment." ***Antim v. Fred Meyer Stores, Inc.***, 150 Idaho 774, 780 n.1, 251 P.3d 602, 608 n.1 (2011). Accordingly, the district court's erroneous decision was also based on the purest of speculation, which is a separate basis for reversal.

c. The District Court Erred by Not Enforcing the 1996 Series A Preferred Shareholder Agreement as to Donna and AIA Services Because the Illegal Portions of that Agreement Involving Reed Could Have Been Severed, Donna Was Not In Pari Delicto and Other Exceptions Also Apply to Her.

While Donna agrees that the Series A Preferred Shareholder Agreement is illegal and unenforceable as to Donna, Reed and AIA Services, the district court erred by not enforcing that Agreement as to Donna and AIA Services, and the provisions regarding Reed should be severed (those terms are meaningless anyway). (R. 2425 (A. 75).) Thus, the Agreement should be enforced.

If an agreement is illegal, a court may sever the illegal portions of an agreement and enforce the non-illegal portions. ***Farrell v. Whiteman***, 146 Idaho 604, 611, 200 P.3d 1153, 1160 (2008). A court may also enforce an agreement when one party is more innocent or when the complaining

parties are not intended beneficiaries. ***Id.*** at 611 (quantum meruit); ***Minnelusa Co. v. A.G. Andrikopoulos***, 929 P.2d 1321 (Col. 1996) (not intended beneficiary); ***McShane v. Quillin***, 47 Idaho 542, 277 P. 554, 559 (1929) (in pari delicto exception). A corporation may not disavow its obligations. ***LaVoy Supply Co. v. Young***, 84 Idaho 120, 369 P.2d 45 (1962) (corporation may not invalidate an illegal redemption agreement). *See* ***AIA Services Corp.***, 151 Idaho at 575, 261 P.3d at 852 (Jones, J., concurring). ("This does not necessarily mean that any contract made in contravention of any corporate governance statute is automatically void and unenforceable. Each case should be decided on its own merits.").

Here, the 1996 Series A Preferred Shareholder Agreement should still be enforced as to Donna and AIA Services only. (R. 617-25 (A. 16-24).) Unlike her ex-husband Reed, Donna is in an entirely different position, and all of the exceptions to the illegality doctrine overwhelmingly weigh in her favor. And, most importantly, Donna needs a contractual remedy and closure.

First, there is no question that Donna is the least guilty party. She also has no high school diploma or college degree. (R. 2350.) Donna was not represented by counsel for entry into the Series A Preferred Shareholder Agreement and she had no knowledge of I.C. § 30-1-6 (A. 151-52). (R. 623, 2350-51.) Donna is a minority preferred shareholder with "no right…to receive notice of or to vote at any regular or special shareholder meeting of stockholders." (R. 726 § 4.2.8.) In other words, Donna could not call a shareholder meeting to authorize capital surplus nor did she have any other rights as a common shareholder to vote at such a meeting. (*Id.*) **I.C. § 30-1-6** (repealed) (A. 151-52). Indeed, the one right she does have—to designate a person to the board—has been repeatedly denied. (R. 2352.) Donna's Series A Preferred Shares was the key payment

for her divorce. (R. 532-600.)

On the other side of the equation, AIA Services was represented by in house counsel (Dan Spickler) and outside counsel for entry into the Series A Preferred Shareholder Agreement, both of whom attended the March 7, 1995 shareholder and board meetings. (R. 623, 3476, 3485, 3524, 3554.) John and Connie were the majority common shareholders of AIA Services and were both attorneys (R. 879-80 n.1, 880, 2225-38), and they are "presumed to know the law." ***Miller v. Smith***, 7 Idaho 204, 61 P. 824, 827 (1900). They could have called a special shareholder meeting and obtained a separate shareholder resolution authorizing capital surplus. (R. 2900-05.) John, Beck and Cashman were directors of AIA Services in 1996, while John was also President. (R. 974-75.) They owed Donna fiduciary duties, and the Individual Defendants and AIA Services are who wanted to redeem Reed's shares. (R. 602-25 (A. 1-24), 1813-30, 1843, 3476-3565.) AIA Services, through the direction and control of the Individual Defendants, could have and should have paid Donna long ago—they are the cause of the present predicament. (*E.g.*, R. 2342-47, 2867-72, 3614-27 (A. 135-47).) In sum, Donna is not in pari delicto. ***McShane***, 277 P. at 559.

Second, for the same reasons discussed above, this Court should hold that AIA Services and the Individual Defendants may not have the Series A Preferred Shareholder Agreement or the Letter Agreements declared illegal or invalidated. ***Minnelusa Co.***, 929 P.2d 1321; ***LaVoy Supply Co.***, 84 Idaho 120, 369 P.2d 45; ***AIA Services Corp.***, 151 Idaho at 575, 261 P.3d at 852. And, even if this Court rejects this argument, then it should create a remedy for her under quantum meruit. ***Farrell***, 146 Idaho at 611, 200 P.3d at 1160.

As such, Donna requests that this Court sever Reed as a party to the 1996 Series A Preferred Shareholder Agreement, sever the recitals from that Agreement, and sever all of the provisions except for Sections 1(a) and (c), which are merely the same contractual rights that she already had under the Letter Agreements. (R. 617-25 (A. 16-24).)

d. No Further Shareholder Vote Was Necessary for the Interest Rate Increase or Shortened Redemption Amortization Period Because the January 11, 1995 Letter Agreement Was Authorized by AIA Services' Amended Articles of Incorporation, Which Expressly Authorized the Use of Capital Surplus Pursuant to I.C. § 30-1-6.

The district court erred when it declined to address the authorization to use capital surplus under AIA Services' amended articles of incorporation on reconsideration. (R. 3349 n.3 (A. 94 n.3).) The district court also failed to address the issue in its other three decisions. (R. 2413-30 (A. 63-80), 2601-10 (A. 81-90), 3802-04 (A. 101-03).) This was error because AIA Services was authorized to use capital surplus under its amended articles of incorporation at the time the January 11, 1995 Letter Agreement was entered into This is fatal to AIA Services and the Individual Defendants' argument and dispositive. Under then-existing Idaho law:

> A corporation shall have the right to purchase…its own shares, but purchases of its own shares…shall be made only to the extent of unreserved and unrestricted earned surplus available therefor, and, **if the articles of incorporation so permit** or with the affirmative vote of the holders of a majority of all shares entitled to vote thereon, **to the extent of unreserved and unrestricted capital surplus available therefor**.

I.C. § 30-1-6 (repealed) (emphasis added) (A. 151-52.)

When Donna and AIA Services entered into the January 11, 1995 Letter Agreement (R. 602-04 (A. 1-3)), AIA Services' amended articles of incorporation expressly authorized the use of capital surplus in accordance with I.C. § 30-1-6 (repealed):

> **The corporation shall have the right to purchase its own shares**, whether direct or indirect, to the extent of unreserved and unrestricted earned surplus available therefor and **to the extent of unreserved and unrestricted capital surplus available therefor**.[18]

(R. 681, Article Twelfth (A. 41) (emphasis added).) The plain language of I.C. § 30-1-6 states that if capital surplus is authorized, then there is no limitation on the redemption price, payments terms, interest rate or amortization schedule. **I.C. § 30-1-6** (repealed) (A. 151-52.) Since there was capital surplus, the January 11, 1995 Letter Agreement legally provided that:

> Effective February 1, 1995, regardless of the outcome of the private placement,[19] the monthly preferred stock redemption payments shall be converted from a fifteen year amortization at prime rate less 1-1/2% to a ten-year payout at prime rate plus 1/4%...

(R. 602 (A. 1).) Further, the modification of Donna's redemption terms was additionally authorized under then-applicable 1987 amended articles of incorporation. (R. 660 § 4.12 (A. 36 § 4.12.)

Thus, AIA Services was lawfully required, without exception, to accrue interest at prime plus ¼% and to fully redeem Donna's Series A Preferred Shares in ten years—on or before December 2, 2003, which is confirmed by AIA Services' payments as reflected in its financial statements and year-end accounting work papers. (R. 2056-2213.) Moreover, AIA Services' board of directors and common shareholders also authorized the January 11, 1995 Letter Agreement and the increased interest rate and shorter amortization period. (3476-3565.) Indeed, if AIA Services

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[18] Incredibly, AIA Services actually repealed Article Twelfth on April 11, 1995 (three months after it had entered into the January 11, 1995 Letter Agreement to redeem Donna's shares), when those amended articles were superseded and replaced. (R. 685-702 (A. 45-62).) This was fatal to the legality of Reed's redemption. (*Id.*) ***AIA Services Corp.***, 151 Idaho at 559-67, 261 P.3d at 836-44.

[19] As this Court is well aware, "AIA Services failed to raise the necessary funds through the private placement." ***AIA Services Corp.***, 151 Idaho at 557, 261 P.3d at 834. However, the January 11, 1995 Letter Agreement confirms that AIA Services promised to pay Donna in ten years with interest accruing at prime plus 1/4% regardless of whether the funds were raised to redeem Reed's shares. (R. 602 (A. 1).)

had paid Donna in the shorter (ten-year) amortization period as promised, it would have saved over $100,000 in interest expense. (*Compare* R. 3328-33 *with* R. 3334-37.)

Thus, the district court committed reversible error here, too.

e. AIA Services May NOT Impair Donna's Contractual Rights by Amending Its Articles of Incorporation to Exclude the Capital Surplus Authorization.

The district court erred by not considering or addressing the argument that the January 11, 1995 Letter Agreement could not be impaired by AIA Services' amendments to its articles of incorporation, which effectively repealed the amended articles authorizing capital surplus. (R. 2413-30 (A. 63-80), 2601-10 (A. 81-90), 3346-51 (A. 91-96), 3802-04 (A. 101-03).)

"[A] corporation cannot impair the obligation of its contracts with third persons by the simple expedient of amending its articles of incorporation." ***Disabled American Veterans v. Hendrixson***, 340 P.2d 416, 418 (Utah 1959); *accord* ***Fisher v. Intermountain Building & Loan Ass'n***, 55 Idaho 326, 42 P.2d 50, 54 (1935); ***Davidson v. Colonial Williamsburg Foundation***, 817 F. Supp. 611, 616 (D.C. E.D. Va. 1993).

Here, since AIA Services had authorization to use capital surplus under I.C. § 30-1-6 when it entered into the January 11, 1995 Letter Agreement with Donna, AIA Services may not impair Donna's contractual obligations through its subsequent amendments to its articles of incorporation. (R. 602 (A. 1), 681 (A. 41), 685-702 (A. 45-62).) This Court should adopt this rule of law because it would simply be unfair for a corporation to get out of its obligations by simply amending its articles of incorporation to impair its contractual obligations with others. Thus, the district court

erred because AIA Services could not improperly amend its articles to impair Donna's rights.[20]

f. Assuming that the Series A Preferred Shareholder Agreement Is Determined by this Court to Also Be Unenforceable (It Is Illegal), Then that Illegal 1996 Agreement Does Not Impact the Legality of the January 11, 1995 Letter Agreement.

The district court *originally* correctly held that the January 11, 1995 Letter Agreement could not be made void through the execution of the illegal 1996 Series A Preferred Shareholder Agreement. (R. 24-26 (A. 26-27).) Then, the district court erred when it apparently abandoned that ruling at the time that granted reconsideration and subsequently denied Donna's reconsideration. (R. 3346-51 (A. 91-96), 3802-04 (A. 101-03).) This Court should correct this error, too.

"[A] contract could not be both void and in full force and effect at one and the same time." ***Hill v. Wilkinson***, 60 Idaho 243, 90 P.2d 696, 699 (1939); ***Shore v. Peterson***, 146 Idaho 903, 909, 204 P.3d 1114 (2009) ("Since an accord and satisfaction is a substituted contract, the essentials of a valid contract must be present"); ***Walter v. Balogh***, 619 N.E.2d 566, 569 (Ind. 1993); ***Morfeld v. Andrews***, 579 P.2d 426, 429 (Wy. 1978); ***Shinn v. Edwin Yee, Ltd.***, 553 P.2d 733, 745 (Hawaii 1976) (An illegal "amendatory agreement could have no effect and the original contract must stand"); ***Tilman v. Talbert***, 93 S.E.2d 101, 103 (N.C. 1956) ("A subsequent illegal agreement by the parties cannot affect a previous fair and lawful contract between them in relation to the same subject"); **RESTATEMENT (SECOND) OF CONTRACTS § 279 cmt. b** (1981) ("Thus, if the substituted contract is voidable, it discharges the original duty until avoidance, but on avoidance of the substituted contract the original duty is again enforceable").

[20] The April 11, 1995 amended and restated articles of incorporation does not reference the March 8, 1989 amended articles of incorporation. (R. 686 (A. 46).) Instead, it contains the catch-all language that the amendments "supersede the original Articles of Amendment and all previous amendments thereto." (*Id.*)

Here, if this Court does not enforce the illegal 1996 Series A Preferred Shareholder Agreement as requested above, then this Court should hold that the legal and enforceable January 11, 1995 Letter Agreement cannot be superseded, substituted, amended or replaced by the illegal 1996 Series A Preferred Shareholder Agreement. (R. 602-04 (A. 1-3), 617-25 (A. 16-24).) Thus, Donna's contractual rights would revert back to the January 11, 1995 Letter Agreement.

g. AIA Services Had Sufficient Earned Surplus to Redeem Donna's Shares When She Exercised Her Mandatory Right of Redemption on December 3, 1993.

The district court erred when it failed to rule that Donna's redemption complied with I.C. § 30-1-6 because AIA Services had $3,948,262 in sufficient earned surplus at the time Donna exercised her mandatory redemption rights for her $2,000,000 in Series A Preferred Shares. (R. 2413-30 (A. 63-80), 2601-10 (A. 81-90), 3346-51 (A. 91-96), 3802-04 (A. 101-03).)

Here, when Donna exercised her right for the mandatory redemption of her shares on December 2, 1993 (R. 525-26), AIA Services had $3,948,262 in earned surplus,[21] which was more than sufficient to authorize the redemption of Donna's shares (only $2,000,000 in earned surplus was required to redeem Donna's 200,000 Series A Preferred Shares ($10 per share)). (*Id.*; R. 652-53 (A. 28-29), 3308.) **I.C. § 30-1-6** (repealed) (A. 151-52.) Since there was more than sufficient earned surplus when Donna exercised her redemption rights and because AIA Services elected to pay over time, the bell cannot be un-rung—Donna's redemption obligations were authorized from

[21] The district court also erroneously ruled that AIA Services "at no time possessing assets in excess of liabilities since 1993." (R. 3348 (A. 93).) AIA Services financial statements (which are statutory balance sheet financial statements) showed assets exceeding liabilities by over $6,000,000 at year-end 1993. (R. 3308.) Moreover, as Richard Riley (AIA Services' former attorney) testified, the fair value of AIA Services was significantly more than the amount stated on its balance sheets, which did not place a fair value on assets. (R. 772-73.)

that point forward. This conclusion is supported by the plain meaning of I.C. § 30-1-6. There is nothing ambiguous about that statute. And, once Donna's redemption was legally authorized, she could agree to modify those terms with AIA Services. (R. 660 § 4.12 (A. 36 § 4.12).) Further, the board of directors and shareholders also separately authorized the modified terms and specifically the January 11, 1995 Agreement. (R. 3476-3565.)

h. AIA Services' Shareholders and Board of Directors Authorized the Higher Interest Rate and Shorter Amortization Period in the January 11, 1995 Letter Agreement.

The district court erred when it held on reconsideration, and failed to correct in a subsequent reconsideration, that "[i]t is now uncontroverted that AIA shareholders never voted to pay a higher interest rate than that authorized by the Articles of Incorporation." (R. 3349 (A. 94), 3802-03 (A. 101-02).) In reality, AIA Services' shareholders approved and acquiesced in the higher interest rate, and the directors had the power to authorize the increased rate, which they did.

First, AIA Services' shareholders expressly authorized the January 11, 1995 Letter Agreement at the March 7, 1995 shareholder meeting. (9/22/16 Bond Decl., Ex. 3-6.) Not surprisingly, John had his lieutenant JoLee Duclos provide the incorrect testimony and evidence that the district court erroneously relied upon (R. 3349 (A. 94) (citing R. 2707-20).) Ms. Duclos, like John, has no credibility. It is easy to see why. She only submitted the shareholder meeting minutes for obvious reasons.

She is incorrect. The notice sent to the shareholders expressly provided that shareholder approval was requested for "[a]ll other corporate actions necessary to recapitalize and reorganize the Company…in accordance with the ***reorganization plan*** approved by the Board of Directors." (R. 3505.) The March 7, 1995 Board Meeting Resolutions expressly addressed and authorized the

January 11, 1996 Letter Agreement, and directed AIA Services' officers to negotiate and modify the terms for redeeming Donna's shares. (R. 3499.) The elements of the "***Reorganization Plan***" are listed in the index to the Disclosure Statement, and include the "Redemption of Donna's Series A Preferred Stock." (R. 3510 (emphasis added).) The acceleration of the redemption of Donna's Series A Preferred Shares and the increased interest rate were specifically disclosed and discussed in the "***Reorganization Plan***" portion of the Disclosure Statement. (R. 3416 (emphasis added).)

> …***any remaining shares will be redeemed over a ten-year period. Begging February 1, 1995, monthly redemption payments will be computed on a ten year amortization at the prime rate of the First Interstate Bank plus ¼%***

(R. 3416 (emphasis added).) AIA Services' shareholders expressly voted for and approved the "***Reorganization Plan***" (by checking a box indicating "FOR the ***Reorganization Plan***…"). (R. 3563.) The proxies sent to the shareholders included the same "[a]ll other corporate actions necessary to recapitalize and reorganize the Company…in accordance with the ***reorganization plan*** approved by the Board of Directors." (R. 3562 ¶ viii. (emphasis added).) The shareholders overwhelmingly approved the ***Reorganization Plan*** by a vote of 926,698.07 in favor of the plan and 6,688.09 against. (R. 3555, 3557-58.)

Moreover, even if the shareholders had not approved the higher interest rate, at a minimum, the Individual Defendants (and AIA Services) have waived the right to challenge the Letter Agreements and any alleged deficiencies in the shareholder notices or votes (including any alleged failure to amend the articles) for acquiescing in the transactions for decades. *See* ***Rowland v. Rowland***, 102 Idaho 534, 538-540, 633 P.2d 599, 603-605 (1981); ***Phillips Petroleum Co. v. Rock Creek Mining Co.***, 449 F.2d 664, 667-68 (9th Cir. 1971).

Second, there is no authority that the undersigned could find that requires more than board of director approval for the higher interest rate. And the board expressly approved the higher rate. Thus, the district court separately erred in this regard.

"Each corporation shall have the power…To make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the corporation may determine, issues its notes, bonds, and other obligations…" **I.C. § 30-1-4(h)** (repealed) (A. 149-50). "All corporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under director of, a board of directors except as may be otherwise provided in this act or the articles of incorporation." **I.C. § 30-1-35** (repealed) (A. 154-55). *See also* ***Sanderson v. Salmon River Canal Co.***, 45 Idaho 244, 263 P. 32 (1927) (holding that directors had the power and authority to borrow money and execute bonds and mortgages without shareholder approval).

Here, the district court's decision is not supported by any applicable authority, and the above-referenced authorities wholly undermine that decision. (R. 3348-50 (A. 93-95).) Moreover, on January 12, 1995 (one day after the January 11, 1995 Letter Agreement was signed), AIA Services' board of directors authorized and ratified the terms of the January 11, 1995 Letter Agreement. (R. 3477, 3480-83.) Specifically, the board resolution states:

> That the letter agreement dated January 11, 1995 between the corporation and the holder of the corporation's Stated Value Preferred Stock, and the actions taken by the corporation's officers in negotiating and entering into such agreement on behalf of the corporation, be and hereby are ratified and confirmed; and that the corporation's officers be and hereby are authorized and directed to carry out such agreement in accordance with its terms.

(R. 3480.) This was further authorized by AIA Services' bylaws. (R. 2906 § 4.4, 2912 § 5.2(b),

2914 §§ 6.1 and 6.2.) Thus, the January 11, 1995 Letter Agreement was duly authorized by AIA Services' board of directors and nothing else was required. (R. 602-04 (A. 1-3).)

Third, the issue is also a red-herring. Had AIA Services actually paid Donna in ten years at the higher interest rate as agreed and promised, AIA Services would have actually paid over $100,000 *less* in interest to Donna. (*Compare* R. 3328-33 *with* R. 3334-37.) It is difficult to imagine how a corporate decision that would have, and should have, resulted in AIA Services saving money would require shareholder approval before entering into that modification. (R. 602 (A. 1).) After all, Donna had the right to consent to modifications of her rights and preferences, and she did so through the January 11, 1995 Letter Agreement. (R. 602-04 (A. 1-3), 660 § 4.12 (A. 36 § 4.12.) Thus, the district court erred, once again, for the three reasons stated above.

i. AIA Services' Amended Articles of Incorporation Authorized the January 11, 1995 Letter Agreement.

The district court erred because AIA Services' amended articles of incorporation, which were adopted by the shareholders, expressly authorized Donna to consent to modifications of her rights and preferences. (R. 660 § 4.12 (A. 36 § 4.12).) Thus, she had the right, so long as there was mutual consent with AIA Services, to increase the interest rate paid to her, which occurred.

A corporation has the general power to engage in any business activities. **I.C. § 30-1-4** (repealed) (A. 149-50). In addition, a corporation's articles of incorporation must indicate "the designation of each class and a statement of the preferences, limitations and relative rights in respect of the shares of each class." **I.C. § 30-1-54(f)** (repealed) (A. 162-63). The articles may also include "[a]ny provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation…" **I.C. §**

30-1-54(f) (repealed) (A. 162-63). The mandatory redemption rights contained in articles of incorporation are a contract between the shareholder and the corporation. ***Franklin Life Ins. Co. v. Commonwealth Edison Co***., 415 F. Supp. 602, 613 (D.C. Ill. 1978).

A contract may be modified by mutual consent of the parties. ***Ore-Ida Potato Prod., Inc. v. Larsen***, 83 Idaho 290, 293, 362 P.2d 384, 385 (1961).

Here, the district court erred because AIA Services' amended articles of incorporation authorized Donna to agree with AIA Services to modify provisions pertaining to her Series A Preferred Shares. (R. 660 § 4.12 (A. 36 § 4.12).) When the shareholders voted and authorized the amended articles of incorporation, they unanimously authorized Donna to consent to any modifications of the provisions pertaining to the Series A Preferred Shares. (*Id*.; R. 662.)

> The rights and preferences hereby conferred on the Series A Preferred Stock shall not be changed, altered or revoked without the consent of the holders of the majority of the Series A Preferred Stock outstanding at the time.

(R. 660 § 4.12 (A. 36 § 4.12).) Because the shareholders authorized Donna and AIA Services to change or alter her preferences under the terms of the amended articles of incorporation, no further shareholder consent was required to enter into the January 11, 1995 Letter Agreement or the subsequent ones. (R. 602-04 (A. 1-3), 608-12 (A. 7-11), 614-15 (A. 13-14), 617-25 (A. 16-24).) Indeed, AIA Services would have actually saved over $100,000 by paying Donna over a shorter period of time (and at the higher interest rate) had it simply paid her as it was contractually obligated to do, instead of using her money for other purposes. (*Compare* R. 3328-33 *with* R. 3334-37; R. 2867-72, 2342-47.) Consequently, the district court's decision was, once again, error.

j. The Defendants Cannot Ask this Court to Void the Letter Agreements or to Recalculate the Interest and Principal Payments Made to Donna and the Number of Her Series A Shares that Were Redeemed with Each Payment.

The district court erred because, assuming the higher interest rate and shorter amortization period were not authorized, the January 11, 1995 Letter Agreement would have been, at most, ultra vires and not subject to an "equitable remedy." (R. 3802-03 (A. 101-02).) Indeed, like many of Donna's other arguments, the district court never even addressed the ultra vires issue. (*Id*.)

"Ultra vires" means: "Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." **BLACK'S LAW DICTIONARY** (10th ed. 2014). The then-existing Idaho Code section on ultra vires acts, I.C. § 30-1-7 (repealed), provides in pertinent part:

> 30-1-7 Defense of ultra vires.
>
> No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

I.C. § 30-1-7 (repealed) (A. 152-53). *See also* ***Scona, Inc. v. Green Willow Trust***, 133 Idaho 283, 985 P.2d 1145 (1999) (explaining how a party lacks standing to challenge ultra vires acts unless that party falls within the ambit of permissible parties); **7A FLETCHER CYC. CORP. § 3407** (2016) ("It is the policy of the law to look with disfavor upon the defense of ultra vires…"); *accord* ***Rowland***, 102 Idaho at 538-540, 633 P.2d at 603-605 (consent through acquiescing in acts).

There are three limited exceptions that provide an exception to challenge an ultra vires act. **I.C. § 30-1-7(a)-(c)** (repealed) (A. 152-53). However, none of them apply here. Simply put, the district court's finding that it "is now uncontroverted that AIA shareholders never voted to pay a higher interest rate than that ***authorized*** by the Articles of Incorporation" is not supported by any

provision in I.C. § 30-1-7. ***Id.*** (R. 3349 (A. 94) (emphasis added).)

First, these consolidated lawsuits are not proceedings by and not an action by the Attorney General. (R. 22-25, 54-63, 74-84, 3367-77, 3378-88.) Thus, **I.C. § 30-1-7(c)** does not apply.

Second, these consolidated lawsuits do not involve proceedings by a shareholder against AIA Services to enjoin an act or transfer of property. (R. 22-25, 54-63, 74-84, 3367-77, 3378-88.) Thus, **I.C. § 30-1-7(a)** does not apply.

Third, these consolidated lawsuits are not proceedings by AIA Services or another permissible party (i.e., a receiver, trustee, legal representative or derivative action) on behalf of AIA Services against incumbent or former officers or directors. (R. 22-25, 54-63, 74-84, 3367-77, 3378-88.) Thus, **I.C. § 30-1-7(b)** does not apply.

Accordingly, the district court erred by setting aside the Letter Agreements or invalidating the higher interest rate that has been paid to Donna since 1995 because AIA Services and the Individual Defendants do not fall within the ambit of parties who may challenge those corporate actions by AIA Services.

k. AIA Services and the Individual Defendants Are Estopped from Challenging the Letter Agreements.

The district court also erred when it failed to rule that AIA Services and the Individual Defendants were estopped from challenging the Letter Agreements or the higher interest rate.

It is well-settled that the doctrine of ultra vires when invoked for or against corporation should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong or the other party has received the benefit of the transaction; in such case the party was estopped. ***Meholin v. Carlson***, 17 Idaho 742, 107 P. 755 (1910); ***First Nat'l Bank v. Callahan Mining Co.***,

28 Idaho 627, 155 P. 673 (1916); ***Hansen v. Woods***, 49 Idaho 656, 290 P.379 (1930).

For all of the reasons stated above (including in the Statement of the Facts), AIA Services and the Individual Defendants are estopped from challenging the authority or validity of the higher interest rate or shorter amortization period agreed to in the Letter Agreements. AIA Services and the Individual Defendants obtained the benefit of having all of Reed's shares redeemed (and, indeed, without having to pay for all of them) in order to take the company a different direction (and used AIA Services' funds and assets for other purposes instead of paying Donna). (*Id*.) Under these circumstances, AIA Services and the Individual Defendants should be estopped from asserting ultra-vires as a defense.

l. AIA Services Never Pleaded or Asserted a Claim to Obtain the Equitable Relief the District Court Granted.

Finally, the district court also erred because the "equitable remedy" that it erroneously granted to AIA Services was never pleaded or requested in AIA Services' answer or through a counterclaim. (R. 3349 (A. 94).)

"'A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.'" ***Brown v. City of Pocatello***, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010) (citations omitted). Thus, the district court erred by granting AIA Services relief that it never properly requested or pleaded.

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C. To the Extent that this Court Finds the Letter Agreements or Series A Preferred Shareholder Agreement to Be Valid and Enforceable as Requested in Section B Above, this Court Should Reverse the District Court Denial of Her Motion for Partial Summary Judgment on AIA Services' Default of the Payment Terms, the Number of Shares Held and that the Individual Defendants Should Be Liable Under Alter-Ego/Piercing the Corporate Veil.

1. Additional Applicable Standard of Review.

On an appeal from a denial of a motion for summary judgment, this Court utilizes the same summary judgment standard. ***Rountree v. Boise Baseball, LLC***, 154 Idaho 167, 170, 296 P.3d 373, 376 (2013).

2. This Court Should Overrule Prior Precedent and Allow Parties to Appeal Orders Denying Motions for Summary Judgment.

In order for this Court to consider Donna's appeal of the denial of her motion for partial summary judgment, this Court must first agree with Donna on overruling prior precedent.

This Court has long-held that "an order denying a motion for summary judgment is not subject to review—even after the entry of an appealable final judgment." ***Dominguez ex rel. Hamp v. Evergreen Res., Inc.***, 142 Idaho 7, 13, 121 P.3d 938, 944 (2005) (citations omitted). Yet, this Court has also allowed parties to appeal orders denying summary judgment. *See, e.g.*, ***Riley I***, 157 Idaho at 329, 336 P.3d at 262; ***Morgan v. State, Dept. of Public Works***, 124 Idaho 658, 661, 62 P.2d 1080, 1083-84 (1993). Other jurisdictions allow parties to appeal the denial of summary judgment. *C.f.* ***Muir v. Council 2 Washington State Council of County & City Employees, Local 1849***, 154 Wn.App. 528, 529, 225 P.3d 1024, 1025 (Wa. Ct. App. 2009); ***Gackstetter v. Frawley***, 135 Cal.App.4th 1257, 1268, 38 Cal.Rptr.3d 333, 341-42 (Cal. Ct. App. 2006).

Indeed, the Legislature expressly gave this Court the power to "**reverse**, affirm or **modify any order** or judgment **appealed from**, and **may direct the proper** judgment or **order** to be entered…" **I.C. § 1-205** (emphasis added).

Thus, this Court should harmonize the apparent inconsistency as to the right to appeal an order denying summary judgment by overruling the prior precedent and allowing parties to appeal orders denying summary judgment after a final judgment is entered. This is also a logical and efficient extension of appeals. However, this Court should limit review of decisions denying summary judgment so long as summary judgment was not denied based on disputed facts after a trial on the merits as to those factual issues. *E.g.*, ***Herring v. Dep't of Soc. & Health Servs.***, 81 Wn.App. 1, 14, 914 P.2d 67 (Wa. Ct. App. 1996). This limitation should not apply to issues of law. *E.g.*, ***Washburn v. City of Federal Way***, 178 Wn.2d 732, 310 P.3d 1275 (Wa. 2016).This will also promote efficiency by resolving certain issues on appeal without requiring a new trial.

3. This Court Should Reverse the Denial of Donna's Motion for Partial Summary Judgment on the Default of the Agreements and the Number of Series A Preferred Shares that She Holds.

The district court erred by not granting partial summary judgment regarding AIA Services' default of the Letter Agreements, Amended Articles of Incorporation or the Series A Preferred Shareholder Agreement. (R. 2427-28 (A. 77-78), 2607-08 (A. 87-88).) In addition, for the same reasons discussed above, this Court should, at a minimum, vacate the district court's orders declaring that Donna only holds 7,110 Series A Preferred Shares, which would result in the district court's original order being correct—that Donna holds the number of shares indicated in AIA Services' actual records—or 41,651.25 Series A Preferred Shares.

"'The burden of proving the existence of a contract and fact of its breach is upon the plaintiff, and one those facts are established, the defendant has the burden of pleading and proving affirmative defenses, which legally excuse performance.'" ***Tapadeera, LLC v. Knowlton***, 153 Idaho 182, 186, 280 P.3d 685, 689 (2012) (citation omitted).

Here, there is no dispute that Donna's redemption commenced on December 2, 1993. (R. 525-26, 2056-2213, 3320.) There is no dispute that AIA Services has not made a single payment to Donna since May 30, 2008. (R. 633, 635, 2352.) In other words, Donna has not been paid a cent in over nine years. (*Id*.) There is no dispute that, under any possible theory under any of the following Agreements or Amended Articles of Incorporation, AIA Services is in default.

If this Court rules that Donna's Letter Agreements (including the January 11, 1995 Letter Agreement) or the Series A Preferred Shareholder Agreement are valid and enforceable, then there is no dispute that all of the elements necessary to prove AIA Services is in breach are present. (R. R. 602-04 (A. 1-3), 614-15 (A. 13-14), 617-25 (A. 16-24).) These contract provisions required the full redemption no later than ten years of December 2, 1995. (*Id*.) This did not happen. Thus, AIA Services is in default under these scenarios.

Likewise, if this Court rules that Donna's contractual rights to enforce payment of her 41,651.25 Series A Preferred Shares revert back to the applicable amended articles of incorporation, then all of the elements required to prove breach are present. (R. 722 §§ 4.2.5, 4.2.6.) These contract provisions requires AIA Services to fully redeem Donna's shares within fifteen years of December 2, 1993. (*Id*.) This did not happen. Thus, AIA Services is in default under this scenario.

Finally, there is no dispute that the number of Series A Preferred Shares is 41,651.25, worth $416,512 according to AIA Services records the day after the last payment was made to Donna on May 30, 2008. (R. 2199.) This is the amount the district court originally ruled that Donna held. (R. 2427 (A. 77).) But even if this Court is inclined to use the number calculated by Donna's expert, 41,509.69, R. 2293, it is essentially so close that the amounts are irrelevant to her.

Accordingly, this Court should reverse the district court's denial of Donna's Motion for Partial Summary Judgment and order the district court to enter judgment in her favor against AIA Services in the amount of $416,512 or the less amount of $416,097. (R. 2199, 2293.) There is simply no reason to have a trial on these issues.

4. The District Court Erred by Not Granting Partial Summary Judgment that the Individual Defendants Are Liable Because They Are the Alter-Egos of AIA Services.

The district court erred and abused its discretion by not applying the alter-ego or piercing the corporate veil to correct the fraud and avoid the injustice inflicted upon Donna. (R. 2608 (A. 88).) If there was ever a case for this Court to apply alter-ego and/or piercing the corporate veil, this is the case. It is difficult to imagine that this Court has seen such wide-spread and long-term corporate malfeasance. There can be no better case showing injustice. This Court can correct the wrongs inflicted on Donna now by ordering the district court to enter judgment against the Individual Defendants under the alter-ego and/or piercing the corporate veil theories.

> A court may[22] disregard the corporate entity if two requirements are met. First, there must be such a unity of interest and ownership that the separate personalities of the corporation and individual no longer exist. Second, there must be a showing

[22] "'A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason.'" ***Fragnella***, 153 Idaho at 271, 281 P.3d at 108 (citations omitted)

> that, if the acts are treated as those of the corporation, an inequitable result will follow or that it would sanction a fraud or promote injustice.[23]

Hutchison v. Anderson, 130 Idaho 936, 940, 950 P.2d 1275, 1279 (1997). **1 FLETCHER CYC. CORP. § 41.85** (2016) ("Piercing the corporate veil and the alter ego doctrine are applicable to causes of action in tort, in contract, or both"); **1 FLETCHER CYC. CORP. § 41.10** (2016) ("Under the alter ego doctrine, when a corporation is the mere instrumentality or business conduit of another corporation or person, the corporate form may be disregarded"). The decision to apply alter-ego or piercing the corporate veil was a decision the district court was required to make. ***Wandering Trails, LLC v. Big Bite Excavation, Inc.***, 156 Idaho 586, 591-92, 329 P.3d 368, 373-74 (2014).

Here, there is no reason for this Court to require Donna to continue spending money with expert witnesses and on attorneys' fees. There is no dispute that the Individual Defendants have used their unity of interest and ownership to loot AIA Services for the benefit of them and entities that they partially own. (*E.g.*, R. 958-76, 1656-1728, 2342-47, 2867-72, 2925-38.)

This Court can end these cases now. In order to do so, this Court need only look at the unrebutted expert testimony submitted by Donna, including, specifically as to the issues of alter-ego and piercing the corporate veil. (R. 2342-47, 2867-72.) Next, this Court need only look to the over $12,000,000 judgment that John, Connie and Beck caused AIA Services to be inflicted with when they unlawfully guaranteed a loan for CropUSA, in violation of AIA Services amended articles of incorporation, and led the transfer of AIA's headquarters. (*Id.*; R. 726-29, 2867-82,

[23] **I.C. § 30-1-622 cmt.** (repealed) ("Shareholders may also possibly become liable for corporate obligations by their voluntary actions or by other conduct under the old common law doctrine of 'piercing the corporate veil'").

3136-38,[24] 3585-3612, 3635 n.3 and 3637 n.12.[25]) In fact, even the former attorneys for AIA Services and the Individual Defendants concede that much:

> If the California Court ultimately determines that AIA guaranteed the CropUSA loan and the lender pursues the remedies that are available to it under the guaranty, then AIA will have incurred a prohibited indebtedness under subsection 4.2.9(c) [of the amended articles of incorporation].

(R. 2361 (referring to R. 726-28).) While another AIA Services shareholder is challenging the GemCap loans and Settlement Agreement (which the undersigned believe are illegal or ultra vires), the present status of the affairs at AIA Services is that AIA Services has an over $12,000,000 judgment against it. (R. 3141-42.)

However, if the GemCap debacle is not enough to convince this Court, then this Court need only look to the over $1,800,000 that AIA Services, through the Individual Defendants, unlawfully lent to PERC, a non-credit worthy entity partially owned by John and Connie. (R. 726-29, 3089-3133, 3567, 3614-26 (A. 135-47).) Those loans also violated AIA Services' amended articles of incorporation, which barred loans or guarantees for any entity other than a wholly owned subsidiary. (R. 2867-82.) Indeed, it is only fair that if the Individual Defendants have disregarded AIA Services' corporate structure and limitations, then it is appropriate and warranted for them to pay. This would also benefit the other minority shareholders, too.

[24] Although not contained in the record on appeal, John, Connie and Beck also signed another board resolution purportedly increasing the guarantee to an unlimited amount. This fact, however, is irrelevant to this appeal since Donna need only prove less than $1,000,000 in tort damages and illegal conduct to recover the sums owed on her Series A Preferred Shares, plus all accrued interest and attorneys' fees.

[25] This disclosure was first made to AIA's shareholders after certain of them had already caught wind of the illegal guarantees and settlement agreement and made derivative demands to take action. Those demands, like all of the others, were ignored. (*E.g.*, 2017 WL 1458191.) Those transactions were concealed from the shareholders.

The bottom line is that the Individual Defendants have exerted their control over AIA Services in such a manner that the unity of interest and ownership is such that the separate personalities of AIA Services and the Individual Defendants no longer exist. It would be wholly unjust to leave Donna holding the bag for their extensive malfeasance. This Court should reverse the district court and order that judgments be entered against the Individual Defendants pursuant to the alter-ego and/or piercing the corporate veil. Then, the Individual Defendants can fight it out amongst themselves regarding contribution or indemnification. **I.C. § 6-803**.

D. The District Court Erred When It Dismissed Donna's Fraud Claims Based on the Economic Loss Rule, this Court Should Re-Visit and Expand the Economic Loss Rule, and the District Court Erred When It Dismissed Donna's Unjust Enrichment Claim.

1. Additional Applicable Standards of Review.

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

Taylor v. McNichols, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010).

> Under notice pleading, 'a party is no longer slavishly bound to stating particular theories in its pleadings.' A complaint must merely state claims upon which relief may be granted, and pleadings should be liberally construed in the interest of securing 'a just, speedy and inexpensive resolution of the case.' The technical rules of pleading have long been abandoned in Idaho, and the 'general policy behind the current rules of civil procedure is to provide every litigant with his or her day in court.' … 'The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it.'

Brown v. City of Pocatello, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010) (citations omitted).

2. The District Court Erred When It Dismissed Donna's Fraud Claims Based on the "Economic Loss Rule" and this Court Should Expand and Rename that Rule.

a. The District Court Erred Because the "Economic Loss Rule" Only Applies to Negligence Claims Under Idaho Law and, Even if the Rule Applied to Donna's Intentional Tort Claims, this Court Should Create a New Special Exception.

The district court erred when Donna's fraud claims were barred by the "Economic Loss Rule" because that Rule applies to negligence claims under Idaho law, and this Court should create a new special relationship or exception under that Rule. (R. 2418-21 (A. 68-71), 2606 (A. 86).)

Under Idaho law, "[t]he economic loss rule applies to **negligence** cases in general." ***Ramerth v. Hart***, 133 Idaho 194, 197, 983 P.2d 848, 851 (1999) (emphasis added); *accord* ***Stapleton v. Jack Cushman Drilling and Pump Co. Inc.***, 153 Idaho 735, 742-43, 291 P.3d 418 (2011) (negligence claims barred by the Economic Loss Rule); ***Aardema v. U.S. Dairy Systems, Inc.***, 147 Idaho 785, 790, 215 P.3d 505, 510 (2009) (same); ***Duffin v. Idaho Crop Imp. Ass'n***, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995) (same); ***Tusch Enterprises v. Coffin***, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987) (same); ***Just's, Inc. v. Arrington Constr. Co., Inc.***, 99 Idaho 462, 467-71, 583 P.2d 997, 1002-06 (1978) (same).

> There are two exceptions to the general rule which prevents a party from recovering purely economic loss in a tort claim; those two exceptions are, (1) where a special relationship exists between the parties, or (2) where unique circumstances require a reallocation of the risk. A special relationship exists "where the relationship between the parties is such that it would be equitable to impose such a duty." The special relationship exception to the economic loss rule is an extremely narrow exception which applies in only limited circumstances. This Court has found a special relationship to exist in only two situations, (1) "where a professional or quasi-professional performs personal services [;]" and (2) "where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function."

Aardema, 147 Idaho at 792, 215 P.3d at 512.

Although that it appears that this Court has never addressed the "special relationship" exception or the unique circumstance exception in the context of the fiduciary duties owed by directors or controlling shareholders of a corporation, this Court has recognized that "The 'special relationship' exception generally pertains to claims for personal services provided by professionals, such as physicians, attorneys, architects, engineers, and insurance agents." ***Nelson v. Anderson Lumber Co.***, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004). This Court, however, "has never applied" the "unique circumstances exception to the economic loss rule." ***Blahd v. Richard B. Smith, Inc.***, 141 Idaho 296, 302, 108 P.3d 996, 1002 (2005).

This Court should reverse the district court's decision for the following reasons.

First, Donna's torts are intentional ones, including fraud. (3367-77, 11-25.) Thus, under the authorities cited above, intentional tort claims are not barred by the Economic Loss Rule because they are not negligence actions. It appears that this Court has never squarely addressed this issue. The district court erred by barring Donna's fraud claims under the Economic Loss Rule.

Second, this Court should carve out a new special relationship or a unique circumstances exception for directors, officers and shareholders who owe fiduciary duties. The Individual Defendants owed fiduciary duties at various times based on being directors, officers and/or controlling shareholders of AIA Services (or in the case of John, all three). (R. 958-76, 1813-30, 1843, 2240-43, 2342-47, 2867-72, 2925-38, 2941-45.)

"In Idaho, a director has a fiduciary responsibility to both the corporation and to shareholders." ***Weatherby v. Weatherby Lumber Co.***, 94 Idaho 504, 506, 492 P.2d 43, 45 (1972); ***McCann v. McCann***, 152 Idaho 809, 814-15, 275 P.3d 824, 829-31 (2011); ***Steelman v. Mallory***,

110 Idaho 510, 513, 716 P.2d 1282, 1285 (1986). Likewise, corporate officers owe duties to shareholders. *E.g.*, ***Jenkins v. Jenkins***, 138 Idaho 424, 427, 64 P.3d 953, 956 (2003).

"Where majority or controlling shareholders in a close corporation breach their heightened fiduciary duty to minority shareholders by utilizing their majority control of the corporation to their own advantage…such breach…is actionable." ***McCann***, 152 Idaho at 815 n.5; **19 AM. JUR. 2D CORPORATIONS § 1956** (2016) (discussing "the fiduciary obligation of dominant or controlling stockholders or directors"); **12B FLETCHER CYC. CORP. § 5810** (2016) ("When majority shareholders exercise their right to control the corporation, they occupy fiduciary relationship toward minority shareholders…Their transactions…must not amount to a wanton destruction of the rights of the minority"); **12B FLETCHER CYC. CORP. § 5811** (2016) ("majority shareholders can violate their fiduciary duty to the minority shareholders by causing selective corporate purchase of its shares").

Accordingly, this Court should create a new special relationship exception or carve out a unique circumstances exception based on the fiduciary duties owed by officers, directors and controlling shareholders of a corporation. On this basis, this Court should also reverse.

Third, the district court separately erred when, on reconsideration, it found "the fraud claims in the instant matter duplicative of Donna's breach of fiduciary duties claims." (R. 2606 (A. 86).) The district court correctly reconsidered, and held that Donna's breach of fiduciary duties and aiding and abetting breach of fiduciary duty claims are not barred by the Economic Loss Rule. (R. 2606-07 (A. 86-87).) The district court questioned Donna's fraud and constructive fraud claims on the basis that they "are merely a regurgitation of her claims for breach of fiduciary duties." (R.

2606 (A. 86). The district court's decision ignores the fact that constructive fraud arises from a fiduciary or special relationship.

> In its generic sense constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another. ***Constructive fraud usually arises from a breach of duty where a relation of trust and confidence exist***s; such relationship may be said to exist whenever trust or confidence is reposed by one person in the integrity and fidelity of another.

McGhee v. McGhee, 82 Idaho 367, 353 P.2d 760 (1960) (citation omitted) (emphasis added).

In sum, there was no legal basis for the district court to bar Donna's fraud or constructive fraud claims, and those claims should not have been barred for the same reasons the district court changed its mind on the fiduciary duty claims. (R. 2606-07 (A. 86-87).)

b. This Court Should Clarify and Expand the "Economic Loss Rule" and Rename It the "Independent Duty Doctrine".

Moreover, this Court should expand and clarify that Rule to specifically exclude torts that arise independently from any contractual obligations and instances when parties make misrepresentations to other party to induce them to enter into a contract.

> [T]he economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract…The test is not simply whether an injury is an economic loss arising from a breach of contract, but rather whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract.

Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 241 P.3d 1256 (Wa. 2010). *See also* ***Robinson Helicopter Co. v. Dana Corp.***, 34 Cal. 4th 979, 991, 102 P.3d 268, 274 (Cal. 2004) (holding that the economic loss rule did not bar a plaintiff's fraud and misrepresentation claim "because they were independent of [the defendant's] breach of contract."). The Washington

Supreme Court further "concluded that the term 'economic loss rule' was a misnomer and renamed the rule the 'independent duty doctrine' to more accurately describe how this court determines whether one contracting party can seek tort remedies against another party to the contract." ***Donatelli v. D.R. Strong Consulting Engineers, Inc.***, 179 Wn.2d 84, 312 P.3d 620 (2013); *accord* ***Jackowski v. Borchelt***, Wn.2d 720, 730, 278 P.3d 1100, 1105 (Wa. 2010).

Here, this Court should abandon the Economic Loss Rule consistent with the authorities cited above, rename it the Independent Duty Doctrine and expand that Doctrine to include misrepresentations made to induce a party to enter into a contract.

c. Because Donna Is the Sole Series A Preferred Shareholder, She Is Not Required to Bring a Derivative Action to Assert Fraud Claims or Other Tort Claims.

The district court also erroneously held that "Donna also appears to argue that the Individual Defendants fraudulently diverted AIA assets to themselves or to entities from which only they benefited. This theory requires Donna to bring a derivative action, not a personal action." (R. 2606 n.5.) This ruling was error because Donna is the sole Series A Preferred Shareholder and she is entitled to bring a direct, rather than derivative, action asserting fraud and other torts.

It is well-settled in Idaho and other states that a shareholder may pursue a direct action for his or her sole benefit, rather than a derivative action for the benefit of the corporation.[26] ***McCann v. McCann***, 152 Idaho 809, 275 P.3d 824 (2011) ("[I]n a closely held corporation a minority shareholder may bring a direct action, rather than a derivative action, if the shareholder alleges harm to himself distinct from that suffered by other shareholders of the corporation or breach of a

[26] It does not appear that this Court has ever addressed a preferred shareholder's right to bring a direct, rather than derivative action. This Court can clarify this point of law, too.

special duty owed by the defendant to the shareholder."); ***Steelman v. Mallory***, 110 Idaho 510, 513, 716 P.2d 1282, 1285 (1986) ("[W]e cannot agree with appellants' contention that this case should have been dismissed because it is a 'direct action' rather than a shareholder's derivative suit."); ***Wolfe v. American Savings and Loan Assoc. of Florida***, 539 So.2d 606 (Fl. 1989) (preferred shareholder may assert direct claims); ***Security National Bank v. Peters, Writer and Christensen, Inc.***, 569 P.2d 875 (Col. 1977) (preferred shareholder may maintain a direct action).

Here, Donna is the sole Series A Preferred Shareholder, and she also has special rights and privileges under AIA Services' amended articles of incorporation that apply to her alone. (R. 724-32, 2144-2213.) She is asserting direct fraud and other tort claims (including breach of fiduciary duties) against the Individual Defendants. (R. 11-25, 3367-77.) And, unless Donna is permitted to amend to include a prayer for punitive damages, she will be limited to recovering the $416,512.00 in principal owed on her Series A Preferred Shares, plus all accrued interest (and attorneys' fees and costs), since it appears that AIA Services has no way of paying those sums. Indeed, this would also benefit the other minority shareholders because the Individual Defendants should have to pay, which would ultimately leave more assets and funds to distribute to them once other lawsuits have concluded. (*E.g.*, R. 2342-47, 2867-72.)

3. The District Court Erred When It Dismissed Donna's Unjust Enrichment Claim for Failure to State a Claim Upon Which Relief May Be Granted When Even the Individual Defendants Concede that She Adequately Pleaded the Claim.

The district court erred when it ruled that Donna failed to state a claim for unjust enrichment in her Second Lawsuit. (R. 2421-23 (A. 71-73), .) Donna's allegations exceeded the minimal pleading requirements under Idaho law.

> A prima facie case of unjust enrichment consists of three elements: (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.

Brewer v. Washington RSA No. 8 Ltd. Partnership, 145 Idaho 735, 739, 184 P.3d 860, 864 (2008).

> Both quantum meruit (implied-in-fact contracts) and unjust enrichment (implied-in-law contracts) are 'measures of equitable recovery.' 'The application of equitable remedies is a question of fact because it requires a balancing of the parties' equities.'

Clayson v. Zebe, 153 Idaho 228, 232, 280 P.3d 731, 735 (2012) (citations omitted).

Here, Donna sufficiently stated a claim for unjust enrichment in her Second Lawsuit:

> 52. Donna Taylor re-alleges and incorporates each and every allegation contained in other paragraphs of this Complaint necessary to support this cause of action.
>
> 53. Beck, Cashman, John Taylor and Connie Taylor have been conferred the benefit by Donna Taylor of obtaining operational and financial control over AIA Services. Through that conferred benefit, Beck, Cashman, John Taylor and Connie Taylor have looted AIA Services to their benefit and to the detriment of Donna Taylor. It would be unjust to allow Beck, Cashman, John Taylor and Connie Taylor to retain the benefits without justly compensating Donna Taylor. As a result, Beck, Cashman, John Taylor and Connie Taylor liable to Donna Taylor under the theory of unjust enrichment.
>
> 54. As a direct and/or proximate result of the acts and/or omissions of Beck, Cashman, John Taylor and Connie Taylor, they have been unjustly enriched and Donna Taylor has been damaged, and, is therefore entitled to judgment and/or relief on this claim in an amount to be proven at or before trial.

(R. 22-23.) As noted above, Donna also incorporated all other allegations in the complaint to support her unjust enrichment claim. (R. 11-22.) Applying notice pleading standards, accepting

the allegations in the complaint as being true, and construing those allegations in Donna's favor as required, she more than adequately states a claim for unjust enrichment. The district court erred in concluding otherwise. (R. 2421-23 (A. 71-73), 2607 (A. 87), 3802-04 (A. 101-03).) ***Brown***, 148 Idaho at 807, 229 P.3d at 1169. In fact, in the district court's first order, it erroneously focused solely on the allegations in Donna's complaint in the First Lawsuit.[27] (R. 2421-23 (A. 71-73).)

To the extent that this Court will consider matters outside of the record, Donna presented more than sufficient evidence to survive summary judgment on her unjust enrichment claim.

There is simply no dispute that Donna conferred a benefit upon the Individual Defendants when she consented, at their request, to allow Reed's shares to be redeemed—that spelled the begging of the long road to the end for AIA Services to the detriment of Donna.

John's Executive Officer's Agreement, alone, provides more than sufficient evidence to establish this point as it confirms in the recitals that Reed's shares were being redeemed so that they could obtain operational and financial control over AIA Services. (R. 1843.) Indeed, the entire reorganization plan was contingent upon Donna's consent (one she wishes that she would have never given). (R. 602-25 (A. 1-24), 3476-3565.) Her consent led to Beck, Cashman and John entering into an Investment Agreement and Voting Agreement to ensure that they maintained control over AIA Services. (R. 1813-30, 2240-43.)

In each of the circumstances below, a portion of the funds or assets could have been used to pay Donna in full and those transactions would never have occurred had she not consented to

[27] Donna is not appealing the dismissal of her unjust enrichment claim asserted in her First Lawsuit as limited solely to John's guarantee.

Reed's redemption and Reed not sold. Once the Individual Defendants obtained control, they determined where all of the money went and used the funds for their own unlawful purposes.

First, the Individual Defendants used AIA Services' funds, assets and creditworthiness to fund other businesses and pay themselves millions of dollars. (R. 2342-47, 2867-72, 3009-40.)

Second, the Individual Defendants had AIA Services lend over $2,000,000 to PERC, when it was unable to pay its bills and had tax liens asserted against it. (R. 3089-3133, 3614-3626 (A. 135-47).)

Third, the Individual Defendants used their control to guarantee loans for CropUSA with GemCap, enter into one-sided Settlement Agreements obligating AIA to pay over $12,000,000, and to transfer AIA's prized asset—its headquarters in Lewiston Idaho—to GemCap as partial payment. (R. 1656-1728, 3136-38 (A. 132-34). 3585-3612 (A. 104-31), 3642-44.)

Fourth, the Individual Defendants unlawfully redeemed over $600,000 of lower-priority common shares, which increased their ownership interest and control over AIA Services, while at the same time deprived Donna of being paid. (R. 3237-61.)

Fifth, John Taylor (and Connie Taylor Henderson through her marriage to him) obtained over $2,729,000 in direct *known* compensation (Donna will never know where all of the money went) from AIA Services after obtaining operational and financial control over AIA Services (as confirmed in John Taylor's Executive Officer's Agreement, which was executed after the redemption of Reed's shares). (R. 1843-51, 3009-40, 3569-70.)

The above are just a sampling of the malfeasance and illegal conduct that has occurred at the hands of the Individual Defendants after Donna conferred the benefit upon them to take

operational control over AIA Services. They obtained an appreciation of those benefits by and through director or indirectly obtaining millions of dollars, and it would be unjust to leave Donna without a remedy under these circumstances. Thus, the district court erroneously dismissed Donna's unjust enrichment claim. This Court should reverse the district court's dismissal of Donna's unjust enrichment claim. That claim is one for the jury.

E. The Rule 54(b) Judgment Should Be Vacated.

If this Court reverses, this Court should similarly order that the Rule 54(b) Judgment be vacated consistent with this Court's opinion. (R. 3438-40.) ***Lepper v. Eastern Idaho Health Services, Inc.***, 160 Idaho 104, 116, 369 P.3d 882, 894 (2016).

F. This Court Should Order a District Court Judge Be Assigned on Remand.

While Donna appreciates the long and complex history of these cases (almost ten years, R 1-3863), any confusion which may have impacted the district court's decisions, and with all due respect to Judge Brudie, Donna most respectfully believes this Court's assignment of a new judge would bring a fresh perspective to these cases and eliminate any possible concern of potential bias.

> Nevertheless, because this case has such a long and complex history, with close to ten years of litigation, this Court believes that a new judge would provide a much needed fresh perspective and would eliminate any concern of bias. Therefore, this Court Orders that the case on remand be assigned to a new district judge.

Capstar Radio Operating Co. v. Lawrence, 153 Idaho 411, 283 P.3d 728 (2012).

G. Donna Should Be Awarded Costs and Fees on Appeal or, Alternatively, the Award of Fees Should Be Reserved for When a Prevailing Party Is Named on Remand.

1. This Court Should Award Costs to Donna on Appeal.

This Court should award Donna costs. **I.A.R. 40(a)**; ***Herbst v. Bothof Dairies, Inc.***, 110 Idaho 971, 975, 719 P.2d 1231, 1235 (1986) (substantially prevailing party entitled to costs).

2. This Court Should Award Fees to Donna on Appeal Pursuant to I.C. § 12-121 Based on Their Anticipated Frivolous Defense.

If Donna prevails on this appeal, this Court should award attorneys' fees to her on appeal. **I.A.R. 41(a)**. Based on the conduct of the Individual Defendants and their anticipated frivolous, unreasonable and lack of foundation defense of this appeal (including the lack of applicable authority), this Court should order the Individual Defendants to pay Donna's attorneys' fees.

"In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." **I.C. § 12-121**. "An award of attorney fees under that statute will be awarded to the prevailing party on appeal only when this Court is left with the abiding belief that the entire appeal was…defended frivolously, unreasonably, or without foundation." ***American Semiconductor., Inc. v. Sage Silicon Solutions, LLC***, 162 Idaho 119, __, 395 P.3d 338, 346 (2017). The failure to cite applicable authority constitutes sufficient grounds to award fees. ***McLean v. Cheyovich Family Trust***, 153 Idaho 425, 432, 283 P.3d 742, 749 (2012).

Here, for the reasons articulated in the Statement of the Facts (and the evidence cited therein) and based on the wide-spread corporate malfeasance that has resulted in the intentional refusal to pay Donna when there is no excuse to have not paid her over a decade ago, this Court should order the Individual Defendants to pay Donna's attorneys' fees on appeal for their illegal and frivolous conduct. (*E.g.*, R. 2342-47, 2867-72.)

3. Alternatively, this Court Should Reserve an Award of Fees for Remand.

Since the redemption of Donna's shares is a commercial transaction between she and AIA Services, this Court should reserve an award of fees incurred by her on appeal to be determined by

the district court after a prevailing party is named on remand. (R. 602-04, 608-12, 649-738.) **I.C. § 12-120(3)**; ***Terra-West, Inc. v. Idaho Mut. Trust, LLC***, 150 Idaho 393, 247 P.3d 620 (2010).

VI. CONCLUSION

This Court should reverse and remand consistent with the arguments asserted above, and award Donna costs and attorneys' fees, or reserve the award of fees for remand.

RESPECTFULLY SUBMITTED this 8th day of August, 2017.

RODERICK BOND LAW OFFICE, PLLC

By: _____
Roderick C. Bond
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of August, 2017, I caused to be served two true and correct copies of the foregoing to the following parties:

	Via:
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_____
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