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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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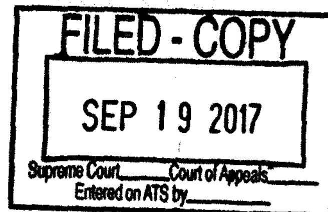

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DRAFT

1 Q. Neither of those loans were owed to mortgage
2 fund 08 were they? Prior to this closing?
3 A. I don't understand your question.
4 Q. Prior to this closing, 0099 was just owed to
5 RE Loans?
6 A. Correct.
7 Q. 106 was just owed to Pensco?
8 A. Well, 106 had not been created yet. It
9 would be in this escrow.
10 Q. Yeah.
11 A. 106, so -- and it was funded by RE Loan --
12 excuse me, it was funded by Pensco.
13 Q. Yes. So neither line that you're reading
14 has the word RE Loans or Pensco, correct?
15 A. Correct.
16 Q. Both lines were called MF '08?
17 A. Correct. In this document.
18 Q. In this document?
19 A. Yes.
20 Q. And that's because MF '08, $21,980,000 loan
21 both included paying off 099 and 016, is it not true?
22 A. That's not true.
23 Q. Well, what are the lesser included loans,
24 then?
25 A. What are the what?

Ex. A

DRAFT

1 Q. Lesser included loans. You called it the
2 loan subject to, which were included in the gross
3 amount?
4 A. Oh. They're the same amounts, but they are
5 RE Loans -- this is a misrepresentation of what
6 actually happened. It was a document that I've never
7 seen, or I would have corrected. It was sent to, I
8 believe, to the borrower. But the amount in the escrow
9 will -- well, I believe, will show that MF '08 never
10 funded sufficient funds to pay off these two loans, as
11 is indicated here.
12 Q. No. They breached the all-inclusive note
13 agreement, did they not?
14 A. Well. Wait, wait? Wait. How does it
15 breach the all-inclusive deed of trust?
16 MS. WEEKS: Your Honor, I would object to
17 questions being posed by the witness.
18 A. And the answer is no.
19 Q. I understood it. But let's look at that
20 borrower statement again. That you sent to a closing
21 agent.
22 A. The borrower's statement.
23 Q. For funding it said?
24 A. Oh, yeah. Okay.
25 Q. Yeah. Yeah.

DRAFT

1 A. What number was that?

2 THE COURT: Was that 19?

3 Q. Not 14, I don't believe.

4 A. 19. 19.

5 Q. On 19, on page 1311, in the boxes, the
6 principle amount of the first included loan, loan
7 number P009, is subtracted from mortgage fund loan.
8 Gross amount, is it not?

9 A. No. If you look at -- if you look at the
10 notation in that same box, it states the parties
11 acknowledge that concurrently with the closing of this
12 loan, Mortgage fund '08, will pay the holder of the
13 first included note outside of escrow, the sum of
14 $1,150,000, which, I mean, everybody I think
15 acknowledges.

16 Q. Yes.

17 A. Thus reducing the principle balance of the
18 first included note from 7,322,328.18 to 6,172,325.18.

19 Q. Okay.

20 A. What this states is that the RE Loans loan,
21 which was P099 is still in place, but has been reduced
22 by the principle amount of $1,150,000, which was paid
23 outside of escrow from MF 08 to RE Loans.

24 Q. Okay. I'm not disputing, with you, anything
25 about the 1,150,000. I do agree it was paid out

1 outside of escrow. We have a check for it. But once
2 it's paid, it just reduces the first included note,
3 loan number 099 down to a figure of 6,172,325.18?
4 A. Correct.
5 Q. And the line says -- again, the principle
6 amount of the first included note, loan number 0099, as
7 being 6,172,325.18?
8 A. Correct.
9 Q. And it's deducted from 21,980,000.
10 A. Correct.
11 Q. Because it is the first included note in the
12 21,980,000?
13 A. It's not included in the note. It is an
14 all- inclusive deed of trust, takes into account
15 underlying or priority loans, in it's total amount,
16 that is offered. The amount that actually is -- what
17 you do in an all-inclusive deed of trust is it would,
18 as an example, if it was 10 million -- if you have an
19 all- inclusive deed of trust of $10 million where
20 there's an existing first of, let's say, 7 million
21 dollars, the actual loan is only $3 million by the
22 lender. The first remains, and so the all-inclusive
23 deed of trust, although it reflects that it's $10
24 million, what it really is reflecting is what the total
25 amount of debt, including the debt of the -- that

DRAFT

1 particular line, with the prior debt, is how it's
2 recognized.
3 So what it is, is it indicates if it's an
4 all-inclusive deed of trust, that there are prior debts
5 in place, and that the total amount of the debts, when
6 added up, in this particular case the first and second,
7 and then how much money is going to be funded by the
8 third, will all add up to, in this particular case,
9 $21,980,000, but then you also have to take into
10 consideration that 12,257,174.82 would be funded into
11 the future.
12 Q. Instead of using a hypothetical, let's use
13 the figures of this case?
14 A. Okay.
15 Q. The MF '02?
16 A. Okay. I can explain it.
17 Q. Yeah, thank you.
18 A. The loan, as it states, or how this is
19 interpreted by the borrower's authorization and
20 agreement, is that MF '08 is creating a loan -- is
21 obvious creating an all-inclusive deed of trust with an
22 all-inclusive note. What that means is that the note
23 also includes the existing debt, without paying it off.
24 So you take the $21,980,000 gross loan. You then take
25 into consideration that in this particular instance,

DRAFT

1 the first note R099, where RE Loans is the beneficiary,
2 still has a remaining balance at the closing, of
3 6,172,325.18. What it also states is that, prior to
4 closing, the actual amount of the loan was
5 7,322,325.18. But in the escrow it has instructions
6 showing that $1,150,000 was going to be transferred
7 from MF '08 to RE Loans, in which they are literally
8 paying down that note, the RE Loans note, for
9 $1,150,000. What this next shows is that a prior,
10 prioritized note of $2.7 million is going to be placed
11 contemporaneously at the time of closing, and that's
12 the Pensco note.
13 Q. Could I stop you with that and just ask you
14 to do the first set of math. If the gross amount of MF
15 '08 loan is 20,980,000?
16 A. Yes.
17 Q. And deduct what it shows as a minus in this
18 box, deduct 6,172,325.18, what do you get?
19 MS. WEEKS: Your Honor, I object. These
20 questions have been asked and answered.
21 THE COURT: Mr. Finney, I've run the math
22 and I think we're wasting time. I mean, if you deduct
23 all those amounts you get down to the bottom line. You
24 know, the math is there, so I think we're kind of going
25 in circles.

DRAFT

1 Q. What do you get?
2 A. Well, I'll put it a different way. If you
3 add the 6 million --
4 Q. Could you, please, do it just like the boxes
5 say?
6 A. Okay.
7 Q. Okay.
8 A. All right. So you take the 21,000,980,
9 subtract 6,172,325. I don't know how to use this
10 calculator. This is all the answer. Leaves
11 15,807,675. And you subtract the 2.7 million, which
12 leaves 18,507,675.
13 Q. No. And you added it -- subtracted, please,
14 subtract it?
15 A. Okay.
16 THE COURT: We're going to take a break.
17 And maybe you can -- Mr. Finney, maybe you could -- if
18 there's a math error, we could figure that out, but I'm
19 not -- we're not going to sit here given the amount of
20 time and just do -- and run math, unless we're getting
21 to a point. Because as I said we ran all the figures
22 yesterday and they add up. So I just don't know where
23 we're going. Maybe you could talk to Mr. Ng during the
24 break and if there's.
25 MR. FINNEY: That would be fine.

DRAFT

1 THE COURT: There's a mistake somewhere.
2 Okay. We'll take 15 minutes. 10:16 AM Friday, January
3 29, 2016.
4 (BREAK IN THE PROCEEDINGS FROM A.M./P.M. TO
5 A.M./P.M.)
6 THE COURT: Back on the record. Mr. --
7 Mr. Finney.
8 Q. I think Mr. Ng and I have gone over this and
9 agree now. But we'll take it step by step. So look
10 again at Exhibit 19.
11 A. Yes.
12 Q. Okay. The first included note in the
13 Mortage Fund '08 note is the RE Loan amount?
14 A. P099.
15 Q. Yes. And the second included amount is
16 whose note?
17 A. Pensco.
18 Q. In what amount?
19 A. 2.7 mill.
20 Q. Go over to Exhibit 17.
21 A. 17, yes.
22 Q. Now that is loan number what?
23 A. P0107, the MF '08 note.
24 Q. And it shows the amount at the top of that?
25 A. 21,000,980.

DRAFT

1 Q. Okay. Look at the bottom of the first page
2 just before the beginning you all inclusive provisions.
3 That's your?
4 A. Oh, yes, yes.
5 Q. Okay. Read read that for us?
6 A. It states: That principle amount of this
7 note includes the current unpaid principle balances of
8 the following described promissory notes which are
9 secured by the following described mortgages.
10 Q. Okay. Just tell us what the 2 mortgage are?
11 A. If you go to the VAL 001073, it states that
12 the first included note dated March 6, 2007, to R.E.
13 Loans will have a remaining balance at the time of
14 closing of 6,172,325.18. And it also states that there
15 is a second included note that would close -- that
16 actually close contemporaneously, but is in a priority
17 position of 2.7 million to Pensco.
18 Q. Okay. Go back to the first page then 1072,
19 the thing that I had your to read?
20 A. Yes.
21 Q. We're going to put the actual numbers in
22 there, so when it reads a principle amount of this
23 note, what do I put in there?
24 A. 21,000,980.
25 Q. Includes unpaid balances of included notes?

DRAFT

1 A. Yes.
2 Q. And the 2 are?
3 A. 6,172,325.18 and 2.7 million.
4 Q. Okay. If you add those 2 together 6.1 and
5 2.7, they're about 8 million?
6 A. 8.8.
7 Q. 8.8, that's right. So of the 21,980,000
8 unpaid principle, 8,800 --
9 A. Million.
10 Q. 8,800,000 are the 2 loans 106 and RE 99?
11 A. Yes.
12 Q. So the let's go to the next page, it's again
13 1073. At the bottom past the 2 boxes, there are just 2
14 sentences. Would you read those?
15 A. Yes.
16 Q. Go ahead?
17 A. The last 2 sentences, is that what you
18 wanted me to read?
19 Q. Yes. After the boxes?
20 A. Lender, by accepting this note, agrees that
21 so long as there is no uncured default under the
22 provision of this note, or any mortgage securing this
23 note, one, lender shall pay against installments of
24 principle and interest as they become due on the
25 included notes.

1 Q. Okay. If we substitute for the word lender,
2 who -- would you identify the entity that's a lender?
3 A. MF '08.
4 Q. Okay. So does does it not say learned MF
5 '08, under paragraph 1: Shall pay the installments due
6 on the 2 included the notes?
7 A. In -- that's what it says, yes.
8 Q. Okay. Thank you. So if the lender pays the
9 2 included notes, wouldn't we presume Pend Oreille
10 Bonner would not pay either of them. They wouldn't?
11 You said yesterday in your testimony that this all
12 inclusive concept is so Pend Oreille Bonner wouldn't
13 pay the a same amount twice, remember that?
14 A. Shaking head.
15 Q. Okay.
16 A. No, I didn't say -- I don't recall saying
17 that earlier.
18 Q. Okay. But this says MF '08 shall pay
19 installments due on 099 and the Pensco note, RE note.
20 A. Yes, it says that in this document, yes.
21 Q. Okay. Now has MF '08 paid those 2 notes?
22 A. No.
23 Q. Well, they're in breach of their own
24 document, aren't they?
25 MR. STACEY: Objection. Calls for a legal

DRAFT

1 conclusion.
2 THE COURT: Sustained.
3 Q. Look at Exhibit 18 and tell us what that is.
4 A. That is the all exclusive deed of trust --
5 it's all inclusive mortgage, excuse me.
6 Q. And I agree we could use either term, deed
7 of trust or mortgage. And we know what it means in
8 this setting, mortgage, correct?
9 A. Yes, yes.
10 Q. Okay. Now in one, two, three, four, five
11 lines down, what does it say? First page.
12 A. Mortgagor has contracted to borrow from
13 mortgagee the principle sum of 21,000,980.
14 Q. Is that -- you can end at that. Excuse me.
15 A. Okay.
16 Q. Is -- is that true? Mortgager has
17 contracted to borrow from mortgagee?
18 A. Correct.
19 Q. 21,980,000?
20 A. Yes.
21 Q. Is is that true?
22 A. Yes. Well, subject to the agreement, yes,
23 but they -- they have the right -- or they have subject
24 to the terms of the loan, they could borrow up to
25 21,980,000.

DRAFT

1 Q. But they haven't contracted to borrow that
2 much because the unpaid amount under the loan agreement
3 is unfunded solely at the discretion of MF '08?
4 MR. STACEY: Objection. Cause for a legal
5 conclusion again. He's asking for what they contracted
6 for.
7 THE COURT: I'll overrule.
8 THE WITNESS: So --
9 THE COURT: Answer stands. You already
10 answered.
11 THE WITNESS: Okay.
12 Q. Now, in that same exhibit, you start at the
13 few pages over, 01043, middle of the page. What is
14 that entitled?
15 A. Beginning of all inclusive provisions.
16 Q. Okay. And those included notes, first note
17 and second note, are the ones we've been talking about,
18 009 and the Pensco loan?
19 A. Yes.
20 Q. Okay. Under Paragraph C, second paragraph,
21 what does that say?
22 A. C the cost of foreclosure hereunder, plus
23 attorney fees and costs incurred by mortgage gee and
24 enforcing this mortgage, or the note secured by hereby
25 is permitted by law.

DRAFT

1 Q. Yeah. And the next paragraph, really, is
2 what I'm looking for.
3 A. At such time as the note secured hereby
4 becomes all due and payable, the amount of principle
5 and interest then payable to mortgagee, thereafter
6 should be reduced by the then unpaid balances of
7 principle and interest due to the included notes.
8 Q. Okay. Doesn't that say that the amount due
9 in MF '08, is the included --
10 MR. STACEY: Objection, the document speaks
11 for itself.
12 THE COURT: Sustained.
13 Q. Just for the further clarification on the
14 next page, 0105, if you look at it. And it's 2 more
15 provisions that this mortgage principle include the
16 included notes; is that true?
17 A. Yes.
18 Q. Okay. You mention that insurance money
19 proceeds were paid, correct?
20 A. At the time of the -- yes.
21 Q. Sure.
22 A. For the recompense for the insurance for the
23 burning down of the clubhouse.
24 Q. Okay. And on your ledger you still show
25 that the principles amount to Pensco is 2,700,000 do

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2016 AUG 22 PM 3:41

CLERK DISTRICT COURT
SR
DEPUTY

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

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

Plaintiff,

v.

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

Defendants.

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

CASE NO. CV-2009-0001810

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

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

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

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

I. INTRODUCTION

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

The second part is referred to herein as the "Valiant Foreclosure." On August 19, 2014, Valiant amended its Answer in the Genesis Suit to include cross-claims and a Third Party Complaint to establish the amounts Pend Oreille Bonner Development, LLC ("POBD") owed to the Idaho Club Lenders and to foreclose the 2007 RE Loans Mortgage, the Pensco Mortgage, and MF08 Mortgage (collectively, "Valiant Mortgages") to recover these amounts. After multiple summary judgments, several motions to reconsider, and a bifurcated four (4) day bench trial, this Court determined that the Valiant Mortgages are valid first, second and/or third priority liens recorded against the Idaho Club Property; it awarded Valiant a Judgment in the amount of $21,485,212.26[1] against POBD; and it awarded Valiant a Decree of Foreclosure entitling Valiant to sell the Idaho Club Property to recover the amounts Valiant is owed pursuant to the Judgment.

II. DISCUSSION

A. Valiant is the Prevailing Party in This Case.

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

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

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

Valiant prevailed on all of its claims, and in defending itself against all of the cross-claims and affirmative defenses raised by JV, NIR and VP in this case. The Valiant Mortgages were adjudicated to be first, second and/or third priority liens recorded against the Idaho Club Property. Valiant obtained a Judgment in the amount of $21,485,212.26[2] against POBD and a Decree of Foreclosure entitling it to sell the Idaho Club Property to pay the Judgment. The claims and affirmative defenses of JV, NIR and VP were rejected. Accordingly, this Court, in the exercise of its discretion, finds that Valiant is the prevailing party in this action.

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

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[1] plus post-judgment interest at the rate of 5.625% per annum.
[2] *ibid.*

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

1. Basis for the Award

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Amount of the Award

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

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

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

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

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

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

*****

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

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

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

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

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

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

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

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

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

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

> **Unfortunately, the standard articulated in *Nampa Meridian* can lead to the result that a party who makes claims or defenses that are clearly frivolous, unreasonable, or without foundation may avoid the consequences of that conduct and cast the burden of attorney fees on the other party, even if the overall view of the case establishes the unreasonableness of the conduct requiring the lawsuit.** Arguably, a single, triable issue of fact may excuse a party from the aggregate of misconduct that necessitates or dominates the conduct of the lawsuit. **This Court does back away from and clarify the overly strict application of Idaho Code section 12–121 set forth in *Nampa Meridian.* Apportionment of attorney fees is appropriate for those elements of the case that were frivolous, unreasonable, and without foundation.** Apportionment of costs and fees is common even for district courts, and this step back from the language of *Nampa Meridian* is consistent with the general principles of apportioning costs and fees.
>
> The record in this case is clear that litigation to obtain possession of the aircraft should never have been necessary. **The litigation was necessitated by factual claims that were indefensible. The Plaintiff asserted some legal theories it could not prove. Those assertions were in response to factual claims by the Defendants that were unsupportable and which were known by the Defendants to be unsupportable. The Defendants had no legitimate triable claims of fact on the question that necessitated the initiation of this action.** The district court did not abuse its discretion in awarding the attorney fees for the claims of the Defendants necessitating this lawsuit that were frivolous,

unreasonable, and without adequate foundation.

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

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

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

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

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

> **(d) Costs.**
> (1) *In General; Items Allowed.*
> (A) Parties Entitled to Costs. Except when otherwise limited by these rules, **costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.**
> ...
> (C) Costs as a Matter of Right. When costs are awarded to a party, that party is entitled to the following costs, actually paid, as a matter of right: ...

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

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

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

COSTS AS A MATTER OF RIGHT			
a.	**Court Filing Fees** **[*see Stacey Dec.*, Exs. A-2, G-2]**	**$**	**86.00**
b.	**Witness fees ($20.00 per day; $.30 mileage) actually paid for each day the following witnesses testified at deposition or at trial** **Casey Linscott Trial - $20.30** **Barney Ng Trial - $20.00** **[*see Stacey Dec.*, Ex. G-5]**	**$**	**20.30**
c.	**Expenses of certified copies of documents admitted as evidence in hearings or at trial [*see Stacey Dec.*, Ex G-5]**	**$**	**158.50**
d.	**Costs of preparing models, maps, pictures, photographs, or other exhibits not to exceed $500.00 for each party [*see Stacey Dec.*, Ex G-5/Streamline]**	**$**	**500.00**
e.	**Charges for reporting and transcribing all depositions and charges for one copy of every deposition taken** **[*see Stacey Dec.*, Ex D-2, Ex G-6]**	**$**	**8,250.19**
TOTAL COSTS AS A MATTER OF RIGHT		**$**	**9.014.99**

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

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

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

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

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

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

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

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

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

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

*****

Based on the foregoing, Valiant is an awarded costs against JV, VP and NIR in the total amount of ($9.014.99 + $32,464.70) = $41,479.69.

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

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

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

III. CONCLUSION AND ORDER

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

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

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

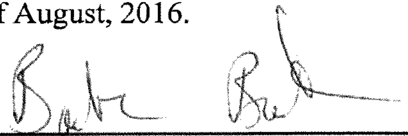
2. Valiant is awarded costs against NIR in the amount of $10,369.93

3. Valiant is awarded costs against JV in the amount of $15,554.88

4. Valiant is awarded costs against VP in the amount of $15,554.88

IT IS SO ORDERED.

DATED this 22 day of August, 2016.



Barbara Buchanan
District Judge

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

CERTIFICATE OF SERVICE

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

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Deputy Clerk

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2016 AUG 22 PM 3:41

CLERK DISTRICT COURT
SB
DEPUTY

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

GENESIS GOLF BUILDERS, INC., formerly known as NATIONAL GOLF BUILDERS, INC., a Nevada corporation,	**CASE NO. CV-2009-0001810**
Plaintiff,	**JUDGMENT re: COSTS AND ATTORNEYS' FEES**
v.	
PEND OREILLE BONNER DEVELOPMENT, LLC, a Nevada limited liability company, *et al.*,	
Defendants.	
AND RELATED COUNTER, CROSS AND THIRD PARTY ACTIONS PREVIOUSLY FILED HEREIN	

JUDGMENT IS ENTERED AS FOLLOWS:

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

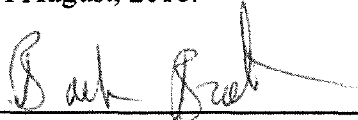
2. Valiant Idaho, LLC is awarded costs against North Idaho Resorts, LLC in the amount of **$10,369.93**.

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

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

IT IS SO ORDERED.

DATED this 22 day of August, 2016.



Barbara Buchanan
District Judge

CERTIFICATE OF SERVICE

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

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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-Orton Engineering Company, an Idaho corporation; PUCCI	)	Case No. CV-2009-1810 JV L.L.C.'S RESPONSE, OBJECTION AND OPPOSITION TO PLANITIFF'S MOTION FOR SANCTIONS

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, Defendant JV L.L.C., (hereinafter JV), by and through its attorney, GARY A. FINNEY of Finney Finney & Finney, P.A., and makes this Response, Objection and Opposition to Plaintiff's Motion for Sanctions, as follows:

Introductory

Plaintiff claims that JV's Motion to Alter, Amend and Reconsider filed August 2, 2016 is without basis in law or fact and is frivolous, for which Plaintiff seeks "sanctions". An examination of the facts and law shows that JV's Motion is well founded on law and the facts of this action.

First is that the Court granted a partial summary judgment

to Plaintiff, but reserved for trial the issue of whether or not the 2007 Loans Note (Loan No. P0099) and the Pensco Note (Loan No. PO 106) have been satisfied. The partial summary judgment was not certified as a final judgment. JV's Motion, grounds, facts, and the written exhibits of the Plaintiff show that the 2007 RE Note No. P0099 and the Pensco Note were satisfied. These issues will be further discussed subsequently, but first is the Idaho law on summary judgment issues.

SUMMARY JUDGMENT IS INTERLOCUTORY AND IS NOT A FINAL JUDGMENT

A summary judgment, partial or otherwise, is only interlocutory, it is not a final judgment. Interlocutory is defined in Black's Law Dictionary, Special Deluxe Fifth Edition as:

"Provisional, interim, temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy."

The meaning of interlocutory is set forth in Idaho case law. In *Baker v. Pendry,* 98 Idaho 745, 572 P.2d 179 (1977), the Idaho Supreme Court stated:

"Therefore, under I.R.C.P. 54(b), it is clear that in multiple party or claim situations before a final decree is entered, the court is free to revise its work:

"In the absence of such determination and direction, any

order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment, adjudicating all the claims." I.R.C.P. 54(b)."

Baker v. Pendry,
98 Idaho 745 at 748 (1977)

The Baker case is cited in *Galindo v. Hubbard*, 106 Idaho 302 (app), 678 P.2d 94 (1984) for the proposition that, a partial summary judgment disposing less than all claims of the parties, not certified as a final under Rule 54(b) was:

"Therefore, it was interlocutory and arguably subject to later revision under that rule."

Galindo v. Hubbard
106 Idaho 302 (app) at 305 (1984)

RECONSIDERATION OF A GRANT OF SUMMARY JUDGMENT

The legal standards on reconsidering a grant of summary judgment is set forth in *Nield v. Pocatello Heath Services*, 156 Idaho 802, 332 P.3d 714 (2014) was not ruled upon in the majority opinion, but it is set forth in the dissent of Justice Eismann. Justice Horton, also dissenting, stated that he entirely concurred with the legal reasoning on Justice Eismann's dissent. The standards for a motion to reconsider are stated as:

"***When considering a motion for reconsideration, the trial court is to consider any new or additional facts that bear on the corrections of the order being reconsidered. *Coeur d'Alene Mining Co. v. First National Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact." *J.I. Case Co. V. McDonald*, 76 Idaho 223, 229, 280 P.2d. 1070, 1073(1955).

In the instant action, JV had filed a motion to reconsider the Court's grant of summary judgment (partial), upon which JV previously prevailed. The Court reserved for trial as the issues(s) being whether or not RE Loans (2007) and RE Loan No. P0099 and Pensco (2008) Loan No. P0106 had been satisfied. The trial court held first to this being the only issue and denied any new additions, facts, bearing on the correction of that order.

<u>The Interlocutory Partial Summary Judgment</u>

The Court entered a partial summary judgment Order (October 30, 2015) that the only issue remaining for the Court trial is whether the 2007 RE Loans Note (Loan No. P0099) and the Pensco Note (Loan No. P0106) have been satisfied." Then on December 29, 2015 the Court entered an Order precluding the Defendants from presenting any evidence at trial on any issue other than

whether the 2007 RE Loan note and for the Pensco Note had been satisfied.

JV's Motion to Alter, Amend and Reconsider seeks reconsideration of the Court's Memorandum, Opinion, and Judgment that the 2007 RE Note and the 2008 Pensco Note had not been satisfied (paid). The Court based its decisions on the testimony of Charles Reeves that they had not been satisfied (paid) and the testimony of Barney Ng that they had not been paid. In summary, the Court has the authority to reconsider and change its prior interlocutory summary judgment (partial).

JV's motion sought reconsideration based on the following:

Charles Reeves

Mr. Reeves had been deposed in the case of Union Bank, N.A. v. POBD et al, Bonner County Case No. CV-2011-135. In that deposition testimony, Mr. Reeves stated that the 2007 RE Loan and the 2008 Pensco Loan had been satisfied (paid). He based his testimony on the 2008 Loan Settlement statement that was Plaintiff's Trial Exhibit No. 34, First American Title Company, Settlement Statement, for Mortgage Fund 08. This document was prepared by Casey Linscott, of First American, based on instructions from MF08. The Exhibit was furnished by Casey Linscott to Bar-K, the mortgage broker from MF08. This Exhibit 35 was signed by Charles N. Reeves for POBD. This Exhibit 35, in writing, states,

"810. Payoff First Note - Loan NO. P0099 - Mortgage Fund 08 o/o Bar K, Inc. $6,172,325.18

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

These two (2) pay-offs were deducted from the loan funds of MF08 plus closing costs, resulting in only $12,257,174.82 being unfunded, potentially available to borrow under the terms of the loan Agreement. The Loan Agreement (Loan No. P0107) is Plaintiff's Trial Exhibit 21. The Exhibit 21, first page, Agreement, paragraph 1, states that at the time the loan closes, Lender shall deposit into escrow or pay directly, the amounts called for by the Borrower's Funding Authorization and Agreement.

The Borrower's Funding Authorization and Agreement are Plaintiff's Exhibit 19, the instructions to First American Title for the closing and settlement of Loans P0106 and P0107, which shows the gross amount of the MF08 Loan as $21,980,000.00 from which a deduction is made outside of closing (pay directly) for, "Principal amount of First Included Note, Loan No. P0099 $6,172,325.18." The NOTE: says MF08 will pay the holder of the First Included Note (i.e. RE 2007 Loan No P0099) outside of escrow (pay directly) the sum of $1,150,000.00, which reduced the unpaid balance of the First Included Note to $6,172,325.18.

It is clear from the written evidence of Plaintiff itself

that MF08 paid RE Loan NO. P0099, in cash outside of closing (direct) including another $1,150,000.00 at the time of closing. MF08 did pay off to RE Loan NO. P0099, and MF08 deducted from MF08's gross loan, the amount of the payoff of $6,172,325.18.

The same happened with the Principal amount of Second Included Note - Loan No. P0106 of $2,700,000.00 which was also deducted from MF08's Gross Loan.

MF08 2008 Loan Documents are "All-Inclusive"

The MF08 2008 Loan No. P0107 documents are Plaintiff's Exhibit 17 and 18, the All-Inclusive Note Secured By Mortgage ($21,980,000.00) and the All-Inclusive Mortgage. These documents have specific written provisions about the "Included Notes". In Plaintiff's Exhibit 17, page 1 of 7, it clearly states that "The principal amount of this Note includes the current unpaid principal balances of the following described promissory notes ("INCLUDED NOTES") which are secured by the following described mortgages:

Then in Exhibit 17, page 2 of 7, are the FIRST INCLUDED NOTE, which describes the 2007 RE Loan (P0099) principal balance of $6,172,325.18 and the SECOND INCLUDED NOTE as the 2008 Pensco Loan (P0106) principal balance of $2,700,000.00. At the bottom of page 2 of 7 it clearly states:

"1. Lender shall pay the installment of principal and interest as they become due on the INCLUDED NOTES, and"

The Lender is MF08, who shall pay the INCLUDED NOTES. At the third paragraph page 3 of 7 of Plaintiff's Exhibit it states…

"Should Lender fail to pay any installment due under the INCLUDED NOTES, as provided herein, but provided there is no uncured default under the provisions of the Note or any mortgage securing this Note, the undersigned may make such payments due."

Valiant's sole argument is that "it was mathematically impossible" for the MF08 closing (Aug 2008) to have paid off the RE Loans note and the Pensco note.

First, the issue of VP and JV is not that the RE Loans (2007 Loan No. P0099) was "paid-off" in cash through First American at the 2008 Loan closing. The issue was whether the 2008 MF08 Loan "satisfied" the 2007 RE Loan No. P0099 and the 2008 Pensco Loan No. P0106.

The trial exhibits of Valiant show that the RE Loan and the Pensco Loan were "satisfied" by the MF08 Loan and it was demonstrated "mathematically". First, the MF08 Loan note/mortgage is for $21,980,000.00. All of the MF08 Loan closing statements, Settlement Statements, mathematically <u>deducted</u> the pay-off amount for the RE Loan and the Pensco Loan. Plaintiff's Exhibit 13 shows:

New Loan .21,980,000.00

Pay off First Note Loan P0099 – MF08 . . . . 6,172,325.18

Pay off Second Note Loan P0106 - MF08 . . . .2,700,000.00

P0099 is the 2007 RE Loan and P0106 is the 2008 Pensco Loan, these together with the other loan closing costs and disbursements paid were all mathematically deducted from the face amount of $21,980,000.00 which left only "Retained Loan Funds - MF08 LLC o/o Bar K, Inc.. . . . .$12,257,174.82.

Neither JV or VP argued that the MF08 loan produced cash to First American Title to pay-off $6,172,325.18 and $2,700,000.00; however these amounts were deducted from MF08's New Loan of $21,980,000.00 so as to "satisfy" both loans. MF08's Loan Agreement, Plaintiff's Exhibit 21 verifies in paragraph 1. That "$12,257,174.82 will be unfunded". If $12,257,174.82 will be "unfunded" it is clear that the remainder of the Loan of $21,980.00 - was funded. (Para B, Plaintiff's Exhibit 21). The First American Title Settlement Statements, Plaintiff's Exhibit 35, signed for POBD by Charles Reeves and also sent by Casey Linscott (of FATCO) to the Lender MF08 o/o Bar K (Barney Ng) includes at Val001385:

Line 808 "Retained Loan Funds". $12,257,174.82

Line 810 Payoff Loan P0099. . . . .$ 6,172,325.18

Line 811 Payoff Loan P0106. . . . .$ 2,700,000.00

When JV principals, James Berry and William Berry went to First American to sign documents they were given and signed Defendant JV's Exhibit I, which clearly stated in writing on

7/31/2008 that deductions (satisfactions) were made for "Payoff First Loan P0099 - MF08 o/o Bar K $6,473,345.18" and for "Payoff Second Loan P0106 - MF08 o/o Bar K $2,700,000.00"

Together with the loan costs and other disbursements paid the mathematical remaining Retained Loan Funds - Mortgage Fund 08 o/o Bar K stated $12,480,000.00.

Given to JV clearly, in writing, was that P0099 and P0106 in the dollar amounts stated were "payoff(s)" by MF08 and were deducted from the face amount of MF08's loan leaving stated amount of Retained Loan Funds - MF08.

Another Exhibit of Valiant, Plaintiff's Exhibit 19, also mathematically demonstrates the same payoff satisfaction, as follows:

Gross Loan Amount by Mortgage Fund 08 . . . $21,980,000.00

Principal Amount of First Included Note

- Loan No. P0099. . . . .$ 6,172,325.18

Principal Amount of Second Included Note

- Loan No. P0106. . . . .$ 2,700,000.00

(Plaintiff's 19, Page 1 of 3). This Plaintiff's Exhibit 19, page 1 of 3 under Loan No. P0099 is a "Note" that says that "MF08...outside of escrow" concurrently with closing this loan will pay the holder of the First Included Note the sum of $1,150,000.00 thus reducing the First Included Note from $7,322,325.18 to $6,172,325.18. This payment by MF08 to the RE

Loan No., P0099 occurred and is shown on Plaintiff's Exhibit 65A, at Reeves S001134, for the date of 08/06/08 a PAYDOWN of ($1,150,000.00). Plaintiff's Exhibit 65A, at Reeves S001134 shows at the top of the page that the last "DRAW" on the RE Loan No. P0099 was Draw J of $59,954.44 on 09/21/2007. This last draw was the final draw on the 2007 Loan P0099, totaling the draws to $15,100,000.00. This is verified by Plaintiff's Exhibit 3, the P0099 Loan Agreement, paragraph 1, page 1, that the unfunded dollars for POBD to draw was only $15,100,000.00. This is the 2007 RE Loan that JV "subordinated to" and it was the total of the pay downs on the 10 Draws A - J of Plaintiff's Exhibit 65A. In other words, all of the loan from RE to which JV subordinated was $15,100,000.00, and it was all paid by POBD.

The MF08 Loan Note and Mortgage were "All-Inclusive". See Plaintiff's Exhibit 17 and Exhibit 18. Both of these Exhibits of Valiant repeat that the face amount of the MF08 note/mortgage <u>include</u> the principal amount of both the FIRST RE Loan ($6,172,325.18) and the SECOND included Note to Pensco of $2,700.000.00. MF08, as "LENDER shall pay the installments of principal and interest as they become due on the INCLUDED NOTES, and" (page 2 of 7, last line) the Note goes on to say, on

Para 2 (page 3 of 7) that,

2. Lender shall...record a release of the mortgage securing the INCLUDED Notes. Should Lender fail to pay any

installments due under the INCLUDED Notes, the undersigned (POBD) may make such payments.

The undersigned shall perform all of the obligations secured by the mortgage securing the INCLUDED Notes, other than the payments to be made by Lender. (MF08 is the LENDER). The "***Lender prefers to be secured by a first priority mortgage." So, the Lender shall have the right to pay off the INCLUDED Notes. The <u>Lender</u> is MF08.

In the All-Inclusive Mortgage, Plaintiff's Exhibit 18, starting on page 4 of 31, at the beginning of All-Inclusive Provision, it states "...the current unpaid principal balance" *** "of the INCLUDED Notes are included in this Note. (i.e. the MF08 Note). On page 5 of 31 the provision (next to last paragraph) it states that the Note (MF08), when it becomes due, the reduced by the then unpaid balances due on INCLUDED NOTES.

Finally, on page 6 of 31 of Plaintiff's Exhibit 18 in the next to last paragraph it clearly states:

"Mortgagor (i.e. POBD) shall perform the obligation securing the INCLUDED Notes <u>other than the payments to be made</u> (emphasis added) by Mortgagee". *** MF08 is the Mortgagee.

It is in writing in multiple places that the MF08 Note/Mortgage includes the INCLUDED Notes and MF08 pays the INCLUDED Notes.

On the issue of an All-Inclusive Mortgage, Idaho case law

has been previously cited to the Court that the holder (Lender/Payee/Mortgagee) pays the Included Note(s). In other words, MF08 pays the 2 INCLUDED Notes and includes those amounts to its disbursements of its "All-Inclusive Note/Mortgage; however, MF08 made no further disbursements of the retained funds.

JV'S SUMMARY AS TO MF08 ALL-INCLUSIVE NOTE/MORTGAGE.

JV subordinated to MF08's Loan No. P0107 and JV has not claimed otherwise in this action. At the oral argument on Plaintiff's request for attorney fees and costs, Valiant's attorney stated that JV signed subordination agreements on RE, Pensco, and MF08 but JV defended against all of its subordinations. As JV's counsel stated at oral argument, JV defended only as to RE's 2007 Loan No. P0099 because it was paid-off, i.e. satisfied" and because if anything owed under the First Included Note (RE) and the Second Inclusive Note (Pensco P0106) those sums were included in the MF08 Note/Mortgage. The MF08 Note/Mortgage verified that it was to be the "first priority lien".

The result of the All-Inclusive 2008 MF08 Note/Mortgage is that all sums owed under the RE 2007 P0099 loan and the 2008 Pensco Loan No. P0106 were "included" in the debt (Note/Mortgage) to MF08 P0107, and were secured by MF08's All-Inclusive Mortgage in first priority as to the real estate in

MF-8's Mortgage because JV "SUBORDINATED" to the MF08 All-Inclusive Loan. However, it has already been submitted by Valiant based on its expert's opinion that 31 Parcels (some Lots) were NOT included (described) in the MF08 Mortgage. Therefore, JV has the first priority mortgage on all of Moose Mountain's original real estate description in JV's Mortgage, recorded October 24, 1995, Instrument No. 474746? (Defendant JV's Exhibit B) LESS the platted Lots sold to Third Parties and partial releases by JV. By definition, any real estate of POBD still encumbered by any Mortgage (JV, RE, Pensco, MF08) has not been sold by PODB to Third Parties and has not been released by JV. In conclusion, JV should have first priority mortgage on all 31 parcels of real estate not in MF08's Mortgage. The foregoing is partially in conformity with a letter Charles Reeve's delivered to JV (James Berry) dated September 29, 2009, which is Defendant JV's Exhibit CC. This date of September 29, 2009 is long after MF08's 2008 All-Inclusive Mortgage. The Exhibit EE letter, last of last paragraph on 1st page says that under both loans you (JV) would retain your same priority position (i.e. 2nd on all our property)…

Tax Deed to Bonner County and Redemption by JV and RE

JV does not agree that RE had and made a valid redemption from Bonner County's tax deed, as the RE assignment was signed by Power of Attorney which was not a recorded document; however,

the Court has ruled RE's redemption was valid. JV redeemed part of the real estate first and then RE redeemed the remainder. It should be clear to the Court that Bonner County's Tax Deed cut off all mortgage holders, subject only to the statutory right of redemption. The result of the tax deed to Bonner County was that all mortgage holders, including both Pensco and FM08 had their mortgages eliminated, neither had any security mortgage to foreclose upon. JV actually holds the first priority mortgage on all of the real estate of POBD which is NOT described in M08's All-Inclusive Mortgage, subject to the issue of the validity of RE's redemption.

Standards Rule 11 Sanctions and I.C. § 12-123

Rule 11(b) describes the Representations made to the Court by a written motion. In this case it is JV's only written motion to reconsider, made after the trial and judgment. Signing of the Motion is a certifying by the attorney that to the best of his knowledge, information and belief, formed after an inquiry reasonable under the circumstances:

1. It is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
2. The claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or

for establishing new law;

3. The factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

4. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

JV and its attorney contend that JV's Motion to Alter, Amend and Reconsider meet all of the above requirements of Rule 11. Much of Valiant's argument is based on JV's Motions that occurred before trial. These are not relevant to JV's Motion to Alter, Amend, or Reconsider.

Rule 11.2(b) itself is clear that a Motion to Reconsider is permitted, stating,

Motion for Reconsideration.

(1) In General. A motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a final judgment.

JV and its counsel submitted its post-trial and post judgment motion complied with Rule 11. JV did not prevail on the Motion, but that is not a test under Rule 11.

The other Defendants, VP and NIR have served <u>their</u>

Memorandum in opposition to Valiant's Motion for Sanctions and their memorandum points out that I.C. § 12-123 covers "frivolous conduct". In this action the trial and testimony covered four days and there were over 100 exhibits of evidential documents. JV's Motion did not serve to merely harass or injure Valiant, and JV's Motion was supported in fact and was warranted under existing law.

In this action, Valiant merely seeks to be compensated for responding to JV, VP/NIR pleadings of Motion(s) to Reconsider. These "pleadings" were well grounded in fact and law. They were not imposed for improper purpose. The focus is to be narrow and is on the pleadings. There was no abuse or litigant misconduct. It is surly not an abuse or misconduct to file a single Motion to Alter, Amend, Reconsider the Findings, Conclusions and Judgment of a four day trial with over one hundred exhibits.

This action is over, there is no court process to be managed. The Court has already determined that I.C. § 12-121 does not apply against JV, VP/NIR. This same ruling applies to Rule 11 OR I.C. § 12-123. I.C. § 12-123 motions are to be within 21 days after entry of judgment. This time had expired by the time of Valiant's Motion for Sanctions. Further, Valiant has not been "affected by frivolous conduct".

Valiant's Motion/Memorandum is catch-all as it does not independent and individually address the conduct it believes

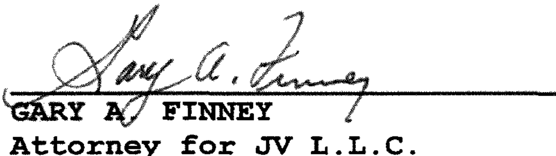
warrants the sanctions. In that respect, Valiant's Motion/Memorandum do not meet the Rule 11 requirements.

The single post-trial and post judgment Motion(s) For Reconsideration by JV are not frivolous simply because they ultimately failed.

JV agrees with the propositions of rule, statue, and law set forth in the Memorandum of VP/NIR.

JV moves the Court to deny Valiant's requests for sanctions.

DATED this 24TH day of August, 2016.



GARY A. FINNEY
Attorney for JV L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile or as otherwise indicated, this 24 day of August, 2016, and was addressed as follows:

Richard Stacey/Jeff Sykes
MCCONNELL WAGNER SYKES & STACEY PLLC
827 East Park Boulevard, Suite 201
Boise, ID 83712
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[Attorney for NORTH IDAHO RESORTS, LLC, V.P. INC, & FOR JV'S THIRD PARTY DEFENDANT

By:

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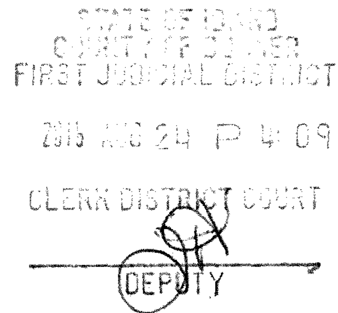


Attorneys for Defendants North Idaho Resorts, LLC and VP, Incorporated

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

DECLARATION OF DANIEL M. KEYES IN SUPPORT OF VP AND NIR'S OPPOSITION TO VALIANT IDAHO'S MOTION FOR SANCTIONS

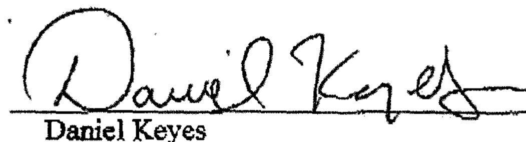
Pursuant to Rule 7(d) of the Idaho Rules of Civil Procedure and Idaho Code § 9-1406, Susan P. Weeks declares as follows:

1. I am over the age of 18, and competent to testify to the matters set forth herein. I make this Declaration of my own personal knowledge, and have personal knowledge of the facts herein contained.
2. I am one of the attorneys of record for Defendants North Idaho Resorts, LLC and VP, Incorporated.

3. On September 21, 2015, my office caused a subpoena duces tecum and a second subpoena duces tecum to be served on First American Title Company ("FATCO"). Those subpoenas requested FATCO's files relating to the loans at issue in this case.
4. FATCO's document production was received on October 9, 2015.
5. The FATCO document production consisted of 1702 pages of documents.
6. On October 13, 2015, NIR and VP's opposition to Valiant Idaho, LLC's third motion for summary judgment was filed.
7. On January 7, 2016, FATCO officers Rick Lynskey and Casy Linscott were deposed regarding the loan closings of the loans at issue in this suit, including the FATCO production documents provided pursuant to subpoena.
8. Attached hereto as Exhibit A is a true and correct copy of Valiant Idaho, LLC's Answers to Interrogatories Propounded by VP, Incorporated, together with a copy of the verification page which was provided later.

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

DATED this 24th day of August, 2016.



Daniel 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 24th day of August, 2016:

___	U.S. Mail, Postage Prepaid	Gary A. Finney
___	Hand Delivered	FINNEY FINNEY & FINNEY, PA
___	Overnight Mail	120 E Lake St., Ste. 317
X	Facsimile: 208-263-8211	Sandpoint, ID 83864

___	U.S. Mail, Postage Prepaid	Richard Stacey
___	Hand Delivered	McConnell Wagner Sykes & Stacey, PLLC
___	Overnight Mail	755 West Front St., Ste. 200
X	Facsimile: 208-489-0110	Boise, ID 83702

Christine Elmore

Richard L. Stacey, ISB #6800
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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 ANSWERS TO INTERROGATORIES PROPOUNDED BY VP, INCORPORATED [Nos. 1 - 12]

Honorable Barbara A. Buchanan

ORIGINAL

COMES NOW, Valiant Idaho, LLC. ("Valiant"), by and through its counsel of record, McConnell Wagner Sykes & Stacey PLLC ("MWSS"), and, pursuant to Rule 33 of the Idaho Rules of Civil Procedure, hereby provides the following answers ("Answers") to VP, Incorporated's ("VP") Interrogatories propounded on or about October 27, 2015 ("Interrogatories").

PRELIMINARY STATEMENT

Valiant, based upon its current understanding and belief of the facts and the information presently known, responds and objects as follows in its Answers. The Answers are based upon diligent exploration by Valiant and its counsel, but reflect only the current state of Valiant's understanding and belief as to the matters of inquiry. It is anticipated that further discovery, independent investigation and consultation with experts may supply additional facts, add meaning to known facts, and establish entirely new factual conclusions and legal contentions, all of which may lead to substantial additions to, modifications of and variations from the Answers herein. The Answers are, therefore, made without prejudice to Valiant's right to produce evidence of subsequently discovered documents or facts which may become available.

Valiant makes certain continuing objections ("Continuing Objections") to each Interrogatory. Valiant's Answer to each individual Interrogatory is submitted without prejudice to and without waiving any Continuing Objection not expressly set forth in that Answer. Accordingly, the inclusion of an objection to an Interrogatory and any Answer below is neither intended as, nor shall in any way be deemed a waiver of any Continuing Objection or of any other specific objection made herein.

CONTINUING OBJECTIONS

Nothing herein is intended to be nor should be construed as a waiver of any attorney-client privilege, work-product protection or the right of privacy and, to the extent the Interrogatories may be construed as calling for the disclosure of information protected by such privilege and/or doctrine, a Continuing Objection to each and every Interrogatory is hereby imposed.

Without waiving any Continuing Objection, Valiant answers the Interrogatories as follows.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1: Please provide the name, address, and phone number of the person answering these Interrogatories and his or her relationship to this action. If you obtain any assistance in answering any of these Interrogatories, state the name and address of each person giving such assistance and note on which Interrogatories such assistance was provided.

ANSWER TO INTERROGATORY NO. 1: Valiant objects to Interrogatory No. 1 to the extent it seeks attorney work product privileged information. Without waiving said objection, Valiant responds as follows: William Haberman, c/o MWSS.

INTERROGATORY NO. 2: Please identify all persons who have knowledge or claim to have knowledge of any facts relating to the subject matter of this litigation; and the specific information known by each person, including but not limited to William Haberman, Josh Holley with Macinae Partners; Rick Dishnica; Charles Reeves; Barney Ng; Gary Finney; James Berry; William Berry; Cheryl Piehl and Vincent Hua.

ANSWER TO INTERROGATORY NO. 2: Valiant objects to Interrogatory No. 2 as overbroad, unduly burdensome, as seeking information not within the personal knowledge of Valiant, and as seeking information that is not reasonably calculated to lead to the discovery of admissible evidence related to the issues remaining for trial (*i.e.*, whether the loans made by R.E. Loans, LLC ["RE Loans"] and Pensco Trust Co. ["Pensco"] were satisfied out of the loan made by Mortgage Fund '08, LLC ["MF08"]). Without waiving said objections, Valiant responds as follows:

Individuals With Knowledge	Probable Knowledge
William Haberman	Mr. Haberman's knowledge may include, but is not necessarily limited to: (a) Valiant's acquisition of its interests the real property commonly known as the "Idaho Club Development"; (b) Valiant's redemption of certain real property within the Idaho Club Development from the Bonner County; (c) the value of the lots and parcels comprising the Idaho Club Development; (d) the total amounts currently owing to Valiant, including interest, late charges and attorneys' fees, pursuant to the RE Loans, Pensco and MF08 mortgages (collectively, "Valiant Mortgages"); and (e) understanding of and experience with "wrap mortgages."
Josh Holley	Mr. Holley's knowledge may include, but is not necessarily limited to, authentication of RE Loans documents.
Rick Dishnica	Mr. Dishnica's knowledge may include, but is not necessarily limited to, authentication of RE Loans documents.

Individuals With Knowledge	Probable Knowledge
Charles Reeves	Mr. Reeves's knowledge may include, but is not necessarily limited to: (a) Pend Oreille Bonner Development, LLC's ("POBD") loans from RE Loans, Pensco and MF08, including the amounts borrowed from, the amounts repaid to, and the amounts remaining owed by POBD to RE Loans, Pensco and MF08; (b) the negotiation, purpose, terms, and intent of the parties related to said loans; (c) the value of the lots and parcels comprising the Idaho Club Development; (d) the amounts paid by VP in consideration for certain lots that POBD quitclaimed to VP; (e) the history and status of the Idaho Club Development, including infrastructure (*i.e.*, roadways, utilities, *etc.*), engineering, platting, construction, permitting, bonding, appraisals, *etc.*; (f) VP's dealings with Idaho Club property owners; (g) authentication of POBD documents and business records; and (h) understanding of the MF08 wrap mortgage and his experience with this type of mortgage.
Barney Ng	Mr. Ng's knowledge may include, but is not necessarily limited to: (a) the amounts POBD borrowed from and repaid to RE Loans, Pensco and MF08; (b) the negotiation, terms and closing of loans related to the same; (c) authentication of Bar-K, Inc., RE Loans, Pensco and MF08 loan documents and business records; (d) understanding of and experience with "wrap mortgages"; and (e) understanding of the MF08 wrap mortgage.
Gary Finney	Mr. Finney's knowledge may include, but is not necessarily limited to: (a) the facts and circumstances related to the closing of the MF08 loan; and (b) the documents he reviewed and initialed on behalf of JV, L.L.C. ("JV") as part of the loan closing.
James Berry	Mr. Berry's knowledge may include, but is not necessarily limited to, amounts owed to JV pursuant to its purchase money mortgage and payments received by JV in repayment of amounts owed pursuant to the same.

Individuals With Knowledge	Probable Knowledge
Cheryl Piehl	Ms. Piehl's knowledge may include, but is not necessarily limited to, amounts paid by Valiant to redeem certain Idaho Club Development real property from Bonner County and the deeds issued to Valiant from the County related to the same.
Vincent Hua	Mr. Hua's knowledge may include, but is not necessarily limited to, authentication of Bar-K, Inc. documents.

INTERROGATORY NO. 3: Please specifically identify each and every document which is relevant to or supports any of Valiant's counterclaims, cross-claims, affirmative defenses, defenses or third party complaint in this action, or refutes or negates any of defendants' defenses.

ANSWER TO INTERROGATORY NO. 3: Valiant objects to Interrogatory No. 3 as overbroad, unduly burdensome, as seeking information not within the personal knowledge of Valiant, and as seeking information that is not reasonably calculated to lead to the discovery of admissible evidence related to the issues remaining for trial (*i.e.*, whether the loans made by RE Loans and Pensco were satisfied out of the loan made by MF08).

Without waiving said objections, Valiant responds as follows: Some or all of the following documents may be relevant or support the remaining claims and defenses in this case:

a. The documents produced pursuant to Valiant's Responses to Requests For Production of Documents propounded by VP;

b. The documents Valiant has attached to affidavits pursuant to motions in this case;

c. The documents VP and/or North Idaho Resorts, LLC ("NIR") have attached to affidavits pursuant to motions in this case;

d. The documents VP and/or NIR produce in response to Valiant's discovery requests;

e. The documents JV produces in response to Valiant's discovery requests;

f. The documents JV has attached to affidavits and memoranda pursuant to motions in this case; and

g. Documents produced by third parties pursuant to subpoenas *duces tecum* or otherwise in this case.

INTERROGATORY NO. 4: With respect to you [sic] allegation that Valiant paid Bonner County $1,665,855.14 to redeem the Idaho Club Property from the Tax Deed, please set forth Valiant's standing as an interested party to redeem the tax deed.

ANSWER TO INTERROGATORY NO. 4: Valiant objects to Interrogatory No. 4 to the extent it seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the Court's Memorandum Decision & Order Re: Motions Heard on October 23, 2015 entered October 30, 2015 ("October 30 Order"), the only issues remaining in this case are whether the loans made by RE Loans and Pensco were satisfied by a loan from MF08.

INTERROGATORY NO. 5: If you will be presenting the testimony of any expert witness at the trial of this matter, please identify each such expert witness and, as to each such expert, provide information in accordance with Idaho Rule of Civil Procedure 26(b)(4). For each such witness, state:

a. His or her name and address;

b. His or her occupation, title, and specialty;

c. A description of his or her qualifications;

d. The number of years of expertise is such specialty [sic];

e. Whether he or she has ever been a witness in any other lawsuit in the preceding four years, and if so, for each lawsuit, give the name of the suit, the name of the court, the date of the filing, and the names and addresses of the party for whom he or she gave testimony;

f. The subject matter in which the witness is expected to testify;

g. A complete statement of all opinions to be expressed and the basis and reasons therefore;

h. All materials and data or other information considered by the expert in forming the opinions;

i. any [sic] exhibits to be used as a summary of or support for the opinion;

j. All materials, including textbooks, treatises, and other articles which the expert relied upon in forming his or her conclusions in this case;

k. Any software, computer programs or applications the expert utilized in arriving at their expert opinion; and

l. Communication between the expert and the attorney for Valiant that related to the amount of compensation for the expert's services; identifying the facts or data that the attorney provided and that the expert considering in forming the opinions to be expressed; and identifying assumptions that the attorney provided and the expert relied on in forming the opinion to be expressed.

ANSWER TO INTERROGATORY NO. 5: Valiant objects to Interrogatory No. 5 to the extent it seeks attorney work product protected information and/or information that is not reasonably calculated to lead to the discovery of admissible evidence. Expert testimony is not necessary for any of the issues remaining in this case (*i.e.*, were the loans by RE Loans or Pensco satisfied by the loan from MF08).

Without waiving said objections, *see* Valiant's Expert Witness Disclosure served on or about October 26, 2015 in accordance with the Court's scheduling orders in this case.

INTERROGATORY NO. 6: Please state each and every fact and/or basis known to you, and all documents known to you, including the source of such document, which supports your contention that "POBD has breached the 2007 R.E. Loans Agreement, by, *inter alia,* refusing to repay amounts loaned by R.E. Loans pursuant to the 2007 R.E. Loans Agreement" as set forth in Paragraph 40 of your Counterclaim, Cross-Claim and Third Party Complaint for Judicial Foreclosure (hereinafter "Complaint").

<u>ANSWER TO INTERROGATORY NO. 6</u>: Valiant objects to Interrogatory No. 6 to the extent it seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the Court's <u>October 30 Order</u>, the only issues remaining in this case are whether the loans made by RE Loans and Pensco were satisfied by a loan from MF08.

<u>INTERROGATORY NO. 7</u>: Please state each and every fact and/or basis known to you, and all documents known to you, which supports your contention that "POBD has breached the Pensco Agreement by, *inter alia*, refusing to pay amounts loaned to Pensco pursuant to the Pensco Agreement" as set forth in Paragraph 52 of your Complaint.

<u>ANSWER TO INTERROGATORY NO. 7</u>: Valiant objects to Interrogatory No. 7 to the extent it seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the Court's <u>October 30 Order</u>, the only issues remaining in this case are whether the loans made by RE Loans and Pensco were satisfied by a loan from MF08.

<u>INTERROGATORY NO. 8</u>: Please state each and every fact and/or basis known to you, and all documents known to you, which supports your contention that "POBD has breached the MF08 Agreement by, *inter alia*, refusing to repay amounts loaned by MF08 pursuant to the MF08 Agreement" as set forth in Paragraph 63 of your Complaint.

<u>ANSWER TO INTERROGATORY NO. 8</u>: Valiant objects to Interrogatory No. 8 to the extent it seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the Court's <u>October 30 Order</u>, the only issues remaining in this case are whether the loans made by RE Loans and Pensco were satisfied by a loan from MF08.

INTERROGATORY NO. 9: Please identify the person or entity who paid the redemption fees to redeem the Idaho Club property from the tax deed and the method of payment (i.e. cash, check, credit card or other payment method) and the mortgage which redeemed the tax deed.

ANSWER TO INTERROGATORY NO. 9: Valiant objects to Interrogatory No. 9 to the extent it seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the Court's October 30 Order, the only issues remaining in this case are whether the loans made by RE Loans and Pensco were satisfied by a loan from MF08.

INTERROGATORY NO. 10: For any Request for Admission for which your response is not an unqualified admission:

a. Describe in detail each and every fact upon which you base your denial;

b. Identify all documentation which supports or relates in any manner to said denial;

c. Identify each person who has or you believe may have knowledge of the facts which support or relate to [sic] any manner to said denial.

ANSWER TO INTERROGATORY NO. 10: Valiant objects to VP's Requests for Admission and this Interrogatory No. 10 as vague, ambiguous, and as seeking irrelevant information not reasonably calculated to lead to the discovery of admissible evidence.

Without waiving said objections, Valiant responds as follows:

a. Denial of Request For Admission No. 2: The Court in this case has ruled that the amounts Valiant is owed pursuant to the Redemption Deed is part of and secured by the mortgage Valiant was assigned by RE Loans ("RE Mortgage"). As the lot upon which the sewer lagoon is situated ("Lagoon Lot") is encumbered by the RE Mortgage, the Redemption Deed also encumbers the Lagoon Lot.

b. Denial of Request For Admission No. 3: Valiant was assigned the RE Mortgage as well as the mortgages recorded by MF08 and Pensco. As the assignee of these three mortgages, Valiant is an interested party in the real estate encumbered by each mortgage and is entitled to redeem the mortgage interests of each. The amounts Valiant paid to redeem became part of whichever underlying mortgage is unsatisfied and has the highest priority.

c. Denial of Request For Admission No. 7: Valiant understands that RE Loans is a California limited liability company by virtue of its name.

d. Denial of Request For Admission No. 28: RE Loans properly declared POBD in default due to nonpayment. This has been substantiated by the sworn testimony of Charles Reeves and Barney Ng, as well as the business records of Bar-K, Inc. which were attached to affidavits executed by these individuals in this case.

INTERROGATORY NO. 11: Please identify any agreement(s) you have with Pend Oreille Bonner Development, including but not limited to all materials [sic] terms of the agreement(s).

ANSWER TO INTERROGATORY NO. 11: Valiant objects to Interrogatory No. 11 to the extent it seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the Court's October 30 Order, the only issues remaining in this case are whether the loans made by RE Loans and Pensco were satisfied by a loan from MF08.

Without waiving said objections Valiant responds as follows: Valiant entered into agreements with POBD and certain of its representatives titled as Consent to Judgment & Waiver of Claims dated July 10, 2014, and Consulting Agreement dated July 8, 2014. These agreements contain confidentiality provisions prohibiting any disclosure to third parties absent an order by the Court. Valiant has asked POBD and its representatives to agree to the disclosure of said

agreements pursuant to a confidentiality agreement executed by the parties to whom they will be disclosed.

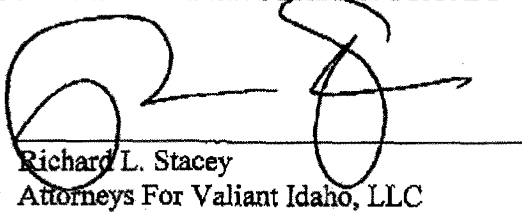
INTERROGATORY NO. 12: Please identify any agreement(s) you have with Charles or Ann Reeves, including but not limited to all material terms of the agreement(s).

ANSWER TO INTERROGATORY NO. 12: Valiant objects to Interrogatory No. 12 to the extent it seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the Court's October 30 Order, the only issues remaining in this case are whether the loans made by RE Loans and Pensco were satisfied by a loan from MF08.

Without waiving said objections, Valiant responds as follows: *See* Answer to Interrogatory No. 11. Mr. Reeves is one of the POBD representatives with whom Valiant has entered into an agreement governed by a confidentiality provision. Valiant has asked POBD and its representatives to agree to the disclosure of the responsive agreements pursuant to a confidentiality agreement executed by the parties to whom they will be disclosed.

DATED this 30th day of November 2015.

McCONNELL WAGNER SYKES & STACEY PLLC



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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November 2015, the *original* or a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Bruce A. Anderson, Esq. Elsaesser Jarzabek Anderson Elliott & MacDonald, Chtd 320 East Neider Avenue, Suite 102 Coeur d' Alene, Idaho 83815 Telephone: 208.667.2900 Facsimile: 208.667.2150 *Counsel For Jacobson, Lazar and Sage Holdings*	[✓] U.S. Mail [ ] Hand Delivered [✓] Facsimile [ ] Overnight Mail [ ] Electronic Mail brucea@ejame.com
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
D. Toby McLaughlin, Esq. Berg & McLaughlin 414 Church Street, Suite 203 Sandpoint, Idaho 83864 Telephone: 208.263.4748 Facsimile: 208.263.7557 *Counsel For Idaho Club HOA/Panhandle Mngmnt*	[✓] U.S. Mail [ ] Hand Delivered [✓] Facsimile [ ] Overnight Mail [ ] Electronic Mail toby@sandpointlaw.com
Susan P. Weeks, Esq. ***ORIGINAL*** James, Vernon & Weeks, PA 1626 Lincoln Way Coeur d'Alene, Idaho 83814 Telephone: 208.667.0683 Facsimile: 208.664.1684 *Counsel For VP Incorporated/North Idaho Resorts*	[✓] U.S. Mail [ ] Hand Delivered [✓] Facsimile [ ] Overnight Mail [ ] Electronic Mail sweeks@jvwlaw.net

Richard L. Stacey

VERIFICATION

I, WILLIAM HABERMAN, hereby state and declare as follows:

That (1) I am a Member of Valiant Idaho, LLC; (2) I have read the foregoing Answers to Interrogatories [Nos. 1 – 12] and know the contents thereof; and (3) the statements therein made are true and correct to the best of my information, knowledge and belief.

I DECLARE under penalty of perjury that the foregoing is true and correct.

DATED this ______ day of December 2015.

VALIANT IDAHO, LLC,
an Idaho limited liability company

By: ______________________________
William Haberman, Member

VERIFICATION

I, WILLIAM HABERMAN, hereby state and declare as follows:

That (1) I am a Member of Valiant Idaho, LLC; (2) I have read the foregoing Answers to Interrogatories [Nos. 1 – 12] and know the contents thereof; and (3) the statements therein made are true and correct to the best of my information, knowledge and belief.

I DECLARE under penalty of perjury that the foregoing is true and correct.

DATED this 7 day of December 2015.

VALIANT IDAHO, LLC,
an Idaho limited liability company

By:
William Haberman, Member

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT
2016 AUG 24 P 4:08
CLERK DISTRICT COURT
DEPUTY

Susan P. Weeks, ISB No. 4255
Daniel M. Keyes, ISB No. 9492
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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-2009-1810 DEFENDANT VP, INC'S AND NIR, LLC'S MEMORANDUM IN OPPOSITION TO VALIANT IDAHO, LLC'S MOTION FOR SANCTIONS

COME NOW VP, Inc. ("VP"), and North Idaho Resorts, LLC ("NIR") (collectively referred to herein as "Defendants" for convenience), by and through their attorneys of record, James, Vernon & Weeks, P.A., and submit this Memorandum in Opposition to Valiant Idaho, LLC's Motion for Sanctions.

I. ARGUMENT

1. Introduction

Valiant filed its Third Party Complaint for Judicial Foreclosure on August 19, 2014. North Idaho Resorts, LLC ("NIR") and VP, Incorporated ("VP") both admitted in their respective responses they claimed interests in the property which was the subject of Valiant's this foreclosure action. NIR claimed it had a superior vendor's lien to the R.E. Loans mortgage, the Pensco mortgage and the MF '08 mortgage. This Court held on summary judgment the validity of the vendor's lien was adjudicated by Judge Griffin in the Union Bank matter concerning separate lake front property at Trestle Creek, and Judge Griffin's holding was binding on NIR.

VP asserted the amount Valiant claimed was owed on the R.E. Loans and Pensco notes was incorrect. The Court agreed based upon evidence introduced by VP at trial that the amount Valiant claimed was owed on the R.E. Loans note was inaccurate. Based on evidence introduced at trial, this Court reduced the amount Valiant was entitled by $96,901.00. Although VP successfully introduced evidence which reduced the amount owed on the R.E. Loans note, VP seeks sanctions.

2. Legal Standards

Valiant ostensibly requests sanctions be entered against Defendants and their counsel pursuant to two separate legal bases: I.C. § 12-123 and Idaho Rule of Civil Procedure 11(c)(1). However, the true nature of its request for these sanctions is an unsupported view it should be awarded its fees and costs as the prevailing party.

a. The American Rule and Attorney Fees

Idaho follows the "America Rule" of attorney fees, which requires "each party to bear their own attorney fees absent statutory authorization or contractual right." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Idaho Pub. Utilities Comm'n*, 125 Idaho 401, 407, 871 P.2d 818, 824 (1994). The American Rule contrasts with the "English Rule," where "a losing litigant must pay the winner's costs and attorney's fees." *Black's Law Dictionary* 609 (Bryan A. Gardner ed., 9th ed., West 2009). The proponent of an award of attorney fees must prove all necessary elements for entitlement to the award.

b. I.C. § 12-123

Pursuant to Idaho Code § 12-123, the Court has discretion to award attorney fees as a form of sanction against a party and/or its counsel if the movant was adversely affected by "frivolous conduct." I.C. § 12-123; *Ackerman v. Bonneville Cty.*, 140 Idaho 307, 313, 92 P.3d 557, 563 (Ct. App. 2004). Frivolous conduct is specifically defined by the statute:

> (b) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies either of the following:
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action;
> (ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

I.C. § 12-123(1)(b). I.C. § 12-123 also has strict timelines and procedural requirements. I.C. § 12-123(2); *Roe Family Servs. v. Doe*, 139 Idaho 930, 938, 88 P.3d 749, 757 (2004). Simple logic provides that conduct is not frivolous if 1) it does not merely serve to harass or maliciously injure a party, or 2) it is supported in fact, warranted under existing law, or is supported by a good faith argument for an extension, modification, or reversal of existing law.

c. IRCP 11(c)

Idaho Rule of Civil Procedure 11(c)(1) allows the court to impose an appropriate sanction on an attorney, law firm, or party that violates the requirements of Civil Rule 11(b). Rule 11 "applies only to the signing of a pleading, motion, or other paper, and its central feature is the certification established by the signature." *Landvik ex rel. Landvick v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997). By signing a pleading, motion, or other paper, the attorney makes multiple certifications contained in subsection (b) of Rule 11.

Rule 11 sanctions are a court management tool, not a compensatory tool to override other rules regarding awards of attorney fees in litigation:

> In our view, Rule 11(a)(1) is not a broad compensatory law. It is a court management tool. The power to impose sanctions under this rule is exercised narrowly, focusing on discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit.

Kent v. Pence, 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct. App. 1989). Indeed, the Idaho Court of Appeals has compared sanctions under Rule 11 with an award of attorney fees pursuant to I.C § 12-121 and held that the two serve very different roles:

> As we said in *Kent v. Pence*, 116 Idaho 22, 773 P.2d 290 (Ct.App.1989), [Rule 11 sanctions do] not exist to duplicate I.C. § 12–121, which has long been construed to authorize an attorney fee award in any civil case brought frivolously, unreasonably, or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979). Rather, the rule serves a separate, cognizable purpose, focusing upon discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit.

State of Alaska ex rel. Sweat v. Hansen, 116 Idaho 927, 929, 782 P.2d 50, 52 (Ct. App. 1989).

A motion for Rule 11 sanctions must be denied if it is requested after the case has been decided merely to compensate the moving party. *Kent v. Pence*, 116 Idaho 22, 24, 773 P.2d 290, 292 (Ct. App. 1989). In *Kent*, the Plaintiff (Kent) sued the clerk of the district court and the prosecuting attorney ("county officials") alleging numerous violations of Idaho election laws, and claiming the prosecuting attorney wrongfully refused to enforce those laws. Kent sought a

money damages award, which characterized the suit as a Tort Claims Act suit. The suit was dismissed because Kent failed to file a notice of tort claim and the county officers were awarded attorney fees because the trial judge found that the action was brought "without legal basis." Kent appealed the award of attorney fees.

On appeal, the Idaho Court of Appeals determined the trial judge's attorney fee award was improper because it did not meet the requirements of the Idaho Tort Claims Act. The county officers alternatively urged the Idaho Supreme Court to uphold the award of attorney fees based on Rule 11. The Court of Appeals declined, holding that Rule 11 authorizes sanctions for "pleadings which are not 'well grounded in fact,' which are not 'warranted by existing law or a good faith argument for the extension, modification or reversal of existing law,' or which are 'interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.'" *Kent v. Pence*, 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct. App. 1989). Most importantly, the court recognized that Rule 11 "is not a broad compensatory law. It is a court management tool." *Id.* Accordingly, it must be "exercised narrowly, focusing on discrete pleading abuses or other types of litigative misconduct." *Id.*

In the *Kent* case the county officers did not present the Court of Appeals with any court management use of the Rule for the requested sanctions. Indeed, at that point the case had been decided and there was no further court process to be managed. Therefore, the court held that if Rule 11 sanctions were awarded after the conclusion of a case as a lump-sum compensatory attorney fee award "there would be little difference between the rule and I.C. § 12-121, which already authorizes a fee award in any civil case brought frivolously, unreasonably or without foundation." *Id.* at 24, 773 P.2d at 292. Therefore, the Rule 11 sanction request was denied.

The Idaho Supreme Court has cautioned that courts are "expected to avoid using the wisdom of hindsight" in considering a motion for Rule 11 sanctions and should only "test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 95, 803 P.2d 993, 1001 (1991). The Idaho Supreme Court continued that "what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." *Id.* This approach is not only well-reasoned precedent that must be followed by the trial court, it is also contemplated by Rule 11 itself.

Rule 11 contemplates that a motion for sanctions should be brought at or near the time the purported offending pleading or other paper is signed, rather than at the conclusion of a case:

> (2) *Motion for Sanction.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party on the motion, reasonable expenses, including attorney's fees and costs incurred for the motion.

IRCP 11(c)(2). A motion for sanctions months, or even years after the conduct complained of, especially when that motion follows the ultimate outcome of the case, inherently is plagued by the hindsight perspective of the movant and ceases to provide any meaningful court management benefit.

3. A Reward Based on Idaho Code Section 12-123 is Precluded by the Terms of the Statute

Idaho Code § 12-123 requires that an award of attorney fees for frivolous conduct within a civil action occur within twenty-one (21) days after the entry of judgment:

> (2) (a) In accordance with the provisions of this section, at any time prior to the commencement of the trial in a civil action or **within twenty-one (21) days after the entry of judgment in a civil action, the court may award reasonable attorney's fees** to any party to that action adversely affected by frivolous conduct.

(Emphasis added). The plain and clear language of the statute requires if such an award is to be made that it must be ordered within twenty-one days of the entry of judgment. This statute further requires that a motion and hearing take place before such an award of attorney fees is granted. I.C. § 12-123(2)(b). Failure to follow the timing and procedure of § 12-123 dictates a denial of the motion for attorney fees. *See Roe Family Servs. v. Doe*, 139 Idaho 930, 938, 88 P.3d 749, 757 (2004) ("there is a specific procedure set forth in the statute requiring a motion by a party and notice and a hearing. None of those procedures took place in the instant case, and thus, the award of fees was improper.").

The Idaho Supreme Court has consistently held plain and unambiguous statutory language shall be given effect by the court: "The literal words of the statute 'must be given their plain, usual, and ordinary meaning; ... [i]f the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.'" *In re Adoption of Doe*, 156 Idaho 345, 349, 326 P.3d 347, 351 (2014) (quoting *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003)). Indeed, the directive of the State Legislature has been the same:

> The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.

I.C. § 73-113(1). Thus, when the language of a statute is clear, it must be followed by the Court.

In this case, judgment was entered on July 20, 2016, and the twenty-first day after the entry of that judgment was August 10, 2016. According to the plain language of I.C. § 12-123(2), the final day for entry of an award of attorney fees based upon on I.C. § 12-123 was August 10, 2016.

Valiant will likely argue that the statute only requires that motion for 12-123 attorney fees must be made within the twenty-one day time frame. That interpretation is not supported by the plain language of the statute. The time for this Court to award attorney fees under § 12-123 has passed and therefore, Valiant's motion must be denied.

4. Valiant's Motion for Sanctions Violates the Express Requirements of Rule 11

Valiant's motion for Rule 11 sanctions should be denied because it failed to follow the express requirements of Rule 11. Rule 11 expressly requires that a motion for Rule 11 sanctions **must** be separate from any other motions: "A motion for sanctions **must** be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." IRCP 11(c)(2) (emphasis added). Rule 11 expressly requires that a motion for Rule 11 sanctions must be independent and separate from any other motion.

Valiant's "Motion for Sanctions Under I.C. § 12-123 and I.R.C.P. 11" clearly violates the separate pleading requirement of Rule 11. Valiant's memorandum in support of its catch-all motion for sanctions also fails to independently and individually address the conduct it believes warrants Rule 11 sanctions. Instead, it merely lumps it "analysis" under I.C. § 12-123 and Rule 11 together. *Memo in Support of Motion for Sanctions*, 11-15 (August 10, 2016). Moreover, Valiant's supporting argument does not describe the alleged conduct that violates Rule 11 with specific reference to the requirements of Rule 11. Instead, it simply provides conclusory

categorizations of "frivolous conduct," "without any basis in law or fact," or "frivolous arguments" without discussing what specific act was an alleged violation of the Rule 11(b) requirements. This clearly violates Rule 11, and therefore, the Court should deny Valiant's motion for Rule 11 sanctions.

5. Valiant has Failed to Provide a Court Management Use of Rule 11 Sanctions

Further, Valiant's motion for Rule 11 sanctions should be denied because it fails to set forth a legitimate management use for sanctions and merely requests a compensatory award. As discussed above, Rule 11 sanctions are a court management tool. *Kent v. Pence*, 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct. App. 1989). Rule 11 sanctions are also inappropriate as a general compensatory award, because that is the role of an I.C. § 12-121 attorney fee award. *Id.*

The sole reason that Valiant provides the Court for granting Rule 11 sanctions against the Defendants and their counsel is to compensate Valiant. Much like *Kent* where the request for Rule 11 sanctions came well after a final determination in the case, Valiant requests sanctions against the Defendants and their counsel after the conclusion of trial and after entry of judgment. Valiant has failed to provide a positive court management benefit for these sanctions because there is none. Valiant simply seeks a compensatory award, which is the purpose of I.C. § 12-121, not Rule 11. The Court will remember that Valiant has already moved the Court for an award of attorney fees against these Defendants based on I.C. § 12-121, which this Court denied. Therefore, Valiant's duplicative efforts to get attorney fees from the Defendants is conduct not warranted by existing law. Valiant's motion for Rule 11 sanctions should be denied because it lacks a court management purpose and is merely a request for a compensatory award.

Further evidence that Valiant is misusing Rule 11 to obtain a broad compensatory award is that the "specific conduct" it alleges violates the Rule is essentially all of the Defendants'

conduct since Valiant's substitution in the case. This is clearly a misuse of the Rule, which targets specific conduct and allow the Court to manage the case.

The alleged bad conduct of the Defendants identified by Valiant begins with the responses to Valiant's first summary judgment motion filed February 4, 2015, and includes VP's most recently filed motions on August 3, 2016. Valiant identifies almost every major event in this litigation as conduct subjecting Defendants and their counsel to sanctions, even their appearance and participation at trial on the matter. This is clearly an attempt at a broad compensatory award of attorney fees against any party or counsel that maintained any defense in this foreclosure action. That is not the purpose of Rule 11 sanctions and therefore, Valiant's motion should be denied.

6. Defendants' Conduct Does Not Warrant Either I.C. § 12-123 Sanctions or Rule 11 Sanctions

Looking to the specific conduct Valiant contends violates I.C. § 12-123 and/or Rule 11[1] there is a clear theme that permeates this motion, as well as Valiant's prior motion for attorney fees: Valiant prevailed, therefore, all defenses must have been frivolous. This is exactly the type of reasoning, or lack thereof, that caused the Idaho Supreme Court to caution courts from awarding attorney fees under Rule 11 "using the wisdom of hindsight." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 95, 803 P.2d 993, 1001 (1991). Instead, there must be analysis of what conduct was reasonable at the time of the alleged conduct under the totality of the circumstances.[2] *Id.* Similarly, a party's conduct is not frivolous of lacking merit "simply because it ultimately fails." *Gulf Chem. Employees Fed. Credit Union v. Williams*, 107 Idaho

[1] The Court should note that Valiant made no attempt to distinguish between the two bases for sanctions.
[2] "What constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." *Id.*

890, 894, 693 P.2d 1092, 1096 (Ct. App. 1984). Moreover, it is inaccurate to contend that VP's defense in this suit were ultimately unsuccessful.

On July 21, 2014, Valiant moved to substitute as the real party in interest in place of R.E. Loans. A hearing was held August 4, 2014. The Register of Action ("ROA") indicates the Court granted the motion at hearing. No written order granting the motion is contained in the ROA. On August 19, 2014, Valiant filed a cross-claim, counterclaim and third party complaint for judicial foreclosure of the R.E. Loans note, the Pensco Note and the MF '08 note, even though Valiant was not yet substituted as the real party in interest for MF '08 or Pensco.[3] Valiant's cross-claim, counterclaim and third party complaint sought judgment in the principal sum of not less than $708,000 plus additional accrued interest, unpaid loan fees and late fees on the R.E. Loans note. R.E. Loans had previously filed an answer and had obtained summary judgment against ACI before it filed its cross-claim, counterclaim and third party complaint against NIR and VP. Thus, Valiant violated Rule 15 by filing the cross-claim, counterclaim and third party complaint on behalf of the R.E. Loans note without motion and leave of the Court. Further, it did not have standing when it filed this pleading to pursue the causes of action for the Pensco note and the MF '08 note. On that basis, VP moved to dismiss the cross-claim, counterclaim and third party complaint. This motion was warranted based upon the facts.

Valiant claims it was sanctionable for VP to assert the amount plead was not the amount due on the R.E. Loans note. Along the way, Valiant significantly reduced the amount it sought be awarded on the R.E. Loans note. Had VP and JV not challenged Valiant's cross-claim, this would not have happened.

[3] Orders substituting Valiant as the real party in interest for MF '08 and Pensco were not entered until November 19, 2014.

Further, when VP opposed Valiant's summary judgment on the amounts it claimed were due, it had the prior sworn deposition testimony of Charles Reeves from the Union Bank matter that the MF '08 loan paid off the R.E. Loans note and the Pensco note. VP also had R.E. Loans bankruptcy disclosure it had one common borrower with MF '08 and that R. E. Loans note loan was paid off with MF '08 proceeds. It had discovery from JV, LLC, which indicated a closing statement was given to Jim Berry, a member of JV, LLC, which showed the loans would be paid off as part of the MF '08 closing to induce JV, LLC to subordinate its lien position to MF '08. This compendium of information supported a good faith belief that the amount that Valiant claimed was due on the R.E. Loans note was not due.

VP also opposed summary judgment on the legal description translation offered by Valiant's experts. VP challenged the foundation for VP's expert to render the opinions he made in the case. VP introduced the affidavit of Barney Ng filed in another matter stating less real property was encumbered by the Pensco loan than the R.E. Loan. The Court ruled in Valiant's favor on the legal description. However, subsequent events prove that VP's opposition was warranted. Initially, Valiant's expert claimed that all three of the mortgages encumbered the same properties. Inexplicably, that expert opinion changed when the Court was asked to address the order of sale. The expert changed his opinion and testified, contrary to his earlier testimony, that the R.E. Loans mortgage encumbered more property than the R.E. Loans mortgage. Thus, VP's opposition was warranted.

Valiant also claims it was improper for VP to move for reconsideration and clarification after the Court granted summary judgment against it. The Court granted the motion for reconsideration in part, and determined there was an issue for trial regarding the amounts owed on the R.E. Loans note and the MF '08 note. Thus, the motion for reconsideration was not

sanctionable. At trial, it was proven that Valant had failed to account for at least one significant payment. This Court's final decree recognized and accounted for this payment.

> Also at trial, Tom Williams, the president of Sandpoint Title Insurance, Inc. ("Sandpoint Title"), testified that on October 16, 2012, Sandpoint Tile wired a payment to Wells Fargo in the amount of $96,901.00 ("Sandpoint Title Payment") from the sale by EaglePointe of one of the lots it had purchased from POBD. Mr. Williams testified he does not know whether his office ever advised POBD or RE Loans of this payment. Nonetheless, the amount owed pursuant to the 2007 RE Loans Note should be reduced by $96,901.99.

Memorandum Decision and Order, 25 (May 27, 2016). Throughout the litigation, Valiant never accounted for this payment against the R.E. Loans note. In fact, Chuck Reeves testified at trial that he had personal knowledge there were no other payments other than those reflected in the Bar-K statements.

The Court must recognize that the basis of Valiant's claim for attorney fees and sanctions is that NIR and VP defended their property interests throughout this litigation, rather than just agreeing to give Valiant what it wanted like POBD did. Valiant's position is unsupported by the law.

a. Opposition to First Summary Judgment Motion was Not Frivolous

Valiant's summary of the arguments presented by both VP and NIR at this stage of the litigation are woefully incomplete and inaccurate. VP's argument in its February 4, 2015, opposition to Valiant's motion for summary judgment was that in addition to the four lots to which it held title, VP had claims to the property in the nature of "prescriptive easements for infrastructure, an express claim by deed to four parcels, and an equitable servitude." The parties know how the Court ultimately ruled on these arguments, but that is not the point. What the Court must consider is whether at the time of signing that pleading on February 4, 2015, those arguments, which will not be repeated in length here, but must be considered by the Court in

analyzing an award, were either a) frivolous conduct as defined by I.C. § 12-123(1)(b), or b) violated the Rule 11(b) requirements. Neither apply here.

The same is true of Valiant's summary of NIR's argument at that stage of the litigation. A trial court is not bound by another court's rulings. Judge Griffin's decision in the *Union Bank v. POBD et al.* was not binding on this Court. Further, Judge Griffin's decision is on appeal the Idaho Supreme Court, and present an issue of first impression to the Idaho Supreme Court. None of the parties or the Court have a crystal ball that would tell how the Supreme Court will rule on the appeal. However, it was not sanctionable for NIR to assert and preserve these related issues in the present case.

In support of its claim, Valiant simply states "Like the arguments raised by JV, these contentions are utterly without any basis in fact or law and were rejected by the Court. Valiant should receive an award of the fees it incurred responding to VP's, NIR's and Weeks' frivolous arguments." *Memo in Support of Motion for Sanctions*, 11. Something is not frivolous merely because Valiant declares it so, and Valiant has failed to point to what was frivolous about those arguments, other than the fact that they did not prevail with this Court.

b. Motions to Reconsider the First Summary Judgment Were Not Frivolous

Without citing to any rule, statute, or case law, Valiant makes the legal assertion that a motion to reconsider based on the same facts and legal theory originally relied upon and rejected by the Court is per se frivolous. *Memo in Support of Motion for Sanctions*, 11. The root of this argument is all too familiar: conduct and arguments are frivolous if they do not prevail. Moreover, just as Valiant failed to identify what specifically was frivolous about the arguments in opposition to the summary judgment, Valiant fails to identify what was frivolous about those arguments is support of a motion for reconsideration. Valiant further ignores that the Court was

persuaded in part by those arguments to conduct a trial on the limited issue of the amounts owed on the R.E. Loans note and Pensco note, and was persuaded that Valiant's evidence failed to account for a payment.

c. VP and its Counsel Did Not Make Intentional Material Misrepresentations

Perhaps the most serious claim made by Valiant is that VP and its counsel intentionally misrepresented facts to the Court and opposing counsel. *Memo in Support of Motion for Sanctions,* 11. Valiant provides absolutely no admissible evidence of this assertion except its allegation of what VP and the undersigned knew at various times, and its explanation of the events of this litigation with the aid of hindsight. Valiant also seems to purposely misrepresent the timeline of relevant events to make its argument more attractive.

Valiant filed its third motion for summary judgment on September 25, 2015. VP filed affidavits of service with the court on October 5, 2015, for subpoenas duces tecum served on First American Title Company (FATCO). VP was provided the document production requested in the FATCO subpoenas on October 9, 2015. Dec. Daniel Keyes ¶ 4 (August 15, 2016). The FATCO document production was nearly two thousand (2,000) pages. Dec. Keyes ¶ 5. The Defendants' opposition to Valiant's third motion for summary judgment was filed on October 10, 2015, only two working days after the FATCO production was received. Oral argument for Valiant's third motion for summary judgment occurred on October 23, 2015. VP did not depose FATCO representatives until January 7, 2016. Dec. Keyes ¶ 7.

Valiant argues to the Court that "VP and Weeks had known since at least October 13, 2016 that is was mathematically impossible" for the MF08 closing to have paid off the RE Loans note and that "VP and Weeks intentionally misrepresented these known facts to the Court and opposing counsel during its oral argument in opposition" to the third summary judgment. *Memo*

in Support of Motion for Sanctions, 12-13. Valiant doesn't explain how Weeks and VP would have known FATCO's testimony regarding the closing documents months before FATCO's representatives were deposed or testified at trial. Valiant fails to specifically identify how Defendants' and its counsel's actions in October 2015 were frivolous according to I.C. § 12-123 or violated the requirements of Rule 11. Valiant simply asks the Court to conclude that the Defendants' arguments in October of 2015 were malicious, frivolous, etc. because they did not prevail when the Court issued its Memorandum Decision and Order on May 27, 2016, following four days of trial. This argument must be rejected.

d. The Entire Trial Was Not the Result of VP's or Its Counsel's Frivolous Conduct

Valiant contends that the whole trial in this matter was unnecessary and due to the frivolous conduct of the Defendants. Valiant forgets that as the foreclosing party it had a burden proof to establish necessary elements in its foreclosure action it had failed to establish in its pretrial motions. Valiant fails to identify any particular and specific conduct that would warrant sanctions against the Defendants and their counsel. Valiant simply asks the Court to view the trial with the lens of hindsight and conclude that the Defendants' conduct must have been frivolous because Valiant prevailed, even though it did not prevail in the amount it claimed in its initial cross-claim, nor did it prevail in its claim there were no payments after Bar-K was no longer the loan processor.

e. Conduct at Trial was Not Frivolous, Malicious and Implemented in a Manner as to Intentionally Delay

Valiant argues further that VP's participation at trial was "frivolous, malicious and implemented in a manner so as to intentionally delay the proceedings and cost Valiant unnecessary expenses." *Memo in Support of Motion for Sanctions*, 14. Valiant apparently forgets that the Court was present at trial, heard these same objections and ruled on Valiant's objections throughout trial. The Court managed the trial and had the Court found that VP's conduct was frivolous at trial it would have intervened. Valiant asks the Court to conclude that VP's cross-examination was tangential and irrelevant. However, there is nothing tangential about foundation, personal knowledge (or lack thereof) of a witness, or witness credibility. Just because these elements were not important to Valiant's case-in-chief does not mean that VP's conduct at trial was frivolous or warrants sanctions.

Similar to all of Valiant's previous arguments, Valiant identifies no specific conduct at trial, other than mentioning in a footnote that VP's cross-examination of Barney Ng was lengthy, that warrants sanctions. Valiant simply provides conclusory statements, but no identifiable conduct that would warrant sanctions.

f. VP's Post-Trial Motions Are Not Frivolous

Valiant asserts that all of VP's post-trial motions have been frivolous because VP has "no dog in the fight." *Memo in Support of Motion for Sanctions*, 14. Not surprisingly, Valiant has provided no legal authority for its "dog in the fight" doctrine. VP has legal interests in property subject to this foreclosure action. Its rights to redeem are affected by all amounts awarded against the property. Therefore, VP has interests in ensuring that the foreclosure action proceeds correctly and in accordance with the law. VP has identified to the Court errors and omissions it believes has occurred in this action, including at trial and in subsequent orders, the decree of

foreclosure, and the judgment. In fact, the Court agreed with VP that the final decree was defective because it did not adjudicate JV's rights.

Valiant fails to identify how this conduct is frivolous or violates Rule 11. Valiant also erroneously and incoherently asserts that "VP did not file any…motion to reconsider" the order of sale after just a few lines before arguing stating "VP has filed motions seeking: 1) to alter or amend the order of sale." *Memo in Support of Motion for Sanctions*, 14. Regardless, it is apparent that Valiant simply believes that the non-prevailing party should be taxed with the prevailing party's attorney fees and costs, simply because that party did not prevail.

Valiant's argument is based on what it believes to be a lack of VP's standing to move the Court to reconsider elements of its ruling that are erroneous because they lack the necessary factual support or because they incorrectly apply the law to the facts. For instance, VP's argument to reconsider the order of sale, which is repeated in the decree of foreclosure, is simply that the order misapplied the law it was purportedly based on because it failed to accurately consider all of the mortgages on the subject property. This affects VP because the Court has determined that its property is encumbered by some of those mortgages. Moreover, VP has a direct interest in assuring the Court properly apply any equitable doctrine (marshalling) by first accounting for all of the interests in the property. Valiant has identified no frivolous conduct or violation of Rule 11 that would warrant sanctions.

It is anticipated that Valiant will also argue that the motion for new trial is a sanctionable action. At the last hearing, Valiant asserted that: (1) VP did not engage in any discovery, and (2) if it had, it would have known of the operating losses and the remediation cost evidence presented at trial. Valiant's statement that VP engaged in no discovery prior to trial is simply untrue. Not only did VP engage in discovery prior to trial, in its answers to interrogatories

propounded upon it, on 10 occasions, Valiant asserted the only issue relevant for trial was whether the loans made by R.E. Loans, LLC and Pensco Trust were satisfied out of the loan made by MF '08. (*See Dec. D. Keyes, Exhibit A,* Answer to Interrogatories No. 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12. Further, Valiant was asked to identify all relevant information that William Haberman had regarding the matter. It was not disclosed that Haberman would testify to an operating loss or costs for remediation of a diesel spill. (*See De. D. Keyes, Exhibit A,* Answer to Interrogatory No. 2). On Valiant's assertion that VP did not request the documents it introduced as exhibits on this matter, and that was why it did not have such documents for trial, again this argument lacks merit. In interrogatory No. 6, Valiant was asked to identify all documents known to it, which supported its contentions that POBD had breached loan agreements. (*See Dec. D. Keyes, Exhibit A,* Answers to Interrogatories No. 6, 7 and 8.) The documents which supported these claims were requested in discovery, but not provided. It would have been a feat in prescience for VP to inquire during discovery regarding an oil spill which according to Valiant it did not occur until shortly before the resumption of the trial. In summary, VP's request for a new trial, or to alter or amend the judgment was not sanctionable.

III. CONCLUSION

For the reasons set forth above Defendants respectfully request the Court deny Valiant's motion for sanctions.

DATED this 24th day of August, 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 24th day of August, 2016:

___	U.S. Mail, Postage Prepaid	Gary A. Finney
___	Hand Delivered	FINNEY FINEY & FINNEY, PA
✓	Facsimile: 208-263-8211	120 E Lake St., Ste. 317
		Sandpoint, ID 83864

___	U.S. Mail, Postage Prepaid	Richard Stacey
___	Hand Delivered	Jeff Sykes
✓	Facsimile: 208-489-0110	McConnell Wagner Sykes & Stacey, PLLC
		827 E. Park Blvd., Ste. 201
		Boise, ID 83712

Christine Elmore

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2016 AUG 25 PM 1:25

CLERK DISTRICT COURT

DEPUTY

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

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

Plaintiff,

v.

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

Defendants.

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

CASE NO. CV-2009-0001810

MEMORANDUM DECISION ORDER DENYING VP, INC.'S MOTION FOR NEW TRIAL

THIS MATTER came before the Court on August 17, 2016, for a hearing on VP, Incorporated's Motion for New Trial, filed August 3, 2016. Valiant Idaho, LLC ("Valiant") is represented by Richard L. Stacey and Jeff R. Sykes, of MCCONNELL WAGNER SYKES & STACEY, PLLC. JV, LLC ("JV") is represented by Gary A. Finney, of FINNEY FINNEY & FINNEY, P.A. North Idaho Resorts, LLC ("NIR") and VP, Incorporated ("VP") are represented by Susan P. Weeks and David M. Keyes, of JAMES, VERNON & WEEKS, P.A.

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

WHEREFORE, upon consideration of the motion, and memorandums and declarations in support and opposition thereof, the following Memorandum Decision and Order are issued.

I. INTRODUCTION

The four-day bifurcated trial of this matter began on January 28, 2016. On January 29, 2016, the trial was recessed and continued until March 16, 2016. On March 16, William Haberman testified that shortly before the trial resumed, there was a diesel fuel leak on and under the Idaho Club Property (hereafter, "Property"), and that Valiant had incurred certain costs to remediate the diesel fuel leak. He also testified as to the costs Valiant had incurred to maintain and operate the Property in order to prevent waste, to-wit:

> **(a) Testimony of William Haberman re: Maintenance and Operation Costs**
>
> William Haberman testified that ownership of the Idaho Club property is still in POBD during these foreclosure proceedings, but because Valiant was concerned about waste, Valiant master leased the property from POBD and assumed the maintenance and operation of the property to prevent any deferred maintenance and further damage.
>
> Mr. Haberman testified that in the fall of 2014, Valiant incurred costs of winterization and general maintenance of the property. He also testified that in May of 2015, Valiant opened the golf course to members only; and although, some revenue was generated, Valiant incurred approximately $228,000.00 in maintenance costs in 2015, which included maintenance payroll, purchase of fungicide and chemicals for the greens, and some repair and maintenance. He testified that no other parties have participated in the maintenance of the Idaho Club since Valiant acquired control in July of 2014. Lastly, Mr. Haberman testified that shortly before trial,[1] there was a diesel fuel leak on the property, which required Valiant to expend approximately $89,000.00 to remediate the property. *Plaintiff's Ex. 111* and *Ex. 112*. No other parties participated in the environmental remediation of the property.
>
> The Court finds this testimony of Mr. Haberman to be credible and uncontroverted.

Memorandum Decision and Order re: court trial held on January 26 and 29 and March 16 and 17, 2016 (filed May 27, 2016) (hereafter, "*Trial Decision*"), at 24.

Valiant provided evidence of these operation and maintenance, and remediation costs to VP and JV on March 14 and 15, 2016, before the trial resumed. *See Declaration of Jeff R. Sykes in Support of Valiant Idaho, LLC's Memorandum in Opposition to VP, Inc.'s Motion for a New*

[1] **[This is Footnote 14 in the Trial Decision:]** This is third day of trial. March 16, 2016.

Trial (filed August 10, 2016) (hereafter, "Sykes Declaration"). During the redirect examination of Mr. Haberman by Mr. Sykes, VP objected to his testimony regarding the operation and maintenance costs as outside the scope of cross-examination. The Court, after noting that it was the third day of trial, and in the interest of getting through the witnesses, and recognizing that Mr. Sykes could call Mr. Haberman again on direct, overruled the objection. VP did not object during Mr. Haberman's testimony regarding the remediation costs, but did object to the admission of Plaintiff's Exhibits 111 and 112 (invoices paid with regard to the fuel leak) as not being disclosed in discovery. The Court admitted the documents. During the subsequent cross-examination, Mr. Keyes asked Mr. Haberman whether he had disclosed Valiant's 2015 expenditures to protect the Property in discovery in this suit. Mr. Haberman answered that he gave it to his counsel "a month ago or three weeks ago." No other questions about the operation and maintenance, and remediation costs were asked of Mr. Haberman by the defendants at trial.

At the conclusion of the trial, the parties were ordered to submit closing arguments. In its closing argument, Valiant asserted its entitlement to the costs incurred to operate and maintain the Idaho Club Property, and to remediate the diesel fuel leak. Valiant set forth the evidence upon which its entitlement was based, and the reasons why the amounts expended should be added to the 2007 RE Loans Note. *See Valiant Idaho, LLC's Closing Argument* (filed April 14, 2016), at 23-24 In its closing argument, VP argued that the admission of the evidence concerning the fuel leak was prejudicial to VP and exceeded the scope of the issue to be decided at trial. *See VP Inc's [sic] Closing Argument* (filed May 12, 2016), at 14. VP made no argument therein concerning Valiant's request for the costs to operate and maintain the Property.

After considering the evidence and arguments presented, the Court awarded Valiant its operation and maintenance, and remediation costs, to-wit:

> As discussed above, the Court finds credible Mr. Haberman's testimony that Valiant is currently operating and maintaining the Idaho Club golf course at Valiant's expense to prevent any waste from occurring to the real property encumbered by the 2007 RE Loans Mortgage; and that Valiant incurred costs of $226,582.98[2] to operate and maintain the course throughout 2015. This amount is secured by the 2007 RE Loans Mortgage, which provides that the "Mortgagee, at the expense of Mortgagor, may from time to time maintain and restore the Mortgaged Property or any part thereof as Mortgagee may reasonably deem desirable and may insure the same." *Plaintiff's Ex. 1*, p. VAL00505, ¶ 3.2. Valiant, as mortgagee, incurred costs of $226,582.98 to maintain and restore the real property that is subject to the 2007 RE Loans Mortgage, and POBD is obligated to repay this amount to Valiant. Since POBD is unable to repay these costs, the amount of costs that Valiant incurred is secured by the 2007 RE Loans Mortgage.
>
> Regarding the diesel fuel leak, Plaintiff's Exhibit 111 and Exhibit 112 show that Valiant incurred $89,432.39 to remediate the leak. The amount Valiant incurred to remediate the diesel fuel leak is secured by the 2007 RE Loans Mortgage, which provides:
>
>> The Mortgagor further shall be personally and solely responsible for and shall indemnify and hold harmless the Mortgagee from and against . . . (2) **the costs of any required or necessary repair, cleanup or detoxification of the property** and (3) all reasonable costs and expenses incurred by the Mortgagee . . . in connection therewith ...
>
> *Plaintiff's Ex. 1*, pp. VAL000508, 000509, ¶ 4.5. (Emphasis supplied).
>
> POBD is obligated to indemnify and reimburse Valiant for the amount Valiant incurred to repair, clean up, or detoxify the real property subject to the 2007 RE Loans Mortgage. As POBD is unable to repay Valiant for this amount, the amount Valiant incurred to perform the remediation is secured by the 2007 RE Loans Mortgage.

Trial Decision, at 26. (Emphasis in original).

VP now moves for a new trial pursuant to Idaho Rule of Civil Procedure 59(a)(1)(A), (B), (D) and (E), on the sole issue of the damage award to Valiant against Pend Oreille Bonner Development, LLC ("POBD") of $226,582.98 for expenses Valiant incurred to maintain and operate the Property; and $89,432.39 to remediate the diesel fuel which leaked onto and under

[2] **[This is Footnote 17 in the Trial Decision:]** This amount was set forth in *Valiant Idaho, LLC's Closing Argument*, filed April 14, 2016, at p. 23. At trial, Mr. Haberman testified that the amount was $228,000.00.

the Property. The Court added these damages to the amount due under the 2007 RE Loans Note in accordance with the terms of the 2007 RE Loans Mortgage. VP alleges that there were irregularities in the proceedings, a surprise and/or an abuse of discretion which prevented it from having a fair trial, as well as newly discovered evidence which justifies a new trial.

II. APPLICABLE LAW AND LEGAL STANDARD

Idaho Rule of Civil Procedure 59 provides, in relevant part:

> **(a) In General.**
> (1) *Grounds for a New Trial.* The court may, on motion, grant a new trial on all or some of the issues, and to any party, for any of the following reasons:
> **(A) irregularity in the proceedings of the court, jury or adverse party;**
> **(B) any order of the court or abuse of discretion by which either party was prevented from having a fair trial;**
> (C) misconduct of the jury;
> **(D) accident or surprise, which ordinary prudence could not have guarded against;**
> **(E) newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial;**
> (F) excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice;
> (G) insufficiency of the evidence to justify the verdict or other decision, or that it is against the law; or
> (H) error in law, occurring at the trial.
> (2) *Support for Motion.* Any motion for a new trial based upon any of the grounds set forth in subdivisions (A)--(E) must be accompanied by an affidavit stating in detail the facts relied upon in support of the motion. Any motion based on subdivisions (G) or (H) must set forth with particularity the factual grounds for the motion.
> ...

I.R.C.P. 59(a). (Emphasis supplied).

In *Hughes v. State, Idaho Dept. of Law Enforcement*, 129 Idaho 558, 929 P.2d 120 (1996), the Idaho Supreme Court set forth the standard of review for a motion for new trial:

> **When considering an appeal from a district court's ruling on a motion for new trial, this Court applies the abuse of discretion standard.** *Bott v.*

Although the Court finds Mr. Haberman's trial testimony credible, the Court shall use the lower amount cited in Valiant's closing brief to calculate the amount owed.

Idaho State Building Authority, 122 Idaho 471, 835 P.2d 1282 (1992). **This Court consistently has recognized the district court's wide discretion to grant or refuse to grant a new trial, and, on appeal, this Court will not disturb a district court ruling, absent a showing of manifest abuse of that discretion.** *First Realty & Investment Co. v. Rubert,* 100 Idaho 493, 600 P.2d 1149 (1979). Although this Court necessarily must review the evidence, it primarily focuses on the process by which the district court reached its decision, not on the result of the district court's decision. *Quick v. Crane,* 111 Idaho 759, 727 P.2d 1187 (1986). Thus, the sequence of this Court's inquiry is:

> (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the district court reached its decision by an exercise of reason.

Sun Valley Shopping Center v. Idaho Power, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Id. at 561, 929 P.2d at 123. (Emphasis supplied).

Additionally, in *Sheridan v. St. Luke's Regional Medical Center*, 135 Idaho 775, 25 P.3d 88, the Idaho Supreme Court explained:

> This Court has long recognized that the trial judge, sitting at the heart of the trial process, is in a position that those on the appellate level cannot duplicate. *Robertson,* 115 Idaho at 631, 769 P.2d at 508. **The "trial court is in a far better position to weigh the demeanor, credibility, and testimony of witnesses, and the persuasiveness of all the evidence."** *Burggraf,* 121 Idaho at 173, 823 P.2d at 777 (citing *Quick,* 111 Idaho at 770, 727 P.2d at 1198). **Because trial judges stand in the unique position of having heard all of the testimony and examined all of the evidence, their weighing of the evidence in a motion for new trial is given considerable discretion.** *Quick,* 111 Idaho at 767, 727 P.2d at 1198. *See also, Robertson,* 115 Idaho at 631, 769 P.2d at 508. The district judge's determination to discount the testimony of the defendant's expert witnesses was a proper exercise of his discretion in weighing the demeanor, credibility and persuasiveness of the evidence.

Id. at 781, 25 P.3d at 94. (Emphasis supplied).

III. DISCUSSION

A. VP is Not Entitled to a New Trial Under I.R.C.P. 59(a)(1)(E).

To be granted a new trial under Idaho Rule of Civil Procedure 59(a)(1)(E), the movant must offer "newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial." I.R.C.P. 59(a)(1)(E). Here, VP is requesting a new trial

> … on the issue of the diesel remediation because preliminary investigation, done without the benefit of any discovery yet, indicates the spill was not upon a lot which is covered by any of the mortgages herein.

Memorandum in Support of VP Inc's [sic] Motion for New Trial (filed August 3, 2016), at 3.

In her supporting Declaration, Ms. Weeks likewise stated:

> Preliminary investigation into the diesel spill indicates it occurred on a lot owned by Andrew Goulder, which is not one of the lots which was the subject of this foreclosure. Further discovery from Valiant would be necessary to ascertain if this fact is correct.

Declaration of Weeks in Support of VP Inc's [sic] Motion for New Trial (filed August 3, 2016), at 2, ¶ 6.

The Court finds that VP's statement as to a "preliminary investigation" is not evidence; it is a mere conclusory statement that is in fact *not* supported by evidence. Mr. Haberman's testimony about the remediation costs occurred on March 16, 2016. It has been over five months since the trial concluded and VP has provided no sworn affidavit testimony about who performed the preliminary investigation or what was done as part of the preliminary investigation. There is no sworn affidavit testimony by Mr. Goulder stating that the leak occurred on his lot; that his lot is not subject to the foreclosure; and that the leak did not impact the Idaho Club Property.

> **To obtain a new trial on the ground of newly discovered evidence, it must be shown that: (1) the evidence is such as will probably change the result if a new trial is granted;** (2) it has been discovered since the trial; **(3) it could not have been discovered before the trial by the exercise of due diligence;** (4) it is material to the issues; and (5) it is not merely cumulative or impeaching. *Craig H.*

> *Hisaw, Inc. v. Bishop,* 95 Idaho 145, 148, 504 P.2d 818, 821 (1972), *quoting Livestock Credit Corp. v. Corbett,* 53 Idaho 190, 198, 22 P.2d 874, 877 (1933).

Hanf v. Syringa Realty, Inc., 120 Idaho 364, 368, 816 P.2d 320, 324 (1991). (Emphasis supplied).

In this case, where the fuel leak occurred (whether on property neighboring the Idaho Club Property or on the Idaho Club Property itself) is not necessarily relevant, because the 2007 RE Loans Mortgage allows Valiant to recover all reasonable costs and expenses incurred for "repair, cleanup or detoxification of the property," Plaintiff's Ex. 1, p. 16, ¶ 4.5. So, even if the leak originated from neighboring property, the uncontroverted testimony by Mr. Haberman was that the leak impacted the Idaho Club Property and required Valiant to incur certain costs to clean up and detoxify the Property. VP has offered no evidence that the remediation efforts were not required or were unnecessary to protect the Idaho Club Property, or that the costs were not actually incurred. Therefore, evidence that the leak originated on neighboring property would probably not change the result if a new trial was granted.

Lastly, at trial, VP chose not to cross-examine Mr. Haberman about the diesel fuel leak or the remediation efforts. By the exercise of due diligence, counsel for VP during cross-examination of Mr. Haberman could have inquired about where the leak occurred. If Mr. Haberman had answered not on Idaho Club Property, counsel could have further inquired as to who owned that property, and whether that property was subject to foreclosure. VP's lack of diligence in this regard does not now justify granting a new trial and reopening discovery into these issues. As it stands, Mr. Haberman's testimony about the remediation costs Valiant incurred remains uncontroverted.

Based on the foregoing, VP is not entitled to a new trial under Rule 59(a)(1)(E).

B. VP is Not Entitled To a New Trial Under I.R.C.P. 59(a)(1)(A).

To be granted a new trial under Rule 59(a)(1)(A), the movant must show "irregularity in the proceedings of the court, jury or adverse party." I.R.C.P. 59(a)(1)(A). Here, VP argues that:

> Allowing testimony regarding these damages constituted an irregularity in the proceedings of the Court. ... For the Court to issue an order specifically limiting the issues at trial, and then disregard its own order and allow one party to expand the scope of trial issues beyond its own cross claim and third party claims was an irregularity in the proceedings of the Court ...

Memorandum in Support of VP Inc's [sic] Motion for New Trial (filed August 3, 2016), at 2-3.

The Court disagrees with VP's contention that scope of the trial was expanded. That issue will be discussed further below. With respect to this Court's allowing the testimony of Mr. Haberman regarding the costs incurred by Valiant to operate and maintain the Property, and remediate the diesel fuel leak, the Court recognizes that the admissibility of evidence is left to the discretion of the trial court.

> For issues involving the introduction of evidence, this Court also reviews the trial court's decision under an abuse of discretion standard. *State v. Perry,* 139 Idaho 520, 521, 81 P.3d 1230, 1231 (2003). **The trial court has broad discretion to admit or exclude evidence**, and to determine whether a witness is qualified as an expert. *Id.* at 521–22, 81 P.3d at 1231–32. "Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is affected." *Burgess v. Salmon River Canal Co.,* 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

Clair v. Clair, 153 Idaho 278, 282-283, 281 P.3d 115, 119-120 (2012). (Emphasis supplied).

An example of an irregularity in court proceedings can be seen in *Hinman v. Morrison-Knudsen Co., Inc.,* 115 Idaho 869, 771 P.2d 533 (1989), where the Idaho Supreme Court upheld a lower court's grant of a new trial based upon an irregularity in the proceeding when "[f]ollowing trial it was discovered that on at least two occasions during the jury deliberations the bailiff, without any authority from the trial court, denied jury requests for certain materials." *Id.* at 871, 771 P.2d at 535 (1989). No such irregularity occurred here. Rather, a most regular

event took place, i.e., this Court exercised its discretion to allow Mr. Haberman's testimony about operation and maintenance costs, and Plaintiff's Exhibits 111 and 112, over an objection by VP. This evidence was relevant to the amount due and owing under the 2007 RE Loans Note, and to allow this evidence over objection was not an irregularity in the court proceedings.

Based on the foregoing, VP is not entitled to a new trial under Rule 59(a)(1)(A).

C. VP is Not Entitled To a New Trial Under I.R.C.P. 59(a)(1)(D).

To be granted a new trial under Rule 59(a)(1)(D), the movant must show "accident or surprise, which ordinary prudence could not have guarded against." I.R.C.P. 59(a)(1)(D). Additionally, "[a] motion for a new trial pursuant to I.R.C.P. 59(a)(3) [now 59(a)(1)(D)] … must show prejudice." *Hughes v. State, Idaho Dept. of Law Enforcement*, 129 Idaho 558, 562, 929 P.2d 120, 124 (1996). Here, VP argues that "allowing evidence beyond the scope of the order constituted surprise which ordinary prudence could not have guarded against." *Memorandum in Support of VP Inc's [sic] Motion for New Trial* (filed August 3, 2016), at 3.

In this case, the Court finds that there was no surprise. The diesel fuel leak occurred shortly before the trial resumed on March 16, 2016. As soon as Valiant learned of the fuel leak and the costs associated with the remediation, counsel for Valiant provided Plaintiff's Exhibits 111 and 112, as well as 110 (2015 profit and loss statement) to VP via e-mail on March 14 and 15, before the trial reconvened. *See Sykes Declaration*, at 2. Mr. Haberman was also available for cross-examination on these issues at trial. These costs have been assessed against POBD, and VP has not shown how it has been prejudiced by the allowance of this evidence.

Based on the foregoing, VP is not entitled to a new trial under Rule 59(a)(1)(D).

D. VP is Not Entitled to a New Trial Under I.R.C.P. 59(a)(1)(B).

To be granted a new trial under Rule 59(a)(1)(B), the movant must offer "any order of the court or abuse of discretion by which either party was prevented from having a fair trial." I.R.C.P. 59(a)(1)(B). Here, VP is asserting that "[f]or the Court to issue an order specifically limiting the issues at trial, and then disregard its own order and allow one party to expand the scope of trial issues beyond its own cross claim and third party claims" prevented VP from having a fair trial. *Memorandum in Support of VP Inc's [sic] Motion for New Trial* (filed August 3, 2016), at 2-3. VP contends that evidence of Valiant's operation and maintenance, and remediation costs was beyond the scope of the order of this Court limiting the issue for trial.

As earlier stated, under the terms of the 2007 RE Loans Mortgage, POBD is obligated to reimburse Valiant for the amounts Valiant spent operating and maintaining the Idaho Club Property, and remediating the fuel leak, and these amounts are secured by the 2007 RE Loans Mortgage. The 2007 RE Loans Mortgage was Plaintiff's Exhibit No.1 at trial.

It is true, as VP points out, that an order was issued stating that "[t]he only issue remaining for the court trial is whether the 2007 RE Loans Note (Loan No. P0099)[3] and the Pensco Note (Loan No. P0106)[4] have been satisfied." *Memorandum Decision and Order re: Motions Heard on October 23, 2015* (filed October 30, 2015), at 18. Going into trial, the defendants were arguing that these loans were satisfied at the closing of the MF08 Note (Loan No. P0107)[5], or some time thereafter; while Valiant claimed that these loans had never been satisfied, and that Valiant was owed the unpaid principal and interest due on P0099, P0106 and P0107. In order to meet its burden at trial, Valiant had to prove that the Notes had not been

[3] From RE Loans, LLC, to POBD.
[4] From Pensco Trust Co. to POBD.
[5] From Mortgage Fund '08, LLC, to POBD.

satisfied AND the amounts due and owing on each Note. *VP understood and articulated Valiant's burden in its own closing argument*, as follows:

> 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).** ... 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 and trial and it failed to meet that burden.

VP Inc's [sic] Closing Argument (filed May 12, 2016), at 5. (Emphasis in italics in original) (Emphasis in bold supplied).

VP cannot have it both ways: It cannot argue before, during and after trial that Valiant must prove the amount it is owed under the RE Loans Note; and then, solely for the purposes of this motion for new trial, complain that the trial was unfair because the Court allowed in evidence relevant to the determination of the amount owed under the RE Loans Note. Under the terms of the 2007 RE Loans Mortgage, any costs incurred by Valiant to operate and maintain the Idaho Club Property, and to remediate the diesel fuel leak were secured thereunder, and would be added to the amount due under the 2007 RE Loans Note. These costs were thus relevant, and within the scope of the limited issue for trial. VP in its own closing argument stated that proof of the amounts due under the Notes fell within the scope of the issue for trial.

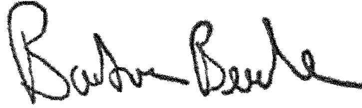
Based on the foregoing, VP is not entitled to a new trial under Rule 59(a)(1)(B).

IV. CONCLUSION AND ORDER

NOW, THEREFORE, based on the foregoing, IT IS HEREBY ORDERED THAT VP. Incorporated's Motion for New Trial is DENIED.

IT IS SO ORDERED.

DATED this 25 day of August, 2016.



Barbara Buchanan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid AND a courtesy copies sent by electronic mail, this 25 day of August, 2016, to:

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FIRST JUDICIAL DISTRICT
P 4:00
CLERK DISTRICT COURT
DEPUTY

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

GENESIS GOLF BUILDERS, INC., 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-Orton Engineering Company, an Idaho corporation; PUCCI	)	Case No. CV-2009-1810 JV L.L.C.'S CORRECTION TO ITS RESPONSE, OBJECTION AND OPPOSITION TO PLANITIFF'S MOTION FOR SANCTIONS

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,

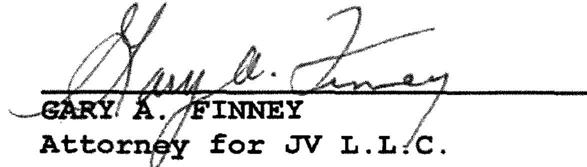
Third Party Defendants.

COMES NOW, Defendant JV L.L.C., (hereinafter JV), by and through its attorney, GARY A. FINNEY of Finney Finney & Finney, P.A., and corrects a mistake made in its Response, Objection and Opposition to Plaintiff's Motion for Sanctions, as follows:

JV made a mistake in referencing the correct name as between Valiant and RE. The mistake is in the caption entitled Tax Deed to Bonner County and Redemption by JV and RE on page 17. RE should have correctly read Valiant. It is Valiant, as Assignee from RE, that made the redemption and received the Redemption Deed, which is Plaintiff's Exhibit 74. The RE Assignment to Valiant is Plaintiff's Exhibit 72 signed by Power

of Attorney, which Power of Attorney was not first, or at all, recorded in Bonner County. In the foregoing reference caption and on pages 17 and 18, "RE's redemption" and "RE redeemed" should have correctly stated Valiant, as the Assignee of RE.

DATED this 25th day of August, 2016.



GARY A. FINNEY
Attorney for JV L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via facsimile or as otherwise indicated, this 25 day of August, 2016, and was addressed as follows:

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

By:

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2016 AUG 29 AM 11: 39

CLERK DISTRICT COURT
SR
DEPUTY

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

GENESIS GOLF BUILDERS, INC., formerly known as NATIONAL GOLF BUILDERS, INC., a Nevada corporation,	
Plaintiff,	**CASE NO. CV-2009-0001810**
v.	**MEMORANDUM DECISION ORDER DENYING VALIANT IDAHO, LLC'S MOTION FOR SANCTIONS**
PEND OREILLE BONNER DEVELOPMENT, LLC, a Nevada limited liability company, *et al.*,	
Defendants.	
AND RELATED COUNTER, CROSS AND THIRD PARTY ACTIONS PREVIOUSLY FILED HEREIN	

THIS MATTER came before the Court upon Valiant Idaho, LLC's Motion for Sanctions Under I.C. § 12-123 and I.R.C.P. 11, filed August 10, 2016. Valiant Idaho, LLC ("Valiant") is represented by Richard L. Stacey, and Jeff M. Sykes, of MCCONNELL WAGNER SYKES & STACEY, PLLC. JV, LLC ("JV") is represented by Gary A. Finney, of FINNEY FINNEY & FINNEY, P.A. North Idaho Resorts, LLC ("NIR") and VP, Incorporated ("VP") are represented by Susan P. Weeks, and David M. Keyes, of JAMES, VERNON & WEEKS, P.A.

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

*****

In open court on August 17, 2016, the Court informed counsel that there would be no hearing on the motion, and gave opposing counsel seven (7) days to file a response. JV and VP filed their responses to the motion on August 24, 2016,[1]

WHEREFORE, upon consideration of the motion, and memorandums and declarations in support and opposition thereof, the following Memorandum Decision and Order are issued.

I. INTRODUCTION

Valiant alleges that "throughout the course of the Valiant Foreclosure, JV and Finney and VP, NIR, and Weeks have engaged in a pattern of delays and tactics bearing no purpose other than delay the inevitable foreclosure of the Idaho Club property or to intentionally harass Valiant." *Valiant Idaho, LLC's Memorandum in Support of Motion for Sanctions Under I.C. § 12-123 and I.R.C.P. 11* (filed August 11, 2016), at 4 (footnote omitted). Valiant is requesting that sanctions "be imposed, jointly and severally, against (1) JV and Finney for their harassing conduct and attempts to maliciously injure Valiant through delay and (2) VP, NIR and Weeks for their harassing conduct and attempts to maliciously injure Valiant through delay. I.C. § 12-123(1)(b)(i)." *Id.* Valiant further asserts that sanctions are warranted under Idaho Code § 12-123(1)(b)(ii) because their conduct was unsupported by fact, law, or a good faith argument for a change in the law. *Id.* Valiant is also seeking sanctions under Idaho Rule of Civil Procedure 11.

Specifically Valiant submits that the following conduct of JV and Mr. Finney was frivolous conduct under Idaho Code § 12-123 and/or violated Rule 11:

1. Despite Valiant's Mortgages[2] and Redemption Deed having clear priority over the JV mortgage and redemption deed by virtue of the JV Subordination Agreements, JV opposed Valiant's 1st Summary Judgment (SJ) Motion, contending that the subordination

[1] JV filed a corrected response on August 25, 2016.
[2] This includes the 2007 RE Loans Mortgage, Pensco Mortgage and MF08 Mortgage.

agreements had no valid and legally binding effect. After losing on summary judgment, JV filed no less than five separate motions asking the Court to reconsider its decision on this issue, alleging the same facts and relying upon the same legal authority, if any. *Valiant Idaho, LLC's Memorandum in Support of Motion for Sanctions Under I.C. § 12-123 and I.R.C.P. 11*, at 7.

2. After repeatedly filing motions to reconsider, JV (acting in concert with VP) convinced the Court that there was a genuine issue of fact for trial. As such, the Court granted JV's motion to reconsider with respect to the single issue of whether the 2007 RE Loans Note and the Pensco Note were paid off at the MF08 Loan closing that took place on August 8, 2008. However, JV failed to submit any evidence at trial to support its contention that those Notes were paid off at the MF08 Loan closing. *Id.* at 8
3. JV and Mr. Finney were in possession of the escrow file from the MF08 Loan closing well in advance of trial. The escrow file establishes that the 2007 RE Loans Note and the Pensco Note were not and could not have been paid off at the MF08 Loan closing. *Id.* at 9.
4. Despite the limited issue for trial, JV repeatedly attempted to expand the scope of the trial to unrelated issues that JV had already lost on summary judgment; and Mr. Finney repeatedly ignored admonishments from the Court to refrain from this improper behavior. *Id.* at 10,
5. After trial, JV file a proposed judgment with the Court that completely ignored the Court's post-trial Memorandum Decision and Order, and showed that JV's mortgage and redemption deed were adjudicated to have priority over the Valiant Mortgages. *Id.* at 10.

6. JV also filed a sixth motion for reconsideration, asking the Court to again reconsider previous arguments that JV has made, and the Court has rejected, in prior motions to reconsider. *Id.* at 10.

Valiant argues that it should be awarded all fees and costs it incurred in this matter as a direct and proximate result of JV's and Mr. Finney's frivolous pleadings, and its intentionally frivolous, malicious and injurious conduct in this case, as enumerated above. Valiant is asking for an award of fees in the amount of $215,110.25, jointly and severally against JV and Mr. Finney, as sanctions for their conduct in this case. *Id.* at 11; *Declaration of Richard L. Stacey in Support of Valiant's Motion for Sanctions Under I.C. §12-123 and I.R.C.P. 11* ("Stacey Decl.").

Additionally, Valiant submits that the following conduct by VP, NIR and Ms. Weeks was frivolous conduct under § 12-123 and/or violated Rule 11:

1. VP opposed Valiant's 1st SJ Motion, contending that quitclaim deeds transferring four lots to VP in 2012 were prior in right, title and interest to the Valiant Mortgages that were recorded in 2007 and 2008. NIR also objected to Valiant's 1st SJ Motion, contending that a vendor's lien that it released on March 15, 2007, has priority over the Valiant Mortgages. Like the arguments raised by JV, these contentions are without any basis in fact or law and were rejected by the Court. *Valiant Idaho, LLC's Memorandum in Support of Motion for Sanctions Under I.C. § 12-123 and I.R.C.P. 11*, at 11.
2. VP, NIR and Ms. Weeks filed two motions asking the Court to reconsider its decision granting Valiant's 1st SJ Motion. VP's, NIR's and Ms. Weeks' motions to reconsider directed the Court to the same alleged facts and relied upon the same inapplicable legal authority, if any, as cited in VP's and NIR's original oppositions to Valiant's 1st SJ Motion. *Id.* at 12.

3. After no less than seven motions to reconsider were collectively filed by JV, NIR and VP, the Court determined that there remained a single issue of fact for trial. This decision was granted in large part due to Mr. Finney's and Ms. Weeks' insistence that a settlement statement from the MF08 loan closing established that the 2007 RE Loans Note and the Pensco Note were paid off at the MF08 loan closing. VP failed to submit any evidence at trial to support its contention that the 2007 RE Loans Note and the Pensco Note were paid off at the MF08 loan closing. *Id.* at 12.
4. The evidence submitted at trial established that VP and Ms. Weeks had known since at least October 13, 2016, that it was mathematically impossible for these Notes to have been paid off by at MF08 loan closing. VP and Ms. Weeks subpoenaed and obtained the escrow file from First American Title on or before that date, which conclusively established this fact. *Id.* at 12.
5. At trial, VP repeatedly attempted to introduce evidence at that had not been disclosed prior to trial and that ultimately proved to be of no relevance to the singular issue of fact that was being tried. Despite the limited scope of the trial, VP repeatedly attempted to expand this scope to unrelated issues that VP had already lost on summary judgment. Moreover, Ms. Weeks repeatedly cross-examined the witness Barney Ng concerning tangential and irrelevant matters for exorbitant periods of time. *Id.* at 14.
6. After trial, VP has filed motions seeking: 1) to alter or amend the order of sale to better reflect VP's opinion of the order of sale that would be most equitable to JV; and 2) a new trial based upon VP's opinion that the evidence does not support the Court's determination that JV has a first priority lien against Parcel 121. VP has no standing to

make these arguments. With respect to Parcel 121, VP has not asserted any claim of right, title or interest in or to this parcel. *Id.* at 14-15.

Valiant argues that it should be awarded all fees and costs it incurred in this matter as a direct and proximate result of NIR's, VP's and Ms. Weeks' intentionally frivolous, malicious and injurious conduct in this case, as enumerated above. Valiant is asking for an award of fees in the amount of $145,429.83, jointly and severally against NIR, VP and Ms. Weeks, as sanctions for their conduct in this case; and for an award of fees in the amount of $115,793.25, jointly and severally against VP and Ms. Weeks, as sanctions for their conduct in this case.

II. APPLICABLE LAW AND STANDARD OF REVIEW

Idaho Code § 12-123, governing sanctions for frivolous conduct in a civil case, provides:

> (1) As used in this section:
> (a) "Conduct" means filing a civil action, asserting a claim, defense, or other position in connection with a civil action, or taking any other action in connection with a civil action.
> **(b) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies either of the following:**
>
> **(i) It obviously serves merely to harass or maliciously injure another party to the civil action;**
> **(ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.**
>
> (2)(a) In accordance with the provisions of this section, at any time prior to the commencement of the trial in a civil action or within twenty-one (21) days after the entry of judgment in a civil action, **the court may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct.**
> (b) An award of reasonable attorney's fees may be made by the court upon the motion of a party to a civil action, but only after the court does the following:
> (i) Sets a date for a hearing to determine whether particular conduct was frivolous; and
> (ii) Gives notice of the date of the hearing to each party or counsel of record who allegedly engaged in frivolous conduct and to each party allegedly adversely affected by frivolous conduct; and

(iii) Conducts the hearing to determine if the conduct was frivolous, whether any party was adversely affected by the conduct if it is found to be frivolous, and to determine if an award is to be made, the amount of that award. In connection with the hearing, the court may order each party who may be awarded reasonable attorney's fees and his counsel of record to submit to the court, for consideration in determining the amount of any such award, an itemized list of the legal services necessitated by the alleged frivolous conduct, the time expended in rendering the services, and the attorney's fees associated with those services. Additionally, the court shall allow the parties and counsel of record involved to present any other relevant evidence at the hearing.

(c) The amount of an award that is made pursuant to this section shall not exceed the attorney's fees that were both reasonably incurred by a party and necessitated by the frivolous conduct.
(d) An award of reasonable attorney's fees pursuant to this section may be made against a party, his counsel of record, or both.
(3) An award of reasonable attorney's fees pursuant to this section does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client.
(4) The provisions of this section do not affect or limit the application of any civil rule or another section of the Idaho Code to the extent that such a rule or section prohibits an award of attorney's fees or authorizes an award of attorney's fees in a specified manner, generally, or subject to limitations.

I.C. § 12-123. (Emphasis supplied).

Idaho Rule of Civil Procedure 11, governing representations to the Court and sanctions, provides, in relevant part:

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record licensed in the State of Idaho, in the individual attorney's name, or by a party personally if the party is unrepresented. The paper must state the signer's address, email address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper, whether by signing, filing, or submitting, or later advocating it, **an attorney** or unrepresented party **certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:**
(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.
(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court must impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. A law firm may be held jointly responsible for a violation committed by its partner, associate, or employee.
(2) *Motion for Sanction.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party on the motion, reasonable expenses, including attorney's fees and costs incurred for the motion.
...
(4) *Nature of the Sanction.* The sanction imposed under this rule may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. The sanction may also include nonmonetary directives.
...
(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.
(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

I.R.C.P. 11. (Emphasis supplied).

In *Webster v. Hoopes,* 126 Idaho 96, 878 P.2d 795 (Ct. App. 1994), the Idaho Court of Appeals stated:

> It is well-settled that an award of attorney fees under I.C. § 12-121 is a matter left to the discretion of the trial judge. **Idaho Code § 12-123 also provides that the court "may award attorney fees" on the condition that the court follow the procedure outlined in the statute. Therefore, in reviewing an award of fees pursuant to I.C. §§ 12-121 or 12-123, we apply an abuse of discretion standard.**

Id. at 100, 878 P.2d at 799. (Emphasis supplied).

Similarly, in *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991), the Idaho Supreme Court explained:

> The use of an abuse-of-discretion standard in reviewing awards pursuant to I.R.C.P. 11(a)(1) is consistent with the standard we apply in reviewing the award of attorney fees pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1). *Anderson v. Ethington,* 103 Idaho 658, 660, 651 P.2d 923, 925 (1982). Therefore, accepting the rationale of the Supreme Court in *Cooter* and considering our own standard for reviewing other awards of attorney fees, **we conclude that the abuse-of-discretion standard is more compatible with our view of the appropriate role of our appellate courts in reviewing the award of sanctions under I.R.C.P. 11(a)(1)** than de novo review.

Id. at 94, 803 P.2d at 1000. (Emphasis supplied).

III. DISCUSSION

A. No Sanctions Will Be Imposed Under Idaho Code § 12-123.

In *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991), the Idaho Supreme Court reasoned:

> **However, I.C. § 12-121, and I.R.C.P. 54(e)(1) authorize the award of attorney fees in a case which was "brought, pursued or defended frivolously, unreasonably or without foundation." This is a similar standard as I.C. § 12-123,** which authorizes the award of attorney fees for "frivolous conduct," which means conduct or argument of counsel that is "not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." Accordingly, we will consider respondent's belated appellate claim that the award of attorney fees can be supported under I.C. § 12-121. Our prior cases have held that we will uphold the decision of a trial court if any alternative legal basis can be found to support it. *Foremost Ins. Co. v. Putzier,* 102 Idaho 138, 627 P.2d 317 (1981); *Anderson & Nafziger v. G.T. Newcomb, Inc.,* 100 Idaho 175, 179, 595 P.2d 709, 713 (1979).
>
> ...
>
> The trial court, having found Idaho law to be unclear, uncertain and conflicting, examined conflicting authority from other jurisdictions to determine the broker's duty. Under the facts of this case, the Hanfs would have had an arguable claim under the Wyoming *Walter* case. We cannot say that plaintiffs' legal argument (based on Wyoming case law) was so plainly fallacious as to be deemed frivolous, or that their case was not supported by a good faith argument for the extension or modification of the law in Idaho, whether under I.C. §§ 12-121 or 12-123. Accordingly, the trial court's award of attorney fees to Syringa

under either I.C. § 12-123 or I.C. § 12-121 and I.R.C.P. 54(e)(1), was not appropriate given the legal issues involved in this case.

Id. at 369-370, 816 P.2d at 325-326. (Emphasis supplied).

In its "Memorandum Decision and Order Awarding Costs and Attorneys' Fees to Valiant Idaho, LLC," filed August 22, 2016, this Court, in denying Valiant's request for attorneys' fees under Idaho Code § 12-121, ruled: "[T]his Court does not believe that JV, NIR or VP defended this action frivolously, unreasonably, or without foundation. Absent such frivolous or unreasonable conduct, Valiant is not entitled to an award of attorneys' fees against them." *Id.* at 9. As stated in *Hanf v. Syringa Realty, Inc., supra,* the standard for awarding fees under § 12-121 is similar to the standard for a fee award under § 12-123. This Court having already denied fees under § 12-121, now also denies them under § 12-123, for the same reasons set forth in its August 22, 2016, Memorandum Decision and Order, and incorporated by reference herein.

Further, the defendants' various motions for reconsideration and/or to alter and amend the judgment impacted the Valiant Foreclosure, as follow: First, this Court granted the defendants' partial reconsideration and denied Valiant's summary judgment on the issue of whether the 2007 RE Loans Note (Loan No. P0099) and the Pensco Note (Loan No. P0106) were satisfied. *See Memorandum Decision and Order Granting in Part Reconsideration of the July 21, 2015, Memorandum Decision & Order* (filed September 4, 2015), at 2-3; and *Memorandum Decision and Order re: Motions Heard on October 23, 2015* (filed October 30, 2015), at 15.

Second, Valiant's expert, C. Dean Shafer, filed three successive Declarations setting forth the legal description of the property encumbered by the Valiant Mortgages. By the third Declaration, he had identified which individual parcels were encumbered by each mortgage. *See Memorandum Decision and Order re: Motions Heard on October 23, 2015*, at 15-18.

Third, two prior proposed Judgments and proposed Decrees of Foreclosure, submitted by

Valiant and entered by this Court, were vacated for issues related to the order of sale of the property and the omission of the legal description of the property encumbered by JV's mortgage.

Fourth, the amount claimed by Valiant as owing under the 2007 RE Loans Note was reduced by $96,901.99 as result of testimony at trial from Tom Williams, the president of Sandpoint Title Insurance (STI) that STI had wired a payment of that amount to Wells Fargo from the sale by EaglePointe Construction & Mgmt., Inc. of one of the lots it had purchased from Pend Oreille Bonner Development, LLC. *See Memorandum Decision and Order re: court trial held on January 26 and 29 and March 16 and 17, 2016*, (filed May 27, 2016), at 25.

The defendant's numerous motions for reconsideration and/or to alter and amend the judgment were undoubtedly cumulative and repetitive, and thus, frustrating for Valiant. However, because these motions had the above-described (essentially, positive) impact on the adjudication of the case, this Court cannot find the arguments made by the defendants therein to be "so plainly fallacious as to be deemed frivolous, or that their case was not supported by a good faith argument for the extension or modification of the law in Idaho, whether under I.C. §§ 12-121 or 12-123." *Hanf v. Syringa Realty, Inc.*, 120 Idaho at 370, 816 P.2d at 326.

For these reasons, this Court, in the exercise of its discretion, finds no basis to impose sanctions and award attorneys' fees under Idaho Code § 12-123, and having so decided, finds it unnecessary to carry out the hearing and other procedures set forth in § 12-123(2)(b).

B. No Sanctions Will Be Imposed Under I.R.C.P. 11.

In *Landvik by Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997), the Idaho Court of Appeals explained:

> Under Idaho Code § 12–121 and I.R.C.P. 54(e)(1), attorney fees may be awarded in any civil action where the court finds that the case has been "brought, pursued or defended frivolously, unreasonably or without foundation." Such an award is subject to reversal only if there has been an abuse of discretion by the

trial court. *Savage Ditch Water Users v. Pulley,* 125 Idaho 237, 250, 869 P.2d 554, 567 (1993); *Sun Valley Shopping Center v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Rule 11(a)(1)[3] provides in part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed.... **The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....** If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

This rule does not duplicate I.C. § 12–121, and circumstances that justify an award of fees under that statute do not necessarily call for imposition of Rule 11 sanctions. *See Sun Valley Shopping Center, Inc.,* 119 Idaho at 96, 803 P.2d at 1002; *Young v. Williams,* 122 Idaho 649, 654, 837 P.2d 324, 329 (Ct.App.1992). **Rule 11 applies only to the signing of a "pleading, motion or other paper," and its "central feature is the certification established by the signature."** *Id.* at 653, 837 P.2d at 328. **An "attorney is required to perform a prefiling inquiry into both the facts and the law involved to satisfy the affirmative duty imposed by Rule 11."** *Riggins v. Smith,* 126 Idaho 1017, 1021, 895 P.2d 1210, 1213 (1995). **Reasonableness under the circumstances, and a duty to make reasonable inquiry prior to filing a pleading or other paper, is the appropriate standard to apply when evaluating an attorney's conduct.** *Durrant v. Christensen,* 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). **Whether a pleading, motion or other signed document is sanctionable must be based on an assessment of the knowledge of the relevant facts and law that reasonably could have been acquired at the time the document was submitted to the court.** *Young,* 122 Idaho at 653, 837 P.2d at 328.

This Court has held that Rule 11 sanctions ought not be applied to make a "lump sum compensatory attorney fee award." *Conley v. Looney,* 117 Idaho 627, 630, 790 P.2d 920, 923 (Ct.App.1990); *Kent v. Pence,* 116 Idaho 22,

[3] The information in former Rule 11(a)(1) is contained in current Rule 11(a)-(c).

> 24, 773 P.2d 290, 292 (Ct.App.1989). **Rather, Rule 11(a)(1) is "a court management tool" which should be exercised narrowly.** *Conley,* 117 Idaho at 631, 790 P.2d at 924; *State of Alaska ex rel. Sweat v. Hansen,* 116 Idaho 927, 929, 782 P.2d 50, 52 (Ct.App.1989). In reviewing the trial court's action on a motion for Rule 11 sanctions, we apply an abuse of discretion standard. *Riggins,* 126 Idaho at 1020, 895 P.2d at 1213; *Sun Valley Shopping Center,* 119 Idaho at 94, 803 P.2d at 1000.
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> ...
>
> We next address Herbert's assertion that the district court should have awarded Rule 11 sanctions against Landvik's attorney for the amount of attorney fees incurred by Herbert throughout the litigation because the attorney did not make a reasonable inquiry into the facts before filing the complaint. Herbert argues that the prefiling inquiry by plaintiff's attorney should have included an interview of Herbert, which would have clarified that he had no involvement with the concert. We are of the view, however, that such a prefiling inquiry of a prospective adversary, to which responses may be self-serving and less than candid, is no substitute for an opportunity for formal discovery where answers must be provided under oath and relevant documentary evidence produced. Therefore, we do not agree with Herbert's assertion that, on this record, the trial court abused its discretion by failing to award Rule 11 sanctions for the filing of the complaint.
>
> We conclude, however, that the trial court did not adequately consider whether Herbert would be entitled to Rule 11 sanctions based upon the attorney's signing of motions, briefs or other papers subsequent to the complaint. As the excerpt from the district court's decision quoted above discloses, after finding that Landvik's counsel conducted a reasonable inquiry before filing the complaint, so that Rule 11 sanctions were not warranted for that pleading, the court ended its discussion of Rule 11 sanctions without considering that rule's application to other papers filed by Landvik's counsel such as Landvik's brief in opposition to Herbert's motion for summary judgment and Landvik's motion for reconsideration of the district court's summary judgment decision. Therefore, on remand the district court is directed to consider whether documents filed by Landvik's attorney, other than the complaint, violated the standards of I.R.C.P. 11(a)(1) such that sanctions against the attorney should be ordered.

Id. at 61-63, 936 P.2d at 704-706. (Emphasis supplied). *Accord Tolley v. THI Co.* 140 Idaho 253, 264, 92 P.3d 503, 514 (2004) ("The district court was within its discretion and acted accordingly to the legal standards to it, as evidenced by its reliance above on *Landvik v. Herbert.*").

It appears that Valiant is not seeking sanctions for any discrete pleading violation, but rather, for the *collective* motions for reconsideration filed by the defendants, containing arguments that had already been rejected by this Court on summary judgment; and for attempts by Ms. Weeks and Mr. Finney to rehash these arguments at trial despite the limited scope of the

trial. As a result of this cumulative conduct, Valiant is seeking, as sanctions, fees in the amount of $215,110.25, jointly and severally against JV and Mr. Finney; $145,429.83, jointly and severally against NIR, VP and Ms. Weeks; and $115,793.25, jointly and severally against VP and Ms. Weeks. Upon consideration, the Court finds this request by Valiant to be a request for a "lump sum compensatory attorney fee award," which is not allowed under Rule 11. *Landvik by Landvik v. Herbert*, 130 Idaho at 61, 936 P.2d at 704.

As stated earlier, the defendants' repeated motions for reconsideration were indeed cumulative and repetitive of many arguments previously rejected on summary judgment as lacking any legal or factual basis With each successive motion to reconsider, JV, NIR and VP and their counsel simply ignored this Court's adverse rulings, and repeated the same arguments and claims again and again. [At trial, this Court allowed some of those arguments to come in because counsel indicated they wanted to make a record for appeal]. Nonetheless, the defendants and their counsel were entitled to mount a vigorous defense to the Valiant Foreclosure, and this Court does not find that the vigor of that defense was in any manner frivolous or unreasonable.

Regarding Mr. Finney's and Ms. Weeks' possession of the escrow file in advance of trial, as indicated by Mr. Keyes in his Declaration, the title company file was 1702 pages of documents. *Declaration of Daniel Keyes in Support of VP and NIR's Opposition to Valiant Idaho's Motion for Sanctions* (filed August 24, 2016), at 2, ¶ 5. Based simply upon the fact of Mr. Finney's and Ms. Weeks' possession of the escrow file in advance of trial, this Court is not prepared to find, as Valiant contends, that the defendants "intentionally misrepresented these known facts to the Court and opposing counsel during its oral argument in opposition to Valiant's Third Motion for Summary Judgment" and made arguments … "to manufacture and/or mislead the Court into concluding that a question of fact existed for trial *[sic]* were frivolous and

without any basis in fact or law." *Valiant Idaho, LLC's Memorandum in Support of Motion for Sanctions Under I.C. § 12-123 and I.R.C.P. 11* (filed August 11, 2016), at 9, 12-13.

This was very complicated case, with thousands of pages of discovery, and after assessing the knowledge of the relevant facts and law that reasonably could have been acquired at the time the various motions for reconsideration and/or to alter and amend the judgment were submitted to this Court, this Court does not find any breach by Mr. Finney or Ms. Weeks of their duty to make reasonable inquiry prior to filing a pleading or other paper.

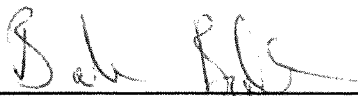
For these reasons, this Court, in the exercise of its discretion, and recognizing that Rule 11 "is 'a court management tool' which should be exercised narrowly," finds no basis to impose sanctions and award attorneys' fees under Rule 11 against JV and Mr. Finney, or VP, NIR and Ms. Weeks. *Landvik by Landvik v. Herbert*, 130 Idaho at 61, 936 P.2d at 704.

IV. CONCLUSION AND ORDER

NOW, THEREFORE, based on the foregoing, IT IS HEREBY ORDERED THAT Valiant Idaho, LLC's Motion for Sanctions Under I.C. § 12-123 and I.R.C.P. 11 is DENIED.

IT IS SO ORDERED.

DATED this 29 day of August, 2016.



Barbara Buchanan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid AND a courtesy copies sent by electronic mail, this 29 day of August, 2016, to:

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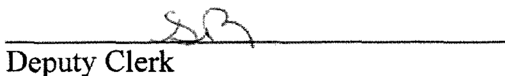

Deputy Clerk