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IN THE SUPREME COURT OF THE STATE OF IDAHO

GENESIS GOLF BUILDERS, INC., *etc.*,

Plaintiff,

vs.

**PEND OREILLE BONNER
DEVELOPMENT, LLC; *et al.*,**

Defendants.

**SUPREME COURT
NO. 44583-2016**

VALIANT IDAHO, LLC,
an Idaho limited liability company,

Cross-Claimant-Respondent,

vs.

NORTH IDAHO RESORTS, LLC,
an Idaho limited liability company,

Cross-Defendant-Appellant.

AND RELATED ACTIONS.

RESPONDENT'S BRIEF

**Appeal From The District Court Of The First Judicial District
In And For The County Of Bonner | Case No. CV-2009-1810**

Honorable Barbara A. Buchanan, District Judge, Presiding

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I.
STATEMENT OF THE CASE

A. Introduction.

North Idaho Resorts, LLC (“NIR”) appeals the award of discretionary costs and costs as a matter of right to Valiant Idaho, LLC (“Valiant”) in Bonner County Case No. CV-2009-1810 (“Valiant Foreclosure”). In a Memorandum Decision Order Awarding Costs and Attorneys’ Fees to Valiant Idaho, LLC (“Memorandum Awarding Costs”) and the subsequently entered Judgment Re: Costs and Attorneys’ Fees, copies of which are attached and identified as Exhibit A [R.Vol. XLVIII, pp. 5829-43 and pp. 5844-46, respectively], the district court awarded Valiant costs against NIR in the total amount of \$10,369.93. R.Vol. XLVIII, pp. 5829–46. This award is comprised of 25% of the total discretionary costs awarded to Valiant (*i.e.*, \$32,464.70 x .25 = \$8,116.18) and 25% of the costs as a matter of right awarded to Valiant (*i.e.*, \$9,014.99 x .25 = \$2,253.75). *Id.* This award was satisfied at a sheriff’s sale held on November 15, 2016 by payment in the full amount of the award plus interest and sheriff’s costs. R.Vol. LX, pp. 7411–12. Although NIR did not object to Valiant’s Memorandum of Costs and Attorneys’ Fees (“Valiant Fee Memo”) filed July 6, 2015, NIR now contends that the award of discretionary costs was an abuse of discretion because the district court failed to: (1) perceive its award as a matter of discretion; (2) establish that said costs were exceptional and should be awarded to Valiant in the interest of justice; and (3) reach its determination through an exercise of reason. NIR’s arguments are without merit and should be rejected.

B. Pertinent Facts And Procedural History.

1. The Idaho Club.

The Valiant Foreclosure is an exceptionally complex real estate foreclosure lawsuit arising out of a failed golf course and residential housing development project located in Sandpoint, Idaho and commonly known as “The Idaho Club.” Valiant’s interests in The Idaho Club arise out of three mortgages that were assigned to it by RE Loans, LLC (“RE Loans Mortgage”), Pensco Trust Co. f/b/o Barney Ng (“Pensco Mortgage”) and Mortgage Fund ‘08, LLC (“MF08 Mortgage”) (collectively, “Valiant Mortgages”). R.Vol. XXII, pp. 2562–66. NIR’s interest in The Idaho Club arises out of a vendor’s lien (“Vendor’s Lien”) that it purportedly obtained by selling certain property to Pend Oreille Bonner Development, LLC (“POBD”), the developer of The Idaho Club. *Id.*, pp. 2568–69; R.Vol. XXV, p. 2960.

2. The Valiant Foreclosure.

The failure of the development spawned a multitude of interrelated civil lawsuits, including the Valiant Foreclosure, and: (a) *Sage Holdings LLC, et. al. v. Pend Oreille Bonner Development, LLC, et. al.* (Bonner County Case No. CV-2010-2142); (b) *ACI Northwest, Inc. v. Bar-K, Inc., et. al.* (Bonner County Case No. CV 2010-2211); (c) *Pacific Capital Bank, N.A. v. Pend Oreille Bonner Development, LLC, et. al.* (Bonner County Case No. CV-2011-0135); (d) *The Idaho Club Homeowner’s Association, Inc. v. Pend Oreille Bonner Development, LLC, et. al.* (Bonner County Case No. CV-2011-2284); and (e) *The State of Idaho, Idaho Transportation*

Board v. Pend Oreille Bonner Development, LLC, et. al. (Bonner County Case No. CV-2012-0008). R.Vol. XLI, pp. 5021–23. Valiant and NIR were parties in each of these lawsuits.

The Valiant Foreclosure is by far the most complex of the lawsuits arising out of The Idaho Club. It began as a mechanic’s lien foreclosure action filed October 13, 2009 by the contractor who constructed the golf course. R.Vol. I, pp. 172–96. After two years of motion practice and an almost two-year long bankruptcy stay¹, Plaintiff’s claims were dismissed with prejudice. See R.Vol. II, pp. 275–83, pp. 284–89, pp. 325–29; R.Vol. III, pp. 374–77, pp. 383–85. Motion practice resumed for approximately another year before Valiant filed its Counterclaim, Cross-claim and Third Party Complaint For Judicial Foreclosure on August 19, 2014 (“Valiant Cross-claim”) and the case morphed into the judicial foreclosure of the Valiant Mortgages. R.Vol. VI, pp. 739–66; R.Vol. X, pp. 1164–67.

The Valiant Cross-Claim sought an adjudication that Valiant’s interests, *vis a vis* the Valiant Mortgages, were prior in right, title and interest to any interest claimed by no less than twenty-eight (28) other persons or entities named as a counter-defendant, cross-defendant or third-party defendant. R.Vol. VI, pp. 741–45. Valiant obtained default judgments or reached stipulations as to Valiant’s priority with the counter-defendant and all but two cross-defendants.

¹ The first bankruptcy stay was entered on September 29, 2011 and the second bankruptcy stay was lifted on August 12, 2013. R.Vol. II, pp. 275–89; R.Vol. III, pp. 374–77. As such, a bankruptcy stay was in effect for 1 year, 10 months and 15 days.

Valiant prevailed on summary judgment against NIR. Lastly, Valiant prevailed at trial against the other remaining cross-defendant (JV L.L.C. [“JV”]) and third-party defendant (VP, Incorporated [“VP”]).

3. Subordination of NIR’s Alleged Vendor’s Lien.

On January 20, 2015, Valiant filed its Motion For Summary Judgment Against JV, NIR and VP (“Valiant SJ”). R.Vols. XIV–XVII, pp. 1720–2069. The Valiant SJ sought adjudication as a matter of law that the Valiant Mortgages were prior in right, title and interest to any interest possessed by NIR. R.Vol. XIV, p. 1741. On April 14, 2015, the district court granted Valiant’s SJ Motion. R.Vol. XXII, p. 2560.

NIR’s appeal does not challenge the propriety of the district court’s memorandum decision granting the Valiant SJ. *Id.*, pp. 2560–78. The district court ruled that NIR’s alleged Vendor’s Lien was subordinate to Valiant’s first-priority mortgage (*i.e.*, the RE Loans Mortgage) because “NIR executed and recorded a Subordination Agreement, which subordinated any interest NIR had in the Idaho Club Property to the 2007 RE Loans Mortgage.” *Id.*, p. 2573. The district court further ruled that NIR’s alleged Vendor’s Lien was subordinate to Valiant’s second-priority and third-priority mortgages (*i.e.*, the Pensco Mortgage and the MF08 Mortgage) because “the Partial Termination recorded on March 15, 2007, and re-recorded on March 11, 2009, terminated the *Memorandum of Sale* [*i.e.*, the Vendor’s Lien] as to the property encumbered by the Pensco Mortgage and MF08 Mortgage.” *Id.* Moreover, the district court noted that another

district court (in Bonner County Case No. CV 2011-0135) had already determined that NIR's Vendor's Lien "was paid in full and had no value." *Id.*, p. 2573, fn. 3.

On June 16, 2015, NIR filed a Renewed Motion For Reconsideration and Consideration ("Renewed Motion"). R.Vol. XXIV, p. 2781. On July 21, 2015, the district court denied NIR's Renewed Motion and reiterated that "the vendor's lien that Judge Griffin held to have no force and effect because it was paid in full is the same vendor's lien relied upon by NIR in this case. Thus . . . NIR is collaterally estopped from re-litigating the issue of the alleged vendor's lien." *Id.*, pp. 2872–73. NIR's appeal does not contest the propriety of the district court's memorandum decision denying NIR's Renewed Motion. *Id.*, pp. 2871–73.

On August 19, 2015, NIR filed its second motion to reconsider. R.Vol. XXVII, p. 3114. On October 30, 2015, the district court, *inter alia*, denied this motion in its entirety. R.Vol. XXXIII, pp. 4000–19. NIR did not appeal the district court's decision.

4. The Valiant Foreclosure Was Factually and Legally Complex.

As this Court is aware, most judicial foreclosures are straight forward and involve one property owner and one lender seeking to foreclose its mortgage against a single parcel of real property. Other judicial foreclosures are more complex; involving multiple lienholders and/or multiple parcels of real property. The more lienholders and parcels of real property that are involved, the more complex the judicial foreclosure becomes. The Valiant Foreclosure involved no less than twenty-nine (29) parties, including Valiant, asserting liens against The Idaho Club. R.Vol. VI, pp. 741–45. Moreover, one hundred fifty-six (156) parcels of real property are subject to some or all

of the Valiant Mortgages. R.Vol. XLIV, pp. 5317–5412; R.Vol. XLV, pp. 5413–5502. Thus, the Valiant Foreclosure is unusually complex just from this standpoint.

The Valiant Foreclosure is made even more complex because the Valiant Mortgages did not describe the same properties. *Id.* Accordingly, Valiant had to establish which parcels were subject to each of the Valiant Mortgages. *Id.* As set forth in the Judgment and the Decree of Foreclosure, certain parcels were subject to only one of the mortgages, other parcels were subject to two of the mortgages, and still other parcels were subject to all three of the Valiant Mortgages. *Id.*

The motion practice in this case was also exceptionally complex. Valiant prevailed on a total of five different dispositive motions, including its SJ Motion against NIR. *See* R.Vol. IV, p. 488; R.Vol. V, pp. 636–42; R.Vol. V, pp. 647–52; R.Vol. XXII, pp. 2560–78; R.Vol. XXIV, pp. 2791–98; R.Vol. XXXII, pp. 4000–19. Even though Valiant prevailed on all of its dispositive motions, NIR, VP and JV refused to accept certain of the district court’s determinations. NIR, VP and JV collectively filed no less than six (6) motions to reconsider. *See* R.Vol. XXII, p. 2596; R.Vol. XXIV, p. 2781; R.Vol. XXVII, p. 3114; R.Vol. XXII, p. 2579; R.Vol. XXV, p. 2967; R. Vol. XXIX, p. 3386. Valiant prevailed in whole or in part on all of these motions, including the three (3) motions to reconsider filed jointly by NIR and VP. *See* R.Vol. XXIV, pp. 2856–79; R.Vol. XXX, pp. 3527-32; R.Vol. XXXII, pp. 4000–19. NIR did not prevail on any aspect of any of its motions to reconsider. *Id.*

Valiant’s claims against NIR were decided on summary judgment. *Id.* However, certain of Valiant’s claims against VP and JV had to be decided at trial. Valiant prevailed at the bi-furcated

four (4) day trial. R.Vol. XXXVII, pp. 4589–4618. Ultimately, Valiant was awarded a judgment against POBD in the total amount of \$21,485,212.26. R.Vol. XLV, pp. 5413–16. The Valiant Mortgages were adjudicated to be prior in right, title and interest to any interest possessed by the counter-defendant, cross-defendants, and third-party defendant in this case, including NIR. *Id.* The district court entered the Decree of Foreclosure entitling Valiant to sell one hundred fifty-six (156) parcels of real property subject to the Valiant Mortgages at a sheriff’s sale to pay the judgment amounts. R.Vol. XLIV, pp. 5317–5412.

On July 6, 2015, Valiant filed its Fee Memo. R.Vol. XLI, pp. 5019–57. NIR did not file an objection to the Valiant Fee Memo. The district court awarded Valiant costs and attorneys’ fees against: (a) POBD in the amount of \$731,275.48; (b) NIR in the amount of \$10,369.93; (c) JV in the amount of \$15,554.88; and (d) VP in the amount of \$15,554.88. Valiant also filed a motion for sanctions against NIR, VP and JV, which was denied. R.Vol. XLVII, pp. 5770–86.

II.
ADDITIONAL ISSUES PRESENTED ON APPEAL

None.

III.
ATTORNEYS’ FEES ON APPEAL

Valiant requests attorneys’ fees on appeal under Idaho Code § 12-121 and the corresponding procedural mechanism, Idaho Appellate Rule 41, because NIR’s appeal was brought frivolously, unreasonably and without foundation. Additional argument concerning Valiant’s request for attorneys’ fees is set forth hereinbelow Section IV.D.

IV. ARGUMENT

A. Standard Of Review.

The Idaho Supreme Court has long held that the grant or denial of discretionary costs is committed to the sound discretion of the trial court and will only be reviewed by an appellate court for an abuse of that discretion. *Fish v. Smith*, 131 Idaho 492, 493, 960 P.2d 175, 176 (1998). In reviewing whether a district court abused its discretion in awarding discretionary costs, the appellate court reviews:

- (1) Whether the trial court correctly perceived the issue as discretionary;
- (2) whether the trial court acted within the boundaries of its discretion and consistent with applicable legal standards; and
- (3) whether the trial court reached its decision through an exercise of reason.

Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 307, 313, 109 P.3d 161, 167 (2005), *overruled on other grounds by Farber v. Idaho State Insurance Fund*, 152 Idaho 495, 497, 272 P.3d 467, 469 (2012). A trial court may award discretionary costs to the prevailing party where there has been “a showing that the costs are necessary and exceptional, reasonably incurred, and should in the interests of justice be assessed against the adverse party.” *Id.* at 314, 109 P.3d at 168. The party opposing an award of discretionary costs bears the burden of demonstrating there was an abuse of discretion by the district court. *Id.*

B. The District Court’s Award Of Discretionary Costs Was Not An Abuse Of Discretion.

NIR asserts that the district court’s award of discretionary costs in favor of Valiant was an abuse of discretion. As NIR has failed to meet its burden of proof, its arguments should be rejected and the district court’s decision should be upheld.

1. NIR Did Not Object to the Valiant Fee Memo.

Rule 54(d)(5) of the Idaho Rules of Civil Procedure requires the party objecting to a memorandum of costs to file an objection within fourteen (14) days of the date of service. *Id.* Moreover, “failure to timely object to the items in the memorandum of costs constitutes a waiver of all objections to the costs claimed.” *Id.* The Idaho Supreme Court upheld this strict requirement in *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 475–76, 36 P.3d 218, 227–28 (2001).

The respondent in *Great Plains* filed its memorandum of costs on June 3, 1999, upon remittitur issued by this Court. *Id.* at 469–70, 36 P.3d at 221–22. The hearing on any objections to the memorandum of costs was set for September 7, 1999. The appellant filed its objection on the date of the hearing and filed its brief and supplemental authorities supporting its objections after the hearing. *Id.* The district court awarded respondent attorneys’ fees, costs as a matter of right, and discretionary costs. *Id.* The appellant appealed this decision to the Idaho Supreme Court, which upheld the award of fees and costs ruling that the appellant had waived any objections to the respondent’s memorandum of costs by failing to timely object as required by the Idaho Rules of Civil Procedure. *Id.* at 475–76, 36 P.3d at 227–28.

Valiant filed the Valiant Fee Memo on July 6, 2015. R.Vol. XLI, p. 5019. The Valiant Fee Memo specifically requested an award of discretionary costs against NIR. *Id.* at 5052–55. Although JV and VP filed objections, NIR did not. *See* R.Vol. XLIV, p. 5306 and R.Vol. XLV, p. 5503. As such, NIR waived any objection that it may have had to an award of discretionary costs in favor of Valiant. The district court’s award of discretionary costs should be upheld.

In the interest of full disclosure, it is worth noting that NIR and VP were represented by the same counsel; thus, it could be argued that VP’s objection to the award of discretionary costs should also apply to NIR. However, Rule 54(d)(5) is clear: “Failure to timely object to the items in the memorandum of costs constitutes a waiver of all objections to the costs claimed.” I.R.C.P. 54(d)(5). This Court has enforced the strict time requirements imposed by the rules notwithstanding a party’s ignorance or misinterpretation thereof. *See Harrison v. Bd. of Prof’l Discipline*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008) (“Considering the circumstances of this case, ignorance or misinterpretation of the rules’ requirements based on a mistaken and narrow reading . . . is not good cause . . . for their failure to comply with the timely service requirement of I.R.C.P. 4(a)(2).”); *Sammis v. MagneTek, Inc.*, 130 Idaho 342, 348, 941 P.2d 314, 320 (1997).

2. The District Court’s Award of Discretionary Costs Was Appropriate.

Even if NIR’s objection to Valiant’s Fee Memo had been timely, the district court did not abuse its discretion when it awarded Valiant \$8,116.18 in discretionary costs. R.Vol. XLVIII, pp. 5844–46. NIR bears the burden of establishing that the award was an abuse of discretion. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 313, 109 P.3d 161, 167 (2005), *overruled on*

other grounds by Farber v. Idaho State Insurance Fund, 152 Idaho 495, 497, 272 P.3d 467, 469 (2012). To establish an abuse of discretion, NIR must show: (a) the district court failed to recognize that an award of discretionary costs was discretionary; (b) the district court did not act within the boundaries of its discretion and consistent with applicable legal standards; or (c) the district court did not reach its decision through an exercise of reason. *Id.* NIR cannot meet its burden of proof.

a. The District Court Understood Its Award Was Discretionary.

NIR contends that the district court failed to perceive its award of discretionary costs to Valiant as discretionary. Valiant does not dispute that it would constitute an abuse of discretion if the district court failed to recognize that its decision was discretionary. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho at 313, 109 P.3d at 167. However, the district court clearly understood that its award of “discretionary costs” was discretionary in this case.

The language that the district court utilized in its Memorandum Awarding Costs demonstrates that it recognized the award of discretionary costs to Valiant as discretionary. The district court ruled that it was “**authorized**” to award certain discretionary costs under the Idaho Rules of Civil Procedure. R.Vol. XLVIII, pp. 5838–39. Moreover, the district court specifically analyzed and determined that certain discretionary costs were “necessary and exceptional, reasonably incurred and **should** in the interest of justice be awarded against [NIR].” *Id.* at 5840–41 (emphasis added). At no time did the district court indicate that it perceived the award of these costs was mandatory. To the contrary, Judge Buchanan repeatedly referred to these costs as

“discretionary costs” throughout her Memorandum Awarding Costs. The district court understood that its award to Valiant was discretionary. NIR’s contention that the district court did not perceive this issue as a matter of discretion should be rejected.

b. The District Court Acted Within the Boundaries of Its Discretion and Consistent With Applicable Legal Standards.

i. The District Court Acted Within the Boundaries of Its Discretion.

A trial court abuses its discretion if it exceeds the limits of its discretion or acts in a manner inconsistent with applicable Idaho law. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho at 313, 109 P.3d at 167. A court “must make express findings as to why a party’s discretionary costs should or should not be allowed.” *Id.* at 314, 109 P.3d at 168. However, “[e]xpress findings as to the general character of requested costs and whether such costs are necessary, reasonable, exceptional, and in the interests of justice is sufficient to comply with this requirement.” *Id.* Moreover, the Idaho Supreme Court “has always construed the requirement that a cost be ‘exceptional’ under I.R.C.P. 54(d)(1)(D) to include those costs incurred because the nature of the case was itself exceptional.” *Id.*

NIR asserts that the district court abused its discretion by failing to make any showing that the costs were exceptional and should, in the interests of justice, be assessed against NIR. Contrary to NIR’s contention, the district court made express findings as to the general character of each item of discretionary cost that it awarded and explained whether said costs were necessary, reasonable, exceptional and should be awarded in the interests of justice. R.Vol. XLVII, pp. 5839-41.

The district court held that “the scope and complexity of this litigation resulted in necessary and exceptional costs which Valiant should be awarded in the interest of justice.” *Id.*, p. 5839. The district court further identified within a table items of discretionary costs that Valiant had requested and explained its determination that these items were “necessary and exceptional, reasonably incurred, and should in the interest of justice be assessed against defendants,” including NIR. *Id.*, pp. 5840–41. The district court’s Memorandum Awarding Costs complied with the requirement that it make express findings as to the general character of requested costs and whether such costs met the requirements of Rule 54(d)(1)(D) of the Idaho Rules of Civil Procedure. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho at 314, 109 P.3d at 168. As such, NIR’ arguments regarding the district court’s award of discretionary costs should be rejected.

ii. **The Award of Discretionary Costs Is Consistent With Applicable Legal Standards.**

The Idaho Supreme Court “has always construed the requirement that a cost be exceptional . . . to include those costs incurred because the nature of the case was itself exceptional.” *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho at 314, 109 P.3d at 168. The determination of whether a particular case or even an individual cost is “exceptional” must be made by assessing “the context and nature of a case as a whole along with multiple circumstances.” *Hoagland v. Ada Cnty.*, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013). Factors that may be considered include, but are not limited to: the length and complexity of the litigation;² whether the payment of certain

2 *Puckett v. Verska*, 144 Idaho 161, 169–70, 158 P.3d 937, 945–46 (2007).

costs could otherwise prohibit legitimate claims from being pursued;³ “whether there was an unnecessary waste of time, the frivolity of the issues presented, and creation of unnecessary costs that could have been easily avoided”;⁴ and whether the conduct of one or more parties made the litigation exceptional or caused an exceptional amount of costs to be incurred.⁵

The district court determined that certain costs incurred by Valiant were necessary and exceptional costs, reasonably incurred, and that they should, in the interest of justice, be assessed against the defendants, including NIR. R.Vol. XLVIII, pp. 5839–41. Only 25% of the discretionary costs were assessed against NIR. The costs assessed against NIR were as follows: (1) \$5,176.25 that Valiant incurred for a litigation guarantee identifying all persons with an interest in the one hundred fifty-six (156) parcels of real property that were foreclosed upon; (2) \$601.01 that Valiant incurred, in excess of the \$500.00 allowed as a matter of right, for scanning and copying the roughly 27,000 pages of documents produced during discovery; (3) \$1,453.11 that Valiant incurred for traveling from Boise to Sandpoint to attend hearings necessitated by NIR’s unsupported motions; (4) \$691.08 that Valiant incurred for postage expenses, courier costs, telephone expenses and computer assisted research; and (5) \$344.23 that Valiant incurred for witness fees in excess of the \$20.00 per day allowed as costs as a matter of right. *Id.*

3 *Id.*

4 *Hoagland v. Ada Cnty.*, 154 Idaho at 914, 303 P.3d at 601.

5 *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 729–30, 291 P.3d 399, 412–13 (2012).

NIR does not dispute that Valiant's discretionary costs were necessary and reasonably incurred. NIR instead argues that litigation guarantees, copy/scanning costs, travel expenses, excess witness fees, and other miscellaneous costs are commonly incurred in commercial litigation matters and, therefore, an award of said costs constitutes an abuse of discretion as a matter of law. In support of its position, NIR cites to several cases in which this Court determined, under the particular facts and circumstances of said cases, that certain costs were typical and therefore not exceptional. However, this Court has never held that any cost is so typically and ordinarily incurred as a matter of law that it cannot be awarded as a discretionary cost in any case. To the contrary, this Court has emphasized that the determination of whether a cost is properly awardable as a discretionary cost must be based upon the facts and circumstances of the particular case. *Hoagland v. Ada Cnty.*, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013). Under the facts of this case, the award of discretionary costs to Valiant was appropriate and consistent with Idaho law.

(1) **The Nature of the Valiant Foreclosure Is Itself Exceptional.**

The district court determined that the length, scope and complexity of the Valiant Foreclosure justified an award of discretionary costs in the interests of justice. R.Vol. XLVIII, pp. 5838–41. The record amply supports this determination. The Valiant Foreclosure has been litigated since the Complaint was filed on October 13, 2009. R.Vol. I, p. 172. Thus, the length of this case by itself is sufficient to justify the district court's award of discretionary costs. *Puckett v. Verska*, 144 Idaho

at 169, 158 P.3d at 945 (“The district court also found that the costs were in the interests of justice because of the case’s length and complexity . . .”).

The scope and complexity of the Valiant Foreclosure are also extraordinary. This case required the parties to copy and analyze approximately 27,000 pages of real property records and other documents that were produced during discovery. R.Vol. XLVIII, p. 5840. It further required the district court to adjudicate the priority of the Valiant Mortgages *vis a vis* the recorded interests of twenty-eight (28) other parties with respect to one hundred fifty-six (156) parcels of real property located within The Idaho Club. *See* R.Vol. VI, pp. 739–67; R.Vol. XLIV, pp. 5317–5412; R.Vol. XLV, pp. 5413–5502. This case was vigorously litigated for approximately seven (7) years before Valiant was awarded a monetary judgment in the amount of \$21,485,212.26. R.Vol. XLV, pp. 5413–16. Thus, the scope and complexity of this case justified the district court’s award of discretionary costs. *Puckett v. Verska*, 144 Idaho at 169, 158 P.3d at 945.

The conduct of the parties also justified the district court’s award of discretionary costs to Valiant. The district court’s determination was based at least in part upon the conduct of NIR. The district court’s Memorandum Awarding Costs states, “[a]lthough this [c]ourt has found no frivolous conduct on the part of the defendants, at several of those hearings, counsel for one or more defendants presented oral arguments not supported by any legal authority or raised issues and claims that had already been decided on summary judgment.” R.Vol. XLVIII, p. 5840. The district court further found that:

[B]ecause Valiant had to defend against multiple motions for reconsideration by the defendants, some of which contained claims unsupported by any legal authority or that had already been determined on summary judgment, the [c]ourt finds certain other costs were also necessary and exceptional and reasonably incurred, and in the interest of justice should be assessed against the defendants.

Id., p. 5841. Thus, the conduct of NIR also made the case exceptional and/or caused an exceptional amount of costs to be incurred. *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 729–30, 291 P.3d 399, 412–13 (2012). NIR refused to acknowledge the priority of the Valiant Mortgages despite: (a) expressly subordinating to the RE Loans Mortgage; (b) subsequently releasing its purported Vendor’s Lien in its entirety; and (c) being collaterally estopped from asserting that NIR is owed anything pursuant to said Lien. R.Vol. XXII, p. 2573; R.Vol. XXIV, pp. 2872–73. Moreover, NIR filed and argued a motion to reconsider that did not seek to alter any part of the district court’s decision affecting NIR. R.Vol. XXVI, pp. 3114–32. Thus, the district court considered the frivolity of the issues presented by NIR and whether NIR’s conduct resulted in an unnecessary waste of time and/or caused Valiant to incur unnecessary costs that could have been easily avoided. *Hoagland v. Ada Cnty.*, 154 Idaho at 914 303 P.3d at 601. The conduct of NIR justified an award of discretionary costs to Valiant.

(2) **Valiant's Discretionary Costs Were Incurred Because the Case Is Exceptional.**

The district court awarded Valiant discretionary costs that were incurred because the nature of the case was itself exceptional. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho at 314, 109 P.3d at 168. The award of these costs was not an abuse of discretion and should not be overturned.

The litigation guarantee is a necessary cost that Valiant reasonably incurred because of the exceptional size, scope and complexity of the real property issues in this case. As repeatedly emphasized herein, this case involves the foreclosure of one hundred fifty-six (156) parcels of real property. R.Vol. XLIV, pp. 5317–5412; R.Vol. XLV, pp. 5413–5502. Moreover, no less than twenty-nine (29) parties, including Valiant, asserted a purported interest in all or a portion of these parcels. R.Vol. VI, pp. 739–67. Six (6) of the parcels are at least twenty (20) acres each, such that they comprise an area that is at least one hundred twenty (120) acres. R.Vol. LXIII, p. 7717. The remaining one hundred fifty (150) parcels are, for the most part, platted building lots with tax parcel identification numbers assigned by the Bonner County Assessor. *Id.*, pp. 7715-7745. Thus, the real property foreclosed by Valiant easily exceeds two hundred (200) acres. In order to foreclose upon the Valiant Mortgages, Valiant had to identify the real property that remained unsold or otherwise unreleased from the Valiant Mortgages, as well as every person or entity that had asserted an interest in these unreleased/unsold parcels. Valiant incurred necessary and exceptional expenses in the amount of \$20,705.00 to obtain a litigation guarantee that included this information. R.Vol. XLVIII, p. 5839. A litigation guarantee is not necessary in a typical foreclosure case as this

information can be obtained by a simple title search. Valiant incurred the costs of a litigation guarantee only because of the exceptional size, scope and complexity of the real property at issue. Moreover, only three parties contested the priority of the Valiant Mortgages. By contesting priority, NIR knew that it was susceptible to an award of the costs as a matter of right and the discretionary costs Valiant incurred in this case. The district court ordered that NIR was responsible to pay twenty-five percent (25%) of the cost Valiant incurred to obtain the litigation guarantee. This determination was not an abuse of discretion and should not be overturned.

The excess scanning costs Valiant was awarded are necessary costs, reasonably incurred because of the exceptional size, scope and complexity of the real property issues in this case. Over 27,000 pages of documents were produced in discovery because of the number of parties and parcels of real property that were the subject of the Valiant Foreclosure. R.Vol. XLVIII, p. 5840. A typical foreclosure case does not involve anywhere near this many documents. Valiant incurred \$1,803.03 in excess copy costs to scan/copy, exhibit stamp and code these documents. R.Vol. XLVIII, p. 5839. These excess copy costs were only incurred because of the exceptional size, scope and complexity of the real property at issue. By contesting the priority of the Valiant Mortgages, NIR knew that it was susceptible to an award of the discretionary costs Valiant incurred in this case. The district court ordered that NIR was responsible to pay twenty-five percent (25%) of the excess copy costs Valiant incurred. This determination was not an abuse of discretion and should not be overturned.

The travel costs Valiant was awarded are necessary costs, reasonably incurred because of the largely unsupported motions filed and argued by NIR in this case. NIR contested the priority of the Valiant Mortgages even though it had no factual or legal bases to do so. NIR expressly subordinated its Vendor's Lien to the RE Loans Mortgage. R.Vol. XXII, pp. 2572–74. NIR thereafter released said Vendor's Lien in its entirety. *Id.* Moreover, another district court had already adjudicated that the Vendor's Lien had been fully satisfied, such that NIR was collaterally estopped from asserting that its alleged Vendor's Lien had priority over the Valiant Mortgages. *Id.*; R.Vol. XXIV, pp. 2871-73. Nonetheless, Valiant incurred costs in the amount of \$5,815.42 traveling from Boise, Idaho to Sandpoint, Idaho to argue at hearings in opposition to defendants' unsupported motions. R.Vol. XLVIII, p. 5839. The district court determined that it was necessary for Valiant to attend these hearings in person and not by telephone. *Id.*, p. 5840. The district court ordered that NIR was responsible to pay twenty-five percent (25%) of Valiant's travel expenses because they were incurred due to NIR's unsupported motions and arguments. *Id.* These are unnecessary costs that could easily have been avoided if NIR had not continued to contest the priority of the Valiant Mortgages without any factual or legal bases to do so. *Hoagland v. Ada Cnty.*, 154 Idaho at 914, 303 P.3d at 601. The district court's award of these costs to Valiant was not an abuse of discretion and it should not be overturned.

Valiant incurred miscellaneous litigation costs for postage expenses, courier costs, telephone expenses and computer assisted research totaling \$2,764.32. The district court determined that Valiant was entitled to an award of a portion of these costs incurred because of NIR's

unsupported motions and arguments. R.Vol. XLVIII, p. 5841. As set forth hereinabove, this award was not an abuse of discretion and should not be overturned.

Valiant incurred witness fees in excess of the \$20.00 allowed as costs as a matter of right. These excess costs totaled \$1,376.93. The district court ordered NIR to pay twenty-five percent (25%) of these costs because of the size, scope and complexity of this case. *Id.*, p. 5840. As set forth hereinabove, this award was not an abuse of discretion and should not be overturned.

C. The District Court Properly Awarded Valiant Costs As A Matter Of Right.

NIR asserts that the district court abused its discretion by awarding Valiant certain costs as a matter of right. This assertion should be rejected.

Rule 54(d)(1)(A) of the Idaho Rules of Civil Procedure entitles the prevailing party to recover certain costs incurred as a matter of right. Moreover, Rule 54(d)(1)(B) of the Idaho Rules of Civil Procedure provides that the trial court “may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action” The costs that the prevailing party is entitled to recover as a matter of right are set forth in Rule 54(d)(1)(C) of the Idaho Rules of Civil Procedure.

NIR does not contend that any of the costs that Valiant was awarded as a matter of right are costs that are not awardable as such under the Idaho Rules of Civil Procedure. To the contrary, NIR only contends that the costs that Valiant was awarded are not awardable against NIR. However, NIR does not cite to any case law, statute, treatise or other legal authority to support its position. NIR does not cite to the record, court transcript or otherwise identify the factual bases

for its assignment of error by the district court. Nor does NIR make any effort to explain or otherwise set forth a cogent argument as to why or how the district court abused its discretion or acted in a manner inconsistent with Idaho law.

Rule 35(a)(6) of the Idaho Appellate Rules provides that an appellant’s argument “shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon.” *Id.* The Idaho Supreme Court will not consider an issue not “supported by argument and authority in the opening brief.” *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 323, 297 P.3d 1134, 1140 (2013). Moreover, “if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered.” *Id.* “A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue.” *Id.* The Idaho Supreme Court does not search the record on appeal for error. *Id.* “To the extent that an assignment of error is not argued and supported in compliance with the Idaho Appellate Rules, it is deemed to be waived.” *Id.*

NIR has failed to cite to the record or any legal citation to support its contention that the district court abused its discretion in ordering NIR pay Valiant twenty-five percent (25%) of the costs that it incurred as a matter of right. As such, NIR has waived any argument that the district court abused its discretion in awarding said costs to Valiant.

D. Attorneys' Fees On Appeal.

Valiant requests attorneys' fees on appeal under Idaho Code § 12-121 and the corresponding procedural mechanism, Idaho Appellate Rule 41, because NIR's appeal was brought frivolously, unreasonably and without foundation. Idaho Code § 12-121 provides, in pertinent part, as follows:

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.

Idaho Code § 12-121.

An award of attorneys' fees to Valiant is supported by: (1) *Lower Payette Ditch Company v. Harvey*, 152 Idaho 291, 271 P.3d 689 (2012); (2) *Wechsler v. Wechsler*, No. 44297 (Idaho December 6, 2017); and (3) Rule 54(d)(5) of the Idaho Rules of Civil Procedure.

Lower Payette Ditch Company presented this Court with one issue on appeal: Whether the district court abused its discretion by refusing to award attorneys' fees under Idaho Code § 12-121 because neither party had prevailed. 152 Idaho at 295, 271 P.3d at 693. The Harveys, who had requested attorneys' fees below, appealed the denial of attorneys' fees, and this Court affirmed the district court's discretionary decision. *Id.* This Court concluded that the Harveys' assertions on appeal were proven false by: (1) simply reading the record; and (2) relevant case law. *Id.* Lastly, and most importantly, this Court awarded the ditch company attorneys' fees on appeal under Idaho Code § 12-121 after finding that the Harveys "simply asked us to second-guess the district court's exercise of discretion without presenting any reasoned argument from which we could conclude that the district court abused its discretion." *Id.* at 297, 271 P.3d at 695.

Similar to the Harveys' appeal in *Lower Payette Ditch Company*, NIR's appeal lacks any reasoned argument and merely asks this Court to second-guess the district court's exercise of discretion. There are two specific similarities between the Harveys' appeal and NIR's appeal. First, in both appeals, the appellants' arguments were refuted by "simply reading" the record. For example, in *Lower Payette Ditch Company*, this Court stated that the Harveys' argument—that the ditch company did not recover any relief in the litigation—was proven false by "[s]imply reading the provisions of the settlement." *Id.* at 296, 271 P.3d at 694. Similarly, NIR's argument—the district court's award was an abuse of discretion—is proven false by the Memorandum Awarding Costs, wherein the district court demonstrated that it: (1) perceived the decision as discretionary; (2) acted consistent with the applicable legal standards; and (3) reached its decision through an exercise of reason by recognizing the overall complexity of the action. R.Vol. XLVIII, p. 5829–43.

Second, in both appeals, the appellants' arguments were undermined by relevant case law. For example, in *Lower Payette Ditch Company*, this Court stated that the Harveys' argument was clearly refuted by case law. *Id.* at 296, 271 P.3d at 694 (citing *Collins v. Jones*, 131 Idaho 556, 559, 961 P.2d 647, 650 (1998)). Similarly, NIR's argument—that certain costs did not qualify as discretionary costs under Rule 54(d)(1)(D)—is refuted by this Court's holding in *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) ("This Court has always construed the requirement that a cost be 'exceptional' under I.R.C.P. 54(d)(1)(D) to include those

costs incurred because the nature of the case was itself exceptional.”), *overruled on other grounds by Farber v. Idaho State Insurance Fund*, 152 Idaho 495, 497, 272 P.3d 467, 469 (2012).

In *Wechsler v. Wechsler*, this Court awarded attorneys’ fees under Idaho Code § 12-121 because “[t]he facts and procedural nature of this case support[ed] Sharon’s contention that Norman’s sole purpose was to cause her to incur additional legal fees and to prolong this litigation to evade collection of the judgments against him. Norman’s appeal amounts to nothing more than continued delay and evasive action.” No. 44297 at *23 (Idaho December 6, 2017). Similarly, NIR’s appeal of the award of costs, which are minuscule when compared to the overall value of the disputed property, is merely an attempt to prolong this litigation. Practically speaking, so long as the disputed property is subject to a pending legal claim (even an appeal of costs), NIR’s Vendor’s Lien continues to encumber the real property it describes. It appears that NIR is aware of this fact and is seeking to hamstring Valiant by appealing the award of costs.

Lastly, NIR’s appeal is unreasonable in light of its failure to file a timely objection to Valiant’s memorandum of costs, pursuant to Rule 54(d)(5) of the Idaho Rules of Civil Procedure. In sum, in the event that Valiant prevails on appeal, Valiant requests attorneys’ fees on appeal under Idaho Code § 12-121 because NIR’s appeal was brought frivolously, unreasonably and without foundation.

V.
CONCLUSION

NIR has failed to establish that the district court’s award of discretionary costs to Valiant was an abuse of discretion. The bases in law and fact, and the record herein all evidence that the district court: (1) understood and perceived its award of discretionary costs to Valiant as a matter of discretion; (2) established that said costs were exceptional and should be awarded to Valiant in the interests of justice; and (3) reached its determination through an exercise of reason. NIR’s arguments are without merit and should be rejected, and Valiant should be awarded attorneys’ fees and costs on appeal.

Respectfully submitted this 10th day of January 2018.

McCONNELL WAGNER SYKES & STACEY PLLC

/s/ Richard L. Stacey

By: Richard L. Stacey, Attorneys For
Cross-Claimant/Respondent
Valiant Idaho, LLC

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 10th day of January 2018, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Susan P. Weeks, Esq. James, Vernon & Weeks, PA 1626 Lincoln Way Coeur d'Alene, Idaho 83814 Telephone: 208.667.0683 Facsimile: 208.664.1684 <i>Counsel For VP Incorporated/North Idaho Resorts</i>	[<input checked="" type="checkbox"/>] U.S. Mail [<input type="checkbox"/>] Hand Delivered [<input type="checkbox"/>] Facsimile [<input type="checkbox"/>] Overnight Mail [<input checked="" type="checkbox"/>] Electronic Mail sweeks@jvwlaw.net
Gary A. Finney, Esq. John A. Finney, Esq. Finney Finney & Finney, P.A. 120 East Lake Street, Suite 317 Sandpoint, Idaho 83864 Telephone: 208.263.7712 Facsimile: 208.263.8211 <i>Counsel For J.V., LLC</i>	[<input checked="" type="checkbox"/>] U.S. Mail [<input type="checkbox"/>] Hand Delivered [<input type="checkbox"/>] Facsimile [<input type="checkbox"/>] Overnight Mail [<input checked="" type="checkbox"/>] Electronic Mail garyfinney@finneylaw.net johnfinney@finneylaw.net

/s/ Richard L. Stacey

Richard L. Stacey

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2016 AUG 22 PM 3:41

CLERK DISTRICT COURT

SR
DEPUTY

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

**GENESIS GOLF BUILDERS, INC., formerly
known as NATIONAL GOLF BUILDERS,
INC., a Nevada corporation,**

Plaintiff,

v.

**PEND OREILLE BONNER DEVELOPMENT,
LLC, a Nevada limited liability company, et al.,**

Defendants.

CASE NO. CV-2009-0001810

MEMORANDUM DECISION
ORDER AWARDING COSTS
AND ATTORNEYS' FEES TO
VALIANT IDAHO, LLC

**AND RELATED COUNTER, CROSS AND
THIRD PARTY ACTIONS PREVIOUSLY
FILED HEREIN**

THIS MATTER came before the Court on August 17, 2016, for a hearing on Valiant Idaho, LLC's Memorandum of Costs and Attorneys' Fees and the objections thereto. Valiant Idaho, LLC ("Valiant") is represented by Richard L. Stacey, of MCCONNELL WAGNER SYKES & STACEY, PLLC. JV, LLC ("JV") is represented by Gary A. Finney, of FINNEY FINNEY & FINNEY, P.A. North Idaho Resorts, LLC ("NIR") and VP, Incorporated ("VP") are represented by Susan P. Weeks, and David M. Keyes, of JAMES, VERNON & WEEKS, P.A.

JV, NIR and VP are referred to collectively herein as "defendants."

NOW, THEREFORE, upon consideration, and pursuant to Rule 54(d)(6) and (e)(7) of the Idaho Rules of Civil Procedure, this Court hereby settles the dollar amount of the costs and attorneys' fees to be awarded to Valiant in this Memorandum Decision and Order.

I. INTRODUCTION

This lengthy lawsuit has two parts: The first part is referred to herein as the "Genesis Suit." The defendants named in the Genesis Suit included RE Loans, LLC, Pensco Trust Co., Mortgage Fund '08, LLC (collectively, "Idaho Club Lenders"), and others. Genesis' complaint sought to foreclose a mechanic's lien it recorded to secure amounts it was allegedly owed for work performed in the construction of the Idaho Club golf course. Cross-claims and counterclaims were alleged by several defendants. The Idaho Club Lenders successfully defended the priority of their respective Mortgages against all of these claims and cross-claims.

The second part is referred to herein as the "Valiant Foreclosure." On August 19, 2014, Valiant amended its Answer in the Genesis Suit to include cross-claims and a Third Party Complaint to establish the amounts Pend Oreille Bonner Development, LLC ("POBD") owed to the Idaho Club Lenders and to foreclose the 2007 RE Loans Mortgage, the Pensco Mortgage, and MF08 Mortgage (collectively, "Valiant Mortgages") to recover these amounts. After multiple summary judgments, several motions to reconsider, and a bifurcated four (4) day bench trial, this Court determined that the Valiant Mortgages are valid first, second and/or third priority liens recorded against the Idaho Club Property; it awarded Valiant a Judgment in the amount of \$21,485,212.26¹ against POBD; and it awarded Valiant a Decree of Foreclosure entitling Valiant to sell the Idaho Club Property to recover the amounts Valiant is owed pursuant to the Judgment.

II. DISCUSSION

A. Valiant is the Prevailing Party in This Case.

Idaho Rule of Civil Procedure 54(d)(1) provides, in part:

(B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B). (Emphasis supplied).

Valiant prevailed on all of its claims, and in defending itself against all of the cross-claims and affirmative defenses raised by JV, NIR and VP in this case. The Valiant Mortgages were adjudicated to be first, second and/or third priority liens recorded against the Idaho Club Property. Valiant obtained a Judgment in the amount of \$21,485,212.26² against POBD and a Decree of Foreclosure entitling it to sell the Idaho Club Property to pay the Judgment. The claims and affirmative defenses of JV, NIR and VP were rejected. Accordingly, this Court, in the exercise of its discretion, finds that Valiant is the prevailing party in this action.

This prevailing party analysis is unique to this case, and does not necessarily apply to the other Idaho Club Lawsuits described in Valiant's Memorandum of Costs and Attorneys' Fees. *See Valiant Idaho, LLC's Memorandum of Costs and Attorneys' Fees* (filed July 6, 2016), at 2-5. Consequently, this Court does not interpret Idaho Rule of Civil Procedure 54 as authorizing an award to Valiant in this case of the fees and costs it incurred in the other Idaho Club Lawsuits.

¹ plus post-judgment interest at the rate of 5.625% per annum.

² *ibid.*

B. Valiant Is Entitled To An Award of Costs and Attorneys' Fees Against POBD Pursuant to the Valiant Mortgages.

1. Basis for the Award

Idaho Rule of Civil Procedure 54(e) provides, in part:

(1) Pursuant to Contract or Statute. In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), **when provided for by any statute or contract.**

I.R.C.P. 54(e)(1). (Emphasis supplied).

Under the terms of the Valiant Mortgages, Valiant is entitled to an award of its legal expenses, including court costs and reasonable attorneys' fees that it incurred in the foreclosure action against POBD. Each of the Valiant Mortgages has language entitling it to recover these fees and costs from POBD, and also, securing POBD's obligation to pay these fees and costs.

Specifically, paragraph 4.9 of the 2007 RE Loans Mortgage (Plaintiff's Ex. 1), Pensco Mortgage (Plaintiff's Ex. 16), and MF08 Mortgage (Plaintiff's Ex. 18) provides:

The prevailing party in any legal action brought by one party against the other and arising out of this Mortgage or the Note shall be entitled to, in addition to any other rights and remedies he may have, to reimbursement for their expenses including court costs and reasonable attorney fees.

Id. (Emphasis supplied). This provision obligates POBD to reimburse Valiant for all reasonable attorneys' fees and court costs it incurs in the Valiant Foreclosure.

Moreover, each of the Valiant Mortgages grants Valiant said mortgage "TO HAVE AND TO HOLD the Mortgaged Property for the purposes and uses herein expressed and FOR THE PURPOSE OF SECURING, in such order of priority as Mortgagee may elect: . . . 2. Due, prompt, and complete observance, performance, and discharge of all obligations of the Mortgagor under this Mortgage and any and all modifications, extensions or renewals of this Mortgage." Plaintiff's Ex. 1, pp. 3-4, Plaintiff's Ex. 16, pp. 3-4, and Plaintiff's Ex. 18, pp. 3-4

(emphasis in original). Thus, POBD's obligation to pay Valiant's expenses, including court costs and reasonable attorneys' fees, is also secured by the Valiant Mortgages.

The secured obligations extend beyond those obligations set forth in paragraph 4.9 of the Valiant Mortgages. POBD is also obligated to forever warrant and defend the priority of Valiant's interest in and title to the Idaho Club Property against any and all lien claims made by third parties. See paragraph 1.2 of the Valiant Mortgages, at Plaintiff's Ex. 1, p. 5, Plaintiff's Ex. 16, p. 5, and Plaintiff's Ex. 18, p. 7. POBD must "pay or reimburse Mortgagee for all reasonable expenses incurred by Mortgagor before and after the date of this Mortgage with respect to **any and all actions**, matters or transactions arising out of or related to the this Mortgage." Paragraph 4.4 of the Valiant Mortgages, at Plaintiff's Ex. 1, p. 15, Plaintiff's Ex. 16, p. 15, and Plaintiff's Ex. 18, p. 17 (emphasis supplied). Furthermore, POBD is also obligated to "indemnify and hold harmless the Mortgagee from and against all claims, damages, losses and liabilities (including, without limitation, reasonable attorneys' fees and expenses) **arising out of or based upon any matter related to the Mortgaged Property and the occupancy, ownership, maintenance, or management of the Mortgaged Property by the Mortgagor.**" Paragraph 4.5 of the Valiant Mortgages, at Plaintiff's Ex. 1, p. 15, Plaintiff's Ex. 16, pp. 15-16, and Plaintiff's Ex. 18, p. 17 (emphasis supplied). These provisions obligate POBD to reimburse Valiant for all reasonable attorneys' fees and court costs it incurred in the Genesis Suit.

Since all of the obligations of POBD are secured by the Valiant Mortgages, all expenses, including reasonable attorneys' fees and costs, incurred by Valiant and its predecessors-in-interest in this case are secured by the Valiant Mortgages.

In sum, as the prevailing party, Valiant is entitled to an award of attorneys' fees and costs against POBD under the terms of the Valiant Mortgages. POBD is obligated under the

Mortgages to reimburse Valiant for these fees and costs, and this obligation is secured by the Valiant Mortgages. Hence, this secured obligation is prior in right, title and interest to any interest possessed by JV, NIR or JV. Accordingly, Valiant's award of attorneys' fees and costs against POBD shall be incorporated into the Judgment as part of Valiant's first priority position pursuant to the 2007 RE Loans Mortgage.

2. Amount of the Award

Upon consideration of the Declaration of Richard L. Stacey in Support of Valiant Idaho's LLC's Memorandum of Costs and Attorneys' Fees, filed July 6, 2016 (hereafter, "*Stacey Dec.*"), and Valiant's Memorandum of Costs and Attorneys' Fees, this Court finds reasonable, and awards against POBD, the following costs and fees:

GENESIS SUIT [see <i>Stacey Dec.</i> , Ex. A]		
Total Attorneys' Fees	\$ 146,853.00	
Total Costs As A Matter of Right	\$ 780.40	<i>see Stacey Dec.</i> , Ex. A-2
Total Discretionary Costs	\$ 1,312.24	<i>see Id.</i> , Ex. A-3
TOTAL COSTS	\$ 148,945.64	

VALIANT FORECLOSURE [see <i>Stacey Dec.</i> , Ex. G]		
Total Attorneys' Fees	\$ 579,460.50	
Total Costs As A Matter of Right	\$ 2,869.34	Actual fees for service of pleadings or documents [see <i>Stacey Dec.</i> , Ex. G-4]
TOTAL COSTS	\$ 582,329.84	

The actual fees for service of pleadings or documents are being assessed against POBD instead of JV, VP and NIR because Exhibit G-4 of the *Stacey Dec.* does not include any invoices for service on JV, VP or NIR, and the defendants shall not be required to reimburse Valiant for

service on the numerous other parties in this matter. To avoid duplicate cost awards, and because POBD did not defend against the Valiant Foreclosure or participate adversely to Valiant at trial, the Court shall assess the remaining costs as a matter of right and discretionary costs incurred by Valiant in the Valiant Foreclosure against JV, VP and NIR, and not against POBD.

Accordingly, Valiant is awarded attorneys' fees and costs against POBD in the total amount of (\$148,945.64 + \$582,329.84) = \$731,275.48. This amount shall be incorporated into the Judgment as part of Valiant's first priority position pursuant to the 2007 RE Loans Mortgage.

Because attorneys' fees and costs have been awarded to Valiant under the terms of the Valiant Mortgages, it is unnecessary to conduct a fee analysis under Idaho Code § 12-120(3).

C. Valiant Is Not Entitled To An Award of Attorneys' Fees Against JV, NIR and VP.

Idaho Rule of Civil Procedure 54(e) provides, in part:

...
(2) Pursuant to Idaho Code Section 12-121, Attorney fees under Idaho Code Section 12-121 may be awarded by the court **only when it finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation, which finding must be in writing and include the basis and reasons for the award**. No attorney fees may be awarded pursuant to Idaho Code Section 12-121 on a default judgment.

I.R.C.P. 54(e)(2). (Emphasis supplied).

"An award of attorney fees pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1) will not be disturbed absent an abuse of discretion." *Idaho Military Historical Society, Inc. v. Maslen*, 156 Idaho 624, 629, 329 P.3d 1072, 1077 (2014) (citation omitted).

Similarly, "[t]he district court's determination as to whether an action was brought or defended frivolously will not be disturbed absent an abuse of discretion." *Id.* (citation omitted). In *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 20 P.3d 702 (2001), the Idaho Supreme Court set forth the standard for making this determination:

This Court has held that an award of attorney fees under I.C. § 12-121 is not a matter of right, and is appropriate only when the Court, in its discretion, “is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.” *Owner-Operator Ind. Drivers Assoc. v. Idaho Public Util. Comm’n*, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994). **When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.** See *Turner v. Willis*, 119 Idaho 1023, 812 P.2d 737 (1991). The award of attorney fees rests in the sound discretion of the trial court and the burden is on the person disputing the award to show an abuse of discretion. See *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982).

Id. at 524-525, 20 P.3d at 708-709. (Emphasis supplied).

Recently, in *Idaho Military Historical Society, Inc. v. Maslen*, *supra*, the Supreme Court attempted to clarify its ruling in *Nampa & Meridian Irrigation Dist.*, as follows:

Unfortunately, the standard articulated in *Nampa Meridian* can lead to the result that a party who makes claims or defenses that are clearly frivolous, unreasonable, or without foundation may avoid the consequences of that conduct and cast the burden of attorney fees on the other party, even if the overall view of the case establishes the unreasonableness of the conduct requiring the lawsuit. Arguably, a single, triable issue of fact may excuse a party from the aggregate of misconduct that necessitates or dominates the conduct of the lawsuit. **This Court does back away from and clarify the overly strict application of Idaho Code section 12-121 set forth in *Nampa Meridian*.** Apportionment of attorney fees is appropriate for those elements of the case that were frivolous, unreasonable, and without foundation. Apportionment of costs and fees is common even for district courts, and this step back from the language of *Nampa Meridian* is consistent with the general principles of apportioning costs and fees.

The record in this case is clear that litigation to obtain possession of the aircraft should never have been necessary. **The litigation was necessitated by factual claims that were indefensible. The Plaintiff asserted some legal theories it could not prove. Those assertions were in response to factual claims by the Defendants that were unsupportable and which were known by the Defendants to be unsupportable. The Defendants had no legitimate triable claims of fact on the question that necessitated the initiation of this action.** The district court did not abuse its discretion in awarding the attorney fees for the claims of the Defendants necessitating this lawsuit that were frivolous,

unreasonable, and without adequate foundation.

156 Idaho 624, 632, 329 P.3d 1072, 1080 (2014). (Emphasis supplied).

Comparing the conduct of the defendants in this case with the conduct the district court found frivolous in *Idaho Military Historical Society, Inc.*, this Court finds as follows: In the Valiant Foreclosure, all the defendants asserted some legal theories they could not prove. One or more of the defendants made some factual claims that were unsupportable. The Court does not find that those claims were known by the defendants to be unsupportable. The issue at trial—namely, whether Loan No. P0099 from RE Loans to POBD and Loan No. P0106 from Pensco Co. to POBD were satisfied at the closing of Loan No. P0106 from MF08 to POBD, or some time thereafter—arose out of a legitimate factual claim by the defendants that the loans had been satisfied. The trial resulted in the production by Valiant of evidence that clearly and convincingly showed that the loans were not satisfied, and the amounts still due thereunder.

Though *some* of the claims and defenses raised by JV, NIR and VP lacked any factual or legal basis, viewing the entire course of the litigation, this Court does not believe that JV, NIR or VP defended this action frivolously, unreasonably, or without foundation. Absent such frivolous or unreasonable conduct, Valiant is not entitled to an award of attorneys' fees against them.

D. Valiant is Entitled to Costs as a Matter of Right Against JV, NIR and VP.

Idaho Rule of Civil Procedure 54(d)(1) provides, in part:

(d) Costs.

(1) *In General; Items Allowed.*

(A) Parties Entitled to Costs. Except when otherwise limited by these rules, **costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.**

...

(C) Costs as a Matter of Right. When costs are awarded to a party, that party is entitled to the following costs, actually paid, as a matter of right: ...

I.R.C.P. 54(d)(1)(A), (C). (Emphasis supplied).

Rule 54(d)(1)(A) and (C) of the Idaho Rules of Civil Procedure grant the prevailing party in a civil matter certain costs “as a matter of right.” Valiant prevailed in the Valiant Foreclosure against the claims and affirmative defenses raised by JV, NIR and VP in motion practice and at trial. As such, Valiant is entitled to an award of these costs. Valiant’s Memorandum of Costs and Attorneys’ Fees and the Stacey Dec. itemize the costs incurred by Valiant that are expressly authorized under Rule 54(d)(1)(C). These include certain court filing fees, service of process fees, deposition and transcript fees, witness fees, witness travel expenses, preparation of trial exhibits, and expert witness fees that Valiant incurred in this case.

Upon consideration, this Court finds reasonable the following costs as a matter of right:

COSTS AS A MATTER OF RIGHT		
a.	Court Filing Fees [see Stacey Dec., Exs. A-2, G-2]	\$ 86.00
b.	Witness fees (\$20.00 per day; \$.30 mileage) actually paid for each day the following witnesses testified at deposition or at trial Casey Linscott Trial - \$20.30 Barney Ng Trial - \$20.00 [see Stacey Dec., Ex. G-5]	\$ 20.30
c.	Expenses of certified copies of documents admitted as evidence in hearings or at trial [see Stacey Dec., Ex G-5]	\$ 158.50
d.	Costs of preparing models, maps, pictures, photographs, or other exhibits not to exceed \$500.00 for each party [see Stacey Dec., Ex G-5/Streamline]	\$ 500.00
e.	Charges for reporting and transcribing all depositions and charges for one copy of every deposition taken [see Stacey Dec., Ex D-2, Ex G-6]	\$ 8,250.19
TOTAL COSTS AS A MATTER OF RIGHT		\$ 9,014.99

E. Valiant is Entitled to an Award of Discretionary Costs Against JV, NIR and VP.

Rule 54(d)(1)(D) of the Idaho Rules of Civil Procedure authorizes this Court to award the prevailing party “[a]dditional items of cost not enumerated in, or in an amount in excess of that listed in subpart (C), ... on a showing that the costs were **necessary and exceptional costs,**

reasonably incurred, and should in the interest of justice be assessed against the adverse party.” I.R.C.P. 54(d)(1)(D) (emphasis supplied). As the prevailing party, Valiant seeks an award of its discretionary costs against JV, VP and NIR, as itemized in Valiant’s Memorandum of Costs and Attorneys’ Fees and the Stacey Dec. The defendants have filed objections thereto.

Upon consideration, this Court finds necessary and exceptional and reasonably incurred the following discretionary costs:

DISCRETIONARY COSTS		
a.	Litigation Guarantee for foreclosure action [see <i>Stacey Dec.</i> , Ex. G-12]	\$ 20,705.00
a.	Witness fees actually incurred in excess of the \$20.00 per witness per day allowed as a matter of right [see <i>Stacey Dec.</i> , Ex G-11 – Barney Ng]	\$ 1,376.93
b.	Costs of scanning, exhibit stamping, copying, and coding and preparing models, maps, pictures, photographs, or other exhibits for use at trial in excess of the \$500.00 per party allowed as a matter of right [see <i>Stacey Dec.</i> , Ex. G-10]	\$ 588.55
c.	Electronic discovery costs for documents not used as exhibits at trial [see <i>Stacey Dec.</i> , Ex. A-3]	\$ 182.61
d.	In-House photocopy expenses [see <i>Stacey Dec.</i> , Ex. A-3]	\$ 351.30
e.	Out-sourced photocopy expenses, and costs of copies reimbursed to third parties [see <i>stacey Dec.</i> , Exs. A-3, G-10]	\$ 680.57
f.	Postage \$ 76.86 [see <i>Stacey Dec.</i> , Ex. G-7] FedEx \$ 532.82 [see <i>Stacey Dec.</i> , Exs. A-3, G-7] Couriers: \$ 44.00 [see <i>Stacey Dec.</i> , Ex G-8]	\$ 653.68
g.	Long distance telephone and conference call charges [see <i>Stacey Dec.</i> , Exs. A-3, G-9]	\$ 239.58
h.	Travel expenses for counsel [see <i>Stacey Dec.</i> , Ex. G-11]	\$ 5,815.42
i.	Computer-assisted research [see <i>Stacey Dec.</i> , Exs. A-2, G-2]	\$ 1,871.06
TOTAL DISCRETIONARY COSTS		\$ 32,464.70

The Court finds that the scope and complexity of this litigation resulted in necessary and exceptional costs which Valiant should be awarded in the interests of justice, because these are costs which Valiant had to expend to fully litigate this matter but which are not contemplated by

the Idaho Rules of Civil Procedure as costs as a matter of right. Specifically:

1. The witness fees Valiant paid in excess of the \$20.00 per day were necessary and exceptional, reasonably incurred, and should in the interest of justice be assessed against the defendants
2. This case required the scanning and copying of thousands of pages of documents. Mr. Stacey estimates that approximately 27,000 documents were produced in discovery; nearly 200 documents were scanned into exhibits for trial; and hard copies of all exhibits were required for the witnesses and record at trial. These costs were necessary and exceptional, reasonably incurred, and should in the interest of justice be assessed against the defendants.
3. In order to ensure that every person or entity with an interest in the Idaho Club Property was named as a defendant in the Valiant Foreclosure, Valiant obtained and paid for a Litigation Guarantee. This Litigation Guarantee was critical to the foreclosure action, and the Court finds that it was a necessary and exceptional cost, reasonably incurred, and should in the interest of justice be assessed against the defendants.
4. Counsel for Valiant is located in Boise, Idaho. Valiant incurred significant travel expenses to and from the multiple hearings that were necessary in the Valiant Foreclosure. Although this Court has found no frivolous conduct on the part of the defendants, at several of those hearings, counsel for one or more of the defendants presented oral arguments not supported by any legal authority or raised issues and claims that had already been determined on summary judgment. Because of the complexity of the case, it was necessary for counsel to appear in person and not by telephone. Thus, the Court finds these travel costs were necessary and exceptional, reasonably incurred,

and should in the interest of justice be assessed against the defendants.

5. Similarly, because Valiant had to defend against multiple motions for reconsideration by the defendants, some of which contained claims unsupported by any legal authority or that had already been determined on summary judgment, the Court finds certain other costs were also necessary and exceptional and reasonably incurred, and in the interest of justice should be assessed against the defendants. They include Valiant's (i) outsourced photocopy expenses; (ii) in-house photocopy expenses; (iii) postage expenses; (iv) courier costs; (v) telephone expenses; and (vi) cost of computer-assisted research.

Based on the foregoing, Valiant is an awarded costs against JV, VP and NIR in the total amount of $(\$9,014.99 + \$32,464.70) = \$41,479.69$.

F. Apportionment of Award of Costs Between JV, NIR and VP.

The Court is authorized by Idaho Rule of Civil Procedure 54 to apportion costs between the defendants. Recognizing that NIR participated in pre- and post-trial motion practice, but not in the court trial, this Court apportions the costs as follows:

1. NIR is responsible for 0.25 of $\$41,479.69 = \$10,369.93^3$
2. JV is responsible for 0.375 of $\$41,479.69 = \$15,554.88$
3. VP is responsible for 0.375 of $\$41,479.69 = \$15,554.88$

III. CONCLUSION AND ORDER

NOW, THEREFORE, based on the foregoing, IT IS HEREBY ORDERED THAT:

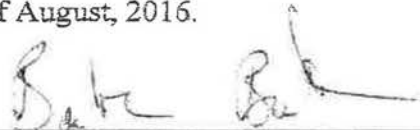
1. Valiant is awarded attorneys' fees and costs against POBD in the total amount of $\$731,275.48$. This amount shall be incorporated into the Judgment as part of

Valiant's first priority position pursuant to the 2007 RE Loans Mortgage.

2. Valiant is awarded costs against NIR in the amount of \$10,369.93
3. Valiant is awarded costs against JV in the amount of \$15,554.88
4. Valiant is awarded costs against VP in the amount of \$15,554.88

IT IS SO ORDERED.

DATED this 22 day of August, 2016.



Barbara Buchanan
District Judge

³ The exact value is \$10,369.92, but the Court has added \$.01 to this value to take into account the rounding of the numbers and to ensure that the contributions from each defendant, added together, total \$41,479.69.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid AND a courtesy copies sent by electronic mail, this 22 day of August, 2016, to:

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DR
Deputy Clerk

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2016 AUG 22 PM 3:41

CLERK DISTRICT COURT

BB
DEPUTY

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

GENESIS GOLF BUILDERS, INC., formerly)
known as NATIONAL GOLF BUILDERS,)
INC., a Nevada corporation,)

Plaintiff,)

v.)

PEND OREILLE BONNER DEVELOPMENT,)
LLC, a Nevada limited liability company, *et al.*,)

Defendants.)

AND RELATED COUNTER, CROSS AND)
THIRD PARTY ACTIONS PREVIOUSLY)
FILED HEREIN)

CASE NO. CV-2009-0001810

JUDGMENT re:
COSTS AND ATTORNEYS' FEES

JUDGMENT IS ENTERED AS FOLLOWS:

1. Valiant Idaho, LLC is awarded costs and attorneys' fees against Pend Oreille Bonner Development, LLC, in the amount of **\$731,275.48**. This amount shall be incorporated into the Judgment as part of Valiant's first priority position pursuant to the 2007 RE Loans Mortgage.
2. Valiant Idaho, LLC is awarded costs against North Idaho Resorts, LLC in the amount of **\$10,369.93**.

3. Valiant Idaho, LLC is awarded costs against JV, LLC in the amount of **\$15,554.88.**
4. Valiant Idaho, LLC is awarded costs against VP, Incorporated in the amount of **\$15,554.88.**

IT IS SO ORDERED.

DATED this 22 day of August, 2016.



Barbara Buchanan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid AND a courtesy copies sent by electronic mail, this 22 day of August, 2016, to:

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