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### Valiant Idaho, LLC v. North Idaho Resorts, LLC Clerk's Record v. 33 Dckt. 44583

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IN THE

**SUPREME COURT  
OF THE  
STATE OF IDAHO**

ISC #44583, 44584, 44585  
Bonner #CV2009-1810

**Valiant Idaho, LLC**  
*Cross-Claimant/Respondent*

vs.

**North Idaho Resorts  
JV, LLC  
VP Incorporated**  
*Cross-Defendants/Appellants*

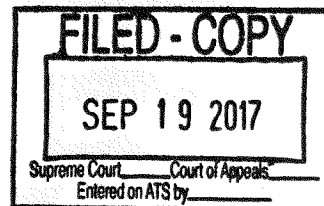
**CLERK'S RECORD ON APPEAL**

*Appealed from the District Court of the First Judicial District  
of the State of Idaho, in and for the County of Bonner*

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**VOLUME XXXIII**

**44583**

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STATE OF IDAHO  
 COUNTY OF BONNER  
 FIRST JUDICIAL DIST.  
 2015 OCT 19 PM 4 21  
 CLERK DISTRICT COURT  
 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.,	)	Case No. CV-2009-1810
formerly known as National	)	
Golf Builders, Inc., a Nevada	)	JV L.L.C.'S RESPONSE TO
corporation,	)	VALIANT'S MOTION TO STRIKE
	)	INADMISSIBLE EVIDENCE
Plaintiff,	)	
	)	
v.	)	
	)	
PEND OREILLE BONNER	)	
DEVELOPMENT, LLC, a Nevada	)	
limited liability company;	)	
R.E. LOANS, LLC, a California	)	
limited liability company; DAN	)	
S. JACOBSON, an individual,	)	
SAGE HOLDINGS LLC, an Idaho	)	
limited liability company;	)	
STEVEN G. LAZAR, an	)	
individual; PENSCO TRUST CO.	)	
CUSTODIAN FBO BARNEY NG;	)	
MORTGAGE FUND '08 LLC, a	)	
Delaware limited liability	)	
company; VP, INCORPORATED, an	)	
Idaho corporation; JV, LLC	)	
L.L.C., an Idaho limited	)	
liability company; WELLS FARGO	)	
FOOTHILL, LLC, a Delaware	)	
limited liability company;	)	
INTERSTATE CONCRETE AND	)	

ASPHALT COMPANY, an Idaho )  
corporation; T-O ENGINEERS, )  
INC., fka Toothman-Orton )  
Engineering Company, an Idaho )  
corporation; PUCCI )  
CONSTRUCTION INC., an Idaho )  
corporation; ACI NORTHWEST, )  
INC., an Idaho corporation; )  
LUMBERMENS, INC., dba )  
ProBuild, a Washington )  
corporation; ROBERT PLASTER )  
dba Cedar Etc; NORTH IDAHO )  
RESORTS, LLC, an Idaho limited )  
liability company; R.C. WORST )  
& COMPANY, INC., an Idaho )  
corporation; DOES 1 through X, )

Defendants. )

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AND RELATED COUNTERCLAIMS, )  
CROSS-CLAIMS, AND THIRD-PARTY )  
COMPLAINTS )

---

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 COUNTERCLAIMS, )  
CROSS-CLAIMS, AND THIRD-PARTY )  
COMPLAINTS )

VALIANT IDAHO, LLC, an Idaho )

limited liability company, )  
 )  
 Third Party )  
 Plaintiff, )  
 )  
 v. )  
 )  
 PEND ORIELLE BONNER )  
 DEVELOPMENT HOLIDNGS, INC., a )  
 Nevada corporation; BAR K, )  
 INC., a California )  
 corporation; TIMBERLINE )  
 INVESTMENTS LLC, an Idaho )  
 limited liability company; AMY )  
 KORENGUT, a married woman; HLT )  
 REAL ESTATE, LLC, an Idaho )  
 limited liability company; )  
 INDEPENDENT MORTGAGE LTD. CO., )  
 an Idaho limited liability )  
 company; PANHANDLE MANAGEMENT )  
 INCORPORATED, an Idaho )  
 corporation; FREDERICK J. )  
 GRANT, an individual; CRISTINE )  
 GRANT, an individual; RUSS )  
 CAPITAL GROUP, LLC, an Arizona )  
 limited liability company; )  
 MOUNTIAN WEST BANK, a division )  
 of GLACIER BANK, a Montana )  
 corporation; FIRST AMERICAN )  
 TITLE COMPANY, a California )  
 corporation; NETTA SOURCE LLC, )  
 a Missouri limited liability )  
 company; MONTAHENO )  
 INVESTMENTS, LLC, a Nevada )  
 limited liability company; )  
 CHARLES W. REEVES and ANN B. )  
 REEVES, husband and wife; and )  
 C.E. KRAMER CRANE & )  
 CONTRACTING, INC., an Idaho )  
 corporation, )  
 )  
 Third Party )  
 Defendants. )  
 )  
 \_\_\_\_\_ )  
 JV, LLC L.L.C., an Idaho )  
 limited liability company, )

Defendant and Cross- )  
 Claimant against all of the )  
 Defendants and Third Party )  
 Plaintiff, )  
 )  
 v. )  
 )  
 VALIANT IDAHO, LLC, an Idaho )  
 limited liability company; )  
 V.P., INC., an Idaho )  
 corporation; RICHARD A. )  
 VILLELLI, a married man; MARIE )  
 VICTORIA VILLELLI, a married )  
 woman; VILLELLI ENTERPRISES, )  
 INC., a California )  
 corporation; RICHARD A. )  
 VILLELLI, as TRUSTEE OF THE )  
 RICHARD ANTHONY VILLELLI AND )  
 MARIE VICTORIA VILLELLI )  
 REVOCABLE TRUST; THE IDAHO )  
 CLUB HOMEOWNERS ASSOCIATION, )  
 INC., an Idaho corporation; )  
 the entity named in Attorney )  
 Toby McLaughlin's Notice of )  
 Unpaid Assessment as PANHANDLE )  
 MANAGEMENT, INCORPORATED, an )  
 Idaho corporation; and )  
 HOLMBERG HOLDINGS, LLC, a )  
 California limited liability )  
 company, )  
 )  
 Third Party )  
 Defendants. )

---

COMES NOW the Defendant JV, L.L.C. ("JV") by and through  
 its Attorney Gary A. Finney, and responds to Valiant's Motion to  
 Strike Inadmissible Evidence as follows:

- I. VALIANT'S MOVES TO STRIKE AS FOLLOWS
  - a. Deposition Testimony of Charles Reeves
  - b. Borrower's Settlement Statement, dated July 31, 2008

c. Borrower's Final Settlement Statement, dated August  
6, 2008

Concerning the Deposition of Charles Reeves, of August 19,  
2013, in Bonner County Case No. CV-2011-0135, Valiant's Motion  
is moot and Valiant has waived the issue of its admissibility.  
First, the Deposition was taken in the Case No. CV-2011-0135.  
In that action, JV, NIR/VP, RE Loans, Pensco, and Mortgage Fund  
08, were all named as parties Defendant. All of these parties  
were served and represented by counsel in the action.  
Specifically, Attorney Rick Stacey was attorney for RE Loans.  
Pensco and Mortgage Fund 08 were represented by Attorney Brent  
Featherston. In this action Attorney Stacey, counsel for RE  
Loans, now also represents Valiant Idaho.

One of JV's defenses to this instant action, involves the  
principals of res judicata. That is to say that RE Loans was  
required to bring its action on its 2006 and 2007 mortgages,  
which involved its Notes/Mortgages against its co-defendants, by  
way of cross-claims. In JV's Memorandum in Opposition to  
Valiant's Motion for Summary Judgment (partial - only as to  
"priorities" of various Mortgages, filed 2/27/2015, JV moved the  
Court to Judicially Notice, Bonner County Case CV-2009-0181. In  
that action, the Findings were served on Attorney Rick Stacey,  
by Clerk's Rule 77(d) mailing on June 3, 2014. In those  
Findings, District Judge Griffin found that, "POBD did pay the

debt they assumed to RE". The actual litigation finding is a bar to RE action, now assigned to Valiant, which involves the defenses of res judicata, collateral estoppel, and issue preclusion, which has not yet been ruled on in this action.

The Court, in all the prior motions and hearings, has considered the Deposition of Charles Reeves and the Borrower's Settlement Statement, dated July 31, 2008, and the Borrower's Final Settlement Statement of August 6, 2008, without any objection by Valiant. Valiant has waived any objection, and these items are now evidence of facts before the Court. As to the Borrower's Settlement Statement dated July 31, 2008, it was Exhibit "B" to the August 19, 2013 Deposition of Charles Reeves, and it is signed by James Berry, dated July 13, 2008. JV's initial Memorandum, filed February 27, 2015, is supported by Affidavit of James Berry. James Berry's Verification is on page 27 of that Memorandum by JV and the Borrower's Settlement Statement of July 31, 2008 is JV's Defendant's Exhibit "G". The Borrower's Final Statement dated August 6, 2008 is also attached as JV's Defendant's Exhibit "H", and the Reeve's Deposition, JV's Exhibit "E".

In summary as to these two "settlement statements" and the deposition, they are all supported by Affidavit of James Berry's Verification.

As to JV's Defendant's Exhibit "E", which is the Deposition of Charles Reeves, it has been also placed in the file by Declaration of Susan Weeks and Richard Villelli.


Further by this Declaration of Attorney Gary A. Finney the Reeves' Deposition is submitted as true and accurate copy of his original Deposition.

Wherefore, the Court is requested to deny Valiant's Motion to Strike.

Declaration

I hereby certify and declare under penalty of perjury pursuant to the law of States of America and the State of Idaho.

Respectfully submitted, this 19<sup>th</sup> day of October, 2015.

  
\_\_\_\_\_  
GARY A. FINNEY  
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile or as otherwise indicated, this 19 day of October, 2015, and was addressed as follows:

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Boise, ID 83712  
[Attorney for R.E. LOANS, LLC & VALIANT IDAHO LLC]  
Via Facsimile: (208) 489-0110

Susan Weeks  
Steven C. Wetzell  
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[Attorney for NORTH IDAHO RESORTS, LLC, V.P. INC, & FOR  
JV'S THIRD PARTY DEFENDANTS]

By: 



Richard L. Stacey, ISB #6800  
 Jeff R. Sykes, ISB #5058  
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STATE OF IDAHO  
 COUNTY OF BONNER  
 FIRST JUDICIAL DIST.  
 2015 OCT 20 PM 2 40  
 CLERK DISTRICT COURT  
 DEPUTY

Attorneys For Valiant Idaho, LLC

**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,

vs.

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-09-1810

**MEMORANDUM IN REPLY TO  
 DEFENDANT JV, LLC'S OPPOSITION  
 TO VALIANT IDAHO, LLC'S  
 THIRD MOTION FOR  
 SUMMARY JUDGMENT**

Honorable Barbara A. Buchanan

**Hearing:**

October 23, 2015 – 2:00 p.m. PDST

COMES NOW, Valiant Idaho, LLC (“Valiant”), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and submits this Memorandum in Reply to Defendant JV, LLC’s Opposition to Valiant Idaho, LLC’s Third Motion for Summary Judgment.

### I. PROCEDURAL HISTORY

On September 25, 2015, Valiant filed its Third Motion For Summary Judgment (“3<sup>rd</sup> SJ Motion”), a notice of hearing, and a supporting memorandum and a declaration (collectively, “SJ Papers”). Valiant served the SJ Papers on counsel for JV, LLC (“JV”) in the same manner that it had served numerous other pleadings in this matter: *via Federal Express* (“FedEx”). The SJ Papers were deposited with FedEx on Thursday, September 24, 2015, for overnight delivery to counsel for Defendants. *Declaration of Chad M. Nicholson Dated October 16, 2015* (“Nicholson Decl.”), ¶¶ 2-4, filed on October 16, 2015. The SJ Papers were then hand-delivered on Friday, September 25, 2015, to counsel for JV by leaving a copy of the SJ Papers at its counsel’s office. *Id.*, Exs. B. As such, the SJ Papers were served **28 days** prior to the October 23, 2015 hearing of Valiant’s 3<sup>rd</sup> SJ Motion, as required by Idaho Rule of Civil Procedure (“Rule”) 56(c).

JV was required to serve any response to the SJ Papers 14 days prior to the hearing, *i.e.*, October 9, 2015. Rule 56(c).

JV failed to serve any response whatsoever on October 9, 2015. On October 13, 2015 – 10 days before the hearing – JV filed and served “JV L.L.C.’s Objection and Memorandum in Opposition to Valiant Idaho, LLC’s Third Motion For Summary Judgment and JV L.L.C.’s Motion to Strike Valiant’s Third Motion For Summary Judgment and Notice of Hearing For October 23, 2015 at 1:30 p.m. (“JV’s Third SJ Opp.”), as well as the “Affidavit of James Berry on Behalf of

JV, LLC in Opposition to Valiant Idaho, LLC's Third Motion For Summary Judgment" ("Berry Third SJ Opp. Aff.").

As demonstrated below, JV's untimely filing does not create a genuine issue of material fact for trial.

Concurrent with this Reply Memorandum Valiant is filing a motion to strike documents attached to JV's Third SJ Opp. as well as the Berry Third SJ Opp. Aff. The evidentiary issues raised in the motion to strike will not be repeated herein. Valiant will address the arguments JV has raised, based on the inadmissible evidence JV has submitted, but in doing so Valiant does not waive its objection to such evidence.

## II. REPLY ARGUMENT

### *A. JV's Third SJ Opp. is Untimely.*

JV's Third SJ Opp. was served on October 13, 2015, just ten (10) days before the Hearing. This deliberate act was clearly designed to (1) deprive Valiant of the seven (7) days it is entitled to under Rule 56(c) to submit its reply in support of its Third SJ Motion, (2) deprive the Court of the seven (7) day time period it is entitled to under Rule 56(c) to consider the memoranda and declarations submitted by all parties prior to the Hearing, and (3) necessitate a continuance of the Hearing given that JV has failed to diligently pursue discovery for the past six (6) years. This deliberate act is sanctionable conduct and cannot be permitted.

The Supreme Court has held that:

"The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." I.R.C.P. 61. Absent any prejudice, we need not address whether the district court abused its discretion in refusing to strike the reply memorandum on the ground that it was served one day late."

*Houston v. Whittier*, 147 Idaho 900, 904, 216 P.3d 1272, 1276 (2009) quoting *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 426, 95 P.3d 34, 44 (2004). In this case, JV's deliberate choice to untimely file JV's Third SJ Opp. has caused prejudice to both the Court and Valiant: (1) JV has deprived the Court of time to consider all parties filings with respect to the Third SJ Motion and (2) JV has forced Valiant to incur the cost of seeking an extension of time to respond.

JV's Third SJ Opp. is untimely. No rationale reading of Rules 6 or 56 lead to the conclusion that the opposition was due ten (10) days prior to the Hearing. JV's Third SJ Opp. must be stricken and JV and its counsel should be subject to Rule 11 sanctions.

***B. Valiant's Third SJ Motion does not violate the Court's September 17, 2015 Order.***

JV's claim that Valiant's Third SJ Motion should be stricken as a violation of the Court's September 17, 2015 Order is without merit. That Order did not preclude additional summary judgment motions or purport to abrogate Valiant's entitlement to file for summary judgment under Rule 56.

***C. JV Subordinated to the 2007 RE Loans Mortgage.***

In a rambling, incoherent response, JV argues that it did not subordinate to the 2007 RE Loans Mortgage. This argument is frivolous and ignores that (1) the Court has held that JV subordinated to the 2007 RE Loans Mortgage, (2) the Court has repeatedly rejected JV's claims that it did not subordinate and (3) the Court has determined that subordination is not an issue for trial.

The foregoing aside, if the Court chooses to address (yet again) JV's claim that it did not subordinate to the 2007 RE Loans Mortgage, the Court may reject (yet again) that claim based on

the following undisputed facts: RE Loans lent money to POBD under the 2007 RE Loans Note that is secured by the 2007 RE Loans Mortgage. *Affidavit of Charles W. Reeves ("Reeves Aff.")*, at ¶¶ 5-10, filed on January 20, 2015. On March 15, 2007, JV recorded a Second Subordination Agreement as Instrument No. 724833, Records of Bonner County, Idaho, subordinating the JV Mortgage, recorded on or about October 24, 1995 as Instrument No. 474746, Records of Bonner County, Idaho, to the 2007 RE Loans Note and 2007 RE Loans Mortgage. *Declaration of Jeff R. Sykes in Support of Valiant Idaho, LLC's Motion for Summary Judgment Against JV, L.L.C., North Idaho Resorts, LLC, and VP, Incorporated* at Ex. 8, filed on January 20, 2015.

The JV Mortgage is subordinate to the 2007 RE Loans Note and Mortgage.

***D. JV has failed to present any evidence establishing that the 2007 RE Loans Note and/or Pensco Note were paid at the August 6, 2008 closing.***

JV continues to rely exclusively on inadmissible settlement statements in its attempt to create a genuine issue of material fact regarding satisfaction of the 2007 RE Loans and Pensco Notes. Noticeably absent from JV's Third SJ Opp. is *any* testimony or evidence to refute Barney Ng's testimony in support of the Third SJ Motion. Mr. Ng provided detailed testimony regarding the amount of money lent by MF08 and Pensco at the August 6, 2008 Closing and how those funds were distributed. *Declaration of Barney Ng in Support of Valiant Idaho, LLC's Third Motion for Summary Judgment ("Ng Third SJ Decl.")* at ¶¶ 8, 20-25, filed on September 25, 2015. No testimony has been offered to rebut Mr. Ng's description of what occurred at the August 6, 2008 Closing. Nor have any admissible documents been offered to rebut Mr. Ng's testimony. JV has not presented testimony from an employee of the title company to the effect that the title company received and distributed funds in the manner claimed by JV. Unauthenticated and unexplained hearsay documents do not create a question of fact.

***E. Insurance proceeds were used to reduce the balance of the 2007 RE Loans Note, not the Pensco Note.***

JV claims that a genuine issue of material fact exists regarding the amount owed to Pensco based on a \$1,000,000.00 check made payable to Bar-K and a letter to Adjusters International. This argument is without merit.

The admissibility of the check and letter aside, these documents do not create a genuine issue of material fact. JV has not produced any evidence that the check was in fact sent to Bar-K or that it was cashed. Nor has JV demonstrated that Bar-K applied these funds toward the Pensco Note.

JV correctly recognizes that POBD was requesting confirmation from Bar-K as to how the payment was booked. JV incorrectly asserts that there is no evidence as to how the \$1,000,000.00 payment was applied.

The check relied upon by JV is dated October 26, 2009. JV's Third SJ Opp., Ex. S. On October 28, 2009, the loan transaction detail report for the 2007 RE Loans Note shows a paydown of \$984,098.58 with a handwritten notation of "Ins". *Reeves Aff.*, Ex. E. Thus, the most probable inference to be drawn from the evidence is that \$1,000,000.00 October 26, 2009 insurance check was applied to reduce the 2007 RE Loans Note, not the Pensco Note. Furthermore, Mr. Ng has testified that Pensco was not repaid a single penny. *Ng Third SJ Decl.* at ¶ 27, filed on September 25, 2015; *Declaration of Barney Ng in Support of Valiant Idaho, LLC's Reply to North Idaho Resorts, LLC's and VP, Incorporated's Opposition to Valiant Idaho, LLC's Third Motion for Summary Judgment* at ¶¶ 4 & 6. See also *Declaration of Barney Ng, Real Party in Interest in Opposition to Motion for Relief from Automatic Stay by RE Loans*, attached as Exhibit F to the


*Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment,*  
filed on October 13, 2015.

**III. CONCLUSION**

Based upon the foregoing, Valiant respectfully submits that there is no genuine issue of material fact that the 2007 RE Loans Note and the Pensco Note remain unsatisfied and that there is no genuine issue of material fact as to the real property as to the real property subject to the 2007 RE Loans Note/Mortgage, the Pensco Note/Mortgage and the MF08 Notes/Mortgage.

**DATED** this 20<sup>th</sup> day of October 2015.

McCONNELL WAGNER SYKES & STACEY <sup>PLLC</sup>

BY:   
Chad M. Nicholson  
Attorneys For Valiant Idaho, LLC

**CERTIFICATE OF SERVICE**

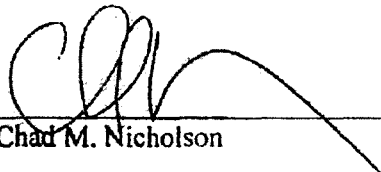
**I HEREBY CERTIFY** that on the 20<sup>th</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Bruce A. Anderson, Esq. Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd 320 East Scider Avenue, Suite 102 Coeur d' Alene, Idaho 83815 Telephone: 208.667.2900 Facsimile: 208.667.2150 <i>Counsel For Jacobson, Lazar and Sage Holdings</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  <a href="mailto:brucea@ejame.com">brucea@ejame.com</a>
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<p>Gary A. Finney, Esq.          Finney Finney &amp; 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></p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Hand Delivered  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Overnight Mail  <input type="checkbox"/> Electronic Mail  <a href="mailto:garyfinney@finneylaw.net">garyfinney@finneylaw.net</a></p>
<p>D. Toby McLaughlin, Esq.          Berg &amp; McLaughlin          414 Church Street, Suite 203          Sandpoint, Idaho 83864          Telephone: 208.263.4748          Facsimile: 208.263.7557  <i>Counsel For Idaho Club HOA/Panhandle Mngmnt</i></p>	<p><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  <a href="mailto:toby@sandpointlaw.com">toby@sandpointlaw.com</a></p>
<p>Susan P. Weeks, Esq.          James, Vernon &amp; 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></p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Hand Delivered  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Overnight Mail  <input type="checkbox"/> Electronic Mail  <a href="mailto:sweeks@jvwlaw.net">sweeks@jvwlaw.net</a></p>

With two (2) copies via Federal Express to:

Honorable Barbara A. Buchanan  
 Judge of the First Judicial District  
 Bonner County Courthouse  
 215 South First Avenue  
 Sandpoint, Idaho 83864

  
 \_\_\_\_\_  
 Chad M. Nicholson



Richard L. Stacey, ISB #6800  
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STATE OF IDAHO  
 COUNTY OF BONNER  
 FIRST JUDICIAL DIST.  
 2015 OCT 20 PM 2 40  
 CLERK DISTRICT COURT  
 DEPUTY

Attorneys For Valiant Idaho, LLC

**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,

vs.

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-09-1810

**MEMORANDUM IN OPPOSITION TO  
 DEFENDANT JV, LLC'S MOTION TO  
 VACATE VALIANT'S HEARING ON  
 OCTOBER 23, 2015**

Honorable Barbara A. Buchanan

**Hearing:**

October 23, 2015 – 1:00 p.m. PDST

COMES NOW, Valiant Idaho, LLC ("Valiant"), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and files its Memorandum in Opposition to Defendants JV, LLC's Motion to Vacate Valiant's Hearing on October 23, 2015.

**I.**  
**RESPONSE ARGUMENT**

JV, LLC ("JV") has moved to vacate the October 23, 2015 hearing ("Hearing") on Valiant Idaho LLC's ("Valiant") Third Motion for Summary Judgment ("3<sup>rd</sup> SJ"). It does not appear that JV has noticed its motion for hearing. This Response is filed in the event that the Court elects to hear JV's Motion on October 23, 2015.

JV seeks to vacate the Hearing on two grounds. First, JV claims that Valiant failed to timely serve the 3<sup>rd</sup> SJ and supporting memorandum and declaration (collectively "SJ Papers"). This claim is wholly without merit.

Idaho Rule of Civil Procedure ("Rule") 56(c) requires that a summary judgment motion be filed and served 28 days prior to the hearing. As the Hearing is scheduled for October 23, 2015, 28 days prior to the hearing is September 25, 2015. JV admits that the SJ Papers were served on September 25, 2015. Valiant's service of the SJ Papers was timely.

Rule 56(f) is the second ground on which JV seeks to vacate the Hearing. JV lack of diligence in pursuing discovery over the past six (6) years justifies denial of JV's Rule 56(f) request.

Where a "party cannot for reasons stated present by affidavit facts essential to justify the party's opposition" a district court may continue a summary judgment hearing. I.R.C.P. 56(f).

The purpose of Rule 56(f) is to ensure that the non-moving party has adequate time to conduct necessary discovery. This case presents an issue not previously addressed by our earlier decisions

regarding Rule 56(f), specifically, whether the trial court may consider a party's lack of diligence in pursuing discovery prior to the motion. The Idaho Rules of Civil Procedure are to be "liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." I.R.C.P. 1. Parties have a significant interest in the timely and economical resolution of legal disputes. Indeed, art. I, § 18 of the Idaho Constitution requires the courts of this state to provide "a speedy remedy" to aggrieved parties and to administer justice without delay. ***We hold that the legal standard governing the district court's exercise of discretion when deciding a Rule 56(f) motion permits consideration of the moving party's previous lack of diligence in pursuing discovery.***

*Boise Mode. LLC v. Donahoe Pace & Partners LTD*, 154 Idaho 99, 105, 294 P.3d 1111 (2013) (emphasis added). Moreover, a party who moves for an extension of time under Rule 56(f) is obligated to provide a supporting affidavit "stating the reasons why the continuance is necessary." *Franklin Bldg Supply Co. v. Hymas*, 157 Idaho 632, 638 (2014), citing *Golay v. Loomis*, 118 Idaho 387, 391 (1990).

Noticeably absent from JV's moving papers is any indication that it intends to conduct additional discovery. The only justification provided by JV is that it needs time to review documents produced in response to subpoenas served by North Idaho Resorts, LLC and VP, Incorporated. Thus, JV has failed to support its request with the required affidavit.

Even if JV had adequately explained why a continuance is necessary, JV's complete lack of diligence in pursuing discovery justifies denial of its motion. This matter has been pending for six (6) years. JV has offered no justification as to why could not have obtained the documents it claims it needs additional time to review in the past six (6) years. Moreover, this is not the first Rule 56(f) request that JV has submitted to the Court. On February 4, 2015 – over eight (8) months ago – JV moved to continue Valiant's first summary judgment motion for 30 days "as additional discovery is necessary to depose Charles Reeves, Sandpoint Title Insurance and First American

Title, as to all POBD closings.” *J.V. L.L.C.’s Motion to Vacate Valiant’s Hearing Date of February 18, 2015 on its Motion for Summary Judgment, Request for Continuance and Request for Hearing on Short Notice* at p. 5, filed on February 4, 2015. Put simply, JV advised the Court over eight (8) months ago that it only needed 30 days to complete the discovery which it now seeks to complete. The only explanation as to why this discovery was not completed seven (7) months ago is a lack of diligence.

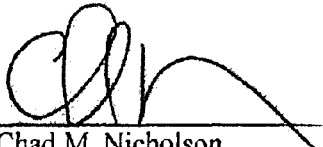
Finally, in considering JV’s motion to vacate, it should also be noted that JV did not attempt to complete this now all-important discovery prior to the expiration of the discovery deadline on June 25, 2015. Thus, JV is required to show “good cause” exists to modify the deadline. I.R.C.P. 16(a). Good cause exists only where the moving party demonstrates it “could not reasonably meet the established timeline in a scheduling order despite [its] diligence.” *DIRECTV, Inc. v. Busdon*, 2005 WL 1364571 at \*1 (D. Idaho 2005). JV’s February 4, 2015 request shows that it was well-aware of the need to complete the discovery it now seeks to complete months before the discovery deadline. JV has not, and cannot, assert that it could not reasonably complete the discovery by the June 25, 2015 deadline. JV’s need for discovery at this late hour is the result of JV’s failure to diligently pursue discovery in the past six (6) years. Good cause has not been established.

## II. CONCLUSION

JV has not provided the Court with any explanation as to why the requested discovery was not completed in the previous six (6) years and prior to expiration of the discovery deadline. Valiant is entitled to have this matter determined in a just, speedy and inexpensive fashion. JV’s desire to conduct discovery at this late hour is unexplained and unjustifiable. As such, Valiant respectfully requests that JV’s Motion to Vacate be *denied*.

DATED this 20<sup>th</sup> day of October 2015.

McCONNELL WAGNER SYKES & STACEY <sup>PLLC</sup>

BY:   
 Chad M. Nicholson  
 Attorneys For Valiant Idaho, LLC

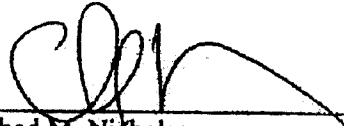
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20<sup>th</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

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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 checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail <a href="mailto:sweeks@jvwlaw.net">sweeks@jvwlaw.net</a>

With two (2) copies via United States Mail to:

Honorable Barbara A. Buchanan  
Judge of the First Judicial District  
Bonner County Courthouse  
215 South First Avenue  
Sandpoint, Idaho 83864



Chad M. Nicholson

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 20 PM 2 41

CLERK DISTRICT COURT

DEPUTY

Richard L. Stacey, ISB #6800  
Jeff R. Sykes, ISB #5058  
Chad M. Nicholson, ISB #7506  
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[stacey@mwsslawyers.com](mailto:stacey@mwsslawyers.com)  
[sykes@mwsslawyers.com](mailto:sykes@mwsslawyers.com)  
[nicholson@mwsslawyers.com](mailto:nicholson@mwsslawyers.com)

Attorneys For Valiant Idaho, LLC

**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,

vs.

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-09-1810

**DECLARATION OF BARNEY NG  
IN SUPPORT OF  
VALIANT IDAHO, LLC'S  
REPLY TO NORTH IDAHO RESORTS,  
LLC'S AND VP, INCORPORATED'S  
OPPOSITION TO VALIANT IDAHO,  
LLC'S THIRD MOTION FOR  
SUMMARY JUDGMENT**

Honorable Barbara A. Buchanan

**Hearing:**

October 23, 2015 - 2:00 p.m. PDST

**DECLARATION OF BARNEY NG IN SUPPORT OF VALIANT IDAHO, LLC'S REPLY TO NORTH  
IDAHO RESORTS, LLC'S AND VP, INCORPORATED'S OPPOSITION TO VALIANT IDAHO, LLC'S  
THIRD MOTION FOR SUMMARY JUDGMENT - Page 1**

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I, Barney Ng, hereby state and declare:

1. I was the President and an officer of Bar-K, Inc. ("BarK") from August of 1975 to September 4, 2009. BarK was a California corporation that was in the business of originating and servicing loans.

2. I am familiar with and recall the declaration I submitted in the United States Bankruptcy Court Northern District of California Oakland Division Bankruptcy Case No. 11-49803-RLE-11 (the "Ng BK Decl."). This declaration appears to be attached to the Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment as Exhibit E, and to Defendants North Idaho Resorts and VP, Incorporated's Motion for Judicial Notice of Declaration of Barney Ng as Exhibit A.

3. My testimony in the Ng BK Decl. substantiates my testimony in the Declaration of Barney Ng in Support of Valiant Idaho, LLC's Third Motion for Summary Judgment (the "Ng 3<sup>rd</sup> SJ Decl.>").

4. Pensco loaned Pend Oreille Bonner Development, LLC ("POBD") \$2,700,000 and was never repaid a single penny. The Pensco loan was secured by a mortgage recorded on August 6, 2008.

5. I filed the Ng BK Decl. because I wanted the bankruptcy court to treat Pensco's mortgage as if it had the same priority as the mortgage recorded by RE Loans, LLC ("RE Loans") recorded on March 15, 2007, even though the RE Loans mortgage was recorded before the Pensco mortgage.

6. I would not have submitted this declaration if Pensco had been paid off. Nor would I have submitted this declaration if Pensco had not funded. In either case Pensco would



not have been owed anything and it would have been a waste of time to argue about the priority of a fully satisfied or unfunded loan.

7. RE Loans' loan was not paid off with funds from the MF08 loan.

8. If RE Loans had been paid off I would not have submitted an affidavit to the bankruptcy court arguing that it should treat RE Loans' mortgage and Pensco's mortgage as having the same priority. Pensco's mortgage is in the second priority lien position behind the RE Loans mortgage. If RE Loans had been paid off, I would have testified that this payoff occurred to establish that Pensco's mortgage was in the first priority position by itself.

**I HEREBY CERTIFY AND DECLARE**, under penalty of perjury pursuant to the laws of the State of Idaho, that the foregoing is true and correct.

**DATED** this 20 day of October 2015.

  
BARNEY NG

**DECLARATION OF BARNEY NG IN SUPPORT OF VALIANT IDAHO, LLC'S REPLY TO NORTH IDAHO RESORTS, LLC'S AND VP, INCORPORATED'S OPPOSITION TO VALIANT IDAHO, LLC'S THIRD MOTION FOR SUMMARY JUDGMENT - Page 3**

\\DOCUME~1\Home\LOCALS~1\Temp\Ng Reply Declaration - 3rd Summary Judgment 150922-4.docx

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 20<sup>th</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

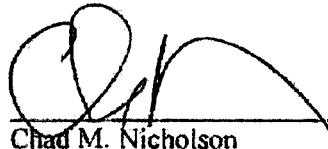
Bruce A. Anderson, Esq. Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd 320 East Neider Avenue, Suite 102 Coeur d' Alene, Idaho 83815 Telephone: 208.667.2900 Facsimile: 208.667.2150 <i>Counsel For Jacobson, Lazar and Sage Holdings</i>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail  <a href="mailto:brucea@ejame.com">brucea@ejame.com</a>
Gary 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 checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail  <a href="mailto:garyfinney@finneylaw.net">garyfinney@finneylaw.net</a>
D. Toby McLaughlin, Esq. Berg & McLaughlin 414 Church Street, Suite 203 Sandpoint, Idaho 83864 Telephone: 208.263.4748 Facsimile: 208.263.7557 <i>Counsel For Idaho Club HOA/Panhandle Mngmnt</i>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail  <a href="mailto:toby@sandpointlaw.com">toby@sandpointlaw.com</a>
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 checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail  <a href="mailto:sweeks@jvwlaw.net">sweeks@jvwlaw.net</a>

**DECLARATION OF BARNEY NG IN SUPPORT OF VALIANT IDAHO, LLC'S REPLY TO NORTH IDAHO RESORTS, LLC'S AND VP, INCORPORATED'S OPPOSITION TO VALIANT IDAHO, LLC'S THIRD MOTION FOR SUMMARY JUDGMENT - Page 4**

E:\1547.201\PL\DCV-2009-1810\Ng Reply Declaration - 3rd Summary Judgment 150922.docx

With two (2) copies via United States Mail to:

Honorable Barbara A. Buchanan  
Judge of the First Judicial District  
Bonner County Courthouse  
215 South First Avenue  
Sandpoint, Idaho 83864



---

Chad M. Nicholson

**DECLARATION OF BARNEY NG IN SUPPORT OF VALIANT IDAHO, LLC'S REPLY TO NORTH IDAHO RESORTS, LLC'S AND VP, INCORPORATED'S OPPOSITION TO VALIANT IDAHO, LLC'S THIRD MOTION FOR SUMMARY JUDGMENT - Page 5**

\\1547.20\PLD\CV-2009-1810\Ng Reply Declaration - 3rd Summary Judgment 150922.docx

Richard L. Stacey, ISB #6800  
 Jeff R. Sykes, ISB #5058  
 Chad M. Nicholson, ISB #7506  
 McCONNELL, WAGNER SYKES & STACEY <sup>PLLC</sup>  
 827 East Park Boulevard, Suite 201  
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[stacey@mwsslawyers.com](mailto:stacey@mwsslawyers.com)  
[sykes@mwsslawyers.com](mailto:sykes@mwsslawyers.com)  
[nicholson@mwsslawyers.com](mailto:nicholson@mwsslawyers.com)

STATE OF IDAHO  
 COUNTY OF BONNER  
 FIRST JUDICIAL DIST.  
 2015 OCT 20 PM 3 00  
 CLERK DISTRICT COURT  
 DEPUTY

Attorneys For Valiant Idaho, LLC

**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,

vs.

PEND OREILLE BONNER  
 DEVELOPMENT, L.L.C.,  
 a Nevada limited liability company; *et al.*,

Defendants.

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

Case No. CV-09-1810

**MOTION TO SHORTEN TIME TO  
 HAVE HEARD VALIANT IDAHO,  
 LLC'S SECOND MOTION TO STRIKE  
 INADMISSIBLE EVIDENCE**

Honorable Barbara A. Buchanan

Hearing:

October 23, 2015 - 1:00 p.m. PDST

COMES NOW, Valiant Idaho, LLC ("Valiant"), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and, pursuant to Rules 6(e)(2) and 7(b)(3) of the Idaho Rules of Civil Procedure, moves this Court for an order shortening time to have heard its Second Motion to Strike Inadmissible Evidence.

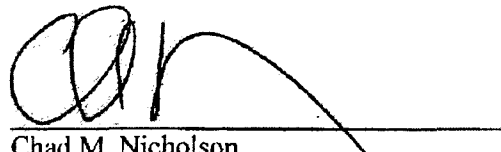
Good cause exists to shorten time because Valiant's Second Motion to Strike Inadmissible Evidence addresses evidence North Idaho Resorts, LLC, VP, Incorporated and JV, L.L.C. (collectively, "Defendants") attempted to introduce through court filings on October 13, 2015. As such, it was not possible to comply with the timing provisions of Idaho Rule of Civil Procedure 7(b)(3).

This motion is made and based upon the record and files herein; together with the Second Motion to Strike and the Memorandum in support thereof.

DATED this 20<sup>th</sup> day of October 2015.

McCONNELL WAGNER SYKES & STACEY<sup>PLLC</sup>

BY:

  
Chad M. Nicholson  
Attorneys For Valiant Idaho, LLC

**CERTIFICATE OF SERVICE**

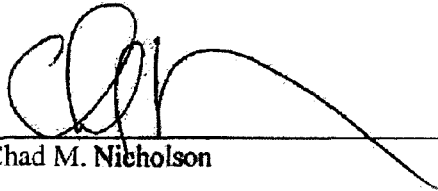
I HEREBY CERTIFY that on the 20<sup>th</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Bruce A. Anderson, Esq. Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd 320 East Neider Avenue, Suite 102 Coeur d' Alene, Idaho 83815 Telephone: 208.667.2900 Facsimile: 208.667.2150 <i>Counsel For Jacobson, Lazar and Sage Holdings</i>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail <a href="mailto:brucea@ejamc.com">brucea@ejamc.com</a>
---	--

<p>Gary A. Finney, Esq.                  Finney Finney &amp; 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></p>	<p>[ <input checked="" type="checkbox"/> ] U.S. Mail                  [ <input type="checkbox"/> ] Hand Delivered                  [ <input checked="" type="checkbox"/> ] Facsimile                  [ <input type="checkbox"/> ] Overnight Mail                  [ <input type="checkbox"/> ] Electronic Mail  <u><a href="mailto:garyfinney@finneylaw.net">garyfinney@finneylaw.net</a></u></p>
<p>D. Toby McLaughlin, Esq.                  Berg &amp; McLaughlin                  414 Church Street, Suite 203                  Sandpoint, Idaho 83864                  Telephone: 208.263.4748                  Facsimile: 208.263.7557  <i>Counsel For Idaho Club HOA/Panhandle Mngmnt</i></p>	<p>[ <input checked="" type="checkbox"/> ] U.S. Mail                  [ <input type="checkbox"/> ] Hand Delivered                  [ <input checked="" type="checkbox"/> ] Facsimile                  [ <input type="checkbox"/> ] Overnight Mail                  [ <input type="checkbox"/> ] Electronic Mail  <u><a href="mailto:toby@sandpointlaw.com">toby@sandpointlaw.com</a></u></p>
<p>Susan P. Weeks, Esq.                  James, Vernon &amp; 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></p>	<p>[ <input checked="" type="checkbox"/> ] U.S. Mail                  [ <input type="checkbox"/> ] Hand Delivered                  [ <input checked="" type="checkbox"/> ] Facsimile                  [ <input type="checkbox"/> ] Overnight Mail                  [ <input type="checkbox"/> ] Electronic Mail  <u><a href="mailto:sweeks@jvwlaw.net">sweeks@jvwlaw.net</a></u></p>

With two (2) copies via United States Mail to:

Honorable Barbara A. Buchanan  
 Judge of the First Judicial District  
 Bonner County Courthouse  
 215 South First Avenue  
 Sandpoint, Idaho 83864



Chad M. Nicholson

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 20 PM 3 00

CLERK DISTRICT COURT

DEPUTY

Richard L. Stacey, ISB #6800  
Jeff R. Sykes, ISB #5058  
Chad M. Nicholson, ISB #7506  
McCONNELL WAGNER SYKES & STACEY P.L.L.C.  
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[sykes@mwsslawyers.com](mailto:sykes@mwsslawyers.com)  
[nicholson@mwsslawyers.com](mailto:nicholson@mwsslawyers.com)

Attorneys For Valiant Idaho, LLC

**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,

vs.

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-09-1810

**DECLARATION OF  
CHAD M. NICHOLSON  
DATED OCTOBER 20, 2015**

Honorable Barbara A. Buchanan

**Hearing:**  
October 23, 2015 – 1:00 p.m. PDST

Pursuant to Rule 7(d) of the Idaho Rules of Civil Procedure and Idaho Code § 9-1406,

**Chad M. Nicholson** declares as follows:

1. I am an attorney at law duly licensed to practice before this Court, and all Courts in the State of Idaho. I am an associate of the law firm of McConnell Wagner Sykes & Stacey PLLC ("MWSS"), attorneys for Defendant/Counter-Claimant/Cross-Claimant/Third Party Plaintiff Valiant Idaho, LLC ("Valiant"). I make this Declaration in support of the Memorandum in Reply to Defendants North Idaho Resorts, LLC ["NIR"] and VP, Incorporated's ["VP"] Third Motion For Summary Judgment.

2. Attached hereto as Exhibit A is a true and correct copy of the Subpoena Duces Tecum to Sandpoint Title Insurance, Incorporated served by counsel for North Idaho Resorts, LLC and VP, Incorporated without attachments.

3. Attached hereto as Exhibit B is a true and correct copy of the Subpoena Duces Tecum to First American Title Company, Incorporated served by counsel for North Idaho Resorts, LLC, and VP, Incorporated without attachments.

**I HEREBY CERTIFY AND DECLARE**, under penalty of perjury pursuant to the laws of the State of Idaho, that the foregoing is true and correct.

**DATED** this 20<sup>th</sup> day of October 2015.

  
CHAD M. NICHOLSON




**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20<sup>th</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Bruce A. Anderson, Esq. Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd 320 East Neider Avenue, Suite 102 Coeur d' Alene, Idaho 83815 Telephone: 208.667.2900 Facsimile: 208.667.2150 <i>Counsel For Jacobson, Lazar and Sage Holdings</i>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail  <a href="mailto:brucea@ejame.com">brucea@ejame.com</a>
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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 checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail  <a href="mailto:sweeks@jvwlaw.net">sweeks@jvwlaw.net</a>

With two (2) copies via United States Mail to:

Honorable Barbara A. Buchanan  
Judge of the First Judicial District  
Bonner County Courthouse  
215 South First Avenue  
Sandpoint, Idaho 83864

  
Chad M. Nicholson

Susan P. Weeks, ISB No. 4255  
Daniel M. Keyes, ISB No. 9492  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, Idaho 83814  
Telephone: (208) 667-0683  
Facsimile: (208) 664-1684  
[sweeks@jvwlaw.net](mailto:sweeks@jvwlaw.net)

Attorneys for Defendants North Idaho Resorts, LLC and VP, Incorporated

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.

vs.

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

Defendants.

Case No. CV-2009-1810

SUBPOENA DUCES TECUM TO  
SANDPOINT TITLE INSURANCE,  
INCORPORATED

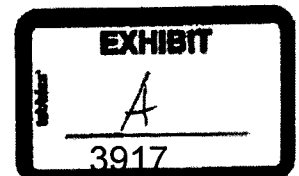
AND RELATED COUNTER, CROSS  
AND THIRD PARTY ACTIONS  
PREVIOUSLY FILED HEREIN

THE STATE OF IDAHO TO: Sandpoint Title Insurance, Incorporated  
120 Lake St. Suite 202  
Sandpoint, ID 83864

You are hereby commanded pursuant to Rule 45(b) of the Idaho Rules of Civil Procedure, to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below.

1. Your entire file, No. 49214-NA for your reference, relating to the R.E. Loans, LLC Loan No. P0099, a true and correct copy of the mortgage from this transaction is **attached** hereto.

SUBPOENA DUCES TECUM TO SANDPOINT TITLE INSURANCE,  
INCORPORATED: 1



This command specifically includes, but is not limited to, the production or permitted inspection and copying of the following:

- All orders or directions to open the file,
- All closing documents,
- All title documents,
- All communications, and
- Copies of all checks issued.

**PLACE, DATE AND TIME:** The law offices of James, Vernon & Weeks, P.A., 1626 Lincoln Way, Coeur d'Alene, ID 83814, by close of business on October 1, 2015.

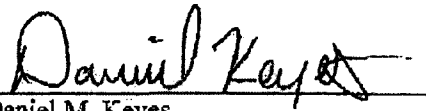
You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100.00 and all damages which he may sustain by your failure to comply with this subpoena.

**A representative of Sandpoint Title Insurance, Incorporated need not appear in person at the place of production or inspection. The documents and materials requested may be provided via u.s. mail or electronic mail transmission.** A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in demand.

**BY ORDER OF THE COURT.**

DATED this 10<sup>th</sup> day of September, 2015.

JAMES, VERNON & WEEKS, P.A.

  
Daniel M. Keyes  
Attorneys for Defendants

SUBPOENA DUCES TECUM TO SANDPOINT TITLE INSURANCE,  
INCORPORATED: 2

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of September, 2015, I served a true and correct copy of the foregoing in the manner indicated:

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile: 208-263-8211

Gary A. Finney  
FINNEY FINNEY & FINNEY, PA  
120 E Lake St., Ste. 317  
Sandpoint, ID 83864

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile: 208-489-0110

Richard Stacey  
McConnell Wagner Sykes & Stacey, PLLC  
827 East Park Blvd., Ste. 201  
Boise, ID 83712

Christine Clouse

SUBPOENA DUCES TECUM TO SANDPOINT TITLE INSURANCE,  
INCORPORATED: 3

Susan P. Weeks, ISB No. 4255  
Daniel M. Keyes, ISB No. 9492  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, Idaho 83814  
Telephone: (208) 667-0683  
Facsimile: (208) 664-1684  
[sweeks@jvwlaw.net](mailto:sweeks@jvwlaw.net)

Attorneys for Defendants North Idaho Resorts, LLC and VP, Incorporated

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,

vs.

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

Defendants.

Case No. CV-2009-1810

SUBPOENA DUCES TECUM TO FIRST  
AMERICAN TITLE COMPANY

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

THE STATE OF IDAHO TO: First American Title Company  
419 N 2nd Ave  
Sandpoint, ID 83864

You are hereby commanded pursuant to Rule 45(b) of the Idaho Rules of Civil Procedure, to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below.

1. Your entire file, No. 239217 for your reference, relating to the Pensco Trust Co.

Loan No. of P0106, a true and correct copy of the mortgage from this transaction is attached hereto

SUBPOENA DUCES TECUM TO FIRST AMERICAN TITLE COMPANY: 1



as "Exhibit G." This command specifically includes, but is not limited to, the production or permitted inspection and copying of the following:

- All orders or directions to open the file,
- All closing documents,
- All title documents,
- All communications, and
- Copies of all checks issued.

2. Your entire file, No. 239217 for your reference, relating to the Mortgage Fund '08 LLC Loan No. P0107, a true and correct copy of the mortgage from this transaction is attached hereto as "Exhibit J." This command specifically includes, but is not limited to, the production or permitted inspection and copying of the following:

- All orders or directions to open the file,
- All closing documents,
- All title documents,
- All communications, and
- Copies of all checks issued.

**PLACE, DATE AND TIME:** The law offices of James, Vernon & Weeks, P.A., 1626 Lincoln Way, Coeur d'Alene, ID 83814, by close of business on October 1, 2015.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100.00 and all damages which he may sustain by your failure to comply with this subpoena.

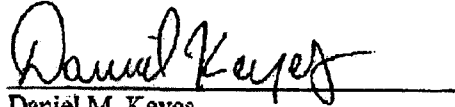
**A representative of Sandpoint Title Insurance, Incorporated need not appear in person at the place of production or inspection. The documents and materials requested may be provided via u.s. mail or electronic mail transmission.** A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in demand.

SUBPOENA DUCES TECUM TO FIRST AMERICAN TITLE COMPANY: 2

**BY ORDER OF THE COURT.**

DATED this 10<sup>th</sup> day of September, 2015.

JAMES, VERNON & WEEKS, P.A.



Daniel M. Keyes

Attorneys for Defendants

SUBPOENA DUCES TECUM TO FIRST AMERICAN TITLE COMPANY: 3

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of September, 2015, I served a true and correct copy of the foregoing in the manner indicated:

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile: 208-263-8211

Gary A. Finney  
FINNEY FINNEY & FINNEY, PA  
120 E Lake St., Ste. 317  
Sandpoint, ID 83864

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile: 208-489-0110

Richard Stacey  
McConnell Wagner Sykes & Stacey, PLLC  
827 East Park Blvd., Ste. 201  
Boise, ID 83712

Christine Chase



STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT  
2015 OCT 20 PM 3 12  
CLERK DISTRICT COURT  
~~DEPUTY~~

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Attorneys For Valiant Idaho, LLC

**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,

vs.

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-09-1810

**MEMORANDUM IN REPLY TO NORTH  
IDAHO RESORTS, INC. AND VP,  
INCORPORATED OPPOSITION TO  
VALIANT IDAHO, LLC'S  
THIRD MOTION FOR  
SUMMARY JUDGMENT**

**Honorable Barbara A. Buchanan**

Hearing:

October 23, 2015 – 1:00 p.m. PDST

COMES NOW, Valiant Idaho, LLC (“Valiant”), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and submits this Memorandum in Reply to Defendant JV, LLC’s Opposition to Valiant Idaho, LLC’s Third Motion for Summary Judgment.

**I. PROCEDURAL HISTORY**

On September 25, 2015, Valiant filed its Third Motion For Summary Judgment (“3<sup>rd</sup> SJ Motion”), a notice of hearing, and a supporting memorandum and a declaration (collectively, “SJ Papers”). Valiant served the SJ Papers on counsel for North Idaho Resorts, Inc. (“NIR”) and VP, Incorporated (“VP”) (collectively, “Defendants”) in the same manner that it had served numerous other pleadings in this matter: *via Federal Express* (“FedEx”). The SJ Papers were deposited with FedEx on Thursday, September 24, 2015, for overnight delivery to counsel for Defendants. *Declaration of Chad M. Nicholson Dated October 16, 2015*, ¶¶ 2-4, filed on October 16, 2015. The SJ Papers were then hand-delivered on Friday, September 25, 2015, to counsel for Defendants by leaving a copy of the SJ Papers at their counsel’s office. *Id.*, Exs. A. As such, the SJ Papers were served **28 days** prior to the October 23, 2015 hearing of Valiant’s 3<sup>rd</sup> SJ Motion, as required by Idaho Rule of Civil Procedure (“Rule”) 56(c).

Defendants were required to serve any response to the SJ Papers 14 days prior to the hearing, *i.e.*, October 9, 2015. Rule 56(c).

On October 13, 2015 – 10 days before the hearing of the 3<sup>rd</sup> SJ Motion – NIR and VP filed and served on Valiant’s counsel: (1) Defendants North Idaho Resorts, LLC and VP Incorporated’s Memorandum in Opposition to Valiant Idaho, LLC’s Third Motion For Summary Judgment (“Opposition”), (2) Declaration of Susan P. Weeks in Opposition to Valiant’s Third Motion For Summary Judgment (“Weeks Opp. Decl.”), (3) Defendants North Idaho Resorts and VP, Incorporated’s Motion For Judicial Notice of Declaration of Barney Ng, and (4) Declaration of

Richard Villelli in Opposition to Valiant Idaho, LLC's Third Motion For Summary Judgment Against JV, L.L.C., North Idaho Resorts, LLC, and VP, Incorporated.

As demonstrated below, Defendants untimely filing does not create a genuine issue of material fact for trial.

## II. REPLY ARGUMENT

### A. *NIR and VP's Opposition is Untimely.*

NIR and VP filed and served the Opposition on October 13, 2015, just ten (10) days before the Hearing. This deliberate act was clearly designed to (1) deprive Valiant of the seven (7) days it is entitled to under Rule 56(c) to submit its reply in support of its Third SJ Motion, (2) deprive the Court of the seven (7) day time period it is entitled to under Rule 56(c) to consider the memoranda and declarations submitted by all parties prior to the Hearing, and (3) necessitate a continuance of the Hearing given that NIR and VP have failed to diligently pursue discovery for the past six (6) years. This deliberate act is sanctionable conduct and cannot be permitted.

NIR and VP attempt to justify this frivolous and sanctionable act by claiming that (1) the Third SJ Motion is actually a motion for reconsideration governed by Rule 11(a)(2)(B) and (2) because the SJ Papers were hand delivered by FedEx twenty eight (28) days before the Hearing. These arguments are specious.

The fallacy of NIR and VP's claim that the Third SJ Motion is actually a reconsideration motion is demonstrated by the timing of NIR and VP's Opposition. If NIR and VP truly believed that they were responding to a Rule 11(a)(2)(B) motion, their opposition would have been filed just seven (7) days before the Hearing, October 16, 2015, as provided for by Rule 7(b)(3)(B). Moreover, if the Third SJ Motion is in fact governed by Rule 11(a)(2)(B), NIR and VP would have no basis to seek a continuance of the Hearing under Rule 56(f) which by its terms *only* applies to

summary judgment motions. Finally, it cannot seriously be believed that if Valiant had submitted new evidence and additional argument just fourteen (14) days before the Hearing that NIR and VP would not have objected on the basis that the motion was in fact a summary judgment motion.

NIR and VP's claim that they are afforded an additional three (3) days to respond under Rule 5(b)(C) is belied by the undisputed facts regarding the service of the SJ Papers and the lack of NIR and VP's previous objection(s) to the timeliness of service of other documents served by Valiant. NIR and VP admit that "[t]he documents were sent by Federal Express and received on September 25, 2015. As such, service is governed by either Rule 5(b)(A), hand delivery, or Rule 5(b)(B)(i), service by leaving a document at counsel's office. Furthermore, the disingenuousness of this claim is demonstrated by the fact that Valiant has served the vast majority of its filings in this manner yet NIR and VP raised no objection.

NIR and VP claim that they are "mindful" of the Supreme Court's admonition that:

"The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." I.R.C.P. 61. Absent any prejudice, we need not address whether the district court abused its discretion in refusing to strike the reply memorandum on the ground that it was served one day late."

*Houston v. Whittier*, 147 Idaho 900, 904, 216 P.3d 1272, 1276 (2009) quoting *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 426, 95 P.3d 34, 44 (2004). Apparently, NIR and VP believe that the Rules only need to be applied in a manner that avoids prejudice to them. Otherwise, NIR and VP would understand that the Supreme Court's admonition in *Whittier* is designed to prevent the gamesmanship they have engaged in. NIR and VP's deliberate choice to untimely file their Opposition has caused prejudice to both the Court and Valiant: (1) they have deprived the Court of time to consider all parties filings with respect to the Third SJ Motion and (2) they have forced Valiant to incur the cost of seeking an extension of time to respond.

**MEMORANDUM IN REPLY TO NORTH IDAHO RESORTS, INC. AND VP, INCORPORATED  
OPPOSITION TO VALIANT IDAHO, LLC'S THIRD MOTION FOR SUMMARY JUDGMENT - Page 4**  
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NIR and VP's Opposition is untimely. No rationale reading of Rules 5(b), 11(a)(2)(B) or 56 lead to the conclusion that the opposition was due ten (10) days prior to the Hearing. NIR and VP Opposition must be stricken and NIR, VP and their counsel should be subject to Rule 11 sanctions.

***B. The Statute of Limitations did not expire prior to Valiant filing its Counterclaims.***

NIR and VP incorrectly argue that the Valiant's Counterclaim<sup>1</sup> was filed after the expiration of the statute of limitation.

NIR and VP direct this Court to Idaho Code Section 5-214A, which provides that "an action for the foreclosure of an action on real property must be commenced within (5) years from the maturity date of the obligation or indebtedness secured by such mortgage." *Id.* However, NIR and VP conveniently ignore Idaho Code Section 5-238.

Idaho Code Section 5-238 applies in situations in which payments or partial payments are made towards the payment of an obligation after the maturity date. Section 5-238 provides: "No acknowledgement or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; ***but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.***" (Emphasis added.) No agreement between the borrower and creditor is necessary for a payment to extend the statute of limitation. *Thomson v. Sunny Ridge Village Partnership*, 118 Idaho 330, 332 (Ct. App. 1990). The nexus between a payment and a new written promise is explicit in I.C. § 5-238. *Id.*

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<sup>1</sup> NIR and VP assert that Valiant's Counterclaim was untimely only with respect to the claims alleged by Valiant as the real party in interest for RE Loans. NIR and/or VP have not alleged that Valiant's claims alleged on behalf of Pensco, or MF08 were untimely. As such, this briefing only addresses the arguments levelled by NIR and VP.

On or about August 19, 2014, Valiant filed its Counterclaim seeking to foreclose its interest in the RE Loans mortgage. On November 24, 2014, this Court entered its Order Granting Valiant Idaho Leave to Amend Answer to Allege a Counterclaim and Cross-Claim (“Amend Order”). The Amend Order orders that the Counterclaim shall be deemed filed as of August 19, 2014. Counterclaims can relate back to the date on which an answer or affirmative defenses were filed in a case. I.R.C.P. Rule 15(c). Nonetheless, the Court need not undertake a Rule 15(c) analysis in this matter.

It is undisputed that RE Loans received payments toward the principal amounts owed on: a) September 15, 2009 in the amount of \$62,713.23; b) October 28, 2009 in the amount of \$984,096.56; c) November 23, 2009 in the amount of \$856.45; and d) November 23, 2009 in the amount of \$358,598.59. *See the Affidavit of Charles W. Reeves (“Reeves Aff.”) at Exhibit E*, filed on January 20, 2015. Each of these payments constituted an additional promise to pay that extended the statute of limitations at least five (5) years from the date of said payment. As such, the statute of limitations could not have begun to toll prior to November 13, 2009, and it could not have expired prior to November 23, 2014. As the Counterclaim is deemed filed as of August 19, 2014, NIR’s and JV’s argument that the Counterclaim was untimely filed should be rejected.

***C. The Court has previously determined that POBD owned the property subject to the Valiant Mortgages.***

NIR and VP claim that Valiant’s summary judgment motion fails because Valiant has not established that POBD owned the property subject to the Valiant Mortgages. This is no longer an issue for trial. The Court has determined that the only issues that remain are (1) whether the 2007 RE Loans Note and Pensco Note have been satisfied and (2) the legal description subject to each of the Valiant Mortgages. Thus, the Court has already determined that POBD owned the property subject to the Valiant Mortgages.

It should be noted that both POBD and Pend Oreille Bonner Development Holdings, Inc. stipulated that Valiant's interest was senior in right, title and interest by virtue of the Valiant Mortgages. Additionally, if POBD did not own the property subject to the Valiant Mortgages, then VP has no interest in the four lots POBD conveyed to VP via quitclaim deed on or about September 20, 2013 which were recorded on May 20, 2014.

***D. Valiant is entitled to foreclose both the 2007 RE Loans Note and the MF08 Note.***

NIR and VP claim that RE Loans and MF08 breached their respective loan agreements with POBD and therefore Valiant is not entitled to foreclose property securing these loan agreements. This argument is without merit.

First, this argument ignores that the Court has determined that the only issues that remain for trial are (1) whether the 2007 RE Loans Note and Pensco Note have been satisfied and (2) the legal description subject to each of the Valiant Mortgages. The question of whether RE Loans and/or MF08 breached their loan agreements with POBD is not an open issue.

Second, NIR and VP do not have standing to assert a breach of contract as a defense to foreclosure. In order to have standing, "a litigant 'must allege or demonstrate a distinct palpable injury in fact; that the injury is fairly traceable to the challenged conduct; and that there is a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.'" *Campbell v. Parkway Surgery Ctr., LLC*, 158 Idaho 957, \_\_\_\_, 354 P.3d 1172, 1177 (2015) quoting *Arambarri v. Armstrong*, 152 Idaho 734, 738, 274 P.3d 1249, 1253 (2012). A litigant must "show either privity or third-party beneficiary status to have standing to sue on a breach of contract." *Campbell*, 158 Idaho at \_\_\_\_, 354 P.3d at 1178. "'Privity is established by proving that the defendant was a party to an enforceable contract with either the plaintiff or a party who assigned its cause of action to the plaintiff.'" *Id.* quoting *OAIC Commercial Assets, L.L.C. v.*

*Stonegate Vill., L.P.*, 234 S.W.3d 726, 738 (Tex. App. 2007). Neither NIR nor VP were a party to the 2007 RE Loans Note or the MF08 Note. POBD did not assign any claims arising from such Notes to either NIR or VP. Thus, neither NIR nor VP have standing to assert that Valiant cannot foreclose because of a breach of contract.

Third, POBD has stipulated that it materially breached the Valiant Mortgages, the damages resulting from such breaches, and that judgment should be accordingly entered in favor of Valiant. As such, POBD waived any alleged breach of contract by either RE Loans or MF08.

***E. The most probable inference to be drawn from the evidence demonstrate that neither the 2007 RE Loans Note nor the Pensco Note have been satisfied.***

NIR and VP's claim that a genuine issue of material fact exists regarding satisfaction of the 2007 RE Loans Note and the Pensco Note rests predominately on inadmissible evidence which Valiant has moved to strike.<sup>2</sup> Valiant will not address the evidentiary deficiencies in NIR and VP's submissions but instead incorporates the arguments set forth in Valiant's motions to strike as if set out in full herein.

***1. The MF08 Loan was a "wrap loan."***

NIR and VP rely on the case of *Adams v. George*, 119 Idaho 973, 812 P.2d 280 (1991) for the proposition that the MF08 Loan was not a wrap loan. This reliance is curious given that the definition of a "wraparound mortgage" set forth in the *Adams* decision is strikingly similar to the definition of a "wrap loan" provided by Barney Ng. The *Adams* decision noted that:

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<sup>2</sup> On October 9, 2015 Valiant moved to strike: (1) the deposition of Charles Reeves taken in Bonner County Case No. CV-2011-0135 filed in this action as (a) Exhibit E to JV, L.L.C.'s Memorandum in Opposition to [Valiant's] Motion For Summary Judgment filed on or about February 2, 2015 ("JV's SJ Opposition") and (b) Exhibit A to the Affidavit of Susan P. Weeks in Support of North Idaho Resorts, LLC and VP, Inc.'s Motion to Reconsider and Motion to Alter and Amend Judgment filed on or about August 19, 2015; (2) the "Borrower's Settlement Statement" dated July 31, 2008 attached as (a) Exhibit G to JV's SJ Opposition and (b) Exhibit A to James Berry's Affidavit in Opposition to R.E. Loan's Motion For Partial Summary Judgment filed in the Union Bank Case, of which Defendants North Idaho Resorts, LLC and VP, Inc. requested that this Court take judicial notice on February 4, 2015; and (3) the "Borrower's Final Settlement Statement" dated August 6, 2008 attached as Exhibit H to JV's SJ Opposition. Concurrent with the filing of this Memorandum, Valiant is filing a motion to strike Exhibits A through E of the Weeks Opp Decl.



*“The purchase money wraparound mortgage differs from a conventional second mortgage in that the wraparound seller in the transaction remains personally liable under any prior obligation, but the purchaser never becomes personally obligated for such. A distinctive feature of such a transaction is the agreement by the wraparound seller that upon receipt of the debt service on the wraparound mortgage a deduction will be made therefrom and remitted directly to the first mortgagee to credit the required debt service on the first mortgage.”*

*Adams*, 119 Idaho at 976, 812 P.2d at 283 quoting *Greenland Vistas, Inc. v. Plantation Place Assoc., Ltd.*, 746 S.W.2d 923, 925 (Tex.1988) (emphasis in original). Mr. Ng testified:

The MF08 Loan Agreement is what is commonly referred to in the lending industry as a “wrap loan.” In a wrap loan scenario, a second (or third) lender agrees to provide additional funds to a borrower who has prior loans from other lenders. The total amount the wrap lender will agree to lend will exceed the amount owed to prior lender(s) by the amount the wrap lender is willing to lend. The wrap lender has the right, but not the obligation, to pay off the prior loans. *Payments made by the borrower under a wrap loan are typically first applied to the most senior loan.*

*Declaration of Barney Ng in Support of Valiant Idaho, LLC’s Third Motion for Summary Judgment (“Ng Third SJ Decl.”)* at ¶ 18, filed on September 25, 2015 (emphasis added). Thus, the *Adams* decision supports the conclusion that the MF08 Loan was a “wrap loan.”

More to the point, even if the MF08 Loan was not a wrap loan, NIR and VP have not established that the MF08 Loan paid off either the 2007 RE Loans Note or the Pensco Note. Mr. Ng provided detailed testimony regarding the amount of money lent by MF08 and Pensco at the August 6, 2008 Closing and how those funds were distributed. *Ng Third SJ Decl.* at ¶¶ 8, 20-25. No testimony has been offered to rebut Mr. Ng description of what occurred at the August 6, 2008 Closing. Nor have any admissible documents been offered to rebut Mr. Ng’s testimony. The absence of any such testimony or documentation is telling given the following:

On September 8, 2015, counsel for NIR and VP served subpoenas duces tecum on First American Title Company (“FATCO”) and Sandpoint Title. *Declaration of Susan P. Weeks in Support of Rule 56(f) Motion (“Weeks 56(f) Aff.”)* at ¶ 4, filed on October 13, 2015. The subpoena duces tecum required Sandpoint Title to produce its “entire file, No. 49214-NA ..., relating to the R.E. Loans, LLC Loan No. P0099[.]” *Exhibit A* to the *Declaration of Chad M. Nicholson dated October 20, 2015*, filed concurrently herewith. The information required to be produced included, but was not limited to, “[c]opies of all checks issued.” *Id.* Similarly, the subpoena duces tecum served on FATCO required it to produce its “entire file, No. 239217 ..., relating to the Pensco Trust Co. Loan No. P0106” as well as its “entire file, No. 239217 ..., relating to the Mortgage Fund ’08 LLC Loan No. P0107[.]” *Id.* at *Exhibit B*. The information required to be produced included, but was not limited to, “[c]opies of all checks issued.” *Id.*

On October 8, 2015, counsel for NIR and VP received approximately 1700 pages of responsive documents.<sup>3</sup> *Weeks 56(f) Aff.* at ¶ 6 and *Gary A. Finney’s Affidavit and JV’s Motion to Vacate Valiant’s Hearing on October 23, 2015 (“Finney 56(f) Aff.”)* at pp. 6-7, filed on October 13, 2015. Despite receiving 1700 pages of documents, NIR and VP have submitted only two documents from the title companies’ files in opposition to the Third SJ Motion: a settlement statement and an e-mail exchange. *Exhibits B and C* to the *Weeks 56(f) Aff.* Noticeably absent from the documentation presented to the Court are any “copies of checks issued” which support NIR and VP’s interpretation of the inadmissible settlements. If MF08 had deposited sufficient funds into escrow to pay off both the 2007 RE Loans Note and the Pensco Note, FATCO’s file would have documentation showing that that money was received and paid out. No such

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<sup>3</sup> Valiant has not been provided copies of the documents received from FATCO and Sandpoint Title despite Valiant’s January 26, 2015 request for production of all documents which “pertain[] in any way to the facts, circumstances or issues involved in this litigation,” and NIR and VP’s Rule 26(e) continuing obligation to supplement its discovery responses.

documentation has been submitted to the Court. The reason for this is simple: the August 6, 2008 Closing did not fund in the manner alleged by NIR and VP.

Moreover, the Declaration of Barney Ng, Real Party in Interest in Opposition to Motion for Relief from Automatic Stay by RE Loans, attached as Exhibit F to the *Weeks Opp. Decl.*, demonstrates that neither the 2007 RE Loans Note nor the Pensco Note were paid at the August 6, 2008 Closing. If Barney Ng was personally repaid on August 6, 2008, there is no reason whatsoever for him to file a declaration nearly five (5) years later asserting that the Pensco Loan had equivalent priority. A paid loan has no priority. Likewise, if the 2007 RE Loans Note was paid on August 6, 2008, he would not have asserted that the Pensco Loan had equivalent priority to the 2007 REL Loan. Again, a paid loan has no priority. Ng's declaration would have asserted that Pensco has a first priority lien if the 2007 REI Loan had been paid off.

2. RE Loans and Pensco's failure to exercise their respective due on sale or encumbrance clauses does not create a genuine issue of material fact.

NIR and VP claim that because the 2007 RE Loans Mortgage and the Pensco Mortgage contain a due on sale or encumbrance clause, the notes secured by these mortgages had to be paid off at closing. This is a non sequitur and a red-herring.

Due on sale or encumbrances ("DOS") clauses are for the protection of the lender, not the borrower. See *First Nat'l Bak of Caruthers*, 443 So.2d 861, 862 (Miss. 1983) quoting *Dunhamd v. Ware Savings Bank*, 384 Mass. 63, 423 N.E.2d 998 (1981); *Snow v. Western Sav. & Loan Ass'n*, 730 P.2d 204, 207-208 (Ariz. 1986). See also 12 U.S.C. § 1701j-3(b)(2) ("... the exercise by the lender of *its* option ...") and § 1701j-3(b)(3) ("In the exercise of *its* option under a due-on-sale clause, a lender is encouraged to ...") (emphasis added). The DOS clauses at issue in this case protect RE Loans and Pensco and provided them with the option to declare the debt immediately due under the mortgage if POBD transferred the security:

Except for a sale resulting in a partial reconveyance in accordance with the provisions of the Loan Agreement between Mortgagor and Mortgagee, Mortgagor shall not transfer the Property without the prior written consent of Mortgagee, *which consent may be withheld in Mortgagee's sole discretion*. Consent to one transfer shall not be deemed to be a waiver of the right to require consent to other transfers. Except for a transfer resulting in a partial reconveyance of this Mortgage if the Note, any Loan Agreement between Mortgagor and Mortgagee, or this Mortgage has a partial release clause, *if Mortgagor transfers the Property or any portion thereof, or any interest therein, without first obtaining the written consent of Mortgagee, all indebtedness secured by this Mortgage shall, at the option of Mortgagee and without notice or demand, become immediately due and payable*. As used herein, transfer includes, but is not limited to, the sale, option to sell, contract to sell, convey, encumber, mortgage (including encumber by a mortgage), pledge, hypothecate, or lease with option to purchase of the Property, or any portion thereof, or any interest therein, whether voluntary, involuntary, by operation of law, or otherwise, or the transfer of more than a 50% interest of Mortgagor if Mortgagor is anything other than a natural person.

*Exhibit B* at Article 1.20 to the *Reeves Decl.* filed on January 20, 2015 and *Exhibit G* at Article 1.20 to the *Reeves Decl.* (emphasis added). NIR and VP have not provided the Court with evidence demonstrating that either RE Loans or Pensco exercised their options under the DOS. Thus, the evidence before the Court, as well as the evidence not before the Court, demonstrates that RE Loans and Pensco consented to not being fully paid at the August 6, 2008 Closing.

Even if NIR and VP were correct that RE Loans somehow did not consent to the Pensco and MF08 encumbrances and that Pensco somehow did not consent to the MF08 encumbrance, lack of consent does not create a genuine issue of material fact. Only evidence that the 2007 RE Loans Note and the Pensco Note were paid at the August 6, 2008 Closing would create a triable question of fact. As discussed above, NIR and VP have presented no evidence to demonstrate that such an issue exists.

3. *The MF08 and Pensco Mortgages, the MF08 and Pensco Notes, the MF08 Loan Agreement, the Borrower's Funding Authorization and Agreement and the testimony*

of Barney Ng establish that the 2007 RE Loans Note and the Pensco Note were not satisfied at closing.

NIR and VP continue to rely on settlement statements for the proposition that the 2007 RE Loans and Pensco Notes were satisfied at closing. The inadmissibility of these documents aside, these settlement statements do not create a genuine issue of material fact.

As previously discussed, Mr. Ng has provided detailed testimony regarding the source of, and distribution of, funds at the August 6, 2008 Closing. *Ng Third SJ Decl.* at ¶¶ 8, 20-25. NIR and VP have not submitted evidence which refutes Mr. Ng's testimony and in fact provided prior testimony of Mr. Ng which further supports the conclusion that neither the 2007 RE Loans Note nor the Pensco Note were paid.

NIR and VP also claim that a \$1,000,000.00 check made payable to Bar-K and a letter to Adjusters International creates an issue of fact as to whether the balance on the Pensco Note was reduced by \$1,000,000.00. The admissibility of these documents aside, these documents do not create a genuine issue of material fact. NIR and VP have not produced any evidence that the check was in fact sent to Bar-K or that it was cashed. Nor have NIR and VP demonstrated that Bar-K applied these funds toward the Pensco Note.

On the contrary, the evidence before the Court demonstrates that the vast majority of this \$1,000,000.00 insurance payment was applied towards the 2007 RE Loans Note. The check attached as Exhibit E to the *Weeks Opp. Decl.* is dated October 26, 2009. On October 28, 2009, the loan transaction detail report for the 2007 RE Loans Note shows a paydown of \$984,098.58 with a handwritten notation of "Ins". *Reeves Aff.*, Ex. E. Thus, the most probable inference to be drawn from the evidence is that the vast majority of the \$1,000,000.00 October 26, 2009 insurance check was applied to reduce the 2007 RE Loans Note, not the Pensco Note.

***F. There is no genuine issue of material fact regarding the property secured by each of the Valiant Mortgages.***

NIR and VP claim that a genuine issues of material fact exist regarding what real property secures each of the Valiant Mortgages. This claim is without merit.

One basis for this claim, alleged inconsistencies in C. Dean Shafer's declarations, was thoroughly addressed in Valiant's opening memorandum. Valiant incorporates that argument as if set forth in full herein.

The second basis for NIR and VP's claim is that e-mails from a title company and the declaration Mr. Ng submitted in the RE Loans bankruptcy call into question the accuracy of Mr. Shafer's opinions regarding the covered properties. NIR or VP have not attempted to demonstrate how this evidence calls into question Mr. Shafer's testimony. No evidence or argument is submitted to establish that Mr. Shafer's conclusions based his review of recorded documents is incorrect. There is no genuine issue of material fact regarding which real property secures each of the Valiant Mortgages.

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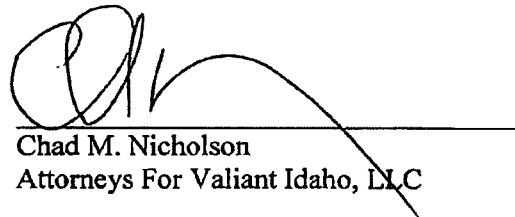
### III. CONCLUSION

Based upon the foregoing, Valiant respectfully submits that there is no genuine issue of material fact that the 2007 RE Loans Note and the Pensco Note remain unsatisfied and that there is no genuine issue of material fact as to the real property as to the real property subject to the 2007 RE Loans Note/Mortgage, the Pensco Note/Mortgage and the MF08 Notes/Mortgage.

**DATED** this 20<sup>th</sup> day of October 2015.

McCONNELL WAGNER SYKES & STACEY <sup>PLLC</sup>

BY:



Chad M. Nicholson  
Attorneys For Valiant Idaho, LLC

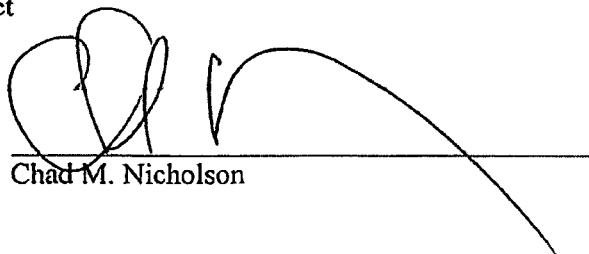
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20<sup>th</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Bruce A. Anderson, Esq. Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd 320 East Neider Avenue, Suite 102 Coeur d' Alene, Idaho 83815 Telephone: 208.667.2900 Facsimile: 208.667.2150 <i>Counsel For Jacobson, Lazar and Sage Holdings</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  <u>brucea@ejame.com</u>
Gary 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 type="checkbox"/> ] U.S. Mail [ <input type="checkbox"/> ] Hand Delivered [ <input type="checkbox"/> ] Facsimile [ <input checked="" type="checkbox"/> ] Overnight Mail [ <input type="checkbox"/> ] Electronic Mail  <u>garyfinney@finneylaw.net</u>
D. Toby McLaughlin, Esq. Berg & McLaughlin 414 Church Street, Suite 203 Sandpoint, Idaho 83864 Telephone: 208.263.4748 Facsimile: 208.263.7557 <i>Counsel For Idaho Club HOA/Panhandle Mngmnt</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  <u>toby@sandpointlaw.com</u>
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 type="checkbox"/> ] U.S. Mail [ <input type="checkbox"/> ] Hand Delivered [ <input type="checkbox"/> ] Facsimile [ <input checked="" type="checkbox"/> ] Overnight Mail [ <input type="checkbox"/> ] Electronic Mail  <u>sweeks@jvwlaw.net</u>

With two (2) copies via Federal Express to:

Honorable Barbara A. Buchanan  
 Judge of the First Judicial District  
 Bonner County Courthouse  
 215 South First Avenue  
 Sandpoint, Idaho 83864

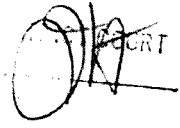


Chad M. Nicholson



Richard L. Stacey, ISB #6800  
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[sykes@mwsslawyers.com](mailto:sykes@mwsslawyers.com)  
[nicholson@mwsslawyers.com](mailto:nicholson@mwsslawyers.com)

FILED  
 OCT 23 2015  
 CLERK OF DISTRICT COURT  
 BOISE, IDAHO



Attorneys For Valiant Idaho, LLC

**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,

vs.

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

Defendants.

Case No. CV-09-1810

**VALIANT IDAHO, LLC'S  
 SECOND MOTION TO STRIKE  
 INADMISSIBLE EVIDENCE**

Honorable Barbara A. Buchanan

**Hearing:**

October 23, 2015 – 1:00 p.m. PDST

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

**COMES NOW**, Valiant Idaho, LLC (“Valiant”), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and, pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure and Rules 602, 801-804, and 901-902 of the Idaho Rules of Evidence, moves this Court for an order striking:

1. Under Rule 56(f) of the Idaho Rules of Civil Procedure and Rules 602, 801 through 804, 901 and 902 of the Idaho Rules of Evidence, the “First American Title Company Settlement Statement” attached as Exhibit A to the Declaration of Susan P. Weeks in Opposition to Valiant’s Third Motion for Summary Judgment (“Weeks Opp. Decl.”), filed on October 13, 2015;

2. Under Rule 56(f) of the Idaho Rules of Civil Procedure and Rules 602, 801 through 804, 901 and 902 of the Idaho Rules of Evidence, the “Borrower’s Final Settlement Statement” dated August 6, 2008 attached as Exhibit B to the Weeks Opp. Decl.

3. Under Rule 56(f) of the Idaho Rules of Civil Procedure and Rules 602, 801 through 804, 901 and 902 of the Idaho Rules of Evidence, the e-mail chain attached as Exhibit C to the Weeks Opp. Decl.

4. Under Rule 56(f) of the Idaho Rules of Civil Procedure and Rules 602, 801 through 804, 901 and 902 of the Idaho Rules of Evidence, the letter to Adjusters International dated October 5, 2009 attached as (a) Exhibit D to the Weeks Opp. Decl. and (b) Exhibit R to the JV L.L.C.’s Objection and Memorandum in Opposition to Valiant Idaho, LLC’s Third Motion for Summary Judgment and JV L.L.C.’s Motion to Strike Valiant’s Third Motion for Summary Judgment and Notice of Hearing for October 23, 2015 at 1:30 P.M. (“J.V. Third SJ Opp.”) filed on October 13, 2015.

5. Under Rule 56(f) of the Idaho Rules of Civil Procedure and Rules 602, 801 through 804, 901 and 902 of the Idaho Rules of Evidence, the check dated October 26, 2009 attached as (a) Exhibit E to the Weeks Opp. Decl. and (b) Exhibit S to the J.V. Third SJ Opp.

6. Under Rule 56(f) of the Idaho Rules of Civil Procedure and *Coeur d'Alene Mining Co. v. First Nat'l. Bank of N. Idaho* 118 Idaho 812, 821, 800 P.2d 1026, 1035 (1990) all documents attached to J.V. Third SJ Opp. filed on October 13, 2015.

7. Under Rule 56(f) of the Idaho Rules of Civil Procedure and Rules 602, 801 through 804, 901 and 902 of the Idaho Rules of Evidence, the "Buyer/Borrower Statement Estimated" attached as (a) Exhibit O to the J.V. Third SJ Opp. and (b) Exhibit O to the Affidavit of James Berry on Behalf of JV, LLC in Opposition to Valiant Idaho, LLC's Third Motion for Summary Judgment ("Berry Aff."), filed on October 13, 2015.

8. Under Rule 56(f) of the Idaho Rules of Civil Procedure and Rules 602, 801 through 804, 901 and 902 of the Idaho Rules of Evidence, the Bar-K ledger attached as (a) Exhibit P to the J.V. Third SJ Opp. and (b) Exhibit P to the Berry Aff.

9. Under Rule 56(f) of the Idaho Rules of Civil Procedure and Rules 602, 801 through 804, 901 and 902 of the Idaho Rules of Evidence, the e-mails attached as Exhibits T and U to the J.V. Third SJ Opp.

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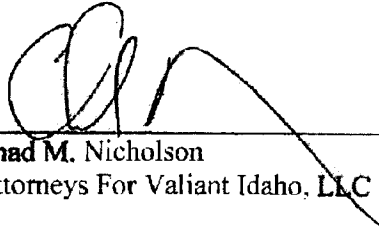
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This motion is made and based upon the records and files herein; the Memorandum in Support of [Valiant's] Motion to Strike Inadmissible Evidence filed herewith; and, all other and further evidence and arguments presented at the hearing of this motion.

DATED this 20<sup>th</sup> day of October 2015.

McCONNELL WAGNER SYKES & STACEY PLLC

BY:   
Chad M. Nicholson  
Attorneys For Valiant Idaho, LLC

**CERTIFICATE OF SERVICE**

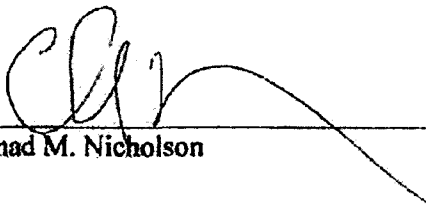
I HEREBY CERTIFY that on the 20<sup>th</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Bruce A. Anderson, Esq. Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd 320 East Neider Avenue, Suite 102 Coeur d' Alene, Idaho 83815 Telephone: 208.667.2900 Facsimile: 208.667.2150 <i>Counsel For Jacobson, Lazar and Sage Holdings</i>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail <a href="mailto:brucea@ejame.com">brucea@ejame.com</a>
Gary 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 checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail <a href="mailto:garyfinney@finneylaw.net">garyfinney@finneylaw.net</a>

D. Toby McLaughlin, Esq. Berg & McLaughlin 414 Church Street, Suite 203 Sandpoint, Idaho 83864 Telephone: 208.263.4748 Facsimile: 208.263.7557 <i>Counsel For Idaho Club HOA/Panhandle Mngmnt</i>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail <a href="mailto:toby@sandpointlaw.com">toby@sandpointlaw.com</a>
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 checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail <a href="mailto:swceks@jvwlaw.net">swceks@jvwlaw.net</a>

With two (2) copies via United States Mail to:


Honorable Barbara A. Buchanan  
Judge of the First Judicial District  
Bonner County Courthouse  
215 South First Avenue  
Sandpoint, Idaho 83864




---

Chad M. Nicholson

Richard L. Stacey, ISB #6800  
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[nicholson@mwsslawyers.com](mailto:nicholson@mwsslawyers.com)

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 CLEARING  


Attorneys For Valiant Idaho, LLC

**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,

vs.

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

Defendants.

Case No. CV-09-1810

**MEMORANDUM IN SUPPORT OF  
 VALIANT IDAHO, LLC'S  
 SECOND MOTION TO STRIKE  
 INADMISSIBLE EVIDENCE**

**Honorable Barbara A. Buchanan**

**Hearing:**

October 23, 2015 – 1:30 p.m. PDST

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

COMES NOW, Valiant Idaho, LLC ("Valiant"), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and files its Memorandum in Support of [its] Second Motion to Strike Inadmissible Evidence ("Second Motion to Strike").

**I.**  
**INTRODUCTION**

On October 13, 2015, North Idaho Resorts, LLC ("NIR"), VP, Incorporated ("VP") and JV, LLC ("JV") (collectively "Defendants") filed memoranda, declarations and affidavits in opposition to Valiant's Third Motion for Summary Judgment. Valiant has moved to strike portions of the declarations and affidavits. This Memorandum is in support of the Second Motion to Strike.

**II.**  
**LAW AND ARGUMENT**

The Idaho Supreme Court recently reiterated what a non-moving party must do to withstand summary judgment:

[T]o survive summary judgment, "an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, *by affidavits or as otherwise provided in this rule*, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(c). Therefore, "the nonmoving party must submit more than just conclusory assertions that an issue of material fact exists...." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005) (citing *Northwest Bec-Corp. v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002)).

*Holdaway v. Broulim's Supermarket*, 2015 WL 2412186 at \*2 (May 21, 2015) (emphasis added).

"Affidavits submitted in support of or in opposition to a motion for summary judgment must be admissible under the Idaho Rules of Evidence." *Id.* at \*4 citing I.R.C.P. 56(e). Rule 56(e) requires that:

Supporting and opposing *affidavits shall be made on personal knowledge*, shall set forth such facts as would be admissible

MEMORANDUM IN SUPPORT OF VALIANT IDAHO, LLC'S SECOND  
MOTION TO STRIKE INADMISSIBLE EVIDENCE - Page 2

\\MS47201\PLD\CV-2009-1810\Strike Exhibit & Depo - Memo (Second) 102015.docx

in evidence, and *shall show affirmatively that the affiant is competent to testify to the matters stated therein*. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

(Emphasis added.) “The admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial.” *Holdaway* at \*4 quoting *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007).

A. **Exhibits A through E to the Weeks Opp. Decl. and Exhibits O, P, R, S, T, and U to JV's Third SJ Opp. and Exhibits O and P to the Berry Aff. Are Inadmissible And Should Be Stricken From The Record.**

NIR and VP have attempted to admit the following documents through the Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment (“Weeks Opp. Decl.”), filed on October 13, 2015:

Exhibit A: a document entitled “First American Title Company Settlement Statement” (“FATCO Statement”);

Exhibit B: “Borrower's Final Settlement Statement” dated August 6, 2008;

Exhibit C: E-mail chain;

Exhibit D: letter to Adjusters International dated October 5, 2009; and

Exhibit E: copy of a check dated October 26, 2009.

These exhibits will collectively be referred to as the “Weeks Documents.”

JV has attempted to admit the following documents, among others, by attaching the documents to the JV L.L.C.'s Objection and Memorandum in Opposition to Valiant Idaho, LLC's Third Motion for Summary Judgment and JV L.L.C.'s Motion to Strike Valiant's Third Motion



for Summary Judgment and Notice of Hearing for October 23, 2015 at 1:30 P.M. ("J.V. Third SJ Opp.") filed on October 13, 2015:

Exhibit O: a "Buyer/Borrower Statement Estimated" dated June 13, 2006;

Exhibit P: a document purporting to be a Bar-K ledger;

Exhibit R: letter to Adjusters International dated October 5, 2009;

Exhibit S: copy of a check dated October 26, 2009;

Exhibit T: e-mail from Kathy Groenhout to Vincent Hua dated November 2, 2009; and

Exhibit U: e-mail from Kathy Groenhout to Vincent Hua dated October 27, 2009.

These documents will be collectively referred to as the "JV Memo. Documents." Exhibits O and P are also attached to the Affidavit of James Berry on Behalf of JV, LLC in Opposition to Valiant Idaho, LLC's Third Motion for Summary Judgment ("Berry Aff."), filed on October 13, 2015.

The Weeks Documents and the JV Memo. Documents are not properly before the Court because: (1) NIR, VP and/or JV have not laid the foundation required to admit these documents; and (2) the documents are inadmissible hearsay.

1. **NIR, VP and/or JV Have Not Laid the Evidentiary Foundation Necessary To Admit the Weeks Documents or the JV Memo. Documents.**

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." I.R.E. 602. Ms. Weeks attempts to admit Weeks Documents but does not testify to having personal knowledge regarding the creation of any of the documents, their authenticity, or if such documents are accurate representations of events that actually occurred. The same is true for Mr. Berry with respect to Exhibits O and P to the Berry Aff. As such, neither Ms. Weeks nor Mr. Berry are competent under Evidence Rule 602 to testify to the documents attached to their affidavits.

NIR and VP have failed to authenticate the Weeks Documents. "The requirement of authentication ... as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." I.R.E. 901(a). As discussed above, NIR and VP have presented no testimony that would support a finding that the Weeks Documents are what NIR and VP claim the documents to be. Such testimony is required because the Weeks Documents are not self-authenticating under Evidence Rule 902. By failing to authenticate the Weeks Documents, NIR and VP have failed to meet the "condition precedent" required for the admission of these documents.

Likewise, no testimony has been presented regarding the JV Memo. Documents except for Exhibit O and P. However, the Berry Aff. does not present testimony that supports a finding that Exhibits O and P to the Berry Aff. are what Mr. Berry claims the documents to be. The JV Memo. Documents are not self-authenticating under Evidence Rule 902 and therefore JV has failed to meet the "condition precedent" required for the admission of these documents.

**2. The Weeks Documents and JV Memo. Documents Are Inadmissible Hearsay.**

Each of the Weeks Documents and JV Memo. Documents are written assertions made out of court that NIR and VP and/or JV are offering for the truth of the matter asserted and are, therefore, hearsay. I.R.E. 801. No exception to the hearsay rule applies to the any of the Weeks Documents or the JV Memo. Documents. I.R.E. 803 & 804. As such, the Weeks Documents and the JV Memo. Documents are inadmissible. I.R.E. 802.

In summary, the Weeks Documents and the JV Memo. Documents do not meet Civil Rule 56(e)'s admissibility requirement because the documents are hearsay and the necessary foundation for these documents has not be laid.

**B. Rule 56(e) Requires That Documents Must Be Submitted Via Affidavit or Declaration To Be Considered at Summary Judgment.**

Documents attached to a memorandum are not a part of a summary judgment record. *Coeur d'Alene Mining Co. v. First Nat'l. Bank of N. Idaho* 118 Idaho 812, 821, 800 P.2d 1026, 1035 (1990) (holding that the record before the trial court was "devoid of any evidence to raise" a genuine issue of material fact despite the fact that documents attached to a memorandum could be construed as created such an issue because "the documents were not presented to the trial court by affidavit or in any other form referred to in I.R.C.P. 56(c).").

JV has attached numerous documents to JV L.L.C.'s Objection and Memorandum in Opposition to Valiant Idaho, LLC's Third Motion for Summary Judgment and JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment and Notice of Hearing for October 23, 2015 at 1:30 P.M., filed on October 13, 2015. These documents have not been offered *via* affidavit or declaration. As such, the documents are not part of the record and cannot be considered by this Court.


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**III.  
CONCLUSION**

Based upon the foregoing argument and legal authority, and whatever further evidence may be presented at the hearing of Valiant's Motion to Strike, Valiant respectfully requests this Court to **grant** Valiant's Second Motion to Strike and strike from the record the documents identified therein.

**DATED** this 20<sup>th</sup> day of October 2015.

McCONNELL WAGNER SYKES & STACEY P.L.L.C

BY:   
Chad M. Nicholson  
Attorneys For Valiant Idaho, LLC

**CERTIFICATE OF SERVICE**

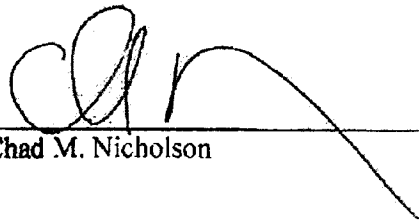
I **HEREBY CERTIFY** that on the 20<sup>th</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Bruce A. Anderson, Esq. Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd 320 East Neider Avenue, Suite 102 Coeur d' Alene, Idaho 83815 Telephone: 208.667.2900 Facsimile: 208.667.2150 <i>Counsel For Jacobson, Lazar and Sage Holdings</i>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail  <a href="mailto:brucea@ejame.com">brucea@ejame.com</a>
Gary 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 checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail  <a href="mailto:garyfinney@finneylaw.net">garyfinney@finneylaw.net</a>

<p>D. Toby McLaughlin, Esq.          Berg &amp; McLaughlin          414 Church Street, Suite 203          Sandpoint, Idaho 83864          Telephone: 208.263.4748          Facsimile: 208.263.7557  <i>Counsel For Idaho Club HOA/Panhandle Mngmnt</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail  <input type="checkbox"/> Hand Delivered  <input checked="" type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Electronic Mail  <a href="mailto:toby@sandpointlaw.com">toby@sandpointlaw.com</a></p>
<p>Susan P. Weeks, Esq.          James, Vernon &amp; 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></p>	<p><input checked="" type="checkbox"/> U.S. Mail  <input type="checkbox"/> Hand Delivered  <input checked="" type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Electronic Mail  <a href="mailto:sweeks@jvwlaw.net">sweeks@jvwlaw.net</a></p>

With two (2) copies via United States Mail to:

Honorable Barbara A. Buchanan  
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 Bonner County Courthouse  
 215 South First Avenue  
 Sandpoint, Idaho 83864




Chad M. Nicholson

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF BONNER  
215 S. FIRST AVENUE  
SANDPOINT, IDAHO 83864

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 21 A 8:03

CLERK DISTRICT COURT  
  
DEPUTY

Genesis Golf Builders, Inc )

vs. )

Pend Oreille Bonner Development, LLC, etal. )

Case No: CV-2009-0001810

AMENDED NOTICE OF TRIAL

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Court Trial - 2 Days  
Judge:

Thursday, January 28, 2016  
Barbara A. Buchanan

09:00 AM

Additional Presiding Judges: Charles W. Hosack, John P. Luster, John T. Mitchell,  
Fred M. Gibler, Steven Verby, George Reinhardt, III, Jeff Brudie, Lansing Haynes,  
Benjamin R Simpson, Carl Kerrick, John Stegner, Barbara Buchanan, Richard  
Christensen, Jay Gaskill, Cynthia K.C. Meyer, Gregory FitzMaurice

I hereby certify that the foregoing is a true and correct copy of this Amended Notice of Trial entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on Wednesday, October 21, 2015.

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CHAD M NICHOLSON  
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SUSAN P. WEEKS  
ATTORNEY AT LAW  
1626 LINCOLN WAY  
COEUR D'ALENE ID 83814

Mailed  Hand Delivered  Faxed

Dated: October 21st, 2015  
Michael W. Rosedale  
Clerk Of The District Court

By: *Linda Apples*  
Deputy Clerk

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 21 PM 3 19

CLERK DISTRICT COURT

DEPUTY *JH*

Richard L. Stacey, ISB #6800  
Jeff R. Sykes, ISB #5058  
Chad M. Nicholson, ISB #7506  
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Attorneys For Valiant Idaho, LLC

**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,

vs.

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

Defendants.

Case No. CV-09-1810

**REPLY TO JV L.L.C.'S RESPONSE TO  
VALIANT IDAHO, LLC'S  
MOTION TO STRIKE  
INADMISSIBLE EVIDENCE**

**Honorable Barbara A. Buchanan**

**Hearing:**

October 23, 2015 – 1:00 p.m. PDST

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

**REPLY TO JV L.L.C.'S RESPONSE TO VALIANT IDAHO, LLC'S MOTION TO STRIKE  
INADMISSIBLE EVIDENCE - Page 1**

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COMES NOW, Valiant Idaho, LLC ("Valiant"), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and files its Reply to JV L.L.C.'s Response to Valiant Idaho, LLC's Motion to Strike Inadmissible Evidence.

**I.**  
**REPLY ARGUMENT**

***A. JV L.L.C.'s Response to Valiant's Motion to Strike Inadmissible Evidence is untimely and should be stricken from the record.***

On October 9, 2015, Valiant served JV L.L.C. ("JV") by facsimile Valiant Idaho, LLC's Motion to Strike Inadmissible Evidence ("Motion to Strike") and supporting papers. The Motion to Strike was noticed for hearing on October 23, 2015. The Motion to Strike was timely served fourteen (14) days prior to the hearing. I.R.C.P. 5(b)(F), 6(a), 7(b)(3)(A), 7(b)(3)(B) & 7(b)(3)(E).

Idaho Rule of Civil Procedure 7(b)(3)(E) requires that "[a]ny responsive brief shall be filed with the court, and served so that it is received by the parties, at least seven (7) days prior to the hearing." JV was required to file and serve its responsive brief by October 16, 2015. *JV L.L.C.'s Response to Valiant's Motion to Strike Inadmissible Evidence* ("*JV's Response*") was filed and served on October 19, 2015. *JV's Response* is untimely and should be stricken from the record.

***B. The Motion to Strike should be granted as JV's [Untimely] Response does not establish that the evidence sought to be stricken is admissible under the Idaho Rules of Evidence.***

Valiant has moved to strike the deposition testimony of Charles Reeves ("*Reeves Depo.*"), which deposition was taken on August 19, 2013, in Bonner County Case No. CV-2011-0135 ("Union Bank Case"). *Valiant Idaho, LLC's Motion to Strike Inadmissible Evidence* ("*Motion to Strike*") at 2, filed on October 9, 2015. This motion was based on Idaho Rule of Civil Procedure ("Procedural Rule") 32(a) and Idaho Rules of Evidence ("Evidence Rule" or "Evidence Rules")

801 through 804. *Id.* Valiant also seeks to strike, pursuant to Procedural Rule 56(e)<sup>1</sup> and Evidence Rules 602, 801 through 804, 901 and 902, the “Borrower’s Settlement Statement” dated July 31, 2008 and the “Borrower’s Final Settlement Statement” dated August 6, 2008 (collectively “Settlement Statements”). *Id.*

JV, L.L.C. (“JV”) does not contend that the documents sought to be stricken are admissible under either the Procedural Rules or the Evidence Rules. Instead, JV contends that Valiant has waived its objections. This claim is without merit.

Valiant’s *Memorandum in Reply to JV, L.L.C.’s Memorandum in Opposition to Valiant Idaho, LLC’s Motion for Summary Judgment* (“*Valiant SJ Reply*”), filed on March 11, 2015 states:

When Charles Reeves was deposed on August 12, 2013, and when the case went to trial thereafter, RE Loans had no interest in the litigation or the real property at issue. Any finding made by Judge Griffin that RE Loans was paid by POBD was not litigated by RE Loans and is not a basis for the application of collateral estoppel.

...

First, JV does not present any sworn facts to the Court. Second, none of the closing statements are properly before the Court. JV attaches the closing statements to its Opposition *without setting forth any foundation that the closing statements are authentic or even accurate copies of any loans which actually closed*. The closing statements are not part of any affidavit or declaration establishing that the documents would be admissible at trial. I.R.C.P. 56(e). The closing statements do not raise any question of fact in this matter whether a debt obligation is owed by POBD to RE Loans under the 2007 RE Loans Note and Mortgage.

*Valiant SJ Reply* at 4 (emphasis added). Thus, Valiant timely objected to the inadmissible evidence which Valiant seeks to strike. Thereafter, Valiant continued to assert its objection to this evidence.

Valiant’s *Memorandum in Opposition to North Idaho Resorts, LLC and VP, Inc.’s Renewed*

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<sup>1</sup> Paragraphs 2 and 3 of the *Motion to Strike* contain a scrivener’s error and indicate that the motion is made under Procedural Rule 56(f). As indicated by the opening paragraph of the *Motion to Strike*, to the extent the *Motion to Strike* is based on Procedural Rule 56, the *Motion to Strike* is made pursuant to subsection (e).

*Motion for Reconsideration and Clarification ("Valiant Opp. to Renewed Reconsideration")*, filed on June 30, 2015, states on page 7:

The closing statement attached to the Berry Affidavit was inadmissible evidence and properly disregarded by the Court. The Berry Affidavit does not lay the required foundation to demonstrate that Mr. Berry is competent to testify to the closing statement, *i.e.* he has no personal knowledge regarding the closing statement, its authenticity, or if the closing statement is even an accurate copy of any loan that was actually closed.

Likewise, Valiant's *Memorandum in Opposition to JV L.L.C.'s Motion to Alter, Amend and to Reconsider the Court's Memorandum Decision and Order Filed 4/14/2015 ("Valiant Opp. JV's 1<sup>st</sup> Mot. Reconsider")*, filed on June 30, 2015, states on page 8:

JV also attempts to rely on an August 19, 2013 deposition of Charles Reeves from the *Union Bank* case. On August 11, 2013 - prior to Mr. Reeves deposition - R.E. Loans stipulated that JV's right, title and interest to the Trestle Creek Property - property not at issue in this suit - was senior to that of R.E. Loans. On August 20, 2013, R.E. Loans disclaimed its interest in Trestle Creek - nearly nine (9) months before Judge Griffin presided over a trial between North Idaho Resorts, LLC ("NIR") and Union Bank to determine the priority of those two party's right, title and interest in the Trestle Creek Property. Following the trial between NIR and Union Bank, Judge Griffin issued the findings on which JV attempts to rely. Since R.E. Loans (1) disclaimed its interest long before the trial to determine priority with respect to the Trestle Creek Property and (2) did not participate in that trial, the Union Bank trial did not provide R.E. Loans a full and final opportunity to litigate the issue of priority over the property at issue in this matter.

Valiant continued on to state:

JV also claims that various closing statements created a genuine issue of material fact as to whether Valiant's mortgages have been paid off and whether any money was disbursed under the MF08 Loan. The closing statements relied upon were attached as Exhibits "D", "G" and "H" to JV L.L.C.'s Memorandum in Opposition to Valiant Idaho, LLC's Motion for Summary Judgment ("Opening Memo.").

...

In this case, JV attempts to rely on Exhibits "D", "G" and "H" attached to its Opening Memo. As these Exhibits were not attached to an affidavit or declaration, the Exhibits are not part of the record and therefore could not be considered by the Court. [*Coeur d'Alene Mining Co. v. First Nat'L Bank of N. Idaho*, 118 Idaho 812, 821, 800 P.2d 1026, 1035 (1990)].

Valiant anticipates that JV will argue that, because James Berry verified the Opening Memo., the affidavit requirement of rule 56(e) was met and the Court could have considered Exhibit "D", "G" and "H." While Valiant believes such an argument fails, even if Mr. Berry's verification is treated as an affidavit, the exhibits still cannot be considered because the verification does not lay the required foundation to demonstrate that Mr. Berry is competent to testify to the closing statements, *i.e.* he has no personal knowledge regarding Exhibits "D", "G" and "H", their authenticity, or if these Exhibits are even accurate copies of any loans were actually closed.

*Valiant Opp. JV's 1<sup>st</sup> Mot. Reconsider* at 9-10.

The foregoing objections were then reasserted by reference in Valiant's *Memorandum in Opposition to JV L.L.C.'s Motion to Alter, Amend and to Reconsider the Court's Memorandum Decision and Order Dated July 21, 2015* at page 5, filed on August 26, 2015 and in Valiant's *Memorandum in Opposition to JV, L.L.C.'s Motion to Alter, Amend and to Reconsider Filed 8/18/2015* at page 3, filed on August 26, 2015.

Clearly, Valiant has not waived its objection.

JV also attempts to cure its failure to attach the *Reeves Depo.* to an affidavit or declaration by a "declaration" of counsel in *JV L.L.C.'s Response to Valiant's Motion to Strike Inadmissible Evidence*. Assuming that this declaration by reference is permissible, counsel's declaration does not cure the evidentiary failings of the *Reeves Depo.*

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**II.  
CONCLUSION**

Based upon the foregoing argument and legal authority, and whatever further evidence may be presented at the hearing of Valiant's Motion to Strike, Valiant respectfully requests this Court to **grant** Valiant's Motion to Strike and strike from the record in this action the Reeves *Union Bank* Depo. and the Settlement Statements attached as Exhibits G and H to JV's SJ Opp.

**DATED** this 21<sup>st</sup> day of October 2015.

McCONNELL WAGNER SYKES & STACEY <sup>PLLC</sup>

BY:   
Chad M. Nicholson  
Attorneys For Valiant Idaho, LLC

**CERTIFICATE OF SERVICE**


**I HEREBY CERTIFY** that on the 21<sup>st</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

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With two (2) copies via United States Mail to:

Honorable Barbara A. Buchanan  
 Judge of the First Judicial District  
 Bonner County Courthouse  
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Chad M. Nicholson

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 21 PM 4 58

CLERK DISTRICT COURT

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Attorneys For Valiant Idaho, LLC

**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,

vs.

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

Defendants.

Case No. CV-09-1810

**REPLY TO DEFENDANTS NORTH  
IDAHO RESORTS, LLC'S AND VP,  
INCORPORATED'S MEMORANDUM  
IN OPPOSITION TO VALIANT IDAHO,  
LLC'S MOTION TO STRIKE  
INADMISSIBLE EVIDENCE**

**Honorable Barbara A. Buchanan**

**Hearing:**

October 23, 2015 – 1:00 p.m. PDST

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

**REPLY TO DEFENDANTS NORTH IDAHO RESORTS, LLC'S AND VP, INCORPORATED'S  
MEMORANDUM IN OPPOSITION TO VALIANT IDAHO, LLC'S MOTION TO STRIKE  
INADMISSIBLE EVIDENCE - Page 1**

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COMES NOW, Valiant Idaho, LLC (“Valiant”), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and files its Reply to Defendants North Idaho Resorts, LLC’s and VP, Incorporated’s Memorandum in Opposition to Valiant Idaho, LLC’s Motion to Strike Inadmissible Evidence.

**I.**  
**REPLY ARGUMENT**

**A. Charles Reeves Deposition Transcript from the Union Bank case is inadmissible.**

NIR and VP argue that the deposition testimony of Charles Reeves (“Reeves Depo.”), was taken on August 19, 2013, in Bonner County Case No. CV-2011-0135 (“Union Bank Case”) is admissible under Idaho Rule of Civil Procedure (“Procedural Rule”) 32(a) and Idaho Rules of Evidence (“Evidence Rule” or “Evidence Rules”) 801 through 804. NIR and VP are wrong.

**1. The Reeves Depo. is inadmissible under Procedural Rule 32(a) since that deposition was taken in another matter and does not contradict or impeach Mr. Reeves testimony provided in this matter.**

NIR and VP claim that the plain language of Procedural Rule 32(a) allows a deposition to be used in a different case with different issues. NIR and VP fail to support this claim with any legal authority interpreting Procedural Rule 32(a). On the contrary, Valiant has provided the Court with authority which construes Federal Rule of Civil Procedure 32(a) that contains identical language to Procedural Rule 32(a). Where an Idaho Rule of Civil Procedure is the same as a Federal Rule of Civil Procedure, “federal case law is relevant and helpful.” *State v. Woodbury*, 127 Idaho 757, 759, 905 P.2d 1066 (Ct. App. 1995) citing *State v. Carrasco*, 117 Idaho 295, 298, 787 P.2d 281, 284 (1990) and *State v. Vaughn*, 124 Idaho 576, 580, 861 P.2d 1241, 1245 (Ct. App. 1993). Federal case law interpreting Federal Rule of Civil Procedure 32(a)(4) holds that that Rule



only permits use of a deposition in the action in which the deposition is taken or a subsequent action involving the same parties and the same issues. *Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662 (7th Cir. 1994). As such, by its terms and case law interpreting it, Rule 32(a)(4) does not permit the *Reeves Depo.* to be used in this matter because it was taken in a different case with different issues.

Even if Rule 32(a) permits depositions to be used in different case with different issues, Rule 32(a) only permits a deposition to be used for specified purposes. *See* I.R.C.P. 32(a)(1)-(4). None of the uses enumerated in Rule 32(a) permit use of the *Reeves Depo.* in this matter.

NIR and VP claim that the *Reeves Depo.* can be used in this matter because it is being used for impeachment purposes. I.R.C.P. 32(a)(1). "Impeachment evidence" is defined as "[e]vidence used to undermine a witness's credibility." BLACK'S LAW DICTIONARY at 597 (8<sup>th</sup> Ed. 2007). To impeach Mr. Reeves, the *Reeves Depo.* must contradict or somehow call into question the testimony provided by Mr. Reeves in this matter. The *Reeves Depo.* does not contradict Mr. Reeves testimony in this matter.

When asked which of the loans were paid off at the August 6, 2008 closing, Mr. Reeves first responded by saying "Well, the second transaction obviously modified the first. So I can't – that's, again, a question for the Ng entities as to how they paid this off." *Reeves Union Bank Depo.* at 69:6-8. When specifically asked if the 2007 RE Loans Note was paid off, Mr. Reeves simply acknowledged that that was what was represented by the exhibit in front of him. *Id.* at 69:16-18. The exhibit Mr. Reeves was reviewing was an unsigned, one page preliminary settlement statement that NIR and VP have not relied upon. *Id.* at 69:16-18 and Exhibit B thereto. Mr. Reeves did not testify that the 2007 REL Loan was in fact paid off. *Id.*

**REPLY TO DEFENDANTS NORTH IDAHO RESORTS, LLC'S AND VP, INCORPORATED'S  
MEMORANDUM IN OPPOSITION TO VALIANT IDAHO, LLC'S MOTION TO STRIKE  
INADMISSIBLE EVIDENCE - Page 3**

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Mr. Reeves clarified this testimony by stating that the 2007 RE Loans Note and the Pensco Note simply were included, or to use Ms. Weeks's term, "incorporated" into the MF08 Note. Mr. Reeves was questioned and testified as follows:

Q. Okay. Did you understand at the time that this loan was being taken that it would pay off that previous loan? And "pay off" is maybe not the correct term. Did you understand that when the new \$22,270,000 loan was obtained that the previous loan, which is loan No. P0099, would be incorporated into those funds that would be owed?

A. Yes.

Q. And is it your understanding that's what happened?

A. Yes.

Q. There's also another Loan No. P0106. Do you know what loan that relates to?

A. No.

Q. And it indicates a payoff of 2.7 million. Do you know where that went to or what it related to?

A. No. In my mind, it's just all part of the – again, this Ng umbrella of monies we owed at the time that were paid off with the new facility.

Q. Okay.

A. Or covered by the new facility.

*Id.* at 151:19 – 152:15. Unartful as it may be, Mr. Reeves's testimony is in harmony with his testimony presented in this matter: that the 2007 RE Loans Note and the Pensco Note remain unsatisfied. Since the *Reeves Depo.* does not impeach Mr. Reeves, it cannot be used in this matter under Procedural Rule 32(a)(1).

2. *The Reeves Depo. is inadmissible hearsay.*

NIR and VP argue that the *Reeves Depo.* is not hearsay under Evidence Rule 801(d)(1) based on the assertion that the testimony therein is a prior inconsistent statement. As demonstrated above, testimony from the *Reeves Depo.* is consistent with the testimony Mr. Reeves has provided in this matter. Thus Evidence Rule 801(c) does not apply.

NIR and VP further argue that the *Reeves Depo.* is admissible under the residual exception of Evidence Rule 803(24). The case of *Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 314 P.3d 593 (2013) forecloses this argument.

In *Silicon Int'l Ore*, when responding to the defendants' summary judgment motions, the plaintiff offered an e-mail between its employee, Sullivan, and a former employee of one of the defendants, Hart. 155 Idaho at 543, 314 P.3d at 598. The defendants challenged the e-mail as hearsay and moved to strike the e-mail. *Id.* The plaintiff argued that the e-mail was admissible under the residual exception set forth in Evidence Rule 803(24). *Id.* The district court granted the defendants' motion to strike and motions for summary judgment. *Id.*

The plaintiff appealed arguing that the district court erred when it struck the e-mail because the e-mails were true and correct e-mails and, according to the plaintiff, was the best evidence of what Hart believed regarding the verbal agreement plaintiff contended existed between the parties. *Id.* at 544, 314 P.3d at 599. The defendants argued that the e-mail was not the most probative evidence because it had affidavit testimony from Sullivan and the sworn testimony of Hart could be procured. *Id.* at 544-545, 314 P.3d 599-600. The Supreme Court explained the district courts findings as follows:

The district court found that the Hart email did not satisfy the requirements of the residual exception to the hearsay rule because it was not more probative than other evidence that could be procured on the matter. Particularly, the district court noted that both of the parties involved in the email correspondence, Hart and Sullivan, were available and their personal testimonies could be reasonably procured. The district court found that said testimony would be more probative than the hearsay email. *Finally, the district court noted that the email might nonetheless be admissible for impeachment, but ultimately it concluded that such impeachment evidence should not be considered on a motion for summary judgment.*

*Id.* at 545, 314 P.3d at 600 (emphasis added). The Supreme Court affirmed and held that the e-mail was not the most probative evidence because of the time it was written and evidence of the verbal agreement could be obtained through the testimony of both Hart and Sullivan who were available witnesses. *Id.* The Supreme Court also affirmed the district court's rejection of the plaintiff's contention that the e-mail was more probative than Hart's testimony because the e-mail was made prior to the lawsuit:

However, the district court noted that this relates to credibility and impeachment of a witness, and relying on persuasive federal authority it held that such credibility issues should not be considered on summary judgment.[] Therefore, the district court did not err when it found the Hart email less probative than other evidence that could reasonably be procured. Because summary judgment is decided on the basis of admissible evidence, and since the district court did not abuse its discretion in excluding the Hart email, the district court did not err in granting [defendants]' Motion to Strike.

*Id.* The "persuasive federal authority" was cited by the Supreme Court to be:

... *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996) ("**such impeachment evidence, therefore, may not be used to create a genuine issue of material fact for trial**"); *Bellard v. Gautreaux*, No. 08-627, 2011 U.S. Dist. LEXIS 29134, 2011 WL 1103320, at \*1 (D. La. 2011) ("[Rule 801(d)(2)(A) evidence] is not . . . competent summary judgment evidence . . ."); *Naylor Med. Sales & Rental, Inc. v. Invacare*, No. 09-2344-STA-cgc, 2010 U.S. Dist. LEXIS 128561, 2010 WL 5055913, at \*6 (D. Tenn. 2010) ("**even if these hearsay statements might be admissible at trial for impeachment purposes, for these statements to be considered for summary judgment purposes, the statements must be admissible as substantive evidence.**"); *Gooch v. Md. Mech. Sys., Inc.*, 81 Md. App. 376, 567 A.2d 954, 963 (Md. App. 1990) ("**While proof of a prior contradictory statement may have an evidentiary effect of impeaching the credibility of a witness, it may not be employed as a matter of substantive evidence**").

*Id.* at 545 n.3, 314 P.3d at 600 n.3 (emphasis added).

In this case, the *Reeves Depo.* is not the most probative evidence regarding which, if any, loans were paid off at the August 6, 2008 closing. As recognized by Mr. Reeves, the question of which loans, if any, were paid off at the closing is “a question for the Ng entities as to how they paid this off.” *Reeves Union Bank Depo.* at 69:6-8. Barney Ng, the loan servicer on the loans at issue has testified regarding the distribution of the loan proceeds at the closing. Mr. Ng’s testimony, not the *Reeves Depo.*, is the most probative evidence on this issue.

Furthermore, Mr. Reeves is available to provide testimony in this matter given that his residence is Sandpoint, Idaho. *Declaration of Charles W. Reeves in Support of Valiant Idaho, LLC’s Motion to Alter, Amend and/or Reconsider the Order of Sale of Real Property* at ¶ 3. Thus, NIR and VP have no reason to rely upon deposition testimony provided in a different matter at a deposition which Valiant, RE Loans, Pensco and/or MF08 were not represented.

Finally, the *Reeves Depo.* is not admissible for the purpose sought by NIR and VP, *i.e.* impeachment, because impeachment evidence is not substantive evidence and only substantive evidence is admissible at summary judgment and can create a genuine issue of material fact. *Silicon Int’l Ore*, 155 Idaho at 545 n.3, 314 P.3d at 600 n.3.

***B. The Borrower’s Settlement Statement and the Borrower’s Final Settlement Statement are Inadmissible.***

NIR and VP claim that the “Borrower’s Settlement Statement” dated July 31, 2008 and the “Borrower’s Final Settlement Statement” dated August 6, 2008 (collectively “Settlement Statements”) are not hearsay because such documents were introduced through the *Reeves Depo.* which was attached to an affidavit, through *James Berry’s Affidavit in Opposition to R.E. Loan’s Motion For Partial Summary Judgment (“Berry Union Bank Aff.”)* filed in the *Union Bank Case*,

and through the *Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment* ("*Weeks Opp. Decl.*"), filed on October 13, 2015. This argument is without merit.

The Settlement Statements are out of court statements being offered for the truth of the matter asserted. The Settlement Statements remain hearsay despite attachment to an affidavit or declaration, unless the affiant/declarant can establish that the documents are a prior statement by a witness or an admission by a party-opponent. I.R.E. 801(d). NIR and VP do not contend that the Settlement Statements are not hearsay under Evidentiary Rule 801(d). Thus, the Settlement Statements are hearsay under Evidence Rule 801(c) and are inadmissible unless the documents meet an exception set forth in Evidence Rule 803 or 804.

NIR and VP contend that the Settlement Statements are a business record of JV, L.L.C. and therefore are admissible under Evidence Rule 803(6). NIR and VP claim that the *Berry Union Bank Aff.* establishes that the Settlement Statements are business records. In order to be admissible under the business record exception of Evidence Rule 803(6), the proponent of the document must show, through the testimony of the custodian of the record or other qualified witness, that: "(1) the exhibit is a memorandum, report, record, or data compilation, (2) of acts, events, conditions, opinions, or diagnoses, (3) made at or near the time by a person with knowledge or from information transmitted by a person with knowledge, (4) that the exhibit was kept in the course of a regularly conducted business activity; and (5) that it was the regular practice of the business activity to create the exhibit." *State v. Watkins*, 148 Idaho 418, 426 n.17, 224 P.3d 485, 493 n.17 (2009).

The *Berry Union Bank Aff.* contains no testimony regarding the Borrower's Final Settlement Statement. As such, that document cannot be admitted as a business record through the *Berry Union Bank Aff.* Moreover, the *Berry Union Bank Aff.* does not set forth testimony required by Evidence Rule 803(6) to admit the Borrower's Settlement Statement as a business record. Therefore, the Settlement Statements are not admissible under Evidentiary Rule 803(6).

Nor are the Settlement Statements admissible under the residual exception of Evidence Rule 803(24). The Settlement Statements were obtained from First American Title Company ("FATCO") which is located in Sandpoint, Idaho. Thus, FATCO is available to provide testimony in this matter and such testimony can be obtained through reasonable efforts, *i.e.* a deposition that could have been noticed up in the prior six (6) years this case is pending.

## II. CONCLUSION

Based upon the foregoing argument and legal authority, and whatever further evidence may be presented at the hearing of Valiant's Motion to Strike, Valiant respectfully requests this Court to *grant* Valiant's Motion to Strike and strike from the record in this action the Reeves *Union Bank* Depo. and the Settlement Statements attached as Exhibits G and H to JV's SJ Opp.

**DATED** this 21<sup>st</sup> day of October 2015.

McCONNELL WAGNER SYKES & STACEY <sup>PLLC</sup>

BY:

  
\_\_\_\_\_  
Chad M. Nicholson

Attorneys For Valiant Idaho, LLC

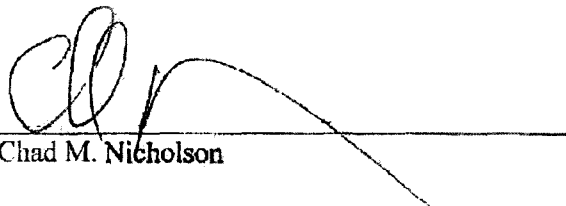
**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 21<sup>st</sup> day of October 2015, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

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With two (2) copies via United States Mail to:

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Judge of the First Judicial District  
Bonner County Courthouse  
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Sandpoint, Idaho 83864

  
Chad M. Nicholson

**REPLY TO DEFENDANTS NORTH IDAHO RESORTS, LLC'S AND VP, INCORPORATED'S  
MEMORANDUM IN OPPOSITION TO VALIANT IDAHO, LLC'S MOTION TO STRIKE  
INADMISSIBLE EVIDENCE - Page 10**

FA1547 2015PLLD/CV-2009-1810Strike Exhibit & Decp - Reply to NIR-VP 151021.docx



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STATE OF IDAHO  
 COUNTY OF BONNER  
 FIRST JUDICIAL DIST.

OCT 21 PM 4 22

CLERK DISTRICT COURT

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., ) Case No. CV-2009-1810  
 formerly known as National )  
 Golf Builders, Inc., a Nevada ) JV L.L.C.'S RESPONSE TO  
 corporation, ) VALIANT'S MOST RECENT  
 ) "FILINGS" AND JV L.L.C.'S  
 Plaintiff, ) OBJECTION THERETO  
 )

v.

PEND OREILLE BONNER )  
 DEVELOPMENT, LLC, a Nevada )  
 limited liability company; )  
 R.E. LOANS, LLC, a California )  
 limited liability company; DAN )  
 S. JACOBSON, an individual, )  
 SAGE HOLDINGS LLC, an Idaho )  
 limited liability company; )  
 STEVEN G. LAZAR, an )  
 individual; PENSCO TRUST CO. )  
 CUSTODIAN FBO BARNEY NG; )  
 MORTGAGE FUND '08 LLC, a )  
 Delaware limited liability )  
 company; VP, INCORPORATED, an )  
 Idaho corporation; JV, LLC )  
 L.L.C., an Idaho limited )  
 liability company; WELLS FARGO )  
 FOOTHILL, LLC, a Delaware )  
 limited liability company; )

JV L.L.C.'S RESPONSE TO VALIANT'S MOST RECENT "FILINGS" AND JV  
 L.L.C.'S OBJECTION THERETO - 1

INTERSTATE CONCRETE AND )  
ASPHALT COMPANY, an Idaho )  
corporation; T-O ENGINEERS, )  
INC., fka Toothman-Orton )  
Engineering Company, an Idaho )  
corporation; PUCCI )  
CONSTRUCTION INC., an Idaho )  
corporation; ACI NORTHWEST, )  
INC., an Idaho corporation; )  
LUMBERMENS, INC., dba )  
ProBuild, a Washington )  
corporation; ROBERT PLASTER )  
dba Cedar Etc; NORTH IDAHO )  
RESORTS, LLC, an Idaho limited )  
liability company; R.C. WORST )  
& COMPANY, INC., an Idaho )  
corporation; DOES 1 through X, )  
)  
Defendants. )  
)

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AND RELATED COUNTERCLAIMS, )  
CROSS-CLAIMS, AND THIRD-PARTY )  
COMPLAINTS )  
)

GENESIS GOLF BUIDLERS, 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. )  
)

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AND RELATED COUNTERCLAIMS, )  
CROSS-CLAIMS, AND THIRD-PARTY )  
COMPLAINTS )  
)

VALIANT IDAHO, LLC, an Idaho )  
 limited liability company, )  
 )  
                   Third Party )  
 Plaintiff, )  
 )  
                   v. )  
 )  
 PEND ORIELLE BONNER )  
 DEVELOPMENT HOLIDINGS, INC., a )  
 Nevada corporation; BAR K, )  
 INC., a California )  
 corporation; TIMBERLINE )  
 INVESTMENTS LLC, an Idaho )  
 limited liability company; AMY )  
 KORENGUT, a married woman; HLT )  
 REAL ESTATE, LLC, an Idaho )  
 limited liability company; )  
 INDEPENDENT MORTGAGE LTD. CO., )  
 an Idaho limited liability )  
 company; PANHANDLE MANAGEMENT )  
 INCORPORATED, an Idaho )  
 corporation; FREDERICK J. )  
 GRANT, an individual; CRISTINE )  
 GRANT, an individual; RUSS )  
 CAPITAL GROUP, LLC, an Arizona )  
 limited liability company; )  
 MOUNTIAN WEST BANK, a division )  
 of GLACIER BANK, a Montana )  
 corporation; FIRST AMERICAN )  
 TITLE COMPANY, a California )  
 corporation; NETTA SOURCE LLC, )  
 a Missouri limited liability )  
 company; MONTAHENO )  
 INVESTMENTS, LLC, a Nevada )  
 limited liability company; )  
 CHARLES W. REEVES and ANN B. )  
 REEVES, husband and wife; and )  
 C.E. KRAMER CRANE & )  
 CONTRACTING, INC., an Idaho )  
 corporation, )  
 )  
                   Third Party )  
 Defendants. )  
 )  
 \_\_\_\_\_ )  
 )

JV, LLC L.L.C., an Idaho )  
limited liability company, )  
) )  
Defendant and Cross- )  
Claimant against all of the )  
Defendants and Third Party )  
Plaintiff, )  
) )  
v. )  
) )  
VALIANT IDAHO, LLC, an Idaho )  
limited liability company; )  
V.P., INC., an Idaho )  
corporation; RICHARD A. )  
VILLELLI, a married man; MARIE )  
VICTORIA VILLELLI, a married )  
woman; VILLELLI ENTERPRISES, )  
INC., a California )  
corporation; RICHARD A. )  
VILLELLI, as TRUSTEE OF THE )  
RICHARD ANTHONY VILLELLI AND )  
MARIE VICTORIA VILLELLI )  
REVOCABLE TRUST; THE IDAHO )  
CLUB HOMEOWNERS ASSOCIATION, )  
INC., an Idaho corporation; )  
the entity named in Attorney )  
Toby McLaughlin's Notice of )  
Unpaid Assessment as PANHANDLE )  
MANAGEMENT, INCORPORATED, an )  
Idaho corporation; and )  
HOLMBERG HOLDINGS, LLC, a )  
California limited liability )  
company, )  
) )  
Third Party )  
Defendants. )

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COMES NOW the Defendant JV, L.L.C. ("JV") by and through its Attorney Gary A. Finney, and informs the Court, Objects, and moves, as follows:

MATTERS FOR HEARING OCTOBER 23, 2015

I. JV'S NOTICE OR ASSOCIATION OF ATTORNEY

JV L.L.C.'S RESPONSE TO VALIANT'S MOST RECENT "FILINGS" AND JV L.L.C.'S OBJECTION THERETO - 4

JV's attorney Gary A. Finney gives notice that Attorney John A Finney is associated as counsel for JV, and will appear and represent JV at the hearing October 23, 2015.

II. BARNEY NG'S DECLARATION, DATED OCTOBER 20, 2015 IS INADMISSIBLE FOR USE ON VALIANT'S THIRD MOTION FOR SUMMARY JUDGMENT.

Valiant has filed Barney Ng's Declaration, dated October 20, 2015; however it is not admissible and JV moves to strike it from consideration at the October 23, 2015 hearing on Valiant's Third Motion for Summary Judgment. IRCP 56(c) states that the motion, affidavits and supporting briefs shall (emphasis added) be served at least twenty-eight (28) days before the time fixed for hearing. Obviously, Barney Ng's Declaration, signed as an alternative to an Affidavit, dated October 20, 2015 is not served at least 28 days before the time fixed for hearing on October 23, 2015. IRCP 56 does not mention filing a Declaration at all, only "Affidavits" are stated in Rule 56. JV requests the relief that Barney Ng's Declaration of October 20, 2015 is untimely, not admissible, and it be stricken, and it not be considered at the October 23, 2015 hearing.

III. VALIANT'S THIRD MOTION FOR SUMMARY JUDGMENT WAS NOT PROPERLY OR TIMELY SERVED ON JV "AT LEAST 28 DAYS" BEFORE THE HEARING ON OCTOBER 23, 2015. RULE 6(A) TIME COMPUTATION.

JV received Valiant's Third Motion for Summary Judgment and the Notice for hearing on September 25, 2015. Rule 6(a) does not use the word "date", but rather uses the word "day". The first "day" is not computed in the time computation. Therefore, the 1<sup>st</sup> "day" is September 25 to September 26, 2015. The first day of the time computation would be September 27, 2015. In order for at least 28 days to expire would result in the day of October 25, 2015 to be expired. October 26 and 27 are a Saturday and a Sunday, so the first date available for a hearing on summary judgment would be October 28, 2015. JV requests the relief that the Court deny and refuse to hear Valiant's Third Motion for Summary Judgment on October 23, 2015 because "at least 28 days" had not expired. Since Valiant's Motion was served by mail, IRCP 6(e)(1) requires three (3) days be added to the prescribed period, which would mean the earliest time for Valiant's hearing would be after November 2, 2015 because October 31 and November 1 are a Saturday and a Sunday.

IV. JV'S RESPONSES TO VALIANT'S THIRD MOTION FOR JUDGMENT WERE TIMELY.

The requirement of Rule 56(c), second sentence, permits the adverse party, JV, VP and NIR to serve opposing affidavits at least fourteen (14) days prior to the "hearing". Valiant's hearing date of October 23, 2015 is not available because it was untimely served; therefore, there is no valid hearing date on

October 23, 2015 and hence there is no duly "time fixed for hearing" and JV's responses filed and served October 13, 2015 are timely. JV requests the relief that Valiant's Motion to Strike be denied.

V. THE COURT'S ORDER OF SEPTEMBER 17, 2015 PROHIBITS VALIANT'S THIRD MOTION FOR SUMMARY JUDGMENT - THE COURT ORDER REQUIRES THIS ACTION TO GO TO TRIAL ON JANUARY 25, 2016.

Valiant's Third Motion for Summary Judgment violates the Court's Order of September 17, 2015. JV requests the relief that no hearing, decision, or order be made on Valiant's Motion until after the time of trial January 25, 2016.

VI. THE DEPOSITION OF CHARLES REEVE'S IS CLEARLY ADMISSIBLE.

First, Charles Reeves filed an Affidavit in this action in support of Valiant's first motion for summary judgment on the limited issue of "priority" of recorded Mortgages. The Affidavit of Reeves contradicts his Deposition testimony, and is admissible as prior inconsistent sworn testimony. Secondly, the Court has already considered Reeves' Affidavit and Reeves' Deposition as creating genuine issues of material fact such that a summary judgment as a matter of law is not permitted. The Court has already set aside, stricken, and withdrawn its prior Judgment and the Decree of Foreclosure. IRCP 32(a) permits, at trial or hearing on a motion, a Deposition to be admissible and used by any party to (1) contradict and impeach the testimony of

the deponent witness Reeves. RE Loans was a party in the action in which Reeves' Deposition was taken. Attorney Stacey being RE's attorney in that case, and in the instant case on RE's "assigned" note/mortgage to Valiant.

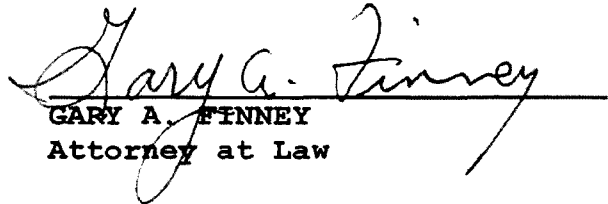
VII. VALIANT IS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL AND BY STATUTE OF LIMITATIONS, IDAHO CODE §5-214A.

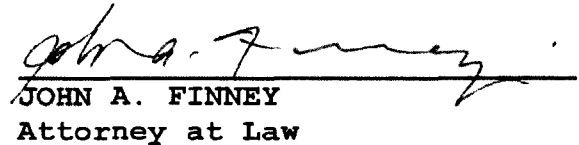
Re Loans assigned its 2007 note and real estate mortgage to Valiant. RE Loans was a party represented by Attorney Stacey at all times in the Union Bank action, which the Court has been requested to judicially notice. RE Loans, represented by Attorney Stacey, is also a party in this action filed in 2009. The first time a filing made to foreclose on the RE Loans 2007 note/mortgage was after RE Loans' Assignment to Valiant. Valiant's first filing was in October of 2014. Clearly this action is only (1) year old - contrary to Valiant's continued assertion that the present "action" is 6 years old. Valiant has filed the Note Secured by Mortgage, dated March 6, 2007 (\$21,200,000.00 - Loan Number P0099) as Exhibit "C" and the Mortgage, recorded March 15, 2007, Loan No. P0099, 49214NA, as Exhibit "D". Both the Note and the Mortgage on their face show a due date of maturity as 24 months following the recording date of March 15, 2007, so the maturity due was about March 15, 2009. The first filing for foreclosure was by Valiant in October of 2014, which is more than the five (5) year bar of Idaho Code §5-



214A. Finally, Valiant obtained court approval, later than October 2014. JV requests the relief that Valiant's foreclosure on RE Loans' Mortgage is time barred and its Third Summary Judgment Motion be DENIED, and its foreclosure action be dismissed. Further, Valiant has no right of tax redemption as assignee of RE Loans.

Respectfully submitted, this 21 day of October, 2015.

  
GARY A. FINNEY  
Attorney at Law

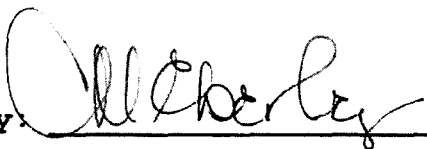
  
JOHN A. FINNEY  
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile or as otherwise indicated, this 21<sup>st</sup> day of October, 2015, and was addressed as follows:

Richard Stacey/Jeff Sykes  
MCCONNELL WAGNER SYKES & STACEY PLLC  
827 East Park Boulevard, Suite 201  
Boise, ID 83712  
[Attorney for R.E. LOANS, LLC & VALIANT IDAHO LLC]  
Via Facsimile: (208) 489-0110

Susan Weeks  
Steven C. Wetzel  
JAMES, VERNON & WEEKS, P.A.  
1626 Lincoln Way  
Coeur d'Alene, ID 83814  
Via Facsimile: (208) 664-1684  
[Attorney for NORTH IDAHO RESORTS, LLC, V.P. INC, & FOR  
JV'S THIRD PARTY DEFENDANTS]

By:  \_\_\_\_\_

Susan P. Weeks, ISB # 4255  
James, Vernon & Weeks, P.A.  
1626 Lincoln Way  
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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 22 AM 9 41

CLERK DISTRICT COURT

*Attorneys for North Idaho Resorts, LLC and V.P., Inc.*

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,

vs.

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

Defendants.

CASE NO. CV-2009-1810

NORTH IDAHO RESORTS, LLC AND  
V.P., INC.'S REPLY MEMORANDUM IN  
SUPPORT OF MOTION TO RECONSIDER  
AND MOTION TO ALTER AND AMEND  
JUDGMENT

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

Valiant points out in response to North Idaho Resorts, LLC ("NIR") and V.P., Inc. ("VP") Motion to Reconsider under Rule 11(a)(2)(B) and their Motion to Alter and Amend Judgment under Rule 60(a) and 60(b) that a portion of it was rendered moot by the Court's oral ruling delivered on September 2, 2015. NIR and VP agree that a portion of the motion was rendered moot and need not be addressed by the Court. However, a portion remains valid and should now be addressed. That portion relates to VP's claimed interest which this Court deemed an affirmative defense.

NORTH IDAHO RESORTS, LLC AND V.P., INC.'S REPLY MEMORANDUM IN SUPPORT  
OF MOTION TO RECONSIDER AND MOTION TO ALTER AND AMEND JUDGMENT 8982

In response to VP and NIR's arguments on this issue, Valiant argues that the issues of VP's claimed easements and equitable servitudes is an affirmative defense. VP disagrees. However, assuming *arguendo* that such claims were affirmative defenses, the failure to plead them in the answer to the cross claim was not fatal to raising them as a defense to summary judgment.

The facts previously discussed in its initial memorandum which remain relevant to this motion are:

- a. Barney Ng had a copy of the Third Restated Purchase and Sale Agreement prior to R.E. Loans funding Loan No. P0099. *See* Villelli Declaration filed 2/24/15, ¶ 8.
- b. The Third Restated Purchase and Sale Agreement specifically included a provision that the Property purchased by POBD excluded domestic water rights which were retained by sewer and water company V.P. Inc. and easements for operation and delivery of domestic water and sewer service including the sewer lagoon, and the land application area. Villelli Declaration filed 2/24/15, Exhibit A, page 2.
- c. Some of VP's easements for its water and sewer system were in place for over 20 years prior to the summary judgment. *See* Villelli Declaration filed 2/24/15, ¶ 10.

Valiant argues consistent with the Court's prior ruling that VP failure to raise its equitable servitude and easement quiet title issues as affirmative defenses in its pleadings and therefore waived raising them as defenses at summary judgment.

Valiant does not address *Fuhriman v. State, Dept. of Transp.*, 143 Idaho 800, 803, 153 P.3d 480, 483, (2007). In *Fuhriman, supra*, our Supreme Court upheld its previous ruling that an affirmative defense may be raised for the first time on a motion for summary judgment.

*Fuhriman*, 143 Idaho at 804, 153 P.3d at 484. In its recent decision in *Guzman v. Piercy*, 155 Idaho 928, 318 P.3d 918, 925 (2014), our Supreme Court reiterated that sanctions are not

imposed for failure to raise an affirmative defense so long as it is raised before trial and the opposing party has time to respond in briefing and oral argument. Valiant has been afforded such an opportunity.

Valiant also claims that VP has failed to place new evidence in the record to support its motion, so it must be denied. Rule 11(a)(2)(B) motions do not require a party to submit new evidence, but it is allowed. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006). Rule 59(e) disallows introduction of new evidence.

In opposition to the summary judgment, VP argued the Ng entities had notice that the water and sewer infrastructure were not included in the sale of property to POBD. VP produced evidence that the Third Restated Purchase and Sale Agreement was provided to Barney Ng prior to R.E. making its loan to POBD. This agreement specifically stated that the water and sewer infrastructure upon the lots sold to POBD was excluded in the sale to POBD. Further, enough evidence exists in the record to draw the reasonable inference that Barney Ng was associated with Bar K, RE. Loans, Pensco Trust fbo Barney Ng, and Mortgage Fund '08. In fact, Reeves testified at deposition that all his loan transaction dealings were with Barney Ng. Thus, the reasonable inference should be drawn that these three related lenders had the same knowledge through Barney Ng prior to making their loans that the water and sewer infrastructure was not sold to POBD as part of the sale. Regarding the prescriptive easements, Vilelli's affidavit testimony was that certain of these easements have existed in excess of 20 years. Thus, the reasonable inference to be drawn from this testimony is that there was a question of material fact regarding the easements.

For the foregoing reasons, VP and NIR respectfully request the Court reconsider its July 21, 2015 decision with respect to VP's easement and equitable servitude defenses.

DATED this 21<sup>st</sup> day of October, 2015.

JAMES, VERNON & WEEKS, P.A.

By: Susan P. Weeks  
Susan P. Weeks

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on the following persons in the manner indicated this 21<sup>st</sup> day of October, 2015:

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile: 208-263-8211

Gary A. Finney  
FINNEY FINEY & FINNEY, PA  
120 E Lake St., Ste. 317  
Sandpoint, ID 83864

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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 22 PM 2 51

CLERK DISTRICT COURT  
DEPUTY

*Attorneys for North Idaho Resorts, LLC and V.P., Inc.*

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,

vs.

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

Defendants.

CASE NO. CV-2009-1810

MOTION FOR ENLARGEMENT OF TIME  
TO FILE NORTH IDAHO RESORTS, LLC  
AND V.P., INC.'S REPLY MEMORANDUM  
IN SUPPORT OF MOTION TO  
RECONSIDER AND MOTION TO ALTER  
AND AMEND JUDGMENT

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

COME NOW Defendants, North Idaho Resorts, LLC and VP, Incorporated, by and through their attorney of record, Susan P. Weeks of the law firm James, Vernon & Weeks, P.A., and pursuant to I.R.C.P. 6(b), hereby moves this Court for a one (1) day enlargement of time for the filing of North Idaho Resorts, LLC and V.P., Inc.'s Reply Memorandum in Support of Motion to Reconsider and Motion to Alter and Amend Judgment. The pleading was faxed to the

MOTION FOR ENLARGEMENT OF TIME TO FILE NORTH IDAHO RESORTS, LLC AND V.P., INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER AND MOTION TO ALTER AND AMEND JUDGMENT: 1 3986

Court and served on opposing counsel on the date required by Rule 7 as indicated on the attached fax sheet; however, it was not filed until 5:23 p.m. due to a staff error.

This motion is not brought to harass or delay the proceeding. Since opposing counsel was served on the date required, there is no prejudice caused by the filing of the pleading the morning after it was faxed to the Court.

DATED this 22<sup>nd</sup> day of October, 2015.

JAMES, VERNON & WEEKS, P.A.

By: Susan P. Weeks  
Susan P. Weeks

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following persons in the manner indicated this 22<sup>nd</sup> day of October, 2015:

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Boise, ID 83712

Christie Chase



STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 22 PM 3 01

CLERK DISTRICT COURT

DEPUTY

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*Attorneys for North Idaho Resorts, LLC and V.P., Inc.*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
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GENESIS GOLF BUILDERS, INC., formerly  
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INC., a Nevada corporation,

Plaintiff,

vs.

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

Defendants.

CASE NO. CV-2009-1810

ERRATA TO DECLARATION OF SUSAN  
P. WEEKS IN OPPOSITION TO  
VALIANT'S THIRD MOTION FOR  
SUMMARY JUDGMENT

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

Susan P. Weeks of the firm James, Vernon & Weeks, P.A., submits the following Errata to Declaration of Susan P. Weeks In Opposition To Valiant's Third Motion for Summary Judgment. This errata is filed because paragraph 7 duplicated paragraph 4. Paragraph 7 is

ERRATA TO DECLARATION OF SUSAN P. WEEKS IN OPPOSITION TO VALIANT'S  
THIRD MOTION FOR SUMMARY JUDGMENT: 1

surplus. Further, in paragraph 8 of the Declaration, the referenced exhibit should be "E, not "F".

In paragraph 9, the referenced exhibit should be "F not "G".

DATED this 22<sup>nd</sup> day of October, 2015.

JAMES, VERNON & WEEKS, P.A.

By: Susan P. Weeks  
Susan P. Weeks

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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 OCT 22 PM 4 38

CLERK DISTRICT COURT

DEPUTY

Attorneys for Defendants North Idaho Resorts, LLC and VP, Incorporated

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,

vs.

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

Defendants.

Case No. CV-2009-01810

DEFENDANTS NORTH IDAHO  
RESORTS, LLC AND VP  
INCORPORATED'S MEMORANDUM IN  
OPPOSITION TO VALIANT IDAHO,  
LLC'S SECOND MOTION TO STRIKE  
INADMISSIBLE EVIDENCE

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

Valiant Idaho, LLC's Second Motion to Strike has requested the Court strike certain evidentiary items presented by the Declaration of Susan P. Weeks, attempting to eliminate material questions of fact in this matter.<sup>1</sup> For the reasons set forth below, this motion should be denied by the Court.

<sup>1</sup> Valiant's Second Motion to Strike relates to the Declaration of Susan P. Weeks in Opposition to valiant's Third Motion for Summary Judgment ("Weeks Declaration"), filed with the Court October 13, 2015. There is also an

**A. The Weeks Declaration Contains the Requisite Foundation**

The Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment (hereinafter "Weeks Declaration")<sup>2</sup> properly lays the foundation for admissibility because it professes personal knowledge of the facts within and the attached documents are themselves admissible under IRE 803(24).

**1. Personal Knowledge is Satisfied**

The burden on a party submitting an opposing affidavit is "to affirmatively show that [the affiant] is competent to testify to the matters contained in the affidavit and that the affidavit is based on [the affiant's] personal knowledge." *Cates v. Albertson's Inc.*, 126 Idaho 1030, 1034, 895 P.2d 1223, 1227 (1995); IRCP 56(e). The Weeks Declaration unequivocally states that she is "competent to testify to the matters set forth herein" and that the declaration was made with her "own personal knowledge" and that she has "personal knowledge of the facts contained herein." Weeks Declaration ¶ 1. The matters and facts contained in that declaration are simply that a subpoena duces tecum was issued to First American Title Company (FATCO) and that certain attached documents were produced pursuant to that subpoena duces tecum. Dec. Weeks ¶¶ 3-5. Additionally, Weeks declares that documents were produced in the Pacific Capital matter pursuant to a deposition duces tecum issued to Pend Oreille Bonner Development, LLC. Dec. Weeks ¶¶ 6-7. Weeks satisfies the requirement of personal knowledge of the matters and facts within her delaration.

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Errata to the Weeks Declaration that has been filed with the Court on October 22, 2015, to remove paragraph 7 and Exhibit E, and then renumber and letter the paragraphs and exhibits. Thus, for purposes of this Memorandum in Opposition, all references to the Weeks Declaration relate to the Errata filed with the Court. Accordingly, this memorandum will not address Valiant's motion to strike an Exhibit E, since the contested paragraphs of the Errata are ¶¶ 4-6 and Exhibits B, C, and D.

<sup>2</sup> The prior footnote explains that this Memorandum is actually referring to the Errata filed with the Curt October 22, 2015.

### 3. The Exhibits are Admissible Under IRE 803(24)

The exhibits produced in response to the subpoena duces tecum to FATCO and the deposition duces tecum issued to Pond Oreille Bonner Development, LLC are business records, although Defendants concede that the Weeks Declaration as presented to the Court lacks the foundation necessary to satisfy the business records exception of IRE 803(6). However, the business records are admissible under 803(24) because of their trustworthiness. IRE 803(24) allows hearsay evidence to be admitted as evidence when it has "equivalent circumstantial guarantees of trustworthiness" as other evidence contemplated by the IRE 803 hearsay exceptions. This catchall hearsay exception is applicable if the Court determines "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." IRE 803(24).

The exhibits introduced by the Weeks Declaration were produced under oath and under penalty of perjury through responses to a subpoena duces tecum and a deposition duces tecum. These documents were produced by the entities that would normally retain such documents. These documents were then submitted to the Court by an officer of the Court under penalty of perjury. These factors present an inherent reliability in the exhibits presented to this Court by the Weeks Declaration.

These exhibits are offered as evidence of material facts. See NIR and VP'S Opposition to Valiant's Third Motion for Summary Judgment. These exhibits are extremely probative in presenting this Court with genuine issues of material fact and the most probative of those available at this time. Reasonable efforts have been undertaken by the Defendants to collect

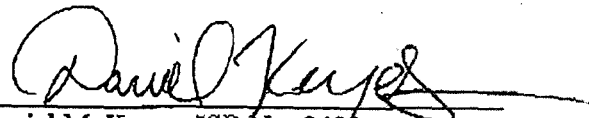
evidence on the matters pertinent to this case, but the timing of Valiant's third motion for summary judgment prevents the Defendants from finish collecting the necessary evidence.<sup>3</sup> Lastly, it is in the general purposes of the rules of evidence and the interests of justice that this Court make its determination on Valiant's third motion for summary judgment with all of the pertinent facts before it. Therefore, the Court should admit the exhibits introduced by the Weeks Declaration in order to be fully advised on the summary judgment issues.

#### Conclusion

For the above reasons, Valiant's Second Motion to Strike should be denied.

DATED this 22<sup>nd</sup> day of October, 2015.

JAMES, VERNON & WEEKS, P.A.

By   
Daniel M. Keyes, ISB No. 9492

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<sup>3</sup> See the argument set forth in Defendants Memorandum in Support of their Rule 56(f) Motion and Defendants' Reply Memorandum in Support.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on the following persons in the manner indicated this 22 day of October, 2015:

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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.  
2015 OCT 22 PM 4 38  
CLERK DISTRICT COURT  
DEPUTY

Attorneys for Defendants North Idaho Resorts, LLC and VP, Incorporated

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,

vs.

PEND ORELLE BONNER  
DEVELOPMENT, LLC, a Nevada limited  
liability company; et al.,

Defendants.

Case No. CV 2009-01810

DEFENDANTS NORTH IDAHO RESORTS,  
LLC AND VP, INCORPORATED'S  
MOTION TO STRIKE THE  
DECLARATIONS OF BARNEY NG AND  
CHAD M. NICHOLSON

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

Defendants, North Idaho Resorts, LLC and VP, Incorporated, by and through their attorney of record, Daniel M. Keyes of the firm James, Vernon & Weeks, P.A., hereby move this Court pursuant to Idaho Rule of Civil Procedure 56(c) to strike the Declarations of Barney Ng and Chad M. Nicholson filed with the Court October 20, 2015.

This motion is supported by the accompanying Memorandum in Support of Defendants North Idaho Resorts, LLC and VP, Incorporated's Motion to Strike the Declarations of Barney Ng and Chad M. Johnson filed concurrently herewith.

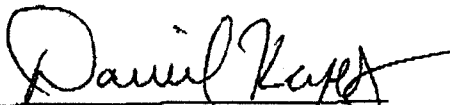
DEFENDANTS NORTH IDAHO RESORTS, LLC AND VP, INCORPORATED'S MOTION  
TO STRIKE THE DECLARATIONS OF BARNEY NG AND CHAD M. NICHOLSON 3995



Oral argument is requested.

DATED this 22<sup>nd</sup> day of October, 2015.

JAMES, VERNON & WEEKS, P.A.

By:   
Daniel M. Keyes, ISB No. 9492

**CERTIFICATE OF SERVICE**

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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.  
2015 OCT 22 PM 4 38  
CLERK DISTRICT COURT  
DEPUTY

Attorneys for Defendants North Idaho Resorts, LLC and VP, Incorporated

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  
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Plaintiff,

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

Defendants.

Case No. CV 2009-01810

DEFENDANTS NORTH IDAHO RESORTS,  
LLC AND VP, INCORPORATED'S  
MEMORANDUM IS SUPPORT OF  
MOTION TO STRIKE THE  
DECLARATIONS OF BARNEY NG AND  
CHAD M. NICHOLSON

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

Defendants, North Idaho Resorts, LLC and VP, Incorporated, by and through their attorney of record, Susan P. Weeks of the firm James, Vernon & Weeks, P.A., submit this Memorandum in Support of Defendants North Idaho Resorts, LLC and VP, Incorporated's Motion to Strike the Declarations of Barney Ng and Chad M. Johnson.

ARGUMENT

Idaho Rule of Civil Procedure 56(c) only allows the party moving for summary judgment to serve affidavits with its original motion and brief, not with its reply brief:

The motion, affidavits and supporting brief shall be served at least twenty eight (28) days before the time fixed for the hearing. If the adverse party desires to serve opposing affidavits the party must do so at least 14 days prior to the date of

the hearing. The adverse party shall also serve an answering brief at least 14 days prior to the date of the hearing. **The moving party may thereafter serve a reply brief not less than 7 days before the date of the hearing ...** The court may alter or shorten the time periods and requirements of this rule for good cause shown, may continue the hearing, and may impose costs, attorney fees and sanctions against a party or the party's attorney, or both.

IRCP 56(c) (emphasis added). Rule 56 does not allow the moving party to file an affidavit or declaration with its reply brief.

Valiant Idaho, LLC (Valiant) filed and served the Declarations of Barney Ng and Chad M. Johnson on October 20, 2015, with its reply brief.<sup>1</sup> Valiant has not shown good cause to have the time periods and requirements of IRCP 56(c) altered. Accordingly, the Declarations of Barney Ng and Chad M. Nicholson should be stricken.

#### CONCLUSION

For the reasons set forth above Defendants, North Idaho Resorts, LLC and VP, Incorporated respectfully request that the Court strike the Declarations of Barney Ng and Chad M. Nicholson.

DATED this 22nd day of October, 2015.

JAMES, VERNON & WEEKS, P.A.

By:   
Daniel M. Keyes, ISB No. 9492

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<sup>1</sup> The certificate of service for Valiant's Memorandum in Reply misrepresents the method and date of service on NIR and VP. The certificate of service states that the document was served by "Overnight Mail" on October, 20, 2015. However, NIR and VP were served by email the following day (October 21, 2015). NIR and VP have never consented to service by email as required by IRCP 5(b)(E). Valiant's legal secretary served the reply brief via email with an explanation that it was meant to have been included in the plethora of faxed pleadings served on NIR and VP on the 20th, but for some unexplained reason was not. While NIR and VP have grounds to strike Valiant's Reply Brief for improper service, they will not out of consideration of the judicial resources already expended on the numerous motions scheduled for October 23, 2015.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on the following persons in the manner indicated this 22<sup>nd</sup> day of October, 2015:

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 Boise, ID 83712

*Christine Elrose*

2015 OCT 30 A 10:42

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

CLERK DISTRICT COURT  


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

**CASE NO. CV-2009-0001810**

**Plaintiff,**

**MEMORANDUM DECISION &  
ORDER re: Motions Heard on  
October 23, 2015**

**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**

THIS MATTER came before the Court on October 23, 2015, for a hearing on numerous motions. Valiant Idaho, LLC (“Valiant”) was represented at the hearing by Richard L. Stacey and Jeff R. Sykes, of McCONNELL WAGNER SYKES & STACEY, PLLC. JV, LLC (“JV”) was represented by John A. Finney, on behalf of Gary A. Finney, of FINNEY FINNEY & FINNEY, P.A. North Idaho Resorts, LLC (“NIR”) and VP, Incorporated (“VP”) were represented by Susan P. Weeks, of JAMES, VERNON & WEEKS, P.A.

Upon consideration of the motions filed, documents in support and opposition thereof, and oral arguments of counsel, the following Memorandum Decision and Order are issued.

**I.**  
**DISCUSSION re: PROCEDURAL MOTIONS**

Upon review of the motions set to be heard on October 23, 2015, and the documents filed in support and opposition thereof, the Court noticed that quite a few of them were filed untimely by one or more of the parties. Because the court trial in this matter is set to commence on January 28, 2016, less than three months away; and in the interest of judicial efficiency—to avoid further hearings on the same issues; and finding that no party is prejudiced thereby, because these same issues have been argued and briefed extensively, the Court, in its discretion, hereby shortens time for the filing of any document related to this hearing that may have been untimely filed. Therefore, no untimely filed documents shall be stricken.

WHEREFORE:

1. NIR and VP's Motion for Enlargement of Time to File Response to Valiant Idaho, LLC's Third Motion for Summary Judgment,<sup>1</sup> filed 10/13/15, is **GRANTED**.
2. NIR and VP's Motion for Enlargement of Time to File Reply Memorandum in Support of Motion to Reconsider and Motion to Alter and Amend Judgment, filed 10/22/15, is **GRANTED**.
3. NIR and VP's Motion to Strike the Declarations of Barney Ng and Chad M. Nicholson, filed 10/22/15, is **DENIED**.
4. Valiant's Motion to Strike Memoranda and Declarations/Affidavits in Opposition to Valiant Idaho, LLC's Third Motion for Summary Judgment, filed 10/16/15, is **DENIED**.
5. JV LLC's Motion to Strike Valiant's Third Motion for Summary Judgment, filed 10/13/15, is **DENIED**.
6. NIR and VP's Rule 56(f) Request for Additional Time to Conduct Discovery, filed 10/13/15, is **DENIED**.

Additionally, with respect to the foregoing motions, the Court makes the following findings:

7. Valiant's Third Motion for Summary Judgment, and memorandum/affidavit in support, were filed and served on opposing counsel on September 25, 2015, which is twenty-eight (28) days from the hearing date of October 23, 2015. Therefore, the motion is timely.
8. Valiant's Third Motion for Summary Judgment, and memorandum/affidavit in support, were mailed on September 24, 2015, to counsel for NIR, VP and JV, by Federal Express overnight mail, such that the documents were hand delivered to counsel or left at counsel's office on September 25, 2015. The Court finds that this manner of service (i.e., hand delivery by commercial courier) constitutes service under Idaho Rule of Civil Procedure 5(b)(A) or 5(b)(B) on the date of hand delivery. It is not service by mail, so the additional time of three (3) days, which is prescribed in Rule 6(e)(1), does not apply.

## II.

### DISCUSSION re:EVIDENTIARY MOTIONS

Regarding the various evidentiary motions, two central issues must be determined: (1) the admissibility of certain documents attached as exhibits to memoranda/affidavits in opposition to summary judgment, and (2) whether to take judicial notice of a document from a separate case.

With respect to the admissibility issue, the Idaho Supreme Court in *Esser Elec. v. Lost River Ballistics Technologies*, 145 Idaho 912, 188 P.3d 854 (2008), stated:

Lost River's motion for summary judgment was supported by the affidavit of its president. Esser Electric did not object to that affidavit in the trial court. On appeal, **Esser Electric contends that the district court erred in relying upon it because it did not comply with Rule 56(e) of the Idaho Rules of Civil Procedure. That rule states, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." "The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e)." *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002) (citations omitted).** Esser Electric contends that the district court should not have considered the affidavit of Lost River's president because it contained hearsay and conclusory statements.

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<sup>1</sup> This motion, as filed, is incorrectly titled as: "Defendants North Idaho Resorts, LLC and VP Incorporated's Motion for Enlargement of Time to File Reply to Plaintiff's Opposition to North Idaho Resorts, LLC and VP, Inc.'s Renewed Motion for Reconsideration and Clarification."

**A trial court has the discretion to decide whether an affidavit offered in support of or opposition to a motion for summary judgment is admissible under Rule 56(e), even if that issue is not raised by one of the parties.** *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). However, we have not required the trial court to rule on the admissibility of the affidavit when there is no objection to it. If there is no timely objection, the trial court can grant summary judgment based upon an affidavit that does not comply with Rule 56(e). *State, Dept. of Agric. v. Curry Bean Co. Inc.*, 139 Idaho 789, 86 P.3d 503 (2004) (conclusory affidavit); *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 862 P.2d 299 (1993) (statements containing hearsay and lacking adequate foundation); *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 837 P.2d 805 (1992) (statements lacked adequate foundation). Because Esser Electric did not object to the affidavit of Lost River's president, the district court did not err in relying upon it when granting Lost River's motion for summary judgment.

Esser Electric argues on appeal that the district court erred in granting summary judgment because at least some of the allegations in the affidavit of Lost River's president were controverted by allegations in Esser Electric's verified complaint. **A motion for summary judgment can be countered by sworn statements in the record that comply with Rule 56(e) of the Idaho Rules of Civil Procedure.** *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991). **Those statements can be in affidavits, depositions, or in a verified pleading. *Id.* They can also be statements that were already in the record prior to the filing of the motion for summary judgment. *Id.*** However, in this case Esser Electric's original attorney did not call the district court's attention to the fact that the complaint was verified or argue that it was sufficient to oppose the summary judgment.

*Id.* at 917-918, 188 P.3d at 859-860. (Emphasis supplied).

With respect to the issue of judicial notice, *In re Estate of Conway*, 152 Idaho 933, 277 P.3d 380 (2012), is instructive, and provides:

Wooden next argues that the magistrate court erred in excluding various affidavits and reports relied on during Conway's guardianship and conservatorship proceeding to demonstrate Conway's lack of testamentary capacity at the time of the 2004 will's execution. Specifically, she argues that the documents were subject to judicial notice under Idaho Rule of Evidence 201 and not hearsay. Martin responds that the documents are not adjudicative facts within the contemplation of Rule 201, contain inadmissible hearsay, and are irrelevant to the question of testamentary capacity. **The magistrate declined to judicially notice the documents because they contained hearsay and were of little relevance...**

**Adjudicative facts may be judicially noticed by the court or upon request under Idaho Rule of Evidence 201. I.R.E. 201(c), (d). Rule 201 makes**



mandatory judicial notice of “records, exhibits, or transcripts from the court file in the same or a separate case” where a party requests such notice and supplies the requisite information. I.R.E. 201(d). However, “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” I.R.E. 201(b). As the district court found, the commentary of Federal Rule of Evidence 201—the federal counterpart of the Idaho rule—is enlightening in this regard. F.R.E. 201. The commentary states that “[a] high degree of indisputability is the essential prerequisite” and that “the tradition has been one of caution in requiring that the matter be beyond reasonable controversy.” F.R.E. 201, note to subdivision (a); F.R.E. 201, note to subdivision (b).

Here, the documents admitted in the guardianship/conservatorship proceeding—while perhaps relied upon by the court in that proceeding to some extent—cannot be said to be free from reasonable dispute. As the district court found, “[t]here is no indication these documents are capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.” Further, the documents constitute hearsay opinions of individuals regarding Conway's capacity and hearsay-within-hearsay declarations of Conway herself, to which no hearsay exception applies. Even sworn trial or deposition testimony from a prior case is inadmissible unless the declarant is unavailable and the party against whom the testimony is now offered had an opportunity and similar motive to cross-examine the declarant. I.R.E. 804(b)(1). The out-of-court declarations sought to be admitted here—medical professionals' and social workers' reports and affidavits—were never even tested in a prior proceeding, let alone one in which Martin had a similar motive as the present case.

Finally, as the district court found, the documents were also of questionable relevance. ... Thus, the magistrate court was also acting within its discretion in excluding the documents as irrelevant.

In sum, the district court did not err in affirming the magistrate court's exclusion of the documents.

*Id.* at 942-943, 277 P.3d at 389-390. (Footnote omitted). (Emphasis supplied).

WHEREFORE, pursuant to the reasoning of the Idaho Supreme Court in *Esser Elec.* and *Estate of Conway*, *supra*, this Court adjudicates the various evidentiary motions as follows:

9. NIR and VP's Motion for Judicial Notice of Declaration of Barney Ng, filed 10/13/15, is **DENIED**. NIR and VP have asked this Court to take judicial notice under Idaho Rule of Evidence 201 of the Declaration of Barney Ng Real Party in Interest in Opposition to Motion for Relief from Automatic Stay by RE Loans, as it is publicly available via the PACER system in the U.S. Bankruptcy Court, N.D. California, Oakland Division. The

Court denies this request, finding that the Declaration of Barney Ng sought to be admitted “cannot be said to be free from reasonable dispute,” *Estate of Conway*, 152 Idaho at 942, 277 P.3d at 390, nor is it “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” I.R.E. 201(b)(2). The Declaration is also of questionable relevance to the issues remaining for trial in this case.

10. Valiant Idaho’s Motion to Strike Inadmissible Evidence, filed 10/9/15, and
11. Valiant Idaho’s Second Motion to Strike Inadmissible Evidence, filed 10/20/15, are **GRANTED IN PART AND DENIED IN PART**, as follows:

- a. Exhibit E to JV L.L.C.’s Memorandum in Opposition to Valiant Idaho, LLC’s Motion for Summary Judgment, filed 2/2/15, is **STRICKEN**. The deposition testimony of Charles Reeves, which was taken on 8/19/13, in CV-11-0135 *Union Bank N.A. v. Pend Oreille Bonner Development, LLC, et al.* (“*Union Bank*”), is inadmissible because “sworn trial or deposition testimony from a prior case is inadmissible unless the declarant is unavailable and the party against whom the testimony is now offered had an opportunity and similar motive to cross-examine the declarant. I.R.E. 804(b)(1).” *Estate of Conway*, 152 Idaho at 943, 277 P.3d at 390. Here, Charles Reeves is not unavailable; and Valiant/RE Loans may have had the opportunity to cross-examine Mr. Reeves at the *Union Bank* deposition, but not with a similar motivation as in the present case.
- b. Exhibit A to Affidavit of Susan P. Weeks in Support of North Idaho Resorts, LLC, and VP, Inc.’s Motion to Reconsider and Motion to Alter and Amend Judgment, filed 8/19/15, is **STRICKEN**. The deposition testimony of Charles Reeves, which was taken on 8/19/13, in *Union Bank* is inadmissible because “sworn trial or deposition testimony from a prior case is inadmissible unless the declarant is unavailable and the party against whom the testimony is now offered had an opportunity and similar motive to cross-examine the declarant. I.R.E. 804(b)(1).” *Estate of Conway*, 152 Idaho at 943, 277 P.3d at 390. Here, Charles Reeves is not unavailable; and Valiant/RE Loans may have had the opportunity to cross-examine Mr. Reeves at the *Union Bank* deposition, but not with a similar motivation as in the present case.
- c. Exhibit G to JV L.L.C.’s Memorandum in Opposition to Valiant Idaho, LLC’s Motion for Summary Judgment, filed 2/2/15, is **ADMISSIBLE** because the Borrower’s Settlement Statement dated July 31, 2008 was “already in the record prior to the filing of the motion for summary judgment,” *Esser Elec.*, 145 Idaho at 918, 188 P.3d at 860, and was considered and discussed in Section III.C, at pp. 14-16, of this Court’s July 21, 2015, Memorandum Decision and Order.
- d. Exhibit A to James W. Berry’s Affidavit in Opposition to R.E. Loan’s [sic] Motion for Partial Summary Judgment, filed 8/12/2013 in *Union Bank*,<sup>2</sup> is

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<sup>2</sup> This Affidavit is attached to NIR and VP’s Request for Judicial Notice, filed 2/4/15, and judicial notice of the Affidavit was taken in this Court’s July 21, 2015, Memorandum Decision and Order, at p. 6, n.10.

ADMISSIBLE because the Borrower's Settlement Statement dated July 31, 2008 was "already in the record prior to the filing of the motion for summary judgment," *Essex Elec.*, 145 Idaho at 918, 188 P.3d at 860, and was considered and discussed in Section III.C, at pp. 14-16, of this Court's July 21, 2015, Memorandum Decision and Order.

- e. Exhibit H to JV L.L.C.'s Memorandum in Opposition to Valiant Idaho, LLC's Motion for Summary Judgment, filed 2/2/15, is ADMISSIBLE because the Borrower's Final Settlement Statement dated August 6, 2008, was "already in the record prior to the filing of the motion for summary judgment," *Essex Elec.*, 145 Idaho at 918, 188 P.3d at 860, and was considered and discussed in Section III.C, at pp. 14-16, of this Court's July 21, 2015, Memorandum Decision and Order.
- f. Exhibits A and B, to Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment, filed 10/13/15, are **STRICKEN** because the First American Title Company Settlement Statement and Borrower's Final Settlement Statement, lack foundation and are inadmissible hearsay.
- g. Exhibit C to Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment, filed 10/13/15, is **STRICKEN** because the e-mail chain lacks foundation and is inadmissible hearsay.
- h. Exhibit D to Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment, filed 10/13/15, is **STRICKEN** because the letter to Adjuster's International lacks foundation and is inadmissible hearsay.
- i. Exhibit R to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment, filed 10/13/15, is **STRICKEN** because the letter to Adjuster's International lacks foundation and is inadmissible hearsay.
- j. Exhibit E to Declaration of Susan P. Weeks in Opposition to Valiant's Third Motion for Summary Judgment, filed 10/13/15; is **STRICKEN** because the copy of the check drawn on Greenspan Adjuster's International, Inc. Client Trust Account lacks foundation and is inadmissible hearsay.
- k. Exhibit S to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment, filed 10/13/15, is **STRICKEN** because the copy of the check drawn on Greenspan Adjuster's International, Inc. Client Trust Account lacks foundation and is inadmissible hearsay.
- l. Exhibit O to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment, filed 10/13/15, is **STRICKEN** because the Sandpoint Title Insurance, Inc. "Buyer/Borrower Statement Estimated" lacks foundation and is inadmissible hearsay.

- m. Exhibit O to Affidavit of James Berry on Behalf of JV, LLC in Opposition to Valiant Idaho LLC's Third Motion for Summary Judgment, filed 10/13/15, is **STRICKEN** because the Sandpoint Title Insurance, Inc. "Buyer/Borrower Statement Estimated" lacks foundation and is inadmissible hearsay.
- n. Exhibit P to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment, filed 10/13/15, is **STRICKEN** because the Bar-K ledger lacks foundation and is inadmissible hearsay.
- o. Exhibit P to Affidavit of James Berry on Behalf of JV, LLC in Opposition to Valiant Idaho LLC's Third Motion for Summary Judgment, filed 10/13/15, is **STRICKEN** because the Bar-K ledger lacks foundation and is inadmissible hearsay.
- p. Exhibits T and U to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment, filed 10/13/15, are **STRICKEN** because the e-mails from Kathy Groenhout, The Idaho Club, lack foundation and are inadmissible hearsay.
- q. Exhibit A to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment,<sup>3</sup> filed 10/13/15, is **ADMISSIBLE** because the Satisfaction of Mortgage, recorded as Instrument# 730445, of the Bonner County, Idaho, records, has been certified as true and correct by the Bonner County Recorder.
- r. Exhibit Q to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment,<sup>4</sup> filed 10/13/15, is **ADMISSIBLE** because the Satisfaction of Mortgage Security Agreement and Fixture Filing, recorded as Instrument# 756408, of the Bonner County, Idaho, records, has been certified as true and correct by the Bonner County Recorder.

### III.

#### DISCUSSION re: SUBSTANTIVE MOTIONS

12. NIR and VP's Motion to Reconsider and Motion to Alter and Amend Judgment, filed 8/19/15 is **DENIED** for different reasons than those set forth in the July 21, 2015, Memorandum Decision and Order.

NIR and VP seek reconsideration of the Memorandum Decision and Order entered by this Court on July 21, 2015. The only portion of that Decision remaining for reconsideration is

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<sup>3</sup> Valiant requested that all exhibits attached to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment, filed 10/13/15, be stricken. Other than Exhibits O, P, R, S, T, and U, which have already been discussed, the only remaining exhibits are Exhibits A and Q.

<sup>4</sup> Valiant requested that all exhibits attached to JV L.L.C.'s Motion to Strike Valiant's Third Motion for Summary Judgment, filed 10/13/15, be stricken. Other than Exhibits O, P, R, S, T, and U, which have already been discussed, the only remaining exhibits are Exhibits A and Q.

Section III.E, at pp. 18-19, in which the Court found that VP's claims of prescriptive easement and equitable servitude for infrastructure did not survive Valiant Idaho, LLC's summary judgment motion, because "[i]n VP's Answer to the Third Party Complaint it did not set forth any affirmative defenses, nor did it plead any counterclaims or cross-claims against Valiant for prescriptive easement or equitable servitude for infrastructure." *Id.* at p. 19.

On September 19, 2014, NIR filed an Answer to Valiant Idaho, LLC's Counterclaim, Cross-Claim and Third Party Complaint for Judicial Foreclosure. On December 11, 2014, VP filed its Answer. No affirmative defenses, counterclaims or cross-claims were pled in either NIR or VP's Answer. On January 20, 2015, Valiant moved for a summary judgment that its RE Loans, Pensco Trust Co., and MF08 Mortgages (hereafter "Valiant Mortgages") against real property of Pend Oreille Bonner Development, LLC ("POBD") located in Bonner County, Idaho, are senior in right and priority to any interest claimed by JV, NIR, and VP in the property.

On February 4, 2015, NIR and VP filed a Memorandum in Opposition to Valiant Idaho, LLC's Motion for Summary Judgment, and the Declaration of Richard Villelli in Opposition to Valiant Idaho, LLC's Motion for Summary Judgment. The Memorandum in Opposition stated that "[t]he nature of VP's claim to the property are prescriptive easements for infrastructure, an express claim by deed to four parcels, and an equitable servitude." *Defendants North Idaho Resorts, LLC and VP Incorporated's Memorandum in Opposition to Valiant Idaho, LLC's Motion for Summary Judgment* (filed February 4, 2015), at p. 11. Additionally, in the Declaration of Richard Villelli, Mr. Villelli stated:

The Construction and Operating Agreement required Pend Oreille Bonner Development to extend portions of existing water and sewer utility infrastructure, required Pend Oreille Bonner Development to transfer easements for the completed infrastructure and title to those lots upon which the sewer lagoons and water systems were located, and required VP to operate the system. ... The deeds attached to Jeff Syke's [sic] Declaration as Exhibits 16, 17, 18 and 19 are the lots

deeded to VP, Inc. in compliance with the Construction and Operation Agreement upon which lagoons, water towers or pumping stations are situated.”

*Declaration of Richard Vilelli* (filed February 4, 2015), at p. 4, ¶11.

“An affirmative defense is ‘[a] defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all allegations in the complaint are true.’ ” *Fuhriman v. State Dept. of Transportation*, 143 Idaho 800, 803, 153 P.3d 480, 483 (2007) (quoting Black’s Law Dictionary 186 (2d Pocket ed.2001)). The Idaho Supreme Court has held that “an affirmative defense may be raised for the first time on a motion for summary judgment,” provided “ ‘... the defense was raised before trial and the defendant was given time to present argument in opposition ...’ ” *Id.* at 804, 153 P.3d at 484 (2007) (quoting *Bluestone v. Mathewson*, 103 Idaho 453, 455, 649 P.2d 1209 1211 (1982)).

VP’s prescriptive easements/equitable servitude claims fit within the definition of an affirmative defense set forth in *Fuhriman, supra*. The claims were raised for the first time in response to Valiant’s January 20<sup>th</sup> motion for summary judgment. But did Valiant have time to present argument in opposition? Certainly not at the time of the first summary judgment motion filed January 20<sup>th</sup>; but as of the date of this decision, nearly nine months after NIR and VP raised the claims in their February 4<sup>th</sup> Memorandum in Opposition/Vilelli Declaration, Valiant has had time to present opposing arguments. Therefore, the Court shall now make the determination as to whether VP’s prescriptive easements/equitable servitude claims survive Valiant’s Third Motion for Summary Judgment. Specifically, whether NIR and VP have presented sufficient evidence to establish a genuine issue of material fact for trial as to those claims?

**When a summary judgment motion has been supported by depositions, affidavits or other evidence, the adverse party may not rest upon the mere allegations or denials of that party’s pleadings, but by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). See also *Gardner v. Evans*, 110**

Idaho 925, 929, 719 P.2d 1185, 1189 (1986). ... A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969). ...

When a court considers a motion for summary judgment in a case that would be tried to a jury, all facts are to be liberally construed, and all reasonable inferences must be drawn in favor of the party resisting the motion. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). The rule is different however when, as here, a jury trial has not been requested. In that event, **because the court would be the fact-finder at trial, on a summary judgment motion the court is entitled to draw the most probable inferences from the undisputed evidence properly before it, and may grant the summary judgment despite the possibility of conflicting inferences. ....**

*Johnson v. McPhee*, 147 Idaho 455, 459-460, 210 P.3d 563, 567-568 (Ct. App. 2009), *review denied*. (Emphasis supplied).

NIR and VP have alleged that: “VP claims prescriptive easement claims for infrastructure and equitable servitudes for infrastructure.” *Memorandum in Support of Renewed Motion for Reconsideration and Clarification* (filed June 18, 2015), at pp. 6-7. In evaluating the evidence presented by NIR and VP, the Court recognizes that a non-movant “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). In their pleadings, NIR and VP characterized their evidence of VP’s prescriptive easements/equitable servitude claims: First, NIR and VP’s *Memorandum in Support of Motion to Reconsider and Motion to Alter and Amend Judgment* states:

In opposition to summary judgment, VP argued the Ng entities had notice that the water and sewer infrastructure were not included in the sale of property to POBD. **VP produced evidence that the Third Restated Purchase and Sale Agreement<sup>5</sup> was provided to Barney Ng prior to R.E. making its loan to**

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<sup>5</sup> The full title is “Third Amended and Restated Real Property Purchase and Sale Agreement” dated March 9, 2006 (hereafter, “Third Restated Purchase and Sale Agreement”). See *Declaration of Richard Vilelli* (filed February 4, 2015), at Exhibit A.

**POBD. This agreement specifically stated that the water and sewer infrastructure upon the lots sold to POBD was not included as part of the sale to POBD.** Further, enough evidence exists in the record to draw the reasonable inference that Barney Ng was associated with Bar K, RE. [sic] Loans, Pensco Trust fbo Barney Ng, and Mortgage Fund '08. In fact, **Reeves testified at deposition that all his loan transaction dealings were with Barney Ng.** Thus, the reasonable inference should be drawn that these three related lenders had the same knowledge through Barney Ng prior to making their loans that the water and sewer infrastructure were not sold to POBD as part of the sale. Regarding the prescriptive easements, **Villelli's affidavit testimony was that certain of these easements have existed in excess of 20 years. ...**

*North Idaho Resorts, LLC and V.P., [sic] Inc.'s Memorandum in Support of Motion to Reconsider and Motion to Alter and Amend Judgment* (filed August 19, 2015), at pp. 15-16. (Emphasis supplied).

Similarly NIR and VP's Reply Memorandum in Support of Motion to Reconsider and Motion to Alter and Amend Judgment states:

- a. Barney Ng had a copy of the Third Restated Purchase and Sale Agreement prior to R.E. Loans funding Loan No. P0099. *See Villelli Declaration* filed 2/24/15, ¶ 8.<sup>6</sup>
- b. The Third Restated Purchase and Sale Agreement specifically included a provision that the Property purchased by POBD excluded domestic water rights which were retained by sewer and water company V.P. Inc. and easements for operation and delivery of domestic water and sewer service including the sewer lagoon, and the land application area. *Villelli Declaration* filed 2/24/15, Exhibit A, page 2.<sup>7</sup>
- c. Some of VP's easements for its water and sewer system were in place for over 20 years prior to the summary judgment. *See Villelli Declaration*, filed 2/24/15, ¶ 10.<sup>8</sup>

*North Idaho Resorts, LLC and VP, Inc.'s Reply Memorandum in Support of Motion to Reconsider and Motion to Alter and Amend Judgment* (filed October 22, 2015), at p. 2.

Is this evidence sufficient to raise a genuine issue of material fact for trial as to VP's prescriptive easements/equitable servitude claims? First, at p. 3, ¶ 8 of the *Villelli Declaration*, Mr. Villelli states: "RE Loans requested and I *provided* a copy of the Second Restated Purchase

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<sup>6</sup> The *Villelli Declaration* was filed on 2/4/15.

<sup>7</sup> The *Villelli Declaration* was filed on 2/4/15.

<sup>8</sup> The *Villelli Declaration* was filed on 2/4/15.



and Sale Agreement. I *understood* R.E. Loans had a copy of the Third Restated Purchase and Sale Agreement when I required inclusion of the term.” This statement makes clear that although Mr. Villelli provided RE Loans with a copy of the Second Restated Purchase and Sale Agreement, he did not provide a copy of the Third Restated Purchase and Sale Agreement to RE Loans or Barney Ng. He merely understood or assumed they had a copy. This does not create a genuine issue of material fact.

Second, the deposition testimony of Charles Reeves in *Union Bank* is inadmissible and has been stricken from the record in this case. Therefore, Reeves’ deposition testimony that all his loan transaction dealings were with Barney Ng does not create a genuine issue of material fact.

Third, Pend Oreille Bonner Development, LLC conveyed by Quitclaim Deeds to VP, Inc. certain property subject to the Valiant Mortgages. Said Quitclaim Deeds were recorded on May 20, 2014, as Instrument Nos. 859562, 859563, 859564 and 859565, in the records of Bonner County, Idaho. *See Declaration of Jeff R. Sykes in Support of Valiant Idaho, LLC’s Motion for Summary Judgment Against JV, LLC, North Idaho Resorts, LLC, and VP, Incorporated* (filed January 20, 2015), at Exhibits 16, 17, 18 and 19. At p. 4, ¶ 11 of the Villelli Declaration, Mr. Villelli states: “The deeds attached to Jeff Syke’s [sic] Declaration as Exhibits 16, 17, 18 and 19 are the lots deeded to VP, Inc. in compliance with the Construction and Operation Agreement upon which lagoons, water towers or pumping stations are situated.” However, VP’s claimed interest in the property was conveyed and recorded after the 2007 RE Loans Mortgage, the Pensco Mortgage and the MF08 Mortgage were recorded. Therefore, VP’s Quitclaim Deeds, as a matter of law, are junior to Valiant’s Mortgages, and do not create a genuine issue of material fact.

Fourth, NIR and VP are relying on: (1) p. 4, ¶ 10, of the Vilelli Declaration, where Mr. Vilelli states, when referring to VP's Construction and Operation Agreement with POBD, which addressed construction by POBD of extensions to VP's existing water and sewer system: "[m]uch of this infrastructure has been in place for over 20 years"; and (2) a parenthetical clause within the Third Restated Purchase and Sale Agreement between NIR and POBD, which states that the term "Property" therein

exclude[es] domestic water rights which are retained by sewer and water company V.P. Inc. including easements for operation and delivery of said domestic water and sewer service including sewer lagoon and land application; Buyer may move lagoon and may alter land application sites, but must provide approved alternate application site and build adequate new lagoon all to DEQ's approval.

*Declaration of Richard Vilelli* (filed February 4, 2015), at Exhibit A, p. 2.

Mr. Vilelli's statement about the infrastructure having been around for 20 years is a conclusory statement that is unsupported by evidence. The Construction and Operation Agreement to which Mr. Vilelli refers is not attached to the Vilelli Declaration. This statement does not, therefore, create a genuine issue of material fact. Also, VP is not a party to the Third Restated Purchase and Sale Agreement, and thus, the clause therein does not create any legal rights in VP and does not create a genuine issue of fact as to VP's prescriptive easements/equitable servitude claims

In sum, after drawing the most probable inferences from the undisputed evidence properly before the Court, this Court finds there are no genuine issues of fact for trial on the issue of whether VP's claims of prescriptive easements and equitable servitudes are junior to Valiant's interest in the subject properties. Accordingly, the Court affirms its ruling in the July 21<sup>st</sup> Memorandum Decision and Order to deny NIR and VP's motion to reconsider this issue.

13. Valiant Idaho, LLC's Third Motion for Summary Judgment filed 9/25/15, is GRANTED IN PART and DENIED IN PART.

At the summary judgment hearing, counsel for Valiant utilized the MF08 loan documents (Exhibit 6, 7, and 8 to the *Declaration of Barney Ng in Support of Valiant Idaho, LLC's Third Motion for Summary Judgment*, filed 9/25/2015) to clarify how the MF08 loan was disbursed and how it was funded. Valiant reconciled the figures from the loan documents with those on the Borrower's Final Settlement Statement dated August 8, 2008 (Exhibit H to *JV L.L.C.'s Memorandum in Opposition to Valiant Idaho, LLC's Motion for Summary Judgment*, filed 2/2/15) to support its argument that the 2007 RE Loans Note (Loan No. P0099) and the Pensco Note (Loan No. P0106) have not been satisfied. Upon consideration of this evidence, the Court acknowledges the strength of Valiant's arguments in this regard. Nevertheless, it appears that conflicting inferences may be drawn from the terms on Exhibit H: "Payoff First Note – Loan No. P0099 - Mortgage Fund '08 LLC c/o Bar K, Inc. ...Payoff Second Note – Loan No. P0106 - Mortgage Fund '08 LLC c/o Bar K, Inc. ..." Does "payoff" in this context mean the loans have been, or have yet to be, paid off? Although this Court "may grant the summary judgment despite the possibility of conflicting inferences," *Johnson v. McPhee*, 147 Idaho at 460, 210 P.3d at 568; in this case, it will not do so. Therefore, the Court affirms its earlier ruling in this case that genuine issues of material fact exist as to whether the 2007 RE Loans Note (Loan No. P0099) and the Pensco Note (Loan No. P0106) have been satisfied, and the motion for summary judgment is DENIED as to this issue.

Conversely, the motion is GRANTED to the extent that the Court finds there is no genuine issue of material fact as to the real property subject to the 2007 RE Loans Note/Mortgage, the Pensco Note/Mortgage, and the MF08 Note/Mortgage. Specifically, the

Court finds that the Declarations submitted by C. Dean Shafer do not create a genuine issue of material fact regarding the legal description of the property subject to each mortgage.

The 2007 RE Loans Mortgage, the Pensco Mortgage and the MF08 Mortgage contain legal descriptions of the property which secures each specific mortgage. No evidence has been presented that the legal descriptions of the property attached to these mortgages are inaccurate. Thus, the property subject to foreclosure under each mortgage is the property described in the legal description attached to each mortgage. There is no genuine issue of material fact on this issue. Additionally, the Court, at p. 13, of its July 21<sup>st</sup> Memorandum Decision and Order ruled that Mr. Shafer is qualified as an expert. Mr. Shafer has provided expert testimony that sets forth the legal description of the property subject to the mortgages after reconveyances of portions of the property are taken into consideration. No party has challenged the accuracy of his testimony on this point, and therefore, there is no genuine issue of material fact on this issue.

In the first Declaration of C. Dean Shafer in Support of Valiant Idaho, LLC's Motion for Entry of Final Judgment, filed 5/20/15, he included five (5) exhibits. Exhibit 5 is the legal description that Mr. Shafer created based on his review of all three mortgages and the redemption deed. *First Shafer Declaration*, at p. 4, ¶ 4. This legal description combines the legal descriptions of all three mortgages, which have not been contested, to create a legal description for the entirety of the "Valiant Encumbrances."<sup>9</sup> Exhibit 5 identifies a total of 186 lots that Valiant requests foreclosure on, but does not identify the individual mortgage encumbering each lot. *Id.*

The legal description provided in the second Declaration of C. Dean Shafer in Support of Valiant Idaho, LLC's Motion for an Order of Sale of Real Property, filed on 7/22/2015. is the

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<sup>9</sup> This includes the Valiant Redemption Deed, 2007 RE Loans Mortgage, Pensco Mortgage, and MF08 Mortgage.

same as the legal description provided in Mr. Shafer's first Declaration. but is simply renamed as the "Idaho Club's Legal Description." *Second Shafer Declaration*, at p. 2, ¶ 3. Like his first Declaration, Mr. Shafer's second Declaration identifies a total of 186 parcels on which Valiant is entitled to foreclose and provides the legal description for each individual lot. It does not specifically identify which mortgage encumbers each individual lot or parcel. *Id.* at pp. 2-3, ¶ 4.

The third Declaration of C. Dean Shafer in Support of Valiant Idaho, LLC's Motion to Alter, Amend and/or Reconsider Order for Sale of Real Property, filed 8/19/15, goes a step further by separately identifying which individual parcels are encumbered by each mortgage. *Third Shafer Declaration*, at p. 5, ¶ 9. This additional information does not change or alter Mr. Shafer's testimony, much less create an inconsistency among his declarations. Mr. Shafer's third Declaration is simply more specific than his first two Declarations.

Valiant contends that after reviewing the legal descriptions of the three mortgages, Mr. Shafer mistakenly advised Valiant's counsel that "each of said liens encumber all of the lots/parcels included within the legal description." *Third Shafer Declaration*, at p. 4, ¶ 7. Valiant's counsel relied on this representation in structuring Valiant's requested Order of Sale and in choosing to submit a single legal description for all of the property which Valiant seeks to foreclose on, instead of submitting three separate legal descriptions based on the three separate mortgages. Valiant asserts that while this miscommunication affected the Order of Sale requested by Valiant, it did not affect the accuracy of Mr. Shafer's testimony. Significantly, no evidence has been submitted to this Court to dispute the accuracy of the legal descriptions provided by Mr. Shafer. No evidence has been submitted to dispute Mr. Shafer's testimony that the RE Loans Mortgage covers 186 lots, the Pensco Mortgage covers 155 lots, and the MF08 Mortgage covers 155 lots. *Id.* at p. 5, ¶ 9. In the absent of contrary testimony, Mr. Shafer's third

Declaration remains undisputed, and the fact that the third Declaration was more specific than the previous Declarations does not create a genuine issue of material fact.

Finally, the Court finds that NIR and VP's reliance on *Capstar Radio Operating Company v. Lawrence*, 153 Idaho 411, 283 P.3d 728 (2012) is misplaced, as that case is distinguishable on its facts. But even assuming *arguendo* that there is a dispute regarding the internal consistency of Mr. Shafer's Declarations, this dispute fails to create a genuine issue of material fact because JV, NIR and VP have not offered any evidence to support their arguments that Mr. Shafer's testimony is inaccurate and have failed to offer any evidence which contradicts Mr. Shafer's testimony. In sum, there is no dispute as to the legal description of the property each mortgage encumbers and Valiant is entitled to summary judgment on this issue.

#### IV. CONCLUSION AND ORDER

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

1. The dispositions of the various motions are as set forth herein.
2. The only issue remaining for the court trial is whether the 2007 RE Loans Note (Loan No. P0099) and the Pensco Note (Loan No. P0106) have been satisfied.

IT IS SO ORDERED.

DATED this 30 day of October, 2015.

  
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**Barbara A. Buchanan**  
District Judge

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile transmission, this 30 day of October, 2015, to:

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JH.