10-19-2017

Valiant Idaho, LLC v. North Idaho Resorts, LLC Clerk's Record v. 39 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 XXXIX

44583

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

GENESIS GOLF BUILDERS, INC., formerly known as National Golf Builders, Inc., a Nevada corporation, Plaintiff, v. PEND OREILLE BONNER DEVELOPMENT, LLC, a Nevada limited liability company; 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 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	Case No. CV-2009-1810 JV L.L.C.'S MOTION TO STRIKE THE DECLARATION OF WILLIAM HABERMAN

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.

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.

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; MOUNTINA 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 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 JV L.L.C., by and through its attorney, GARY A. FINNEY and moves the Court to Strike the Declaration of William Haberman in Support of Valiant Idaho, LLC's Closing Argument, dated 14 April 2016, as follows:

1. Valiant Idaho has the burden of proof on all matters of factS on its case in chief, which is a foreclosure of mortgage on Bonner County real estate.

2. Valiant Idaho failed on its burden of proof on several issues, including the amount of indebtedness existing on an underlying mortgage indebtedness, the Loan No. P099 to R.E. Loans. The RE Loan, P099, was fully paid, in fact it was paid in excess of any sum owed.

3. Valiant Idaho's post-trial Declaration of William Haberman, dated 14 April 2016, is inadmissible and JV moves to strike it from consideration.

4. The Declaration of William Haberman is hearsay, not subject to cross-examination, and is inadmissible.

5. Valiant Idaho has cited no Rule, Statute or Authority to support said Declaration.

6. The Trial evidence proved that the RE Loan No. P0099 was fully paid, in fact "overpaid" by the 3 Assignments of first lien priority Deeds of Trust from Shea/Eagle Point and the subsequent escrow received from the sale of one of these Lots. All of this evidence was "withheld" by Valiant Idaho at the trial stage.

Wherefore, JV moves the Court to strike the Declaration of William Haberman in Support of Valiant Idaho, LLC's Closing Argument, dated 14 April 2016, and not consider it as evidence in this action, or at all.

DATED this 18TH day of April, 2016.

Respectfully Submitted,

GARY A. FINNEY
Attorney for JV L.L.C., an Idaho limited liability company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served as indicated, by facsimile, or by hand delivery, this 18 day of April, 2016, and was addressed as follows:

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

The Honorable Barbara Buchanan -
Bonner County Courthouse - Judge's Chambers
215 S. First Avenue
Sandpoint, ID 83864
VIA HAND DELIVERY

By: Gwen McVicker

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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.

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

Case No. CV-2009-01810

VP INC'S MOTION TO STRIKE THE DECLARATION OF WILLIAM HABERMAN

COMES NOW VP, Inc. ("VP"), by and through its attorneys of record, James, Vernon & Weeks, P.A., and moves this Court to strike the April 14, 2016, Declaration of William Haberman. This motion is supported by the Memorandum in Support of VP Inc.'s Motion to

Strike the Declaration of William Haberman.

DATED this 21st day of April, 2016.

JAMES, VERNON & WEEKS, P.A.

By Daniel Keyes
Daniel M. Keyes

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 21st day of April, 2016:

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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. AND RELATED COUNTER, CROSS AND THIRD PARTY ACTIONS PREVIOUSLY FILED HEREIN	Case No. CV-2009-01810 MEMORANDUM IN SUPPORT OF VP INC'S MOTION TO STRIKE THE DECLARATION OF WILLIAM HABERMAN

COMES NOW VP, Inc. ("VP"), by and through its attorneys of record, James, Vernon & Weeks, P.A., and submits this Memorandum in Support of VP Inc.'s Motion to Strike the Declaration of William Haberman.

ARGUMENT

This matter was tried before the Court on January 28-29 and March 16-17, 2016. At trial Valiant Idaho, LLC ("Valiant") as the foreclosing party had the burden of proof to establish the existence of the debt, a default on that debt, and the amount of the defaulted debt. *U.S. Bank Nat. Ass'n N.D. v. CitiMortgage, Inc.*, 157 Idaho 446, 451-52, 337 P.3d 605, 610-11 (2014). The time for Vailant to introduce that evidence was a trial where all the parties had the opportunity to cross-examine witnesses and rebut evidence presented. Valiant's post-trial submission of evidence through the Declaration of William Haberman is inappropriate because the conclusion of trial closed the time for submission of evidence in this matter. Submission of new evidence through a post-trial declaration denies the parties the opportunity to cross-examine Mr. Haberman and present rebuttal evidence. Accordingly, the Declaration of William Haberman should be stricken.

Idaho law provides a mechanism for a party to present post-trial evidence in certain situations. The Idaho Supreme Court has recognized the discretionary power of the trial court to reopen a case for submission of new evidence prior to entry of final judgment. *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 967, 968, 812 P.2d 274, 275 (1991); *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049, 1052 (1931). In exercising its discretion to reopen this case for submission of new evidence this Court would need to first carefully consider the relevant factual circumstances and principles of law presented by the moving party (Valiant), "without arbitrary disregard for those facts and principles of justice." *Montierth*, 119 Idaho at 968, 812 P.2d at 275.

A party moving the Court to reopen a case must make a showing of "some reasonable excuse, such as oversight, inability to produce the evidence, or ignorance of the evidence." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 744, 9 P.3d 1204, 1210 (2000).

At this time Valiant has not moved this Court to reopen the case. Valiant has not made a showing that would warrant reopening the case to present new evidence. Idaho law provides Valiant Idaho a viable means of introducing post-trial evidence to the Court that it failed to provide at trial. However, presentation of new evidence by post-trial declaration is not allowed by Idaho law and therefore, the Declaration of William Haberman should be stricken.

DATED this 21st day of April, 2016.

JAMES, VERNON & WEEKS, P.A.

By Daniel Keyes
Daniel M. Keyes

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 21st day of April, 2016:

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Christine Clowes

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,	**CASE NO. CV-2009-0001810**
Plaintiff,	**ORDER DENYING MOTIONS TO STRIKE**
v.	
PEND OREILLE BONNER DEVELOPMENT, LLC, a Nevada limited liability company, *et al.*,	
Defendants.	

On April 14, 2016, Valiant Idaho LLC filed the Declaration of William Haberman in Support of Valiant Idaho, LLC's Closing Argument. In response thereto, JV L.L.C. filed a Motion to Strike the Declaration of William Haberman on April 18, 2016, and VP Inc. filed a Motion to Strike the Declaration of William Haberman on April 21, 2016.

The Declaration of William Haberman contains the updated interest calculations for amounts owing to Valiant Idaho, LLC, on the 2007 RE Note and 2007 RE Mortgage.

Upon consideration of the declaration and the motions to strike, this Court shall not strike Mr. Haberman's Declaration because if the Court were to find in favor of Valiant Idaho, LLC, on the sole issue at trial of whether the 2007 R.E. Loans Note (Loan No. P0099) and Pensco Note (Loan No. P0106) have been satisfied, the updated interest calculations will be relevant.

NOW, THEREFORE, based on the foregoing, IT IS HEREBY ORDERED THAT JV, L.L.C.'s and VP, Inc.'s Motions to Strike the Declaration of William Haberman are DENIED.

IT IS SO ORDERED,

DATED this 27 day of April, 2016.

Barbara Buchanan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 27 day of April, 2016, to:

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Deputy Clerk

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ISB No. 1356

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

GENESIS GOLF BUILDERS, INC., formerly known as National Golf Builders, Inc., a Nevada corporation, Plaintiff, v. PEND OREILLE BONNER DEVELOPMENT, LLC, a Nevada limited liability company; RE 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 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-	Case No. CV-2009-1810 JV L.L.C.'S POST TRIAL MEMORANDUM AND ARGUMENT

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.

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.

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;)
MOUNTINA 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 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 JV L.L.C. (hereafter JV), by and through its attorney, GARY A. FINNEY and submits this post trial memorandum and argument.

THE WHOLE STORY, THE FACTS

In February of 2005, by a Third Amended Purchase and Sale Agreement, V.P., Inc. and its related entities, all owned and managed by Richard Villelli, contracted to sell several parcels of real estate to the Monterey Group, managed by Charles Reeves, who is a predecessor to POBD. The terms and conditions of the purchase price were:

a) $4,750,000.00 cash

b) Assume the 1st purchase money mortgage of October 1995 from V.P. Inc. to JV, LLC, on the 650 acres known as

Moose Mountain of $2,565,000.00 owed, escrowed at Panhandle Escrow No. 2067429

c) Assumed V.P. et al 2004 Mortgage to RE Loans, a second mortgage of $8,515,000.00, RE Loan No. V0140, collected through Bar-K

for total consideration of $15,830,000.00.

At the time of the Third Amended Purchase and Sale Agreement (February 2005), RE Loans had been suspended/prohibited from making loans by the State of California. RE Loans had no money to loan until about June of 2006. This delayed the closing of VP to POBD from 2005 to over a year, until about June 14/19, 2006. The closing occurred for the purchase and sale closing and also for a refinance loan from RE Loans, to POBD, as 2006 Loan No. 0094, which both occurred simultaneously. The sale closing settlement statement is JV Defendant Exhibit H, Seller's Closing Statement (POBD/NIR). This shows the Total Consideration of $15,830,000.00, and about six lines down is "Berry Note assumed by buyer"... $2,565,000.00. The Villelli (VP/NIR) 2004 mortgage RE Loans V0140 entered as Loan Payoff: Bar-K. . . $8,064,776.27 (which sum was not paid).

The Buyer/Borrower Statement for the 2006 RE loan of the same date (6/14/2006) is JV Defendant Exhibit O, for the 2006 POBD/RE Mortgage signed by REEVES for POBD, shows the total consideration of $15,830,000.00. There is an entry for a 1995 JV Mortgage assumption for $2,565,000.00 by POBD; however the

2004 V.P. et al/RE Mortgage V0140 is not listed at all on the Buyer/Borrower Statement. The 2006 new mortgage RE/POBD ($20,500,000.00) is listed specifically on the statement. It is disclosed as "New to Bar-K Inc... $20,500,000.00" along with "Hold For Construction: Bar-K Inc... $11,400,000.00". The Buyer/Borrower Statement, JV Defendant Exhibit O, does not show any money disbursed from RE to POBD, at all, because no new 2006 loan money was advanced or disbursed. Of course, all references to Bar-K Inc., should have referred to RE Loans, as Bar-K was only a loan broker/record keeper for Barney Ng, it was never a lender. The difference between;

"New to Bar-K Inc...		$20,500,000.00"
and "Hold For Construction: Bar-K Inc...		$11,400,000.00"
	is	$ 9,100,000.00

This $9,100,000.00 is the amount determined by Bar-K (Barney Ng) and POBD as the dollar amount still owed on POBD's Assumption of the existing 2004 RE/V.P. Mortgage Loan V0140. This figure in the Third Amended Purchase and Sale Agreement, assumption dollar amount was $8,515,000.00 in February of 2005, which by the time of closing, over a year later, in June of 2006 was $9,100,000.00. It needs to be kept in mind that at the purchase and sale closing (June 2006) POBD did not even have enough money to pay the agreed cash of $4,750,000.00, nor did RE have any money to loan POBD to make up the shortfall, so the Buyer/Borrower Statement, JV Defendant Exhibit O, and the Seller's Closing Statement, JV Defendant Exhibit H, of June 14,

2006, both show the entry of "Note for RE loan differential...$511,583.34, for which POBD gave an unsecured promissory note to seller NIR/VP et al.

In point of fact, the February 2005 Third Amended Purchase and Sale closing did not occur until June 2006 (1 year and 4 months later) because neither POBD nor RE Loans had enough cash money to close the sale, and RE Loans had no money to loan or advance for "new construction". Therefore, the assumed 2004 V.P./RE Loan V0140 was carried over at $9,100,000.00, none of which was new or cash at all. This is easier further identified by going to POBD's (Reeves) own financing record with RE, being JV Defendant Exhibit P, which is captioned Bar-K 6-28-07, showing., on the first, second and third line:

"Date"	"Loan Balance"
"06/19/2006	$20,500,000.00"
"06/19/2006	$ 9,100,000.00"

The so called "advance" was the balance of the 2004 Mortgage RE/V.P. Loan No. V0140, assumed but not paid, still owing of $9,100,000.00.

The 2006 RE/POBD Mortgage loan of $20,500,000.00 was never disbursed except for a small dollar amount because RE didn't have the money shown as "Hold For Construction: Bar-k Inc... of $11,400,000.00" and because POBD was commencing to sell LOTS and to paydown. JV Defendant Exhibit P further discloses only two (2) loan advances from RE to POBD of:

Line 5 "advance $(88,411.47)" and
Line 9 "advance $(478,176.97)"
these total to $ 566,588.44 which is all, the entire RE 2006 Loan dollar amount to POBD.

There were also previous listed paydowns, so the 2006 RE/POBD under Draw Balance was entered as $(454,266.12). JV Defendant Exhibit P further shows that in 2006 POBD made no more construction draws except for the 2 aforementioned (listed as "advance"); however, POBD made Lot sales for several more paydowns resulting in entries (far right) of "$9,813,900.00 - Loan draws incl refinance costs" and "($3,713,900.00) Paydown old loan." In other words, POBD borrowed only $566,588.44 on the 2006 $20,500,000 Loan from RE, but POBD paid down $3,713,900.00 on the "old loan" of 2004 Mortgage V0140 Villelli entities to RE.

It is very important to read JV Defendant Exhibit P because it says "refinance", not "new" finance, and it says "Paydown old loan". The words "refinance" and "Paydown old loan" used in the 2006 Mortgage contract must necessarily reference and do actually refer to the refinance and paydown of the previous "old loan" i.e. the RE/V.P. Inc. 2004 Loan/Mortgage No. V0140 which by the written purchase and sale contract was "assumed" by POBD at the February 2005 balance of $8,515,000.00 = growing to June of 2006 to $9,100,000.00.

The Bar-K, 8-28-07 document, JV Defendant Exhibit P, coming from Reeves at POBD, as the business record of POBD for its

financial records of both the 2006 refinance and the 2007 second refinance, reveal the actual financial money figures. At the top of that JV Defendant Exhibit P the ending balance for the 2006 refinance of the 2004 loan assumption shows:

$9,813,900.00 Loan draws incl refinance costs
$3,713,900.00 Paydown old loan - with the
difference of $6,100,000.00 being the dollar amount still owed on the 2006 refinance of the "old loan" (2004) of VP (No. 0140).

Then, on JV Defendant Exhibit P, mid-page begins with "3/15/2007...$21,200,000.00" upon which the 2004/2006 old loan carryover $6,100,000.00 was still owed and a balance of $15,100,000.00 was used by RE as the beginning balance advance; however, no $6,100,000.00 actual money was loaned or "advanced". This is further verified by the Plaintiff's Exhibit 65-A (Reeves 001310) first entry for the 2007 new loan as

"Date	P0099	Pend Oreille"
03/15/2007	Init Adv	$6,100,000.00

The Settlement Closing Statement for the RE to POBD 2007 Loan No. P099 verifies that no money (new money) was advanced - it was merely a carryover of 2004 to 2006 to 2007. The 2007 Loan Agreement and the buyer borrower settlement shows the 2007 mortgage to be $21,200,000 of which $6,100,000 was "used up", so only $15,100,000 was available to borrow on the 2007 RE/POBD Loan No. 0094. This is actually disclosed in the 2007 Loan Agreement, RE/POBD, Plaintiff's Exhibit 3.

JV's Mortgage is recorded October 24, 1995, Instrument No. 474746 on all of approximately 650 acres. From time to time JV partially released only platted LOTS as sold by POBD. JV is the superior mortgage on all the real estate knows as Moose Mountain, less platted lots sold and released, because:

a. JV's Mortgage is the original vendor's priority purchase money mortgage when sold and conveyed by JV and mortgaged by VP Inc. as provided by Idaho Code § 45-112, and Idaho Code § 45-801, and

b. JV's Mortgage is recorded first in time, first in right, pursuant to Idaho's Race Notice recording statute, Idaho Code § 55-811, and

c. The 2006 Subordination Agreement by JV did not "subordinate" JV to RE because RE did not loan the $20,5000,000.00 claimed in its Mortgage recorded 6/19/2006 and any money loaned was fully repaid and the 2006 Mortgage was discharged. Normally, the RE 2006 Mortgage and JV's Subordination would not need to be discussed, but the facts make it important to analyze. First, the 2006 Mortgage loan closing document is entitled Buyer/Borrower Statement/Escrow No. 41847 by Sandpoint Title is JV Defendant Exhibit O. That document, under Ledger Charges, a "New to Bar-K Inc of $20,500,000.00; however, no loan was advanced or distributed. Rather, the entity "Hold For Construction Bar-K Inc... $11,400,000.00 - was held for construction draws by POBD from Re. The difference

between $20,500,000.00 and $11,400,000.00 is $9,100,000.00 the then unpaid balance of the VP loan from RE No. V0140, Mortgage of 2004, which Mortgage was assumed by POBD in the Third Purchase and Sale Agreement as part of the purchase price, total consideration of $15,830,000.00. The 2006 RE Mortgage was nothing more than a "refinance" of the VP 2004 Mortgage to RE assumed by POBD. The VP 2004 Mortgage, Loan No. V0140 was left and remained a recorded record. That loan statement furnished by REEVES, which is JV Defendant Exhibit P, starts with the date 6/19/2006 Loan Balance Advance (6/19/2006) $20,500,000.00 and $9,100,000.00 (which is the 2004 VP Mortgage to RE, assumed by POBD at closing of the purchase and sale). Under the heading Draw Balance it is shown that, $9,813,900.00 was the Loan draws including refinance costs POBD. The $9,100,000.00 of 6/19/2006 was never a "loan draw" it was merely the refinance amount still owed in 2006 on the RE/VP 2004 Mortgage Loan No. V0140. The further entry shows: (loan draws and refinance) $9,813,900.00 - $3,713,900.00 PAYDOWN Old Loan the difference = $6,100,000.00, which is the amount still owed from the 2004 Mortgage. Even though the JV Defendant Exhibit B shows $6,100,000.00 still unpaid, which sum carried over, so the 3/15/2007 Mortgage entered that amount as an advance of $6,100,000.00. However, RE clearly fully satisfied the 2006 RE Mortgage by recording a SATISFACTION of Mortgage on 6/8/2007, Instrument No. 730445, which document is JV Defendant Exhibit V, which document states

that RE acknowledges the $20,500,00.00 Mortgage of June 19, 2006 has been Fully Satisfied and Discharged (emphasis added) and a full satisfaction thereof (emphasis added) is to be entered. Clearly, the 2004/2006 "old loan" refinance was fully satisfied and discharged by RE. However, contrarily RE started the 2007 Mortgage loan balance ledger with the already released and discharged sum of $6,100,000.00 entered as 3/15/2007 "Init. (Initial) Advance" for Pend Oreille as $6,100,000.00 (See Plaintiff's Exhibit 65A, Reeves 001343).

In conclusion:

a. The 2004/2006 "old loan" paydown to $6,100,000.00 was satisfied by 2006 Satisfaction of Mortgage executed and recorded by RE in June of 2007, and

b. At no time and in no document did JV ever agree to be subordinate to VP's 2004 Mortgage No. V0140 to RE.

The JV Defendant Exhibit P continues at mid-page to the 2007 RE/POBD Mortgage, recorded June 19, 2006 for $21,200.000.00. The actual Mortgage of 2007 is Loan No. 0099, Plaintiff's Exhibit 1. The Loan Agreement (P0099) is Plaintiff's Exhibit 3. These documents are for 3/15/2007, Loan No. P0099 between RE Loans and POBD. RE neither advanced nor loaned any money as part of the loan closing. The remainder still owed from the 2004/2006 RE loans in sum of $6,100,000.00, even thought it was DISCHARGED of record (JV Defendant Exhibit

V), was entered as a carry over on the Plaintiff's Exhibit 65A, Reeves 001133, as a 3/15/2007, Initial advance, $6,100,000.-.

REEVES verified that for the 2006 loan, no funds were disbursed by RE to POBD because the sum of $8 or $9 million was already used up (because 2004 VP loan was still unpaid). Also for the 2007 RE to POBD loan (P0099) the $6 million from the 2004 Loan was already used up, because the 2004 VP loan was still unpaid. The 2007 Loan No. P0099, Promissory Note and Mortgage were in the face amount of $21,200,000.00 of which still unpaid from the Second Mortgage of 2004 VP to RE (Loan No. V0140) still unpaid was $6,100,000.00, which left the unfunded, undisbursed new loan balance = $15,100,000.000.

The 2007 Mortgage actually states that "the Mortgagor (POBD) is indebted to Mortgagee (RE) for so much of said loan as Mortgage (RE) shall disburse to Mortgagor (POBD) from time to time". So, the actual money disbursed of $15,100,000 was the agreed only indebtedness POBD to RE on the 2007 loan. The proof is that the actual disbursements RE to POBD for the 2007 loan, totals only $15,100,000 - the exact amount unfunded and undisbursed at closing: $21,200,000.00 was never actually disbursed by RE to POBD. Plaintiff's Exhibit 65A, Reeves001133, 001134, and 001135 show all of the actual loan disbursements, called DRAWS, starting 3/16/07 and ending on DRAW J on 9/21/07. These 10 DRAWS are compiled as:

i.	3/18/07	Draw A	$1,626,095.48
ii.	4/16/07	Draw B	$2,078,812.80
iii.	5/21/07	Draw C	$407,880.18
iv.	6/1/07	Draw D	$949,396.41
v.	6/14/07	Draw E	$831,578.95
vi.	7/17/07	Draw F	$4,620,044.54
vii.	7/17/07	Draw G	$82,021.01
viii.	7/30/07	Draw H	$4,335,053.24
ix.	8/9/07	Draw I	$109,162.95
x.	9/21/07	Draw J	$59,954.44
	Total Loan Draws:		$15,100,000.00

The loan paydowns on Plaintiff's Exhibit 65A, Reeves001133, 001134, and 001135 total more money than disbursed as draws by POBD, as follows:

i.	3/15/07	$136,000.00
ii.	3/15/07	$100,000.00
iii.	4/9/07	$631,125.00
iv.	5/3/07	$240,975.00
v.	5/7/07	$332,775.00
vi.	5/7/07	$178,500.00
vii.	5/10/07	$309,825.00
viii.	5/18/07	$455,175.00
ix.	5/18/07	$187,000.00
x.	5/21/07	$344,250.00
xi.	5/23/07	$286,875.00
xii.	5/31/07	$573,750.00
xiii.	6/14/07	$115,000.00
xiv.	7/20/07	$212,500.00
xv.	8/17/07	$229,500.00
xvi.	8/23/07	$234,250.00
xvii.	8/23/07	$224,215.00
xviii.	8/23/07	$215,175.00
xix.	8/27/07	$140,250.00
xx.	9/14/07	$178,500.00
xxi.	9/14/07	$115,000.00
xxii.	9/28/07	$470,475.00
xxiii.	9/28/07	$582,275.00

xxiv.	10/01/07	$455,175.00
xxv.	10/04/07	$524,025.00
xxvi.	10/09/07	$353,281.00
		$531,675.00
		$309,825.00
xxvii.	10/12/07	$371,025.00
xxviii.	10/22/07	$443,700.00
xxix.	10/23/07	$371,025.00
xxx.	11/5/07	$371,025.00
xxxi.	11/7/07	$401,625.00
xxxii.	11/09/07	$400,987.50
xxxiii.	11/13/07	$969,000.00
xxxiv.	1/7/08	$294,525.00
xxxv.	1/14/08	$15,957.34
xxxvi.	2/25/08	$187,000.00
xxxvii.	2/25/08	$371,025.00
xxxviii.	3/31/08	$290,030.00
xxxix.	4/15/08	$290,000.00
xl.	5/12/08	$11,220.00
xli.	7/16/08	$140,935.98
xlii.	8/1/08	$11,220.00
xliii.	8/1/08	$290,000.00
xliv.	8/6/08	$1,150,000.00
xlv.	8/7/08	$290,000.00
xlvi.	8/21/08	$290,000.00
xlvii.	8/22/08	$290,000.00
xlviii.	10/7/08	$11,220.00
xlix.	5/5/09	$966,416.64
l.	7/2/09	$2,640,474.03
li.	9/15/09	$62,713.23
lii.	10/28/09	$984,098.58
liii.	11/23/09	$656.48
	11/23/2009	$358,598.59
Total Paydowns		$20,941,849.37

POBD, on the 2007 loan, had actual disbursements as Draws A to J of only $15,100,000-, but POBD made "paydowns" in the sum

of $20,941,849.37, the excess paid down over advances of $5,841,849.37.

This was because POBD was still paying, long after March of 2007, on the 2004 VP V0140 "old loan" refinance balance of $6,100,000- even though it was fully satisfied and discharged by the Satisfaction of Mortgage signed and recorded by RE on June 7, 2007 as Instrument No. 730445, JV Defendant Exhibit V.

In addition, the Second Subordination Agreement, signed by JV, recorded 3/15/07, Instrument No. 724833, which is Plaintiff's Exhibit 6, also stated and required that the 2006 Mortgage "to be discharged and released and to be replaced by a New Note and Mortgage securing the original sum of $21,200,000." In other words, JV did not want or agree to give a new Second Subordination Agreement and also be subordinate to any indebtedness prior to it. This is why in 2007 RE actually signed and recorded the Satisfaction of Mortgage, JV Defendant Exhibit V, for the 2006 Mortgage. The proof is that RE carried over VP's 2004 Mortgage, V0140, on the payment record under the heading "Init. Advance" in spite of the wording of the Second Subordination Agreement, which wording is the fifth paragraph that, "1. The 20,500,000.00 Note and Mortgage shall be discharged and release (sic) of record, and the "new" Note and Mortgage (21,200,000.00) shall be the only obligation and lien to which the Jr. Mortgage is subordinate *** " (underline added -see Plaintiff's Exhibit 6, middle of first page).

In fact, RE did not sign and record the Satisfaction of Mortgage of the 2004 VP/RE Mortgage until recorded August 6, 2008, Instrument No. 756408 (JV Defendant Exhibit O).

As to JV's Second Subordination Agreement (2007), JV is not subordinate to any sums under RE's 2007 Mortgage Loan No. P0099 because,

a. RE was fully paid in excess of the $278,147.65 balance on 11/23/2009 because of the Shea Assignments of three (3) first Notes and Deeds of Trust, plus more cash on one of the Deeds of Trust, from the closing agent Sandpoint Title, and

b. RE only disbursed funds of $15,100,000 as Loan Draws A - J, Loan No. P0099, but received Paydowns totaling over $20,000,000, resulting in paydowns in excess of draws, and

c. The Second Subordination Agreement by JV (2007) required all prior loans/mortgages to be released and discharged, so that the only obligation and lien on to which JV was subordinate was the "new" 2007 loan/mortgage, and

d. RE, contrary to JV's agreement and requirement, did not sign and record a Satisfaction for the 2004 VP "old loan" until August 2008, Instrument No. 756408, which is JV Defendant Exhibit O.

The payment history showed that the last entry was on 11/23/09 reflecting an unpaid principal balance of $278,147.65 (Plaintiff's Exhibit 65A, Reeves 001135). NG was gone from Bar-K before that date.

THE SHEA/EAGLE POINT 3 SELLER CARRY BACK NOTES/DEEDS OF TRUST

None of the Plaintiff's witnesses made any mention of four references in Plaintiff's Exhibit 65A starting 1/14/08 through 10/7/08 (Reeves 001134) all as "P0101, P0103, P0104 until cross-examined by JV's counsel and by VP's counsel. What were these reference numbers? This can be answered by starting with JV Defendant Exhibit P, Charles Reeves (hereafter REEVES), manager of POBD, identified as part of the business records he furnished on a document discovery request. On JV Defendant Exhibit P, lines 2, 3, and 4 up from the bottom left column, are 3 entries all on

8/23/07	Paydown Shea	$234,250.-
8/23/07	Paydown Shea	$224,215.-
8/23/07	Paydown Shea	$215,175.-

Shea are individuals doing business as Eagle Point Construction. REEVES testified to the only three (3) seller-carry back sale of lots by POBD to Shea. All of the other Lot sales were for CASH and pursuant to the RE/POBD "release clause" the greater of three (3) provisions, i.e. 85% of the sale price had to be paid at closing to RE for a partial release of its mortgage on the Lot(s) sold. Shea was unable to pay enough CASH for 85% to be given to RE for a partial release of each of said three (3) Lots. So Shea, REEVES, and RE agreed that RE would get all of the cash down payment and POBD would "assign" each promissory note and first lien priority deed of trust to RE, whereby RE would give a partial release in exchange for all of

the sale proceeds cash and purchase money deeds of trust for the three (3) Lots sold to Shea. Plaintiff's Exhibit 65A, all dated 8/23/07, are three (3) Paydowns of $234,250, $224,215, $215,175 which are the exact Shea cash down payments shown on JV Defendant Exhibit P. All of the sale proceeds, cash and seller carry back notes/deeds of trust were assigned to RE, and RE gave a simultaneous partial release of mortgage on each Shea Lot. PBOD and RE used the same legal format on all 3 Shea Lots, to wit.

a. RE, through Bar-K Loan No. P0099 received all of the cash, as three (3) PAYDOWNS.

b. RE executed and recorded a Partial Release of Mortgage identified on Loan No. P0099 on the document recorded 9/25/07, Instrument No. 737860.

c. The legal descriptions identified the three (3) Lots as Lot 7, Block 2; Lot 4, Block 9, and Lot 16, Block 2, of their respective Plats and Additions in Golden Tees Estates (this is JV Defendant Exhibit FF). Shea for Eagle Point Construction gave a recorded seller carry-back purchase money first lien deed of trust for each of the three (3) Lots being;

1. Lot 16, Block 2 - purchase money Deed of Trust recorded August 22, 2007 as Instrument No. 735613 for $110,000 (JV Defendant Exhibit W)

a. Simultaneously the purchase money first lien Deed of Trust was assigned from POBD to RE, by

Assumption of Deed of Trust, for $110,000 recorded August 22, 2007 as Instrument No. 735614 (JV Defendant Exhibit X)

2. Lot 7, Block 2 - purchase money Deed of Trust securing POBD recorded 8/22/2007, Instrument No. 735623 - for $240,000 (JV Defendant Exhibit Y)

a. Simultaneously the purchase money first lien Deed of Trust was assigned from POBD to RE, by Assumption of Deed of Trust, for $240,000 recorded August 22, 2007 as Instrument No. 735624 (JV Defendant Exhibit Z)

3. Lot 4, Block 9 - purchase money Deed of Trust securing POBD recorded 8/22/2007, Instrument No. 735618 - for $177,500 (JV Defendant Exhibit AA)

a. Simultaneously the purchase money first lien Deed of Trust was assigned from POBD to RE, by Assumption of Deed of Trust, for $177,500 recorded August 22, 2007 as Instrument No. 735619 (JV Defendant Exhibit BB)

d. As of August 22, 2007 RE received all of the down payment cash Paydowns, totaling $673,640 ($234,250 + $224,215 + $215,175) and 3 first lien Deeds of Trust totaling:

a. $110,000
b. $240,000
c. $177,500
$527,500

All three (3) of these Promissory Notes/Deeds of Trust, state a final due date maturity of February 15, 2010, which date is after the ending date of Plaintiffs Exhibit 65 A, and is after Barney Ng's departure date from RE.

POBD was never given any credit on the 2007 Loan No P0099, Plaintiff's Exhibit 65A, for the 3 assigned first lien Deeds of Trust totaling $527,500 toward the P0099 last balance entry of $278,147.66, so:

($527,500.00) = received on 3 Deeds of Trust assigned to RE
$278,147.65 - last entry of unpaid balance
($249,352.35) = amount POBD OVERPAID RE LOAN P0099

2. Also, Shea/Eagle Point later resold one (1) of the Lots. Tom Williams, of Sandpoint Title, who did the closing/settlement was subpoenaed by VP and he produced STI file (60642) showing the Lot 4, Block 9 Shea Lot, upon which RE Loans held an assigned first Deed of Trust for $177,500, was sold in October 16, 2012, and Demand for Payment was made by Wells Fargo Bank, who was RE's Assignee of the entire Mortgage POBD/RE Loan No. P0099. The net proceeds were disbursed by Sandpoint Title for $96,901.99 to credit on the RE Loan to POBD (P0099). This resulted in more overpayment by POBD on the RE Loans of:

($249,352.35) + amount POBD OVERPAID RE LOAN P0099 (3 Shea Lots)
$96,901.99) + Shae resale cash
($346,254.34) = amount POBD OVERPAID RE LOAN P0099

3. Also, RE held 2 more first Deeds of Trust assigned from POBD, which were held and owned by RE. The amounts received on these Deeds of Trust would result in more overpayment to RE. The

burden of proof is on Valiant to prove the amount, if any, owed on the 2007 Mortgage, and Valiant offers no proof.

In summary, on this issue of payment of the 2007 RE Loan No. P0099, the fact is the loan was fully paid, and even paid in excess of what it was owed. No witness from Valiant, NG, REEVE, or anyone disputed this evidence. It is undisputed evidence.

THE 2007 MORTGAGE POBD TO RE, WAS "ASSIGNED TO VALIANT BY ASSIGNMENT OF MORTGAGE, SIGNED FOR RE BY A POWER OF ATTORNEY - WHICH ASSIGNMENT WAS NOT EVEN ENTITLED TO BE RECORDED

The 2007 Mortgage No. P099 was assigned by RE to Valiant Idaho, which was recorded 7/7/2014, Instrument No. 861388, which is Plaintiff's Exhibit 72. This Assignment shows on its face that it was signed in Texas "By: Howard Marc Spector, Attorney in Fact," for RE Loans.

Valiant did not offer any proof of the authority of Spector to sign for RE by power of attorney. This is an obligation required by Idaho Code § 55-806 statute.

"55-806 POWER MUST BE RECORDED BEFORE CONVEYANCE BY ATTORNEY. An instrument executed by an attorney in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office."

Therefore, the Plaintiff's Exhibit 72, Assignment of RE Mortgage (2007 Mortgage No. P0099) by Spector "by power of attorney" could not be recorded in Bonner County, Idaho.

Since RE Loan No. P0099, the 2007 Mortgage was already

"fully-overpaid", RE held no "right of redemption" for the Tax Deed to Bonner County. Also Valiant was "no" party in interest because the Spector assignment was not entitled to be recorded. Further, to be entitled to redeem from a Tax Deed, the redemption must meet Idaho Code § 63-1007 as being a "party in interest". A party in interest as to real estate, must necessarily hold a recorded interest, i.e. RE held a recorded, but already fully paid-off 2007 Mortgage. RE was not a redemptioner, but Valiant somehow obtained a Redemption Deed (Plaintiff's Exhibit 74) from Bonner County Tax Collector. Having no valid by recorded power of attorney for Spector, the Assignment (Plaintiff's Exhibit 72) of Mortgage could not be recorded. Therefore, Valiant never held a recordable Assignment of Mortgage and could not be a statutory Redemptioner and was not entitled to its Redemption Deed (Plaintiff's Exhibit 74) being of no legal force or effect. A document that is not entitled to be recorded is no notice at all, neither constructive or actual notice.

JV's positions that the 2007 RE Mortgage was fully paid and that the Assignment of it to Valiant could not be recorded, means Valiant as assignee of RE could not have redeemed from Bonner County's Tax Deed.

If the Court disagrees with JV, and permits Valiant to redeem and to receive the Redemption Deed, Plaintiff's Exhibit 74, then the further applicable facts and results are:

a. Valiant's redemption was a few days after JV had already redeemed a portion of the Tax Deed real estate. JV gave the Bonner County Tax Collector, a written Notice of Redemption and paid the amount of money necessary to redeem. JV's Notice of Redemption is JV Defendant Exhibit K and the Redemption Deed to JV, recorded July 7, 2014, Instrument No. 861430, subsequently rerecorded by the Tax Collector, is JV Defendant Exhibit L reciting that JV paid $140,999.86 on July 2, 2014 in order to redeem.

JV OWNS THE REAL ESTATE DESCRIBED IN ITS REDEMPTION DEED - FREE AND CLEAR.

The facts are undisputable that Bonner County took title to all of the Idaho Club real estate by Tax Deed for non-payment of taxes. JV made the first redemption by written Notice of Redemption, JV Defendant Exhibit K, and payment thereon of $140,999.86 paid July 2, 2014. The Tax Collector gave JV a Redemption Deed recorded 7/7/2014, Instrument No. 861430 and rerecorded 8/22/2014 as Instrument No. 863295 (JV Defendant Exhibit L). Valiant later redeemed the remaining Tax Deed real estate, i.e. the real estate remaining after JV first redeemed. The legal description conveyed to JV is described in its Redemption Deed, as Parcels 1, 2, 3 & 4. Valiant's Redemption Deed describes the real estate it redeemed, withholding the real estate redeemed by JV. The withheld real estate being "And Less the following parcels redeemed by Instrument No. 861430" (JV's

Redemption Deed). The rerecorded Redemption Deed to Valiant also again withheld the JV's redemption real estate by the words "And Less all of the following parcels described below:

Which described the Parcels 1, 2, 3, and 4 previously redeemed by JV."

The legal effect of which is governed by Idaho Statutory law, as follows:

a. Idaho Code ¶ 45-113 gives every person having an interest in property, a right to redeem before his right of redemption expires.

b. Idaho Code ¶ 45-114 provides that one who has a lien inferior to another upon the same property, has a right:

1. To redeem the property the same manner as its owner might, from the superior lien, and

2. To be subrogated to all the benefits of the superior lien, for the protection of his interests upon satisfying the claim secured thereby.

Apply these statutes to the facts as stated that JV having a mortgage interest in the POBD Idaho Club real estate, JV, has a right to redeem before its right of redemption expires. JV's mortgage lien being inferior, the Bonner County's real estate tax lien upon the same property, gives JV a right to redeem in the same manner as its owner might (POBD was the owner) from the superior tax lien; and JV is subrogated to all the benefits of the superior lien for the protection of JV's interests, upon

satisfying the tax lien. JV paid Bonner County, hence redeeming the real estate described in its Redemption Deed and thereby JV became subrogated to all the benefits of Bonner County's tax lien, Tax Deed. By Case law:

a. A deed from the County for the property acquired by it for non-payment of taxes to the County's purchase, conveys the property free and clear. (Smith v. City of Nampa 57 Idaho 736, 68 P.2d 344 (1937)

b. Where realty is subject to redemption from tax deed made to the County, the time of redemption from the deed is governed by the law in effect at the time the County obtained title. Winans v. Swisher 68 Idaho 364, 195 P.2d 357(1948)

c. The Redemption - Expiration right is as stated in Idaho Code § 63-1007 broken down into 2 sections being:

(1) After the issuance of a tax deed, real property may be redeemed only (emphasis added) by the record owner or owners (POBD), or party in interest (JV as Mortgage holder), up to the time the county commissioners have entered into a contract of sale or the property has been transferred by county deed (neither of which had occurred in this matter). In order to redeem real property, the record owner or owners (POBD), or party in interest (JV), shall pay any delinquency including the late charges, accrued interest, and costs, including the current calendar year. JV made a valid redemption of the real estate in its Notice of Redemption and paid the dollar amount.

(2) Should such payments be made, a redemption deed shall be issued by the county tax collector into the name of the redemptioner (JV) and the rights, title and interest acquired by the county shall cease and terminate; provided however, that such right of redemption shall expire fourteen (14) months from the date of issuance of a tax deed to the county, in the event the county commissioners have not extinguished the right of redemption by contract of sale or transfer by county deed during said redemption period. In the event a tax deed is issued and payment is not received within fourteen (14) months of the issuance of such tax deed, then said tax deed to the county is presumptive evidence of the regularity of all proceedings prior thereto and the fee simple title, after the issuance of said tax deed, rests in the county.

In the instant action, JV validly "redeemed" in July 2014. No one redeemed from JV, and 14 months after the county tax deed (which was in May of 2014) the fee simple title rests in JV, who is statutorily subrogated to all the rights of Bonner County. In the instant action, no further redemption is permitted by the statute, and fee simple title rests in JV, as no party can get ahead of the tax lien tax deed and all rights of redemption have long since expired.

THE EFFECT OF A TAX REDEMPTION

After a statutory period of non-payment of real estate taxes, the real estate described in the tax assessments and the

amount thereof, plus interest/costs/fees, is conveyed to Bonner County by the Tax Collector. In the case of the POBD real estate, "Idaho Club" the real estate was conveyed to Bonner County by Tax Deed. The sequence was;

a. JV redeemed a portion of the real estate on July 2, 2014 and received Redemption Deed, recorded July 7, 2014 then Valiant, as the purported Assignee of the already paid-off Mortgage, purported to redeem the remaining real estate not already redeemed by JV, and Valiant paid on 7 July 2014 and received a Redemption Deed recorded July 8, 2014. The real estate previously redeemed by JV is described in its Redemption Deed, and it is further described in the Valiant Redemption Deed as being with-held by the words:

> And Less all of the following parcels below redeemed in Instrument # 861130 (i.e. JV's redeemed parcels) and Less all of the parcels described below: - The LESS parcels are described as the same exact legal descriptions as conveyed to JV in its previous Redemption Deed.

Keep in mind that William Haberman, testifying at trial for Valiant, stated that Valiant redeemed after JV and Valiant only partially redeemed, only as to the real estate remaining after JV's redemption. Valiant never offered anything at trial contesting JV's Redemption Deed.

Issue: What is the result of a tax redemption under Idaho Code § 63-1007?

First, the delinquent real estate taxes are the priority tax lien on the real estate. The real estate tax lien against the POBD real estate, Idaho Code" is the first priority and Bonner County took a Tax Deed to the real estate.

Alternatively, JV as first lien on its Redemption Real Estate, being subrogated (substituted) in place of the first lien delinquent taxes and the Tax Deed.

REEVES TESTIMONY FAVORING VALIANT IS CONTRADICTED BY HIM AND IS IMPEACHED

The testimony of Charles Reeves, POBD, totally supports JV's claim. His trial testimony in favor of Valiant is totally impeached by his contract, with Valiant to "pay" him and his partners, with 3 buildings lots only if Valiant prevails. The compensation document is dated 20 June, 2014 and is Plaintiff's Exhibit 75.

The testimony of Charles Reeves, manager of POBD, must be broken down into 2 segments. First is his deposition testimony given prior to his compensation agreement with Valiant; and then his testimony subsequently given after the compensation agreement for Valiant to give he and his 2 partners - (3) three free and clear residential lots - only if Valiant successfully prevails!

The testimony/deposition of Charles Reeves:

POBD closed the purchase in June of 2006 by paying the cash of about $5.0 million, plus assuming some debt NIR had on the

property with the Barney Ng entities - possibly called Bar-K. (This is the 2004 Mortgage VP et al to RE in the sum of $8.0 million in 2004 Loan No. V0140) and POBD assumed a loan NIR (VP) had with JV. (This is the 1995 Mortgage to JV from VP on all of the Moose Mountain real estate - i.e. 650 + acres lying south of highway 200).

The debt assumed to the Barney Ng entity was probably in the $9.0 million dollar range. Sometime later the Ng entity (RE) could not fund a POBD monthly draw request. The Ng entity development loan had money left to be drawn, but basically they (Ng - RE) stopped funding. Later, Ng said he would be able to start funding again and POBD ask to borrow additional funding. From Reeves' standpoint, POBD was still dealing with one person Barney Ng. The entities are Re, MF08, and Pensco. The Ng entities August 6, 2008 closing was probably in the $14-15 million dollar range.

Concerning the original assumption of VP et al Mortgage to Re, all Reeves knows is that whatever $7, $8 million due on that was then upped to $20, $21 million. Whether RE intentionally paid that off ($8.0 mortgage of 2004) and advanced funds and whether that loan actually stayed in place, Reeves didn't know. However, when the 2006 refinance loan closed with RE, Reeves viewed it as have a "21 million dollar credit facility of which, whatever the number was, 8 or 9 million wasn't available because those funds were already outstanding...So whatever the math is,

12, 13, or 14 million of development funds remained of which POBD could have drawn on.

Concerning the June 2006 closing, Reeves couldn't' remember how much money was obtained, but POBD redid the transaction a year or two later. Reeves recognized Exhibit B to his deposition (which is also JV Defendant Exhibit I and J) as being the third transaction (refinancing) with RE. On the closing settlement statement the "New Loans, Mortgage Fund 08 in care of Bar K, Inc. under New Loan to file - MF08 is with Borrowers credit $22,270,000.00 Reeves said his entity (POBD) did not receive that loan in money funds. The first note-loan No. P0099 to RE of $6,473,545 is correct, but two entities were paid off of about 8/9 million, and the new loan (MF08) of $22,270,000, part of those proceeds were used to pay off those two (2) loans. The next entry was the P0106 (PENSCO) entry paid off of $2,700,000.00). The closing statement was acceptable to Reeves at that time. The entry words "Retained Loan Funds, Mortgage Fund 08 in care of Bar-K of $12,480,000. was retained as money available to later draw. POBD received some money, plus or minus $2.0 million at closing, and that is all we received with this loan. We didn't receive any more subsequent to closing. The additional money to draw of $12,480,000 was to begin in the next month's draw requests (about September 2008), but there was no money subsequent at closing.

The club house burned in December of 2008.

Barney Ng is the person who speaks for the financing, with the three (3) entities RE, MF08, and Pensco Trust. POBD always looked to them as the NG Umbrella. One loan to POBD, but three (3) different entities. Barney Ng was the only one POBD had dealings with, he being the only one Reeves ever spoke with to those entities.

When first purchased, NIR (VP) had a loan with Ng entities, so Barney Ng was approached about POBD assuming that loan, and then advancing additional funds as development and acquisition. The loan was essentially rolled into one by the August, 2008 closing with RE. The "pay off" first Loan No. P0099 is the same loan number, so potentially or logically that was paid off. The other loan No. P0106 indicates a payoff of $2.7 million but Reeves did not know what loan related to, just part of the Ng umbrella of money POBD owed at the time they were paid off with the "new facility or covered by the new facility". There are no negotiations for preparation of documents, Ng entities prepare the documents and that's what are used. Reeves knows there are 3 entities involved, but from a business standpoint he is dealing with 1 entity.

After the August 2008 MF08 loan, POBD made no payments to anybody, as it became moot because MF08 didn't fund POBD's first draw request, so POBD didn't make any payment from then on- from Reeves perspective MF08 failed to fund. Reeves said they (MF08) didn't fund any further draws, so POBD did not make any further

payments once MF08 failed to fund. POBD's position was that it wasn't going to pay until they (MF08) funded future draws.

Reeves admitted that on the June 19, 2006 RE Note and Mortgage Loan No. P0094 in the face amount of $20,500,000. - that subsequently RE only loaned and disbursed $88,411.47 and $488,176.97, a total of $576,588.44; however, POBD actually paid $3,709,889.50 on that 2006 Loan No. P0094 and on the "old loan(s)".

POBD STILL OWES VP FOR THE UNPAID 1995 JV MORTGAGE POBD ASSUMED BUT DID NOT PAY

Judge Griffins finding and conclusions, entitled FINDINGS, in CV-2011-135 were that,

a. "POBD" did pay the debt they assumed to RE". This is the VP et. all 2004 Mortgage, Loan No. V0140, which was not discharged and satisfied of record by Re until August 6, 2008, recorded Satisfaction of Mortgage, Instrument No. 756408 (JV Defendant Exhibit 0).

b. "POBD has not paid the debt they assumed to JV, LLC". This was also the trial testimony by James Berry. JV Defendant Exhibit H is the unpaid Secured Promissory Note, 10/20/1995, JV Defendant Exhibit B is JV's Mortgage recorded October 24, 1995, Instrument No. 474716, and JV Defendant Exhibit C is the entire payment record from Panhandle Escrow, No. 2067429, from payor PO Bonner to JV seller, showing the last unpaid principal balance of $1,476,450.35 as of 9/18/08 plus interest at $485.408 per day

until paid.

JV is entitled to a mortgage foreclosure in said amount. VP is likewise entitled to a mortgage foreclosure thereon in the same amount based on it being a part of the purchase price assumed in the contract from NIR to POBD which POBD assumed but did not pay secured by Idaho Code § 45-801 which provides that, "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

By Idaho Statute, VP has a Vendor's Lien for so much of the purchase price remaining as unsecured otherwise than by the personal obligation of POBD by its contractual assumption of the JV Mortgage. RE, Barney Ng, Pensco and MF08 all had constructive notice from title reports and recording and had actual knowledge, at all time of POBDs Assumption of the JV Mortgage. They had actual knowledge, at all time of POBD's Assumption of the JV Mortgage and VP Vendor's lien is valid and superior to everyone claiming under the debtor, POBD. Valiant is only an "assignee" from RE, Pensco and MF08, so Valiant takes subject to VP's Vendor's Lien (Idaho Code § 45-803).

THE 2007 RE MORTGAGE/LOAN NO 0099 AND THE 2008 PENSCO MORTGAGE, LOAN P016 ARE FULLY PAID AND DISCHARGED.

JV was given a Borrower's Settlement Statement at Reeve's request and was ask to sign it immediately. JV's principals,

James W. Berry and William A. Berry, went carefully over the document with JV's Counsel, Gary Finney. This document is JV Defendant Exhibit I, which clearly, without any ambiguity whatsoever, states:

"New Loan(s)"

"Lender: Mortgage Fund '08 LLC c/o Bar K, Inc."

"New Loan to File - Mortgage Fund '08 LLC c/o Bar K, Inc. . . . $22,270,000.00"

Then 5/6 lines down JV Defendant Exhibit I states:

"Payoff First Note - Loan No. P009 - Mortgage Fund '08 LLC c/o Bar K, Inc. $6,473,545.18"

This entry clearly states that the "First" Loan No. P0099, which is the 2007 Mortgage Loan from RE to POBD has been paid off by MFO8 in the sum of $6,473,545.18.

Then are the words,

""Payoff Second Note - Loan No. P0106 - Mortgage Fund '08 LLC c/o Bar K, Inc. $2,700,000.00"

This entry clearly states that the "Second" Loan No. P0106, which is the 2008 Loan/Mortgage to Pensco Inc.

After reviewing and understanding the clear language of JV Defendant Exhibit I, JV (James and William Berry) took the document to First American Title. Theron, they signed the Subordination Agreement recorded 8/6/2008, Instrument No. 756402, which is Valiant Plaintiff Exhibit 25. The body of the document refers to the Pensco Mortgage ($2,700,000) and the

Mortgage Fund 08 Mortgage ($21,908,000) which are the Loan No. P0106 and Loan No. P0107.

Briefly, at that point in time, RE Loan No. P0099 and Pensco Loan No. P0106 were "paid off" which resulted in JV's 1995 Mortgage being the first priority mortgage of record. Backing up to Plaintiff's Exhibit 25, the Subordination Agreement recorded later on the same day, August 6, 2008, Instrument No. 756402 has a specific provision on page 2 of 15, Val 001388, that provides that Subordination Agreement of 2006 by JV and the Second Subordination Agreement of 2007 by JV are no longer of any force or effect. However, recorded on August 6, 2008 as Instrument No. 756394, 756395, 756396 the Mortgage from POBD to RENSCO was recorded (Plaintiff's Exhibit 16) and following on August 6, 2008, Instrument No. 756397, 756398, 756399, All-Inclusive Mortgage for $21,980,000.00 was recorded from POBD to Mortgage Fund 08. Of course, that is true because the 2007 Mortgage to RE, Loan No. P0099 was then "paid-off" in full. In fact, the Subordination Agreement, Plaintiff's Exhibit 25, supports JV's position that P0099 to RE was paid in full because Plaintiff's Exhibit 25, page 2 of 15, signed by JV, states,

"Para. 4. This subordination agreement, when executed, shall constitute the one and only (emphasis added) agreement or set of rights and obligations as between Lenders and the Undersigned***"

Since the Subordination Agreement, Plaintiff's Exhibit 25 is a document from and prepared by Bar k, and JV is called the Undersigned, it is clear that this Subordination Agreement is the "one and only agreement of set of rights and obligations as between Lenders (Pensco & MF08) and the undersigned (JV)".

As to the pay-offs an RE Loan P0099 and Pensco P0106, Valiant itself admitted proof of those pay-offs by Valiant's Exhibit 11. On page 1, FATCO 000387, line 6 & 7 down are the exact words.

"Payoff First Note - Loan No. P0099 - Mortgage Fund '08 LLC c/o Bar K, Inc. $6,172,325.18"

""Payoff Second Note - Loan No. P0106 - Mortgage Fund '08 LLC c/o Bar K, Inc. $2,700,000.00"

These words are repeated on Page 2 (FATCO 000388) and again on Page 3 (FATCO 000389).

Further, Valiant's Plaintiff Exhibit 34 (second page, Reeves 000711) and 35 (second page Val 001382, line 810 and 811) both show P0099 and P0106 as "Pay-off". These pay-off entries are again on the page Val 001385, lines 810 and 811. These Exhibits are signed by Charles Reeves for POBD. Casey Linscott at First American testified that she furnished copies to Bar K both before and after closing to Bar K and no one made any objection to the pay-off entries at all.

Further proof that Mortgage Fund 08 paid-off RE Loan No. P099 and Pensco Loan No. P0106, was also furnished by Valiant,

as Plaintiff's Exhibit 19, page 1 of 3, Val001311 with entries that the Gross Loan Amount by MF08 is $21,980,000.00. The "Note" states that the Gross Loan by MF08 includes the First Included and the Second Included Notes. From the MF08 Gross Loan is a deduction of " - $6,172,325.18" which is the payoff amount to RE Loan No. P0099. The Second Included Note is also "-$2,700,000.00" which is a deduction from the Pensco Loan No. P0106 payoff. In other words the MF08 Gross Loan amount available to POBD was decreased by deduction of the exact payoff amounts of P0099 (RE) and P0106 (PENSCO). After payoffs of P0099, P0106, and the points, interests, loan fees and document preparation, amount remaining to be funded by Mortgage Fund 08 on page 2 of 3, Val 001312 is shown as $12,257,174.82. It is undisputed fact that MF08 never funded any of the retained $12,257,174.82 from the MF08 loan.

THE MF08 "ALL INCLUSIVE NOTE AND ALL INCLUSIVE MORTGAGE HAVE MANY PROVISIONS VERIFYING THAT P0099 AND P0106 ARE PAID BY MF08

The all-inclusive Note, Loan NO. P0107 ($21,980,000) is Valiant's Plaintiff Exhibit 17, and the recorded All - Inclusive Mortgage, receiving $21,980.000. is Valiant's Plaintiff Exhibit 18. Both prove the position of JV, as follows:

All - Inclusive Note provisions: (Plaintiff's Exhibit 17)

a. The principal amount of this Note includes the current unpaid balances of the following described promissory notes ("INCLUDED NOTES") which are secured by

the following mortgages: (VAL061072)

b. The footnote 1. recites the same language.

c. The "First Include Note" is the March 2007 RE Loan (No. P0099),

d. The "Second Include Note" is the August 2008 Pensco Loan (No. 0106)

e. "Lender, by accepting this Note, agrees that so long as there is no unsecured default under this Note or any mortgage securing this Note: Provisions of

i. Lender shall pay the installments of principal and interest as they become due on the INCLUDED Notes, and "Plaintiff's Exhibit 17 (Page 2 of 7, Val 001073)

Keep in mind that all testimony was that no notice of default was ever give to POBD by RE, Pensco or MF08.

Plaintiff's Exhibit 17, page 3 of 2, Val001074 continues at the top with,

"2. Lender shall secure and cause to be recorded a release of the mortgage securing the INCLUDED NOTE upon the undersigned's payment in full of the principal and interest due under this Note "o".

In other words, MF08 agreed to pay and release the RE (P0099) Mortgage and the Pensco (P0106) Mortgage, for POBD's payment only of the amount due under the MF08 Note (testified to be $2,000,500.).

Then Page 3 of 7 (Plaintiff's Exhibit 17) states "Should Lender fail to pay any installment when due under the INCLUDED NOTES…". In other words, Lender (MF08) is to pay the indebtedness due RE and Pensco.

Then, on Page 3 of 7, net to last paragraph, is proof that MF08 is to be the first priority mortgage, leaving JV as second priority, with the language, "The Undersigned acknowledges that Lender prefers it be secured by a first priority mortgage. * * *"

The Idaho law of All-Inclusive Mortgages has been cited by case law to the Court by NIR/VP's prior briefing, and Idaho law substantiates JV and NIR/VP positions that RE and Pensco are to be paid by MF08, not by POBD.

The All-Inclusive Mortgage recorded August 6, 2008 is Plaintiff's Exhibit 18, and its all-inclusive provisions are beginning on Page 4 of 31, the First Included Note is RE 2007 (Loan NO. P0099) and the Second Included Note is Pensco 2008 (Loan No. P0106). On Page 5 of 31, mid-page, is the provision that in the event of the foreclosure the lien of the Mortgage (i.e. MF08, P0107) the indebtedness due Mortgagee (MF08) may not exceed the sum of the following amounts:

"a) The difference between the unpaid principal and interest on the Note secured hereby and the then unpaid balance of principal on the INLCUDED NOTES; and ***". In other words, any balance on RE 2007 and Pensco 2008 that remain unpaid by

MF08, reduce the amount due MF08. This supports the all-inclusive provisions that MF08 pays the included notes.

There is unrefuted proof that MF08 was to pay off the RE and Pensco loans, not just because the All-Inclusive Note and All-Inclusive Mortgage said so, but because MF08 actually did pay a loan sum of $1,150,000.00 to RE. That was paid by MF08 Check 1168 on 8/5/2008, which is Plaintiff's Exhibit 100. That payment is posted on Plaintiff's Exhibit 65 A as a paydown on 8/6/06 of $1,150,000. - with the notation of "AITD P0107" (Plaintiff's Exhibit 100, Reeves001134). The AITD P0107 is the 2008 MF08 Loan/Mortgage. This is proof positive that MF08 was to pay and did pay RE!

VALIANT'S CLAIMS OF 3 MORTGAGES AHEAD OF JV IS REBUTTED.

Valiant claims the priority of mortgages as:

1. 2007 RE Loan No. P0099 - as first priority
2. Pensco 2008 Loan No. P0106 - as second priority
3. MF08 2008 Loan No. P0107 - as third priority
4. And then JV's 1995 Mortgage

JV has shown:

1. 2007 RE Loan No. P0099 is paid-off, no mortgage lien.
2. 2008 Pensco Loan No. P0106 is paid by MF08 - no mortgage lien.
3. 2008 MF08 Loan No. P0107 is in existence as an All-Inclusive Mortgage, but the amount of debt it secures was unproved by Valiant.

4. This leaves JV's 1995 as a second priority mortgage subject to only, any actual dollar amount loaned to POBD by MF08.

Charles Reeves substantiated that JV is a second position lien. He gave a letter, dated September 29, 2009, to Jim Berry of JV. As of that date, which first page is after the 2008 Pensco and MF08 transactions occurred, Reeves confirmed that JV "*** would retain you same priority position (i.e. 2nd on all our property). (See last paragraph, first page of JV Defendant Exhibit CC)

This statement by Reeve's supports JV's positions that JV has a second priority mortgage only behind MF08 (August 2008) loan NO. P0107, with Valiant's only testimony/evidence was that the unpaid balance was $2,000,500.00 (Plaintiff's Exhibit 64).

BARNEY NG'S TESTIMONY AS TO RE P0099 AND PENSCO 0106 LOAN BALANCES ARE IMPEACHED

Barney Ng tried to support Valiant's claim that RE P0099 and Pensco 0106 were still "owed" at the time of trail. He impeached his own claims to that effect by admitting the genuineness of the written loan settlement states clearly stating to the contrary. Ng further admitted the MF08 Loan No. 0107 was intended and agreed to fund and pay off both RE and Pensco. MF08 had assured Barney Ng that MF08 would have the funds available to do.

Barney Ng admitted that his sale of the 2008 Pensco loan

No. 0106 was pursuant to Plaintiff's Exhibit 75. The Agreement for Sale of Promissory Note and Assignment of Security Interest, which is dated 20 June 2014. Barney Ng testified and admitted that the "REDACTED" portions of Exhibit 75, provided that the purchase price payment would be increased ($120,000/$150,000) only if Valiant was successful on foreclosing on the 2008 Pensco Mortgage and being the successful bidder at a Sheriff's foreclosure sale. In addition, William Haberman, for Valiant, gave the same testimony s Barney Ng.

In other words, Pensco through Mr. Ng and Valiant through Mr. Haberman both testified that the additional payment on the assign purchase price "increased" contingent upon Valiant's success at foreclosure and sheriff's sale. This contingent payment, only if Valiant was successful, impeaches Ng's contradicting testimony that Pensco was paid-off by MF08's All= Inclusive Note/Mortgage or that Pensco was not paid off. Ng's testimony as to Pensco 0106 "not paid off" lacks total credibility. Pensco (Ng) is being paid only if Valiant "wins".

SUMMARY AND CONCLUSION

The only recovery for Valiant is its position that MF08 has a first priority mortgage for $2,000,500. But only secured by the real estate described in its All-Inclusive Mortgage Plaintiff's Exhibit 17, on the Exhibit A.

JV has the title/ownership for the real estate in its Redemption Deed, having been subrogated to Bonner County's first

lien Tax Deed position since 14 months have expired, no one can further "redeem".

JV has a second priority mortgage on the real estate described in MF08's All-Inclusive Mortgage, Plaintiff's Exhibit 17. JV has first lien priority on the remaining real estate in JV's 1995 Mortgage, which covers real estate not included in the MF08 Mortgage. JV has a 1995 Mortgage on all of Moose Mountain, the entire original 650 acres Less only Platted Lots partially released by JV which are legally described in VP's Answer, Counterclaim, Cross-Claim Third Party Complaint, filed September 15, 2014.

JV's lien amount is $1,476,450.35 principal from 9/18/08 plus 12% interest at $485.408 per day, plus attorney fees and costs.

VP has a Vender's Lien on all of the POBD real estate, ahead of any entity, including POBD, RE, PENSCO and MF08, for $1,476,450.35 interest at 12% from 9/18/2008 at $485.408 per day; subject to the alternative relief of Valiant's tax redemption if any.

JV is entitled to such other and further relief as available on the facts, at law and equity.

ADDITIONAL CLOSING

Valiant has the burden of proof on how much money, if any, is owed to RE, Pensco and MF08. Valiant introduced Plaintiff's Exhibit 24, which is 2 pages, Page 1 of 2 and Page 2 of 7,

Val001079 and Val001080. This Plaintiff's Exhibit 24, entitled "DEPOSIT ACCOUNT AGREEMENT, AUGUST 1, 2008, WHICH IS AFTER RE WAS PAID OFF. Plaintiff's Exhibit 24 is captioned for "Loan No. P0106 & P0107". Reading Plaintiff's Exhibit 24 shows that POBD (Customer) had a Bank account No. 1605110949 at Wells Fargo Bank. At the request of "Lenders" all of the money in such account has been pledged by Customer (POBD) to Lenders. Al of the net money from POBD sales of real estate had to be deposited in that account as a "lock-box" account, i.e. it could only be withdrawn

"1. By a check or checks requiring
X one signature from Bar-K Inc., as the agent for either Lender, only"

In other words, only Bar-K (Barney Ng) could withdraw POBD's money! Valiant gave no evidence, nor did Barney Ng of where did the Deposit Account money go. POBD's bank account money would have paid off RE, PENSCO, MF08. At any rate, Valiant had the burden of proof and gave none.

DATED this 12TH day of May, 2016.

Respectfully Submitted,

GARY A. FINNEY
Attorney for JV L.L.C., an Idaho limited liability company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served as indicated, by facsimile, or by hand delivery, this 12 day of May, 2016, and was addressed as follows:

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The Honorable Barbara Buchanan -
Bonner County Courthouse - Judge's Chambers
215 S. First Avenue
Sandpoint, ID 83864
VIA HAND DELIVERY

By: _____

STATE OF IDAHO
County of Bonner } ss
FILED 5-12-16
AT 4:37 O'CLOCK P M
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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-2009-01810

VP INC'S CLOSING ARGUMENT

COMES NOW VP, Inc. ("VP"), by and through its attorneys of record, James, Vernon & Weeks, P.A., and submits its post-trial closing argument.

I. INTRODUCTION

This matter involved foreclosure of three loans. Evidence at trial demonstrated the principals of the lenders were interrelated to each other in varying degrees. Based upon previous

partial summary judgments entered by this Court, the only loan which affects VP's interest is Loan No. P0099.

On March 6, 2007, Pend Oreille Bonner Development, LLC (POBD) executed a non-recourse promissory note for $21,200,000.00 (Exhibit 2). The promissory note matured April 30, 2009. On July 17, 2007, R.E. Loans made a collateral assignment of all its right, title and interest in the mortgage, together with the note and all other loan documents, to Wells Fargo Foothill, LLC (Wells Fargo). Exhibit 7. An allonge of the note was executed to Wells Fargo (Exhibit 69) at the same time. Wells Fargo executed an allonge to R.E. Loans on July 2, 2014 (Exhibit 69).[1] No allonge from R.E. Loans to Valiant is admitted into evidence.

A Loan Agreement was also executed on March 6, 2007 (Exhibit 3). The Loan Agreement was amended on August 1, 2008 (Exhibits 22 and 22A). The agreement deleted original Paragraph 10.h which required payment of the greater of $115,000.00 per cabin lot or $290,000 per single family lot, or 85% of the gross sales price for each lot sold in return for a partial release by the lender. The amended loan agreement provided for a new paragraph 10.h, 10.i and 10.j which allowed for the same amounts of money to be paid as consideration for a partial release. The new paragraph 10.i provided if there was no default in the loan documents, any amounts collected that were greater than the $115,000 or $290,000 release price respectively would be deposited to a development account under the control of the lender and not credited to the loan. The funds were to pay any interest due on the notes due Pensco and MF '08, and to give the lender discretion to make the funds available to POBD for construction as long as it was not in default. R.E. Loans had the discretion to cure a loan default from the account. If the

[1] Title 28, Chapter 3 of the Idaho Uniform Commercial Code employs the concept of a "person entitled to enforce" a note to determine the person entitled to enforce a note. I.C. § 28-3-301. That person might or might not be the owner of the note (I.C. § 28-3-203), but payment to that person discharges the maker's obligation under the note. I.C. §§ 28-3-412 and 28-3-602(1)

development account funds exceeded the amount owed on the R.E. Loans note, POBD had the right to require that the note be paid in full.

The promissory note was secured by a mortgage (Exhibit 1). Section 3.1 of the mortgage allowed R.E. Loans to declare the entire principal of the note to be due and payable immediately upon default. No evidence was presented at trial that R.E. Loans had ever declared the principal of the note due and payable pursuant to Section 3.1 of the mortgage. Section 3.4 of the mortgage allowed R.E. Loans to foreclose the mortgage if the options in Section 3.1 were exercised. No evidence was presented at trial that Wells Fargo had declared the principal of the note due and payable pursuant to Section 3.1.

R.E. Loans was formed in 2002. At the times relevant to the loans in this matter, B-4 Partners was the sole manager of R.E. Loans. Walter Ng, Kelly Ng, Barney Ng and Bruce Horowitz were the managers of B-4 Partners. Barney Ng testified his father, Water Ng, was the manager of B-4 Partners.

Bar-K was the loan originator and the loan servicer for R.E. Loans. At the time of the loan, Barney Ng and his brother, Kelly Ng were the sole members of Bar-K. Barney Ng testified he originated the loans and spent most of his time traveling in that capacity. Barney Ng testified Kelly Ng was responsible for daily operation of the loan servicing aspect of the business. Barney Ng testified he was the president of Bar-K until September 2009. Barney Ng testified he discontinued his participation in the operation of Bar-K because his brother was lying and hiding money. Barney Ng testified he was the inside informant against his brother and father in an SEC action and an FBI investigation.

Bar-K was terminated as the R.E. Loans servicer on October 1, 2010. At that time, LEND, Inc, whose stock holders were Walter Ng and Kelly Ng, took over servicing for R.E. Loans.

On August 1, 2008, POBD executed a non-recourse promissory note in favor of Pensco Trust Co., custodian for the benefit of Barney Ng in the amount of $2,700,000.00 (Exhibit 15). The Loan Number assigned to this loan was P0106. At the same time, a mortgage was executed (Exhibit 16).

On August 1, 2008, POBD also executed an All-Inclusive Note Secured by Mortgage in favor of Mortgage Fund '08 (MF '08) in the amount of $21,980,000.00 (Exhibit 17). The loan was assigned Loan No. P0107. An All-Inclusive Mortgage was also executed by POBD (Exhibit 18). According to Barney Ng's testimony, The Mortgage Fund, LLC was the sole member and manager of MF '08. Barney Ng's trial testimony also established that Kelly Ng was the only manager of The Mortgage Fund, LLC.

On June 13, 2014, R.E. Loans sold its promissory note and assigned its security interest to Valiant Idaho, LLC (Valiant) (Exhibit 68). R.E. Loans did not have the promissory note to deliver at that time because of the allonge it executed to Wells Fargo (Exhibit 69). On June 30, 2014, Wells Fargo executed a reassignment of collateral assignment of mortgage and loan documents to R.E. Loans (Exhibit 70). Apparently, the note itself was delivered later. On July 2, 2014, Wells Fargo executed an allonge of the note to R.E. Loans (Exhibit 69).

II. ARGUMENT

1. Burden of Proof at Trial

As the foreclosing party, Valiant Idaho, LLC ("Valiant") had the burden of proof at trial. The "party seeking foreclosure has the burden of establishing the existence of the debt and

default on that debt." *U.S. Bank Nat. Ass'n N.D. v. CitiMortgage, Inc.*, 157 Idaho 446, 451-52, 337 P.3d 605, 610-11 (2014). The standard of proof required is the preponderance of the evidence standard. *Nield v. Pocatello Health Servs., Inc.*, 156 Idaho 802, 848, 332 P.3d 714, 760 (2014). The only burden the Defendants carried at trial was to prove any affirmative defenses asserted. *Id.* An affirmative defense is an "assertion raising new facts and arguments that, if true, will defeat the plaintiff's...claim...even if all allegations in the complaint are true." *Fuhriman v. State, Dep't of Transp.*, 143 Idaho 800, 803, 153 P.3d 480, 483 (2007).

As the party seeking foreclosure, Valiant has the burden to prove that 1) a debt exists that is owed to Valiant, and 2) there was a default on that debt. Contained within the burden to prove the debt and its default is the burden to prove the *amount* of that debt. To be clear, Valiant has the burden of proof to establish by a preponderance of the evidence at trial to prove what amount was owed under each of the three notes secured by the mortgages it is foreclosing in this case: the RE Loans note (P0099), the Pensco note (P0106), and the MF08 note (P0107). Despite the clear burden of proof on the foreclosing party, Valiant attempted to shift that burden of proof to VP and JV, LLC ("LV") by asserting that VP and JV have the burden to prove the notes were paid. This is absolutely wrong. Put simply, Valiant had the burden to prove amounts owed on the notes, in doing so it necessarily has to prove that the notes have not been satisfied. Valiant is the foreclosing party with the burden of proof at trial and it failed to meet that burden.

2. Valiant did not prove the amount owed on the R.E. Note (P0099)

a. Failure to Produce POBD Accounting Records

At trial Valiant did not offer any independent accounting records of the P0099, P0106, or P0107 loans from POBD. Charles Reeves, the managing member of POBD, testified he was unable to locate any of POBD's accounting records.

However, Charles Reeves produced faxes from Bar-K. Chuck Reeves testified that Bar-K sent them regular statements of amounts owed and testified that Exhibits 63, 64, 65, 65A, and 66 were copies of the records and that much of the handwriting was their former bookkeeper, Kathy Groenhout.[2] Ms. Groenhout's hand notes on Exhibit 65 (pages Reeves13780-1380) indicated that upon application of the last payments to R.E. Loans that the payments exceeded the amount due by $313.57.

Charles Reeves testified that Kathy Groenhout would receive those account statements from Bar-K, review them, and if necessary raise any discrepancies with her contact, Vincent Hua at Bar-K. Valiant interprets these efforts as something approaching heroic when they argue to the Court that "Charles Reeves testified that POBD spent untold hours reviewing RE Invoices to verify the accuracy of said invoices and to calculate upcoming interest payments as they became due." Valiant's Closing Argument, p. 20. However, Charles Reeves agreed that POBD kept its own set of books where it kept track of payments (although he testified they were not produced in this litigation because he could not locate them). They were obviously available to him in 2011 when he prepared the pro forma in Exhibit 107. It seems incredible to believe a business would keep copies of faxed loan statements from a lender with its hand notes on them, but not its own set of books.

As noted above, Barney Ng testified he handled the loan brokering side of Bar-K and his brother handled the loan servicing operation. However, Barney Ng testified he was familiar with reports that the software Bar-K used and knew the reports it could generate. Barney Ng testified Exhibits 63, 64, 65, 65A and 66 were reports that the software could generate upon request.

[2] Mr. Reeves testified Ms. Groenhout had brain cancer and it impaired her ability to recall facts by the time of trial. Neither party called her as a witness.

The Bar-K reports admitted into evidence are incomplete to show payment history. Testimony at trial established POBD sold three lots to Eagle Pointe s and carried their own papers back (Exhibits W, X, Y, Z, AA, BB). The mortgages were assigned to R.E. Loans in payment for three lots sold to Eagle Pointe by POBD. Barney Ng testified the amount of the notes should have been credited against Loan P0099. The amount of the Eagle Pointe mortgages totaled $527,410 which was not applied to the loan following the assignment. It is anticipated that Valiant will argue in rebuttal that the assignments were collateral assignments to further secure Loan No. P0099. However, the assignments were complete assignments and not a collateral assignment as was given to Wells Fargo. Thus, POBD retained no rights in the promissory notes secured by the deeds of trust following assignment on August 22, 2007.

Exhibit 66 is a Bar-K report that is a payment history detail through 5/6/2010. As noted above, prior to the amendment to the loan agreement, the entire lot payments collected by R.E. Loans were to be applied to the loan. After the amendment on August 1, 2008, any portion of the lot payments that exceeded the minimum were to be allocated to the development account.

Prior to the August 1, 2008 loan amendment changing the allocation of loan payments, R.E. Loans failed to credit the entire lot payments to the loan. On April 1, 2008, R.E. Loans credited $206,121.06 to a category specified as "Other" which did not reduce the loan principal, which was not authorized by the loan agreement. Again on April 1, 2008, Bar-K credited $199,451.25 of a collected lot payment to "Other" rather than applying to it to the loan as required by the loan agreement.

Further, on May 5, 2009, R.E. Loans received a $1,516,416.64 payment which was a fire insurance proceeds check. Nothing in the loan agreement or the amendment to the loan agreement allowed R.E. Loans not to apply the entire payment to the loan. However, R.E. Loans

accounting indicates it credited $550,000 of the payment to the column specified as "Other". In total, Exhibit 66 reveals that R.E. Loans failed to apply $1,699,890.18 in payments to the loan. Only $743,207.88 of that amount was properly directed to the development account pursuant to the amended loan agreement. The remaining $955,632.30 in payments were required to be applied to Loan P0099 by Bar-K according to the terms of the loan agreement.[3] No testimony was provided at trial regarding the impounded $743,207.88 account. Apparently, R.E. Loans (of the trustee in liquidation) received this money. However, there was no forfeiture provision, and this money should have been applied to the loan.

Another piece of evidence inconsistent with Bar-K records is Exhibit 107. This record indicated that through 2011, POBD had lot sales totaling $45,519,615. At 85% of the value of sales, R.E. Loans would have collected $38,691,672, even if all that amounts collected were not applied to the loan. However, the May 6, 2010 payment history for R.E. Loans reveals only $21,489,471.60 in total payments, which included the $1,150,000 from the MF '08 loan. Richard Villelli testified at trial that Kathy Groenhout with POBD gave him regular reports of lots sales, and based upon the report of lot sales provided to him, over three million in lot sales were unaccounted for in Bar-K's accounting. This leads to the inference that loan payments were not properly accounted for by Bar-K.

Evidence at trial proves the payment history presented at trial is incomplete because it did not account for payments received on the Eagle Pointe lot at assignment or in 2012, after Bar-K was no longer the loan servicer.[4] Other evidence demonstrated it was inaccurate because it did

[3] There was also $1,050.00 deducted from payments pursuant to the loan agreement for a $30 fee on some payments, which was appropriate.

[4] Despite Barney Ng's testimony that the Eagle Pointe promissory notes should have been credited against Loan No. P0099 upon assignment, Chuck Reeves testified that he understood an assigned note would only be reflected as a payment when actual payments on the assigned notes were collected.

not properly account for the assigned notes secured by mortgage for Eagle Pointe. Further, it did not apply a payment received of $550,000 to the loan. Other loan payments itemized above were also not credited against the loan.

b. Failure of Valiant to Produce records for Wells Fargo

Valiant presented no accounting records for Wells Fargo, who also had a right to collect under the note. Charles Reeves testified he had personal knowledge none of the Eagle Pointe lots had sold. However, Tom Williams with Sandpoint Title testified on October 16, 2012, Wells Fargo collected $96,901.99 on a sale of one of the Eagle Pointe lots. Exhibit 270 verified this payment. This evidence discredits Charles Reeves' testimony regarding personal knowledge of all payments. It is unknown if Wells Fargo collected any other amounts as Valiant did not produce their accounting records or testimony from them.

c. Failure of Valiant to Produce Records for LEND, Inc.

It was undisputed by Barney Ng at trial that Bar-K ceased to service the POBD loan after October 1, 2010. Charles Reeves was unaware at trial that the loan servicer had changed. No testimony was offered by Valiant regarding the accounting records for LEND, Inc., so amounts owed on Loan No. P0099 after that date were not proven by a preponderance of the evidence as the Court has no record before it of amounts paid, fees charged, or interest accrued. Defendants were able to show there was at least one payment in 2012, and there may have been others. It was Valiant's burden to show the payment history between October 1, 2010 and the date of trial. It failed to do so.

d. R.E. Loans self disclosed its loan was paid

Barney Ng testified at trial that POBD was the only borrower that MF '08 and R.E. Loans had in common. He reviewed R.E. Loans bankruptcy disclosure statement which indicated that

the MF '08 loan to the common borrower paid off R.E. Loans. He quibbled that the disclosure indicated there was a list of notes that were assigned from R.E. Loans to MF '08 which he did not see attached to the federal pleading, so he was unable to ascertain if it was accurate. However, he acknowledged the disclosure (Refused exhibit 268) indicated the exhibit related to notes that were assigned and was unrelated to the common borrower loan.

3. Credibility of Witnesses

At trial Valiant relied heavily on the testimony of Barney Ng and Charles Reeves to prove the amounts owed today on the RE Loans note, except for the claim of interest and attorney fees. As noted earlier, Mr. Reeves had no accounting records of POBD upon which to base his testimony. Instead, he had faxed copies of loan statements with the bookkeeper's handwriting on them. The handwriting did not agree with his opinion regarding the amount due. Ms. Groenhout's last notations showed no further amounts due. Further, Mr. Reeves was impeached by Tom Williams' testimony which established there was a sale of one of the Eagle Pointe lots, contrary to Mr. Reeves testimony. Further, Mr. Reeves acknowledged he testified in the companion case (Union Bank) that Loan No. P0099 was paid in full.

In its closing argument Valiant repeatedly claims that the Ng and Reeves testimony was undisputed at trial. However, there was substantial and competent evidence presented at trial that both disputed the testimony of Ng and Reeves, as well as impeached the credibility of each witness. The Idaho Supreme Court has discussed the interplay between substantive evidence and impeachment evidence, both of which were presented to this Court at trial:

> While **substantive evidence** is **"offered for the purpose of persuading** the trier of fact as to **the truth of a proposition on which the determination** of the tribunal is to be asked," impeachment evidence "is designed to discredit a witness, i.e. to reduce the effectiveness of his testimony by bringing forth the evidence which explains why the jury should not put faith in him or his testimony." *Ellington I,*

> 151 Idaho at 74, 253 P.3d at 748. Evidence that does both is both substantive and impeaching. *Id.*

State v. Ellington, 157 Idaho 480, 486, 337 P.3d 639, 645 (2014). At trial, VP presented the Court with both substantive evidence and impeachment evidence, which taken together must lead the Court to the conclusion that Valiant failed to carry its burden of proof at trial. The substantive evidence on Loan No. P0099 is discussed above.

Almost all of the Exhibits admitted into evidence by Valiant were either authenticated through Ng or Reeves. Almost all of the so called "accounting records" admitted into evidence were done so through Barney Ng or Charles Reeves. Yet, there was substantial and competent evidence presented at trial that seriously called into question the accuracy of the admitted exhibits and the testimony of each witness.

The testimony and evidence presented at trial was that Barney Ng and his family members were not trustworthy, nor were their financial records. Barney Ng acknowledged that he disassociated from continuing management of Bar-K after September 1, 2009 because his brother was hiding money. Barney Ng testified he turned state's evidence against his brother and father, leading to their convictions.

Barney Ng testified that during June and July of 2008, the Department of Real Estate for the State of California audited Bar-K's various business records. Ng agreed the result of that audit was a report that listed multiple deficiencies including failure to maintain exact real estate records, failure to record deeds of trust in the name of beneficiaries, failure to provide lenders/purchasers with disclosure statements in a timely manner, incomplete income and net worth statements, inexact funding constituting fraud or dishonest dealing, and unlawful acts of Barney Ng. Mr. Ng testified that as a result of this audit and investigation his California real estate license as well as the license held by Bar-K were suspended in 2010 for various violations

of loan servicing agreements, including mismanagement of trust funds, in which he and his entities were involved. Barney Ng testified he lost his real estate license in California, which allowed him to operate a mortgage brokerage and loan servicing business, because of his brother's dishonest actions within Bar-K. Yet, Valiant asks this Court to give great weight and credibility to Bar-K's accounting records without independent accounting or bookkeeping records from POBD to substantiate the information.

Further evidence that Barney Ng was disingenuous in his dealings is found in the Pensco loan application documents. Barney Ng testified that the Pensco loan was from his retirement funds, but that he had to have the oversight and approval of Pensco to make the loan. Barney Ng testified he reviewed and signed all the Pensco loan documents. These documents indicated that the Pensco loan would be in first position. Yet at trial, Barney Ng testified it was never contemplated that the Pensco loan would be in first position and claimed not to have noticed the representation. The reasonable inference was that Barney Ng, a loan servicer well experienced in the review and processing of loan applications, provided Pensco with false information to induce its agreement to extend the loan.[5]

Valiant asks the Court to rely on the accounting records produced by Bar-K to determine that the P0099 and other loans were never satisfied. These are the same records produced by an entity and individuals investigated for failure to maintain exact records, failure to record deeds of trust in the name of beneficiaries, failure to provide lenders/purchasers with disclosure statements, incomplete income and net worth statements, inexact funding constituting fraud or dishonest dealing, and failure to exercise reasonable supervision of activities and personnel of

[5] VP does not address the Pensco loan nor the MF '08 loan in its closing argument because the lots owned by VP are not encumbered by these loans.

Bar-K. The accuracy of these records is questionable at best and Barney Ng has proved to be have no credibility before this Court.

Coupled with the above issues is the concern that Barney Ng testified he has a financial interest in the outcome of this litigation only if it is successful. Barney Ng's attendance at trial was not pursuant to a subpoena, and his testimony was given to protect his financial interest in a successful foreclosure.

Like Barney Ng, Charles Reeves testified he too had a financial interest in this matter is there was a successful foreclosure. Charles Reeves reached an agreement with Valiant wherein Reeves would cooperate with the foreclosure action and consult and assist Valiant in this litigation. Trial Exhibit 262. Charles Reeves testified at trial that as consideration for his cooperation in the foreclosure action Reeves will be compensated with a home and the opportunity to provide additional professional services at the Idaho Club. This is an important fact for the Court to weigh because before Reeves obtained this financial motive for a successful foreclosure, he testified in a companion case which also involved R.E. Loans that he understood that Loan No. P0099, has been paid in full. The fact that Reeves has a direct financial interest in the outcome of this action, coupled with the fact that he has changed his sworn testimony since he acquired the direct financial interest in the action, seriously calls into questions the reliability and credibility of all testimony presented by Mr. Reeves. This motivation combined with POBD's inability in this litigation to locate any of its financial documents other than faxes regarding the loans calls into question his credibility.

4. Property Ownership

Valiant claims in its closing that POBD is the record of all the real property subject to the P0099 Loan. That is not true. At trial, VP attempted to admit deeds showing it owned four (4)

lots. This Court refused to admit Exhibits 250, 251, 252, and 253 on the basis it had already ruled on that issue, and ownership of the property was not within the limited scope of trial the Court was allowing. Thus, the Court should not accept this "undisputed" fact, or if it is inclined to accept it, VP respectfully requests it reverse its ruling regarding the admissibility of Exhibits 250-253.

5. Remediation

Valiant contends it should be allowed to collect on the costs expended to remediate a diesel leak discovered shortly before trial in the amount of $89,432.39. The pleadings did not state a claim for recoupment of costs for remediation of the secured collateral. Over the objection of the Defendants, Plaintiff was allowed to introduce such cost at trial.

This ruling of the Court was prejudicial to the Defendants. The testimony at trial revealed there was a lease between POBD and Valiant to operate the property. Charles Reeves testified that the lease required Valiant to pay all expenses. Defendants had no fair opportunity to determine if this expense was related to Valiant's activities as a lessee of the premises. Further, Defendants had no fair opportunity to conduct discovery on the cause of the leak, the responsible party for the leak, if the claimed costs related to the leak, or how the diesel came to be stored on the property.

In its most recent order issued by the Court allowing the post-trial declaration of William Haberman, this Court again emphasized that it had limited the trial to the amount owed on the loans. The cost of repair for remediation was not within that scope. Thus, the Court should not consider this issue.

III. CONCLUSION

Valiant implies to this Court that VP's defense of the foreclosure was frivolous because the facts at trial were not the same as the facts known at the time of summary judgment. Given the breadth and years of experience of the district judge, VP believes the Court can appreciate that facts known at various stages of litigation expand and shift with discovery and depositions. Further, Charles Reeves changed his testimony regarding payment of the loan from testimony given in a prior companion proceeding. Further, by their own admission following the close of evidence, Valiant has admitted it was unaware of certain payments on the loan. Thus, VP had every right to try this matter before this Court, and such conduct was not frivolous.

Based upon the foregoing evidence, VP requests this Court adjudge that Valiant has not met its burden of proof of establishing the amounts due under the loan.

DATED this 12th day of May, 2016.

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 12th day of May, 2016:

____	U.S. Mail, Postage Prepaid	Gary A. Finney
____	Hand Delivered	FINNEY FINEY & FINNEY, PA
X	Facsimile: 208-263-8211	120 E Lake St., Ste. 317
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X	U.S. Mail, Postage Prepaid	Richard Stacey
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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

VALIANT IDAHO, LLC'S RESPONSE AND REBUTTAL TO VP, INC.'S CLOSING ARGUMENT

Honorable Barbara A. Buchanan

COMES NOW, Valiant Idaho, LLC ("Valiant"), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and files its Closing Argument Rebuttal.

I.
INTRODUCTION

As this Court has repeatedly reiterated, there are only two questions remaining to be resolved in this case:

1. Was the 2007 RE Loans, LLC ("RE Loans") note paid-off at the Mortgage Fund '08 LLC ("MF08") loan closing on August 6, 2008?
2. Was the Pensco Trust Co. f/b/o Barney Ng ("Pensco") note paid-off at the MF08 loan closing?

The evidence submitted at trial was undisputed. There can be no doubt that neither the RE Loans note nor Pensco note were paid off on August 8, 2008. This was established so clearly that Third Party Defendant VP, Inc. ("VP") has altogether abandoned its argument that a payoff occurred at the MF08 loan closing. Moreover, Cross-Defendant JV, LLC ("JV") devoted 42 of its 46-page Post Trial Memorandum and Argument ("JV Memorandum") to arguments unrelated to this issue.

As predicted in Valiant's Closing Argument, VP and JV now argue that RE Loans and Pensco were paid off for entirely different reasons. It should now be obvious that the arguments raised by VP and JV to defeat summary judgment were a sham and their new arguments are not any better. Regardless, Valiant has established beyond a preponderance of the evidence that, as of May 26, 2016, it is still owed: (1) $3,153,332.74 pursuant to the RE Loans note, including *per diem* interest of $1,417.94 accruing thereafter until judgment is entered; (2) $316,015.37 in operating losses and remediation costs recoverable pursuant to the RE Loans mortgage; (3) $9,859,130.21 pursuant to the Pensco note, including *per diem* interest of $4,197.74 accruing thereafter until

judgment is entered; and (4) $7,618,519.79 pursuant to the MF08 note, including *per diem* interest of $3,244.28 accruing thereafter until judgment is entered. The arguments set forth in JV's Memorandum and VP's Closing Argument ("VP's Argument") have no basis in fact or law and should be rejected.

VP and JV each filed separate closing arguments. This brief shall respond only to those arguments set forth in VP's Argument. Another brief will be filed concurrently responding to JV's Memorandum.

II.
ARGUMENT

A. The Arguments Set Forth In VP's Introductory Section Should Be Rejected.

VP's Argument begins with an introductory section purporting to set forth a series of undisputed facts in this case. However, VP interjects several arguments into this section related to the validity of Valiant's interest in the RE Loans note and mortgage and its ability to foreclose said mortgage in this case. These arguments are nothing more than thinly veiled attempts to rejuvenate arguments that VP lost on summary judgment and should be rejected.

1. RE Loans Executed An Allonge To Valiant.

VP asserts that an allonge from RE Loans to Valiant was never executed or admitted into evidence apparently in an attempt to imply that the transfer from RE Loans to Valiant may be invalid. This argument is completely unrelated to this Court's determination whether the RE Loans note and the Pensco note have been satisfied. Moreover, this Court has already determined on summary judgment that the RE Loans mortgage is a binding mortgage validly

transferred to Valiant. *See* Memorandum Decision & Order Granting Valiant Idaho, LLC's Motion For Summary Judgment Against JV, LLC, North Idaho Resorts, LLC and VP, Incorporated entered April 14, 2015 ("1st SJ Decision"). Regardless, VP materially misrepresents the evidence submitted into evidence at trial. In fact, the allonge from RE Loans to Valiant was actually admitted into evidence at trial. Valiant's Trial Exhibit ("Tr.Ex.") 69A. Like all of the arguments VP has made throughout this case, this argument has no basis in fact or law.

2. Valiant Had No Obligation to Declare VP in Default Under the RE Loans Loan Agreement.

VP asserts that Wells Fargo never declared the principal of the note due and payable pursuant to the RE Loans mortgage apparently in an attempt to imply that Valiant is not entitled to foreclosure. Again, this issue was already decided on summary judgment. The Court has already determined that POBD is in default under the RE Loans, Pensco and MF08 Notes and mortgages, such that Valiant is entitled to foreclosure. Regardless, VP badly misinterprets the loan documents in making this argument.

Article 3.1 of the Mortgage states that, upon occurrence of an "Event of Default," "Mortgagee ***may*** declare the entire principal of the Note then outstanding to be due and payable immediately, and, notwithstanding the stated maturity in the Note . . . the principal amount of the Note shall become immediately due and payable." Tr.Ex. 1, p. 11 (emphasis added). However, ***an event of default automatically occurs if***: "The Mortgagor shall fail to pay interest or the principal amount of the Note when due, or any fee or other amount payable under the Note, hereunder or under either of the Other Mortgages, on the due date thereof." *Id.* at Article 2.1, p. 11. Moreover, Article 3.11 expressly states, "In the event of an Event of Default under any of the Note,

this Mortgage or the Other Mortgages, Mortgagee may foreclose or exercise any right or remedy provided hereunder." *Id.*, pp. 13-14.

Undisputed trial testimony and evidence establishes that Pend Oreille Bonner Development, LLC's ("POBD") final payment to repay the RE Loans loan was made on or about November 23, 2009. Tr.Exs. 65A, 66. Mr. Reeves testified that no further payments were made thereafter by POBD. The maturity date of the RE Loans note was March 7, 2009. Tr.Ex. 1, p. 1. As such, POBD was already in default on the date POBD made its last payment.[1/] RE Loans (and then Valiant after RE Loans' interests had been assigned) were contractually entitled to declare an Event of Default and foreclose due to POBD's nonpayment any time after March 7, 2009. However, neither RE Loans nor Valiant were ever required to make such a declaration under the terms of the mortgage. Both the mortgage and Idaho law allowed them to simply file a foreclosure action, which is exactly what Valiant did in this case. VP's argument regarding RE Loans' failure to declare a default has no basis in fact or law.

3. Barney Ng Did Not Testify That Kelly Ng Misappropriated Any Funds.

VP asserts that Barney Ng testified that his brother was lying and hiding money in an attempt to imply that Kelly Ng may have misappropriated funds that were paid by POBD. This assertion completely mischaracterizes Mr. Ng's testimony.

1/ On October 16, 2012, a single payment of $96,901.09 was wired to Wells Fargo by Sandpoint Title on POBD's behalf. This payment was insufficient to pay the outstanding interest that had accrued against said note as of that date and did not cure POBD's default.

Barney Ng testified that RE Loans was required to advise Wells Fargo of every loan it made after RE Loans and Wells Fargo entered into the collateral assignment. Tr.Ex. 7. He testified that his brother lied to him because Kelly did not disclose that certain loans were kept secret from Wells Fargo. Mr. Ng also testified that the profits from these undisclosed loans were paid to investors instead of Wells Fargo as required under the collateral assignment. Mr. Ng further testified that these matters were completely unrelated to the loan between POBD and RE Loans. It is undisputed that Wells Fargo was fully aware of and was collaterally assigned all right, title and interest in the RE Loans note and mortgage. No testimony was elicited at trial suggesting that his brother or father have ever failed to account for funds paid by a borrower towards the repayment of any loan, specifically including the loans from RE Loans, Pensco and MF08 that are the subject of this litigation.

B. Valiant Has Met Its Burden Of Proof.

VP argues that Valiant has attempted to shift the burden of proof to VP. However, nothing could be further from the truth. Valiant met its burden by proving beyond a preponderance of the evidence that the notes from RE Loans and Pensco remain unsatisfied. As explained in Valiant's Closing Argument, this evidence is virtually undisputed.

Valiant concurs that "the party seeking foreclosure has the burden of establishing the existence of the debt and default on that debt." *U.S. Bank Nat. Ass'n N.D. v. CitiMortgage, Inc.*, 157 Idaho 446, 451 (2014). The burden of proving an affirmative defense, however, rests upon the party who advances the affirmative defense. *Id.* Payment is an affirmative defense which must be affirmatively plead according to the Idaho Rules of Civil Procedure. I.R.C.P. Rule 8(c). This procedural rule, with respect to the affirmative defense of payment, has been specifically

considered and enforced by the Idaho Court of Appeals. *Nguyen v. Bui*, 146 Idaho 187 (2008) (holding that a party must set forth in his or her pleading any affirmative defenses to the other party's pleading, ***including the defense of payment*** (emphasis added)). The standard of proof for the claims and affirmative defenses in this case is the preponderance of the evidence standard. *Pearson v. Weiser*, 69 Idaho 253, 259-261 (1949).

Based upon Idaho law, it was incumbent upon Valiant in its case-in-chief to establish it is more probable than not that it is still owed amounts pursuant to the RE Loans and Pensco notes. In order for VP to prevail on its affirmative defense of payment, it is then incumbent upon VP to submit sufficient evidence to prove it is more probable than not that POBD has already been paid in full. Valiant has clearly met its burden of proof whereas VP has not.

Both on summary judgment[2/] and at trial, Valiant submitted undisputed testimonial evidence from the lender (Barney Ng on behalf of RE Loans and Pensco) and the borrower (Charles Reeves on behalf of POBD) to establish that RE Loans and Pensco loaned sums to POBD which have not been repaid. Mr. Reeves and Mr. Ng both testified at trial that RE Loans loaned POBD a total of $21,200,000.00, of which $278,147.65 in principal has not been paid; and that Pensco loaned POBD a total of $2,700,000.00, of which POBD never repaid a single penny. Moreover, both on summary judgment and at trial, Valiant submitted invoices that POBD received from Bar K, Inc. ("BarK") ("RE Loans Invoices") in the ordinary course showing the exact same amounts are still due and owing. Tr.Exs. 64, 65, 65A. At trial, Mr. Reeves testified that the RE Loans Invoices were

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2/ The evidence submitted on summary judgment is relevant because Valiant had already met its burden of proof prior to trial. Unless the evidence Valiant submitted on summary judgment was excluded, VP was aware that it needed to submit evidence affirmatively proving it was paid. VP knowingly pursued this case to trial without any evidence to meet its burden of proof.

reviewed and reconciled by POBD each month. He authenticated the handwriting of POBD's bookkeeper (Kathy Groenhout), who wrote notes on each invoice reconciling payments made by POBD and calculating accruing interest payments owed by POBD on each Invoice. *Id.* Mr. Ng authenticated BarK's accounting records for the RE Loans loan that also show a principal balance owed of $278,147.65. Tr.Ex. 66. Mr. Reeves also authenticated a *pro forma* spreadsheet he gave to potential lenders on behalf of POBD in 2011 for purposes of seeking to refinance. Tr.Ex. 105. The *pro forma* spreadsheet also shows a principal balance owed to RE Loans of $278,147.65 and to Pensco of $2,700,000.00. Valiant plainly met its burden of proof in this case.

C. VP Failed To Meet Its Burden Of Proving That The Notes Valiant Obtained From RE Loans Or Pensco Have Been Repaid.

As explained hereinabove, once Valiant has met its burden of proof with respect to the existence of POBD's debt, VP has the burden of proving any affirmative defenses. The only affirmative defense argued by VP in this case is the defense of payment. VP fell woefully short of meeting its burden of proof.

1. VP Failed to Submit Any Accounting Records Showing That the Notes From RE Loans and Pensco Were Satisfied.

VP contends that certain accounting records from POBD, Lend Inc., and Wells Fargo were not submitted into evidence at trial and that this somehow establishes that the notes from RE Loans and Pensco were actually paid. This argument ignores VP's burden of proof.

Charles Reeves and Barney Ng both testified concerning the amounts that POBD borrowed from RE Loans and Pensco and the amounts that are still owed pursuant to these loans. Mr. Reeves is responsible for managing POBD's day-to-day operations, including its financing obligations. Mr. Ng is a member of RE Loans and managed the day-to-day operations of

its loan servicer (BarK). The money Pensco loaned to POBD also came from Mr. Ng's bank account. The testimony of Mr. Reeves and Mr. Ng was sufficient by itself for Valiant to meet its burden of proof. No accounting records were necessary. Nonetheless, in an abundance of caution, Valiant did submit a variety of accounting records from POBD and BarK to ensure it met its burden of proof.

If VP believes there are other accounting records generated by POBD[3/], Lend, Inc.[4/], BarK[5/], Wells Fargo[6/], or any other entity involved in financing the Idaho Club showing the notes from RE Loans or Pensco were satisfied, VP bore the burden of submitting these documents into evidence at trial. If POBD, Lend, Inc., BarK or Wells Fargo had any documents showing that RE Loans and Pensco were paid, VP certainly would have obtained these records in discovery and admitted them into evidence at trial. No such evidence was submitted because these records simply do not exist. As VP failed to submit any evidence whatsoever supporting its affirmative defense that the notes from RE Loans and Pensco have been satisfied, its arguments that the RE Loans note and Pensco note have been satisfied are frivolous and without any basis in fact or law.

3/ VP asserts that Charles Reeves testified that he could not locate any of POBD's accounting records. This blatantly misstates Mr. Reeves' testimony. He testified concerning hundreds of pages of accounting records that he produced in discovery, including, but not limited to, those documents admitted into evidence as Plaintiff's Exhibits 63, 64, 65, and 65A. These invoices were sent to POBD from Bar-K but POBD used them to reconcile POBD payments and calculate accrued interest payments as described in the handwriting on these documents. The handwriting on these invoices and POBD's use of them to reconcile payments and calculate interest makes these documents part of POBD's accounting records. Mr. Reeves also testified that additional accounting records were stored on Kathy Groenhout's computer, which cannot be located. Neither VP nor JV ever sought to obtain discovery of POBD's backup tapes for this computer.

4/ Neither VP nor JV ever sought any discovery from Lend, Inc.

5/ Neither VP nor JV ever sought any discovery from BarK.

6/ Neither VP nor JV ever sought any discovery from Wells Fargo.

2. Tr.Ex. 66 Establishes That the RE Loans Note Was Not Satisfied.

VP argues that Tr.Ex. 66 somehow establishes that the RE Loans note was satisfied. To the contrary, both the Exhibit and Barney Ng's testimony concerning said Exhibit establish that the note from RE Loans has not been repaid.

Tr.Ex. 66 is a "Payment History Detail Report" from BarK. Mr. Ng testified that BarK used this report to track payments from POBD and that it shows each payment and the manner in which the payments were applied to interest and principal. Tr.Ex. 66 shows that, after subtracting all payments made by POBD, Valiant is still owed a total principal balance of $278,147.65. This is the same principal amount Charles Reeves testified is owed.

The Payment History Detail Report also includes a column entitled "Other." There are entries totaling $1,699,890.18 listed under this column heading. VP contends that these entries identify amounts that were wrongly withheld from POBD by Wells Fargo. However, this argument is pure speculation. Mr. Ng was not asked a single question concerning the meaning of this column or the entries in this column at trial. Moreover, neither Mr. Ng nor anyone else testified that this column identifies amounts retained by Wells Fargo or otherwise withheld from POBD. To the contrary, both Mr. Reeves and Mr. Ng testified that RE Loans and Wells Fargo released insurance proceeds and other amounts that otherwise could have been used to pay-down the amounts

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owed to RE Loans in order to provide POBD operating capital and funding to pay its construction obligations.[7/] The undisputed evidence establishes that POBD still owes a principal balance of $278,147.65 on the note from RE Loans.

As VP bears the burden of proving the notes Valiant obtained from RE Loans and Pensco were satisfied, it was incumbent upon VP to elicit testimony or submit documentary evidence establishing that the amounts in the "Other" column were actually withheld from POBD. As VP failed to elicit said testimony or submit said evidence, its arguments with respect to Tr.Ex. 66 are without any basis in fact or law.

3. Payments Received Pursuant to the Collateral Assignments to EaglePointe Have Been Properly Applied to Reduce POBD's Debt Pursuant to the RE Loans Note.

VP contends the RE Loans note was somehow satisfied because three (3) promissory notes and deeds of trust from EaglePointe Construction & Management, Inc. ("EaglePointe") were assigned from POBD to RE Loans. VP acknowledges that a collateral assignment cannot constitute a payment, but intentionally misstates the testimony of Mr. Reeves and Mr. Ng and blatantly misconstrues the MF08 Loan Agreement (Tr.Ex. 21) in arguing that the assignment to RE Loans was a complete assignment rather than a collateral assignment.

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7/ This testimony is consistent with the terms of the Second Amendment to Loan Agreement (Tr.Ex. 22), which allowed POBD to draw excess funds from the Development Account for operating costs and to pay for the costs of construction. *See Id.* at Section 10.i, p. 2. However, no evidence was admitted at trial suggesting that any excess funds were ever paid or deposited into the Development Account, and it is pure speculation to conclude that the amounts identified in the "Other" column were ever deposited in said Account.

The evidence with respect to the EaglePointe lots was undisputed. Charles Reeves testified that in August of 2008, POBD sold three (3) lots to EaglePointe (Lot 16, Block 2 ["Lot N1"]; Lot 4, Block 9 ["Lot D3"]; and Lot 7, Block 2 ["Lot A6"]). Tr.Exs. 113, 114, 115. EaglePointe paid POBD a total of $673,640.00 at closing (Lot N1 - $234,250.00; Lot D3 - $224,215.00; and Lot A6 - $215,175.00). *Id.* POBD also accepted seller carry-back notes and seller deeds of trust securing the remaining balance of $527,410.00 (Lot N1 - $110,000.00; Lot D3 - $177,500; and Lot A6 - $240,500). *See* JV's Exhibits X, BB, Z. Entries dated August 23, 2007 on the RE Loans Invoices and dated August 30, 2007 on BarK's Payment History Detail Report show payments that POBD received from EaglePointe at closing were paid to RE Loans and credited against the balance on said loan. Tr.Exs. 65A, 66. Mr. Reeves and Mr. Ng testified that additional entries on the RE Loans invoices dated May 12, 2008, August 1, 2008, and October 7, 2008 identify interest only payments totaling $33,660.00 that were paid by EaglePointe and credited against the RE Loans loan balance. Tr.Ex. 65A. Corresponding entries for these interest payments can be found on the Payment History Detail Report as entries dated May 12, 2008, July 30, 2008, and October 7, 2008. Tr.Ex. 66. Mr. Reeves and Mr. Ng testified they were unaware of any further payments that were made by EaglePointe in repayment of the seller carry back notes and deeds of trust. However, the president of Sandpoint Title testified that one of these lots was sold by EaglePointe in 2012, which resulted in an additional payment being wired directly to Wells Fargo in the amount of $96,901.99. In accordance with the terms of the RE Loans note, this payment has been credited first to outstanding interest and other charges then due and payable to RE Loans. Tr.Ex. 3, p. 2. As such, this payment did not reduce the principal balance POBD owed on the

RE Loans note. *See* Declaration of William Haberman in Support of [Valiant's] Closing Argument filed on or about April 14, 2016, Ex. A.

VP asserts that the balance owed by EaglePointe at the closing in August 2008 should have been credited against the balance POBD owed to RE Loans because "the assignments were complete assignments and not a collateral assignment as was given to Wells Fargo." In addition to failing to cite to any authority whatsoever to support its contention that this distinction is somehow meaningful, VP blatantly misrepresents the agreement between the parties.

No evidence was submitted at trial suggesting the parties intended anything other than a collateral assignment. Mr. Reeves and Mr. Ng both testified that the seller carry back notes and deeds of trust were collaterally assigned to secure the remaining amounts owed by EaglePointe. Moreover, the MF08 Loan Agreement memorializes the agreement between the parties as follows:

> a. Borrower acknowledges that it previously sold three lots commonly described as Marketing Lot A6 - Lot 7, Block 2; Marketing Lot D3 - Lot 4, Block 9; and Marketing Lot N1 - Lot 16, Block 2, and that Borrower carried back three promissory notes ("Seller Carry- Back Notes"), each secured by a deed of trust from the buyer of these three lots ("Seller Carry-Back Deeds of Trust"). Borrower further acknowledges that it previously assigned the Seller Carry-Back Notes and Seller Carry-Back Deeds of Trust to R.E. Loans, LLC, **as collateral securing a prior loan from R.E. Loans, LLC to Borrower**.
>
> b. Borrower agrees that if and when the loan in favor of R.E. Loans, LLC is paid off, R.E. Loans, LLC shall assign these three Seller Carry-Back Notes and Deeds of Trust to Lender as additional personal property **collateral** securing the Loan.

c. **The value of the Seller Carry-Back Notes will NOT be credited to principal or interest due under Borrower's Note to Lender unless and until Lender receives actual payments of cash from the makers of the Seller Carry-Back Notes.** Payments on the Seller Carry-Back Notes, when received by Lender, will be credited to Borrower's Note to Lender as follows:

. . .

Tr.Ex. 21, Section 11, VAL001317 (emphasis added).

The evidence is clear that the parties never intended that the value of the Seller Carry-Back Notes be credited to the principal or interest due under the RE Loans' note until EaglePointe made cash payments. It cannot be reasonably argued that POBD or RE Loans ever intended the Seller Carry-Back Notes and Deeds of Trust to be anything other than collateral assignments to secure the amounts owed. There is also no evidence that EaglePointe made any other payments that have not been accounted for. As such, VP's arguments regarding the EaglePointe lots are without basis in fact or law.

4. **Tr.Ex. 107 is Consistent With the Evidence Admitted at Trial.**

VP argues that because Tr.Ex. 107 shows Idaho Club lot sales totaling over $45 Million, this proves that the RE Loans note must have been paid-off. This argument ignores mathematics, the fact that there have been multiple loans for the construction and development of the Idaho Club, and VP's burden of proof.

Richard Villelli testified he was the original owner of the Idaho Club and that he borrowed $8,000,000.00 from RE Loans for development purposes on or about March 19, 2004. JV Exhibit DD. According to the loan documents, this loan was identified as Loan Number V0104. *Id.* Moreover, VP admitted a mortgage and note secured by mortgage between RE Loans and

Pend Oreille Bonner Development Holdings, Inc. ("POBDH") into evidence. These documents memorialized a loan in the amount of $20,500,000.00 ("Loan No. P0094"). VP Exhibits 19-20. Mr. Ng testified that this loan was obtained for the purposes of designing and constructing the Idaho Club. On or about March 6, 2007, POBD borrowed an additional $21,200,000.00 from RE Loans ("Loan No. P0099") for purposes of developing the Idaho Club. Tr.Exs. 1-3. Loan No. P0099 is the loan from RE Loans that is the subject of this dispute. *Id.* The subordination agreement between JV and Pacific Capital Bank, N.A. ("FNB") further makes mention of a loan between POBD and FNB dated March 7, 2008 in the amount of $5,000,000.00. Tr.Ex. 30A. Although the loan number for this loan is not identified, it is obviously not related to Loan No. P0099. Mr. Reeves and Mr. Ng each testified there were other loans obtained during the course of development of the Idaho Club from entities including Sage Holdings, LLC and Mountain West Bank, among others. The dollar amount of these loans was not admitted into evidence at trial because these loans are not relevant to the issue to be decided in this trial. Nonetheless, undisputed evidence was submitted at trial establishing there were loans likely totaling substantially more than, but could not be less than $54,700,000.00 for construction and development of the Idaho Club. Even if none of the proceeds from the lot sales identified on Tr.Ex. 107 were used to pay for the design and construction of the Idaho Club development, these lot sales are insufficient to pay all the loans obtained by Villelli, POBDH and POBD ($45,519,615.00 < $54,700,000.00).

More importantly, VP bears the burden of proving the note from RE Loans was satisfied. It is incumbent upon VP to identify which of the lot sales generated proceeds that should have been, but were not applied to the RE Loans note. Its argument with respect to Tr.Ex. 107 falls woefully short of meeting this burden. VP's arguments concerning Tr.Ex. 107 are without any basis in fact or law.

5. Richard Villelli Failed to Identify Any Lots Whose Proceeds Were Used to Satisfy the RE Loans or Pensco Notes.

VP asserts that over three million dollars in lot sales are unaccounted for on the Payment History Detail Report (Tr.Ex. 66) and RE Loans Invoices, and argues this proves the note from RE Loans was satisfied.

Mr. Villelli originally testified on direct that over three million dollars in lot sales was unaccounted for; however, VP failed to submit any documentary evidence whatsoever to support this testimony. Moreover, on cross-examination Mr. Villelli could actually only identify three lots that were unaccounted for. He testified that there were three lots transferred to Chip and Debra Bowlby ("Bowlby Lots") in late December 2007 that were not accounted for on the Payment History Detail Report or the RE Loans Invoices. Tr.Exs 116-118. Mr. Reeves explained on rebuttal that the Bowlby Lots should not have been accounted for on the Payment History Detail Report or the RE Loans Invoices because they were never subject to the mortgage recorded pursuant to Loan No. P0099. (Tr.Ex. 1). To the contrary, the Bowlby Lots were only subject to the mortgage ("2006 RE Mortgage") recorded pursuant to Loan No. P0094 (VP Exhibit 20). Two of the Bowlby Lots were released from the 2006 RE Mortgage on March 21, 2007. Tr.Ex. 119. The remaining

Bowlby Lot was released by satisfaction of the 2006 RE Mortgage recorded June 8, 2007. Tr.Ex. 120. The testimony of Charles Reeves was undisputed.

As previously explained, Mr. Ng testified that the Payment History Detail Report only accounts for payments POBD made towards the repayment of Loan No. P0099. Moreover, Mr. Ng and Mr. Reeves testified that the RE Loans Invoices only show payments made pursuant to Loan No. P0099. As such, neither would or should show any payments made related to the Bowlby Lots. These payments are shown on the payment history detail report and invoices for Loan No. P0094, which are not relevant to the questions at issue in this trial. There is no credible evidence that any lot sales were unaccounted for. VP's argument in this regard is without any basis in fact or law.

6. **Barney Ng's Testimony Was Credible.**

VP blatantly misstates the testimony of Mr. Ng in an attempt to impeach his credibility. Mr. Ng did not testify that RE Loans' bankruptcy disclosure statement indicates that the MF08 loan paid-off the loan from RE Loans. To the contrary, Mr. Ng testified only that he could not recall what was stated on the disclosure statement. He further refused to speculate as to what the disclosure statement said because counsel for VP did not provide it to him for his review at trial. Moreover, this disclosure statement was not admitted into evidence. This is another example of VP's complete disregard for the facts and evidence at issue in this case.[8/]

8/ It should be reiterated that VP has completely abandoned its argument that RE Loans was paid-off at the MF08 loan closing. None of the arguments raised in its closing argument were raised at summary judgment or ever disclosed in discovery in this case. VP's only mention of its former argument is now as a basis to try to impeach the credibility of Mr. Ng's testimony.

Mr. Ng's testimony was credible and largely undisputed. Moreover, it was consistent with all of the documents that were generated by POBD and BarK in the ordinary course of business long before this litigation was contemplated. VP did not submit an iota of evidence or testimony showing even a single accounting error by RE Loans, BarK or Lend, Inc. There is absolutely nothing to support VP's contention that Mr. Ng's testimony was not credible. VP's arguments concerning his credibility are without any basis in fact or law.

7. **Charles Reeves's Testimony Was Credible.**

VP also misrepresents the evidence in an attempt to attack the credibility of Mr. Reeves. VP asserts Mr. Reeves's testimony is not credible because the bookkeeper's last notations show the RE Loans note was satisfied and no POBD accounting records were produced. VP also argues that Mr. Reeves's testimony was inconsistent with the testimony of Tom Williams. Each of these contentions are flatly false.

The last notations made by Kathy Groenhout on the final RE Loans Invoice do not indicate in any way that RE Loans was paid-off. To the contrary these records show that an additional interest payment of $4,881.75 was due and owing to RE Loans. Tr.Ex. 65, pp. Reeves001386-389. It is axiomatic that POBD would not be calculating interest payments owed towards a loan that had already been satisfied.

VP also inaccurately asserts that Mr. Reeves failed to produce POBD's accounting records. Mr. Reeves produced hundreds of pages of accounting records to the parties in this case. He had no legal obligation to produce these records a second time at trial. Mr. Reeves did testify that he has been unable to locate his bookkeeper's computer that may contain additional accounting records. However, this is hardly surprising given that she is now suffering from a

traumatic brain disease and POBD has been insolvent since 2010 (more than six years). VP never sought to obtain discovery for POBD's backup tapes for this computer.

Finally, Mr. Reeves's testimony was consistent with the testimony of Tom Williams. Mr. Williams testified that one of the EaglePointe lots was sold on October 16, 2012. Pursuant to this sale, Sandpoint Title wired $96,901.09 directly to Wells Fargo. As it was wired directly to Wells Fargo, Mr. Reeves was unaware of this payment. This is the only payment to Wells Fargo of which Mr. Williams was aware. This payment has now been credited against the amounts owed by POBD.

Mr. Reeves's testimony is consistent with the business records of POBD and BarK that were admitted into evidence. VP failed to admit an iota of testimony or evidence showing accounting errors in these documents. There is no evidence to support VP's contention that Mr. Reeves's testimony was not credible. VP's arguments concerning his credibility are without any basis in fact or law.

8. Valiant Acknowledges That VP is the Record Owner of Four Lots That Were Quitclaimed to It by POBD in 2013.

VP argues it is the record owner of four lots that are part of the Idaho Club development. This argument is unnecessary. It was determined on summary judgment that POBD quitclaimed these lots to VP on or about September 20, 2013 without payment of any consideration. Rather, VP coerced POBD into transferring these lots hoping they would not be included in any foreclosure proceedings brought by lenders. The quitclaim deeds were not recorded in the Bonner County Recorder's Office until May 20, 2014. As such, VP's interest in these lots was determined to be junior to Valiant's as a matter of law. *See* 1st SJ Decision.

9. **Valiant is Entitled To Include Remediation Costs in Its Judgment.**

As set forth in Valiant's Closing Argument, Valiant, as the assignee of RE Loans, Pensco and MFF08, is entitled to include the amounts it has incurred to repair, cleanup and detoxify the encumbered property as part of its loan amounts. As the RE Loans mortgage has been determined to be in a first priority position, the costs Valiant incurred to remediate the diesel leak discovered on the property should be secured by the RE Loans mortgage.

VP acknowledges that Valiant is entitled to recover these amounts pursuant to the Valiant mortgages, but argues that Valiant should not recover these amounts because VP did not have an opportunity to conduct discovery related to the leak. William Haberman testified that the leak was discovered only days prior to the trial and the remediation work was still ongoing as of the date of the trial. Valiant only seeks to recover those costs actually incurred prior to the date of the trial. Moreover, at trial counsel for VP had the opportunity to ask Mr. Haberman any questions that it wanted concerning when and how this leak was discovered and who might be responsible. VP chose not to ask any of these questions.

10. **VP Does Not Contest That Valiant is Entitled to Recover Its Operating Losses.**

During trial, William Haberman testified that Valiant, as the mortgagee, has operated the golf course as a going concern in order to maintain the golf course property and to prevent it from being wasted and devaluing the saleable lots subject to the mortgage. VP does not dispute that Valiant is entitled to recover these losses pursuant to the Valiant mortgages.

11. **VP Does Not Dispute That Valiant is Owed $2,700,000.00 in Principal Pursuant to the Pensco Note.**

VP's closing argument does not direct this Court to an iota of documentary or testimonial evidence or even pose a single argument that the Pensco note was satisfied. VP's defenses with respect to the Pensco note were clearly frivolous and without any basis in fact or law.

D. **VP's Defenses Are Frivolous And Without Any Basis In Fact Or Law.**

As repeatedly emphasized in Valiant's Closing Argument, the trial of this matter was limited to the singular issue of whether the notes Valiant obtained from RE Loans and Pensco were satisfied. Thru multiple motions for summary judgment, motions to reconsider, and other associated motions, VP provided only one argument as its basis for contending that the RE Loans and Pensco notes have been satisfied. VP always asserted that these notes were paid-off at the closing of the MF08 loan on August 6, 2008. Moreover, VP failed to ever identify any other argument in pretrial discovery or pretrial briefing. Throughout this case, VP has blatantly misinterpreted documents, misstated testimony, and offered arguments that are without any basis in fact or law. VP's tactics in this case were consciously undertaken by its counsel for the purpose of harassing Valiant, delaying its efforts to foreclose on the real property secured by its mortgages, and needlessly increasing the costs of litigation. During trial, VP failed to offer a scintilla of evidence that supported its preposterous argument that the notes from RE Loans and Pensco were paid-off at the MF08 loan closing. As set forth in Valiant's Closing Argument, it was mathematically impossible for this to have occurred. Counsel for VP certified in each pleading setting forth this argument that it was well grounded in fact and warranted by existing law. I.R.C.P. Rule 11(a)(1). It was because of

counsel's repeated protestations that these arguments were legitimized and Valiant's summary judgment denied. It is now obvious that VP's arguments were frivolous and without any basis in fact or law. Valiant will seek sanctions and fees against VP and its counsel for this conduct after judgment is entered in this case.

III.
CONCLUSION

Based upon the foregoing, Valiant's Closing Argument, and the testimony and evidence submitted at trial, Valiant requests an order declaring that it is entitled to final judgment in accordance with this Court's prior Summary Judgment Orders and awarding Valiant: (a) damages against POBD pursuant to the 2007 RE Loans note in the amount $3,409,794.61, plus interest thereon at a rate of $1,417.94 *per diem* from April 15, 2016 until judgment has been entered, the entirety of which is secured by the 2007 RE Loans Mortgage; (b) damages against POBD pursuant to the Pensco note in the amount $9,590,474.85, plus interest thereon at a rate of $4,197.74 *per diem* from April 15, 2016 until judgment has been entered, the entirety of which is secured by the Pensco Mortgage, and (c) damages against POBD pursuant to the MF08 note in the amount $7,410,885.87, plus interest thereon at a rate of $3,244.28 *per diem* from April 15, 2016 until judgment has been entered, the entirety of which is secured by the MF08 Mortgage.

DATED this 26th day of May 2016.

McCONNELL WAGNER SYKES & STACEY PLLC

BY: _____
Richard L. Stacey
Attorneys For Valiant Idaho, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of May 2016, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

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 *Counsel For J.V., LLC*	[✓] U.S. Mail [ ] Hand Delivered [✓] Facsimile [ ] Overnight Mail [✓] Electronic Mail garyfinney@finneylaw.net
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With two (2) copies *via* U.S. Mail to:

The Honorable Barbara A. Buchanan
Judge of the First Judicial District
Bonner County Courthouse
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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

VALIANT IDAHO, LLC'S RESPONSE AND OBJECTIONS TO JV, L.L.C.'S POST-TRIAL MEMORANDUM AND ARGUMENT

Honorable Barbara A. Buchanan

COMES NOW, Valiant Idaho, LLC ("Valiant"), by and through its attorneys of record, McConnell Wagner Sykes & Stacey PLLC, and files its Response and Objections to JV, L.L.C's Post-Trial Memorandum and Argument.

I.
INTRODUCTION

As this Court is well aware, in advance of the trial Valiant filed multiple motions for summary judgment and North Idaho Resorts, LLC ("NIR"), VP, Incorporated ("VP") and JV, L.L.C. ("JV") (collectively, "Defendants") filed multiple motions to reconsider the Court's decision affirming Valiant's right to foreclose the 2007 RE Loans Note and Mortgage, Pensco Note and Mortgage, and MF08 Note and Mortgage (collectively, "Valiant Notes and Mortgages"). Following a hearing on all of the motions, on October 30, 2015, this Court issued its Memorandum Decision & Order Re: Motions Heard on October 23, 2015 ("October Ruling") making it unequivocally clear that there were only two remaining questions of fact to be resolved at trial:

1. Was the 2007 RE Loans Note paid-off at the closing of the MF08 Note?
2. Was the Pensco Note paid-off at the closing of the MF08 Note?

As is set forth in Valiant's Closing Argument ("Closing Argument") filed on or about April 14, 2016, Valiant presented uncontroverted evidence of the amounts owed by Pend Oreille Bonner Development, LLC ("POBD") on each of the Valiant Notes and Mortgages, and that POBD was in default on each Note and Mortgage. There was no evidence presented at trial by JV or VP that either the 2007 RE Loans Note or the Pensco Note were paid-off at the closing of the MF08 Note which occurred August 6, 2008.

JV and VP utterly failed to put on ***any*** admissible evidence whatsoever to support their specious claims that either the 2007 RE Loans Note or the Pensco Note were paid-off at the closing of the MF08 Note. JV and VP were in possession of the records from the escrow company unequivocally demonstrating that no such pay-off occurred. Unfortunately, instead of acknowledging that these records established there is no factual or legal bases for their arguments as ethically required, counsel for JV and VP misleadingly avoided the efficient and proper resolution of this matter on summary judgment by insisting that the "pay-off" notation on a settlement statement from the MF08 closing meant the 2007 RE Loans Note and Pensco Note had been paid-off. This is particularly egregious given that: (1) anyone who understands the basic math found in the closing ledgers would have known that was not the case; and (2) these documents were not produced to Valiant until the date of hearing when opposing counsel knew it was too late for the documents to be used in support of Valiant's motion for summary judgment.

After intentionally misleading this Court into denying Valiant's Third Summary Judgment Motion filed September 25, 2015 on the basis that there was supposedly a material issue of fact as to whether the 2007 RE Loans Note and Pensco Note had been paid-off at the closing of the MF08 Note, JV and VP now seek to improperly change the narrative altogether. At trial—and now in their closing memoranda—JV and VP have raised entirely new theories as to how and when the 2007 RE Loans Note and Pensco Note could have possibly been paid-off. In so doing, JV and VP completely ignored the express instructions of this Court, the repeated admonitions of this Court, and have only added insult to injury to the aggrieved, rightful owner of the 2007 RE Loans Note and Pensco Note by delaying the relief to which Valiant is entitled: ***Foreclosure of the Mortgages securing these Notes.***

Although JV and VP persist in using their respective closing briefs to argue the 2007 RE Loans Note was paid in some fashion—other than through the MF08 closing—they once again distort the record and fail to address the key evidence in the record that belies their assertions. It is therefore not surprising that JV and VP fail to offer a single citation to legal authority, but instead offer murky and incoherent argument based on supposed evidence offered at the trial. Valiant presented uncontroverted evidence of the amounts loaned under the terms of the 2007 RE Loans Note, Pensco Note and MF08 Note; accounted for all payments made to both principal and interest on all three Notes; set forth proof of the principal balances due and owing under the terms of the 2007 RE Loans Note, the Pensco Note and the MF08 Note; and set forth all accrued interest.

In its rambling, incoherent 46-page Post Trial Memorandum and Argument ("Memorandum") diatribe, JV attempts to reiterate the entire chronology of events that gave rise to three notes and mortgages sought to be foreclosed by Valiant. Additionally, JV seeks to revive arguments that have already been ruled on and rejected by this Court on multiple summary judgments and motions to reconsider. None of JV's arguments serve to defeat Valiant's claims, and only seek to obfuscate the unrebutted evidence offered by Valiant at trial, both on the narrow issue to which the trial was supposed to have been limited and in response to all of the new theories that both JV and VP now seek to raise after failing to disclose them in discovery.

JV and VP have each filed separate closing arguments. This brief responds only to those arguments raised by JV in its Memorandum. Another brief will be filed concurrently responding to VP's closing argument.

II.
ARGUMENT

A. Valiant Has Met Its Burden Of Proof.

Valiant met its burden by proving beyond a preponderance of the evidence that the notes from RE Loans and Pensco remain unsatisfied. As explained in Valiant's Closing Argument, this evidence is virtually undisputed.

"The party seeking foreclosure has the burden of establishing the existence of the debt and default on that debt." *U.S. Bank Nat. Ass'n N.D. v. CitiMortgage, Inc.*, 157 Idaho 446, 451 (2014). The burden of proving an affirmative defense, however, rests upon the party who advances the affirmative defense. *Id.* Payment is an affirmative defense which must be affirmatively plead according to the Idaho Rules of Civil Procedure. I.R.C.P. Rule 8(c). This procedural rule, with respect to the affirmative defense of payment, has been specifically considered and enforced by the Idaho Court of Appeals. *Nguyen v. Bui*, 146 Idaho 187 (2008) (holding that a party must set forth in his or her pleading any affirmative defenses to the other party's pleading, ***including the defense of payment*** (emphasis added)). The standard of proof for the claims and affirmative defenses in this case is the preponderance of the evidence standard. *Pearson v. Weiser*, 69 Idaho 253, 259-261 (1949).

Based upon Idaho law, it was incumbent upon Valiant in its case-in-chief to establish it is more probable than not that it is still owed amounts pursuant to the RE Loans and Pensco notes. In order for JV to prevail on its affirmative defense of payment, it is then incumbent upon JV to submit sufficient evidence to prove it is more probable than not that POBD has already been paid in full. Valiant has clearly met its burden of proof whereas JV has not.

Both on summary judgment[1/] and at trial, Valiant submitted undisputed testimonial evidence from the lender (Barney Ng on behalf of RE Loans and Pensco) and the borrower (Charles Reeves on behalf of POBD) to establish that RE Loans and Pensco loaned sums to POBD which have not been repaid. Mr. Reeves and Mr. Ng both testified at trial that RE Loans loaned POBD a total of $21,200,000.00, of which $278,147.65 in principal has not been paid; and that Pensco loaned POBD a total of $2,700,000.00, of which POBD never repaid a single penny. Moreover, both on summary judgment and at trial, Valiant submitted invoices that POBD received from Bar K, Inc. ("BarK") ("RE Loans Invoices") in the ordinary course showing the exact same amounts are still due and owing. Tr.Exs. 64, 65, 65A. At trial, Mr. Reeves testified that the RE Loans Invoices were reviewed and reconciled by POBD each month. He authenticated the handwriting of POBD's bookkeeper (Kathy Groenhout), who wrote notes on each invoice reconciling payments made by POBD and calculating accruing interest payments owed by POBD on each Invoice. *Id.* Mr. Ng authenticated BarK's accounting records for the RE Loans loan that also show a principal balance owed of $278,147.65. Tr.Ex. 66. Mr. Reeves also authenticated a *pro forma* spreadsheet he gave to potential lenders on behalf of POBD in 2011 for purposes of seeking to refinance. Tr.Ex. 105. The *pro forma* spreadsheet also shows a principal balance owed to RE Loans of $278,147.65 and to Pensco of $2,700,000.00. Valiant plainly met its burden of proof in this case.

1/ The evidence submitted on summary judgment is relevant because Valiant had already met its burden of proof prior to trial. Unless the evidence Valiant submitted on summary judgment was excluded, JV was aware that it needed to submit evidence affirmatively proving it was paid. JV knowingly pursued this case to trial without any evidence to meet its burden of proof.

B. The 2007 RE Loans Note Was Never Satisfied.

JV argues the 2006 RE Loans Note was paid-off at the closing of the 2007 RE Loans Note and the amount due on the 2006 RE Loans Note cannot be included as part of the principal balance owed under the 2007 RE Loans Note. Memorandum, pp. 1-17.[2/] JV's arguments have no basis in fact or law. It is undisputed that POBD used the loan it obtained from RE Loans on March 6, 2007 to pay-off a prior loan from RE Loans that was entered into on May 31, 2006 and to obtain additional financing in the amount of $15,100,000.00. At the time the 2006 RE Loans Note was paid-off by the 2007 RE Loans loan, it had a principal balance of $6.1 Million. However, JV fails to cite to any legal authority or to provide any factual bases as to how or why this is relevant to the questions remaining unresolved in this case.

As was testified to by Barney Ng, at the time of closing the 2007 RE Loans Note, no cash was transferred by RE Loans to RE Loans; that was unnecessary because RE Loans was the only lender. The initial advance on the 2007 RE Loans Note ($6.1 Million) became part of the 2007 RE Loans Note. JV's assertion that the $6.1 Million initial advance is somehow not owed under the 2007 RE Loans Note is incredible. JV's reconciliation of the 2007 RE Loans Note [Memorandum, pp. 13-14] actually confirms Valiant's proof that the total amount loaned under the 2007 RE Loans Note was $21,200,000.00 ($6.1 Million initial advance and $15.1 Million in additional draws).

2/ JV bases its argument primarily on JV's Exhibit P, which JV alleges is a reconciliation of the 2007 RE Loans Note. There was no testimony presented at trial to authenticate or even explain what Exhibit P was or who created it. Charles Reeves specifically testified that neither he nor POBD created JV's Exhibit P and that it was not POBD's business record as asserted by JV.

Moreover, JV subordinated to both the 2006 and 2007 RE Loans Notes and Mortgages, the Pensco Note and Mortgage, and the MF08 Note and Mortgage.[3/] It should be noted that JV's argument is the very same argument JV made in opposition to Valiant's motions for summary judgment.[4/] This argument was rejected by the Court and, thus, was not even an issue to be resolved at trial.[5/]

C. **The 2007 RE Loans Note Was Not Paid-Off By The EaglePointe Purchases.**

JV argues the 2007 RE Loans Note was paid-off because of the three notes and deeds of trust granted by EaglePointe Construction & Management, Inc. ("EaglePointe") to purchase three lots. Memorandum, pp. 18-22. JV, without any authority or basis in law, argues the total amount of the down payments made by EaglePointe, plus the amounts remaining under the carry-back notes and deeds of trust had to be credited against the principal balance of the 2007 RE Loans Note. This assertion is incorrect and not in accord with the testimony at trial. The testimony at trial by both Mr. Ng and Charles Reeves was that EaglePointe purchased three lots and made down payments on those lots. The down payments were credited against the 2007 RE Loans Note. Three carry-back notes and deeds of trust were issued by EaglePointe in favor of RE Loans. It was agreed that any payments made against those loans by EaglePointe would be credited against the 2007 RE

3/ These records are all before the Court on Valiant's first motion for summary judgment. *See* Declaration of Jeff R. Sykes in Support of Valiant Idaho, LLC's Motion For Summary Judgment filed on or about January 16, 2015, Exs. 7-9.

4/ This argument was raised by JV in its Objection and Memorandum in Opposition to [Valiant's] Third Motion For Summary Judgment and [JV'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 or about October 13, 2015, and was rejected by this Court in its October Ruling.

5/ JV makes reference to Defendant's Exhibit H—"Seller's Closing Statement"—an exhibit never admitted into evidence at trial.

Loans Note. Both Messrs. Ng and Reeves testified that the payments made by EaglePointe were credited against the 2007 RE Loans Note and the balance of the EaglePointe notes were uncollected.

The testimony of Mr. Reeves and Mr. Ng is consistent with the agreement of the parties memorialized in the MF08 loan documents. *See* Valiant Trial Exhibit ("Tr.Ex.") 21, VAL001317 ("11. Three Seller Carry-Back Notes And Seller Carry-Back Deeds of Trust."). The MF08 Loan Agreement specifically provided:

> a. Borrower acknowledges that it previously sold three lots commonly described as Marketing Lot A6 - Lot 7, Block 2; Marketing Lot D3 - Lot 4, Block 9; and Marketing Lot N1 - Lot 16, Block 2, and that Borrower carried back three promissory notes ("Seller Carry- Back Notes"), each secured by a deed of trust from the buyer of these three lots ("Seller Carry-Back Deeds of Trust"). Borrower further acknowledges that it previously assigned the Seller Carry-Back Notes and Seller Carry-Back Deeds of Trust to R.E. Loans, LLC, **as collateral securing a prior loan from R.E. Loans, LLC to Borrower**.
>
> b. Borrower agrees that if and when the loan in favor of R.E. Loans, LLC is paid off, R.E. Loans, LLC shall assign these three Seller Carry-Back Notes and Deeds of Trust to Lender as additional personal property **collateral** securing the Loan.
>
> c. **The value of the Seller Carry-Back Notes will NOT be credited to principal or interest due under Borrower's Note to Lender unless and until Lender receives actual payments of cash from the makers of the Seller Carry-Back Notes.** Payments on the Seller Carry-Back Notes, when received by Lender, will be credited to Borrower's Note to Lender as follows:
>
> . . .

Tr.Ex. 21, Section 11, VAL001317 (emphasis added).

During trial, an issue was raised that a loan closed and Wells Fargo was paid sums under one of the notes. Valiant recognized the payment and it was credited against the interest due in accordance with the 2007 RE Loans Note.

JV's arguments that additional amounts should have been credited against the RE Loans note because of the collateral assignment of the EaglePointe lots is without any basis in fact or law.

D. JV's Arguments Concerning The Assignments To Valiant Of The Valiant Notes And Mortgages, And Issues Concerning The Tax Redemption Deeds Were Resolved On Summary Judgment.

JV argues the 2007 RE Loans Mortgage was assigned to Valiant by a power of attorney which was invalid for purposes of recordation. Memorandum, pp. 22-24. This argument was raised on summary judgment and this Court rejected JV's argument.[6/] This issue was not litigated at trial.

JV argues it owns, free and clear, the real estate described in its tax redemption deed. *Id.*, pp. 24-29. Again, this was an issue raised by JV in opposition to motions for summary judgment and in JV's motions for reconsideration, and rejected by this Court.[7/] This was not an issue litigated at trial.

6/ JV raised this argument in JV's First Supplemental Memorandum in Opposition to [Valiant's] Motion For Summary Judgment filed on or about February 27, 2015 ("JV's 1st Supp. SJ Opposition"), and thereafter rejected by this Court in its Memorandum Decision and Order Granting [Valiant's] Motion For Summary Judgment Against JV, LLC, North Idaho Resorts, LLC and VP, Incorporated entered April 14, 2015 ("1st SJ Decision"). It is further noteworthy that JV repeatedly raised this same argument in subsequent motions to reconsider and motions for summary judgment. Although the Court has rejected this argument on each occasion it has been raised. JV continues to ignore the Court's decisions.

7/ This issue was raised by JV in its Memorandum in Opposition to [Valiant's] Motion For Summary Judgment filed on or about February 2, 2015 ("JV's SJ Opposition"), and thereafter rejected by this Court in its 1st SJ Decision. It is further noteworthy that JV repeatedly raised this same argument in subsequent motions to reconsider and motions for summary judgment. Although the Court has rejected this argument on each occasion it has been raised. JV continues to ignore the Court's decisions.

JV argues POBD still owes JV for the unpaid 1995 JV mortgage. *Id.*, pp. 33-34. Frankly, Valiant does not understand JV's argument at all. Whether any money is owed by POBD to JV on an unpaid 1995 mortgage was not at issue in this case. The issues in this case involve Valiant's foreclosure of Valiant's Notes and Mortgages, and, specifically, whether the 2007 RE Loans Note and Pensco Note were paid-off at the closing of the MF08 Note.

E. Neither The 2007 RE Loans Note Nor The Pensco Note Nor The MF08 Note Were Paid-Off.

JV argues that the terms of the MF08 Note evidence that the 2007 RE Loans Note and Pensco Note were paid in full and discharged. *Id.*, pp. 34-41. This argument is without any basis in fact or law. The MF08 loan documents specifically set forth the nature of the transaction—it is an all-inclusive mortgage which included the 2007 RE Loans Note and Mortgage and the Pensco Note and Mortgage. Tr.Exs. 17, 18, 19, 21. There was no evidence presented at trial that any of the loans were paid-off. To the contrary, both Charles Reeves and Barney Ng testified, and their testimony was unrebutted, that none of the loans were paid-off. They also testified to the principal amounts owed under each Note. The escrow officer for the loan closing also testified that the RE Loans Note and the Pensco Note could not have been paid-off at the MF08 loan closing. She testified that $2,975,000.00 was deposited into escrow by Pensco and MF08 and that $2,975,000.00 was disbursed to parties out of escrow. Ms. Linscott testified neither RE Loans nor Pensco received any of these disbursements. Ms. Linscott's testimony is substantiated by the title company's records that were admitted into evidence at trial. *See* Tr.Exs. 33, 36, 38, 39, 41, 42, 43, 45, 47, 50, 51, 53, 54. Finally, as explained in Valiant's Closing Argument, it is mathematically impossible that RE Loans and

Pensco were paid out of the MF08 loan closing. JV's arguments in this regard are totally frivolous and without any basis in fact or law.

F. All Priority Issues Were Decided On Summary Judgment.

JV argues that its loans have priority over the Valiant Notes and Mortgages. This was an issue resolved on summary judgment.[8/] This Court ruled that the Valiant Notes and Mortgages have priority over JV, VP and NIR. These issues were not litigated at trial.

G. Both Barney Ng And Charles Reeves Were Credible Witnesses.

JV argues that neither the testimony of Charles Reeves nor Barney Ng was credible and, apparently, their testimony should be totally disregarded. Neither the testimony of Mr. Reeves nor Mr. Ng should be disregarded. First, neither JV nor VP offered any competing testimony to rebut the testimony of Mr. Reeves or Mr. Ng. Second, both testified unequivocally to the amounts owed under the RE Loans Note, the Pensco Note and the MF08 Note. Both accounted for draws tendered under those Notes and payments made toward those Notes. While both Messrs. Reeves and Ng should be compensated at the end of this foreclosure, neither's testimony was incredible. To the contrary, both Mr. Reeves's and Mr. Ng's testimony was reasoned and corroborated the terms of the Notes, Mortgages and loan agreements, the amounts loaned under the Notes, and the payments made toward the Notes. JV's arguments that neither Mr. Reeves nor Mr. Ng should be believed is without merit.

8/ JV raised this issue in its SJ Opposition and it was thereafter rejected by the Court in its 1st SJ Decision.

H. JV's Defenses Are Frivolous And Without Any Basis In Fact Or Law.

As repeatedly emphasized in Valiant's Closing Argument, the trial of this matter was limited to the singular issue of whether the notes Valiant obtained from RE Loans and Pensco were satisfied. Thru multiple motions for summary judgment, motions to reconsider, and other associated motions, JV provided only one argument as its basis for contending that the RE Loans and Pensco notes have been satisfied. JV always asserted that these notes were paid-off at the closing of the MF08 loan on August 6, 2008. Moreover, JV failed to ever identify any other argument in pretrial discovery or pretrial briefing. Throughout this case, JV has blatantly misinterpreted documents, misstated testimony, and offered arguments that are without any basis in fact or law. JV's tactics in this case were consciously undertaken by its counsel for the purpose of harassing Valiant, delaying its efforts to foreclose on the real property secured by its mortgages, and needlessly increasing the costs of litigation. During trial, JV failed to offer a scintilla of evidence that supported its preposterous argument that the notes from RE Loans and Pensco were paid-off at the MF08 loan closing. As set forth in Valiant's Closing Argument, it was mathematically impossible for this to have occurred. Counsel for JV certified in each pleading setting forth this argument that it was well grounded in fact and warranted by existing law. I.R.C.P. Rule 11(a)(1). It was because of counsel's repeated protestations that these arguments were legitimized and Valiant's summary judgment denied. It is now obvious that JV's arguments were frivolous and without any basis in fact or law. Valiant will seek sanctions and fees against JV and its counsel for this conduct after judgment is entered in this case.

III.
CONCLUSION

Based upon the foregoing, Valiant's Closing Argument, and the testimony and evidence submitted at trial, Valiant requests an order declaring that it is entitled to final judgment in accordance with this Court's prior Summary Judgment Orders and awarding Valiant: (a) damages against POBD pursuant to the 2007 RE Loans note in the amount $3,409,794.61, plus interest thereon at a rate of $1,417.94 *per diem* from April 15, 2016 until judgment has been entered, the entirety of which is secured by the 2007 RE Loans Mortgage; (b) damages against POBD pursuant to the Pensco note in the amount $9,590,474.85, plus interest thereon at a rate of $4,197.74 *per diem* from April 15, 2016 until judgment has been entered, the entirety of which is secured by the Pensco Mortgage, and (c) damages against POBD pursuant to the MF08 note in the amount $7,410,885.87, plus interest thereon at a rate of $3,244.28 *per diem* from April 15, 2016 until judgment has been entered, the entirety of which is secured by the MF08 Mortgage.

DATED this 26th day of May 2016.

McCONNELL WAGNER SYKES & STACEY PLLC

BY: _____
Richard L. Stacey
Attorneys For Valiant Idaho, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of May 2016, 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* U.S. Mail to:

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

Richard L. Stacey