12-26-2017

Taylor v. Taylor Appellant's Reply Brief Dckt. 44833

IN THE SUPREME COURT OF THE STATE OF IDAHO

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 REPLY/CROSS-RESPONDENT'S BRIEF

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I. INTRODUCTION

In the Appellant's Brief, Donna articulated a thoughtful analysis of the facts and legal issues presented on appeal. (Appellant's Br. at 1-56.) AIA Services and the Individual Defendants,[1] through their newest attorney Mr. Martelle (who is now at least the eleventh different law firm to have represented one or more of the respondents or their entities in various litigation), respond by asserting numerous convoluted, unsupported and inconsistent arguments.

However, the overarching issue on this appeal is quite simple. Unlike Reed (whose shares were canceled in 1995), Donna's Series A Preferred Shares were only redeemed as payments were made to her. From 1996 through the time that AIA Services stopped paying Donna in May 2008, it was paying her in accordance with the higher interest rate in the 1996 Series A Preferred Shareholder Agreement. (A. 18 § 1(a).[2]) Because the parties agree that the 1996 Series A Preferred Shareholder Agreement is illegal because it is tainted with the illegality from Reed's redemption, then this Court must either sever the illegal portions of that Agreement as to Reed and enforce it as to Donna and AIA Services or leave Donna and AIA Services where it finds them, which is Donna holding the same 41,651.25 Series A Preferred Shares that she held when AIA Services stopped paying her in May 2008. However, under any scenario, Donna still holds 41,651.25 shares.

This Court will need to determine is what contractual provisions govern the redemption of her remaining shares—whether it is the severed portions of the Series A Preferred Shareholder Agreement, the January 11, 1995 Letter Agreement or AIA Services' amended articles of

[1] Donna will use the same descriptions for the parties and agreements as defined in her opening Brief. (Appellant's Br. at 1, 6, 8-9.)

[2] Donna's citations to "A." is to the Appendix attached to her Appellant's Brief.

incorporation. However, under any of these instruments, the very latest Donna was required to be paid was in 2008—nearly a decade ago. Thus, there is no dispute that AIA Services is in breach.

However, instead of simply paying Donna the $416,512.50 in principal, plus accrued interest, owed for her Series A Preferred Shares, AIA Services, through the Individual Defendants, have engaged in a vindictive and scorched earth policy of paying more money in attorneys' fees than it would have taken to simply pay her over a decade ago. Meanwhile, AIA Services has been decimated by the Individual Defendants' malfeasance—including through the entry of an illegal Settlement Agreement with GemCap for a $10,000,000 loan illegally guaranteed by AIA Services. (A. 104-134.) To add insult on injury, again instead of just paying Donna, the Individual Defendants also had AIA Services loan over $1,800,000 to Pacific Empire Radio when the latter was unable to even pay its debts. (A. 135-147.) With over $15,000,000 being borrowed by the Individual Defendants for other entities that they control in recent years, this begs the question of where did all of the money go? This answer to that question will likely never be known. But a small portion of that over $15,000,000 could have easily paid Donna—but they chose not to.

After now waiting for over fifteen years since her obligations matured, it is time for her to be paid. After all, it is money that she earned by helping to build the companies. The fact that AIA Services has now been decimated by the Individual Defendants is not Donna's fault. However, she needs to be paid and needs a remedy to facilitate that payment. Thus, this Court should reverse the district court, remand and provide Donna with the well-deserved closure that she rightfully deserves after all these years.

II. RESPONSE TO "STATEMENT OF THE FACTS"

Pursuant to I.A.R. 35(b)(3), Donna objects to AIA Services and the Individual Defendants so-called facts that are not supported by the cited portions of the record and/or by any citations to the record—many of them are simply unsupported or pure conjecture. (Resp'ts' Br. at 2-6.) Donna's recitation of the facts and citations to the record are accurate and actually supported by citations to the record and authorities. (Appellant's Br. at 3-11.)

For example, contrary to AIA Services and the Individual Defendants' assertions, the Series A Preferred Shares in AIA Services were not issued to Donna in order to "divert[] funds from AIA[3] to pay Reed's alimony." (Resp'ts' Br. at 2.) AIA Services acquired Donna and Reed's interests in AIA Insurance and other business interests in exchange for issuing them 200,000 Series A Preferred Shares (which were transferred to Donna) and the issuance of additional common shares to them. (R. 533-35, 560-65.) In other words, Donna, through the issuance of her Series A Preferred Shares, lent AIA Services $2,000,000 so that it could acquire AIA Insurance, which was the "cash cow" of the AIA companies and ultimately generated over $70 million in revenues from 1995 through 2013. (R. 3569-70.) The Series A Preferred Shares were not "alimony."

Contrary to AIA Services and the Individual Defendants' assertions (Resp'ts' Br. at 3), the write-off in 1994 and 1995 pertained to the discontinuance of AIA Services' underwriting division and the purchase of Reed's shares, which was engineered by John, Beck and Cashman. (R. 1813-30, 1843, 2240-43, 3504-52.) AIA Services subsequently wrote up those assets by over $8,000,000

[3] AIA Services and the Individual Defendants define "AIA Services" as "AIA", yet they incorrectly also use "AIA" to describe AIA Insurance (AIA Services' wholly owned subsidiary).

in 1998. (R. 2030.) Their citation to page 3545 of the record does not support their "facts" regarding the allegations of Reed's alleged mismanagement, which never occurred. (R. 3545.) The mismanagement of AIA Services occurred after Reed left, as indisputably established by the unrebutted opinions of Donna's expert witnesses. (R. 2342-47, 2867-72.) The alleged "terrible mismanagement of AIA" by Reed is also unsupported by the citations provided and quite irrelevant to Donna. (Resp'ts' Br. at 4 (citing R. 2030; 3509-53).)

As to their argument that CropUSA was formed by AIA "to move a different direction" to keep AIA Services "afloat" (Resp'ts' Br. at 5), the facts and unrebutted expert testimony submitted by Donna establish otherwise. (R. 2342-47, 2867-72.) As to the 2006 Subordination Agreement entered into between Reed and Donna, that Agreement would not have been even necessary had AIA Services paid either of them as required. (Resp'ts' Br. at 5-6.) There is simply no evidence that supports the notion that Reed and Donna "hid" the 2006 Subordination Agreement and that would not have benefitted them because AIA Services would need to know. To reiterate, Donna's facts and procedural history are significantly more accurate. (Appellant's Br. at 3-14.)

III. RESTATEMENT OF ISSUES ON CROSS-APPEAL

Pursuant to I.A.R. 35(b)(4), Donna restates the issues on cross-appeal as follows:

1. Whether the district court correctly ruled that Donna's claims against the Individual Defendants for breach of fiduciary duty were not barred by the Economic Loss Rule because those claims were independent and based on common law and statutory duties?

2. Whether the district court correctly dismissed AIA Services' counterclaim for breach of contract when all parties agree that the 1996 Series A Preferred Shareholder Agreement was illegal and unenforceable as to Donna, AIA Services and Reed?

3. Whether Donna is entitled to an award of attorneys' fees for the cross-appeal?

IV. ARGUMENT

AIA Services and the Individual Defendants' arguments are convoluted, inaccurate, inconsistent, unsupported, and incoherent. Rather than respond to Donna's arguments point by point in a rational and logical order, they appear to have intentionally responded in a confusing and convoluted manner. Nevertheless, Donna will attempt to respond to their arguments in substantially the same order as addressed in the Appellant's Brief, followed by responding to their cross-appeals and then by addressing the parties' respective requests for attorneys' fees and costs.

A. Under Any Possible Scenario, Donna Still Holds 41,651.25 Series A Preferred Shares and the 1996 Series A Preferred Shareholder Agreement Should Be Enforced or, Alternatively, the 1995 Letter Agreements Should Be Enforced.

1. The District Court Erred Because Donna Should Still Hold 41,651.25 Shares.

Donna maintains that the district court erred by not following the illegality doctrine and either enforcing the 1996 Series A Preferred Shareholder Agreement only as to Donna and AIA Services (not as to Reed) or leaving the parties where it found them, i.e., Donna holding the same 41,651.25 Series A Preferred Shares that she held when AIA Services stopped paying her in May 2008 and then determining whether the 1995 Letter Agreements (or the January 11, 1995 one) or AIA Services' amended articles of incorporation governs the repurchase of those remaining 41,651.25 shares. (Appellant's Br. at 17-19 (citing ***Taylor v. AIA Services Corp.***, 151 Idaho 552, 564-67, 261 P.3d 829, 841-44 (2011)).) AIA Services and the Individual Defendants never squarely address Donna's arguments regarding the district court's misapplication of the illegality doctrine. (Resp'ts' Br. at 11-29.) The district court got it right the first time when it ruled 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"—or 41,651.25 shares. (R. 2427 (A. 77), 2207, 2352.) The issue on appeal is really whether Donna's rights regarding the redemption of her remaining 41,651.25 shares is governed by the 1996 Series A Preferred Shareholder Agreement, one or more of the 1995 Letter Agreements or AIA Services' amended articles of incorporation.

From 1996 through May 2008, AIA Services made numerous full or partial monthly payments to Donna by paying the accrued interest and redeeming a certain number of Series A Preferred Shares with the remaining portion of each payment under the higher interest rate (prime plus ¼%) set forth in the illegal 1996 Series A Preferred Shareholder Agreement.[4] (R. 619 § 1(a) (A. 18 § 1(a)).) Unlike Reed (his 613,493.5 common shares were canceled in their entirety in 1995 (R. 2238 n.a) and he was issued two promissory notes (R. 618)), Donna was not issued a promissory note and only a limited number of her Series A Preferred Shares were canceled after each payment of principal and interest was made to her by AIA Services (as reflected on AIA Services' *actual* records through the last payment in May 2008). (R. 633, 745, 791, 808-09, 817, 2056-2143, 2148, 2150-51, 2155, 2157-58, 2162, 2165-66, 2169, 2171-72, 2176, 2179-80, 2182, 2187, 2192, 2199, 2216-20, 2293, 2299-2305, 2352.) This is why under any scenario—whether the Series A Preferred Shareholder Agreement and the 1995 Letter Agreements are illegal, ultra vires, enforceable and/or unenforceable—Donna still holds the same 41,651.25 Series A Preferred Shares that she held after AIA Services' last payment in May 2008, as reflected on AIA Services'

[4] However, AIA Services never paid Donna an additional $100,000 every six months as required under the 1996 Series A Preferred Shareholder Agreement. (R. 619 § 1(b) (A. 18 § 1(b)).) Reed's $1.5 million down payment note was paid in full in 2001, but AIA Services and the Individual Defendants never paid her any of the required $100,000 payments. (R. 806, 2056-2213, 2351-52 ¶¶ 5-6.)

actual records.[5] (*Id*.) If this Court holds that the 1996 Series A Preferred Shareholder Agreement should be enforced as to Donna and AIA Services (i.e., Reed's terms are severed), then Donna still holds 41,651.25 shares. (*Id.*) If this Court refuses to enforce that Agreement and leaves Donna and AIA Services where it finds them, then Donna still holds 41,651.25 shares (irrespective of whether the 1995 Letter Agreements or AIA Services' amended articles of incorporation are the operative contract for the redemption of her remaining 41,651.25 shares). (*Id.*) If this Court holds that the illegal 1996 Series A Preferred Shareholder Agreement could not supersede or replace the legal January 11, 1995 Letter Agreement, then Donna still holds 41,651.25 shares. (*Id.*) If this Court holds that AIA Services' amended articles of incorporation control and the 1995 Letter Agreements and the 1996 Series A Preferred Shareholder Agreement are all illegal and unenforceable, then Donna still holds 41,651.25 shares. (*Id.*) Thus, all roads lead to the same conclusion—Donna holds 41,651.25 Series A Preferred Shares—and the district court erred when it changed its mind almost a year later—it was right the first time. (R. 2427 (A. 77).)

a. This Court Should Conduct a Complete Analysis Under the Illegality Doctrine for the First Time on Appeal to Determine the Legality and Enforceability of the 1995 Letter Agreements and the 1996 Series A Preferred Shareholder Agreement.

Donna maintains that the district court erred when it "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)" and that this Court

[5] Donna's expert found one payment that AIA Services had failed to account for, and according to his calculations, the actual number of Series A Preferred Shares should be 41,509.69 shares. (R. 2293.) The parties, however, do not dispute that, if the district court did err, then Donna holds 41,651.25 shares, as reflected in AIA Services' records. (Appellant's Br. at 17-41; Resp'ts' Br. at 11-32.)

should address those issues now for the first time on appeal. (Appellant's Br. at 19-20.) AIA Services and the Individual Defendants concede that the district court "has a duty to raise the issue of illegality of a contract *sua sponte*" and concede that "'Courts *on occasion*, however, apply an exception to the illegality doctrine.'" (Resp'ts' Br. at 12-13.) However, they *incorrectly* argue that the district court "must leave the parties where the law finds them" and that it "was not required to determine whether the [1996 Series A Preferred Shareholder Agreement] was enforceable under any of the…exceptions" to the illegality doctrine. (Resp'ts' Br. at 13.) They are incorrect. Under Idaho law, courts are not required to leave parties to an illegal contract where it finds them, and courts are required to determine whether the general rule applies or whether the illegal contract will be enforced by any exceptions to the general rule. ***AIA Services Corp.***, 151 Idaho at 564-67, 261 P.3d at 841-44; ***Farrell v. Whiteman***, 146 Idaho 604, 609-13, 200 P.3d 1153, 1158-62 (2009).

AIA Services and the Individual Defendants also argue that Donna improperly raised the *in pari delicto* and public policy exceptions to the illegality doctrine for the first time on appeal. (Resp'ts' Br. at 13.) Their arguments are, once again, wrong. Donna raised each of those arguments before the district court. (*E.g.*, R. 2270, 2325-26; 5/23/14 Tr., p. 19, 23-24.)

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.

Donna maintains that, in the worst case scenario for her, the district court erred by not correctly applying the illegality doctrine by leaving Donna and AIA Services where it found them after correctly ruling that the 1996 Series A Preferred Shareholder Agreement between them and Reed was illegal—which was Donna holding the same 41,651.25 Series A Preferred Shares that

she held after AIA Services' last payment to her in May 2008 and her contractual rights reverting back to AIA Services' amended articles of incorporation. (Appellant's Br. at 20-21.) Donna further maintains that the district court violated the illegality doctrine by lending its aid to AIA Services by employing an "equitable" remedy thereby allowing AIA Services to go back in time almost twenty years and recalculate the number of shares redeemed by utilizing an interest rate lower than the prime plus ¼% rate in the January 11, 1995 Letter Agreement and 1996 Series A Preferred Shareholder Agreement and that remedy was also improperly based on pure speculation because that is not how AIA Services paid Donna. (*Id*. (quoting ***Clark v. Utah Const. Co.***, 51 Idaho 587, 8 P.2d 454, 458 (1932) ("no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore this is no place for equitable considerations.")).) AIA Services and the Individual Defendants never respond to Donna's arguments or authority that the district court erred by applying an "equitable" remedy for the illegal 1996 Series A Preferred Shareholder Agreement if it was leaving the parties where it found them and, thus, concede them. (Resp'ts' Br. at 11-29.)

AIA Services and the Individual Defendants do argue, however, that the district court's recalculation of the payments to Donna and the retroactive modification of the number of shares redeemed since 1995 was supported by non-speculative testimony and calculations submitted by Kenneth Goods. (Resp'ts' Br. at 19-20.) Their arguments miss the point and the mark. Unlike a loan with a bank, when AIA Services made payments to Donna over the years at the higher interest rate since 1995, only a certain number of her Series A Preferred Shares were redeemed with each payment after the accrued interest was paid and her remaining outstanding shares were reflected on the books and records of AIA Services. (R. 633, 745, 791, 808-09, 817, 2056-2143, 2148, 2150-

51, 2155, 2157-58, 2162, 2165-66, 2169, 2171-72, 2176, 2179-80, 2182, 2187, 2192, 2199, 2216-20, 2293, 2299-2305, 2352.) As Donna maintained, it was pure speculation for AIA Services to submit a revised calculation of the number of shares redeemed with each payment based on a lower interest rate when that was not what actually happened. (*Id*.) AIA Services simply speculated as to how it wished that it might have paid Donna, but that is simply speculation (not to mention a violation of the illegality doctrine). ***Antim v. Fred Meyer Stores, Inc.***, 150 Idaho 774, 780 n.1, 251 P.3d 602, 608 n.1 (2011) ("Th[is] speculation provides no facts relevant to summary judgment."); ***Clark***, 8 P.2d at 458. This Court should reject their speculative and improper arguments now.

c. The District Court Erred by Not Severing the Portions Relating to Reed and Enforcing the 1996 Series A Preferred Shareholder Agreement as to Donna and AIA Services.

While the parties agreed before the district court and now agree on appeal that the three-party 1996 Series A Preferred Shareholder Agreement is illegal as to Donna, AIA Services and Reed, Donna maintains that the district court erred by not severing the portions relating to Reed and enforcing that Agreement only as to Donna and AIA Services under certain exceptions to the illegality doctrine. (Appellant's Br. at 22-25.) AIA Services and the Individual Defendants argue that none of the exceptions apply and that the district court did not err by failing to sever the illegal portions from the Agreement. (Resp'ts' Br. at 13-16.) Their arguments are unavailing.

First, AIA Services and the Individual Defendants argue that Donna was equally guilty and the Series A Preferred Shareholder Agreement should not be enforced under the *in pari delicto* exception. (Resp'ts' Br. at 13-14.) Their arguments are nonsensical and they, once again, concede many of Donna's arguments by failing to address them. (*See* Appellant's Br. at 23-24.)

AIA Services and the Individual Defendants cite and rely upon this Court's distinguishable decision regarding Reed's illegality. *See* ***AIA Services Corp.***, 151 Idaho at 564-67, 261 P.3d at 841-44. (Resp'ts' Br. at 13-14.) The facts could not be more different here. (*Id*.) AIA Services and the Individual Defendants were responsible for redeeming Reed's shares and burdening AIA Services with those obligations. (*Id*.) Unlike Reed's redemption, Donna was not represented by counsel for entry into the 1996 Series A Preferred Shareholder Agreement. (R. 623 (A. 22).) Unlike Reed, Donna was not a majority common shareholder of AIA Services. (*Compare* R. 2237 *with* R. 2238.) Unlike Reed, Donna had no right to call a shareholder meeting and she did not control any of the vote of AIA Services' common shares (including for approval of capital surplus). (R. 689 § 4.2.8 (A. 49 § 4.2.8), 726 § 4.2.8.) Unlike Reed, Donna was not an officer or director of AIA Services (but John, Beck and Cashman were). (R. 974-75.) Unlike Reed, Donna's board designee, Cumer Green, did not vote for the higher interest rate paid to her. (R. 3499-3500.) Unlike Reed, Donna was not an employee with access to AIA Services' records. (*Id*.) Unlike Reed, Donna's Series A Preferred Shares have payment priority over all other preferred and common shares and, thus, she is entitled to have her interests placed above other preferred and common shareholders. (R. 689 § 4.2.7 (A. 49 § 4.2.7), 726 § 4.2.7.) It is irrelevant that Donna was represented at the time of her 1995 Letter Agreements because the issue is whether she was represented by counsel for entry into the 1996 Series A Preferred Shareholder Agreement, which she was not. (Resp'ts' Br. at 13; R. 527 ¶ 8, 623 (A. 22), 2350 ¶ 4.) AIA Services and the Individual Defendants sought to benefit from redeeming Reed's shares by obtaining operational and majority voting control over AIA Services at terms acceptable to them and they required Donna's consent. (R. 1821-22, 1843,

2240-43.) Thus, under the distinguishable facts present here, the district court erred in failing to rule that Donna was not *in pari delicto*. ***AIA Services Corp.***, 151 Idaho at 565, 261 P.3d at 842.

Second, AIA Services and the Individual Defendants argue that this Court should refuse to award Donna damages based on *quantum meruit* because she "provided no services to AIA or the Individual Defendants" and "it was AIA who provided a benefit to Donna." (Resp'ts' Br. at 14-15.) They are wrong again. Through the issuance of the Series A Preferred Shares, Donna essentially lent AIA Services the money to acquire AIA Insurance—the entity that would generate over $74 million in revenues from 1995 through 2013. (R. 533-34, 560-64, 3569-70.) Lastly, the argument that Donna has received over $2 million of the funds owed to her is irrelevant. (Resp'ts' Br. at 15.) She is owed the money. Moreover, their argument is fatally undermined by the fact that John (and Connie through their marriage) received over $2,729,000[6] in direct compensation from AIA alone (R. 3570), excluding the millions of dollars that were improperly used for other purposes. (*E.g.*, A. 104-146.) Thus, Donna's situation is precisely the type that the *quantum meruit* exception was designed to provide a remedy for. (*E.g.*, R. 2342-47, 2867-72.)

Third, AIA Services and the Individual Defendants argue that this Court should reject Donna's position that they are intended beneficiaries and may not challenge the illegality or enforceability of the 1996 Series A Preferred Shareholder Agreement. (Resp'ts' Br. at 17-18.) Here, unlike Reed, Donna is a preferred *minority* shareholder of AIA Services (with no right to call a shareholder meeting or a common share vote) and it would be unjust to allow AIA Services

[6] Indeed, when considering the direct compensation that John received from both AIA and CropUSA, John was paid at least $4,560,395 by AIA and CropUSA from 1995 through 2014.

and the Individual Defendants (who were the majority or controlling shareholders) to disavow or challenge the enforceability of the 1996 Series A Preferred Shareholder Agreement as to Donna and AIA Services. (R. 653 § 4.8 (A. 29 § 4.8), 726 § 4.2.8, 2237, 2342-47, 2867-72.) ***AIA Services Corp.***, 151 Idaho at 564, 261 P.3d at 841. As Justice J. Jones explained in his concurring opinion, "[t]his 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." 151 Idaho at 575, 261 P.3d at 852. The facts pertaining to Donna could not be more different than those pertaining to Reed. (*Id*.) Indeed, as explained in Donna's opening brief (Appellant's Br. at 25-27, 29-30) and as addressed below, their arguments also fail to reconcile how AIA Services had sufficient earned surplus when Donna exercised her mandatory redemption rights in 1993 and AIA Services' amended articles of incorporation authorized the use of capital surplus when AIA Services agreed to redeem her shares at a higher interest rate and shorter amortization period—both material distinguishable facts to Reed's illegal redemption.

Fourth, AIA Services and the Individual Defendants argue that severing the terms of the 1996 Series A Preferred Shareholder Agreement that apply to Reed "would have no effect on the portions related to Donna as they are still illegal." (Resp'ts' Br. at 16.) This argument is nonsensical. Donna is requesting this Court to enforce that Agreement only as to she and AIA Services based on several exceptions to the illegality doctrine, i.e., she was not equally guilty, AIA Services and the Individual Defendants cannot challenge the Agreement, she should be entitled to recover under *quantum meruit*, etc. (Appellant's Br. at 22-25.) If this Court agrees with any one of her arguments, then it will enforce the remaining portions of the Agreement. (*Id*. at 25.) Lastly,

AIA Services and the Individual Defendants' argument that the Series A Preferred Shareholder Agreement would still be illegal even after severing Reed's illegal terms also fails because Donna's redemption was not illegal (like Reed's) for the reasons discussed below.

d. The Interest Rate Increase or Shortened Redemption Amortization Period Was Authorized by AIA Services' Amended Articles of Incorporation, Which Expressly Authorized the Use of Capital Surplus Pursuant to I.C. § 30-1-6.

Donna maintains that the district court erred when it declined to address capital surplus because AIA Services' amended articles of incorporation authorized the use of capital surplus to redeem Donna's shares at the higher interest rate in the January 11, 1995 Letter Agreement as provided under I.C. § 30-1-6. (Appellant's Br. at 25-27.) AIA Services and the Individual Defendants concede that AIA Services' amended articles of incorporation authorized capital surplus under I.C. § 30-1-6, but they argue that the capital surplus authorization's "inclusion in the 1989 Articles does not support Donna's argument for several reasons." (Resp'ts' Br. at 27-28.) Once again, their arguments fail (albeit some of them were improperly raised for the first time).

First, AIA Services and the Individual Defendants argue that only the January 11, 1995 Letter Agreement was executed at the time the 1989 amended articles authorizing capital surplus were in place and that the "July 18, 1995 Letter does not include the provision in the January 11th letter that states the change in amortization of Donna's shares will be effective 'regardless of the outcome of the private placement.'" (Resp'ts' Br. at 28.) But these arguments may not be considered because they improperly raise them for the first time on appeal. (R. 2354-70, 3774-84.) ***Trimble v. Engelking***, 134 Idaho 195, 197, 998 P.2d 502, 504 (2000) ("It is well settled law in Idaho that Idaho appellate courts will not consider an issue raised for the first time on appeal.").

But the argument also fails. It is nonsensical to argue that the July 18, 1995 failed to include the "regardless of the outcome of the private placement" language contained in the January 11, 1995 Letter Agreement because by that time the Series B private placement offering had been abandoned. (*Compare* R. 602 (A. 1) *with* R. 608-12 (A. 7-11).) ***AIA Services Corp.***, 151 Idaho at 557, 261 P.3d at 834. On June 1, 1995, AIA Services implemented a new Series C private placement offering. *Id*. Thus, there was no reason to include that language in the July 18, 1995 Letter Agreement. The parties' obvious intent of the original "regardless of the outcome of the private placement" language in the January 11, 1995 Letter Agreement was to make clear that the higher interest rate and shorter amortization period applied irrespective of the outcome of Reed's redemption. *Id*. *See* ***In re University Place/Idaho Water Center Project***, 146 Idaho 527, 534, 199 P.3d 102, 111 (2008).

Finally, since the January 11, 1995 Letter Agreement was authorized by AIA Services' amended articles of incorporation, AIA Services "cannot impair the obligation of its contracts with [Donna] by the simple expedient of amending its articles of incorporation." ***Disabled American Veterans v. Hendrixson***, 340 P.2d 416, 418 (Utah 1959). Thus, the contents of the later executed Letter Agreements or Series A Preferred Shareholder Agreement is meaningless because capital surplus had already been authorized. (R. 602 (A. 1), 681 (A. 41).)

Second, AIA Services and the Individual Defendants argue that it is irrelevant that AIA Services' amended articles of incorporation authorized capital surplus because Donna failed to present evidence that AIA Services had any earned or capital surplus available. (Resp'ts' Br. at 28.) Once again, these arguments may not be considered because they improperly raise them for

the first time on appeal. (R. 2354-70, 3774-84.) ***Trimble***, 134 Idaho at 197, 998 P.2d at 504. And, once again, their arguments also fail. As a preliminary matter, AIA Services and the Individual Defendants have asserted a violation of I.C. § 30-1-6 as a defense—the burden is on them to prove these issues and they failed to do so because they never raised the issue before the district court and have failed to present any evidence now. ***AIA Services Corp.***, 151 Idaho at 564, 261 P.3d at 841 ("The Respondents are defendants and have invoked I.C. § 30–1–6 as a defense"); ***U.S. Bank National Assoc. v. CitiMortgage, Inc.***, 157 Idaho 446, 451, 337 P.3d 605, 610 (2014) ("The burden of proving an affirmative defense…rests upon the party who advances the…defense.").

Finally, contrary to their arguments, Donna established that AIA Services had sufficient earned surplus when Donna exercised her mandatory redemption rights (Appellant's Br. at 29-30) and, according to AIA Services, it generated over $9 million in capital surplus after 1995 to pay Reed. ***AIA Services Corp.***, 151 Idaho at 567 n.3, 261 P.3d at 844 n.3. And AIA Services also generated over $2 million in capital surplus to partially redeem Donna's shares. (R. 2305.) Thus, AIA Services generated over $11 million in capital surplus since 1995 (excluding the millions paid to John and siphoned off). (*Id*.; R. 2342-47, 2867-72.)

Third, AIA Services and the Individual Defendants argue that AIA Services' amended articles of incorporation prevented the use of capital surplus if AIA Services was insolvent and that it had a $10,650,150 deficit according to Donna's expert. (Resp'ts' Br. at 28-29.) Once again, these arguments may not be considered because they improperly raise them for the first time on appeal. (R. 2354-70, 3774-84.) ***Trimble***, 134 Idaho at 197, 998 P.2d at 504. Once again, the burden is on them to prove AIA Services was insolvent. ***AIA Services Corp.***, 151 Idaho at 564, 261 P.3d

at 841 ("The Respondents are defendants and have invoked I.C. § 30–1–6 as a defense"); ***U.S. Bank National Assoc.***, 157 Idaho at 451, 337 P.3d at 610. And, once again, they have failed to meet that burden. Donna's accounting expert (who they cite) also opined that "it is my opinion the redemption of Reed Taylor's shares did not render AIA insolvent." (R. 2033.) His opinions are unrebutted. Thus, the only evidence establishes that AIA Services was not insolvent.

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

Donna maintains that the district court erred by not ruling that the January 11, 1995 Letter Agreement, which was authorized under I.C. § 30-1-6, could not be impaired later by the subsequent amendments to AIA Services' articles of incorporation. (Appellant's Br. at 27-28.) In other words, once AIA Services agreed to repurchase Donna's shares at a higher interest rate and the shorter amortization period, then AIA Services may not "impair the obligation of its contracts with [Donna] by the simple expedient of amending its articles of incorporation." ***Disabled American Veterans***, 340 P.2d at 418. As succinctly stated by a district court:

> A contrary rule would allow an organization…to amend its articles of incorporation in an effort to avoid antecedent tort liability. The court declines to adopt a rule that would encourage such mischief...

Davidson v. Colonial Williamsburg Foundation, 817 F. Supp. 611, 616 (D.C. E.D. Va. 1993). Any different rule of law would encourage mischief. AIA Services and the Individual Defendants do not address this argument thereby conceding it. (Resp'ts' Br. at 11-29.)

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f. If the Illegal 1996 Series A Preferred Shareholder Agreement Is Not Enforced, It Cannot Impact the Legality of the January 11, 1995 Letter Agreement.

Donna maintains that the district court *originally* correctly held that the January 11, 1995 Letter Agreement could not be superseded or replaced by the illegal 1996 Series A Preferred Shareholder Agreement and that her contractual rights must reverse back to the January 11, 1996 Letter Agreement if the Series A Preferred Shareholder Agreement is not enforced. (Appellant's Br. at 28-29 (citing R. 2426-27 (A. 76-77)[7]).) AIA Services and the Individual Defendants argue that no "elements are present" to void the 1996 Series A Preferred Shareholder Agreement and that "allowing Donna to exhume the 1995 Letters would force AIA to carry out an illegal contract." (Resp'ts' Br. at 22-23.) Their arguments make no sense and are unavailing.

As discussed above, the parties agree that the Series A Preferred Shareholder Agreement is illegal and unenforceable as to Donna, AIA Services and Reed. However, the parties disagree as to whether the illegal portions pertaining to Reed should be severed and the remaining portions of that Agreement enforced as to Donna and AIA Services. If this Court agrees with AIA Services and the Individual Defendants, and refuses to sever and enforce the illegal 1996 Series A Preferred Shareholder Agreement as to Donna and AIA Services, then the 1996 Series A Preferred Shareholder Agreement will be void. This would trigger what the district court referred to as the "no taint" enforcement of the January 11, 1995 Letter Agreement. (R. 602-04 (A. 1-3), 2426-27 (A. 76-77) (quoting ***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

[7] The cites provided in the Appellant's Brief were inadvertently incorrect and the correct citations to the Record and the Appendix have been provided here. Donna's counsel apologizes for those typos and others.

to the same subject…")).) *See also* ***Hill v. Wilkinson***, 60 Idaho 243, 90 P.2d 696, 699 (1939) ("[A] contract could not be both void and in full force and effect at one and the same time.").

Once again, the district court got it right the first time. (R. 2426-27 (A. 76-77).) AIA Services and the Individual Defendants do not squarely address these arguments and authorities. Instead, they partially quote a part of a comment to the Restatement (Resp'ts' Br. at 22), but a full reading of that comment supports Donna. **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").

If this Court declines to enforce the severed portions of the illegal 1996 Series A Preferred Shareholder Agreement, then that Agreement cannot supersede any prior lawful agreements and Donna's contractual rights should revert back to the legal and enforceable January 11, 1995 Letter Agreement. This would not carry out the terms of the illegal 1996 Series A Preferred Shareholder Agreement, but would instead enforce the original lawful obligations in the January 11, 1995 Letter Agreement. It would be unjust and nonsensical to allow the illegal 1996 Series A Preferred Shareholder Agreement (to the extent that this Court refuses to enforce it) to replace the legal and enforceable 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.

Donna maintains that the district court erred because AIA Services had $3,948,262 in earned surplus at the time Donna exercised her mandatory redemption rights in 1993 for her $2,000,000 in Series A Preferred Shares and thus her obligations were authorized by I.C. § 30-1-6 from that date forward. (Appellant's Br. at 29-30.) AIA Services and the Individual Defendants

do not address this argument and thereby concede it. (Resp'ts' Br. at 11-29.)

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

Donna maintains that the district court erred when it ruled that the higher interest rate in the January 11, 1995 Letter Agreement was never authorized by AIA Services' shareholders because they had authorized it and the board of directors did, too. (Appellant's Br. at 30-33.) AIA Services and the Individual Defendants argue that the district court correctly found that the shareholders had not authorized the higher interest rate. (Resp'ts' Br. at 21-22.)

First, AIA Services and the Individual Defendants incorrectly argue that the district court ruled that, because there was no evidence of a shareholder vote authorizing capital surplus, the parties were left were they stood in 1987. (Resp'ts' Br. at 21.) The district court ruled that "[t]he parties disagree as to whether the Articles of Incorporation in effect in 1993 authorize the use of capital surplus to redeem shares but the court does not find it necessary to rule on this issue at this time." (R. 3349 (A. 94).) The district did erroneously find that the shareholders did not authorize the higher interest rate. (*Id*.)

Second, Donna maintains that the shareholders authorized the higher interest rate and that JoLee Duclos simply attached the limited May 7, 1995 shareholder meeting minutes to her declaration and failed to submit the shareholder disclosures and proxies—both of which conclusively establish that the shareholders authorized the higher interest rate. (Appellant's Br. at 30-32.) In support of her argument, Donna's two cites to R. 3416 should have been to R. 3516, which she apologizes for. (Appellant's Br. at 31.) AIA Services and the Individual Defendants argue that JoLee Duclos' unsupported testimony should be sufficient (even though it is

contradicted by the documents Donna submitted) and that the shareholder authorization for the higher interest rate was "contingent upon AIA obtaining capital through private placement, which did not occur." (Resp'ts' Br. at 21-22.) Once again, the latter are new arguments that they never raised below and may not raise now. (R. 2354-70, 3774-84.) ***Trimble***, 134 Idaho at 197, 998 P.2d at 504. They are also incorrect. The reorganization plan approved by the board of directors expressly included the January 11, 1995 Letter Agreement, which provided that the higher interest rate would apply "regardless of the outcome of the private placement." (R. 602 (A. 1), 3499.) The only contingency to the success of the private placement was the requirement that an additional $700,000 or more would be paid to Donna if funds were raised, but, if not, then she would be paid in accordance with the interest rate and amortization schedule in the January 11, 1995 Letter Agreement. (*Id*.; R. 3499, 3516.)

Third, Donna maintains that board approval of the higher interest rate was all that was required. (Appellant's Br. at 32-33.) AIA Services and the Individual Defendants argue that Donna's position that she found no authority requiring anything other than board approval for the higher interest rate "fails to take into consideration the fact the contract for AIA's redemption of Donna's shares is contained solely in AIA's 1987 Articles." (Resp'ts' Br. at 18.) Their argument ignores the fatal fact that AIA Services' amended articles of incorporation authorized Donna and AIA Services to modify her preferences and rights. (R. 660 § 4.12 (A. 36 § 4.12), 696 § 4.2.12 (A. 56 § 4.2.12), 732 § 4.2.12.) ***Twin Lakes Village Property Ass'n, Inc. v. Crowley***, 124 Idaho 132, 135, 857 P.2d 611, 614 (1993) ("Because corporate documents are equivalent to contracts among the members of the association, the normal rules governing the interpretation of contracts apply.").

Fourth, AIA Services and the Individual Defendants fail to address and thereby concede that the modification of the interest rate and amortization period did not require any board or shareholder consent because AIA Services would have actually saved money had it timely paid.

i. AIA Services' Amended Articles of Incorporation Authorized the Higher Interest Rate and Shorter Amortization Period for the Redemption of Donna's Shares.

Donna maintains that the district court erred because AIA Services' amended articles of incorporation, which were adopted by the shareholders, expressly authorized AIA Services to modify the redemption terms with Donna's consent. (Appellant's Br. at 33-34.) AIA Services and the Individual Defendants argue that Donna's argument "fails to take into consideration the fact that the contract for AIA's redemption of Donna's shares is contained solely in AIA's 1987 Articles" and that AIA Services' amended articles of incorporation were not amended again to authorize the higher interest rate in violation of I.C. § 30-1-1003 (1997) and I.C. § 30-29-1003 (2015). (Resp'ts' Br. at 18-19.) They make similar arguments later in their brief and argue that Donna may not unilaterally modify her redemption terms. (Resp'ts' Br. at 23-24.) Their arguments are, once again, incorrect.

As a preliminary matter, neither I.C. § 30-1-1003 (1997) or I.C. § 30-29-1003 (2015) existed in 1995 or 1996. Thus, neither of those statutes apply. Moreover, Donna never "unilaterally" modified her redemption terms. (R. 602-04 (A. 1-3), 608-12 (A. 7-11), 614-15 (A. 13-14), 617-25 (A. 16-24).) The modifications to her mandatory redemption terms were through mutual assent between her and AIA Services, and approved by John, Beck and Cashman. (*Id.*; R. 1821 § 9(e).) The argument that Donna unilaterally modified them is beyond frivolous.

Most importantly, when AIA Services' shareholders approved the amended articles of incorporation, they contractually authorized AIA Services to modify Donna's mandatory redemption "rights and preferences" under amended articles of incorporation so long as she consented, which she and AIA Services mutually did in 1995 and 1996. (R. 602-04 (A. 1-3), 608-12 (A. 7-11), 614-15 (A. 13-14), 617-25 (A. 16-24), 660 § 4.12 (A. 36 § 4.12), 696 § 4.2.12 (A. 56 § 4.2.12), 732 § 4.2.12.) ***Twin Lakes Village Property Ass'n, Inc.***, 124 Idaho at 135, 857 P.2d at 614 ("Because corporate documents are equivalent to contracts among the members of the association, the normal rules governing the interpretation of contracts apply.") ***Ore-Ida Potato Prod., Inc. v. Larsen***, 83 Idaho 290, 293, 362 P.2d 384, 385 (1961) ("This Court has followed the general rule of law that parties to an unperformed contract may, by mutual consent, modify it by altering, excising or adding provisions."). In other words, assuming that AIA Services and the Individual Defendants' arguments had merit, AIA Services' amended articles of incorporation were adopted and approved by the shareholders to anticipate and authorize the modifications of the higher interest rate and shorter amortization period between Donna and AIA Services (and any other modifications dealing with the Series A Preferred Shares). (*Id*.) Thus, AIA Services and Donna's agreements to modify her mandatory redemption terms were fully authorized and complied with AIA Services' amended articles of incorporation.

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.

Donna maintains that 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." (Appellant's Br. at 35-36.) AIA Services and the Individual Defendants argue that Donna has "confused ultra vires acts with illegal acts" and her "argument that the defendants are claiming that the 1995 Letters are ultra vires is misguided and inaccurate." (Resp'ts' Br. at 25.) Their arguments are perplexing and wrong.

First, Donna is not confused as to the difference between an ultra vires act and an illegal act. (Resp'ts' Br. at 25.) Donna is maintaining that the issue of whether the shareholders or AIA Services' amended articles of incorporation authorized the higher interest rate agreed to in the January 11, 1995 Letter Agreement was, at most, an ultra vires act.

> **An illegal act of a corporation is one expressly prohibited by statute or against public policy and, thus, a corporate act may be ultra vires without being illegal.**
>
> However, the terms "ultra vires" and "illegality" represent distinct ideas. An illegal act of a corporation is one expressly prohibited by statute or against public policy and, thus, a corporate act may be ultra vires without being illegal.

19 C.J.S. CORPORATIONS § 674 (footnotes omitted) (bold in original). *See* I.C. § 30-1-7 (repealed) (A. 152-53.) AIA Services' amended articles of incorporation do not prohibit it from agreeing to pay Donna the higher interest rate first agreed to in the January 11, 1995 Letter Agreement. (R. 651-60 (A. 27-36), 687-96 (A. 47-56), 705-14, 724-32.) Indeed, AIA Services' amended articles of incorporation authorize Donna and AIA Services to modify her preferences and rights. (R. 660 § 4.12 (A. 36 § 4.12), 696 § 4.2.12 (A. 56 § 4.2.12), 732 § 4.2.12.)

Second, AIA Services and the Individual Defendants argue that they are not asserting that the 1995 Letter Agreements are ultra vires, but they are instead arguing that the 1995 Letter Agreements and the 1996 Series A Preferred Shareholder Agreement violates I.C. § 30-1-1003

(repealed) and I.C. § 30-1-6 (repealed). Notably, neither of these two statutes prohibits AIA Services from paying Donna the higher agreed upon interest rate. (*E.g.*, R. 602 (A. 1).) And AIA Services and the Individual Defendants never raised a violation of I.C. § 30-1-1003 (1997) before the district court, so they are barred from raising that argument for the first time on appeal. ***Trimble***, 134 Idaho at 197, 998 P.2d at 504. Moreover, I.C. § 30-1-1003 did not exist until 1997 and that statute has no application anyway because it was unnecessary to amend the articles because they already contained a provision authorizing the modification of Donna's rights and preferences, as discussed above.

Third, Donna did not maintain that AIA Services and the Individual Defendants are alleging that the 1995 Letter Agreements are ultra vires. (Resp'ts' Br. at 25.) Donna is maintaining that the higher interest rate first authorized in the January 11, 1995 Letter Agreement was, at most, an ultra vires act because that higher rate is not prohibited by AIA Services' amended articles of incorporation or by any statute (assuming that the district court was correct that shareholder approval was required and was not obtained, both of which Donna disputes). Donna is also maintaining that AIA Services and the Individual Defendants are not one of the classes of parties how may challenge an ultra vires act, which they concede is correct by failing to address. (*Compare* Appellant's Br. at 35-36 *with* Resp'ts' Br. at 25.)

Consequently, the district court erred because, at most, any alleged failure to properly obtain shareholder consent or amend AIA Services' articles of incorporation to authorize the higher interest rate would simply be ultra vires act and not an illegal act. (R. 3346-50 (A. 91-95), 3802-0 (A. 101-02).)

k. AIA Services and the Individual Defendants Are Estopped from Challenging the 1995 Letter Agreements.

Donna maintains that the district court also erred when it failed to rule that AIA Services and the Individual Defendants were estopped from challenging the higher interest rate in Letter Agreements (which was the same rate subsequently included in the 1996 Series A Preferred Shareholder Agreement). (Appellant's Br. at 36-37.) (R. 602 (A. 1), 619 § 1(a) (A. 18 § 1(a)).) AIA Services and the Individual Defendants argue that an illegal contract cannot be made valid by invoking waiver or estoppel and that they have not pleaded ultra vires. (Resp'ts' Br. at 26-27.) Donna is not maintaining that they are estopped from asserting illegality, she is maintaining that they are estopped from challenging any alleged ultra vires act of the shareholders failing to authorize the higher interest rate for her redemption. As explained above, AIA Services' amended articles of incorporation do not prohibit the payment of the higher interest rate. Also, AIA Services and the Individual Defendants cannot point to any statute that prohibits paying the higher rate.

> Where a corporation has the power to enter into a transaction or contract, neither party to it, who has had the benefit of it, can set up as a defense that legal formalities were not complied with or that the power was improperly exercised.

19 C.J.S. CORPORATIONS § 675. Thus, the district court erred by not estopping them. (A. 102.)

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

Donna maintains that the district court erred when it provided AIA Services the "equitable remedy" of retroactively reducing the number of Donna's Series A Preferred Shares to 7,110. (Appellant's Br. at 37 (citing R. 3349 (A. 94)).) AIA Services and the Individual Defendants do not address this argument and thereby concede it. There is good reason for this concession. AIA Services never pleaded a counterclaim seeking an equitable remedy. (R. 54-63.) Thus, AIA

Services was not entitled to the equitable relief granted by the district court. (3346-51 (A. 91-96).)

B. <u>This Court Should Reverse the District Court's Denial of Donna's Motion for Partial Summary Judgment on AIA Services' Default of the Payment Terms and that the Individual Defendants Should Be Liable Under Alter-Ego/Piercing the Corporate Veil</u>.

1. This Court Should Allow Parties to Appeal Orders Denying Summary Judgment.

Donna maintains that this Court should allow parties to appeal the denial of summary judgment motions, with certain exceptions. (Appellant's Br. at 38-39.) AIA Services and the Individual Defendant argue that this Court should not allow parties to appeal from the denial of summary judgment. (Resp'ts' Br. at 29-31.) Yet, they seek to appeal the denial of their summary judgment as to Donna's breach of fiduciary duty claims. (Resp'ts' Br. at 35-37.) This is one more reason why this Court should overrule prior precedent and allow appeals from the denial of summary judgment as requested by Donna. If this Court is not inclined to overrule prior precedent, then Donna requests that this Court treat her appeal from the denial of summary judgment as a permissive appeal since the parties have briefed the issues. ***Taylor v. Maile***, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005).

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

Donna maintains that this Court should reverse the district court's denial of her motion for summary judgment establishing that Donna holds 41,651.25 Series A Preferred Shares and that judgment should be entered as to AIA Services' default of the payments and the $416,512 in principal due (interest would be determined on remand). (Appellant's Br. at 39-41.) AIA Services and the Individual Defendants ignore Donna's arguments and rely on re-hashing prior arguments addressed in other sections in support of their argument that Donna should only hold 7,110 shares.

(Resp'ts' Br. at 29-31.) They do not deny or dispute that they are in default and they do not deny or dispute that if Donna prevails on one or more of her arguments in Section A above that she is entitled to summary judgment. (*Id*.) The bottom line is that whether Donna's redemption obligations were due in ten years under the severed remaining provisions of the Series A Preferred Shareholder Agreement or one or more of the 1995 Letter Agreements or due the fifteen years under AIA Services' amended articles of incorporation, AIA Services has been in default for over a decade now and judgment should be entered in favor of Donna. (Appellant's Br. at 39-41.) There is simply no reason for a trial on these issues.

3. 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.

Donna maintains that the district court erred when it denied her motion for summary judgment seeking to impose liability against the Individual Defendants based on the alter-ego/piercing the corporate veil theories. (Appellant's Br. at 41-44.) The Individual Defendants argue that the district court correctly denied summary judgment and found that there were issues of fact regarding whether Donna had proven alter-ego. (Resp'ts' Br. at 31.) They also ask this Court to dismiss Donna's alter-ego remedy if this Court agrees with Donna and allows parties to appeal from the denial of a motion for summary judgment. (Resp'ts' Br. at 31-32.) Their arguments all fail based on the same fatal facts of indisputable malfeasance and unlawful conduct.

First, the Individual Defendants have not disputed the specific examples of malfeasance that Donna submitted thereby conceding the obvious that she is correct. (Appellant's Br. at 42-44.)

Second, their arguments are unsupported to the record. They cite an incorrect spreadsheet purportedly showing payments made to Reed and Donna, R. 1746, for the proposition that they

keep "excellent financial records." (Resp'ts' Br. at 32.) The only experts who provided testimony opined precisely the opposite—that the Individual Defendants have essentially looted AIA Services. (R. 2342-47, 2846-72.) They allege that because AIA Services has articles of incorporation, has submitted certain annual reports and by keeping minutes of board and shareholders meeting that they are observing corporate formalities. (Resp'ts' Br. at 32.) These arguments miss the mark. The fact that AIA Services has articles of incorporation, submits annual reports and prepared meeting minutes back in 1995 are wholly meaningless because the Individual Defendants intentionally refuse to comply with articles and fail to even conduct annual shareholder meetings, as explained by Donna's unrebutted expert testimony. (R. 2342-47, 2846-72.) ***Union Warehouse and Supply Co., Inc. v. Illinois R.B. Jones, Inc.***, 128 Idaho 660, 667, 917 P.2d 1300 (1996) (A trial court may grant summary judgment based on unrebutted expert testimony.). The issue is what has transpired since 1995, not what transpired in 1995. (*Id*.) Had the Individual Defendants operated AIA Services with the slightest bit of integrity, Donna would have been paid over a decade ago or, at a minimum, there would be sufficient funds to pay her now. (*Id*.) For some reason, the district court disregarded the only evidence before it that supported but one conclusion—that the alter-ego/piercing the corporate veil theories should be applied to prevent an injustice to Donna.

Third, the fact that Donna does not appear to have a remedy against AIA Services because it has been looted simply solidifies why this Court should impose liability upon the Individual Defendants under the alter-ego/piercing the corporate veil doctrines. They should not be permitted to avoid paying Donna as a result of their immoral and improper conduct. (R. 2342-47, 2846-72.)

Fourth, even if this Court does not reverse in favor of Donna, for the same reasons discussed above, there is absolutely no evidence supporting reversing in favor of the Individual Defendants on alter-ego/piercing the corporate veil. (*Compare* Appellant's Brief at 41-44 *with* Resp'ts' Br. at 31-32.)

C. 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. 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 this Court Should Create a New Special Exception.

Donna maintains that the district court erred when it dismissed her fraud claims based on the Economic Loss Rule because those claims were intentional torts and this Court should create a new special relationship or exception to the rule to the extent necessary based on the Individual Defendants' fiduciary duties owed to Donna through their special relationship as officers, directors, majority shareholders and controlling shareholders of AIA Services. (Appellant's Br. at 45-48.) AIA Services and the Individual Defendants fail to provide any compelling facts or authorities to rebut Donna's arguments. (Resp'ts' Br. at 32-33.) Thus, this Court should reverse the dismissal of her fraud claims.

b. This Court Should Clarify and Expand the Economic Loss Rule.

Donna further maintained that this Court should clarify and expand the Economic Loss Rule consistent with that done by other states and rename it the Independent Duty Doctrine. (Appellant's Br. at 48-49.) Once again, AIA Services and the Individual Defendants fail to offer any compelling argument, authorities or facts to rebut Donna's contentions. (Resp'ts' Br. at 32-

34.) As such, this Court should clarify and expand the Economic Loss Rule.

c. <u>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</u>.

Donna maintains that the district court erred because she was not required to bring a derivative action to pursue her tort claims since she was the sole Series A Preferred Shareholder with special rights and protections, including payment priority. (Appellant's Br. at 49-50.) AIA Services and the Individual Defendants nakedly argue that Donna's fiduciary duty claims "may only be brought in a derivative action." (Resp'ts' Br. at 35.) Other than those statements, they offer no compelling argument or authorities to rebut the well-settled Idaho law that a shareholder may pursue a direct action under limited circumstances, which apply here because Donna is the sole Series A Preferred Shareholder. (*Id.*; R. 534, 651-60, 724-32, 2350-52.)

2. The District Court Erred When It Dismissed Donna's Unjust Enrichment Claim for Failure to State a Claim Upon Which Relief May Be Granted.

Donna maintains that the district court erred when it dismissed her unjust enrichment claims pled in her Second Lawsuit against the Individual Defendants. (Appellant's Br. at 50-54.) The Individual Defendants argue that the district court correctly dismissed those claims. (Resp'ts' Br. at 37-38.) Their arguments are incorrect and unavailing.

<u>First</u>, contrary to AIA Services and the Individual Defendants' arguments (Resp'ts' Br. at 37-38), Donna did not appeal the district court's dismissal of her unjust enrichment claim asserted in her first lawsuit based on the deferral of five months of payments. (Appellant's Br. 50-54.) Rather, she only appealed the dismissal of her unjust enrichment claim asserted in her second one.

<u>Second</u>, contrary to their assertions (Resp'ts' Br. at 37), Donna focused her primary

arguments solely on the allegations in her pleadings because the district court dismissed her unjust enrichment claim pursuant to I.R.C.P. 12(b)(6). (Appellant's Br. at 50-52.) However, Donna also submitted substantial citations to the record to support her unjust enrichment claim. (Appellant's Br. at 52-54.) Thus, their arguments are wrong once again.

Third, Donna also submitted evidence to support her unjust enrichment claim because evidence was also submitted to the district court and it was unclear whether the district court considered the evidence. (Appellant's Br. at 52-54.)

In sum, Donna's unjust enrichment claim was adequately pleaded and further supported by substantial evidence. (Appellant's Br. at 52-54.) Thus, this Court should reverse on that claim.

D. The Issues Raised by Donna Are Within the Scope of the Rule 54(b) Judgment, Subject to this Court's Determination of Whether to Allow the Parties to Appeal from the District Court's Denials of Partial Summary Judgment.

AIA Services and the Individual Defendants argue that the "majority of Donna's appellate brief is comprised of unproven allegations relevant only to her claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, or…the alter ego doctrine…none of which are part of the IRCP 54(b) Judgment and may not be considered on appeal." (Resp'ts' Br. at 10.) ***AIA Services Corp.***, 151 Idaho at 573-74, 261 P.3d at 850-51. These arguments are without merit.

Donna's arguments are all within the scope of the Rule 54(b) judgment with the possible exception of the breach of the amended articles of incorporation to the extent that this Court does not enforce the 1995 Letter Agreements or the severed remaining portions of the 1996 Series A Preferred Shareholder Agreement. (R. 3438-41 (A. 97-100); Appellant's Br. at 15-54.)

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E. Donna's Arguments Are Cogent and Properly Supported by Authorities and Citations to the Record.

AIA Services and the Individual Defendants argue, without citing to a single page or particular section in the Appellant's Brief, "that this Court [should] disregard the many arguments…going beyond the record and in which the error complaint of is not identified or the issue is not supported by cogent argument and authority." (Resp'ts' Br. at 10 (citing I.A.R. 35(a)(6)).) The Appellant's Brief fully complies with I.A.R. 35(a) and the reason that AIA Services and the Individual Defendants are unable to provide a specific example of any alleged deficiency is because each of Donna's arguments are supported by cogent argument, authority and citations to the record. (Appellant's Br. at 15-56.) ***Rekow v. Weekes***, 158 Idaho 868, 871, 353 P.3d 1102, 1105 (Ct. App. 2015) ("Because the issue is clearly expressed and supported by argument and authority, we will consider the issue on appeal." (footnote omitted)).

F. AIA Services and the Individual Defendants' Cross-Appeal Lacks Merit and Proves, Once Again, that They Will Take Any Position, Irrespective of How Inconsistent.

1. The District Court Properly Dismissed AIA Services' Counterclaim for Breach of Contract because the Series A Preferred Shareholder Agreement Is Illegal and Unenforceable as to Donna, AIA Services and Reed.

AIA Services argues the court erred in dismissing its counterclaim that Donna allegedly breached the 1996 Series A Preferred Shareholder Agreement and the 1995 Letter Agreements upon entering into a 2006 Subordination Agreement with Reed. (Resp'ts' Br. at 38-40.)

First, AIA Services improperly raises an alleged breach of contract claim based on the 1995 Letter Agreements when it never asserted a counterclaim before the district court. (Resp'ts' Br. at 38-39.) AIA Services' counterclaim was based solely on the alleged breach of the illegal

1996 Series A Preferred Shareholder Agreement. (R. 54-63.)

"'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, AIA Services may not assert on appeal that Donna breached the 1995 Letter Agreements because AIA Services never asserted such a claim and it is improperly raising that argument for the first time on appeal. ***Trimble***, 134 Idaho at 197, 998 P.2d at 504; ***Kolar v. Cassia County Idaho***, 142 Idaho 346, 350, 127 P.3d 962, 966 (2005).

Second, as the district court correctly ruled, "one cannot breach an illegal agreement" and Donna Taylor cannot be held to have breached an illegal agreement by entering into a subordination agreement with Reed Taylor." (R. 2428 (A. 28).) AIA Services and the Individual Defendants make no argument on appeal that the illegal 1996 Series A Preferred Shareholder Agreement should be enforced as to Reed, Donn and AIA Services, which would be required for their argument because "a contract could not be both void and in full force and effect at one and the same time." ***Hill***, 90 P.2d at 699. (Resp'ts' Br. at 9-40.) Moreover, the 2006 Subordination Agreement was illegal and unenforceable because it was tainted with Reed's illegal obligations and AIA Services owed Reed nothing, so the subordination was of no legal effect. (R. 1040-42.) ***AIA Services Corp.***, 151 Idaho at 564-67, 261 P.3d at 841-44.

Third, the district court correctly ruled that "[t]he only beneficiary to the priority of payment was Donna Taylor and, as the only beneficiary, it was her right to waive and to do so without legal obligation to first obtain the consent of AIA." (R. 2428 (A. 78).) This was correct

because Idaho law "does not preclude subordination by agreement by a person entitled to priority." **I.C. § 28-9-339**. It was within Donna's right to enter into the 2006 Subordination Agreement.

Fourth, assuming their arguments had merit (Resp'ts' Br. at 39-40), Donna's entry into the 2006 Subordination Agreement could not be a breach of contract because AIA Services had already materially breached the Series A Preferred Shareholder Agreement and the 1995 Letter Agreements by failing to timely pay Donna on or before December 2, 2003 (she was required to be paid in ten years, excluding the additional $100,000 payments that were never made after Reed's $1.5 million note was paid) and Reed on August 1, 2005 (his note was due in ten years). (R. 602 (A. 1), 619 § 1(a) (A. 18 §§ 1(a)-(b)), 2178, 2351-52 ¶¶ 5-6.) ***AIA Services Corp.***, 151 Idaho at 557, 261 P.3d at 834. As a breaching party, AIA Services cannot complain because it had "'[t]he burden of proving the existence of a contract and fact of its breach,'" ***Tapadeera, LLC v. Knowlton***, 153 Idaho 182, 186, 280 P.3d 685, 689 (2012), and "each party is entitled to the assurance that he will not be called upon to perform his remaining duties of performance with respect to the expected exchange if there has already been an uncured material failure of performance by the other party." **RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. b (1981)**. To this day, AIA Services remains in breach and its naked arguments that the 2006 Subordination Agreement between Reed and Donna somehow damaged AIA Services is wholly without merit—AIA Services and the Individual Defendants caused the damage. (*E.g.*, R. 2867-72, 2342-47.)

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2. The District Court Properly Refused to Dismiss Donna's Claims for Breach of Fiduciary Duties because Those Claims Are Not Barred by the Economic Loss Rule.

AIA Services and the Individual Defendants argue that the district court erred when it refused to dismiss Donna's breach of fiduciary duty claims[8] under the Economic Loss Rule. (Resp'ts' Br. at 35-37.) Their arguments are without merit and should be rejected.

First, if this Court does not overrule prior precedent and permit the parties to appeal from the denial of summary judgment, then AIA Services and the Individual Defendants appeal on this issue should not be considered because it exceeds the scope of the Rule 54(b) judgment. (R. 3438-41 (A. 97-100).) ***AIA Services Corp.***, 151 Idaho at 573-74, 261 P.3d at 850-51.

Second, "[t]he economic loss rule applies to negligence cases in general." ***Ramerth v. Hart***, 133 Idaho 194, 197, 983 P.2d 848, 851 (1999). Donna's breach of fiduciary duty claims are intentional torts—not claims based on mere negligence. (R. 12-22, 2867-72, 2342-47, 3368-75.) ***FLS Transportation Services (USA) Inc. v. Casillas***, 2017 WL 4127980 * 4 (D. Nevada 2017) ("The economic loss doctrine bars unintentional tort actions"); **86 C.J.S. TORTS § 23**. The Economic Loss Rule does not apply to the claims for intentional breaches of fiduciary duty.

Third, the fiduciary duties owed to Donna by the Individual Defendants were not created through the 1995 Letter Agreements or the 1996 Series A Preferred Shareholder Agreement. (R. 12-22, 603-635 (A. 1-24), 958-76, 2925-36, 3368-75.) Those fiduciary duties were created by statutory and common law. And, most importantly, the Individual Defendants are not parties to any of the 1995 Letter Agreements or the Series A Preferred Shareholder Agreement. (*Id*.)

[8] Curiously, they do not cross-appeal the district court's refusal to dismiss Donna's aiding and abetting in breaches of fiduciary duties under the Economic Loss Rule.

Under Idaho common and statutory law, directors owe fiduciary duties to shareholders. *E.g.*, ***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); **I.C. § 30-29-830**. Likewise, under Idaho common and statutory law, corporate officers owe duties to shareholders. *E.g.*, ***Jenkins v. Jenkins***, 138 Idaho 424, 427, 64 P.3d 953, 956 (2003); **I.C. § 30-29-841**; **I.C. § 30-29-842**. Finally, under Idaho common law, majority or controlling shareholders owe fiduciary duties to the minority shareholders. *E.g.*, ***McCann***, 152 Idaho at 815 n.5, 275 P.3d at 830.

While never addressed in Idaho, other jurisdictions have acknowledged that fiduciary duty claims are not barred by the Economic Loss Rule when the duties are not created by the contract or are independent from the contract. *E.g.*, ***Davis v. Beling***, 278 P.3d 501, 515 (Nev. 2012); ***Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.***, 891 So.2d 532, 536-37 (Fla. 2004); ***Dunn Constr. Co. v. Cloney***, 682 S.E.2d 943, 946-47 (Va. 2009); ***Lake County Grading Co. of Libertyville, Inc. v. Great Lakes Agency, Inc.***, 589 N.E.2d 1128, 1131-33 (Ill. Ct. App. 1992); *accord* ***Eastwood v. Horse Harbor Found., Inc.***, 241 P.3d 1256 (Wa. 2010); ***Robinson Helicopter Co. v. Dana Corp.***, 102 P.3d 268, 274 (Cal. 2004).

The cases cited by the Individual Defendants are all distinguishable or actually support Donna. (Resp'ts' Br. at 35-36.) The Individual Defendants are not in privity with Donna. (R. 603-635 (A. 1-24).) As explained above, Donna's agreements did not create the fiduciary duties owed to her by the Individual Defendants—those fiduciary duties were independently owed to her under Idaho statutory and common law. (*Id.*) As also succinctly addressed by Donna's accounting expert, Paul Pederson, and her legal expert, Professor Richard McDermott, the Individual Defendants'

malfeasance was outside of the contractual obligations owed under the 1995 Letter Agreements and 1996 Series A Preferred Shareholder Agreement. (R. 2342-47, 2867-72.)

Thus, Donna's fiduciary duty claims against the Individual Defendants as directors, officers, majority shareholders and controlling shareholders of AIA Services are not barred by the Economic Loss Rule.

Fourth, to the extent necessary, this Court should create another "special relationship" or "unique exception" to the Economic Loss Rule for breach of fiduciary duty claims.

"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).

For the same reasons and authorities stated above, this Court should create a new "special relationship" or "unique circumstance" exception to the Economic Loss Rule for fiduciary duty claims against officers, directors, controlling shareholders and majority shareholders.

Fifth, as already explained by Donna (Appellant's Br. at 49-50; Resp'ts' Br. at 35), she is not required to pursue her fiduciary duty claims derivatively—she can pursue those claims as direct ones against the Individual Defendants. *E.g.*, ***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 special duty owed by the

defendant to the shareholder.").

Sixth, to the extent that this Court rules that either the 1995 Letter Agreements and/or the 1996 Series A Preferred Shareholder Agreement are not enforceable, then the Economic Loss Rule cannot apply under any circumstances because there is no agreement. If the district court's present rulings were affirmed, then there is no contract for the Economic Loss Rule to apply to. (R. 2428 (A. 78), 3348-50 (A. 93-95), 3439 (A. 98).) Moreover, the parties were very clear that Donna's redemption terms were not intended to replace her rights as a shareholder: "all of [Donna's] existing claims are preserved" and her "rights and protections as a preferred shareholder…shall be preserved." (R. 603 (A. 2).)

Accordingly, the Economic Loss Rule does not bar Donna's fiduciary duty claims.

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

Donna respectfully asked this Court to assign a new district court judge to these consolidated cases after nearly ten years to avoid any potential appearance of bias. (Appellant's Br. at 54 (quoting *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 424, 283 P.3d 728, 741 (2012)).) AIA Services and the Individual Defendants argue that Donna's request is "improper", that *Capstar Radio* does not apply, and she her "request [is] for a purely advisory opinion." (Resp'ts' Br. at 11.) Their arguments are incorrect.

Donna's request has nothing to do with a motion to disqualify, she is not seeking an advisory opinion from this Court, and they misconstrue *Capstar Radio*. Donna is requesting a new district court judge to be assigned on remand. *See* ***Martinez (Portillo) v. Carrasco (Mendoza)***, 162 Idaho 336, 396 P.3d 1218, 1228 (2017) (ordering the assignment of a new judge on remand); ***Kantor v.***

Kantor, 160 Idaho 803, 809, 379 P.3d 1073, 1079 (2016) (same) (quoting *Capstar Radio*); ***Capstar Radio Operating Co.***, 153 Idaho at 424, 283 P.3d at 741 (same, but affirming the denial of a motion to disqualify). Simply put, after nearly ten years of litigation, Donna simply believes that a new district court judge would be appropriate on remand to prevent any potential appearance of bias and to bring a fresh perspective to any remaining issues—a request fully supported by this Court's precedent. *Id*. Under the unique circumstances of these cases, Donna's request is an appropriate.

H. Donna Should Be Awarded 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 Fees to Donna on Appeal Pursuant to I.C. § 12-121 for the Defense of Her Appeal and Her Defense of the Cross-Appeal.

Donna maintains that this Court should award her fees pursuant to I.C. § 12-121 based on AIA Services and the Individual Defendants' anticipated frivolous defense of this appeal. (Appellant's Br. at 55.) AIA Services and the Individual Defendants argue that they "have presented, in good faith, genuine issues to this Court and as a result, Donna should not be entitled to fees." (Resp'ts' Br. at 40.) Donna is even more convinced that she should be awarded fees for their frivolous defense of her appeal and frivolous pursuit of their cross-appeal—which contain nothing more than convoluted, inconsistent, unsupported and disingenuous arguments that mischaracterize the facts and the law. (Resp'ts' Br. at 9-39.)

As seen from the Appellant's Brief and Donna's arguments above, AIA Services and the Individual Defendants continue to defend and pursue appeals in a manner intended to simply increase the cost of litigation for Donna. (Appellant's Br. at 15-54.) As explained by Donna's unrebutted expert witnesses, she simply should have been paid over a decade ago. (R. 2342-47,

2286-2305, 2846-72.) Under these circumstances and based on the arguments and authorities in this Brief, an award of fees is appropriate for Donna pursuing her appeal and defending against the cross-appeal. It is simply unjust and unfair that Donna is still having to litigate these cases.

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

In the alternative, Donna maintains that this Court should reserve her award of fees against AIA Services for remand after naming a prevailing party. (Appellant's Br. at 55-56.) AIA Services and the Individual Defendants do not respond and thus concede this argument. (Resp'ts' Br. at 40.)

I. AIA Services and the Individual Defendants Should Not Be Awarded Fees or Costs.

AIA Services and the Individual Defendants, without making a cogent argument supported by any specific examples of credible wrongdoing, request fees under I.C. § 12-121 and Idaho Rule of Civil Procedure 11. (Resp'ts' Br. at 40-41.)

First, unless they prevail in the entirety, AIA Services and the Individual Defendants are not entitled to an award of fees or costs on appeal. ***Watkins Co., LLC v. Storms***, 152 Idaho 531, 540, 272 P.3d 503, 512 (2012).

Second, AIA Services and the Individual Defendants' request for fees under I.R.C.P. 11 is misplaced. That rule does not apply on appeal. I.A.R. 11.2 applies to appeals.

Third, AIA Services and the Individual Defendants are not entitled to any fees under I.A.R. 11.2 or I.C. § 12-121 because this appeal involves several issues of first impression, as fully explained above and in the Appellant's Brief, including as to matters of the Economic Loss Rule, interest rates paid for redemption of stock, capital surplus authorization under articles of incorporation, the difference between an ultra vires and illegal act for the redemption of stock, and

whether articles of incorporation may be amended to disavow contractual obligations, among others. ***Campbell v. Kildew***, 141 Idaho 640, 651, 115 P.3d 731, 742 (2005); ***Perkins v. Croman, Inc.***, 134 Idaho 721, 726, 9 P.3d 524, 529 (2000) (addressing the former I.A.R. 11.1).

Fourth, other than citing argument and cases involving Reed (Resp'ts' Br. at 41 n.12), AIA Services and the Individual Defendants provide no examples of any matters that Donna is seeking to "re-litigate" or issues that have been decided against Donna on "multiple" occasions. This appeal is not about Reed. He has nothing to do with this appeal. There is not a shred of evidence that this appeal is being pursued for any purpose other than to get Donna paid the money she has been owed for decades and her appeal is fully supported by authority and citations to the record. *See* **I.A.R. 11.2**. They have provided no viable basis to sanction Donna or her undersigned attorney pursuant to I.A.R. 11.2 (assuming that they had actually cited that rule).

Fifth, standing alone and without even addressing the egregious facts (Appellant's Br. at 1-54), Donna's unrebutted expert testimony is indisputable proof of the wrongdoing by AIA Services and the Individual Defendants and that her appeal has been pursued for proper purposes and is not frivolous or unfounded. Donna is 78-years-old, and she is entitled to be paid the balance of the money that she lent AIA Services decades ago to purchase AIA Insurance and other assets (assets that she worked for years with Reed to develop and grow). (R. 532-600.) Ironically, AIA Services and the Individual Defendants cannot reconcile or explain why they have spent more money fighting Donna than just paying her.

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V. CONCLUSION

This Court should reverse and remand consistent with the arguments asserted above and in the Appellant's Brief, and award Donna costs and attorneys' fees, or reserve an award of fees.

RESPECTFULLY SUBMITTED this 26th day of December 2017.

RODERICK BOND LAW OFFICE, PLLC

By: _____
Roderick C. Bond
Attorney for Appellant Donna J. Taylor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of December 2017, I caused to be served two true and correct copies of the foregoing to the following parties:

	Via:
Martin Martelle	( ) U.S. Mail, Postage Prepaid
Martelle & Associates, P.A.	(**X**) Hand Delivered
380 W. State St.	( ) Overnight Mail
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	(**X**) Email (pdf attachment)

_____
Roderick C. Bond