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Monitor Finance, L.C. v. Wildlife Ridge Estates, LLC Clerk's Record Dckt. 45517

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited)
Liability company; and FIRST CAPITAL)
FUNDING, L.C., a Utah limited liability)
Company,)
)
)
)
Plaintiffs-Counterdefendants,) Supreme Court No. 45517-2017
Respondents)
v.)
)
WILDLIFE RIDGE ESTATES, LLC, an)
Idaho limited liability company;)
)
Defendant-Counterclaimant-Appellant,)
)
)
)
and)
)
)
M&S DEVELOPMENT, LLC, an Idaho)
Limited liability company)
_____)

CLERK'S RECORD

Appeal from the District Court of the Sixth Judicial District of the State of
Idaho, in and for the County of Bannock.

Before **HONORABLE Robert C. Naftz** District Judge.

For Appellant:

A. Bruce Larson
Richard A. Hearn
HEARN LAW PLC
P.O. Box 70
Pocatello, Idaho 83204

For Respondent:

Ron Kerl
COOPER & LARSEN, CHARTERED
P.O. Box 4229
Pocatello, Idaho 83205-4229

Monitor Finance, LC, First Capital Funding, LC vs. Wildlife Ridge Estates, LLC, M&S Development, LLC

Date	Code	User	Judge
10/7/2016	LOCT	LAUREN	IDAHO SUPREME COURT; Diane's Desk
	NCOC	LAUREN	New Case Filed-Other Claims
	COMP	LAUREN	Complaint Filed
	SMIS	LAUREN	Summons Issued
		LAUREN	Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Cooper & Larsen, Chtd. Receipt number: 0031772 Dated: 10/7/2016 Amount: \$221.00 (Check) For:
	ATTR	TAMILYN	Plaintiff: Monitor Finance, LC Attorney Retained Ron Kerl
	ATTR	TAMILYN	Plaintiff: First Capital Funding, LC Attorney Retained Ron Kerl
	COMP	TAMILYN	Complaint to Judicially Foreclose Deed of Trust-by Monitor Finance and First Capital Funder thru atty Ron Kerl
10/20/2016	AFFD	KERI	Affidavit Of Service Of Another Summons And Complaint To Judicially Forclose Deed Of Trust; served docs on M & S Developement, LLC on 10/13/16
10/21/2016	AFFD	KERI	Affidavit Of Service Of Summons And Complaint To Judicially Forclose Deed Of Trust; served docs on Wildlife Ridge Estates, LLC on 10/16/16
11/4/2016		LAUREN	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: A. Bruce Larson Receipt number: 0034591 Dated: 11/4/2016 Amount: \$136.00 (Check) For: Wildlife Ridge Estates, LLC, (defendant)
	ANSW	KERI	Answer To Complaint And Counterclaim; atty for dfds
11/8/2016	ATTR	KERI	Defendant: Wildlife Ridge Estates, LLC, Attorney Retained A Bruce Larson
	ATTR	KERI	Defendant: M&S Development, LLC Attorney Retained A Bruce Larson
	ORDR	KERI	Order For Submission Of Information For Scheduling Order /s/ J Naftz 11/08/16
11/22/2016		KERI	Joint Submission Of Information For Scheduling Order; Ron Kerl, atty for plaintiff
12/15/2016		TAMILYN	Amended Joint Submission of Information for Scheduling Order
12/29/2016	ORDR	KERI	Order Setting Jury Trial; Primary Setting September 6-8, & 12, 2017, Secondary Setting December 5-8, 2017 /s/ J Naftz 12/29/16
12/30/2016	HRSC	KERI	Hearing Scheduled (Jury Trial 09/06/2017 09:00 AM) Primary Setting

Monitor Finance, LC, First Capital Funding, LC vs. Wildlife Ridge Estates, LLC, M&S Development, LLC

Date	Code	User	Judge
12/30/2016	HRSC	KERI	Hearing Scheduled (Jury Trial 09/12/2017 09:00 AM) Primary Setting (Day 4) Robert C Naftz
	HRSC	KERI	Hearing Scheduled (Jury Trial 12/05/2017 09:00 AM) Secondary Setting Robert C Naftz
1/5/2017	HRSC	KERI	Hearing Scheduled (Motion for Summary Judgment 02/21/2017 02:00 PM) Robert C Naftz
	ANSW	KERI	Monitor Finance, L.C. and First Capital Funding, L.C.'s Answer To Counterclaim; Ron Kerl, atty for Monitor Finance L.C. and First Capital Funding L.C. Robert C Naftz
1/6/2017	MOTN	KERI	Motion For Summary Judgment By Monitor Finance, L.C. And First Capital Funding, L.C.; Ron Kerl, atty for Monitor Finance L.C. and First Capital Funding L.C. Robert C Naftz
	MEMO	KERI	Memorandum In Support Of Summary Judgment Motion Filed By Monitor Finance, L.C. And First Capital Funding, L.C.; Ron Kerl, atty for Monitor Finance L.C. and First Capital Funding L.C. Robert C Naftz
	AFFD	KERI	Affidavit Of Ron Kerl In Support Of Summary Judgment Motion Filed By Monitor Finance, L.C. And First Capital Funding, L.C.; Ron Kerl, atty for Monitor Finance L.C. and First Capital Funding L.C. Robert C Naftz
	NOTC	KERI	Notice Of Hearing By Monitor Finance L.C. and First Capital Funding, L.C.; Ron Kerl, atty for Monitor Finance L.C. and First Capital Funding L.C. Robert C Naftz
2/6/2017		KERI	Defendant/Counterclaimant Wildlife Ridge's Response To Plaintiffs/Counterdefendants Monitor Finance, L.C.'s And First Capital, L.C.'s Motion For Partial Summary Judgment; A Bruce Larson, atty for dfdt Robert C Naftz
	AFFD	KERI	Affidavit Of Richard A Hearn; A Bruce Larson, atty for dfdt Robert C Naftz
2/7/2017	MOTN	KERI	Motion To Amend To Add Additional Defendant, To Wit: Pioneer Title Company; Ron Kerl, atty for plaintiff Robert C Naftz
2/8/2017	HRSC	KERI	Hearing Scheduled (Motion 02/27/2017 02:00 PM) Plaintiff's Motion to Amend to Add Additional Defendant Robert C Naftz
2/14/2017	MEMO	KERI	Reply Memorandum In Support Of Summary Judgment Motion Filed By Monitor Finance, L.C. And First Capital Funding, L.C., Ron Kerl, atty for Monitor Finance, L.C. And First Capital Funding, L.C. Robert C Naftz

Monitor Finance, LC, First Capital Funding, LC vs. Wildlife Ridge Estates, LLC, M&S Development, LLC

Date	Code	User	Judge
2/14/2017	AFFD	KERI	Robert C Naftz
			Second Affidavit Of Ron Kerl In Support Of Summary Judgment Motion Filed By Monitor Finance, L.C. And First Capital Funding, L.C.; Ron Kerl, atty for Monitor Finance, L.C. And First Capital Funding, L.C.
2/21/2017	HRVC	KERI	Robert C Naftz
			Hearing result for Motion scheduled on 02/27/2017 02:00 PM: Hearing Vacated Plaintiff's Motion to Amend to Add Additional Defendant
	DCHH	KERI	Robert C Naftz
			Hearing result for Motion for Summary Judgment scheduled on 02/21/2017 02:00 PM: District Court Hearing Held Court Reporter: Stephanie Davis Number of Transcript Pages for this hearing estimated: More than 100 pages
2/22/2017	MEOR	KERI	Robert C Naftz
			Minute Entry and Order; Court heard argument on Plaintiff's motion to amend the complaint and add additional defendant, with no objection from defendants, motion was granted, plaintiff atty will prepare order and submit to the Court, hearing scheduled on 02/27/17 at 2:00 p.m. to hear the motion is vacated, Court next heard argument on Plaintiff's motion for summary judgment, the Court took the matter under advisement /s/ J Naftz 02/21/17
2/23/2017	ORDR	KERI	Robert C Naftz
			Order Granting Leave To File Amended Complaint; pursuant to the parties having stipulated in open court, plaintiff's motion was granted /s/ J Naftz 02/23/17
2/28/2017	LOCT	TAMILYN	Robert C Naftz
3/1/2017		TAMILYN	Robert C Naftz
			File #2 started First Amended Complaint to Judicially Foreclose Deed of Trust-by plaintiff thru atty Ron Kerl
3/13/2017	STIP	TAMILYN	Robert C Naftz
			Stipulation Consenting to Sale of Real Property and Deposit of Proceeds into Trust
3/27/2017	MEMO	KERI	Robert C Naftz
			Memorandum Decision And Order; Plaintiffs motion for partial summary judgment is granted, all affirmative defenses listed in the defendant's answer, as well as the defendant's counterclaim for fraud are hereby stricken and dismissed /s/ J Naftz 03/27/17
	MEMO	KERI	Robert C Naftz
			Memorandum Decision And Order; Plaintiff's motion for partial summary judgment is granted, and the affirmative defenses and counterclaim filed by defendant are hereby dismissed /s/ J Naftz 03/27/17
3/29/2017	APPL	TAMILYN	Robert C Naftz
			Application for Entry of Default Against M & S Development,. LLC-thru atty Ron Kerl
3/30/2017	DFLT	TAMILYN	Robert C Naftz
			Default-entered agains M & S Development, LLC s/Naftz 03/30/2017

Monitor Finance, LC, First Capital Funding, LC vs. Wildlife Ridge Estates, LLC, M&S Development, LLC

Date	Code	User	Judge
4/13/2017	MOTN	TAMILYN	Motion for Summary Judgment by Monitor Finance, L.C. and First Capital Funding, L.C.-thru atty Ron Kerl
	MEMO	TAMILYN	Memorandum in Support of Summary Judgment Motion Filed by Monitor Finance, L.C. and First Capital Funding, L.C.-by atty Ron Kerl
	AFFD	TAMILYN	Affidavit in Support of Plaintiff's Foreclosure Decree-by Miles Pitcher thru atty Ron Kerl
	HRSC	TAMILYN	Notice of Hearing-Hearing Scheduled (Motion for Summary Judgment 05/15/2017 02:00 PM)-by atty Ron Kerl
4/19/2017	SMIS	TAMILYN	Summons Issued
4/27/2017		TAMILYN	Plaintiffs' Witness Disclosure-thru atty Ron Kerl
4/28/2017	STIP	TAMILYN	Supplemental Stipulation Consenting to Sale of Real Property and Deposit of Proceeds into Trust
4/30/2017	ORDR	TAMILYN	Stipulated Order Approving Stipulations Consenting to Sale of Real Property-stipulation and supplemental stipulation are approved s/Naftz 04/28/2017
5/1/2017	MOTN	TAMILYN	Motion for Reconsideration-by defendant thru atty Bruce Larson
	MEMO	TAMILYN	Memorandum in Opposition to plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Reconsideration-thru atty Bruce Larson
	NOTC	TAMILYN	Notice of Hearing-Hearing Scheduled (Motion for Reconsideration 05/15/2017 02:00 PM)-by atty Bruce Larson
5/4/2017	ACKN	TAMILYN	Acknowledgment of Service-summons and first amended complaint accepted by Jesse Hamilton
		TAMILYN	Waiver of Right to Respond to Complaint and Consent to Entry of Judgment and Decree of Foreclosure-by Jesse Hamilton thru atty Ron Kerl
	AFFD	TAMILYN	Affidavit of Mailing-by Ron Kerl
5/8/2017	AFFD	TAMILYN	Third Affidavit of Ron Kerl in Support of Summary Judgment Motion and Opposing Motion for Reconsideration
	MEMO	TAMILYN	Memorandum Opposing Motion for Reconsideration and Reply Memorandum in Support of Summary Judgment Motion-by atty Ron Kerl
		TAMILYN	Supplemental Affidavit in Support of Plaintiffs' Foreclosure Decree-by Miles Pitcher

Monitor Finance, LC, First Capital Funding, LC vs. Wildlife Ridge Estates, LLC, M&S Development, LLC

Date	Code	User	Judge
5/15/2017	DCHH	KERI	Hearing result for Motion for Summary Judgment scheduled on 05/15/2017 02:00 PM: District Court Hearing Held Court Reporter: Stephanie Davis Number of Transcript Pages for this hearing estimated: More than 100 pages and Motion for Reconsideration
	MEOR	KERI	Minute Entry and Order; the Court heard argument on the Defendant's motion for reconsideration and Plaintiff's motion for summary judgment, at the conclusion, the Court took the matter under advisement /s/ J Naftz 05/15/17
6/14/2017	DEOP	KERI	Memorandum Decision And Order; Plaintiff's Motion for summary judgment was granted, counsel for the plaintiff's shall submit a proposed judgment and decree of foreclosure and may also submit a memorandum detailing the grounds for any claimed award of litigation costs & attorney fees /s/ J Naftz 06/13/17
6/20/2017	HRVC	KERI	Hearing result for Jury Trial scheduled on 12/05/2017 09:00 AM: Hearing Vacated Secondary Setting
	HRVC	KERI	Hearing result for Jury Trial scheduled on 09/12/2017 09:00 AM: Hearing Vacated Primary Setting (Day 4)
	HRVC	KERI	Hearing result for Jury Trial scheduled on 09/06/2017 09:00 AM: Hearing Vacated Primary Setting
	JDMT	TAMILYN	Judgment, Decree of Foreclosure and Order of Sale s/Naftz 06/20/2017; Recorded 6-26-17 Instrument No. 21708981; record book 1016
	CSTS	TAMILYN	Case Status Changed: Closed
		TAMILYN	judgment, decree of foreclosure and order of sale instrument #21708981
6/26/2017		DCANO	Miscellaneous Payment: For Taking Acknowledgments, Including Seal Paid by: Cooper & Larsen Receipt number: 0019714 Dated: 6/26/2017 Amount: \$2.00 (Check)
6/27/2017	WRIT	NICOLE	Writ of Execution in Foreclosure and Notice of Levy issued; sent back to counsel for Plaintiff, Ron Kerl; Instrument No. 21709079
6/29/2017		NICOLE	Miscellaneous Payment: Writs Of Execution Paid by: First Capital Funding, LC Receipt number: 0020132 Dated: 6/29/2017 Amount: \$2.00 (Check)

Monitor Finance, LC, First Capital Funding, LC vs. Wildlife Ridge Estates, LLC, M&S Development, LLC

Date	Code	User	Judge
7/11/2017		LAUREN	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Hearn Law, PLC Receipt number: 0021269 Dated: 7/11/2017 Amount: \$37.00 (Check)
		NICOLE	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Hearn Law, PLC Receipt number: 0021291 Dated: 7/11/2017 Amount: \$129.00 (Check) For: Wildlife Ridge Estates, LLC, (defendant)
	APSC	DCANO	Appealed To The Supreme Court
	NOTC	DCANO	NOTICE OF APPEAL: Richard A. Hearn, Attorney for Appellant Wildlife Ridge Estate, LLC
	MISC	DCANO	Received check # 1161 in the amount of \$100.00 for deposit of Clerk's Record.
7/19/2017		TAMILYN	Respondents' Designation of Additional Record on Appeal-by atty Ron Kerl
7/21/2017	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL: Signed and Mailed to Counsel and SC on 7-21-17.
8/1/2017	NOTC	TAMILYN	Notice of sheriff's Sale in Foreclosure-by atty Ron Kerl
8/2/2017	AFFD	TAMILYN	Affidavit of Mailing-notice of sheriff's sale in foreclosure-by atty Ron Kerl
8/23/2017		DCANO	IDAHO SUPREME COURT; Received Notice of Appeal, No Transcripts Requested. Filed Respondent's Designation of Additional Record on Appeal. Idaho Supreme Court entered Order Conditionally Dismissing Appeal as it appears not to be from a final District Court Judgment. *Suspended for (21) days for entry of Final Judgment in the District Court.
9/1/2017	WRRT	NICOLE	Writ of Execution in Foreclosure and Notice of Levy Returned
9/20/2017	ORDR	DCANO	IDAHO SUPREME COURT; Order Dismissing Appeal: An Order Conditionally Dismissing Appeal was issued by this Court on August 22, 2017. as it appeared the JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE entered by Dist. Judge Robert C. Naftz and filed on 6-20-17 did not comply with IRCP 54(a). This appeal was suspended for entry of a final judgment in the District Court. Whereas, there having been no final judgment entered in the District Court, pursuant to IRCP 54(a), and Appellant having filed no Response with this Court to the Order Conditionally Dismissing Appeal entered by this Court on 8-22-17. It hereby is Ordered that this appeal be, and hereby is DISMISSED. Signed Karel A. Lehrman, Clerk for Supreme Court on 9-18-17.

Monitor Finance, LC, First Capital Funding, LC vs. Wildlife Ridge Estates, LLC, M&S Development, LLC

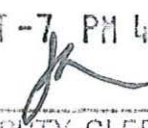
Date	Code	User	Judge
9/21/2017	HRSC	KERI	Notice of Hearing-Hearing Scheduled (Hearing Scheduled 10/10/2017 03:00 PM) Deficiency hearing-by atty Ron Kerl
	CSTS	KERI	Case Status Changed: Closed pending clerk action
	MOTN	TAMILYN	Motion for Deficiency Judgment Against M&S Development, LLC-by plaintiff thru atty Ron Kerl
10/10/2017	JDMT	TAMILYN	Judgment-against M&S Development, LLC in the amount of \$6,728,907.39 s/Naftz 10/10/2017
	CSTS	TAMILYN	Case Status Changed: closed
10/16/2017	MISC	DCANO	ACKNOWLEDGMENT OF RECEIPT: Remittitur. Signed and Mailed back to SC on 10-16-17
	REMT	DCANO	Remittitur: The Court having entered an Order dismissing this appeal 9-9-17 therefore, it is hereby Ordered that the appeal herein is DISMISSED. 10-11-17.
10/19/2017		DCANO	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Hearn Law Receipt number: 0032040 Dated: 10/23/2017 Amount: \$129.00 (Check) For: Wildlife Ridge Estates, LLC, (defendant)
	APSC	DCANO	Appealed To The Supreme Court
	NOTC	DCANO	NOTICE OF APPEAL: Richard A. Hearn, Attorney for Wildlife Ridge Estates, LLC, Defendant/Appellants.
10/23/2017	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL: Signed and Mailed to Counsel and Supreme Court on 10-23-17.
10/24/2017		TAMILYN	Respondents' Designation of Additional Record on Appeal-third affidavit of Ron Kerl in Support of Summary Judgment and opposing motion for reconsideration AND memorandum opposing motion for reconsideration and reply memorandum in support of summary judgment motion; to be included in appeal-by atty Ron Kerl
11/17/2017	MISC	DCANO	IDAHO SUPREME COURT; Filed Notice of Appeal with attachments. No Transcripts Requested. Filed Respondent's Designation of Additional Record on Appeal. Entered Order Conditionally Dismissing Appeal as it appears it was not filed from a final, District Court judgment as to all parties or, a final Judgment with IRCP 54(b). Suspended for Twenty-one Days from the Date of this Order.

Case: CV-2016-0003588-OC Current Judge: Robert C Naftz
Monitor Finance, LC, etal. vs. Wildlife Ridge Estates, LLC, etal.

Monitor Finance, LC, First Capital Funding, LC vs. Wildlife Ridge Estates, LLC, M&S Development, LLC

Date	Code	User	Judge
11/22/2017		DCANO	Rule 54(b) Certificate: Final Judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules: Signed Judge Naftz on 11-22-17. Emailed Cert. copy to SC on 11-22-17.
11/27/2017	MISC	DCANO	IDAHO SUPREME COURT; Entered Order withdraw Coniditonal Dismissal and Reinstating Appeal. Set Due Date - Clerk's Record only due to Counsel on 12-25-17. Due in SC on 1-29-18.
1/8/2018		DCANO	CLERK'S RECORD ONLY received in Court Records on 1-8-18.

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
 151 North Third Avenue, Second Floor
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 Pocatello, ID 83205-4229
 Telephone: (208) 235-1145
 Facsimile: (208) 235-1182
 Email: ron@cooper-larsen.com

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2016 OCT -7 PM 4:01
 BY 
 DEPUTY CLERK

ROBERT C. NAFTZ

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,
 Plaintiffs,
 vs.
 WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,
 Defendants.

CASE NO. CV-2016-3588-OC
 FEE CATEGORY: AA
 FEE: \$221.00
**COMPLAINT TO
 JUDICIALLY FORECLOSE
 DEED OF TRUST**

Plaintiffs, for cause of suit against the above named Defendant, complains and alleges as follows:

1.

STATUS OF PLAINTIFFS. At all times herein mentioned Monitor Finance, L.C. ("Monitor") has been and now is a limited liability company organized under the state of Utah.

Monitor has its place of business in Provo, Utah, and is authorized, among other things, to loan money and to take notes and deeds of trust as security therefore in the State of Idaho.

At all times herein mentioned First Capital Funding, L.C. ("Capital") has been and now is a limited liability company organized under the state of Utah. Capital has its place of business in Provo, Utah, and is authorized, among other things, to loan money and to take notes and deeds of trust as security therefore in the State of Idaho.

Monitor and Capital will be referred to herein collectively as the Plaintiffs.

2.

STATUS OF DEFENDANTS. The Defendant Wildlife Ridge Estates, LLC ("Wildlife Ridge") is now a limited liability company organized under the laws of the state of Idaho, first organized in on May 12, 2006. However, between August 6, 2007 and August 27, 2007, between August 7, 2008 and October 5, 2009 and between August 5, 2010 and September 18, 2015 Wildlife Ridge was administratively dissolved as an Idaho limited liability company and did not legally exist. Wildlife Ridge is the current owner of the premises herein sought to be foreclosed, having acquired the property subject to the rights of the Plaintiffs.

Michael J. Millward, a married man ("Millward") and M&S Development LLC ("M&S"), an Idaho limited liability company, are the makers of the Trust Deed Note hereinafter described, and M&S was the grantor of the Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing herein sought to be foreclosed and owner in fee simple of the premises.

3.

INFERIOR INTERESTS. The above named Defendants, and each of them, claim some right, title, lien or interest in the property described in Plaintiffs' Deed of Trust described herein, but their interest, if any, in and to said property is junior, subordinate, and subsequent to the right and lien of the Plaintiffs.

4.

TRUST DEED NOTE. On the 30th day of December, 2005, Plaintiffs jointly loaned to Millward and M&S the sum of \$244,000, and as evidence of said loan Millward and M&S, made, executed and delivered to the Plaintiffs their Trust Deed Note in writing, which Note was dated the 30th day of December, 2005, in the principal sum of \$244,000, both principal and interest being payable in words and figures as set forth in Exhibit "A" attached hereto, which is a true and correct copy of the Trust Deed Note dated December 30, 2005 and it is hereby incorporated herein by this reference as if set forth in full at this place.

5.

MODIFICATION OF TRUST DEED NOTE. By an agreement dated March 3, 2008, Millward, M&S, the Plaintiffs and Wildlife Ridge entered into a Modification of Trust Deed Note to provide for additional sums loaned by Plaintiffs to Millward and M&S to become part of the unpaid principal balance of the Trust Deed Note ("Modification"). A True and correct copy of the Modification is attached hereto as Exhibit "B," which is hereby incorporated herein by this reference as if set forth in full at this place

6.

BANKRUPTCY FILING OF MILLWARD. On September 10, 2012, Millward filed for relief under chapter 7 of the Bankruptcy Code, Case No. 12-41260 pending in the United States Bankruptcy Court for the District of Idaho. Pursuant to 11 U.S.C. § 362, an automatic stay commenced on September 10, 2012 which prohibited Plaintiffs from taking any action to enforce the Trust Deed Note, as amended. That automatic stay existed until Millward's bankruptcy case was closed on June 23, 2016.

7.

DESCRIPTION OF REAL PROPERTY SECURITY. As security for the repayment of the Trust Deed Note, together with interest, costs, and attorney's fees, M&S made, executed and delivered to Plaintiffs that certain Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005 ("Deed of Trust") on the following described real property situated in Bannock County, State of Idaho, to-wit:

A Tract of land in the South ½ of the South ½ Section 31, Township 6 South, Range 35 East, Boise Meridian, Bannock County, Idaho, more particularly described as follows:

Beginning at the South quarter corner of Section 31; thence South 89°36'40" East, 82.68 feet; thence North 53°44'13" East, 88.1 feet; thence North 26°44'09" West, 320 feet; thence North 63°15'51" East, 260 feet; thence North 26°44'09" West 495.62 feet, more or less, to the Southerly right of way line of Barton Road; thence South 72°27'20" West along the Southerly right of way of Barton Road 472.74 feet; thence continuing along the Southerly right of way line of Barton Road, South 83°18'20" West, 389.3 feet, more or less, to the Easterly line of the Old Stock Trail; thence South 26°44'40" East along the Easterly line of the Old Stock Trail 791.56 feet, more or less, to the South line of said Section 31; thence South 89°44' East, 462.23 feet, more or less, to the point of beginning.

The Deed of Trust was recorded on the 30th day of December, 2005, under Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho, and contains covenants, conditions and agreements of the mortgagor as set forth in Exhibit "C" attached hereto, which is a

true and correct copy of the Deed of Trust, and it is hereby incorporated by this reference herein as if set forth at length. The Deed of Trust has never been satisfied or discharged or the rights thereunder reconveyed.

8.

PARTIAL RELEASES. After the recording of the Deed of Trust, there was released from the Deed of Trust certain portions of the Property, and as of the date of this Complaint the Deed of Trust applies only to the following described portion of the Deed of Trust property:

Lot 2, Block 3, Wild Horse Ridge Subdivision Phase 1, according to the plat thereof, filed as Instrument No. 97000607, records of Bannock County, Idaho.

Lot 6, Block 3, Wild Horse Ridge Subdivision Phase 1, according to the plat thereof, filed as Instrument No. 97000607, records of Bannock County, Idaho.

Lot 1, Block 2, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 2, Block 2, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 4, Block 3, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 5, Block 3, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 7, Block 3, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 9, Block 3, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

9.

DEFAULT. Plaintiffs are the owners and holders of said Trust Deed Note and the joint and several beneficiaries of the Deed of Trust.

In order to protect their interest in the Property, Plaintiffs paid attorney's fees and costs in the amount of \$4,546.19 to defend Wild Life Ridge's Quiet Title Action brought against the Plaintiffs in Bannock County Case No. CV 14-7483. Plaintiffs are entitled to recover said fees and costs by virtue of the attorney fees provisions contained in the Trust Deed Note and Deed of Trust.

General taxes were duly levied against and constituted a first lien upon the property described in the Deed of Trust and to protect the lien of their Deed of Trust, Plaintiffs have paid taxes in the amount of \$22,136.63. Plaintiffs are entitled to recover reimbursement for the amount of the taxes they paid on behalf of Wild Life Ridge by virtue of the provisions contained in the Deed of Trust.

As of the 1st day of October, 2016, there is due, owing and unpaid upon the Trust Deed Note the sum of \$6,812,821.71, together with interest thereafter accruing at the default rate of 35% per annum until date of Judgment herein, together with costs, foreclosure expenses, attorney's fees and expenses necessary to preserve Plaintiffs' interest in the property heretofore advanced or hereafter accruing.

10.

ATTORNEY'S FEES. Plaintiffs have had to employ counsel to represent it in this action and has obligated itself to pay a reasonable fee for such services. Plaintiffs are entitled to recover reasonable attorney fees by virtue of the attorney fee provisions contained in the Trust Deed Note as amended and Deed of Trust herein above described. Plaintiffs allege that \$5,000.00 is a reasonable sum to be allowed as attorney's fees herein if this action is uncontested, plus such

additional sums as the Court may adjudge as reasonable attorney's fees in the event of contest, trial or appeal.

11.

REASONABLE VALUE. The Plaintiffs, upon information and belief, allege that the reasonable value of the Deed of Trust Property and its appurtenances is the sum of \$50,000.00 per lot, or a total of \$400,000.00.

12.

NO OTHER ACTION. The Plaintiffs have no plain, speedy or adequate remedy at law, and no other proceedings at law or in equity have been commenced or are pending to collect the Trust Deed Note as amended or any portion thereof or to foreclose the Deed of Trust. All conditions precedent to the initiation and prosecution of this action and the foreclosure of the Deed of Trust have been satisfied.

WHEREFORE, Plaintiffs pray for Judgment as follows:

1. That Plaintiffs receive the Decree of this Court foreclosing the Deed of Trust so that the amounts due Plaintiffs under the Trust Deed Note as amended, which as of October 1, 2016 totaled \$6,812,821.71, plus interest accruing thereafter, together with any additional sums advanced by Plaintiffs or which Plaintiffs become obligated to advance for the payment of taxes or assessments and/or attorney fees and costs during the pendency of this action, including interest on such advances from date of advance; for the sum of \$5,000.00 as attorney's fee if this action is uncontested, plus such additional sums as the Court may adjudge as reasonable in the event of contest, trial or appeal; for Plaintiffs' taxable costs and disbursements herein; and for interest on the entire amount of said judgment at the maximum rate allowed by law;

2. That the Plaintiffs' Deed of Trust described herein be adjudged a first and prior lien upon the property described in the Deed of Trust superior to any right, title, claim, lien or interest on the part of the named Defendants or persons claiming by, through or under said Defendants;

3. That the Court, in the Decree, establish the reasonable value of the property herein described at \$400,000.00;

4. That the Plaintiffs' Deed of Trust described herein be foreclosed and said real property be sold in separate parcels in accordance with and in the manner provided by law; that Plaintiffs be permitted to be a purchaser at sale; that the net proceeds of said sale be applied first toward the payment of the costs of said sale and then towards the payment of Plaintiffs Trust Deed Note as amended;

5. That the Decree provide that after the sale of said property all right, title, claim, lien or interest of the named Defendants and every person claiming by, through or under said Defendants, in or to said property, including the right of possession thereof from and after said sale, be forever barred and foreclosed and that the purchaser at said sale be entitled to immediate possession of the premises as allowed by law subject only to such statutory right of redemption as said Defendants may have by law;

6. That in the event the Plaintiffs become the purchasers at the sale and possession of the premises is not surrendered to the Plaintiffs, a writ of assistance be issued directing the Sheriff of Bannock County, Idaho, to deliver possession of the premises to the Plaintiffs;

7. That after the conclusion of any foreclosure sale, upon proper motion of the Plaintiffs, that a deficiency judgment be entered against M&S in the event the net proceeds of the foreclosure sale are insufficient to fully satisfy the sums due and owing to the Plaintiffs; and

8. That Plaintiffs may have such other and further relief as may be just and equitable in the premises.

DATED this 7th day of October, 2016.

COOPER & LARSEN, CHTD
Attorneys for Plaintiffs

By: [Signature]
Ron Kerl

STATE OF UTAH)
 ss
County of Utah)

Miles Pitcher, being first duly sworn, deposes and says:

That he is the authorized agent of Monitor Finance, L.C., one of the Plaintiffs in the above entitled and foregoing action; that he has read the foregoing Complaint to Judicially Foreclose Deed of Trust, knows the contents thereof, and that the facts therein stated are true as he verily believes.

DATED this 3 day of October, 2016.

[Signature]
Miles Pitcher

SUBSCRIBED AND SWORN to before me this 3 day of October, 2016.

(SEAL)



Kyle Fitzsimons Shanklin
NOTARY PUBLIC for Utah
Residing at: Provo, UT
Commission Expires: 5-22-2018

STATE OF UTAH)
)
) SS
County of Utah)

Derek Ollivier, being first duly sworn, deposes and says:

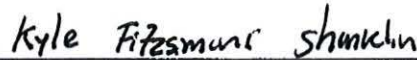
That he is the authorized agent of First Capital Funding, L.C., one of the Plaintiffs in the above entitled and foregoing action; that he has read the foregoing Complaint to Judicially Foreclose Deed of Trust, knows the contents thereof, and that the facts therein stated are true as he verily believes.

DATED this 3rd day of October, 2016.



Derek Ollivier

SUBSCRIBED AND SWORN to before me this 3 day of October, 2016.



NOTARY PUBLIC for Utah

Residing at: 3914 Provo, UT

Commission Expires: 5-22-2018

(SEAL)



TRUST DEED NOTE

\$244,000.00

Dated: December 30, 2005

1. Promise to Pay. For value received, Michael J. Millward, a married man, and M & S Development, LLC, a Idaho Limited Liability Company (hereinafter individually referred to as "Maker" and collectively referred to as "Makers") each promise to pay to the order of Monitor Finance, L.C., a Utah limited liability company as to an undivided 50% interest and First Capital Funding, L.C., a Utah limited liability company as to an undivided 50% interest ("Holder(s)", at 3191 North Canyon Road, Provo, Utah 84604, or at such other place as Holder may from time to time designate, in lawful money of the United States of America, the principal sum of **TWO HUNDRED FORTY FOUR THOUSAND DOLLARS (\$244,000.00)**, or so much of that sum as may be advanced under this Trust Deed Note by the Holder, together with any other advances made pursuant to this Trust Deed Note (collectively the "Principal Indebtedness"), plus interest as computed below along with any other cost, fee or expenditure contemplated herein (the "Total Indebtedness"). All of the terms and conditions of that certain Trust Deed, of even date which secures this obligation are hereby incorporated and made a part of this Trust Deed Note.

2. Term. The term of this Trust Deed Note shall be one hundred eighty (180) days. This Trust Deed Note shall fully mature on June 28, 2006 (the "Maturity Date").

3. Interest. The outstanding balance of the Principal Indebtedness shall bear interest from December 30, 2005 until fully paid at a fixed interest rate of fifteen percent (15%) per annum. Interest shall accrue daily on the outstanding balance of the Principal Indebtedness both before and after judgment, and shall be calculated on the basis of a 360-day year. Interest is compounded on a 360-day year simple interest basis by applying the ratio for the annual interest rate over a year of 360 days (365/360), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.

4. Payments. Monthly interest payments will be made by Makers beginning February 1, 2006 and the first of the month thereafter. This Trust Deed Note calls for a balloon payment to become due and payable on the Maturity Date. On the Maturity Date the Total Indebtedness shall be due and payable in full. Checks will constitute payment only when collected. If any installment or interest payment is not made within five (5) calendar days of the due date, a *late penalty equal to twenty percent (20%)* of any such installment or interest payment owed hereunder shall automatically be assessed. If any balloon payment is not made within five (5) calendar days of the due date, a late penalty equal to ten percent (10%) of any such balloon payment owed hereunder shall automatically be assessed. There shall be no grace period and no further notice shall be required. In the event that a payment date falls on a weekend, or public holiday, payment shall be due and payable the following business day.

5. Origination and Document Fees. As part of this transaction, Makers agree to pay to Holder the amount of \$12,200.00 as an origination fee (the "Origination Fee"). Said Origination Fee shall be due and paid by the Makers on December 30, 2005. Makers also agree to pay all of the costs incurred in documenting, recording and closing this transaction (the "Documentation



Fee”). Makers agree that both the Origination Fee and Documentation Fee may be subtracted directly from the principal amount at closing.

6. Holder's Expenditures. Makers agree to pay on demand any expenditures made by Holder in accordance with the Trust Deed and this Trust Deed Note, including, but not limited to, the payment of taxes, insurance premiums, costs of maintenance and preservation of the collateral, common expense and other assessments relating to the collateral, and attorney fees and costs incurred in connection with any matter pertaining hereto or to the security pledged to secure the Principal Indebtedness or any portion thereof (collectively the “Holder Expenditures”). At the election of Holder, all Holder Expenditures may be added to the unpaid balance of this Trust Deed Note and become a part of and on a parity with the Principal Indebtedness secured by the Trust Deed and shall accrue interest at such rate as may be computed from time to time in the manner prescribed in this Trust Deed Note.

7. Prepayment. Makers shall have the right, from time to time and at any time, to prepay all, or any part, of this Trust Deed Note at any time or times prior to the Maturity Date of this note without payment of any premium or penalty. Prepaid Interest will be pro rated if this Note is paid off early.

8. Default. Makers will be in default if any of the following happens: (a) Makers fail to make any payment when due; (b) any Maker breaks any promise Maker has made to Holder, or any Maker fails to comply with or to perform when due any other term, obligation, covenant, or condition contained in this Trust Deed Note or any agreement related to this Trust Deed Note; (c) any Maker defaults under any loan, extension of credit security agreement, purchase or sales agreement, or any other in favor of any other creditor or person that may materially affect any Maker's property or any Maker's ability to repay this Trust Deed Note or perform Makers' obligations under this Trust Deed Note or any of the Related Documents; (d) any representation or statement made or furnished to Holder by any Maker or on any Maker's behalf is false or misleading in any material respect either now or at the time made or furnished; (e) any Maker dissolves (regardless of whether election to continue is made), any member withdraws from any Maker, any member dies, or any of the members of any Maker becomes insolvent, a receiver is appointed for any part of any Maker's property, any Maker makes an assignment for the benefit of creditors, or any proceeding is commenced either by any Maker or against any Maker under any bankruptcy or insolvency laws; (f) any creditor tries to take any of any Maker's property on or in which Holder has a lien or security interest; (g) a material adverse change occurs in any Maker's financial condition, or Holder believes the prospect of payment or performance of the Indebtedness is impaired; (h) Holder in good faith deems itself insecure.

9. Default Interest Rate. Notwithstanding anything above to the contrary, if default occurs in the payment of any principal, interest, fee or cost, when due, or if any Event of Default occurs hereunder, time being of the essence hereof, if said default remains uncured for five (5) calendar days, thereafter, all outstanding Principal Indebtedness shall bear interest at a default rate of thirty-five percent (35%) until paid, both before and after judgment. If this Trust Deed Note becomes in default or payment is accelerated, Makers agree to pay to the Holder of the Trust Deed Note all collections costs, including reasonable attorney's fees and legal expenses

incurred both before and after judgment, including any bankruptcy proceeding or appeal, in addition to all other sums due under this Trust Deed Note.

10. Application of Payments. Any and all payments by any Maker under this Trust Deed Note shall be applied as follows: first, to the repayment of any Holder Expenditures advanced by Holder under this Trust Deed Note; second, to the payment of any late charges; third, to the payment of accrued interest on the Principal Indebtedness; and fourth, to the payment of the Principal Indebtedness.

11. Extension. The time for any payment required under this Trust Deed Note may be extended from time to time at the sole discretion of the Holder. Makers agree to pay to Holder an extension fee in the sum of ten percent (10%) of the Total Indebtedness then outstanding under this Trust Deed Note (the "Extension Fee"). The Extension Fee shall be paid to Monitor Finance, L.C./First Capital Funding, L.C., at 3191 North Canyon Road, Provo, Utah 84604. In addition to the Extension Fee, Makers further agree to pay any and all documentation and recording costs incurred in the preparation of said extension. Both the Extension Fee and the extension documentation costs shall be due and payable at the time the extension is executed. Acceptance by Holder of any additional security or guarantees for the performance of the terms and provisions contained in this Trust Deed Note shall not in any way affect the liability of an individual Maker.

12. Governing Law. This Trust Deed Note has been delivered to Holder in the State of Utah. If there is a lawsuit, Makers agree upon Holder's request to submit to the jurisdiction of the courts of Utah County, the State of Utah. This Trust Deed Note shall be governed by and construed in accordance with the laws of the State of Utah.

13. Joint and Several Liability. In the event this Trust Deed Note is executed, endorsed, guaranteed or assumed by more than one person, corporation, or any other entity, all of the parties shall be jointly and severally liable and do hereby waive presentment, demand, protest and notice of non-payment and of protest. Furthermore, each of the parties hereto agrees that his, her or its obligation shall continue in full force and effect notwithstanding the death, bankruptcy (or commencement thereof), dissolution or release of any other party and notwithstanding the taking or release of other or additional security and notwithstanding any waiver, amendment or modification (including, but not limited to, extensions of time or performance) by the holder of this Trust Deed Note as to the obligations under this Trust Deed Note or under any other Loan Document of any of the other parties, with or without notice. Without limiting the generality of the foregoing, each of the parties to this Trust Deed Note agree that a separate action or actions may be brought against him, her or it, whether or not such action is brought against any of the other parties to this Trust Deed Note.

14. Interest Limitation. All agreements between the parties to this Trust Deed Note and the Holder of this Trust Deed Note are hereby expressly limited so that in no contingency or event whatsoever, whether by reason of deferment or advancement of the proceeds of the loan evidenced by this Trust Deed Note, acceleration of maturity of the Loan, or otherwise shall the amount paid or agreed to be paid to Holder for the use, forbearance or detention of the money to be loaned under this Trust Deed Note exceed the maximum interest rate permissible under


applicable law. If, from any circumstance whatsoever, fulfillment of any provision of this Trust Deed Note or of any other agreement between the parties to this Trust Deed Note and the Holder, at the time performance of such provision shall be due, shall involve transcending the limit of validity prescribed by law, then, ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity. In the event that any payment is received by the Holder of this Trust Deed Note which would otherwise be deemed to be a payment of interest in excess of the maximum allowed by law, such payment shall be deemed to have been paid on account of principal at the time of receipt. This provision shall never be superseded or waived and shall control every other provision of the Trust Deed Note and all agreements between the parties and the holder of this Trust Deed Note.

15. General Provisions. Both Holder and Maker acknowledge and agree that any and all monies provided by Holder to Maker pursuant to the terms hereof are for a business purpose. Holder may delay or forego enforcing any of its rights or remedies under this Trust Deed Note without losing them. Upon any change in the terms of this Trust Deed Note, and unless otherwise expressly stated in writing, no party who sign this Trust Deed Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Holder may renew or extend (repeatedly and for any length of time) this loan, or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Holder's security interest in the collateral; and take any other action deemed necessary by Holder without the consent of or notice to anyone. All such parties also agree that Holder may modify this Trust Deed Note without the consent of or notice to anyone other than the party with whom the modification is made.

DATED this 30 day of December, 2005.

MAKERS:


Michael J. Millward - Individually


M & S Development, LLC, an Idaho Limited Liability Company
By: _____
Its: _____

Modification of Trust Deed Note

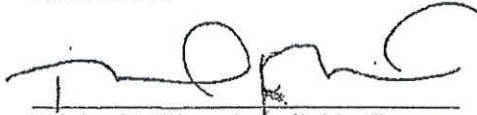
On December 30, 2005, Michael Millward and M&S Development, executed a Note and Trust Deed in favor of Monitor Finance, L.C. and First Capital Funding, L.C. in the amount of \$244,000.00. The Trust Deed was recorded as Entry No. 20528398 in the records of the Bannock County, Idaho, Recorder.

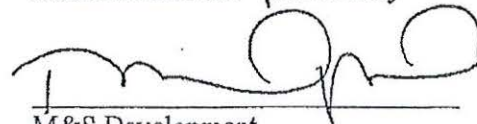
The parties hereby modify said Trust Deed Note as follows:


- The Note will be expanded to include the following draws:
 - 8/14/07 \$75,000.00
 - 9/4/07 \$25,000.00
 - 9/19/07 \$7,400.00
 - 10/25/07 \$100,000.00
 - 3/1/08 \$10,000.00


The parties acknowledge that the same terms and conditions of the original Note and Trust Deed will apply to the amended amount and terms.

Date: 3/3/08



Michael Millward - Individually

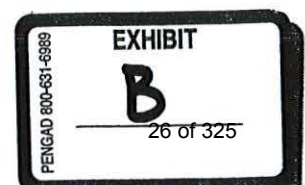

M&S Development
By: Mike Millward
Its: Manager


Monitor Finance, L.C.
By: Miles C. Pitcher
Its: Managing Member


First Capital Funding, L.C.
By: Derek Ollivier
Its: Member

Acknowledged by:


Wildlife Ridge Estates LLC
By: Michael Millward
Its: Member



**TRUST DEED, ASSIGNMENT OF RENTS,
SECURITY AGREEMENT AND
FIXTURE FILING**

This Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing (the "Trust Deed") is made and executed this 30th day of December, 2005 (the "Closing Date"), by M&S Development, LLC, an Idaho Limited Liability Company ("Trustor") whose address is 1801 N. ARTHUR STE C, POCA TELLO, ID 83204, and Pioneer Title Company as Trustee ("Trustee"), in favor of Monitor Finance, L.C. as to an undivided 50% interest whose address is 3191 North Canyon Road, Provo, UT 84604, and First Capital Funding, L.C. as to an undivided 50% interest whose address is 3191 North Canyon Road, Provo, UT 84604 ("Beneficiary").

Beneficiary has loaned monies to Trustor and the transaction is memorialized by that certain Promissory Note dated December 30, 2005 executed by Trustor in favor of Beneficiary in the amount of Two Hundred Forty Four Thousand Dollars (\$244,000.00) (the "Note").

See attached "Exhibit A"

In exchange for good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE I GRANT AND CONVEYANCE

1.1 General Grant. Trustor hereby assigns, grants, bargains, sells, conveys, warrants, and transfers to Trustee in trust, for the Benefit of Beneficiary, with power of sale, and right of entry and possession, the following described property (the "Real Property"):

1.1.1 Real Property. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to the real property located in Bannock County, State of Idaho (the "Real Property") as more particularly described in Exhibit "A" attached hereto and incorporated herein by this reference.

1.1.2 Buildings, Improvements and Interests. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to: (a) All buildings, improvements, works, structures, facilities and fixtures, including any future additions to, and improvements and betterments now or hereafter constructed upon, and all renewals and replacements of, any of the foregoing, which are now or hereafter shall be constructed or affixed or constructively affixed to the Property, or to any portion of the Real Property (the "Improvements"). (b) All easements, licenses, streets, ways, alleys, roads, passages, rights-of-way, minerals, oil, gas and other hydrocarbon substances, development rights, air rights, water, water



courses, water rights, and water stock (whether now owned or hereafter acquired by Trustor and whether arising by virtue of land ownership, contract or otherwise), of any kind and nature, relating to or in any way appurtenant or appertaining to the Real Property or to any portion of the Real Property.

1.1.3 Tenements, Hereditaments. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to all of the tenements, hereditaments, rights, privileges, and appurtenances belonging, relating, or in any way appertaining to any of the Real Property or the Improvements, or any portion of the Real Property or the Improvements, or which shall hereafter in any way belong, relate, or in any way appertain thereto, whether now owned or hereafter acquired, and the reversion and reversions, remainder and remainders, and estates, rights, titles, interests possessions claims, and demands of every natures whatsoever, at law or in equity, which Trustor may have or may hereafter acquire in and to the Real Property, the Improvements, or any portion thereof.

1.1.4 Leases, Rents, Issues, Etc. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to all leases and subleases of all or any portion of the Real Property or the Improvements now or hereafter existing or entered into, and all lease agreements and documents evidencing the same, including without limitation, any tenant leases for all or a portion of the Real Property; and all right, title and interest of Trustor thereunder, including without limitation, all rents, sub-rents, room rents and other amounts received for use of any portion of the Real Property, including the Improvements, and any and all room rental agreements and arrangements now owned or hereafter acquired, and all proceeds from such room rents, issues, royalties, security deposits, income and profits of and from the Real Property, the Improvements, or any portion thereof.

1.2 Security Interest. Trustor hereby assigns and grants to Beneficiary a security interest in the following described property (collectively the "Personalty"), whether now or hereafter existing, and in which Trustor now has or hereafter obtains any right, title, estate or interest, together with all additions and accessions thereto and all rents and proceeds thereof:

1.2.1 Tangible Personal Property. All right, title, interest, and estate of Trustor, now owned or hereafter acquired, in and to: (a) All furniture, fixtures and equipment and inventory as equipment inventory are defined in the Uniform Commercial Code, wherever located, and all related right, title and interest of Trustor, now owned or hereafter acquired or created, all proceeds and products of the foregoing and all additions and accessions to, replacements of, insurance or condemnation proceeds of, and documents covering any of the foregoing, all leases of any of the

foregoing, and all rents, revenues, issues, profits and proceeds arising from the sale, lease, license, encumbrance collection, or any other temporary or permanent disposition of any of the foregoing or any interest therein.

1.2.2 Awards. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to: (a) All awards made for the taking by eminent domain or by any proceeding or purchase in lieu thereof of the Real Property or Personalty or any portion of the Real Property or Personalty, the Improvements or any portion of the Improvements, or of any other Improvements now or hereafter situate thereon or any estate or easement in the Property (including any awards for change of grade of streets); (b) All insurance policies and all proceeds of insurance paid on account of any partial or total destruction of the Improvements or any portion thereof; (c) All causes of action and recoveries for any loss or diminution in the value of the Real Property or Personalty or the Improvements; and (d) All proceeds of each of the foregoing.

1.2.3 General Intangibles. All general intangibles of Trustor, presently existing or hereafter arising, including general intangibles as defined in the Uniform Commercial Code, choses in action, proceeds, contracts, distributions, dividends, refunds, security deposits, judgments, insurance claims, any right to payment of any nature, intellectual property rights or licenses, any other rights or assets of trustor customarily or for accounting purposes classified as general intangibles, and all documentation and supporting information related to any of the foregoing all rents, profits and issues thereof, and all proceeds thereof.

1.3 Security Agreement. This Trust Deed constitutes a Security Agreement with respect to the Personalty, and Beneficiary shall have all the rights and remedies of a secured party under the Uniform Commercial Code of Utah as well as all other rights and remedies available at law or in equity. Trustor and Beneficiary acknowledge their mutual intent that all security interests contemplated herein are given as a contemporaneous exchange for new value to Trustor, regardless of when advances to Trustor are actually made or when the Trust Estate is acquired.

1.4 Fixture Filing. This Trust Deed is intended to be a fixture filing under Utah Code Annotated; Section 70A-9-402. The addresses of the Secured Party (Beneficiary) and the debtor (Trustor) from which information may be obtained concerning this security interest granted hereunder are set forth in Section 12.1 herein. This Trust Deed is to be recorded in the real estate records in the County Recorder's office of the county in which the Real Property is located. Trustor is the record owner of the Real Property.

1.5 Trust Estate. The Real Property, the Improvements and the Personalty are sometimes hereinafter collectively referred to as the "Trust Estate".

ARTICLE II OBLIGATION SECURED

2.1 Obligations. This Trust Deed is given for the purpose of securing the following obligations (collectively the "Obligations") of Trustor:

2.1.1 Note. The payment and performance of each and every agreement and obligation under the Note, including without limitation, the payment of principal and interest under the Note.

2.1.2 Other Loan Documents. The payment and performance of each and every agreement and obligation of Trustor under this Trust Deed, the Note, and any other Loan Document.

2.1.3 Advances by Trustee or Beneficiary. The payment of all sums expended and advanced by Trustee or Beneficiary pursuant to the terms of this Trust Deed, together with interest thereon as provided in this Trust Deed.

2.1.4 Extensions, Etc. The payment and performance of any extensions of, renewals of, modifications of, or additional advances under the Note, or any of the obligations evidenced by the Note, regardless of the extent of or the subject matter of any such extension, renewal, modification or additional advance.

2.1.5 Other Obligations. The payment and performance of any other note or obligation reciting that it is secured by this Trust Deed. Trustor expressly acknowledges its mutual intent with Beneficiary that the security interest created by this Trust Deed secure any and all present and future debts, obligations, and liabilities of Trustor to Beneficiary without any limitation whatsoever.

ARTICLE III REPRESENTATIONS AND WARRANTIES

3.1 Property. Trustor represents and warrants to Beneficiary as follows:

3.1.1 Fee Title. Trustor is the owner of fee simple marketable title in and to the Real Property.

3.1.2 Defense of Title. Trustor shall defend title to the Real Property and the Improvements against all claims and demands whatsoever.

3.1.3 Hazardous Material. No Hazardous Materials have been stored, or improperly used, disposed of, discarded, dumped, or abandoned

by any person or entity on, in or under the Real Property or the Improvements in violation of any Environmental Laws. Trustor has complied with all applicable federal, state and local laws, rules, ordinances and regulations relating to the storage, transportation, and disposal of Hazardous Materials on, in or under the Real Property or the Improvements.

3.2 Personalty. Trustor further represents and warrants to Beneficiary as follows:

3.2.1 Owner of Personalty. Trustor is the owner, or upon acquisition thereof, will be the owner of the Personalty.

3.2.2 Location of Personalty. The Personalty will be located in the State of Utah, will not be removed from that state without the prior written consent of Beneficiary.

ARTICLE IV MAINTENANCE OF TRUST ESTATE

4.1 Maintenance. Trustor shall do each of the following: (a) maintain the Trust Estate at all times in good condition and repair; (b) not commit any waste of the Trust Estate, or remove, damage, demolish, or structurally alter any of the Improvements; (c) complete promptly and in good and workmanlike manner any Improvement on the Real Property; (d) except to the extent that insurance proceeds are applied by Beneficiary to the satisfaction of the Obligations in accordance with Article V, restore promptly and in good and workmanlike manner any of the Improvements or any portion thereof, which may for any reason be damaged or destroyed; (e) comply at all times with all laws, ordinances, regulations, covenants, and restrictions in any manner affecting the Trust Estate; (f) not commit or permit any act upon the Trust Estate in violation of law; and (g) do all acts which by reason of the character or use of the Trust Estate may be reasonably necessary to maintain and care for the same, the specific enumeration herein not excluding the general.

ARTICLE V INSURANCE

5.1 Insurance. Trustor shall secure and maintain in force on the Trust Estate commercial general liability insurance. All such insurance policies must cover all risks required to be covered by Beneficiary, comply with any requirements set forth in the Sales Agreement and be approved by Beneficiary as to amount, form, terms, deductibles and insurer. All such policies of insurance shall name Beneficiary as an additional insured or loss payee, as appropriate. All such insurance policies shall contain a provision that such policies will not be cancelled or amended, which term shall include any reduction in the scope or limits of coverage, without at least thirty (30) days prior written notice to Beneficiary.

5.2 Notice of Casualty. In the event of loss or damage to the Trust Estate, or any portion of the Trust Estate, Trustor shall immediately give notice thereof to Beneficiary.

5.3 Proceeds of Insurance. All proceeds of insurance on the Trust Estate, and all causes of action, claims, compensation, awards and recoveries for any damage, condemnation or taking of all or any part of the Trust Estate, or for any damage or injury to it or for any loss or diminution in the value of the Trust Estate, are hereby assigned to and shall be paid to Beneficiary, except as otherwise provided in the Sales Agreement. Beneficiary may participate in any suits or proceedings relating to any such proceeds, causes of action, claims, compensation, awards or recoveries.

5.4 Disposition of Policies on Foreclosure. In the event Beneficiary exercises the power of sale or foreclosure provisions of this Trust Deed or makes any other transfer of title or assignment of the Trust Estate in extinguishment in whole or in part of the Obligations, all right, title and interest of Trustor in and to the policies of insurance required by Section 5.1 shall inure to the benefit of and pass to the transferee of the interests conveyed under this Trust Deed or to the purchaser at the foreclosure sale, as the case may be.

ARTICLE VI INDEMNIFICATION AND OFF-SET

6.1 Indemnification. Trustor hereby indemnifies and holds Beneficiary harmless in accordance with the following:

6.1.1 General Indemnification. Trustor shall indemnify and hold Beneficiary harmless from any and all losses, damages, claims, causes of action, suits, debts, obligations, or liabilities which arise from or relate to, the Note, this Trust Deed, but excluding any such claims based upon breach or default by Beneficiary or gross negligence or wilful misconduct of Beneficiary. If Beneficiary commences an action against Trustor to enforce any of the terms, covenants or conditions of this Trust Deed or because of the breach by Trustor of any of the terms, covenants, or conditions, or for the recovery of any sum secured hereby, Trustor shall pay to Beneficiary reasonable attorneys fees and costs actually incurred by Beneficiary. The right to such attorneys fees and costs shall be deemed to have accrued on the commencement of such action, and shall be enforceable whether or not such action is prosecuted to judgment. If Trustor breaches any term, covenant or condition of this Trust Deed, Beneficiary may employ an attorney or attorneys to protect Beneficiary's rights hereunder and in the event of such employment following any breach of Trustor, Trustor shall pay Beneficiary reasonable attorneys fees and costs actually incurred by Beneficiary, whether or not action is actually commenced against Trustor by reason of such material breach.

6.1.2 Mechanics Liens. If Beneficiary or the Real Property is held liable or could be held liable for, or is subject to any losses, damages, costs, charges or expenses, directly or indirectly on account of any claims for work, labor, or material furnished in connection with or arising from the construction of any building, fixture and improvements, then Trustor shall indemnify, defend and hold Beneficiary harmless from all liability or expense arising therefrom including reasonable attorneys fees and costs.

6.1.3 Hazardous Materials. Trustor hereby agrees to indemnify, hold harmless and defend (by counsel of Beneficiary's choice) Beneficiary, its directors, officers, employees, agent, successors and assigns from and against any and all claims, losses, damages, liabilities, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, remedial action requirements, enforcement actions of any kind, and all costs and expenses incurred in connection therewith (including but not limited to attorneys' fees and expenses), arising directly or indirectly, in whole or in part, out of (a) the presence on or under the Real Property of any Hazardous Materials, or any releases or discharges of any Hazardous Materials on, under or off the Real Property, or (b) any activity carried on or undertaken on or off the Real Property, whether prior to or during the term of the Note, and whether by Trustor or any predecessor in title or any employees, agents, contractors or subcontractors of Trustor or any predecessor in title, or any third persons at any time occupying or present on the Real Property, in connection with the handling, treatment, removal, storage, decontamination, clean-up, transport or disposal of any Hazardous Materials at any time located or present on or under the Real Property. The foregoing indemnity shall further apply to any residual contamination on or under the Real Property, or affecting any natural resources, and to any contamination of any property or natural resources arising in connection with the generation, use, handling, storage, transport or disposal of any such Hazardous Materials, and irrespective of whether any of such activities were or will be undertaken in accordance with applicable laws, regulations, codes and ordinances. Trustor hereby acknowledges and agrees that, notwithstanding any other provision of this Trust Deed or any of the other Purchase Documents to the contrary, the obligations of Trustor under this Section 6.1.3 shall be unlimited personal obligations of Trustor and shall survive any foreclosure under this Trust Deed, any transfer in lieu thereof, and any satisfaction of the obligations of Trustor in connection with the Note. Trustor acknowledges that Beneficiary's appraisal of the Real Property is such that Beneficiary would not extend the Note but for the personal liability undertaken by Trustor for the obligations under this Section 6.1.4.

6.2 Off-Set. All sums payable by Trustor under the Note and this Trust Deed shall be paid without notices, demand, counterclaim, set-off, deduction or defense and without abatement, suspension, deferment, diminution or reduction. The Obligations and liabilities of Trustor hereunder shall in no way be released, discharged or otherwise affected (except as expressly provided herein) by reason of: (a) any damage to or destruction of, or any condemnation or similar taking of the Trust Estate or any part thereof; (b) any destruction or prevention of or interference with any use of the Trust Estate or any part thereof; (c) any title defect or encumbrance or any eviction from the Trust Estate or any part thereof by title paramount or otherwise; (d) any bankruptcy, insolvency, reorganization, composition, adjustment, dissolution, liquidation or other like proceeding relating to Beneficiary, or any action taken with respect to this Trust Deed by any trustee or any action taken with respect to this Trust Deed by any trustee or receiver of Beneficiary, or by any court, in any such proceeding; (e) any claim which Trustor has or might have against Beneficiary; (f) the occurrence of an Event of Default or any default or failure on the part of Beneficiary to perform or comply with any of the terms, covenants or conditions of this Trust Deed or of any other agreement with Trustor; or (g) any other occurrence whatsoever, whether similar or dissimilar to the foregoing.

ARTICLE VII TAXES AND IMPOSITIONS

7.1 Payment of Taxes and Impositions. Trustor shall pay, prior to delinquency, all real property taxes and assessments, general and special, and all other taxes, assessments and other governmental, municipal, or other charges or impositions of any kind or nature whatsoever (including without limitation, charges and assessments on water or water stocks used on or with the Real Property and levies or charges resulting from covenants, conditions and restrictions affecting the Trust Estate) which are assessed or imposed upon the Trust Estate, or become due and payable, and which create, may create, or appear to create, a lien upon the Trust Estate or any portion of the Trust Estate, or upon any equipment or other facility used in the construction, operation or maintenance of the Trust Estate (all of which taxes, assessments and other governmental charges of like nature are referred to as the "Impositions"); provided, however, that if, by law, any such Imposition is payable, or may at the election of the taxpayer be paid in installments, Trustor may pay the same together with any accrued interest on the unpaid balance of such Imposition in installments as the same become due and before any fine, penalty, interest or cost may be added thereto for the nonpayment of any such installment and interest.

7.2 Evidence of Payment. Unless such Imposition is paid directly by Beneficiary pursuant to Section 8.3, Trustor shall furnish Beneficiary, within thirty (30) days after the date upon which such Imposition is due and payable by Trustor, official receipts of the appropriate taxing authority, or other proof satisfactory to Beneficiary, evidencing the payment thereof.

7.3 Right to Contest. Trustor shall have the right before any delinquency occurs to contest or object to the amount or validity of any Imposition by appropriate legal proceedings, but such contest shall not be deemed or construed in any way as relieving, modifying or extending Trustor's covenant to pay any such Imposition at the time and in the manner provided in Section 7.1 unless Trustor has given prior written notice to Beneficiary of Trustor's intent to so contest or object to an Imposition, and unless, at Beneficiary's option, (a) Trustor shall demonstrate to Beneficiary's satisfaction that the legal proceedings shall conclusively operate to prevent the sale of the Trust Estate, or any part thereof, to satisfy such Imposition prior to final determination of such proceedings; or (b) Trustor shall furnish a good and sufficient undertaking and sureties as may be required or permitted by law to accomplish a stay of such proceedings.

ARTICLE VIII ADDITIONAL COVENANTS

8.1 Payment of Utilities. Trustor shall pay when due all utility charges incurred by Trustor for the benefit of the Trust Estate or which may become a charge or lien against the Trust Estate for gas, electricity, water or sewer services furnished to the Trust Estate and all assessments or charges of a similar nature, whether public or private, affecting the Trust Estate or any portion thereof, whether or not such assessments or charges are liens thereon.

8.2 Reserves for Taxes and Insurance. In furtherance of Article V and Article VII of this Trust Deed and anything to the contrary herein notwithstanding, if any Event of Default shall occur and be continuing, and at Beneficiary's written request, Trustor shall deposit with Beneficiary in a non-interest bearing account, on the first day of each month, until the Note is paid in full, an amount equal to one-twelfth of the annual Impositions, as defined in Article VII, as reasonably estimated by Beneficiary to pay the installment of Impositions next due on the Trust Estate, and one-twelfth of the estimated annual aggregate insurance premiums on all policies of insurance required in Article V. In such event, Trustor shall cause all bills, statements or other documents relating to the Impositions and insurance premiums to be sent to Beneficiary. Providing Trustor has deposited sufficient funds with Beneficiary pursuant to this Section 8.2, Beneficiary shall pay such amounts as may be due thereunder out of the funds so deposited with Beneficiary. If at any time and for any reason the funds deposited with Beneficiary are or will be insufficient to pay such amounts as may then or subsequently be due, Beneficiary shall notify Trustor and Trustor shall immediately deposit an amount equal to such deficiency with Beneficiary. Nothing contained herein shall cause Beneficiary to be deemed a trustee of such funds deposited with Beneficiary pursuant to this Section 8.2. Beneficiary shall not be obligated to pay any interest on any sums held by Beneficiary pending disbursement or application hereunder, and Beneficiary may impound or reserve for future payment of Impositions and insurance premiums such portion of such payments as Beneficiary may, in Beneficiary's absolute discretion, deem proper,

applying the balance on the principal of or interest on the Obligations secured hereby. Should Trustor fail to deposit with Beneficiary (exclusive of that portion of the payments which has been applied by Beneficiary on the principal of or interest on the Note) sums sufficient to fully pay such Impositions and insurance premiums at least thirty (30) days before delinquency thereof, Beneficiary, at Beneficiary's election, but without any obligation to do so, may advance any amounts required to make up the deficiency, which advances, if any, shall be secured by this Trust Deed and shall bear interest and be repayable to Beneficiary in the manner specified in Section 8.4 of this Trust Deed.

8.3 Performance in Trustor's Stead. Should Trustor fail to make any payment or to do any act as provided in this Trust Deed, then Beneficiary or Trustee, but without any obligation to do so, and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: (a) make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof (Beneficiary or Trustee being authorized to enter upon the Trust Estate for such purposes); commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; or (b) pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be superior to the lien of this Trust Deed; and in exercising any such powers, incur any liability, or expend such reasonable amounts as Beneficiary may deem necessary therefor, including costs of evidence of title, employment of attorneys, and payment of reasonable attorney fees and costs. All such amounts expended by either or both Trustee or Beneficiary shall, at the election of Beneficiary, be added to the principal indebtedness secured by this Trust Deed and shall accrue interest in accordance with the terms of the Note. Trustor hereby waives and releases all claims or causes of action which may hereafter arise in favor of Trustor against Beneficiary by reason of any action taken by Beneficiary pursuant to any power or authority granted in this Section 8.3, except for Beneficiary's gross negligence or wilful misconduct.

8.4 Repayment of Advances. Trustor shall immediately repay to Beneficiary sums, with interest thereon as provided in the Note, which at any time may be paid or advanced by Beneficiary for the payment of insurance premiums, Impositions, title searches, title reports or abstracts, and any other advances made by Beneficiary which are reasonably necessary or desirable to maintain this Trust Deed as a prior, valid, and subsisting lien upon the Trust Estate, to preserve and protect Beneficiary's interest in this Trust Deed, or to preserve, repair, or maintain the Trust Estate. All such advances shall be wholly optional on the part of Beneficiary, and Trustor's obligation to repay the same, with interest, to Beneficiary shall be secured by the lien of this Trust Deed.

8.5 No Removal of Fixtures. Trustor shall not, during the existence of this Trust Deed and without the written consent of Beneficiary, remove from the Real Property or the Improvements, any fixture, structure, or other improvement

at any time affixed or constructively affixed to the Real Property or the Improvements or any portion thereof, or any Personalty, except in the ordinary course of Trustor's business.

8.6 Further Assurance. Trustor shall execute and deliver to Beneficiary such further instruments, including without limitation Uniform Commercial Code Financing Statements and Continuation Statements, and do such further acts as may be necessary or as may be reasonably required by Beneficiary to carry out more effectively the purposes of this Trust Deed and to subject to the lien, security interest and mortgage created or intended to be created hereby any property, rights, or interests covered or intended to be covered by this Trust Deed. Trustor authorizes (to the extent such authorization is valid under applicable law) Beneficiary to execute and file, without Trustor's signature, such Uniform Commercial Code Financing Statements and Continuation Statements as Beneficiary may deem necessary in order to perfect, or continue the perfection of the security interests created by this Trust Deed.

8.7 Attornment. Trustor shall assign to Beneficiary, as additional security for Trustor's performance of the Obligations, any and all existing or future lease agreements entered into by Trustor, as landlord, which pertain to the Property or the Improvements, or any portion thereof, and all such leases shall contain a covenant on the part of the tenant thereunder, enforceable by Beneficiary, obligating such tenant upon request of Beneficiary, to attorn to and become a tenant of Beneficiary, or any purchaser from Trustee or through foreclosure of this Trust Deed, for the unexpired term, and subject to the terms and conditions of such future lease agreements. The assignments of lease shall be in form and content satisfactory to Beneficiary.

8.8 No Further Encumbrances. As an express condition of Beneficiary making the loan secured by this Trust Deed, Trustor shall not further encumber, pledge, mortgage, hypothecate, place any lien, charge or claim upon, or otherwise give as security the Trust Estate or nay interest therein, not cause or allow by operation of law the encumbrance of the Trust Estate or any interest therein without the written consent of Beneficiary even though such encumbrance may be junior to the encumbrance created by this Trust Deed. Encumbrance of the Trust Estate contrary to the provisions of this Section 8.9 without the express written consent of Beneficiary, shall constitute an Event of Default and at Beneficiary's option, Beneficiary may declare the entire balance of principal and interest immediately due and payable, whether the same be created by Trustor or an unaffiliated third party asserting a judgment lien, mechanic's or materialmen's lien or any other type of encumbrance or title defect.

8.9 Due on Sale. Other than (a) a transfer by devise, descent or by operation of law upon the death of a joint tenant; (b) a transfer of Personalty in the ordinary course of Trustor's business; or (c) the grant of any leasehold interest of three (3) years or less not containing an option to purchase, Trustor shall not sell,

convey or otherwise transfer the Trust Estate or any part thereof or interest therein, without the prior written consent of Beneficiary. If the Trust Estate, or any part thereof, or any interest therein, is sold, conveyed or otherwise transferred without the prior written consent of Beneficiary, or if Trustor be divested of title to the Trust Estate, or any part thereof or involuntarily, then the full principal indebtedness of the Note and the other Obligations, at the option of Beneficiary and without demand or notice, shall immediately become due and payable. It is expressly acknowledged and agreed that any transfer of more than twenty-five percent (25%) of the capital stock, partnership or member interests of Trustor, as the case may be, shall constitute a transfer of the entire Trust Estate within the meaning of this Section 8.9.

8.10 Evidence of Title. Trustor shall deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements or endorsements thereto.

8.11 Additional Collateral. If, at any time, the value of all of the Trust Estate, based on an appraisal acceptable to Beneficiary, is not sufficient to establish a ratio between the total amount of the Obligations then due and owing and the value of all of the Trust Estate equal to or less than one hundred percent (100%), Trustor shall provide Beneficiary with such additional collateral as is necessary so that the total value of all collateral securing Trustor's performance of the Obligations is sufficient to establish a ratio between the total amount of the Obligations due and owing and the value of all such collateral of no more than one hundred percent (100%).

8.12 Compliance With Laws. Trustor shall comply with all laws, ordinances, regulations, easement agreements, covenants, conditions, and restrictions (including laws relating to hazardous wastes and/or protection of the environment, or species of plants or animals protected by federal, state, local or other law) affecting the Trust Estate. Trustor shall not cause, permit nor suffer any violation of any of the foregoing and shall pay all response costs, fees, or charges of any kind in connection therewith and defend, indemnify, and hold harmless Beneficiary with respect thereto.

8.13 Financial Statements. Trustor shall keep adequate books and records of account of the Trust Estate and its own financial affairs sufficient to permit the preparation of financial statements therefrom in accordance with generally accepted accounting principles. Beneficiary shall have the right to examine, copy and audit Trustor's records and books of account at all reasonable times. Trustor shall furnish to Beneficiary copies of its financial statements and other financial information satisfactory to Beneficiary at the time and in the manner provided in the Loan Agreement.

8.14 Inspections. Beneficiary, and its agents, representatives and employees, are authorized, but not obligated, to enter at any reasonable time upon the Real Property for the purpose of inspecting the same, and for the purpose of performing any of the acts it or Trustor is authorized to perform under the terms of this Trust Deed or any other Loan Document.

8.15 No Merger. If the Trust Estate is under any lease or any portion thereof which constitutes a part of the Trust Estate shall at any time become vested in one owner, this Trust Deed and the lien created hereby shall not be destroyed or terminated by application of the doctrine of merger and, in such event, Beneficiary shall continue to have and enjoy all of the rights and privileges of Beneficiary as to the separate estates. In addition, upon the foreclosure of the lien created by This Trust Deed on the Trust Estate pursuant to the provisions of this Trust Deed, any leases or subleases then existing and created by Trustor shall not be destroyed or terminated by application of the law of merger or as a matter of law or as a result of such foreclosure unless Beneficiary or any purchaser at any such foreclosure sale shall so elect. No act by or on behalf of Beneficiary or any such purchaser shall constitute a termination of any lease or sublease unless Beneficiary or such purchaser shall give written notice thereof to such tenant or subtenant.

ARTICLE IX CONDEMNATION AWARDS

9.1 If the Trust Estate or any portion thereof should be taken or damaged by reason of any public improvement or condemnation proceeding, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at Beneficiary's option to commence, appear in, and prosecute in Beneficiary's own name any action or proceeding, and to make any compromise or settlement, in connection with such taking. Trustor shall promptly give notice to Beneficiary of any condemnation proceeding or any taking for public improvement. All such compensation, awards, damages, causes of action, proceeds, or other payments are hereby assigned to Beneficiary, which may, after deducting therefrom all costs and expenses (regardless of the particular nature thereof and whether incurred with or without suit or before or after judgment), including reasonable attorney fees, incurred by Beneficiary in connection with such compensation, awards, damages, rights of action, proceeds, or other payments, release any and all moneys so received by Beneficiary or apply the same, or any portion thereof, on any of the Obligations (whether or not then due) secured by this Trust Deed. Beneficiary shall have no obligation to apply proceeds of condemnation to restore or repair damage to the Trust Estate regardless of whether such taking has a significant adverse impact on the operation of the remaining portion of the Trust Estate. Trustor shall execute and deliver to Beneficiary such further assignments of such compensation, awards, damages, causes of action, proceeds, or other payments as Beneficiary may from time to time require.

ARTICLE X ASSIGNMENT OF LEASES, RENTS AND INCOME

10.1 Assignment. Trustor hereby absolutely assigns to Trustee all right, title and interest of Trustor in and to all leases now existing or hereafter entered into by Trustor and demising the whole or any part of the Trust Estate, and does hereby further assign any and all rents, subrents, room rents and other amounts received for the use of any rooms in the Trust Estate, including the Improvements, and any and all room rental agreements and arrangements now owned or hereafter acquired, and all proceeds from such room rents, covering the Trust Estate or any portion thereof, now or hereafter existing or entered into, together with issues, royalties, income, profits and security deposits of and from the Trust Estate. Until the occurrence of an Event of Default, Trustor may, under a temporary revocable license granted hereby, collect and use all such rents, subrents, room rents, issues, royalties, income, and profits which become payable prior to default. Upon the occurrence of an Event or Default, Trustor's license to collect and use any of such proceeds shall immediately cease without further action by or on behalf of any party, and Beneficiary shall have the right, with or without taking possession of the Trust Estate, and either in person, by agent, or through a court-appointed receiver (Trustor hereby consents to the appointment of Beneficiary or Beneficiary's designee as such receiver), to sue for or otherwise collect all such rents, subrents, room rents, issues, royalties, income, and profits, including those past due and unpaid. Any sums so collected, after the deduction of all costs and expenses of operation and collection (regardless of the particular nature thereof and whether incurred with or without suit or before or after judgment), including reasonable attorney fees, shall be applied toward the payment of the Obligations. Such right of collection and use of such proceeds by Beneficiary shall obtain both before and after the exercise of the power of sale provisions of this Trust Deed, the foreclosure of this Trust Deed and throughout any period of redemption. The rights granted under this Section 10.1 shall in no way be dependent upon and shall apply without regard to whether all or a portion of the Trust Estate is in danger of being lost, removed, or materially injured, or whether the Trust Estate or any other security is adequate to discharge the obligations secured by this Trust Deed. Beneficiary's failure or discontinuance at any time to collect any of such proceeds shall not in any manner affect the right, power, and authority of Beneficiary thereafter to collect the same. Neither any provision contained herein, nor the Beneficiary's exercise of Beneficiary's right to collect such proceeds, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease, sublease, option, or other interest in the Trust Estate, or an assumption of liability under, or a subordination of the lien or charge of this Trust Deed to, any tenancy, lease, sublease, option, or other interest in the Trust Estate. All tenants, lessees, sublessees and other persons which have any obligation to make any payment to Trustor in connection with the Trust Estate or any portion thereof are hereby authorized and directed to pay rents, subrents, room rents, issues, royalties, income, and profits payable to them with respect to the Trust Estate, or any part thereof, directly to Beneficiary on the demand of Beneficiary. Beneficiary's receipt of such rents, subrents, room rents, issues, royalties, income, and profits

shall be a good and sufficient discharge of the obligation of the tenant lessee, sublessee, or other person concerned to make the payment connected with the amount so received by the Trustee.

10.2 Application of Payments. If at any time during the term of this Trust Deed Beneficiary receives or obtains a payment, installment, or sum which is less than the entire amount then due under the Note secured by this Trust Deed and under all other instruments further evidencing or securing the Obligations, then Beneficiary shall, except as provided otherwise in the Note and notwithstanding any instructions which may be given by Trustor, have the right to apply such payment, installment, or sum, or any part thereof, to such of the items or obligations then due from Trustor or to Beneficiary as Beneficiary may in Beneficiary's sole discretion determine.

10.3 No Waiver of Rights by Collection of Proceeds. The entering upon and taking possession of the Trust Estate or any portion of the Trust Estate or the collection of rents, subrents, room rents, issues, royalties, income, profits, proceeds of fire and other insurance policies, or compensation or awards for any taking or damaging of the Trust Estate, or the application or release thereof as aforesaid, shall not cure or waive any Event of Default or notice of default hereunder, shall not invalidate any act done pursuant to such notice of default, and shall not operate to postpone or suspend the obligation to make, or have the effect of altering the size of any scheduled installments provided for in any of the Obligations secured by this Trust Deed.

10.4 Indemnification. Trustor shall indemnify, pay, protect, defend and hold Beneficiary harmless from and against all claims, demands, judgments, liabilities, actions, costs, and fees (including reasonable attorney fees) arising from or related to receipt by Beneficiary of the rents, subrents, room rents, issues, royalties, income and profit from the Trust Estate or any portion of the Trust Estate, except those liabilities arising from Beneficiary's own gross negligence and wilful misconduct.

ARTICLE XI EVENTS OF DEFAULT AND REMEDIES

11.1 Events of Default. Fifteen (15) days after written notice from Beneficiary to Trustor for monetary defaults and thirty (30) days after written notice from Beneficiary to Trustor for non-monetary defaults, if such defaults are not cured within such fifteen (15) day or thirty (30) day periods, respectively, each of the following shall constitute an event of default under this Trust Deed (an "Event of Default"):

11.1.1 Failure to Make Payment. If Trustor shall fail to make any payment due and payable under the terms of the Note or this Trust Deed.

11.1.2 Non-Monetary Default. Except as provided otherwise in Section 11.1.1, failure to observe and perform any of the terms, covenants, or conditions to be observed or performed in the Note or this Trust Deed.

11.1.3 False Warranty. Any material representation or warranty of the Trustor contained in the Note or this Trust Deed.

11.1.4 Insolvency, Etc. If (a) Trustor commences any case, proceeding, or other action seeking reorganization, arrangement, adjustment, liquidation, dissolution, or composition of Trustor or Trustor's debts under any law relating to bankruptcy, reorganization, or relief of debtors, or seeking appointment of a receiver, trustee, custodian, or other similar official for Trustor of for all or any substantial part of Trustor's property; (b) any guarantor of the Note commences any case, proceeding, or other action seeking reorganization, arrangement, adjustment, liquidation, dissolution, or composition of such guarantor or such guarantor's debts under any law relating to bankruptcy, reorganization, or relief of debtors, or seeking appointment of a receiver, trustee, custodian, or other similar official for such guarantor or for any substantial part of such guarantor's property; or (c) any such case, proceeding, or other action is commenced against either Trustor or any guarantor of the Note.

11.1.5 Failure to Pay Debts. Trustor fails to pay Trustor's debts as they become due, admits in writing Trustor's inability to pay Trustor's debts, or makes a general assignment for the benefit of creditors.

11.1.6 Failure to Perform Other Obligations. A default by Trustor under the terms of any other promissory note, deed of trust, security agreement, undertaking or arrangement between Trustor and Beneficiary now existing or entered into hereafter.

11.2 Acceleration; Notice. Time is of the essence hereof. Upon the occurrence of any Event of Default under this Trust Deed and following the expiration of any cure period provided for herein, at Beneficiary's option and in addition to any other remedy Beneficiary may have under the Note, Beneficiary may declare all sums secured hereby immediately due and payable and elect to have the Trust Estate sold in the manner provided herein. In the event Beneficiary elects to sell the Trust Estate, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause the Trust Estate to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in the office of the County Recorder of the County wherein the Trust Estate is located. Beneficiary shall also deposit with Trustee the Note and all documents evidencing expenditures secured by this Trust Deed.

11.3 Exercise of Power of Sale. Upon receipt of such notice from Beneficiary, Trustee shall cause to be recorded, published and delivered to

Trustor and each Guarantor such Notice of Default and Election to Sell as then required by Chapter 57 of the Utah Code Annotated. Trustee shall, without demand on Trustor, after lapse of such time as may be required by law and after recordation of such Notice of Default and Election to Sell first give notice of the time and place of such sale, in the manner provided by the laws of the State of Utah for the sale of real property under execution, and may from time to time postpone such sale by such advertisement as it may deem reasonable, or without further advertisement, by proclamation made to the persons assembled at the time and place previously appointed and advertised for such sale, and on the day of sale so advertised, or to which such sale may have been postponed, Trustee may sell the Real Property so advertised, at public auction, at the time and place specified in the notice, either in the county in which the Real Property, or any part thereof, to be sold, is situated, or at the principal office of Trustee located in Salt Lake County, State of Utah, in its discretion, to the highest cash bidder. Trustee shall execute and deliver to the purchaser a Trustee's Deed conveying the Real Property so sold, but without any covenant of warranty, express or implied. The recitals in the Trustee's Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (a) the costs and expenses of exercising the power of sale and of the sale, including the payment of Trustee's and attorney's fees and costs; (b) cost of any evidence of title procured in connection with such sale; (c) all sums expended under the terms hereof in conjunction with any default provision hereunder, not then repaid, with accrued interest at the rate then provided for in the Note; (d) all sums then secured by this Trust Deed, including interest and principal on the Note; and (e) the remainder, if any, to the person or persons legally entitled thereto, or Trustee, in Trustee's discretion, may deposit the balance of such proceeds with the County Clerk of the County wherein the Trust Estate is located.

11.4 Surrender of Possession. Trustor shall surrender possession of the Trust Estate to the purchaser immediately after the sale of the Trust Estate as provided in Section 11.3 above, in the event such possession has not previously been surrendered by Trustor.

11.5 UCC Remedies. Notwithstanding anything to the contrary in Sections 11.3 and 11.4 of this Trust Deed, Beneficiary, with regard to all the Personalty, shall have the right to exercise, from time to time, any and all rights and remedies available to Beneficiary, as a secured party under the Uniform Commercial Code of Utah, and any and all rights and remedies available to Beneficiary under any other applicable law. Upon written demand from Beneficiary, Trustor shall, at Trustor's expense, assemble the Personalty and make them available to Beneficiary at a reasonably convenient place designated by Beneficiary. Beneficiary shall have the right to enter upon any premises where the Personalty or records pertaining to Personalty may be and take possession of the Personalty and records relating to the Personalty. Beneficiary may sell, lease or otherwise dispose of any or all of the Personalty and , after

deducting the reasonable costs and out of pocket expenses incurred by Beneficiary, including, without limitation, (a) reasonable attorneys fees and legal expenses, (b) transportation and storage costs, (c) advertising of sale of the Personalty, (d) sale commissions, (e) sales tax, (f) costs for improving or repairing the Personalty, and (g) costs for preservation and protection of the Personalty, apply the remainder to pay, or to hold as a reserve against, the Obligations.

The rights and remedies of Beneficiary upon the occurrence of one or more Events of Default (whether such rights and remedies are conferred by statute, by rule of law, by this Trust Deed, the Loan Agreement or otherwise) may be exercised by Beneficiary, either alternatively, concurrently, or consecutively in any order. The exercise of Beneficiary or Trustee at the express direction of Beneficiary of any one or more of such rights and remedies shall not be construed to be an election of remedies nor waiver of any other rights and remedies Beneficiary might have unless, and limited to the extent that, Beneficiary shall elect or so waive by an instrument in writing delivered to Trustee. Without limiting the generality of the foregoing, to the extent that this Trust Deed covers both the Real Property and the Personalty, Beneficiary may, in the sole discretion of Beneficiary, either alternatively, concurrently or consecutively in any order:

- a. Proceed as to the Real Property, Improvements and the Personalty in accordance with Beneficiary's rights and remedies in respect to real property.
- b. Proceed as to the Real Property and Improvements in accordance with Beneficiary's rights and remedies in respect to real property and proceed as to the Personalty in accordance with Beneficiary's rights and remedies in respect to the personal property.

Beneficiary may, in the sole discretion of Beneficiary, appoint Trustee as the agent of Beneficiary for the purpose of disposition of the Personalty in accordance with the Utah Uniform Commercial Code – Secured Transactions.

If Beneficiary should elect to proceed as to the Real Property, Improvements and the Personalty in accordance with Beneficiary's rights and remedies in respect to real property:

- c. All the Personalty may be sold, in the manner and at the time and place provided in this Trust Deed, in one lot, or in separate lots consisting of any combination or combinations of the Real Property, Improvements and Personalty, as the Beneficiary may elect, in the sole discretion of Beneficiary.
- d. Trustor acknowledges and agrees that a disposition of the Personalty in accordance with Beneficiary's rights and remedies in

respect to real property, as hereinabove provided, is a commercially reasonable disposition of the Personalty.

If Beneficiary should elect to proceed as to the Personalty in accordance with Beneficiary's rights and remedies in respect to personal property, Beneficiary shall have all the rights and remedies conferred on a secured party by the Uniform Commercial Code as adopted by the State of Utah.

11.6 Foreclosure as a Mortgage. If an Event of Default occurs hereunder, Beneficiary shall have the option to foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto, including reasonable attorneys fees and costs in such amounts as shall be fixed by the court.

11.7 Receiver. If an Event of Default occurs, Beneficiary, as a matter of right and without regard to the interest of Trustor therein, shall have the right upon notice to Trustor to apply to any court having jurisdiction to appoint a receiver or receivers of the Trust Estate and Trustor hereby irrevocably consents to such appointment. Any such receiver or receivers shall have all the usual powers and duties of a receiver and shall continue as such and exercise all such powers until completion of the sale of the Trust Estate or the foreclosure proceeding, unless the receivership is sooner terminated.

11.8 No Remedy Exclusive. No remedy conferred upon or reserved to Beneficiary under this Trust Deed shall be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Trust Deed or any other Loan Document, or now or hereafter existing at law or in equity or by statute. No delay or failure to exercise any right or power accruing upon any Event of Default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.

11.9 Rights upon Default. In making the Note, Beneficiary has relied upon the rights available to Beneficiary under this Trust Deed upon the occurrence of an Event of Default, including, but not limited to, the rights to accelerate the payment of any and all amounts secured by this Trust Deed, to sell the Real Property encumbered by this Trust Deed pursuant to the power of sale granted hereunder, the right to foreclose this Trust Deed as a mortgage, and the right to have a receiver appointed. In addition to any other damages that might be recoverable by Beneficiary under the terms of this Trust Deed, Trustor shall be liable for any damages incurred by Beneficiary because Beneficiary is, for any reason, denied the opportunity to exercise Beneficiary's rights upon the occurrence of an Event of Default, including, but not limited to, such damages as are occasioned by depreciation of the Trust Estate, loss of use of the Trust Estate

by Beneficiary, and all opportunity costs incurred through the loss of use of any funds as would have been received by Beneficiary through exercise of the power of sale or foreclosure, or the appointment of a receiver.

ARTICLE XII GENERAL PROVISIONS

12.1 Notices. All notices shall be in writing and shall be deemed to have been sufficiently given or served when personally delivered, deposited in the United States mail, by registered or certified mail, or deposited with a reputable overnight mail carrier which provides delivery of such mail to be traced, addressed as follows:

Beneficiary: Monitor Finance, L.C. /
First Capital Funding, L.C.
3191 North Canyon Road
Provo, UT 84604

With copies to: John G. Mulliner
363 North University, Suite 103
P.O. Box 1045
Provo, UT 84603

Trustee:

Trustor:

With copies to:

Such addresses may be changed by notice to the other party given in the same manner provided in this Section.

12.2 Severability. If any provision of this Trust Deed shall be held or deemed to be or shall, in fact, be illegal, inoperative, or unenforceable, the same shall not affect any other provision or provisions contained in the Trust Deed or render the same invalid, inoperative, or unenforceable to any extent whatsoever.

12.3 Amendments, Changes, and Modifications. This Trust Deed may not be amended, changed, modified, altered, or terminated without the written consent of Beneficiary.

12.4 Governing Law. This Trust Deed shall be governed exclusively by and construed in accordance with the applicable laws of the State of Utah.

12.5 Interpretation. Whenever the context shall include the singular, the whole shall include any part thereof, and the gender shall include both other genders. The section headings contained in this Trust Deed are for purposes of reference only and shall not limit, expand, or otherwise affect the construction of any provisions hereof.

12.6 Binding Effect. This Trust Deed shall be binding upon Trustor and Trustor's successors and assigns. This Trust Deed shall inure to the benefit of Beneficiary, and Beneficiary's successors and assigns, and the holders of any of the Obligations secured hereby.

12.7 Waivers. Beneficiary's failure at any time or times hereafter to require strict performance by Trustor of any of undertakings, agreements, or covenants contained in this Trust Deed shall not waive, affect, or diminish any right of Beneficiary hereunder to demand strict compliance and performance therewith. Any waiver by Beneficiary of any Event of Default under this Trust Deed shall not waive or affect any other Event of Default hereunder, whether such Event of Default is prior or subsequent thereto and whether of the same or a different type. None of the undertakings, agreements, or covenants of Trustor under this Trust Deed, shall be deemed to have been waived by Beneficiary, unless such waiver is evidenced by an instrument in writing signed by an officer of Beneficiary and directed to Trustor specifying such waiver.

12.8 Successor Trustee. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of the county wherein the Real Property is located, a substitution of trustee. From the time the substitution is filed for record, the new Trustee shall succeed to all the powers, duties, authority and title of Trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made in the manner provided by law.

12.9 Heirs, Successors, Etc., Definitions. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder, if more than one party, are joint and several as between them. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the Note secured hereby. In this Trust Deed, whenever the context so requires, the masculine gender includes both the feminine and neuter, and the singular number includes the plural.

12.10 Acceptance of Trust. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of any pending sale under any other deed of trust or any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

12.11 Attorneys' Fees. Trustor agrees to reimburse Beneficiary for any reasonable attorneys' fees and costs actually incurred by Beneficiary with respect to any bankruptcy or insolvency proceeding, or other action involving Trustor or any guarantor as a debtor.

Trustor additionally agrees to pay all reasonable costs and out of pocket expenses, including, without limitation, (a) reasonable attorneys fees and legal expenses, (b) transportation and storage costs, (c) advertising of sale of the Trust Estate, (d) sale commissions, (e) sales tax, (f) costs for improving or repairing the Trust Estate, and (g) costs for preservation and protection of the Trust Estate, incurred by Beneficiary in obtaining possession of Trust Estate, storage and preparation for sale, sale or other disposition, and otherwise incurred in foreclosing upon the Trust Estate. Any and all such costs and out of pocket expenses shall be payable by Trustor upon demand, together with interest thereon from the date of the advance until repaid, both before and after judgment, at the rate provided in the Note.

Regardless of any breach or default, Trustor agrees to pay all expenses, including reasonable attorneys fees and legal expenses incurred by Beneficiary in any bankruptcy proceedings of any type involving Trustor, the Trust Estate, or this Trust Deed, including, without limitation, expenses incurred in modifying or lifting the automatic stay, determining adequate protection, use of cash collateral, or relating to any plan of reorganization.

12.12 Request for Notice. Trustor requests that a copy of any Notice of Default and of any Notice of Sale hereunder be mailed to Trustor at the address for Trustor specified in Section 12.1.

12.13 Limitation on Damages. Beneficiary and its officers, directors, employees, representatives, agents, and attorneys, shall not be liable to Trustor or any Guarantor for consequential damages arising from or relating to any breach of contract, tort, or other wrong in connection with or relating to this Trust Deed or the Trust Estate.

12.14 Preferential Transfers. If the incurring of any debt by Trustor or the payment of any money or transfer of property to Beneficiary by or on behalf of Trustor or any Guarantor should for any reason subsequently be determined to be "voidable" or "avoidable" in whole or in part within the meaning of any state or federal law (collectively "voidable transfers"), including, without limitation,

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20528398

RECORDED AT REQUEST OF

FEE 72⁰⁰ DEPUTY Smw
PIONEER TITLE

2005 DEC 30 PM 3 03

OFFICIAL RECORD BK# 878
RECORDER
BANNOCK COUNTY IDAHO

Exhibit A

A Tract of land in the South 1/2 of the South 1/2 Section 31, Township 6 South, Range 35 East, Boise Meridian, Bannock County, Idaho, more particularly described as follows:

Beginning at the South quarter corner of Section 31; thence South 89°36'40" East, 82.68 feet; thence North 53°44'13" East, 88.1 feet; thence North 26°44'09" West, 320 feet; thence North 63°15'51" East, 260 feet; thence North 26°44'09" West 495.62 feet, more or less, to the Southerly right of way line of Barton Road; thence South 72°27'20" West along the Southerly right of way of Barton Road 472.74 feet; thence continuing along the Southerly right of way line of Barton Road, South 83°18'20" West, 389.3 feet, more or less, to the Easterly line of the Old Stock Trail; thence South 26°44'40" East along the Easterly line of the Old Stock Trail 791.56 feet, more or less, to the South line of said Section 31; thence South 89°44' East, 462.23 feet, more or less, to the point of beginning.

A. Bruce Larson (ISB#: 2093)
HEARN & WOOD LLP
P.O. Box 70
Pocatello, Idaho 83204
Telephone: (208) 497-0405
Fax: (208) 932-4380
Email: bruce@hwlawpro.com

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2016 NOV -4 PM 3:11
BY KP
DEPUTY CLERK

Attorney for Defendants

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs,

v

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendants.

WILDLIFE RIDGE ESTATES, LLC, and Idaho limited liability company,

Counterclaimant,

v

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Counterdefendants.

Case No. CV-2016-3588-OC

ANSWER TO COMPLAINT AND COUNTERCLAIM

WILDLIFE RIDGE ESTATES, LLC (hereafter "Wildlife Ridge") responds to Plaintiffs'

Complaint to Judicially Foreclose Deed of Trust ("the Complaint") as follows:

ANSWER TO COMPLAINT AND COUNTERCLAIM

Page 1

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief can be granted, and should therefore be dismissed.

SECOND DEFENSE

Defendants deny each and every allegation of Plaintiffs' Complaint not specifically admitted herein.

THIRD DEFENSE

The Plaintiffs have failed to join all necessary and indispensable parties to this action.

ANSWER

1. Wildlife Ridge denies all of the allegations of the complaint not specifically admitted in this Answer.

2. Wildlife Ridge admits only that First Capital Funding, L.C. is a limited liability company that is apparently organized under the laws of the state of Utah, Wildlife Ridge denies all other allegations contained in paragraph 1 of the Complaint.

3. Wildlife Ridge, answering the allegations contained in paragraph 2 of the Complaint, admits only that it is a limited liability company, in good standing under the laws of the state of Idaho and to those facts shown of public record. Wildlife Ridge admits only that Millward and M&S appear in the documents relied upon by Plaintiffs as makers of the document purported to be a note and that defendant M&S is shown as the "Trustor" on a document purported to be a Trust Deed among other things. Wildlife Ridge specifically denies that either Millward or M&S are owners or were ever owners in fee simple of the premises.

4. Wildlife Ridge denies those allegations of paragraph 3 of the Complaint as the same relate to Wildlife Ridge.

5. Wildlife Ridge denies the allegations of paragraph 4 of the Complaint.

6. Wildlife Ridge denies the allegations of paragraph 5 of the Complaint.

7. Wildlife Ridge admits that Millward filed for relief under Chapter 7 of the Bankruptcy Code, as Case No. 12-41260 and that the filing commenced an automatic stay but denies the balance of the allegations contained in the second sentence of paragraph 6 of the Complaint. Wildlife Ridge admits the Millward bankruptcy case was closed on June 23, 2016.

8. Wildlife Ridge admits that a document purporting to be a "Trust Deed" was recorded on the 30th day of December, 2005, as Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho and denies the balance of the allegations contained in paragraph 7 of the Complaint.

9. Wildlife Ridge denies that any Deed of Trust or Trust Deed applies to any real property that it owns and denies all other allegations contained in paragraphs 8, 9, 10, 11, and 12 of the Complaint.

AFFIRMATIVE DEFENSES

10. The relief sought in the Complaint is barred by applicable statutes of limitations including by not limited to Idaho Code §§45-1515 and 5-214A.

11. The relief sought in the Complaint is barred by laches.

12. The relief sought in the Complaint is barred by the doctrine of Collateral Estoppel.

13. The relief sought in the Complaint is barred by the doctrines of *res judicata*, claim and/or issue preclusion.

14. The relief sought in the Complaint is barred by the doctrines of unclean hands.

15. The interest of Wildlife Ridge is prior to and superior to the interest of any of the Plaintiffs.

16. The security interest claimed by the Plaintiff is invalid and void.

17. The “Modification” referred to in Paragraph 5 of the complaint is void and unenforceable.

18. The “Modification” referred to in Paragraph 5 of the complaint caused the priority of the Trust Deed to become inferior to the right, title and interest of the Wildlife Ridge.

17. Plaintiffs did not act reasonably to protect itself or to mitigate any damages which it may have sustained, which damages are denied, and are barred from recovering on its Complaint to the extent of such failure to mitigate.

18. Performance of one or more contractual obligations alleged in the Complaint was excused due to, among other things, Plaintiffs’ own breach of its warranties, representations, and/or other obligations to Defendant, and consequently Plaintiffs are barred from recovery on any claim for relief contained in the Complaint.

19. If any monetary sums are recoverable by Plaintiff, which liability Wildlife Ridge expressly denies, such sums must be offset by the amount in which Wildlife Ridge was damaged by Plaintiffs and the Defendant. M&S, including but not limited to all damages, costs, penalties, interest, and other sums incurred by the Defendant M&S due to the failure of said Defendant to timely pay any and all invoices, bills, accounts or other business expenses, its failure to indemnify Wildlife Ridge against resulting claims, causes of action, liabilities, and damages and all other damages incurred by Defendant relating to the subject matter of the Complaint or otherwise, or alleged in the Complaint filed in this action by Defendant.

20. If any monetary sums are recoverable by Plaintiff, which liability Wildlife Ridge expressly denies, Defendant M&S, should indemnify and hold Wildlife Ridge harmless from all such monetary sums and from the foreclosure of any lien, deed of trust, mortgage or other

encumbrance including but not limited to all damages, costs, penalties, interest, and other sums incurred by the Defendant M&S relating to the subject matter of the Complaint or otherwise, or alleged in the Complaint filed in this action by said Defendant.

21. The obligations sought to be enforced by Plaintiffs in this action are unenforceable and void by reason of violation of public policy and, as a result, Plaintiff may recover nothing thereon.

22. The obligations sought to be enforced by Plaintiff are unconscionable and are unenforceable and void by reason of unconscionability. By reason of said unconscionability, and the unconscionable nature of activities related to attempted foreclosure or collection thereof, Plaintiffs should not recover on their Complaint.

23. One or more of the Plaintiffs are not the real parties in interest and are without authority to act or bring an action to foreclose a mortgage in the state of Idaho.

24. The interest claimed by the Plaintiffs in the real property owned by Wildlife Ridge, if any such interest exists, was obtained by the fraudulent and collusive conduct of the Plaintiffs and, Defendant M&S and their respective agents and employees, in particular:

a). During August 2004, the Michael Williams (who is now the sole owner of Wildlife Ridge) began negotiating with J. P Lasley's and Jean Lasley's ("Lasley's"), as trustees of the J.P and Jean Lasley's Living Trust, for the purchase of the real property ("Property") which is the subject matter of this action with the intent of developing the Property. Following those negotiations Michael Williams and the Lasley's executed a purchase and sale agreement for the Property.

b). Michael Williams and his partner Henry Proctor subsequently learned that they could not obtain lender financing to purchase the Property and decided to obtain additional capital investors.

c). Sometime during September 2005 Michael Williams spoke with Defendant Millward, (who Wildlife Ridge now believes was acting jointly with the Plaintiffs and Plaintiffs' principals as a part of an ongoing business), about financing the development project in exchange for a percentage of the profits. Defendant Millward represented that he and his business associates would handle the financing with their money to purchase of the Property if Michael Williams was able to obtain preliminary plat approval for the Property. Michael Williams relied on the representations of Defendant Millward including his representation that said defendant and the Plaintiffs and Plaintiffs' principals would be bound by the Agreement.

d). During October 25, 2005, the preliminary plat was approved. All costs of obtaining the preliminary plat were paid by Michael Williams. Defendant Millward on behalf of Plaintiffs represented that they would agree to provide the needed financing to purchase the Property for a percentage of the profits.

e. On December 29, 2005 Millward and Michael Williams memorialized their agreement ("Agreement"). The Agreement is attached hereto as Exhibit "A." The Agreement provides among other things that: (i) M&S would pay \$230,000 to purchase the Property from the Lasley's and would be entitled to 55% of the property; (ii) thereafter each party would pay \$25,000 to buy-out Henry Proctor's interest; (iii) M&S would then own 62.5% of the Property and Michael Williams

would own the remaining 37.5% of the Property.(iv) M&S would form a limited liability company for the development project; (v) the Property would be held by the newly organized LLC, the Defendant M&S and Michael Williams would be managers of the LLC; (vi) in consideration of the mutual covenants outlined in the Agreement Michael Williams assigned his interest in the purchase and sale agreement to M&S.

f). Contrary to the representations made to Michael Williams and contrary to the terms of the Agreement, Defendant M&S recorded a deed conveying the real property solely to M&S on December 30, 2006 in Bannock County as Instrument No. 20528397. A true and correct copy is attached as Exhibit "B".

g). Defendant M&S and Plaintiffs immediately encumbered all of the Property with the Trust Deed which is the subject matter of this action.

h). Thereafter Defendant M&S and Plaintiffs actively concealed the true nature of the investment, loan balances, interest and accounts, said Defendants and Plaintiffs knew that the statements about the transaction were false, material and they intended that the representations would be acted upon in a reasonable manner,

(i) Michael Williams, Wildlife Ridge's predecessor in interest was ignorant of the falsity of the Plaintiff's statements; relied on the truth of the representations; had the right to rely upon the truth of the representations; and

(j) Wildlife Ridge has been injured in and amount to be shown at the trial of this matter as a consequence of Defendants Millward, M&S and the Plaintiff's representations and conduct.

WHEREFORE the Wildlife Ridge having fully responded to the Complaint request that this Court enter Judgment in favor of the Wildlife Ridge as follows:

1. Dismissing the Complaint with prejudice with the Plaintiffs taking nothing thereby.
2. Awarding the Wildlife Ridge its costs necessarily incurred in this action together with reasonable attorney's fees pursuant to the provisions of the Idaho Code including but not limited to §§12-120, 12-121, and Rule 54(e) of the Idaho Rules of Civil Procedure.
3. That this Court denies the Plaintiffs request for equitable relief of foreclosure in any form.
4. For such other and further relief as this Court determines to be just.

COUNTERCLAIM

Counterclaimant Wildlife Ridge Estates, LLC ("Wildlife Ridge") alleges and complains of the Counterdefendants as follows:

1. Wildlife Ridge is an Idaho limited liability company, in good standing with its principal place of business located at 4915 Apache Ave., Pocatello, ID 83204.
2. Counterdefendant Monitor Financed L.C. ("Monitor") claims to be a Utah limited liability company, the Counterdefendant First Capital Funding, L.C., claims to be a Utah limited liability company.
3. During August 2004, the Michael Williams (who is now the sole owner and a predecessor in interest of Wildlife Ridge) began negotiating with J. P Lasley's and Jean Lasley's ("Lasley's"), as trustees of the J.P and Jean Lasley's Living Trust, for the purchase of the real property ("Property") which is the subject matter of this action with the intent of developing the Property. Following those negotiations Michael Williams and the Lasley's executed a purchase and sale agreement for the Property.

4. Michael Williams and his partner Henry Proctor subsequently learned that they could not obtain lender financing to purchase the Property and decided to obtain additional capital investors.

5. Sometime during September 2005 Michael Williams spoke with Defendant Millward, (who Wildlife Ridge now believes was acting jointly with the Counter Defendants and Counter Defendants' principals as a part of an ongoing business), about financing the development project in exchange for a percentage of the profits. Defendant Millward represented that he and his business associates would handle the financing with their money to purchase of the Property if Michael Williams was able to obtain preliminary plat approval for the Property. Michael Williams relied on the representations of Defendant Millward including his representation that said defendant and the Counter Defendants and Counter Defendants' principals would be bound by the Agreement.

6. During October 25, 2005 the preliminary plat was approved. All costs of obtaining the preliminary plat were paid by Michael Williams. Defendant Millward on behalf of Counter Defendants represented that they would agree to provide the needed financing to purchase the Property for a percentage of the profits.

7. On December 29, 2005 Millward and Michael Williams memorialized their agreement ("Agreement"). The Agreement is attached hereto as Exhibit "A." The Agreement provides among other things that: (i) M&S would pay \$230,000 to purchase the Property from the Lasley's and would be entitled to 55% of the property; (ii) thereafter each party would pay \$25,000 to buy-out Henry Proctor's interest; (iii) M&S would then own 62.5% of the Property and Michael Williams would own the remaining 37.5% of the Property; (iv) M&S would form a limited liability company for the development project; (v) the Property would be held by the newly

organized LLC, the Defendant M&S and Michael Williams would be managers of the LLC; (vi) in consideration of the mutual covenants outlined in the Agreement Michael Williams assigned his interest in the purchase and sale agreement to M&S.

8. Contrary to the representations made to Michael Williams and contrary to the terms of the Agreement, Defendant M&S recorded a deed conveying the real property solely to M&S on December 30, 2005 in Bannock County as Instrument No. 20528397. A true and correct copy is attached as Exhibit "B".

9. Defendant M&S and Counter Defendants immediately encumbered all of the Property with the Trust Deed which is the subject matter of this action.

FRAUD

10. Wildlife Ridge repleads paragraphs 1 through 9.

11. Thereafter Defendant M&S and Plaintiffs actively concealed the true nature of the investment, loan balances, interest and accounts. The said Defendant and Plaintiffs knew that the statements about the transaction were false. The statements were material and they intended that the representations would be acted upon in a reasonable manner by Wildlife Ridge.

12. Wildlife Ridge's predecessor in interest was ignorant of the falsity of the Plaintiff's statements; relied on the truth of the representations; had the right to rely upon the truth of the representations; and

13. Wildlife Ridge has been injured in an amount to be shown at the trial of this matter as a consequence of Defendant M&S and the Plaintiff's representations and conduct.

DECLARATORY AND INJUNCTIVE RELIEF

14. Wildlife Ridge repleads paragraphs 1 through 13.

15. Wildlife Ridge desires a judicial determination the Trust Deed sought to be foreclosed in this matter is unenforceable due the conduct of the Counterdefendants

16. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Counterclaimants may ascertain the validity and enforceability of the Trust Deed and Note which form the basis of the Counterdefendants' claims.

17. On December 30, 2005 and continuing to the present the Counterdefendants have wrongfully encumbered the Property owned by Wildlife Ridge.

18. Counterdefendants have actively concealed the true nature of their transaction with M&S and misrepresented the same.

19. Counterdefendants attempted to modify the transactions claimed Note at a time when M&S was administratively dissolved therefore the modification is void and unenforceable.

20. As a result of Counterdefendants acts, Wildlife Ridge has and will sustain great and irreparable injury, in that the Counterdefendants' conduct interferes with the sale of developed lots owned by Wildlife Ridge and wrongfully encumbered by Counterdefendants.

21. Wildlife Ridge cannot be fully compensated in damages, and is without an adequate remedy at law because the exact amount of damage Wildlife Ridge will sustain is difficult to determine and there in no other adequate remedy at law to recover the damages.

22. As a further result of defendant's acts, Wildlife Ridge has sustained money damages in an amount to be proven at the time of trial. If this court allows these acts to continue, Wildlife Ridge will be further damaged in an amount to proven at trial.

ATTORNEY'S FEES

23. The Wildlife Ridge is entitled to the award of attorney's fees in accordance with the provisions of Idaho Code §§ 12-120, 12-121, provisions of Rule 54(e) of the Idaho Rules of Civil Procedure.

DEMAND FOR TRIAL BY JURY

Wildlife Ridge demands trial by jury and all issues that are triable by a jury in this action.

WHEREFORE the Counterclaimants pray judgment against the Counterdefendant as follows:

1. That the Court determine that an actual controversy has arisen and now exists between the Counterclaimants and Counterdefendants concerning their respective rights and duties;
2. That the Trust Deed is void and unenforceable and that the Counterdefendants are enjoined from the foreclosure of the said trust deed.
3. That the Note and the modification of the Note are void and invalid.
4. For actual damages to be proven at the time of trial.
5. For an award of costs necessarily incurred herein together with an award of reasonable attorney's fees in accordance with the provisions of Idaho Code §§12-120 and 12-121; and
6. For such further relief as the Court deems just in the premises.

DATED this 4th day of November, 2016.

HEARN & WOOD LLP

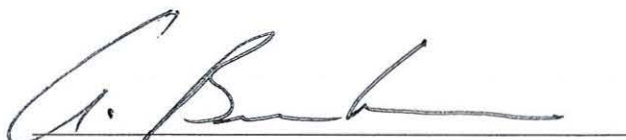

A. BRUCE LARSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of November, 2016, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Ron Kerl
COOPER & LARSEN, Chartered
151 North Third Avenue, 2nd Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145

U.S. Mail – Postage Prepaid
 Hand Delivery
 Overnight Mail
 Facsimile: 208-235-1182
 Email: ron@cooper-larsen.com


A. BRUCE LARSON

Equity Builders, LLC

20600050

20500050



RECORDED AT REQUEST C

FEES ³⁰⁰ DEPUTY SM

PIONEER TITLE

JAN 3 PM 12 02

OFFICIAL RECORD BK# 81

RECORDER

BANNOCK COUNTY IDAHO

THIS INSTRUMENT FILED FROM RECORD BY PIONEER TITLE CO. AS AN ACCUMULATION COPY IF HAS NOT BEEN EXAMINED AS TO ITS EXECUTION OR AS TO ITS EFFECT UPON TITLE

Signature

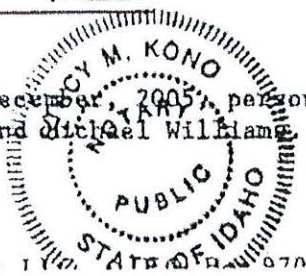
Proposal for Mike Williams

1. M & S Development will pay for existing 40-lot subdivision for \$230,000 by January 1, 2005. M & S Development will own 55 % of the development.
2. M & S Development will pay \$ 25,000 to purchase the share from Henry Proctor. M & S Development will then own 62.5% of the 40-lot subdivision. Mike Williams will pay \$25,000 to purchase the share from Henry Proctor Mike Williams will then own 37.5% of the 40-lot subdivision.
3. M & S Development will attempt to purchase the adjoining properties at a fair market value. Mike Williams will have the option to purchase whatever portion of each additional phase, as he is comfortable. Whatever portion each party invests in the purchase of the property represents their percentage of the profits in that phase.
4. M & S Development will form an LLC for the project; each party will be a manager of the LLC. All properties that are under contract will be held by the LLC with each manager's percentage documented.
5. M & S Development and Mike Williams will have the option to purchase all lots at market value to construct the homes. Both managers of the LLC must agree on this. The profits that are obtained from the construction of the homes will belong to M & S Development. *The respective sharing is 70/30*
6. All remaining costs associated with obtaining the final plat will be split based on the percentage of ownership. All previous costs associated with the preliminary plat will be the responsibility of Mike Williams.

Signature
Michael Millward

Signature 12/29/05
Michael Williams

On this 29th day of December, 2005, personally appeared before me, the undersigned Michael J. Millward and Michael Williams



Signature
NOTARY PUBLIC OF IDAHO
Residing at: POCATELLO, ID Comm exp
Haber City Wash 2 24022



2016 NOV -3 AM 2:29
DEPT CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MONITOR FINANCE, LC, ETAL. ,

Plaintiff,

vs.

WILDLIFE RIDGE ESTATES, LLC, ETAL.,

Defendant.

Case No:CV-2016-0003588-OC

**ORDER FOR SUBMISSION OF
INFORMATION FOR
SCHEDULING ORDER**

A Complaint was filed in this matter on the 7th day of October, 2016. The Defendant has now appeared and/or answered and the case is at issue.

IT IS HEREBY ORDERED, pursuant to I.R.C.P. 16, that the parties, through their counsel (or the parties themselves if self-represented), confer and submit to the Court, within fourteen (14) days of the date of this Order, a joint statement containing the following information:

- (1) Whether any service is still needed upon any unserved parties.
- (2) Whether motions to add new parties or otherwise amend the pleadings are contemplated.
- (3) Whether the parties currently contemplate or anticipate any pre-trial motions.
- (4) Whether the case presents any unusual time requirements for trial

preparation.

- (5) The agreed amount of time required for trial.
- (6) Whether the case presents any unusual times requirements for discovery.
- (7) Whether any party requests court-ordered mediation.
- (8) Three stipulated trial dates, one no less than six (6) months and no more than nine (9) months from the date of this Order, and a second no less than nine (9) months and no more than twelve (12) months from the date of this Order, and a third no less than twelve (12) months and no more than fifteen (15) months from the date of this Order. These trial dates cannot be during the first full week of any month.

(9) Whether there are other matters conducive to determination of the action that the parties agree should be brought to the attention of the Court prior to entering a Scheduling Order.

The parties shall agree as to which party shall make the joint submission but, if they cannot agree, Plaintiff shall be responsible to make the submission.

Upon receipt of this joint submission the Court will issue an Order setting the matter for trial with appropriate dates for discovery, disclosure of witness, etc.

IT IS FURTHER ORDERED that if the parties do not file the stipulation required herein, within the fourteen (14) days set forth, the Court will set this matter for trial on a date available to the Court.

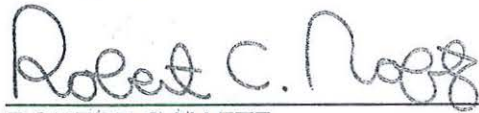
IT IS FURTHER ORDERED that the submissions requested in the order are deemed by the Court to constitute the scheduling conference required by IRCP 16(a). However, if either party wishes a more formal scheduling conference please contact the Court's clerk and one will be scheduled.

IT IS FURTHER ORDERED that unless the Court receives written notification to

the contrary, all documents sent by the Court to counsel will be delivered electronically. Counsel is hereby instructed to provide the Court with an email address they wish to have documents delivered to. Counsel will also have the continuing obligation to notify the Court upon any change to the email address submitted.

NOTICE: ELECTRONIC FILING IN THE SIXTH JUDICIAL DISTRICT IS NOT YET AVAILABLE. PLEASE CONTINUE TO PHYSICALLY FILE DOCUMENTS UNTIL FURTHER NOTICE.

DATED this 8 day of November, 2016.



ROBERT C NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9 day of November, 2016 I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Ron Kerl Cooper & Larsen Po Box 4229 Pocatello, ID 83205-4229 ron@cooper-larsen.com	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Hand Deliver <input type="checkbox"/> Fax:
A. Bruce Larsen Hearn & Wood LLP Po Box 70 Pocatello, ID 83204 bruce@hwlawpro.com	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Hand Deliver <input type="checkbox"/> Fax:

Robert Poleki
Clerk of the Court

By: Kent Poley
Deputy Clerk

2016 DEC 29 PM 5:04

KP

DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MONITOR FINANCE, LC, ETAL. ,

Plaintiff,

vs.

WILDLIFE RIDGE ESTATES, LLC, ETAL.,

Defendant.

Case No:CV-2016-0003588-OC

ORDER SETTING JURY TRIAL

(1) **TRIAL DATE(S)**. This matter is set for **JURY TRIAL** on (A) **PRIMARY TRIAL SETTING: SEPTEMBER 6-8, 12, 2017** and (B) **ALTERNATIVE TRIAL SETTING: DECEMBER 5-8, 2017 AT THE HOUR OF 9:00 A.M.**, in Courtroom 309, Bannock County Courthouse, Pocatello, Idaho. A continuance of the trial date shall occur only upon written Motion or Stipulated Motion to the Court which clearly states the reasons for the requested continuance and which includes an acknowledgment and agreement **signed by each party** that certifies that the Motion to Continue has been discussed with and agreed to by each party. All deadlines listed below shall apply to the trial setting listed in line (A) above. An Order continuing the trial date will not alter the deadlines set forth in this Order, except for good cause shown.

(2) **PRE-TRIAL CONFERENCE**. Pursuant to I.R.C.P. 16(b), in lieu of a pre-trial

conference, trial counsel for the parties (or the parties if they are self-represented) are ORDERED to meet and/or confer for the purpose of preparing a joint Pre-Trial Memorandum, which shall be submitted to the Court at least 14 days prior to Trial, and shall include:

(A) A statement that all exhibits to be offered at trial have been provided to all other parties and attaching an Exhibit List of all exhibits to be offered at trial by both parties. The Exhibit List shall indicate: 1) by whom the exhibit is being offered, 2) a brief description of the exhibit, 3) whether the parties have stipulated to its admission, and if not, 4) the legal grounds for any objection. If any exhibit includes a summary of other documents, such as medical expense records, to be offered pursuant to I.R.E. 1006, the summary shall be attached to the Stipulation.

(B) A statement whether depositions or any discovery responses will be offered in lieu of live testimony, and a list of what will actually be offered, the manner in which such evidence will be presented, and the legal grounds for any objection to any such offer.

(C) A list of the names and addresses of all witnesses which each party intends to call to testify at trial, including anticipated rebuttal or impeachment witnesses. Expert witnesses shall be identified as such. The Stipulation should also identify whether any witness' testimony will be objected to in its entirety and the legal grounds therefore.

(D) A brief non-argumentative summary of the factual nature of the case. The purpose of the summary is to provide an overview of the case for the jury and is to be included in pre-proof instructions to the jury, unless found inappropriate by the Court.

(E) A statement that counsel have, in good faith, discussed settlement unsuccessfully and/or completed mediation unsuccessfully, if mediation was ordered by the Court.

(F) A statement that all pre-trial discovery procedures under I.R.C.P. 26 to 37 have been complied with and all discovery responses supplemented as required by the rules to reflect facts known to the date of the Stipulation.

(G) A statement of all issues of fact and law which remain to be litigated, listing which party has the burden of proof as to each issue.

(H) A list of any stipulated admissions of fact, which will avoid unnecessary proof.

(I) A list of any orders requested by the parties which will expedite the trial.

(J) A statement as to whether counsel require more than 30 minutes per party for voir dire or opening statement and, if so, an explanation of the reason more time is needed.

These submissions will be deemed by the Court to constitute the final pre-trial conference required by IRCP 16(b). However, if either party wishes a more formal pre-trial conference the same should be requested in writing at least 60 days prior to trial and one will be scheduled.

(3) **MOTIONS TO ADD NEW PARTIES OR AMEND PLEADINGS** shall be filed no later than 60 days after the date of this Order.

(4) **DISCOVERY** must be served and completely responded to at least 60 days prior to trial. This includes supplementation of discovery responses required by I.R.C.P. 26(e), unless good cause is shown for late supplementation. Discovery requests must be responded to in a timely way as required by the I.R.C.P. The deadlines contained in this Order cannot be used as a basis or reason for failing to timely respond to or supplement properly served discovery, including requests for disclosure of witnesses and/or trial exhibits. Discovery disputes will not be heard by the Court without the written certification required by I.R.C.P. 37(a)(2).

(5) **WITNESS DISCLOSURE**. Except as previously disclosed in responses to discovery requests, Plaintiff shall disclose all fact and expert witnesses no later than 140 days before trial. Defendants shall disclose their fact and expert witnesses no later than 110 days before trial. Rebuttal witnesses shall be disclosed no later than 80 days before trial. Expert witnesses shall be disclosed in the manner and with the specificity required by I.R.C.P. 26(b)(4)(A)(i). Any objection to the I.R.C.P. 26(b)(4)(A)(i) expert witness disclosure must be filed within 45 days of the disclosure or is deemed waived. Witnesses

not disclosed in responses to discovery and/or as required herein will be excluded at trial, unless allowed by the Court in the interest of justice.

(6) **MOTIONS. DISPOSITIVE MOTIONS**, and responses thereto, shall comply in all respects with I.R.C.P. 56 and be filed no later than 90 days before trial. **ALL OTHER MOTIONS**, including any Motion in Limine, shall be filed and heard by the Court no later than 30 days before trial. The original of all Motions and supporting submissions shall be filed with the clerk of the court. **However, one (1) duplicate Judge's Copy of all Motions, and any opposition thereto, together with supporting memorandum, affidavits and documents, shall be E-MAILED to the deputy clerk at kpovey@bannockcounty.us**. All other pleadings, notices, etc., should be filed with the Clerk **without** copies to the Court's chambers.

(7) **STIPULATED MODIFICATIONS**. The parties may stipulate to the modification of the discovery, witness disclosure and motion deadlines stated herein only upon submission of a stipulation to the Court and a Court Order modifying the deadlines. No order modifying deadlines will be granted if it would result in a delay in the trial date, without a formal motion to vacate the trial, and good cause shown.

(8) **TRIAL BRIEFS**. Trial briefs are encouraged but not required. If submitted, trial briefs should address substantive factual, legal and/or evidentiary issues the parties believe are likely to arise during the trial, with appropriate citation to authority. Any trial brief should be exchanged between the parties and submitted to the clerk of the court, and a duplicate Judge's Copy shall be submitted to the Court's chambers in Bannock County, no later than 10 days prior to trial.

(9) **PRE-MARKED EXHIBITS, AND AN EXHIBIT LIST IN THE FORM ATTACHED HERETO**, shall be exchanged between the parties and filed with the Court no later than 10 days prior to trial. Unless otherwise ordered, Plaintiff shall identify exhibits beginning with the number "1" and the Defendant shall identify exhibits beginning with the letter "A."

(10) **JURY INSTRUCTIONS**. Proposed jury instructions and verdict forms requested by any party shall be prepared in conformity with I.R.C.P. 51(a), except that they shall be filed with the Court and exchanged between the parties at least 7 days prior to trial. Except for good cause shown, proposed jury instructions should conform to the pattern Idaho Jury Instructions (IDJI) approved by the Idaho Supreme Court. In addition to submitting written proposed instructions that comply with Rule 51(a), the parties shall also submit both a clean version and a version with cited authority by e-mail to the Court's Clerk, in Word format, at least 7 days prior to trial. Certain "stock" instructions need not be submitted. These will typically include IDJI 1.00, 1.01, 1.03, 1.03.1, 1.05, 1.09, 1.11, 1.13/1.13.1, 1.15.1, 1.17, 1.20.1, and 1.24.1. It is requested that the parties agree on the basic instruction giving the jury a short, plain statement of the claims, per IDJI 1.07.

(11) **MEDIATION**. Mediation is highly recommended. Any formal mediation must occur at least 60 days before the trial date. If the parties cannot agree on a mediator upon motion by either party, the Court will appoint a mediator.

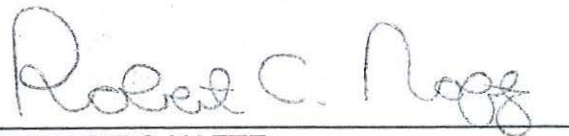
(12) **TRIAL PROCEDURES**. A total of **FOUR (4)** trial days have been reserved for this trial. If the parties believe that more trial days will be required, the parties are ORDERED to notify the Court of this request no less than 60 days prior to trial. On the

first day of trial, counsel shall report to the Court's chambers at 8:30 a.m. for a brief status conference. Unless otherwise ordered, or as modified during trial as necessary, trial days will begin at 9:00 a.m. and close at or about 5:00 p.m., with a one hour break for lunch.

(13) **HEARINGS OR CONFERENCES WITH THE COURT.** All meetings, conferences, and/or hearings with the Court shall be scheduled in advance with the Court's Clerk by calling 208-236-7252. **No hearing shall be noticed without contacting the Clerk.**

(14) **ALTERNATE JUDGES.** Notice is hereby given, pursuant to I.R.C.P. 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case, if the current presiding judge is unavailable. The list of potential alternate judges is: 1) Honorable Stephen S. Dunn; 2) Honorable David C. Nye; 3) Honorable Mitchell W. Brown; 4) Honorable Jon Shindurling; 5) Honorable William H. Woodland; 6) Honorable Richard T. St. Clair. If the I.R.C.P. 40(d)(1) disqualification has not previously been exercised, failure to disqualify, without cause, any one of these alternate judges within ten (10) days of the date of this Order shall constitute a waiver of such right.

DATED this 29 ^{December, 2016} day of January, 2017.



ROBERT C NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of December, 2014 ~~January, 2017~~, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Ron Kerl Cooper & Larsen P O Box 4229 Pocatello, ID 83205-4229	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail: <input type="checkbox"/> Hand Deliver <input type="checkbox"/> Fax:
A Bruce Larson 155 S 2nd Ave Pocatello, ID 83201	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail: <input type="checkbox"/> Hand Deliver <input type="checkbox"/> Fax:

Robert Poleki
Clerk of the Court

By: Keri Povey
Deputy Clerk

Nasty

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

FILED
2017 JAN 15 PM 3:55
KP
DEPUTY CLERK

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability)
company; and FIRST CAPITAL FUNDING, L.C., a)
Utah limited liability company,)
)
Plaintiffs,)

vs.)

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited)
liability company; M&S DEVELOPMENT, LLC, an)
Idaho limited liability company,)
)
Defendants.)

CASE NO. CV-2016-3588-OC

**MONITOR FINANCE, L.C.
and
FIRST CAPITAL FUNDING,
L.C.'s ANSWER TO
COUNTERCLAIM**

_____)
WILDLIFE RIDGE ESTATES, LLC, an Idaho limited)
liability company;)
Counter-claimant,)

vs.)

MONITOR FINANCE, L.C., a Utah limited liability)
company; and FIRST CAPITAL FUNDING, L.C., a)
Utah limited liability company,)
)
Counter-defendant,)
_____)

COMES NOW the Plaintiffs and Counter-defendants Monitor Finance, L.C., a Utah limited liability company (“Monitor”) and First Capital Funding, L.C., a Utah limited liability company (“First Capital”), and in answer to the Counter-claim filed against them by the Defendant and Counter-claimant Wildlife Ridge Estates, LLC (“Wildlife Ridge”), admits, denies and alleges the following:

1. Monitor and First Capital re-allege the facts and claims set forth in thier Complaint on file in this case as if set forth herein at length.

2. Monitor and First Capital admit the allegations contained in paragraphs 1., and 2. of Wildlife Ridge’s Counter-claim.

3. Monitor and First Capital have insufficient knowledge of the allegations contained in paragraphs 3., 4., 5., 6., 7., and 8. of Wildlife Ridge’s Counter-claim, and therefore deny the same.

4. Monitor and First Capital, in answer to paragraph 9. of Wildlife Ridge’s Counter-claim, admit that on the 30th day of December, 2005, they jointly loaned to Michael Millward and M&S Development, LLC the sum of \$244,000, and as evidence of said loan, Michael Millward and M&S Development, LLC made, executed and delivered to the Plaintiffs their Trust Deed Note dated the 30th day of December, 2005, in the principal sum of \$244,000 as set forth in Exhibit “A” attached to the Complaint on file herein, and it is hereby incorporated herein by this reference as if set forth in full at this place.

Further, as security for the repayment of the Trust Deed Note, together with interest, costs, and attorney’s fees, M&S made, executed and delivered to Plaintiffs that certain Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005 (“Deed of Trust”) on the Bannock County Real Property therein described. The Deed of Trust was recorded

on the 30th day of December, 2005, under Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho, and is attached as Exhibit "B" to the Complaint on file herein. It is hereby incorporated herein by this reference as if set forth in full at this place (the "Monitor and First Capital Deed of Trust").

5. In answer to paragraph 10. of Wildlife Ridge's Counter-claim, Monitor and First Capital restate their answers to paragraphs 1. through 9. of Wildlife Ridge's Counter-claim.

6. Monitor and First Capital deny the allegations set out in paragraphs 11., 12., and 13. of Wildlife Ridge's Counter-claim.

7. In answer to paragraph 14. of Wildlife Ridge's Counter-claim, Monitor and First Capital restate their answers to paragraphs 1. through 13. of Wildlife Ridge's Counter-claim.

8. In answer to paragraphs 15. and 16. of Wildlife Ridge's Counter-claim, Monitor and First Capital admit that Wildlife Ridge is seeking the relief described therein, but denies that it is entitled to any such relief.

9. Monitor and First Capital deny the allegations set out in paragraphs 17., 18., 19., 20., 21., 22., and 23. of Wildlife Ridge's Counter-claim.

FIRST AFFIRMATIVE DEFENSE

The Counter-claim of Wildlife Ridge fails to state a claim against Monitor and First Capital upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The Counter-claim of Wildlife Ridge is barred by the applicable statutes of limitations including, but not limited to, Idaho Code §§ 5-201, 5-216, 5-218, and 5-224.

THIRD AFFIRMATIVE DEFENSE

The Counter-claim of Wildlife Ridge is barred by the applicable doctrines of res judicata, collateral estoppel, issue preclusion, judicial estoppel, claim preclusion and waiver by reason of the following:

On December 3, 2014, Wildlife Ridge commenced an action against Monitor and First Capital in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock as Case No. CV 2014-4783 OC (the “First Action”).

In the First Action Wildlife Ridge sought a decree quieting title in its name to the lands described in the Monitor and First Capital Deed of Trust, free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from the Court that the sums due Monitor and First Capital, which were or may have been secured by the Monitor and First Capital Deed of Trust, had been satisfied.

On March 12, 2015, Wildlife Ridge amended its complaint in the First Action and continued to seek a decree quieting title in its name to the lands described in the Monitor and First Capital Deed of Trust, free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from the Court that the sums due Monitor and First Capital, which were or may have been secured by the Monitor and First Capital Deed of Trust, had been satisfied.

On March 26, 2015, Monitor and First Capital filed their Answer to the Amended Complaint of Wildlife Ridge denying Wildlife Ridge’s right to any of the relief sought in its Amended Complaint.

On June 14, 2016, the First Action was dismissed by a Judgment of the Court, with prejudice, with each party to bear their own attorney fees and costs of suit (the “Dismissal of the First Action”).

Under the applicable doctrines of res judicata, collateral estoppel, and claim preclusion, the Dismissal of the First Action not only defeated the claims set out in the First Action, but also served to bar the future litigation of every matter which might and should have been litigated in the First Action, including the claims set out in Wildlife Ridge's Counter-claim filed herein.

FOURTH AFFIRMATIVE DEFENSE

Monitor and First Capital reserve the right to assert further and additional affirmative defenses.

ATTORNEY FEE REQUEST

Monitor and First Capital have had to employ counsel to defend the Counter-claim and have obligated themselves to pay a reasonable fee for such services. Monitor and First Capital are entitled to recover their reasonable attorney fees and their costs of suit against Wildlife Ridge pursuant to Idaho Code §§12-120, 12-121, and 12-123, and Rule 54 of the Idaho Rules of Civil Procedure.

WHEREFORE, having answered the Counter-claim of Wildlife Ridge, and having raised good and valid defenses thereto, Monitor and First Capital pray that judgment be entered in their favor dismissing the Counter-claim, with prejudice, and awarding Monitor and First Capital their reasonable attorney fees and their costs of suit against Wildlife Ridge pursuant to Idaho Code §§12-120, 12-121, and 12-123, and Rule 54 of the Idaho Rules of Civil Procedure.

Dated this 4 day of January, 2017.

COOPER & LARSEN, CHTD
Attorneys for Plaintiffs

By: _____

Ron Kerl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 5 day of January, 2017, I served a true and correct copy of

the foregoing document as follows:

A. Bruce Larson
Hearn & Wood LLP
155 S. 2nd Ave.
Pocatello, ID 83201

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile - 208-932-1083
- Email to: bruce@hwlawpro.com

Chamber Copy:
Hon. Robert C. Naftz
624 E. Center
Pocatello, ID 83201

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile - 208-547-2147
- Email to:
nicoled@bannockcounty.us

COOPER & LARSEN, CHTD

By: 

Ron Kerl, of the firm

2017 FEB 22 AM 8:16
KP

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MONITOR FINANCE, LC, ETAL. ,

Plaintiff,

vs.

WILDLIFE RIDGE ESTATES, LLC, ETAL.,

Defendant.

Case No:CV-2016-0003588-OC

MINUTE ENTRY & ORDER

THE PARTIES came before the Court on the 21st day of February, 2017 for motion for summary judgment. Ron Kerl appeared in person on behalf of the Plaintiff. A. Bruce Larson and Rick Hearn appeared in person on behalf of the Defendant. Stephanie Davis was the Court Reporter.

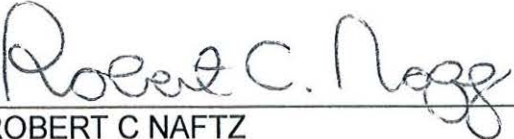
At the outset, Mr. Kerl informed the Court that he had filed a motion to amend the complaint and that hearing is set on Monday, February 27, 2017. He had requested that the Court set that hearing separate from today's hearing due to not having enough time to give proper notice to Defense counsel. However if the Court would prefer to hear the motion and there was no objection from the Defense, that motion could be heard as well. Mr. Larson had no objection to the motion, therefore said motion was **GRANTED**. Mr. Kerl will prepare the order and submit it to the Court.

Case No.: CV-2016-0003588-OC
MINUTE ENTRY & ORDER
Page 1 of 3

NOW THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's **MOTION** to amend the complaint that is scheduled to commence on Monday, February 27, 2017 at the hour of 2:00 p.m. is hereby **VACATED**.

The Court next heard argument on the Plaintiff's motion for summary judgment. At the conclusion of argument, the Court took the matter under advisement.

DATED this 21 day of February, 2017.



ROBERT C NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of February, 2017, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Ron Kerl Cooper & Larsen P O Box 4229 Pocatello, ID 83205-4229	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail: ron@cooper-larsen.com <input type="checkbox"/> Hand Deliver <input type="checkbox"/> Fax:
A. Bruce Larson 155 S. 2 nd Ave Pocatello, ID 83201	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail: bruce@hwlawpro.com <input type="checkbox"/> Hand Deliver <input type="checkbox"/> Fax:

Robert Poleki
CLERK OF THE COURT

By: Keri Pavey
Deputy Clerk

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
 151 North Third Avenue, Second Floor
 P.O. Box 4229
 Pocatello, ID 83205-4229
 Telephone: (208) 235-1145
 Facsimile: (208) 235-1182
 Email: ron@cooper-larsen.com

2017 FEB 23 AM 9:26

KP

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
 company; and FIRST CAPITAL FUNDING, L.C., a
 Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
 liability company; M&S DEVELOPMENT, LLC, an
 Idaho limited liability company,

Defendants.

CASE NO. CV-2016-3588-OC

**ORDER GRANTING LEAVE
 TO FILE AMENDED
 COMPLAINT**

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
 liability company;

Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability
 company; and FIRST CAPITAL FUNDING, L.C., a
 Utah limited liability company,

Counter-defendant,


Order Granting Leave To File Amended Complaint

Pg. 1

THE COURT, having reviewed the Plaintiffs' Motion to Amend Complaint to add a new defendant, and the parties having stipulated in open court that the Motion may be granted,

NOW, THEREFORE, it is hereby ordered that the Plaintiffs are hereby granted leave to file the Amended Complaint in the form attached to their Motion dated February 7, 2017.

Dated this 13 day of February, 2017.


Robert C. Naftz, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 13 day of February, 2017, I served a true and correct copy of the foregoing document as follows:

A. Bruce Larson
Hearn & Wood LLP
155 S. 2nd Ave.
Pocatello, ID 83201

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: bruce@hwlawpro.com

Ron Kerl
Cooper & Larsen, Chtd.
P.O. Box 4229
Pocatello, ID 83205

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: ron@cooper-larsen.com

CLERK OF THE DISTRICT COURT

By: 
Deputy

Nguyen

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

FILED
JUNIOR CLERK
2017 MAR -1 PM 4:12
BY *[Signature]*
DEPUTY CLERK

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
liability company; M&S DEVELOPMENT, LLC, an
Idaho limited liability company; and PIONEER
TITLE COMPANY, a corporation,

Defendants.

CASE NO. CV - 2016-3588-OC

**FIRST AMENDED
COMPLAINT TO
JUDICIALLY FORECLOSE
DEED OF TRUST**

_____)

Plaintiffs, for cause of suit against the above named Defendant, complains and alleges as follows:

1.

STATUS OF PLAINTIFFS. At all times herein mentioned Monitor Finance, L.C. (“Monitor”) has been and now is a limited liability company organized under the state of Utah. Monitor has its place of business in Provo, Utah, and is authorized, among other things, to loan money and to take notes and deeds of trust as security therefore in the State of Idaho.

At all times herein mentioned First Capital Funding, L.C. (“Capital”) has been and now is a limited liability company organized under the state of Utah. Capital has its place of business in Provo, Utah, and is authorized, among other things, to loan money and to take notes and deeds of trust as security therefore in the State of Idaho.

Monitor and Capital will be referred to herein collectively as the Plaintiffs.

2.

STATUS OF DEFENDANTS. The Defendant Wildlife Ridge Estates, LLC (“Wildlife Ridge”) is now a limited liability company organized under the laws of the state of Idaho, first organized in on May 12, 2006. However, between August 6, 2007 and August 27, 2007, between August 7, 2008 and October 5, 2009 and between August 5, 2010 and September 18, 2015 Wildlife Ridge was administratively dissolved as an Idaho limited liability company and did not legally exist. Wildlife Ridge is the current owner of the premises herein sought to be foreclosed, having acquired the property subject to the rights of the Plaintiffs.

Michael J. Millward, a married man (“Millward”) and M&S Development LLC (“M&S”), an Idaho limited liability company, are the makers of the Trust Deed Note hereinafter described, and M&S was the grantor of the Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing herein sought to be foreclosed and owner in fee simple of the premises.

Defendant Pioneer Title Company is the Trustee named in the Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005, herein sought to be foreclosed.

3.

INFERIOR INTERESTS. The above named Defendants, and each of them, claim some right, title, lien or interest in the property described in Plaintiffs' Deed of Trust described herein, but their interest, if any, in and to said property is junior, subordinate, and subsequent to the right and lien of the Plaintiffs.

4.

TRUST DEED NOTE. On the 30th day of December, 2005, Plaintiffs jointly loaned to Millward and M&S the sum of \$244,000, and as evidence of said loan Millward and M&S, made, executed and delivered to the Plaintiffs their Trust Deed Note in writing, which Note was dated the 30th day of December, 2005, in the principal sum of \$244,000, both principal and interest being payable in words and figures as set forth in Exhibit "A" attached hereto, which is a true and correct copy of the Trust Deed Note dated December 30, 2005 and it is hereby incorporated herein by this reference as if set forth in full at this place.

5.

MODIFICATION OF TRUST DEED NOTE. By an agreement dated March 3, 2008, Millward, M&S, the Plaintiffs and Wildlife Ridge entered into a Modification of Trust Deed Note to provide for additional sums loaned by Plaintiffs to Millward and M&S to become part of the unpaid principal balance of the Trust Deed Note ("Modification"). A True and correct copy of the

Modification is attached hereto as Exhibit "B," which is hereby incorporated herein by this reference as if set forth in full at this place

6.

BANKRUPTCY FILING OF MILLWARD. On September 10, 2012, Millward filed for relief under chapter 7 of the Bankruptcy Code, Case No. 12-41260 pending in the United States Bankruptcy Court for the District of Idaho. Pursuant to 11 U.S.C. § 362, an automatic stay commenced on September 10, 2012 which prohibited Plaintiffs from taking any action to enforce the Trust Deed Note, as amended. That automatic stay existed until Millward's bankruptcy case was closed on June 23, 2016.

7.

DESCRIPTION OF REAL PROPERTY SECURITY. As security for the repayment of the Trust Deed Note, together with interest, costs, and attorney's fees, M&S made, executed and delivered to Plaintiffs that certain Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005 ("Deed of Trust") on the following described real property situated in Bannock County, State of Idaho, to-wit:

A Tract of land in the South ½ of the South ½ Section 31, Township 6 South, Range 35 East, Boise Meridian, Bannock County, Idaho, more particularly described as follows:

Beginning at the South quarter corner of Section 31; thence South 89°36'40" East, 82.68 feet; thence North 53°44'13" East, 88.1 feet; thence North 26°44'09" West, 320 feet; thence North 63°15'51" East, 260 feet; thence North 26°44'09" West 495.62 feet, more or less, to the Southerly right of way line of Barton Road; thence South 72°27'20" West along the Southerly right of way of Barton Road 472.74 feet; thence continuing along the Southerly right of way line of Barton Road, South 83°18'20" West, 389.3 feet, more or less, to the Easterly line of the Old Stock Trail; thence South 26°44'40" East along the Easterly line of the Old Stock Trail 791.56 feet, more or less, to the South line of said Section 31; thence South 89°44' East, 462.23 feet, more or less, to the point of beginning.

The Deed of Trust was recorded on the 30th day of December, 2005, under Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho, and contains covenants, conditions and agreements of the mortgagor as set forth in Exhibit "C" attached hereto, which is a true and correct copy of the Deed of Trust, and it is hereby incorporated by this reference herein as if set forth at length. The Deed of Trust has never been satisfied or discharged or the rights thereunder reconveyed.

8.

PARTIAL RELEASES. After the recording of the Deed of Trust, there was released from the Deed of Trust certain portions of the Property, and as of the date of this Complaint the Deed of Trust applies only to the following described portion of the Deed of Trust property:

Lot 2, Block 3, Wild Horse Ridge Subdivision Phase 1, according to the plat thereof, filed as Instrument No. 97000607, records of Bannock County, Idaho.

Lot 6, Block 3, Wild Horse Ridge Subdivision Phase 1, according to the plat thereof, filed as Instrument No. 97000607, records of Bannock County, Idaho.

Lot 1, Block 2, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 2, Block 2, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 4, Block 3, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 5, Block 3, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 7, Block 3, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

Lot 9, Block 3, Wild Horse Ridge Subdivision Phase 2, according to the plat thereof, filed as Instrument No. 20728743, records of Bannock County, Idaho.

9.

DEFAULT. Plaintiffs are the owners and holders of said Trust Deed Note and the joint and several beneficiaries of the Deed of Trust.

In order to protect their interest in the Property, Plaintiffs paid attorney's fees and costs in the amount of \$4,546.19 to defend Wild Life Ridge's Quiet Title Action brought against the Plaintiffs in Bannock County Case No. CV 14-7483. Plaintiffs are entitled to recover said fees and costs by virtue of the attorney fees provisions contained in the Trust Deed Note and Deed of Trust.

General taxes were duly levied against and constituted a first lien upon the property described in the Deed of Trust and to protect the lien of their Deed of Trust, Plaintiffs have paid taxes in the amount of \$22,136.63. Plaintiffs are entitled to recover reimbursement for the amount of the taxes they paid on behalf of Wild Life Ridge by virtue of the provisions contained in the Deed of Trust.

As of the 1st day of October, 2016, there is due, owing and unpaid upon the Trust Deed Note the sum of \$6,812,821.71, together with interest thereafter accruing at the default rate of 35% per annum until date of Judgment herein, together with costs, foreclosure expenses, attorney's fees and expenses necessary to preserve Plaintiffs' interest in the property heretofore advanced or hereafter accruing.

10.

ATTORNEY'S FEES. Plaintiffs have had to employ counsel to represent it in this action and has obligated itself to pay a reasonable fee for such services. Plaintiffs are entitled to recover reasonable attorney fees by virtue of the attorney fee provisions contained in the Trust Deed Note

as amended and Deed of Trust herein above described. Plaintiffs allege that \$5,000.00 is a reasonable sum to be allowed as attorney's fees herein if this action is uncontested, plus such additional sums as the Court may adjudge as reasonable attorney's fees in the event of contest, trial or appeal.

11.

REASONABLE VALUE. The Plaintiffs, upon information and belief, allege that the reasonable value of the Deed of Trust Property and its appurtenances is the sum of \$50,000.00 per lot, or a total of \$400,000.00.

12.

NO OTHER ACTION. The Plaintiffs have no plain, speedy or adequate remedy at law, and no other proceedings at law or in equity have been commenced or are pending to collect the Trust Deed Note as amended or any portion thereof or to foreclose the Deed of Trust. All conditions precedent to the initiation and prosecution of this action and the foreclosure of the Deed of Trust have been satisfied.

WHEREFORE, Plaintiffs pray for Judgment as follows:

1. That Plaintiffs receive the Decree of this Court foreclosing the Deed of Trust so that the amounts due Plaintiffs under the Trust Deed Note as amended, which as of October 1, 2016 totaled \$6,812,821.71, plus interest accruing thereafter, together with any additional sums advanced by Plaintiffs or which Plaintiffs become obligated to advance for the payment of taxes or assessments and/or attorney fees and costs during the pendency of this action, including interest on such advances from date of advance; for the sum of \$5,000.00 as attorney's fee if this action is uncontested, plus such additional sums as the Court may adjudge as reasonable in the event of

contest, trial or appeal; for Plaintiffs' taxable costs and disbursements herein; and for interest on the entire amount of said judgment at the maximum rate allowed by law;

2. That the Plaintiffs' Deed of Trust described herein be adjudged a first and prior lien upon the property described in the Deed of Trust superior to any right, title, claim, lien or interest on the part of the named Defendants or persons claiming by, through or under said Defendants;

3. That the Court, in the Decree, establish the reasonable value of the property herein described at \$400,000.00;

4. That the Plaintiffs' Deed of Trust described herein be foreclosed and said real property be sold in separate parcels in accordance with and in the manner provided by law; that Plaintiffs be permitted to be a purchaser at sale; that the net proceeds of said sale be applied first toward the payment of the costs of said sale and then towards the payment of Plaintiffs Trust Deed Note as amended;

5. That the Decree provide that after the sale of said property all right, title, claim, lien or interest of the named Defendants and every person claiming by, through or under said Defendants, in or to said property, including the right of possession thereof from and after said sale, be forever barred and foreclosed and that the purchaser at said sale be entitled to immediate possession of the premises as allowed by law subject only to such statutory right of redemption as said Defendants may have by law;

6. That in the event the Plaintiffs become the purchasers at the sale and possession of the premises is not surrendered to the Plaintiffs, a writ of assistance be issued directing the Sheriff of Bannock County, Idaho, to deliver possession of the premises to the Plaintiffs;

7. That after the conclusion of any foreclosure sale, upon proper motion of the Plaintiffs, that a deficiency judgment be entered against M&S in the event the net proceeds of the foreclosure sale are insufficient to fully satisfy the sums due and owing to the Plaintiffs; and

8. That Plaintiffs may have such other and further relief as may be just and equitable in the premises.

DATED this 1st day of March, 2017.

COOPER & LARSEN, CHTD

Attorneys for Plaintiffs

By:  _____
J.D. Oborn for Ron Kerl

CERTIFICATE OF SERVICE

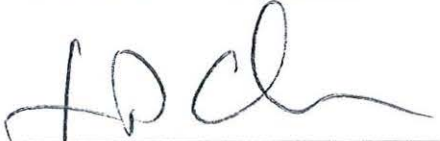
I HEREBY CERTIFY on the 1st day of March, 2017, I served a true and correct copy of the foregoing document as follows:

A. Bruce Larson
Hearn & Wood LLP
155 S. 2nd Ave.
Pocatello, ID 83201

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile - 208-932-1083
- Email to: bruce@hwlawpro.com

COOPER & LARSEN, CHTD

By: _____



J.D. Oborn for Ron Kerl, of the firm

Exhibit “A”

TRUST DEED NOTE

\$244,000.00

Dated: December 30, 2005

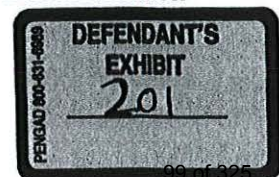
1. Promise to Pay. For value received, Michael J. Millward, a married man, and M & S Development, LLC, a Idaho Limited Liability Company (hereinafter individually referred to as "Maker" and collectively referred to as "Makers") each promise to pay to the order of Monitor Finance, L.C., a Utah limited liability company as to an undivided 50% interest and First Capital Funding, L.C., a Utah limited liability company as to an undivided 50% interest ("Holder(s)"), at 3191 North Canyon Road, Provo, Utah 84604, or at such other place as Holder may from time to time designate, in lawful money of the United States of America, the principal sum of **TWO HUNDRED FORTY FOUR THOUSAND DOLLARS (\$244,000.00)**, or so much of that sum as may be advanced under this Trust Deed Note by the Holder, together with any other advances made pursuant to this Trust Deed Note (collectively the "Principal Indebtedness"), plus interest as computed below along with any other cost, fee or expenditure contemplated herein (the "Total Indebtedness"). All of the terms and conditions of that certain Trust Deed, of even date which secures this obligation are hereby incorporated and made a part of this Trust Deed Note.

2. Term. The term of this Trust Deed Note shall be one hundred eighty (180) days. This Trust Deed Note shall fully mature on June 28, 2006 (the "Maturity Date").

3. Interest. The outstanding balance of the Principal Indebtedness shall bear interest from December 30, 2005 until fully paid at a fixed interest rate of fifteen percent (15%) per annum. Interest shall accrue daily on the outstanding balance of the Principal Indebtedness both before and after judgment, and shall be calculated on the basis of a 360-day year. Interest is compounded on a 360-day year simple interest basis by applying the ratio for the annual interest rate over a year of 360 days (365/360), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.

4. Payments. Monthly interest payments will be made by Makers beginning February 1, 2006 and the first of the month thereafter. This Trust Deed Note calls for a balloon payment to become due and payable on the Maturity Date. On the Maturity Date the Total Indebtedness shall be due and payable in full. Checks will constitute payment only when collected. If any installment or interest payment is not made within five (5) calendar days of the due date, a *late penalty equal to twenty percent (20%)* of any such installment or interest payment owed hereunder shall automatically be assessed. If any balloon payment is not made within five (5) calendar days of the due date, a late penalty equal to ten percent (10%) of any such balloon payment owed hereunder shall automatically be assessed. There shall be no grace period and no further notice shall be required. In the event that a payment date falls on a weekend, or public holiday, payment shall be due and payable the following business day.

5. Origination and Document Fees. As part of this transaction, Makers agree to pay to Holder the amount of \$12,200.00 as an origination fee (the "Origination Fee"). Said Origination Fee shall be due and paid by the Makers on December 30, 2005. Makers also agree to pay all of the costs incurred in documenting, recording and closing this transaction (the "Documentation



Fee"). Makers agree that both the Origination Fee and Documentation Fee may be subtracted directly from the principal amount at closing.

6. Holder's Expenditures. Makers agree to pay on demand any expenditures made by Holder in accordance with the Trust Deed and this Trust Deed Note, including, but not limited to, the payment of taxes, insurance premiums, costs of maintenance and preservation of the collateral, common expense and other assessments relating to the collateral, and attorney fees and costs incurred in connection with any matter pertaining hereto or to the security pledged to secure the Principal Indebtedness or any portion thereof (collectively the "Holder Expenditures"). At the election of Holder, all Holder Expenditures may be added to the unpaid balance of this Trust Deed Note and become a part of and on a parity with the Principal Indebtedness secured by the Trust Deed and shall accrue interest at such rate as may be computed from time to time in the manner prescribed in this Trust Deed Note.

7. Prepayment. Makers shall have the right, from time to time and at any time, to prepay all, or any part, of this Trust Deed Note at any time or times prior to the Maturity Date of this note without payment of any premium or penalty. Prepaid Interest will be pro rated if this Note is paid off early.

8. Default. Makers will be in default if any of the following happens: (a) Makers fail to make any payment when due; (b) any Maker breaks any promise Maker has made to Holder, or any Maker fails to comply with or to perform when due any other term, obligation, covenant, or condition contained in this Trust Deed Note or any agreement related to this Trust Deed Note; (c) any Maker defaults under any loan, extension of credit security agreement, purchase or sales agreement, or any other in favor of any other creditor or person that may materially affect any Maker's property or any Maker's ability to repay this Trust Deed Note or perform Makers' obligations under this Trust Deed Note or any of the Related Documents; (d) any representation or statement made or furnished to Holder by any Maker or on any Maker's behalf is false or misleading in any material respect either now or at the time made or furnished; (e) any Maker dissolves (regardless of whether election to continue is made), any member withdraws from any Maker, any member dies, or any of the members of any Maker becomes insolvent, a receiver is appointed for any part of any Maker's property, any Maker makes an assignment for the benefit of creditors, or any proceeding is commenced either by any Maker or against any Maker under any bankruptcy or insolvency laws; (f) any creditor tries to take any of any Maker's property on or in which Holder has a lien or security interest; (g) a material adverse change occurs in any Maker's financial condition, or Holder believes the prospect of payment or performance of the Indebtedness is impaired; (h) Holder in good faith deems itself insecure.

9. Default Interest Rate. Notwithstanding anything above to the contrary, if default occurs in the payment of any principal, interest, fee or cost, when due, or if any Event of Default occurs hereunder, time being of the essence hereof, if said default remains uncured for five (5) calendar days, thereafter, all outstanding Principal Indebtedness shall bear interest at a default rate of thirty-five percent (35%) until paid, both before and after judgment. If this Trust Deed Note becomes in default or payment is accelerated, Makers agree to pay to the Holder of the Trust Deed Note all collections costs, including reasonable attorney's fees and legal expenses

incurred both before and after judgment, including any bankruptcy proceeding or appeal, in addition to all other sums due under this Trust Deed Note.

10. Application of Payments. Any and all payments by any Maker under this Trust Deed Note shall be applied as follows: first, to the repayment of any Holder Expenditures advanced by Holder under this Trust Deed Note; second, to the payment of any late charges; third, to the payment of accrued interest on the Principal Indebtedness; and fourth, to the payment of the Principal Indebtedness.

11. Extension. The time for any payment required under this Trust Deed Note may be extended from time to time at the sole discretion of the Holder. Makers agree to pay to Holder an extension fee in the sum of ten percent (10%) of the Total Indebtedness then outstanding under this Trust Deed Note (the "Extension Fee"). The Extension Fee shall be paid to Monitor Finance, L.C./First Capital Funding, L.C., at 3191 North Canyon Road, Provo, Utah 84604. In addition to the Extension Fee, Makers further agree to pay any and all documentation and recording costs incurred in the preparation of said extension. Both the Extension Fee and the extension documentation costs shall be due and payable at the time the extension is executed. Acceptance by Holder of any additional security or guarantees for the performance of the terms and provisions contained in this Trust Deed Note shall not in any way affect the liability of an individual Maker.

12. Governing Law. This Trust Deed Note has been delivered to Holder in the State of Utah. If there is a lawsuit, Makers agree upon Holder's request to submit to the jurisdiction of the courts of Utah County, the State of Utah. This Trust Deed Note shall be governed by and construed in accordance with the laws of the State of Utah.

13. Joint and Several Liability. In the event this Trust Deed Note is executed, endorsed, guaranteed or assumed by more than one person, corporation, or any other entity, all of the parties shall be jointly and severally liable and do hereby waive presentment, demand, protest and notice of non-payment and of protest. Furthermore, each of the parties hereto agrees that his, her or its obligation shall continue in full force and effect notwithstanding the death, bankruptcy (or commencement thereof), dissolution or release of any other party and notwithstanding the taking or release of other or additional security and notwithstanding any waiver, amendment or modification (including, but not limited to, extensions of time or performance) by the holder of this Trust Deed Note as to the obligations under this Trust Deed Note or under any other Loan Document of any of the other parties, with or without notice. Without limiting the generality of the foregoing, each of the parties to this Trust Deed Note agree that a separate action or actions may be brought against him, her or it, whether or not such action is brought against any of the other parties to this Trust Deed Note.

14. Interest Limitation. All agreements between the parties to this Trust Deed Note and the Holder of this Trust Deed Note are hereby expressly limited so that in no contingency or event whatsoever, whether by reason of deferment or advancement of the proceeds of the loan evidenced by this Trust Deed Note, acceleration of maturity of the Loan, or otherwise shall the amount paid or agreed to be paid to Holder for the use, forbearance or detention of the money to be loaned under this Trust Deed Note exceed the maximum interest rate permissible under

applicable law. If, from any circumstance whatsoever, fulfillment of any provision of this Trust Deed Note or of any other agreement between the parties to this Trust Deed Note and the Holder, at the time performance of such provision shall be due, shall involve transcending the limit of validity prescribed by law, then, ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity. In the event that any payment is received by the Holder of this Trust Deed Note which would otherwise be deemed to be a payment of interest in excess of the maximum allowed by law, such payment shall be deemed to have been paid on account of principal at the time of receipt. This provision shall never be superseded or waived and shall control every other provision of the Trust Deed Note and all agreements between the parties and the holder of this Trust Deed Note.

15. General Provisions. Both Holder and Maker acknowledge and agree that any and all monies provided by Holder to Maker pursuant to the terms hereof are for a business purpose. Holder may delay or forego enforcing any of its rights or remedies under this Trust Deed Note without losing them. Upon any change in the terms of this Trust Deed Note, and unless otherwise expressly stated in writing, no party who sign this Trust Deed Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Holder may renew or extend (repeatedly and for any length of time) this loan, or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Holder's security interest in the collateral; and take any other action deemed necessary by Holder without the consent of or notice to anyone. All such parties also agree that Holder may modify this Trust Deed Note without the consent of or notice to anyone other than the party with whom the modification is made.

DATED this 30 day of December, 2005.

MAKERS:


Michael J. Millward - Individually



M & S Development, LLC, an Idaho Limited Liability Company
By: _____
Its: _____

Exhibit
“B”

Modification of Trust Deed Note

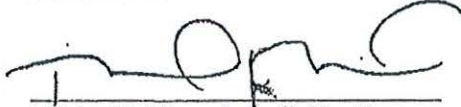
On December 30, 2005, Michael Millward and M&S Development, executed a Note and Trust Deed in favor of Monitor Finance, L.C. and First Capital Funding, L.C. in the amount of \$244,000.00. The Trust Deed was recorded as Entry No. 20528398 in the records of the Bannock County, Idaho, Recorder.



The parties hereby modify said Trust Deed Note as follows:

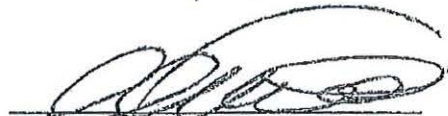
- The Note will be expanded to include the following draws:
 - 8/14/07 \$75,000.00
 - 9/4/07 \$25,000.00
 - 9/19/07 \$7,400.00
 - 10/25/07 \$100,000.00
 - 3/1/08 \$10,000.00


The parties acknowledge that the same terms and conditions of the original Note and Trust Deed will apply to the amended amount and terms.

Date: 3/3/08


Michael Millward - Individually


M&S Development
By: 
Its: Manager


Monitor Finance, L.C.
By: Miles C. Pitcher
Its: Managing Member


First Capital Funding, L.C.
By: Derek Ollivier
Its: Member

Acknowledged by:


Wildlife Ridge Estates LLC
By: 
Its: Member

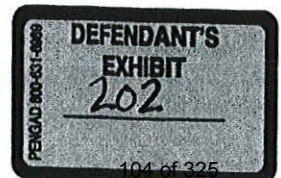


Exhibit “C”

**TRUST DEED, ASSIGNMENT OF RENTS,
SECURITY AGREEMENT AND
FIXTURE FILING**

This Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing (the "Trust Deed") is made and executed this 30th day of December, 2005 (the "Closing Date"), by M&S Development, LLC, an Idaho Limited Liability Company ("Trustor") whose address is 1801 N. ARTHUR STE C, POCA TELLO, ID 83204, and Pioneer Title Company as Trustee ("Trustee"), in favor of Monitor Finance, L.C. as to an undivided 50% interest whose address is 3191 North Canyon Road, Provo, UT 84604, and First Capital Funding, L.C. as to an undivided 50% interest whose address is 3191 North Canyon Road, Provo, UT 84604 ("Beneficiary").

Beneficiary has loaned monies to Trustor and the transaction is memorialized by that certain Promissory Note dated December 30, 2005 executed by Trustor in favor of Beneficiary in the amount of Two Hundred Forty Four Thousand Dollars (\$244,000.00) (the "Note").

See attached "Exhibit A"

In exchange for good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE I GRANT AND CONVEYANCE

1.1 General Grant. Trustor hereby assigns, grants, bargains, sells, conveys, warrants, and transfers to Trustee in trust, for the Benefit of Beneficiary, with power of sale, and right of entry and possession, the following described property (the "Real Property"):

1.1.1 Real Property. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to the real property located in Bannock County, State of Idaho (the "Real Property") as more particularly described in Exhibit "A" attached hereto and incorporated herein by this reference.

1.1.2 Buildings, Improvements and Interests. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to: (a) All buildings, improvements, works, structures, facilities and fixtures, including any future additions to, and improvements and betterments now or hereafter constructed upon, and all renewals and replacements of, any of the foregoing, which are now or hereafter shall be constructed or affixed or constructively affixed to the Property, or to any portion of the Real Property (the "Improvements"). (b) All easements, licenses, streets, ways, alleys, roads, passages, rights-of-way, minerals, oil, gas and other hydrocarbon substances, development rights, air rights, water, water

courses, water rights, and water stock (whether now owned or hereafter acquired by Trustor and whether arising by virtue of land ownership, contract or otherwise), of any kind and nature, relating to or in any way appurtenant or appertaining to the Real Property or to any portion of the Real Property.

1.1.3 Tenements, Hereditaments. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to all of the tenements, hereditaments, rights, privileges, and appurtenances belonging, relating, or in any way appertaining to any of the Real Property or the Improvements, or any portion of the Real Property or the Improvements, or which shall hereafter in any way belong, relate, or in any way appertain thereto, whether now owned or hereafter acquired, and the reversion and reversions, remainder and remainders, and estates, rights, titles, interests possessions claims, and demands of every natures whatsoever, at law or in equity, which Trustor may have or may hereafter acquire in and to the Real Property, the Improvements, or any portion thereof.

1.1.4 Leases, Rents, Issues, Etc. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to all leases and subleases of all or any portion of the Real Property or the Improvements now or hereafter existing or entered into, and all lease agreements and documents evidencing the same, including without limitation, any tenant leases for all or a portion of the Real Property; and all right, title and interest of Trustor thereunder, including without limitation, all rents, sub-rents, room rents and other amounts received for use of any portion of the Real Property, including the Improvements, and any and all room rental agreements and arrangements now owned or hereafter acquired, and all proceeds from such room rents, issues, royalties, security deposits, income and profits of and from the Real Property, the Improvements, or any portion thereof.

1.2 Security Interest. Trustor hereby assigns and grants to Beneficiary a security interest in the following described property (collectively the "Personalty"), whether now or hereafter existing, and in which Trustor now has or hereafter obtains any right, title, estate or interest, together with all additions and accessions thereto and all rents and proceeds thereof:

1.2.1 Tangible Personal Property. All right, title, interest, and estate of Trustor, now owned or hereafter acquired, in and to: (a) All furniture, fixtures and equipment and inventory as equipment inventory are defined in the Uniform Commercial Code, wherever located, and all related right, title and interest of Trustor, now owned or hereafter acquired or created, all proceeds and products of the foregoing and all additions and accessions to, replacements of, insurance or condemnation proceeds of, and documents covering any of the foregoing, all leases of any of the

foregoing, and all rents, revenues, issues, profits and proceeds arising from the sale, lease, license, encumbrance collection, or any other temporary or permanent disposition of any of the foregoing or any interest therein.

1.2.2 Awards. All right, title, interest and estate of Trustor, now owned or hereafter acquired, in and to: (a) All awards made for the taking by eminent domain or by any proceeding or purchase in lieu thereof of the Real Property or Personalty or any portion of the Real Property or Personalty, the Improvements or any portion of the Improvements, or of any other Improvements now or hereafter situate thereon or any estate or easement in the Property (including any awards for change of grade of streets); (b) All insurance policies and all proceeds of insurance paid on account of any partial or total destruction of the Improvements or any portion thereof; (c) All causes of action and recoveries for any loss or diminution in the value of the Real Property or Personalty or the Improvements; and (d) All proceeds of each of the foregoing.

1.2.3 General Intangibles. All general intangibles of Trustor, presently existing or hereafter arising, including general intangibles as defined in the Uniform Commercial Code, choses in action, proceeds, contracts, distributions, dividends, refunds, security deposits, judgments, insurance claims, any right to payment of any nature, intellectual property rights or licenses, any other rights or assets of trustor customarily or for accounting purposes classified as general intangibles, and all documentation and supporting information related to any of the foregoing all rents, profits and issues thereof, and all proceeds thereof.

1.3 Security Agreement. This Trust Deed constitutes a Security Agreement with respect to the Personalty, and Beneficiary shall have all the rights and remedies of a secured party under the Uniform Commercial Code of Utah as well as all other rights and remedies available at law or in equity. Trustor and Beneficiary acknowledge their mutual intent that all security interests contemplated herein are given as a contemporaneous exchange for new value to Trustor, regardless of when advances to Trustor are actually made or when the Trust Estate is acquired.

1.4 Fixture Filing. This Trust Deed is intended to be a fixture filing under Utah Code Annotated; Section 70A-9-402. The addresses of the Secured Party (Beneficiary) and the debtor (Trustor) from which information may be obtained concerning this security interest granted hereunder are set forth in Section 12.1 herein. This Trust Deed is to be recorded in the real estate records in the County Recorder's office of the county in which the Real Property is located. Trustor is the record owner of the Real Property.

1.5 Trust Estate. The Real Property, the Improvements and the Personalty are sometimes hereinafter collectively referred to as the "Trust Estate".

ARTICLE II OBLIGATION SECURED

2.1 Obligations. This Trust Deed is given for the purpose of securing the following obligations (collectively the "Obligations") of Trustor:

2.1.1 Note. The payment and performance of each and every agreement and obligation under the Note, including without limitation, the payment of principal and interest under the Note.

2.1.2 Other Loan Documents. The payment and performance of each and every agreement and obligation of Trustor under this Trust Deed, the Note, and any other Loan Document.

2.1.3 Advances by Trustee or Beneficiary. The payment of all sums expended and advanced by Trustee or Beneficiary pursuant to the terms of this Trust Deed, together with interest thereon as provided in this Trust Deed.

2.1.4 Extensions, Etc. The payment and performance of any extensions of, renewals of, modifications of, or additional advances under the Note, or any of the obligations evidenced by the Note, regardless of the extent of or the subject matter of any such extension, renewal, modification or additional advance.

2.1.5 Other Obligations. The payment and performance of any other note or obligation reciting that it is secured by this Trust Deed. Trustor expressly acknowledges its mutual intent with Beneficiary that the security interest created by this Trust Deed secure any and all present and future debts, obligations, and liabilities of Trustor to Beneficiary without any limitation whatsoever.

ARTICLE III REPRESENTATIONS AND WARRANTIES

3.1 Property. Trustor represents and warrants to Beneficiary as follows:

3.1.1 Fee Title. Trustor is the owner of fee simple marketable title in and to the Real Property.

3.1.2 Defense of Title. Trustor shall defend title to the Real Property and the Improvements against all claims and demands whatsoever.

3.1.3 Hazardous Material. No Hazardous Materials have been stored, or improperly used, disposed of, discarded, dumped, or abandoned

by any person or entity on, in or under the Real Property or the Improvements in violation of any Environmental Laws. Trustor has complied with all applicable federal, state and local laws, rules, ordinances and regulations relating to the storage, transportation, and disposal of Hazardous Materials on, in or under the Real Property or the Improvements.

3.2 Personalty. Trustor further represents and warrants to Beneficiary as follows:

3.2.1 Owner of Personalty. Trustor is the owner, or upon acquisition thereof, will be the owner of the Personalty.

3.2.2 Location of Personalty. The Personalty will be located in the State of Utah, will not be removed from that state without the prior written consent of Beneficiary.

ARTICLE IV MAINTENANCE OF TRUST ESTATE

4.1 Maintenance. Trustor shall do each of the following: (a) maintain the Trust Estate at all times in good condition and repair; (b) not commit any waste of the Trust Estate, or remove, damage, demolish, or structurally alter any of the Improvements; (c) complete promptly and in good and workmanlike manner any Improvement on the Real Property; (d) except to the extent that insurance proceeds are applied by Beneficiary to the satisfaction of the Obligations in accordance with Article V, restore promptly and in good and workmanlike manner any of the Improvements or any portion thereof, which may for any reason be damaged or destroyed; (e) comply at all times with all laws, ordinances, regulations, covenants, and restrictions in any manner affecting the Trust Estate; (f) not commit or permit any act upon the Trust Estate in violation of law; and (g) do all acts which by reason of the character or use of the Trust Estate may be reasonably necessary to maintain and care for the same, the specific enumeration herein not excluding the general.

ARTICLE V INSURANCE

5.1 Insurance. Trustor shall secure and maintain in force on the Trust Estate commercial general liability insurance. All such insurance policies must cover all risks required to be covered by Beneficiary, comply with any requirements set forth in the Sales Agreement and be approved by Beneficiary as to amount, form, terms, deductibles and insurer. All such policies of insurance shall name Beneficiary as an additional insured or loss payee, as appropriate. All such insurance policies shall contain a provision that such policies will not be cancelled or amended, which term shall include any reduction in the scope or limits of coverage, without at least thirty (30) days prior written notice to Beneficiary.

5.2 Notice of Casualty. In the event of loss or damage to the Trust Estate, or any portion of the Trust Estate, Trustor shall immediately give notice thereof to Beneficiary.

5.3 Proceeds of Insurance. All proceeds of insurance on the Trust Estate, and all causes of action, claims, compensation, awards and recoveries for any damage, condemnation or taking of all or any part of the Trust Estate, or for any damage or injury to it or for any loss or diminution in the value of the Trust Estate, are hereby assigned to and shall be paid to Beneficiary, except as otherwise provided in the Sales Agreement. Beneficiary may participate in any suits or proceedings relating to any such proceeds, causes of action, claims, compensation, awards or recoveries.

5.4 Disposition of Policies on Foreclosure. In the event Beneficiary exercises the power of sale or foreclosure provisions of this Trust Deed or makes any other transfer of title or assignment of the Trust Estate in extinguishment in whole or in part of the Obligations, all right, title and interest of Trustor in and to the policies of insurance required by Section 5.1 shall inure to the benefit of and pass to the transferee of the interests conveyed under this Trust Deed or to the purchaser at the foreclosure sale, as the case may be.

ARTICLE VI INDEMNIFICATION AND OFF-SET

6.1 Indemnification. Trustor hereby indemnifies and holds Beneficiary harmless in accordance with the following:

6.1.1 General Indemnification. Trustor shall indemnify and hold Beneficiary harmless from any and all losses, damages, claims, causes of action, suits, debts, obligations, or liabilities which arise from or relate to, the Note, this Trust Deed, but excluding any such claims based upon breach or default by Beneficiary or gross negligence or wilful misconduct of Beneficiary. If Beneficiary commences an action against Trustor to enforce any of the terms, covenants or conditions of this Trust Deed or because of the breach by Trustor of any of the terms, covenants, or conditions, or for the recovery of any sum secured hereby, Trustor shall pay to Beneficiary reasonable attorneys fees and costs actually incurred by Beneficiary. The right to such attorneys fees and costs shall be deemed to have accrued on the commencement of such action, and shall be enforceable whether or not such action is prosecuted to judgment. If Trustor breaches any term, covenant or condition of this Trust Deed, Beneficiary may employ an attorney or attorneys to protect Beneficiary's rights hereunder and in the event of such employment following any breach of Trustor, Trustor shall pay Beneficiary reasonable attorneys fees and costs actually incurred by Beneficiary, whether or not action is actually commenced against Trustor by reason of such material breach.

6.1.2 Mechanics Liens. If Beneficiary or the Real Property is held liable or could be held liable for, or is subject to any losses, damages, costs, charges or expenses, directly or indirectly on account of any claims for work, labor, or material furnished in connection with or arising from the construction of any building, fixture and improvements, then Trustor shall indemnify, defend and hold Beneficiary harmless from all liability or expense arising therefrom including reasonable attorneys fees and costs.

6.1.3 Hazardous Materials. Trustor hereby agrees to indemnify, hold harmless and defend (by counsel of Beneficiary's choice) Beneficiary, its directors, officers, employees, agent, successors and assigns from and against any and all claims, losses, damages, liabilities, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, remedial action requirements, enforcement actions of any kind, and all costs and expenses incurred in connection therewith (including but not limited to attorneys' fees and expenses), arising directly or indirectly, in whole or in part, out of (a) the presence on or under the Real Property of any Hazardous Materials, or any releases or discharges of any Hazardous Materials on, under or off the Real Property, or (b) any activity carried on or undertaken on or off the Real Property, whether prior to or during the term of the Note, and whether by Trustor or any predecessor in title or any employees, agents, contractors or subcontractors of Trustor or any predecessor in title, or any third persons at any time occupying or present on the Real Property, in connection with the handling, treatment, removal, storage, decontamination, clean-up, transport or disposal of any Hazardous Materials at any time located or present on or under the Real Property. The foregoing indemnity shall further apply to any residual contamination on or under the Real Property, or affecting any natural resources, and to any contamination of any property or natural resources arising in connection with the generation, use, handling, storage, transport or disposal of any such Hazardous Materials, and irrespective of whether any of such activities were or will be undertaken in accordance with applicable laws, regulations, codes and ordinances. Trustor hereby acknowledges and agrees that, notwithstanding any other provision of this Trust Deed or any of the other Purchase Documents to the contrary, the obligations of Trustor under this Section 6.1.3 shall be unlimited personal obligations of Trustor and shall survive any foreclosure under this Trust Deed, any transfer in lieu thereof, and any satisfaction of the obligations of Trustor in connection with the Note. Trustor acknowledges that Beneficiary's appraisal of the Real Property is such that Beneficiary would not extend the Note but for the personal liability undertaken by Trustor for the obligations under this Section 6.1.4.

6.2 Off-Set. All sums payable by Trustor under the Note and this Trust Deed shall be paid without notices, demand, counterclaim, set-off, deduction or defense and without abatement, suspension, deferment, diminution or reduction. The Obligations and liabilities of Trustor hereunder shall in no way be released, discharged or otherwise affected (except as expressly provided herein) by reason of: (a) any damage to or destruction of, or any condemnation or similar taking of the Trust Estate or any part thereof; (b) any destruction or prevention of or interference with any use of the Trust Estate or any part thereof; (c) any title defect or encumbrance or any eviction from the Trust Estate or any part thereof by title paramount or otherwise; (d) any bankruptcy, insolvency, reorganization, composition, adjustment, dissolution, liquidation or other like proceeding relating to Beneficiary, or any action taken with respect to this Trust Deed by any trustee or any action taken with respect to this Trust Deed by any trustee or receiver of Beneficiary, or by any court, in any such proceeding; (e) any claim which Trustor has or might have against Beneficiary; (f) the occurrence of an Event of Default or any default or failure on the part of Beneficiary to perform or comply with any of the terms, covenants or conditions of this Trust Deed or of any other agreement with Trustor; or (g) any other occurrence whatsoever, whether similar or dissimilar to the foregoing.

ARTICLE VII TAXES AND IMPOSITIONS

7.1 Payment of Taxes and Impositions. Trustor shall pay, prior to delinquency, all real property taxes and assessments, general and special, and all other taxes, assessments and other governmental, municipal, or other charges or impositions of any kind or nature whatsoever (including without limitation, charges and assessments on water or water stocks used on or with the Real Property and levies or charges resulting from covenants, conditions and restrictions affecting the Trust Estate) which are assessed or imposed upon the Trust Estate, or become due and payable, and which create, may create, or appear to create, a lien upon the Trust Estate or any portion of the Trust Estate, or upon any equipment or other facility used in the construction, operation or maintenance of the Trust Estate (all of which taxes, assessments and other governmental charges of like nature are referred to as the "Impositions"); provided, however, that if, by law, any such Imposition is payable, or may at the election of the taxpayer be paid in installments, Trustor may pay the same together with any accrued interest on the unpaid balance of such Imposition in installments as the same become due and before any fine, penalty, interest or cost may be added thereto for the nonpayment of any such installment and interest.

7.2 Evidence of Payment. Unless such Imposition is paid directly by Beneficiary pursuant to Section 8.3, Trustor shall furnish Beneficiary, within thirty (30) days after the date upon which such Imposition is due and payable by Trustor, official receipts of the appropriate taxing authority, or other proof satisfactory to Beneficiary, evidencing the payment thereof.

7.3 Right to Contest. Trustor shall have the right before any delinquency occurs to contest or object to the amount or validity of any Imposition by appropriate legal proceedings, but such contest shall not be deemed or construed in any way as relieving, modifying or extending Trustor's covenant to pay any such Imposition at the time and in the manner provided in Section 7.1 unless Trustor has given prior written notice to Beneficiary of Trustor's intent to so contest or object to an Imposition, and unless, at Beneficiary's option, (a) Trustor shall demonstrate to Beneficiary's satisfaction that the legal proceedings shall conclusively operate to prevent the sale of the Trust Estate, or any part thereof, to satisfy such Imposition prior to final determination of such proceedings; or (b) Trustor shall furnish a good and sufficient undertaking and sureties as may be required or permitted by law to accomplish a stay of such proceedings.

ARTICLE VIII ADDITIONAL COVENANTS

8.1 Payment of Utilities. Trustor shall pay when due all utility charges incurred by Trustor for the benefit of the Trust Estate or which may become a charge or lien against the Trust Estate for gas, electricity, water or sewer services furnished to the Trust Estate and all assessments or charges of a similar nature, whether public or private, affecting the Trust Estate or any portion thereof, whether or not such assessments or charges are liens thereon.

8.2 Reserves for Taxes and Insurance. In furtherance of Article V and Article VII of this Trust Deed and anything to the contrary herein notwithstanding, if any Event of Default shall occur and be continuing, and at Beneficiary's written request, Trustor shall deposit with Beneficiary in a non-interest bearing account, on the first day of each month, until the Note is paid in full, an amount equal to one-twelfth of the annual Impositions, as defined in Article VII, as reasonably estimated by Beneficiary to pay the installment of Impositions next due on the Trust Estate, and one-twelfth of the estimated annual aggregate insurance premiums on all policies of insurance required in Article V. In such event, Trustor shall cause all bills, statements or other documents relating to the Impositions and insurance premiums to be sent to Beneficiary. Providing Trustor has deposited sufficient funds with Beneficiary pursuant to this Section 8.2, Beneficiary shall pay such amounts as may be due thereunder out of the funds so deposited with Beneficiary. If at any time and for any reason the funds deposited with Beneficiary are or will be insufficient to pay such amounts as may then or subsequently be due, Beneficiary shall notify Trustor and Trustor shall immediately deposit an amount equal to such deficiency with Beneficiary. Nothing contained herein shall cause Beneficiary to be deemed a trustee of such funds deposited with Beneficiary pursuant to this Section 8.2. Beneficiary shall not be obligated to pay any interest on any sums held by Beneficiary pending disbursement or application hereunder, and Beneficiary may impound or reserve for future payment of Impositions and insurance premiums such portion of such payments as Beneficiary may, in Beneficiary's absolute discretion, deem proper,

applying the balance on the principal of or interest on the Obligations secured hereby. Should Trustor fail to deposit with Beneficiary (exclusive of that portion of the payments which has been applied by Beneficiary on the principal of or interest on the Note) sums sufficient to fully pay such Impositions and insurance premiums at least thirty (30) days before delinquency thereof, Beneficiary, at Beneficiary's election, but without any obligation to do so, may advance any amounts required to make up the deficiency, which advances, if any, shall be secured by this Trust Deed and shall bear interest and be repayable to Beneficiary in the manner specified in Section 8.4 of this Trust Deed.

8.3 Performance in Trustor's Stead. Should Trustor fail to make any payment or to do any act as provided in this Trust Deed, then Beneficiary or Trustee, but without any obligation to do so, and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: (a) make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof (Beneficiary or Trustee being authorized to enter upon the Trust Estate for such purposes); commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; or (b) pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be superior to the lien of this Trust Deed; and in exercising any such powers, incur any liability, or expend such reasonable amounts as Beneficiary may deem necessary therefor, including costs of evidence of title, employment of attorneys, and payment of reasonable attorney fees and costs. All such amounts expended by either or both Trustee or Beneficiary shall, at the election of Beneficiary, be added to the principal indebtedness secured by this Trust Deed and shall accrue interest in accordance with the terms of the Note. Trustor hereby waives and releases all claims or causes of action which may hereafter arise in favor of Trustor against Beneficiary by reason of any action taken by Beneficiary pursuant to any power or authority granted in this Section 8.3, except for Beneficiary's gross negligence or wilful misconduct.

8.4 Repayment of Advances. Trustor shall immediately repay to Beneficiary sums, with interest thereon as provided in the Note, which at any time may be paid or advanced by Beneficiary for the payment of insurance premiums, Impositions, title searches, title reports or abstracts, and any other advances made by Beneficiary which are reasonably necessary or desirable to maintain this Trust Deed as a prior, valid, and subsisting lien upon the Trust Estate, to preserve and protect Beneficiary's interest in this Trust Deed, or to preserve, repair, or maintain the Trust Estate. All such advances shall be wholly optional on the part of Beneficiary, and Trustor's obligation to repay the same, with interest, to Beneficiary shall be secured by the lien of this Trust Deed.

8.5 No Removal of Fixtures. Trustor shall not, during the existence of this Trust Deed and without the written consent of Beneficiary, remove from the Real Property or the Improvements, any fixture, structure, or other improvement

at any time affixed or constructively affixed to the Real Property or the Improvements or any portion thereof, or any Personalty, except in the ordinary course of Trustor's business.

8.6 Further Assurance. Trustor shall execute and deliver to Beneficiary such further instruments, including without limitation Uniform Commercial Code Financing Statements and Continuation Statements, and do such further acts as may be necessary or as may be reasonably required by Beneficiary to carry out more effectively the purposes of this Trust Deed and to subject to the lien, security interest and mortgage created or intended to be created hereby any property, rights, or interests covered or intended to be covered by this Trust Deed. Trustor authorizes (to the extent such authorization is valid under applicable law) Beneficiary to execute and file, without Trustor's signature, such Uniform Commercial Code Financing Statements and Continuation Statements as Beneficiary may deem necessary in order to perfect, or continue the perfection of the security interests created by this Trust Deed.

8.7 Attornment. Trustor shall assign to Beneficiary, as additional security for Trustor's performance of the Obligations, any and all existing or future lease agreements entered into by Trustor, as landlord, which pertain to the Property or the Improvements, or any portion thereof, and all such leases shall contain a covenant on the part of the tenant thereunder, enforceable by Beneficiary, obligating such tenant upon request of Beneficiary, to attorn to and become a tenant of Beneficiary, or any purchaser from Trustee or through foreclosure of this Trust Deed, for the unexpired term, and subject to the terms and conditions of such future lease agreements. The assignments of lease shall be in form and content satisfactory to Beneficiary.

8.8 No Further Encumbrances. As an express condition of Beneficiary making the loan secured by this Trust Deed, Trustor shall not further encumber, pledge, mortgage, hypothecate, place any lien, charge or claim upon, or otherwise give as security the Trust Estate or any interest therein, not cause or allow by operation of law the encumbrance of the Trust Estate or any interest therein without the written consent of Beneficiary even though such encumbrance may be junior to the encumbrance created by this Trust Deed. Encumbrance of the Trust Estate contrary to the provisions of this Section 8.9 without the express written consent of Beneficiary, shall constitute an Event of Default and at Beneficiary's option, Beneficiary may declare the entire balance of principal and interest immediately due and payable, whether the same be created by Trustor or an unaffiliated third party asserting a judgment lien, mechanic's or materialmen's lien or any other type of encumbrance or title defect.

8.9 Due on Sale. Other than (a) a transfer by devise, descent or by operation of law upon the death of a joint tenant; (b) a transfer of Personalty in the ordinary course of Trustor's business; or (c) the grant of any leasehold interest of three (3) years or less not containing an option to purchase, Trustor shall not sell,

convey or otherwise transfer the Trust Estate or any part thereof or interest therein, without the prior written consent of Beneficiary. If the Trust Estate, or any part thereof, or any interest therein, is sold, conveyed or otherwise transferred without the prior written consent of Beneficiary, or if Trustor be divested of title to the Trust Estate, or any part thereof or involuntarily, then the full principal indebtedness of the Note and the other Obligations, at the option of Beneficiary and without demand or notice, shall immediately become due and payable. It is expressly acknowledged and agreed that any transfer of more than twenty-five percent (25%) of the capital stock, partnership or member interests of Trustor, as the case may be, shall constitute a transfer of the entire Trust Estate within the meaning of this Section 8.9.

8.10 Evidence of Title. Trustor shall deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements or endorsements thereto.

8.11 Additional Collateral. If, at any time, the value of all of the Trust Estate, based on an appraisal acceptable to Beneficiary, is not sufficient to establish a ratio between the total amount of the Obligations then due and owing and the value of all of the Trust Estate equal to or less than one hundred percent (100%), Trustor shall provide Beneficiary with such additional collateral as is necessary so that the total value of all collateral securing Trustor's performance of the Obligations is sufficient to establish a ratio between the total amount of the Obligations due and owing and the value of all such collateral of no more than one hundred percent (100%).

8.12 Compliance With Laws. Trustor shall comply with all laws, ordinances, regulations, easement agreements, covenants, conditions, and restrictions (including laws relating to hazardous wastes and/or protection of the environment, or species of plants or animals protected by federal, state, local or other law) affecting the Trust Estate. Trustor shall not cause, permit nor suffer any violation of any of the foregoing and shall pay all response costs, fees, or charges of any kind in connection therewith and defend, indemnify, and hold harmless Beneficiary with respect thereto.

8.13 Financial Statements. Trustor shall keep adequate books and records of account of the Trust Estate and its own financial affairs sufficient to permit the preparation of financial statements therefrom in accordance with generally accepted accounting principles. Beneficiary shall have the right to examine, copy and audit Trustor's records and books of account at all reasonable times. Trustor shall furnish to Beneficiary copies of its financial statements and other financial information satisfactory to Beneficiary at the time and in the manner provided in the Loan Agreement.

8.14 Inspections. Beneficiary, and its agents, representatives and employees, are authorized, but not obligated, to enter at any reasonable time upon the Real Property for the purpose of inspecting the same, and for the purpose of performing any of the acts it or Trustor is authorized to perform under the terms of this Trust Deed or any other Loan Document.

8.15 No Merger. If the Trust Estate is under any lease or any portion thereof which constitutes a part of the Trust Estate shall at any time become vested in one owner, this Trust Deed and the lien created hereby shall not be destroyed or terminated by application of the doctrine of merger and, in such event, Beneficiary shall continue to have and enjoy all of the rights and privileges of Beneficiary as to the separate estates. In addition, upon the foreclosure of the lien created by This Trust Deed on the Trust Estate pursuant to the provisions of this Trust Deed, any leases or subleases then existing and created by Trustor shall not be destroyed or terminated by application of the law of merger or as a matter of law or as a result of such foreclosure unless Beneficiary or any purchaser at any such foreclosure sale shall so elect. No act by or on behalf of Beneficiary or any such purchaser shall constitute a termination of any lease or sublease unless Beneficiary or such purchaser shall give written notice thereof to such tenant or subtenant.

ARTICLE IX CONDEMNATION AWARDS

9.1 If the Trust Estate or any portion thereof should be taken or damaged by reason of any public improvement or condemnation proceeding, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at Beneficiary's option to commence, appear in, and prosecute in Beneficiary's own name any action or proceeding, and to make any compromise or settlement, in connection with such taking. Trustor shall promptly give notice to Beneficiary of any condemnation proceeding or any taking for public improvement. All such compensation, awards, damages, causes of action, proceeds, or other payments are hereby assigned to Beneficiary, which may, after deducting therefrom all costs and expenses (regardless of the particular nature thereof and whether incurred with or without suit or before or after judgment), including reasonable attorney fees, incurred by Beneficiary in connection with such compensation, awards, damages, rights of action, proceeds, or other payments, release any and all moneys so received by Beneficiary or apply the same, or any portion thereof, on any of the Obligations (whether or not then due) secured by this Trust Deed. Beneficiary shall have no obligation to apply proceeds of condemnation to restore or repair damage to the Trust Estate regardless of whether such taking has a significant adverse impact on the operation of the remaining portion of the Trust Estate. Trustor shall execute and deliver to Beneficiary such further assignments of such compensation, awards, damages, causes of action, proceeds, or other payments as Beneficiary may from time to time require.

ARTICLE X ASSIGNMENT OF LEASES, RENTS AND INCOME

10.1 Assignment. Trustor hereby absolutely assigns to Trustee all right, title and interest of Trustor in and to all leases now existing or hereafter entered into by Trustor and demising the whole or any part of the Trust Estate, and does hereby further assign any and all rents, subrents, room rents and other amounts received for the use of any rooms in the Trust Estate, including the Improvements, and any and all room rental agreements and arrangements now owned or hereafter acquired, and all proceeds from such room rents, covering the Trust Estate or any portion thereof, now or hereafter existing or entered into, together with issues, royalties, income, profits and security deposits of and from the Trust Estate. Until the occurrence of an Event of Default, Trustor may, under a temporary revocable license granted hereby, collect and use all such rents, subrents, room rents, issues, royalties, income, and profits which become payable prior to default. Upon the occurrence of an Event or Default, Trustor's license to collect and use any of such proceeds shall immediately cease without further action by or on behalf of any party, and Beneficiary shall have the right, with or without taking possession of the Trust Estate, and either in person, by agent, or through a court-appointed receiver (Trustor hereby consents to the appointment of Beneficiary or Beneficiary's designee as such receiver), to sue for or otherwise collect all such rents, subrents, room rents, issues, royalties, income, and profits, including those past due and unpaid. Any sums so collected, after the deduction of all costs and expenses of operation and collection (regardless of the particular nature thereof and whether incurred with or without suit or before or after judgment), including reasonable attorney fees, shall be applied toward the payment of the Obligations. Such right of collection and use of such proceeds by Beneficiary shall obtain both before and after the exercise of the power of sale provisions of this Trust Deed, the foreclosure of this Trust Deed and throughout any period of redemption. The rights granted under this Section 10.1 shall in no way be dependent upon and shall apply without regard to whether all or a portion of the Trust Estate is in danger of being lost, removed, or materially injured, or whether the Trust Estate or any other security is adequate to discharge the obligations secured by this Trust Deed. Beneficiary's failure or discontinuance at any time to collect any of such proceeds shall not in any manner affect the right, power, and authority of Beneficiary thereafter to collect the same. Neither any provision contained herein, nor the Beneficiary's exercise of Beneficiary's right to collect such proceeds, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease, sublease, option, or other interest in the Trust Estate, or an assumption of liability under, or a subordination of the lien or charge of this Trust Deed to, any tenancy, lease, sublease, option, or other interest in the Trust Estate. All tenants, lessees, sublessees and other persons which have any obligation to make any payment to Trustor in connection with the Trust Estate or any portion thereof are hereby authorized and directed to pay rents, subrents, room rents, issues, royalties, income, and profits payable tby them with respect to the Trust Estate, or any part thereof, directly to Beneficiary on the demand of Beneficiary. Beneficiary's receipt of such rents, subrents, room rents, issues, royalties, income, and profits

shall be a good and sufficient discharge of the obligation of the tenant lessee, sublessee, or other person concerned to make the payment connected with the amount so received by the Trustee.

10.2 Application of Payments. If at any time during the term of this Trust Deed Beneficiary receives or obtains a payment, installment, or sum which is less than the entire amount then due under the Note secured by this Trust Deed and under all other instruments further evidencing or securing the Obligations, then Beneficiary shall, except as provided otherwise in the Note and notwithstanding any instructions which may be given by Trustor, have the right to apply such payment, installment, or sum, or any part thereof, to such of the items or obligations then due from Trustor or to Beneficiary as Beneficiary may in Beneficiary's sole discretion determine.

10.3 No Waiver of Rights by Collection of Proceeds. The entering upon and taking possession of the Trust Estate or any portion of the Trust Estate or the collection of rents, subrents, room rents, issues, royalties, income, profits, proceeds of fire and other insurance policies, or compensation or awards for any taking or damaging of the Trust Estate, or the application or release thereof as aforesaid, shall not cure or waive any Event of Default or notice of default hereunder, shall not invalidate any act done pursuant to such notice of default, and shall not operate to postpone or suspend the obligation to make, or have the effect of altering the size of any scheduled installments provided for in any of the Obligations secured by this Trust Deed.

10.4 Indemnification. Trustor shall indemnify, pay, protect, defend and hold Beneficiary harmless from and against all claims, demands, judgments, liabilities, actions, costs, and fees (including reasonable attorney fees) arising from or related to receipt by Beneficiary of the rents, subrents, room rents, issues, royalties, income and profit from the Trust Estate or any portion of the Trust Estate, except those liabilities arising from Beneficiary's own gross negligence and wilful misconduct.

ARTICLE XI EVENTS OF DEFAULT AND REMEDIES

11.1 Events of Default. Fifteen (15) days after written notice from Beneficiary to Trustor for monetary defaults and thirty (30) days after written notice from Beneficiary to Trustor for non-monetary defaults, if such defaults are not cured within such fifteen (15) day or thirty (30) day periods, respectively, each of the following shall constitute an event of default under this Trust Deed (an "Event of Default"):

11.1.1 Failure to Make Payment. If Trustor shall fail to make any payment due and payable under the terms of the Note or this Trust Deed.

11.1.2 Non-Monetary Default. Except as provided otherwise in Section 11.1.1, failure to observe and perform any of the terms, covenants, or conditions to be observed or performed in the Note or this Trust Deed.

11.1.3 False Warranty. Any material representation or warranty of the Trustor contained in the Note or this Trust Deed.

11.1.4 Insolvency, Etc. If (a) Trustor commences any case, proceeding, or other action seeking reorganization, arrangement, adjustment, liquidation, dissolution, or composition of Trustor or Trustor's debts under any law relating to bankruptcy, reorganization, or relief of debtors, or seeking appointment of a receiver, trustee, custodian, or other similar official for Trustor of for all or any substantial part of Trustor's property; (b) any guarantor of the Note commences any case, proceeding, or other action seeking reorganization, arrangement, adjustment, liquidation, dissolution, or composition of such guarantor or such guarantor's debts under any law relating to bankruptcy, reorganization, or relief of debtors, or seeking appointment of a receiver, trustee, custodian, or other similar official for such guarantor or for any substantial part of such guarantor's property; or (c) any such case, proceeding, or other action is commenced against either Trustor or any guarantor of the Note.

11.1.5 Failure to Pay Debts. Trustor fails to pay Trustor's debts as they become due, admits in writing Trustor's inability to pay Trustor's debts, or makes a general assignment for the benefit of creditors.

11.1.6 Failure to Perform Other Obligations. A default by Trustor under the terms of any other promissory note, deed of trust, security agreement, undertaking or arrangement between Trustor and Beneficiary now existing or entered into hereafter.

11.2 Acceleration; Notice. Time is of the essence hereof. Upon the occurrence of any Event of Default under this Trust Deed and following the expiration of any cure period provided for herein, at Beneficiary's option and in addition to any other remedy Beneficiary may have under the Note, Beneficiary may declare all sums secured hereby immediately due and payable and elect to have the Trust Estate sold in the manner provided herein. In the event Beneficiary elects to sell the Trust Estate, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause the Trust Estate to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in the office of the County Recorder of the County wherein the Trust Estate is located. Beneficiary shall also deposit with Trustee the Note and all documents evidencing expenditures secured by this Trust Deed.

11.3 Exercise of Power of Sale. Upon receipt of such notice from Beneficiary, Trustee shall cause to be recorded, published and delivered to

Trustor and each Guarantor such Notice of Default and Election to Sell as then required by Chapter 57 of the Utah Code Annotated. Trustee shall, without demand on Trustor, after lapse of such time as may be required by law and after recordation of such Notice of Default and Election to Sell first give notice of the time and place of such sale, in the manner provided by the laws of the State of Utah for the sale of real property under execution, and may from time to time postpone such sale by such advertisement as it may deem reasonable, or without further advertisement, by proclamation made to the persons assembled at the time and place previously appointed and advertised for such sale, and on the day of sale so advertised, or to which such sale may have been postponed, Trustee may sell the Real Property so advertised, at public auction, at the time and place specified in the notice, either in the county in which the Real Property, or any part thereof, to be sold, is situated, or at the principal office of Trustee located in Salt Lake County, State of Utah, in its discretion, to the highest cash bidder. Trustee shall execute and deliver to the purchaser a Trustee's Deed conveying the Real Property so sold, but without any covenant of warranty, express or implied. The recitals in the Trustee's Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (a) the costs and expenses of exercising the power of sale and of the sale, including the payment of Trustee's and attorney's fees and costs; (b) cost of any evidence of title procured in connection with such sale; (c) all sums expended under the terms hereof in conjunction with any default provision hereunder, not then repaid, with accrued interest at the rate then provided for in the Note; (d) all sums then secured by this Trust Deed, including interest and principal on the Note; and (e) the remainder, if any, to the person or persons legally entitled thereto, or Trustee, in Trustee's discretion, may deposit the balance of such proceeds with the County Clerk of the County wherein the Trust Estate is located.

11.4 Surrender of Possession. Trustor shall surrender possession of the Trust Estate to the purchaser immediately after the sale of the Trust Estate as provided in Section 11.3 above, in the event such possession has not previously been surrendered by Trustor.

11.5 UCC Remedies. Notwithstanding anything to the contrary in Sections 11.3 and 11.4 of this Trust Deed, Beneficiary, with regard to all the Personalty, shall have the right to exercise, from time to time, any and all rights and remedies available to Beneficiary, as a secured party under the Uniform Commercial Code of Utah, and any and all rights and remedies available to Beneficiary under any other applicable law. Upon written demand from Beneficiary, Trustor shall, at Trustor's expense, assemble the Personalty and make them available to Beneficiary at a reasonably convenient place designated by Beneficiary. Beneficiary shall have the right to enter upon any premises where the Personalty or records pertaining to Personalty may be and take possession of the Personalty and records relating to the Personalty. Beneficiary may sell, lease or otherwise dispose of any or all of the Personalty and , after

deducting the reasonable costs and out of pocket expenses incurred by Beneficiary, including, without limitation, (a) reasonable attorneys fees and legal expenses, (b) transportation and storage costs, (c) advertising of sale of the Personalty, (d) sale commissions, (e) sales tax, (f) costs for improving or repairing the Personalty, and (g) costs for preservation and protection of the Personalty, apply the remainder to pay, or to hold as a reserve against, the Obligations.

The rights and remedies of Beneficiary upon the occurrence of one or more Events of Default (whether such rights and remedies are conferred by statute, by rule of law, by this Trust Deed, the Loan Agreement or otherwise) may be exercised by Beneficiary, either alternatively, concurrently, or consecutively in any order. The exercise of Beneficiary or Trustee at the express direction of Beneficiary of any one or more of such rights and remedies shall not be construed to be an election of remedies nor waiver of any other rights and remedies Beneficiary might have unless, and limited to the extent that, Beneficiary shall elect or so waive by an instrument in writing delivered to Trustee. Without limiting the generality of the foregoing, to the extent that this Trust Deed covers both the Real Property and the Personalty, Beneficiary may, in the sole discretion of Beneficiary, either alternatively, concurrently or consecutively in any order:

- a. Proceed as to the Real Property, Improvements and the Personalty in accordance with Beneficiary's rights and remedies in respect to real property.
- b. Proceed as to the Real Property and Improvements in accordance with Beneficiary's rights and remedies in respect to real property and proceed as to the Personalty in accordance with Beneficiary's rights and remedies in respect to the personal property.

Beneficiary may, in the sole discretion of Beneficiary, appoint Trustee as the agent of Beneficiary for the purpose of disposition of the Personalty in accordance with the Utah Uniform Commercial Code – Secured Transactions.

If Beneficiary should elect to proceed as to the Real Property, Improvements and the Personalty in accordance with Beneficiary's rights and remedies in respect to real property:

- c. All the Personalty may be sold, in the manner and at the time and place provided in this Trust Deed, in one lot, or in separate lots consisting of any combination or combinations of the Real Property, Improvements and Personalty, as the Beneficiary may elect, in the sole discretion of Beneficiary.
- d. Trustor acknowledges and agrees that a disposition of the Personalty in accordance with Beneficiary's rights and remedies in

respect to real property, as hereinabove provided, is a commercially reasonable disposition of the Personality.

If Beneficiary should elect to proceed as to the Personality in accordance with Beneficiary's rights and remedies in respect to personal property, Beneficiary shall have all the rights and remedies conferred on a secured party by the Uniform Commercial Code as adopted by the State of Utah.

11.6 Foreclosure as a Mortgage. If an Event of Default occurs hereunder, Beneficiary shall have the option to foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto, including reasonable attorneys fees and costs in such amounts as shall be fixed by the court.

11.7 Receiver. If an Event of Default occurs, Beneficiary, as a matter of right and without regard to the interest of Trustor therein, shall have the right upon notice to Trustor to apply to any court having jurisdiction to appoint a receiver or receivers of the Trust Estate and Trustor hereby irrevocably consents to such appointment. Any such receiver or receivers shall have all the usual powers and duties of a receiver and shall continue as such and exercise all such powers until completion of the sale of the Trust Estate or the foreclosure proceeding, unless the receivership is sooner terminated.

11.8 No Remedy Exclusive. No remedy conferred upon or reserved to Beneficiary under this Trust Deed shall be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Trust Deed or any other Loan Document, or now or hereafter existing at law or in equity or by statute. No delay or failure to exercise any right or power accruing upon any Event of Default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.

11.9 Rights upon Default. In making the Note, Beneficiary has relied upon the rights available to Beneficiary under this Trust Deed upon the occurrence of an Event of Default, including, but not limited to, the rights to accelerate the payment of any and all amounts secured by this Trust Deed, to sell the Real Property encumbered by this Trust Deed pursuant to the power of sale granted hereunder, the right to foreclose this Trust Deed as a mortgage, and the right to have a receiver appointed. In addition to any other damages that might be recoverable by Beneficiary under the terms of this Trust Deed, Trustor shall be liable for any damages incurred by Beneficiary because Beneficiary is, for any reason, denied the opportunity to exercise Beneficiary's rights upon the occurrence of an Event of Default, including, but not limited to, such damages as are occasioned by depreciation of the Trust Estate, loss of use of the Trust Estate

by Beneficiary, and all opportunity costs incurred through the loss of use of any funds as would have been received by Beneficiary through exercise of the power of sale or foreclosure, or the appointment of a receiver.

ARTICLE XII GENERAL PROVISIONS

12.1 Notices. All notices shall be in writing and shall be deemed to have been sufficiently given or served when personally delivered, deposited in the United States mail, by registered or certified mail, or deposited with a reputable overnight mail carrier which provides delivery of such mail to be traced, addressed as follows:

Beneficiary: Monitor Finance, L.C. /
First Capital Funding, L.C.
3191 North Canyon Road
Provo, UT 84604

With copies to: John G. Mulliner
363 North University, Suite 103
P.O. Box 1045
Provo, UT 84603

Trustee:

Trustor:

With copies to:

Such addresses may be changed by notice to the other party given in the same manner provided in this Section.

12.2 Severability. If any provision of this Trust Deed shall be held or deemed to be or shall, in fact, be illegal, inoperative, or unenforceable, the same shall not affect any other provision or provisions contained in the Trust Deed or render the same invalid, inoperative, or unenforceable to any extent whatsoever.

by Beneficiary, and all opportunity costs incurred through the loss of use of any funds as would have been received by Beneficiary through exercise of the power of sale or foreclosure, or the appointment of a receiver.

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Trustee:

Trustor:

With copies to:

Such addresses may be changed by notice to the other party given in the same manner provided in this Section.

12.2 Severability. If any provision of this Trust Deed shall be held or deemed to be or shall, in fact, be illegal, inoperative, or unenforceable, the same shall not affect any other provision or provisions contained in the Trust Deed or render the same invalid, inoperative, or unenforceable to any extent whatsoever.

12.3 Amendments, Changes, and Modifications. This Trust Deed may not be amended, changed, modified, altered, or terminated without the written consent of Beneficiary.

12.4 Governing Law. This Trust Deed shall be governed exclusively by and construed in accordance with the applicable laws of the State of Utah.

12.5 Interpretation. Whenever the context shall include the singular, the whole shall include any part thereof, and the gender shall include both other genders. The section headings contained in this Trust Deed are for purposes of reference only and shall not limit, expand, or otherwise affect the construction of any provisions hereof.

12.6 Binding Effect. This Trust Deed shall be binding upon Trustor and Trustor's successors and assigns. This Trust Deed shall inure to the benefit of Beneficiary, and Beneficiary's successors and assigns, and the holders of any of the Obligations secured hereby.

12.7 Waivers. Beneficiary's failure at any time or times hereafter to require strict performance by Trustor of any of undertakings, agreements, or covenants contained in this Trust Deed shall not waive, affect, or diminish any right of Beneficiary hereunder to demand strict compliance and performance therewith. Any waiver by Beneficiary of any Event of Default under this Trust Deed shall not waive or affect any other Event of Default hereunder, whether such Event of Default is prior or subsequent thereto and whether of the same or a different type. None of the undertakings, agreements, or covenants of Trustor under this Trust Deed, shall be deemed to have been waived by Beneficiary, unless such waiver is evidenced by an instrument in writing signed by an officer of Beneficiary and directed to Trustor specifying such waiver.

12.8 Successor Trustee. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of the county wherein the Real Property is located, a substitution of trustee. From the time the substitution is filed for record, the new Trustee shall succeed to all the powers, duties, authority and title of Trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made in the manner provided by law.

12.9 Heirs, Successors, Etc., Definitions. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder, if more than one party, are joint and several as between them. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the Note secured hereby. In this Trust Deed, whenever the context so requires, the masculine gender includes both the feminine and neuter, and the singular number includes the plural.

12.10 Acceptance of Trust. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of any pending sale under any other deed of trust or any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

12.11 Attorneys' Fees. Trustor agrees to reimburse Beneficiary for any reasonable attorneys' fees and costs actually incurred by Beneficiary with respect to any bankruptcy or insolvency proceeding, or other action involving Trustor or any guarantor as a debtor.

Trustor additionally agrees to pay all reasonable costs and out of pocket expenses, including, without limitation, (a) reasonable attorneys fees and legal expenses, (b) transportation and storage costs, (c) advertising of sale of the Trust Estate, (d) sale commissions, (e) sales tax, (f) costs for improving or repairing the Trust Estate, and (g) costs for preservation and protection of the Trust Estate, incurred by Beneficiary in obtaining possession of Trust Estate, storage and preparation for sale, sale or other disposition, and otherwise incurred in foreclosing upon the Trust Estate. Any and all such costs and out of pocket expenses shall be payable by Trustor upon demand, together with interest thereon from the date of the advance until repaid, both before and after judgment, at the rate provided in the Note.

Regardless of any breach or default, Trustor agrees to pay all expenses, including reasonable attorneys fees and legal expenses incurred by Beneficiary in any bankruptcy proceedings of any type involving Trustor, the Trust Estate, or this Trust Deed, including, without limitation, expenses incurred in modifying or lifting the automatic stay, determining adequate protection, use of cash collateral, or relating to any plan of reorganization.

12.12 Request for Notice. Trustor requests that a copy of any Notice of Default and of any Notice of Sale hereunder be mailed to Trustor at the address for Trustor specified in Section 12.1.

12.13 Limitation on Damages. Beneficiary and its officers, directors, employees, representatives, agents, and attorneys, shall not be liable to Trustor or any Guarantor for consequential damages arising from or relating to any breach of contract, tort, or other wrong in connection with or relating to this Trust Deed or the Trust Estate.

12.14 Preferential Transfers. If the incurring of any debt by Trustor or the payment of any money or transfer of property to Beneficiary by or on behalf of Trustor or any Guarantor should for any reason subsequently be determined to be "voidable" or "avoidable" in whole or in part within the meaning of any state or federal law (collectively "voidable transfers"), including, without limitation,

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OFFICIAL RECORD BK# *878*

RECORDER

BANNOCK COUNTY IDAHO

Exhibit A

A Tract of land in the South 1/2 of the South 1/2 Section 31, Township 6 South, Range 35 East, Boise Meridian, Bannock County, Idaho, more particularly described as follows:

Beginning at the South quarter corner of Section 31; thence South 89°36'40" East, 82.68 feet; thence North 53°44'13" East, 88.1 feet; thence North 26°44'09" West, 320 feet; thence North 63°15'51" East, 260 feet; thence North 26°44'09" West 495.62 feet, more or less, to the Southerly right of way line of Barton Road; thence South 72°27'20" West along the Southerly right of way of Barton Road 472.74 feet; thence continuing along the Southerly right of way line of Barton Road, South 83°18'20" West, 389.3 feet, more or less, to the Easterly line of the Old Stock Trail; thence South 26°44'40" East along the Easterly line of the Old Stock Trail 791.56 feet, more or less, to the South line of said Section 31; thence South 89°44' East, 462.23 feet, more or less, to the point of beginning.

copy

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

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DEPUTY CLERK
KERRY

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendants.

CASE NO. CV-2016-3588-OC

STIPULATION CONSENTING TO SALE OF REAL PROPERTY AND DEPOSIT OF PROCEEDS INTO TRUST

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company;

Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Counter-defendant,

Stipulation Consenting To Sale of Real Property and Deposit of Proceeds Into Trust
pg. 1

COMES NOW the Plaintiffs and Counter-defendants Monitor Finance, L.C., a Utah limited liability company ("Monitor") and First Capital Funding, L.C., a Utah limited liability company ("First Capital"), by and through their attorney of record, Ron Kerl; and the Defendant and Counter-claimant Wildlife Ridge Estates, LLC ("Wildlife Ridge"), by and through its attorney of record, A. Bruce Larson, and stipulate and agree as follows:

1. In their Complaint on file herein, Monitor and First Capital allege that on the December 30, 2005, they jointly loaned to Michael Millward and M&S Development, LLC the sum of \$244,000, as evidenced by a Trust Deed Note dated December 30, 2005, in the principal sum of \$244,000, both principal and interest being payable in words and figures as set forth in Exhibit "A" attached to their Complaint on file herein. They further allege that the Deed of Trust Note was thereafter modified on March 3, 2008.

2. In their Complaint Monitor and First Capital allege that as security for the repayment of the Trust Deed Note as modified, M & S Development, LLC executed a Deed of Trust on certain Bannock County real property. The Deed of Trust was recorded on the 30th day of December, 2005, under Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho.

3. In its Answer and Counter-claim on file herein, Wildlife Ridge disputes the enforceability of the Deed of Trust Note, as modified, and the Deed of Trust.

4. Wildlife Ridge has arranged for the sale of some of the real property described in the Deed of Trust and has asked Monitor and First Capital to consent to the sale and release the Deed of Trust on the property to be sold. Wildlife Ridge proposed that Monitor and First Capital's consent to such sales would be dependent upon the proceeds of such sales being deposited into a trust account and the lien rights and security interests of Monitor and First Capital will

Stipulation Consenting To Sale of Real Property and Deposit of Proceeds Into Trust
pg. 2

automatically attach to the sale proceeds deposited into trust.

5. Monitor and First Capital consent to the sale of the below described real property provided that after payment of real estate commissions and closing costs the net proceeds of such sales are deposited by the closing agent closing the sales into a trust account at Pioneer Title Company, Pocatello, Idaho and the lien rights and security interests of Monitor and First Capital in that real property automatically attach to the sale proceeds deposited into trust. Based upon that agreement by Wildlife Ridge, Monitor and First Capital will consent to the following real property sales, and execute any and all instruments required by the closing agent to release the Deed of Trust as an encumbrance to the title of such property:

a. Sale of Lot 4, Block 3, Wildlife Ridge Estates, Division 2, to Timothy D. And Micaela Queen Jones for the Purchase Price of \$49,900.00.

b. Sale of Lot 6, Block 3, Wildlife Ridge Estates, Division 1, to Jonathan Vincent for the Purchase Price of \$38,000.00.

c. Sale of Lot 7 and Lot 9, Block 3, Wildlife Ridge Estates, Division 2, to SDH Construction, LLC for the Purchase Price of \$92,926.00.

d. Sale of Lot 1, Block 2, Wildlife Ridge Estates, Division 2, to Thomas James McFarland for the Purchase Price of \$44,000.00.

6. Once deposited into Trust, the sale proceeds shall be held until either Wildlife Ridge, Monitor and First Capital enter into a written agreement directing the distribution of such sale proceeds, or the Court in this proceeding issues its Order directing the distribution of such sale proceeds.

7. The parties agree that this Stipulation shall not be enforceable against each other until the Court in this proceeding enters its Order approving the terms of this Stipulation and makes the same binding upon Wildlife Ridge, Monitor and First Capital.

Dated this 13 day of March, 2017.

COOPER & LARSEN, CHTD

Attorney for Monitor Finance/L.C. and First Capital Funding, L.C.


By: 

Ron Kerl

Dated this 6th day of March, 2017.

HEARN & WOOD, LLP

Attorney for Wildlife Ridge Estates, LLC

By: 

A. Bruce Larson

BANNOCK
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KP
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**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,
Plaintiffs,

Case No. CV-2016-3588-OC

vs.

**MEMORANDUM DECISION
AND ORDER**

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,
Defendants.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company;
Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,
Counter-defendant.

NATURE OF THE ACTION

This case was initiated by a Complaint to Judicially Foreclose Deed of Trust filed by the Plaintiffs/Counterdefendants Monitor Finance, L.C. ("Monitor") and First Capital Funding, L.C.

(“First Capital”).¹ Defendant/Counterclaimant Wildlife Ridge Estates, LLC², filed an Answer and also brought a counterclaim against Monitor and First Capital for fraud and declaratory and injunctive relief. The Plaintiffs have now submitted a Motion for Partial Summary Judgment seeking dismissal of the affirmative defenses raised by Wildlife Ridge in its Answer, as well as dismissal of the Counterclaim. The Plaintiffs also submitted a Motion to Amend the Complaint, which was scheduled for a hearing date separate from the motion for partial summary judgment. In support of partial summary judgment, the Plaintiffs submitted a written brief and the Affidavit of Ron Kerl, including exhibits. Defendant/Counterclaimant Wildlife Ridge responded with an opposing brief and the Affidavit of Richard A. Hearn, with attached exhibits. The Plaintiffs then followed up with a reply brief and the Second Affidavit of Ron Kerl, including exhibits.

Oral arguments were conducted on February 21, 2017. At the outset of the hearing, the parties addressed the Plaintiffs’ Motion to Amend the Complaint. Although that motion was set to be heard at a later date, counsel for the Defendants indicated they had no objection to the amendment of the Complaint. Therefore, in a ruling from the bench, this Court granted the Plaintiffs’ request to add a new defendant based upon stipulation of the parties.

Having reviewed the entire file and the relevant law, and after consideration of the arguments made by the parties, this Court now issues this Memorandum Decision and Order.

ISSUE

1. Whether to grant the Plaintiffs’ Motion for Partial Summary Judgment.

¹ Collectively referred to herein as “the Plaintiffs”.

² Referred to herein as “Wildlife Ridge” or “the Defendant”.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment shall be rendered “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Idaho R. Civ. P. 56(c)(2016). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

If the moving party challenges an element of the non-moving party’s case on the basis that no genuine issue of material fact exists, the burden now shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Tingley*, 125 Idaho at 90, 867 P.2d at 964. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party’s case upon which that party bears the burden of proof at trial. *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The party opposing the summary judgment motion “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must *set*

forth specific facts showing that there is a genuine issue for trial.” Idaho R. Civ. P. 56(e)(2016) (emphasis added).

STATEMENT OF FACTS

The following pertinent facts are found by a preponderance of the evidence, with all reasonable inferences drawn in favor of the Defendant. *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694, 698 (2009)(“All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006)).³

Wildlife Ridge is the owner in fee simple of certain real property described in the Deed of Trust attached as Exhibit A to the Plaintiffs’ Complaint to Judicially Foreclose Deed of Trust. On December 3, 2014, Wildlife Ridge filed its initial Complaint seeking to quiet title in that property against the same plaintiffs in this case, Monitor Finance and First Capital (“the First Action”).⁴ (See Exs. A and B, attached to Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor and First Capital (“Kerl Aff.”), Jan. 6, 2017.) That Complaint was amended on March 12, 2015. (Exs. A and C, attached to Kerl Aff.) By its Complaint and Amended Complaint, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from

³ The background information was extracted from the parties’ briefs and the submitted affidavits and exhibits.

⁴ Based on stipulation of the parties at oral arguments, this Court takes judicial notice of the filings and outcome of the First Action.

the district court that the sums due under the Deed of Trust Note and the Modification of Trust Deed Note (“the Modification”) secured by the Monitor and First Capital Deed of Trust had been satisfied. (Exs. B and C, attached to Kerl Aff.) On June 14, 2016, a Judgment dismissing the First Action with prejudice was entered. (Ex. E, attached to Kerl Aff.)

DISCUSSION

As explained above, the case presently before this Court was initiated by a Complaint to Judicially Foreclose Deed of Trust filed against Defendants Wildlife Ridge Estates, LLC and M&S Development, LLC. Wildlife Ridge filed an Answer to Complaint and a Counterclaim against the Plaintiffs for fraud and declaratory and injunctive relief. In an earlier action, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from the district court that the sums due under the Deed of Trust Note and Modification had been satisfied. That case was dismissed with prejudice. In seeking partial summary judgment, the Plaintiffs argue that all defenses and claims now raised by Wildlife Ridge in response to the current lawsuit are barred by the doctrine of *res judicata*.

a. Law

Under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. The Idaho Supreme Court explained the doctrine of *res judicata*, or claim preclusion, as follows:

Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action.

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (citations omitted, emphasis added). Thus, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. *Elliot v. Darwin Neibaur Farms*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). As such, “in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.” *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436–37, 849 P.2d 107, 109–10 (1993)(emphasis added); see also *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922). As further explained by Idaho courts, because the transactional concept of a claim is broad, “the bar of claim preclusion may apply even where there is not a substantial overlap between the theories advanced in support of a claim, or in the evidence relating to those theories.” *Aldape v. Akins*, 105 Idaho 254, 259, 668 P.2d 130, 135 (Idaho Ct. App. 1983)(cited with approval by *Kolouch*, 123 Idaho at 437, 849 P.2d at 110.) Thus, “a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose.” *Kolouch*, 123 Idaho

Memorandum Decision and Order

Case No. CV-2016-3588-OC

Re: Plaintiffs' Motion for Partial Summary Judgment

6

at 437, 849 P.2d at 110; *see also Diamond v. Farmers Ins.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990).

Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805 (quoting *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct.App.1983)).

Ticor Title Co. v. Stanion, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007).

b. Analysis

The Plaintiffs argue the First Action already addressed the enforceability of the same Deed of Trust Note, Modification, and Deed of Trust at issue here. Because that lawsuit was dismissed with prejudice, the Plaintiffs maintain that the Defendants are now prevented from presenting any defense or claim challenging the enforceability of the debt which might have and should have been litigated in that First Action. (Mem. in Supp. of Summ. J. Mot. Filed by Monitor and First Capital (“Mem. in Supp. of Summ. J.”), Jan. 6, 2017, 3-4.) The Plaintiffs have therefore asked this Court to strike and dismiss the affirmative defenses and the Counterclaim raised by the Defendant.

In response, the Defendant argues *res judicata* is not a bar to the defenses and/or counterclaim it has raised in the present lawsuit because none of those issues were “actually litigated in the Quiet Title Action and they could not have been litigated.” (Def. Wildlife Ridge’s Resp. to Pls. Monitor Finance L.C.’s and First Capital L.C.’s Mot. for Partial Summ. J. (“Def.’s Resp.”), Feb. 6, 2017, 12.) For example, Wildlife Ridge first argues that “[t]he entity

that appeared in the Quiet Title Action as Monitor Finance L.C. was not a real party in interest to the transactions that were the subject matter of that action or the present action.” (Def.’s Resp. at 6.) In support of that allegation, the Defendant points to the fact that the Monitor Finance, L.C. that was named as a party to the Note and Deed of Trust expired on September 17, 2012, and was never renewed. Instead, “[a] new entity bearing the same name Monitor Finance L.C. was established on January 23, 2015 nearly two months after the Quiet Title Action was filed on December 3, 2014.” (*Id.*) Thus, the Defendant argues that one of the plaintiffs in this case, Monitor Finance, L.C., which entity was named as a defendant in the First Action to quiet title filed by Wildlife Ridge, was not a real party in interest in that case because it had been administratively dissolved before the First Action was filed. The Defendant further argues that its pending counterclaim and affirmative defenses for fraud were not raised and could not have been litigated in the quiet title action because neither M&S Development, LLC (“M&S”), or Michael Millward were named parties.⁵ (*See id.*) While the Defendant notes that M&S and Mr. Millward were referenced in both the initial complaint and the amended complaint to quiet title, the Defendant argues that neither M&S nor Mr. Millward were named parties in the quiet title action and “there were no allegations made by any party in the Quiet Title Action that either M&S or Millward had done anything wrong.” (*Id.*) The Defendant thus argues: “As Millward and M&S would have been necessary parties to any fraud claim brought against Plaintiffs,

⁵ “On December 30, 2005, M&S Development, LLC and Michael Millward signed a promissory note with First Capital Funding, L.C. and Monitor Finance, L.C. for \$244,000.00.” (Ex. C, attached to Kerl Aff., Am. Compl. to Quiet Title (“First Action”), March 16, 2016, ¶7; *see also* Ex. B, attached to Kerl Aff., Compl. to Quiet Title, Dec. 1, 2014, §§7-8.)

Wildlife Ridge had no duty to bring its claim for fraud against Plaintiffs, Millward and M&S in association with its Quiet Title Action.” (Def.’s Resp. at 8.) Finally, the Defendant argues that the Modification of Trust Deed Note was never mentioned in the pleadings filed in the quiet title action. (*Id.* at 7.) The Defendant argues the Modification is “central” to the foreclosure action and Wildlife Ridge’s counterclaim for fraud, and is another example of a claim that could not have been brought in the First Action. (*Id.*)

First, this Court must reject the Defendant’s argument that Monitor Finance, L.C., while a named defendant in the First Action, was nonetheless not a real party in interest to that lawsuit because it had been previously administratively dissolved. Dissolution of a corporation does not prevent the commencement of legal proceedings against that corporation in its corporate name.

Arndt v. First Interstate Bank of Utah, N.A., 1999 UT 91, ¶ 14, 991 P.2d 584, 587; *see also*

UTAH CODE ANN. § 16-10a-1405 (West).⁶ Because the debt owed existed prior to any

⁶ § 16-10a-1405. **Effect of dissolution**

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

- (a) collecting its assets;
- (b) disposing of its properties that will not be distributed in kind to its shareholders;
- (c) discharging or making provision for discharging its liabilities;
- (d) distributing its remaining property among its shareholders according to their interests; and
- (e) doing every other act necessary to wind up and liquidate its business and affairs.

(2) Dissolution of a corporation does not:

- (a) transfer title to the corporation's property;
- (b) prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;
- (c) subject its directors or officers to standards of conduct different from those prescribed in Part 8, Directors and Officers;
- (d) change:

- (i) quorum or voting requirements for its board of directors or shareholders;
- (ii) provisions for selection, resignation, or removal of its directors or officers or both; or
- (iii) provisions for amending its bylaws or its articles of incorporation;

(e) prevent commencement of a proceeding by or against the corporation in its corporate name;

Memorandum Decision and Order

Case No. CV-2016-3588-OC

Re: Plaintiffs’ Motion for Partial Summary Judgment

dissolution and Monitor Finance was sued during the winding down process to invalidate that debt, Monitor Finance was a legitimate party in interest and a named defendant in the First Action.

This Court further rejects the Defendant's argument that M&S and Michael Millward were indispensable parties for a complete resolution regarding Wildlife Ridge's claim that the debt due to the Plaintiffs was unenforceable. Whether a party is "indispensable" is governed by IRCP 19(a)(1).⁷ Under that rule, a party shall be joined if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Idaho R. Civ. P. 19(a). In this case, complete relief could have been granted to Wildlife Ridge if the court in the quiet title action had determined that the debt had been satisfied. If that had been

(f) abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
(g) terminate the authority of the registered agent of the corporation.

UTAH CODE ANN. § 16-10a-1405 (West)(emphasis added).

⁷ **Rule 19. Required joinder of parties**

(a) Persons Required to be Joined if Feasible.

(1) *Required Party.* A person who is subject to service of process must be joined as a party in the action if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Memorandum Decision and Order

Case No. CV-2016-3588-OC

Re: Plaintiffs' Motion for Partial Summary Judgment

the outcome, the Plaintiffs' Deed of Trust would have no debt to secure, and title to the premises could have been quieted in Wildlife Ridge, free and clear of that encumbrance. No matter the basis for such a finding, that outcome would not have adversely affected either M&S or Mr. Millward since the debt they were personally liable for would no longer be enforceable. In addition, there was no risk of double, multiple or otherwise inconsistent obligations since M&S and Mr. Millward would have been bound by a decree finding that the debt owed was unenforceable, no matter whether the basis of such a decree was that the debt had been satisfied or that the debt was unenforceable based on a statute of limitations or fraud argument. As such, M&S and Mr. Millward were not indispensable parties to Wildlife Ridge's quiet title action and/or Wildlife Ridge's attempt to have the debt deemed unenforceable.

This Court must also reject the Defendant's arguments regarding the Modification. The Defendant argued the Modification dated March 3, 2008, was fraudulent and the "statute of limitations claim is related directly to the validity and effect of the claimed Modification." (Def.'s Resp. at 10.) The Defendant argued that because the Modification of Trust Deed Note was "never mentioned" in the pleadings filed in the quiet title action, the issues surrounding the Modification could not have been litigated and therefore cannot now be barred by *res judicata*. However, the record shows the Defendant was aware of the Modification during the First Action, since the Modification was produced to Wildlife Ridge through discovery. (Ex. 2, First Capital Funding, L.C.'s Resp. to Pl.'s First Set of Discovery, attached to Second Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor Finance, L.C. and First Capital Funding, L.C., ¶¶4-5,

Feb. 14, 2017.) As such, any claims pertaining to the Modification could have been raised in the **Memorandum Decision and Order** Case No. CV-2016-3588-OC
Re: Plaintiffs' Motion for Partial Summary Judgment

First Action, and this Court has also already determined that M&S and Mr. Millward were not indispensable parties to the Quiet Title Action necessary to any fraud allegation attempting to show the debt owed to the Plaintiffs was unenforceable.

Therefore, based on the above findings and the undisputed facts in this case, all of the Defendant's claims that could have challenged the enforceability of the debt secured by the Deed of Trust should have been litigated in the quiet title action. There is no dispute that in the First Action Wildlife Ridge sought a decree quieting title to the property described in Monitor Finance's and First Capital's Deed of Trust free and clear of that Deed of Trust by claiming there was no enforceable debt which could be secured because the applicable promissory note had been satisfied by previous payments made to the Plaintiffs. Thus, the gravamen of the first quiet title action was that there was no enforceable debt left to be secured by the Plaintiffs' encumbering the Deed of Trust. Furthermore, there is no question that both the First Action and this matter involve the same parties and the same Deed of Trust. There is also no question that the First Action was finally resolved and dismissed with prejudice by entry of a final judgment rejecting the Defendant's attempt to challenge the enforceability of the Deed of Trust Note, the Modification, and the Deed of Trust. As explained, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made *or which might have been made*. No matter the theory advanced by the Defendant in its original quiet title action, the dismissal of the First Action serves as a dismissal with prejudice of every matter that was

available in the First Action to challenge the enforceability of the Deed of Trust Note, the
Memorandum Decision and Order
Case No. CV-2016-3588-OC
Re: Plaintiffs' Motion for Partial Summary Judgment

Modification, and the Deed of Trust in this case. A careful reading of Wildlife Ridge's Answer and Counterclaim show that the affirmative defenses and claim of fraud all challenge the enforceability of the same Monitor and First Capital Deed of Trust Note, Modification and Deed of Trust at issue in the First Action; therefore, those claims should have been litigated in the First Action. The Defendant has not demonstrated that it was in any way prevented from presenting in the First Action any of the claims it has now raised. This Court has found there to be no question of fact that those claims, including any statute of limitations defense, the equitable doctrines of laches and unclean hands, and the claim of fraud all relate to and arose prior to the dismissal of the First Action.

Therefore, because the First Case ended in a final judgment on the merits, because this case involves the same parties as the First Case, and because all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Case, the affirmative defenses and counterclaim now raised by the Defendant are barred by the doctrine of *res judicata*.

CONCLUSION

The Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED. This Court has determined the Defendant's affirmative defenses and fraud claim are barred by the doctrine of *res judicata*. Therefore, all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud are hereby stricken and dismissed.

IT IS SO ORDERED.

DATED this 27 day of March 2017.


ROBERT C. NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of March, 2017, I served a true and correct copy of the foregoing document upon each of the following in the manner indicated.

Ron Kerl
Cooper & Larsen
PO Box 4229
Pocatello, ID 83205-4229

E
 U.S. Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

A. Bruce Larsen
155 S. 2nd Ave.
Pocatello, ID 83201

E
 U.S. Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

ROBERT POLEKI, Clerk

By: Keri Povey
KERI POVEY
Deputy Clerk

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

2017 MAR 30 AM 8:28
BY  CLERK

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendants.

CASE NO. CV-2016-3588-OC

DEFAULT

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company;

Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Counter-defendant,

In this action the Defendant M & S Development, LLC, having been regularly served with process, and having failed to appear or answer Plaintiff's Complaint on file herein, and the time allowed by law for answering having expired, upon application of the Plaintiff herein, the default of the Defendant M & S Development, LLC, in the premises, is hereby duly entered according to law.

DATED This 30 day of March, 2017.



Hon. Robert C. Naftz, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 30 day of March, 2017, I served a true and correct copy of the foregoing document as follows:

A. Bruce Larson
Hearn & Wood LLP
155 S. 2nd Ave.
Pocatello, ID 83201

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Cooper & Larsen, Chtd.
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Pocatello, ID 83205

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M&S Development, LLC
c/o Michael Millward, Registered Agent
9716 W. Bighorn Drive
Pocatello, ID 83204

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- Hand Delivery
- Overnight Mail
- Facsimile - 208-932-1083
- Email to: ron@cooper-larsen.com

CLERK OF THE DISTRICT COURT

By: _____


Deputy

Neftoy

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2017 MAY -8 PM 3:20
BY *[Signature]*
DEPUTY CLERK

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
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Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
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Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
liability company; M&S DEVELOPMENT, LLC, an
Idaho limited liability company,

Defendants.

CASE NO. CV-2016-3588-OC

**THIRD AFFIDAVIT OF RON
KERL IN SUPPORT OF
SUMMARY JUDGMENT
MOTION AND OPPOSING
MOTION FOR
RECONSIDERATION**

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
liability company;

Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Counter-defendant,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 4th day of May, 2017, I served a true and correct copy of the foregoing document as follows:

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Chamber Copy:
Hon. Robert C. Naftz
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Pocatello, ID 83201

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nicoled@bannockcounty.us

COOPER & LARSEN, CHTD



By: _____
Ron Kerl, of the firm

Exhibit "1"

B6B (Official Form 6B) (12/07) - Cont.

In re **Michael Millward,
Stephanie Millward**

Case No. 12-41260

Debtors

SCHEDULE B - PERSONAL PROPERTY

(Continuation Sheet)

Type of Property	N O N E	Description and Location of Property	Husband, Wife, Joint, or Community	Current Value of Debtor's Interest in Property, without Deducting any Secured Claim or Exemption
7. Furs and jewelry.	X			
8. Firearms and sports, photographic, and other hobby equipment.	X			
9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.	X			
10. Annuities. Itemize and name each issuer.	X			
11. Interests in an education IRA as defined in 26 U.S.C. § 530(b)(1) or under a qualified State tuition plan as defined in 26 U.S.C. § 529(b)(1). Give particulars. (File separately the record(s) of any such interest(s). 11 U.S.C. § 521(c).)	X			
12. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Give particulars.	PERSI		C	2,298.91
13. Stock and interests in incorporated and unincorporated businesses. Itemize.	X			
14. Interests in partnerships or joint ventures. Itemize.		100% Ownership of M & S Development	C	Unknown
		65% interest in Wildlife Ridge LLC	C	Unknown
15. Government and corporate bonds and other negotiable and nonnegotiable instruments.	X			
16. Accounts receivable.	X			
17. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.	X			
18. Other liquidated debts owed to debtor including tax refunds. Give particulars.	X			

Sub-Total > **2,298.91**
(Total of this page)

Sheet 3 of 5 continuation sheets attached to the Schedule of Personal Property

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2017 MAY -8 PM 3:20
 BY [Signature]
 DEPUTY CLERK

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Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
 company; and FIRST CAPITAL FUNDING, L.C., a
 Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
 liability company; M&S DEVELOPMENT, LLC, an
 Idaho limited liability company; and PIONEER TITLE
 COMPANY OF BANNOCK COUNTY, INC.

Defendants.

CASE NO. CV-2016-3588-OC

**MEMORANDUM OPPOSING
 MOTION FOR
 RECONSIDERATION**

AND

**REPLY MEMORANDUM IN
 SUPPORT OF SUMMARY
 JUDGMENT MOTION**

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
 liability company;

Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability
 company; and FIRST CAPITAL FUNDING, L.C., a
 Utah limited liability company,

COME NOW the Plaintiffs Monitor Finance, L.C., a Utah limited liability company (“Monitor”), and First Capital Funding, L.C., a Utah limited liability company (“First Capital”), by and through their attorneys and submit this memorandum (1) in opposition to the Motion for Reconsideration filed by Wildlife Ridge Estates, LLC on May 1, 2017, and (2) as a Reply Memorandum in support of Monitor and First Capital’s Motion for Summary Judgment dated April 13, 2017.¹

STATEMENT OF THE CASE

This lawsuit was commenced when Monitor and First Capital filed a Complaint to enforce a Trust Deed Note dated December 30, 2005, in the principal sum of \$244,000, as set forth in Exhibit “A” attached to the Amended Complaint on file herein (“Deed of Trust Note”). The Deed of Trust Note was amended by the Modification attached to the Amended Complaint as Exhibit “B” (“Modification”). Plaintiffs seek to judicially foreclose a Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005 (“Deed of Trust”) on the Bannock County real property therein described. A true and accurate copy of the Deed of Trust is attached to the Amended Complaint as Exhibit “C”.

Wildlife Ridge is the owner in fee simple of the real property described in the Deed of Trust and has filed its Answer (including Affirmative Defenses) and Counter-claim in this action seeking a declaration from this Court that the Deed of Trust Note, as Modified, and the Deed of Trust securing that Note, are unenforceable. On March 27, 2017, this Court entered its Memorandum Decision and Order granting Plaintiffs’ prior motion for partial summary judgment and dismissed

¹Plaintiffs also submit a Supplemental Affidavit in Support of Plaintiffs’ Foreclosure Decree (dated May 3, 2017) and Third Affidavit of Ron Kerl (dated May 4, 2017) in Support of Plaintiffs’ Summary Judgment Motion and in opposition to Wildlife Ridge’s Motion for Reconsideration.

Wildlife Ridge's affirmative defenses and counter-claim against the Plaintiffs, finding that they are barred by the doctrines of *res judicata* and collateral estoppel. Wildlife Ridge's Motion for Reconsideration seeks to reverse the Court's March 27, 2017 decision.

The Court, on March 30, 2017, entered a default against the Defendant, M&S. On May 4, 2017, the Defendant Pioneer Title Company of Bannock County filed a waiver of its right to respond further to the Plaintiffs' Amended Complaint and consented to the entry of a Judgment and Decree of Foreclosure as prayed for by Monitor and First Capital in their Amended Complaint.

MOTION FOR RECONSIDERATION

Wildlife Ridge's motion for reconsideration makes two affirmations of fact and law which are incorrect and not support by either the law or the facts:

1. *The Statute of Limitations Defense was not Available in the First Quiet Title Action.*

and,

2. *The Debt [owed to Monitor and First Capital] Cannot be Relitigated.*

A. The Applicability of Statute of Limitations to Bar Plaintiff's Enforcement of its Obligation and Right to Foreclose its Deed of Trust was Available in the First Quiet Title Action.

Wildlife Ridge cites this Court to the 1952 Idaho Supreme Court decision in *Trusty v Ray*, 73 Idaho 232, 249 P.2d 814 (Idaho, 1952) for the proposition that in the Quiet Title Action² it had no standing to quiet title *and* raise a claim that the statute of limitations prohibited Monitor and First Capital from enforcing the debt secured by, and foreclosing, the Deed of Trust.

² On December 3, 2014, Wildlife Ridge commenced a quiet title action against the Plaintiffs in Bannock County Case No. CV 2014-4783 OC (the "First Quiet Title Action").

A careful reading of that case does not support this broad conclusion. The Court in *Trusty* only concluded that a “mortgagor or his successor in interest *cannot quiet title* against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run against the right to foreclose the mortgage.”

This simple statement, however, does not also state that Wildlife Ridge was prohibited from bringing all available claims for relief *other than one for quieting title to the property*. Wildlife Ridge was free to request a declaration from the Court that subject obligation and Deed of Trust were unenforceable for any other legitimate reason³ and could have made a request for relief that included the court’s permanent injunction prohibiting Monitor and First Capital from enforcing the subject obligation through foreclosure of the Deed of Trust. It did not do so. Having not done so, it cannot now raise additional claims for relief which could have been raised in the First Quiet Title Action.

Res judicata’s subparts, issue and claim preclusion, as explained in *Ticor Title Company v. Stanion*, 144 Idaho 119, 157 P.3d 613 (2007), cover not only the theory of recovery advanced in the first action (here, “Quiet Title”) but any theory of recovery at law or inequity which could have been raised in the first action. At 144 Idaho, page 123, the Supreme Court stated:

The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims “relating to the same cause of action ... which might have been made.” *Id.* Issue preclusion protects litigants from litigating an identical issue with the same party or its privy. *Rodriguez v. Dep’t of Corr.*, 136

³Such as those claims raised in its answer and counterclaim filed in this case: (1) Statute of Limitations - ¶10, (2) Laches - ¶11, (3) Collateral Estoppel - ¶12, (4) *Res Judicata*, claim and/or issue preclusion - ¶13, (5) Unclean Hands - ¶14, and (6) Fraud as set out in the Counterclaim - ¶¶10-13.

Idaho 90, 92, 29 P.3d 401, 403 (2001). Separate tests are used to determine whether claim preclusion or issue preclusion applies. *See, D.A.R., Inc., v. Sheffer*, 134 Idaho 141, 144, 997 P.2d 602, 605 (2000). *Res judicata* serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805 (quoting *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct. App. 1983)).

In other words, Wildlife Ridge should have asserted every legal rule and/or equitable remedy establishing that Monitor and First Capital's Deed of Trust Note was unenforceable; and, Wildlife Ridge should have requested any remedy, other than to 'quiet title', to prevent foreclosure of the Deed of Trust.

Wildlife Ridge did not have to limit its requested relief to simply seeking a decree quieting title to the land. Wildlife Ridge, having chosen that solitary claim for relief cannot now attempt to add new and additional claims for relief that were available at the time the First Quiet Title action was litigated to a final judgment.

B. The Debt owed to Monitor and First Capital Is Not Being Relitigated Because It Was Not Raised by Monitor and First Capital as a "Claim" in the First Quiet Title Action.

First, Wildlife Ridge conflates Monitor and First Capital's defense that the obligation owed by Michael Millward ("Millward") and M & Development, LLC ("M & S Development") had not been satisfied - as a 'claim actually litigated' in the First Quiet Title Action. Monitor and First Capital's denial that the obligation was fully satisfied and their production of evidence in discovery supporting that denial does not constitute a 'claim' within the scope of *res judicata* or collateral estoppel.

A 'claim' is where one seeks affirmative relief, that is, seeking a 'remedy' from the court. A 'defense' is where an opposing party seeks to prevent a claim made against it from succeeding. "Claim" is defined very broadly for *res judicata* purposes: "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments, § 24(1), at 196 & Comment c (1982). That broad definition comports with the goal of *res judicata* to require a plaintiff to seek all relief or available remedies in a single action.

Second, Monitor and First Capital did not seek any relief in the First Quiet Title Action they were defending because they was prohibited from doing so under applicable bankruptcy law. The makers of the Deed of Trust Note, as modified, were Millward and M & S Development. They were not parties to the First Quiet Title Action commenced by Wildlife Ridge. They would have been necessary and indispensable parties to any claim by Monitor and First Capital to foreclose the Deed of Trust and enforce the Deed of Trust Note and Modification. I.R.C.P. Rule 20(a)(2).

On September 10, 2012, Millward filed for relief under chapter 7 of the Bankruptcy Code, Case No. 12-41260 pending in the United States Bankruptcy Court for the District of Idaho. Pursuant to 11 U.S.C. § 362, an automatic stay commenced on September 10, 2012 which prohibited the Plaintiffs from taking any action to enforce the Trust Deed Note, as amended, and foreclose the Deed of Trust securing that Trust Deed Note. That automatic stay existed until Millward's bankruptcy case was closed on June 23, 2016.⁴

⁴Paragraph 6 of Plaintiff's Amended Complaint; Wildlife Ridge's answer to the original complaint, at paragraph 7, admits the filing of Millward's bankruptcy, Case No. 12-41260. Wildlife Ridge has not yet answered Plaintiffs' Amended Complaint.

Millward's pending chapter 7 bankruptcy prevented Monitor and First Capital from asserting their foreclosure claims against Millward, M & S Development, and Wildlife Ridge in the First Quiet Title Action.

Idaho Rule of Civil Procedure 13(a) provides:

Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) *does not require adding another party over whom the court cannot acquire jurisdiction.* (Emphasis added).

The automatic stay imposed by 11 U.S.C. § 362 commenced on September 10, 2012 and continued until Millward's bankruptcy case was closed on June 23, 2016, a date falling after the First Quiet title Action was dismissed with prejudice on June 14, 2016.

The bankruptcy stay prohibited Monitor and First Capital from taking any action to enforce the Trust Deed Note, as amended, against either Millward or his property, M & S Development. 11

U.S.C. § 362 provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301 [a voluntary case under any chapter of the Bankruptcy Code, including Chapter 7], 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, *operates as a stay, applicable to all entities, of—*

(1) the commencement or continuation, *including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, or *to recover a claim against the debtor that arose before the commencement of the case under this title;*

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;.... (Emphasis added)

Millward owned 100% of M & S Development, and that ownership interest became property of his bankruptcy estate when he filed his bankruptcy case in 2012.⁵ See, 11 U.S.C. §541(a)(1). Any suit against Millward or M & S Development to collect and enforce the obligation they owed to Monitor and First Capital was prohibited by 11 U.S.C. § 362.

As a result of the bankruptcy stay the court in the First Quiet Title Action could not issue its process or summons against Millward and M & S Development and therefore obtain jurisdiction over them during the pendency of the First Quiet Title Action. The bankruptcy stay protected Millward and M & S from any effort by Monitor and First Capital to seek enforcement of the Deed of Trust Note and Modification, or foreclose the Deed of Trust in the First Quiet Title Action.

Since Monitor and First Capital were not required to request foreclosure relief in the form of a compulsory counterclaim in the First Action, Monitor and First Capital were prohibited from 'litigating its claim' in the First Quiet Title Action. *A fortiori*, Monitor and First Capital did not actually litigate its claim in the First Quiet Title Action because they were prohibited by law from actually doing so.

⁵See, Third Affidavit of Ron Kerl, dated May 4, 2017, Exhibit - Schedule B Personal Property.

SUMMARY JUDGMENT MOTION

A. The Statute of Limitations has Not Expired.

Wildlife Ridge urges the Court to conclude that the applicable statute of limitations bars Monitor and First Capital from enforcing their rights under Deed of Trust Note and Modification and to foreclose the Deed of Trust on the lands described therein.⁶ That is not true, and the record before the Court and applicable law supports a finding that the subject obligation is not time barred by any applicable statute of limitations.

I.C. §5-214A provides a general five year statute of limitations applicable to the foreclosure of a mortgage:

5-214A. Action to foreclose mortgage on real property. An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness.

I.C. §45-1515 adopts the same statute of limitations for the foreclosure of a deeds of trust:

45-1515. Time limits for foreclosure. The foreclosure of a trust deed by advertisement and sale shall be made and the foreclosure of a trust deed by judicial procedure shall be commenced within the time limited by the same period and according to the same provisions including extensions as provided by law for the foreclosure of a mortgage on real property.

Wildlife Ridge urges this Court to find that the applicable five year statute of limitations began from the maturity date stated in the Deed of Trust Note, to wit: June 26, 2006. But, the above noted statutes cannot be read in a vacuum. They must also be read in conjunction with I.C. §5-238 which

⁶Most of the lots encumbered by the Deed of Trust have been sold by Wildlife Ridge pursuant to two stipulations and this Court's April 28, 2017 Order approving the stipulations. The parties' stipulation provided that Monitor and First Capital's lien on the land would attach to the net sale proceeds from the partial sales of that land. Net sale proceeds on the sale of several lots are now being held in trust by Pioneer Title Company of Bannock County.

provides:

5-238. Acknowledgment or new promise — Effect on operation of statute — Effect of partial payment. No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; *but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.* (Emphasis added)

On November 8, 2012, Monitor and First Capital received a payment on the Deed of Trust Note in the amount of \$38,472.24 and applied that payment to the principal due on the obligation. This payment represented the net sale proceeds derived from the sale of Lot 2, Block 3, Division 2 of the Wildlife Ridge Estates Subdivision, property that had been encumbered by the Deed of Trust.⁷

In *Horkley v Horkley*, 144 Idaho 879, 173 P.3d 1138 (Idaho 2007), the Idaho Supreme Court ruled that such a payment as that received by Monitor and First Capital on November 8, 2012, served to “restart the statute of limitations on all installments of the Note.” 173 P3d 1140.

This partial payment restarted the applicable five year statute of limitations, extending the maturity date of the obligations secured by the Deed of Trust, and the right to foreclose that Deed of Trust, to November 8, 2017.

The partial payment of \$38,472.24 received and applied to the obligation owed to Monitor and First Capital on November 8, 2012, was made *after* Wildlife Ridge had acquired the subject property from M & S Development on June 13, 2006.⁸ This partial payment was made to Monitor and First Capital with Wildlife Ridge’s full knowledge and consent.

As provided by I.C. §5-214A, this partial payment to the Plaintiffs constituted a ‘new promise in writing, duly signed, to pay the residue’ of the obligation and extended the statute of

⁷See, Supplemental Affidavit in Support of Plaintiffs’ Foreclosure Decree dated May 3, 2017, and page 3 of its exhibit.

⁸See, paragraph 9 of Wildlife Ridge’s Complaint filed in the First Quiet Title Action.
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Reply Memorandum in Support of Summary Judgment Motion
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limitations for an additional five years under I.C. §§ 5-214A, 5-216 and 45-1515 and permits Monitor and First Capital's present action to foreclose its Deed of Trust. This action was filed on October 7, 2016, well within five (5) years from the maturity date of the obligation created by the November 8, 2012 payment and new promise to pay Monitor and First Capital's obligation.

CONCLUSION

Wildlife Ridge's Motion for Reconsideration should be denied because Wildlife Ridge could have raised alternative claims for relief other than its request that the court 'quiet title' in the First Quiet Title Action. Wildlife Ridge could have sought a declaration from that court that Monitor and First Capital's right to collect on their obligation secured by the Deed of Trust were barred by the applicable statute of limitations, or laches, or fraud, or any other legal theory or claim for relief besides its actual request for a decree quieting title. Wildlife Ridge did not seek remedies under any alternative claims for relief, and it is now prohibited from asserting any alternative claims for relief in this proceeding under the doctrine of *res judicata*.

The amount of Monitor and First Capital's debt owed by Millward and M & S Development was not actually litigated in the First Quiet Title Action. Raising a defense to Wildlife Ridge's claim that the debt had been fully satisfied is not the equivalent of *making a claim* for the payment of that obligation. Further, Monitor and First Capital were prevented from making such a claim because their debtors, Millward and M & S Development, were not parties to the First Quiet Title Action and the bankruptcy stay prohibited Monitor and First Capital from using the process of that court to bring them into the First Quiet Title Action. Because of the bankruptcy stay, Monitor and First Capital were not compelled by Idaho Rule of Civil Procedure 13(a) to bring a counterclaim against Millward and M & S Development to prosecute its 'claim' that the obligation was unpaid, in default and the Deed of Trust was ripe for foreclosure.

Lastly, Wildlife Ridge's claim that the obligation owed to Monitor and First Capital are time barred by the applicable statute of limitations, and their right to foreclose their Deed of Trust has lapsed, is simply wrong and without any supporting facts or applicable law. The undisputed fact is that the November 8, 2012, partial payment on the Deed of Trust Note, by operation of law, restarted the applicable five year statute of limitations, thereby extending the maturity date of the obligation to November 8, 2017. This foreclosure action was commenced timely.

Monitor and First Capital respectfully request the Court to deny Wildlife Ridge's Motion for Reconsideration, and to grant Monitor and First Capital's motion for summary judgment and issue its Decree of Foreclosure and Order of Sale.⁹

DATED This 8 day of May, 2017.

COOPER & LARSEN, CHTD.
Attorneys for Monitor Finance, L.C.
and First Capital Funding, L.C.

By



Ron Kerl

⁹Most of the lots still encumbered by the Deed of Trust have been sold by Wildlife Ridge pursuant to two stipulations and this Court's April 28, 2017 Order approving the stipulations. As part of its requested relief, Monitor and First Capital ask that the Court to include in its Decree an order directing Pioneer Title of Bannock County to surrender the funds it holds in trust to the Plaintiffs, in care of their counsel, Ron Kerl.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 8 day of May, 2017, I served a true and correct copy of the foregoing document as follows:


A. Bruce Larson
Hearn Law, PLLP
P.O. Box 70
Pocatello, ID 83204

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: bruce@hwlawpro.com

Chamber Copy:
Hon. Robert C. Naftz
624 E. Center
Pocatello, ID 83201

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-547-2147
 Email to:
nicoled@bannockcounty.us

COOPER & LARSEN, CHTD

By: 

Ron Kerl, of the firm

2017 JUN 16 AM 8:20

KP

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendants.

Case No. CV-2016-3588-OC

**MEMORANDUM DECISION
AND ORDER**

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company,

Counterclaimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Counterdefendants,

NATURE OF THE ACTION

This case was initiated by a Complaint to Judicially Foreclose Deed of Trust filed by the Plaintiffs/Counterdefendants Monitor Finance, L.C. ("Monitor") and First Capital Funding, L.C.

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("First Capital").¹ Defendant/Counterclaimant Wildlife Ridge Estates, LLC², filed an Answer and also brought a counterclaim against Monitor and First Capital for fraud and declaratory and injunctive relief.

On January 6, 2017, the Plaintiffs submitted a Motion for Partial Summary Judgment seeking dismissal of the affirmative defenses raised by Wildlife Ridge in its Answer, as well as dismissal of the Counterclaim. The Plaintiffs' Motion for Partial Summary Judgment was granted, and all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud were stricken and dismissed. (Mem. Decision and Order, March 27, 2017, 13.)

On April 13, 2017, the Plaintiffs filed the pending Motion for Summary Judgment, along with a brief and affidavits. Defendant Wildlife Ridge opposed the Motion for Summary Judgment by submitting a Motion for Reconsideration, seeking reversal of this Court's prior entry of summary judgment granting the Plaintiffs' request to strike the Defendant's affirmative defenses and Counterclaim. The Defendant's brief addressed both the Motion for Reconsideration and opposed the Plaintiffs' Motion for Summary Judgment. The Defendant did not submit any affidavits or other evidence.

Oral arguments regarding both motions were heard on May 15, 2017. Having reviewed the entire file and the relevant law, and after consideration of the arguments made by the parties, this Court now issues this Memorandum Decision and Order.

¹ Collectively referred to herein as "the Plaintiffs".

² Referred to herein as "Wildlife Ridge" or "the Defendant".

STATEMENT OF FACTS

Wildlife Ridge is the owner in fee simple of certain real property described in the Deed of Trust attached as Exhibit A to the Plaintiffs' Complaint to Judicially Foreclose Deed of Trust. On December 3, 2014, Wildlife Ridge filed a Complaint seeking to quiet title in that property against the same plaintiffs in this case, Monitor Finance and First Capital ("the First Action").³ (See Exs. A and B, attached to Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor and First Capital ("Kerl Aff."), Jan. 6, 2017.) That Complaint was amended on March 12, 2015. (Exs. A and C, attached to Kerl Aff.) By its Complaint and Amended Complaint, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from the district court that the sums due under the Deed of Trust Note and the Modification of Trust Deed Note ("the Modification") secured by the Monitor and First Capital Deed of Trust had been satisfied. (Exs. B and C, attached to Kerl Aff.) On June 14, 2016, pursuant to a stipulation by the parties, a Judgment dismissing the First Action with prejudice was entered. (Ex. E, attached to Kerl Aff.) The dismissal of the First Action was followed by the Plaintiffs' present lawsuit to judicially foreclose the Deed of Trust.

As explained, this Court previously granted the Plaintiffs' Motion for Partial Summary Judgment. In seeking partial summary judgment, the Plaintiffs argued that all of the defenses and claims raised by Wildlife Ridge in response to the current lawsuit were barred by the

³ Based on stipulation of the parties at oral arguments, this Court takes judicial notice of the filings and outcome of the First Action.

doctrine of *res judicata* based on the dismissal of the First Action. In granting that motion, this Court determined that the First Action ended in a final judgment on the merits and that the present case involves the same parties as the First Action. (Mem. Decision and Order, March 27, 2017, 13.) This Court further determined that because all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Action, the affirmative defenses and counterclaim raised by the Defendant were barred by *res judicata*. (*Id.*) Therefore, all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud were stricken and dismissed. (*Id.*) A Judgment to that effect was entered on March 27, 2017. Then, on March 30, 2017, Default was entered against Defendant M & S Development, LLC ("M&S"), for failure to appear or answer the Plaintiffs' Complaint. Subsequently, Defendant Pioneer Title Company of Bannock County filed a waiver of its right to respond further to the Plaintiffs' Amended Complaint and consented to the entry of a Judgment and Decree of Foreclosure as sought by Monitor and First Capital pursuant to the Amended Complaint.

The Plaintiffs then filed the pending Motion for Summary Judgment. By that motion, the Plaintiffs are seeking a Judgment and Decree of Foreclosure against Defendant Wildlife Ridge on the basis of this Court's prior Memorandum Decision and Order dismissing Wildlife Ridge's affirmative defenses and counterclaim against the Plaintiffs, as well as the fact that Defendant Pioneer Title Company waived its right to respond and consented to the entry of a Judgment and Decree of Foreclosure.

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ISSUES

1. Whether to grant the Defendant's Motion for Reconsideration.
2. Whether to grant the Plaintiffs' Motion for Summary Judgment.

DISCUSSION

It is necessary for this Court to first address the Defendant's Motion for Reconsideration, as resolution of that motion necessarily resolves the question of summary judgment.

Motion for Reconsideration

a. Standard of Review

Rule 11.2(b)(1)⁴ of the Idaho Rules of Civil Procedure ("IRCP") governs motions for reconsideration. Under that rule, "[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."

In explaining motions for reconsideration, the Idaho Supreme Court has stated: "A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order." *Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012). "[T]he most important consideration is the correctness of the interlocutory order." *Id.* Thus, "[a]fter a final judgment, a party has one more chance under [Rule 11.2(b)(1)] to ask the court to decide the law and facts correctly." *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 913, 332 P.3d 815, 825 (2014). That rule "allows

⁴ Prior to 2016, this rule was labeled as Idaho Rule of Civil Procedure 11(a)(2)(B).

the trial court to reconsider facts in light of any new or additional facts that are submitted in support of the motion. This ensures the district court decides a case on the proper law and facts.” *Id.* (internal citation omitted.) Therefore, the district court should consider any new facts and new evidence presented by the moving party bearing on the correctness of the interlocutory order. *Coeur d’Alene Mining Co. v. First Nat’l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990); *Kepler-Fleenor v. Fremont Cty.*, 152 Idaho 207, 210, 268 P.3d 1159, 1162 (2012). “The burden is on the moving party to bring the trial court’s attention to the new facts.” *Coeur d’Alene Mining Co.*, 118 Idaho at 823, 800 P.2d at 1037. A trial court is not required “to search the record to determine if there is any new information that might change the specification of facts deemed to be established.” *Id.* However, while Rule 11.2(b)(1) “permits a party to present new evidence when a motion is brought under that rule, [the rule] does not require that the motion be accompanied by new evidence.” *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Idaho Ct.App. 2006). Thus, this Court is not precluded from reconsidering an interlocutory decision on the grounds of the initial evidence. *Id.* at 473, 147 P.3d at 105.

“When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). This Court is being asked to reconsider the granting of a partial motion for summary judgment. Therefore, this Court “must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.” *Id.*

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b. Analysis

As explained, this Court previously dismissed the Defendant's affirmative defenses and counterclaim on the basis of *res judicata*. This Court specifically determined that the First Action between the parties ended in a final judgment on the merits, that case involved the same parties as the First Action, and all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Action. (Mem. Decision and Order at 13.) Because "the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made *or which might have been made*", this Court ruled that "[n]o matter the theory advanced by the Defendant in its original quiet title action, the dismissal of the First Action serves as a dismissal with prejudice of every matter that was available in the First Action to challenge the enforceability of the Deed of Trust Note, the Modification, and the Deed of Trust in this case." (*Id.* at 12.) This Court further determined that all of the affirmative defenses and the counterclaim raised by Wildlife Ridge challenged "the enforceability of the same Monitor and First Capital Deed of Trust Note, Modification and Deed of Trust at issue in the First Action; therefore, those claims should have been litigated in the First Action." (*Id.* at 13.) This Court found that the Defendant had "not demonstrated that it was in any way prevented from presenting in the First Action any of the claims it has now raised." (*Id.*) As such, this Court found there were no questions of fact regarding the Defendant's defenses or counterclaim, and the defenses and counterclaim were necessarily stricken and dismissed. (*Id.*)

Through the Motion for Reconsideration, the Defendant specifically challenges the dismissal of the statute of limitations defense, arguing that defense was not available in the First Action and therefore should not have been barred by this Court under the theory of *res judicata*. (Mem. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Def.'s Mot. for Reconsideration ("Mem. in Opp'n"), May 1, 2017, 2.) Wildlife Ridge, the Defendant in this action, was the Plaintiff in the First Action to quiet title filed against Monitor and First Capital, now the Plaintiffs in the present case. The Defendant argues that during the time of the First Action, Wildlife Ridge had no standing to quiet title *and* raise a claim that the statute of limitations prohibited Monitor and First Capital from enforcing the debt secured by, and foreclosing, the Deed of Trust. (*See id.* at 2-3.) In support of that argument, the Defendant cited to Idaho Code § 5-214A, which provides a five-year statute of limitations for the commencement of an action for the foreclosure of a mortgage. The Defendant also cited to one sentence from a 1952 Idaho Supreme Court case pertaining to that statute of limitations. Quoting from *Trusty v. Ray*, 73 Idaho 232, 249 P.2d 814 (1952), the Defendant argued: "In Idaho, a 'mortgagor or his successor in interest cannot quiet title against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run against the right to foreclose the mortgage.'" (*Id.* at 2.)

The Plaintiffs dispute the Defendant's analysis of *Trusty* as being too broad. The Plaintiffs agree that the Idaho Supreme Court in the *Trusty* case concluded that the "mortgagor or his successor in interest *cannot quiet title* against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run against the right to foreclose the mortgage."

(Mem. Opposing Mot. for Reconsideration and Reply Mem. in Supp. of Summ. J. Mot. ("Mem.

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Opposing Mot. for Reconsideration”), May 8, 2017, 4.) However, the Plaintiffs argue that “simple statement” did not prohibit Wildlife Ridge “from bringing all available claims for relief *other than one for quieting title to the property*” in the First Action. (*Id.*) Thus, the Plaintiffs argue that even if quiet title was not available to Wildlife Ridge in the First Action, there is nothing about the *Trusty* case that prevented the Defendant from pursuing other, still available avenues of relief, such as seeking a permanent injunction stopping any enforcement of the deed of trust by foreclosure. The Plaintiffs point out, for example, that the Defendant raised different forms for relief other than quiet title in responding to this action. (*See id.*) The Plaintiffs argue that because Wildlife Ridge did not pursue those other avenues of relief in the First Action, the Defendant is barred under the theory of *res judicata* from “now rais[ing] additional claims for relief which could have been raised in the First Quiet Title Action.” (*Id.*) Therefore, the Plaintiffs maintain that this Court was correct in its decision granting partial summary judgment because “[r]es judicata’s subparts, issue and claim preclusion, ... cover not only the theory of recover[y] advanced in the first action (here, ‘Quiet Title’) but any theory of recovery at law or inequity [sic] which could have been raised in the first action.” (*Id.*)

Under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. “[R]es judicata is an umbrella term for different but related concepts: claim preclusion and issue preclusion.” Steve Wieland, *Don't Let the Tab Decide Your Next*

Infringement Dispute, 59 ADVOCATE 38 (2016); *see also*, *Taylor v. Sturgell*, 553 U.S. 880, 892,

128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008). “Separate tests are used to determine whether

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claim preclusion or issue preclusion applies.” *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007)(internal citation omitted).

Pursuant to the doctrine of claim preclusion, a final judgment bars a party from re-litigating that same claim, regardless of whether the subsequent litigation involves new or different issues. *Sturgell*, 553 U.S. at 892, 128 S. Ct. at 2171. The Idaho Supreme Court further explained claim preclusion as follows:

Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action.

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (citations omitted, emphasis added). Thus, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. *Elliot v. Darwin Neibaur Farms*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). As such, “in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim *but also as to every matter which might and should have been litigated in the first suit.*” *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436–37, 849 P.2d 107, 109–10 (1993)(emphasis added); *see also Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553,

208 P. 241, 242-43 (1922). Similarly, “[i]ssue preclusion ... bars ‘successive litigation of an

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issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Sturgell*, 553 U.S. at 892, 128 S. Ct. at 2171 (internal citation omitted). Thus, when a court finally determines an issue in one case that is essential to that judgment, a litigant is barred from raising the issue again in another lawsuit.

Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805 (quoting *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct.App.1983)).

Stanion, 144 Idaho at 123, 157 P.3d at 617; *see also*, *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008).

Whether claim preclusion or issue preclusion bars relitigation between the same parties of a prior litigation is a question of law upon which this Court exercises free review. *Lohman v. Flynn*, 139 Idaho 312, 319, 78 P.3d 379, 386 (2003). *Res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence. *Foster v. City of St. Anthony*, 122 Idaho 883, 890, 841 P.2d 413, 420 (1992).

Id. at 122, 157 P.3d at 616.

In its decision granting partial summary judgment, this Court determined that the doctrine of *res judicata* applied to not only the theory of recovery advanced by Wildlife Ridge in the First Action, but to any theory of recovery at law or equity which *could have* been raised in that First Action. Thus, Wildlife Ridge should have asserted every legal rule and/or equitable remedy to establish that the Deed of Trust Note was unenforceable. The Defendant's new reliance on the

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Trusty case does not support the Defendant's argument that it was prohibited in the First Action from bringing all available claims for relief other than a claim for quieting title. Wildlife Ridge was not required to limit its requested relief to simply seeking a decree quieting title to the land. However, having selected that solitary claim for relief, the doctrine of *res judicata* prohibits Wildlife Ridge from now adding new or additional claims for relief that were available at the time of the First Action, which action was indisputably litigated to a final judgment. When the First Action was dismissed, Wildlife Ridge lost the ability to relitigate any other theories of recovery arising out of the same transaction or series of transactions which were actually made or which might have been made in the First Action. Unfortunately, Wildlife Ridge limited itself by seeking a relief that was too narrow, and this Court can find no error of fact or law in its previous decision to that effect.

The Defendant additionally argued reconsideration should be granted because the Plaintiffs are simply barred from "the commencement of a foreclosure action in this matter" because "[a]n action for the foreclosure of a mortgage on a real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage." (Mem. in Opp'n at 3.) Citing to the Trust Deed Note attached to the Plaintiffs' Complaint, the Defendant argued:

The Deed of Trust being foreclosed is subject to the mandatory maturity date contained in the Trust Deed Note. The note specifically states that **"2. The term of this Trust Deed Note shall be one hundred eighty (180) days. This Trust Deed Note shall fully mature on June 28, 2006 (the 'Maturity Date')."**

(*Id.* at 3.) The Defendant argues there was no stay on the statute of limitations, and the five-year timeframe for commencing an action for the foreclosure of the subject mortgage has expired based on the maturity date of June 28, 2006. Therefore, the Defendant claims the Plaintiffs are now time-barred from enforcing their rights under the Deed of Trust Note and Modification.

(*See Mem. in Opp'n* at 3.) The Plaintiffs dispute that contention, arguing that “the record before the Court and applicable law supports a finding that the subject obligation is not time barred by any applicable statute of limitations.” (*Mem. Opposing Mot. for Reconsideration* at 9.)

As mentioned earlier, Idaho Code § 5-214A provides a five-year statute of limitations for the commencement of an action for the foreclosure of a mortgage. That statute states:

An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness.

IDAHO CODE ANN. § 5-214A (West). Idaho Code § 45-1515 adopts the same five-year statute of limitations for the foreclosure of deeds of trust. That statute states:

The foreclosure of a trust deed by advertisement and sale shall be made and the foreclosure of a trust deed by judicial procedure shall be commenced within the time limited by the same period and according to the same provisions including extensions as provided by law for the foreclosure of a mortgage on real property.

IDAHO CODE ANN. § 45-1515 (West). The Defendant points to the maturity date stated in the Deed of Trust Note, which is June 28, 2006. (*See Ex. A, Trust Deed Note, attached to Compl. to Judicially Foreclose Deed of Trust, Oct. 7, 2016.*) That date is not in dispute, and the Complaint to foreclose the Deed of Trust was not filed until 2016. However, the Plaintiffs argue the statute

of limitations was restarted by a partial payment made on November 8, 2012, “extending the maturity date of the obligations secured by the Deed of Trust, and the right to foreclose that Deed of Trust, to November 8, 2017.” (Mem. Opposing Mot. for Reconsideration at 10.)

In support of the extension argument, the Plaintiffs direct this Court to Idaho Code § 5-238, which pertains to the effect of partial payments. That statute provides:

No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; ***but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.***

IDAHO CODE ANN. § 5-238 (West)(emphasis added). The Idaho Supreme Court has found that payments of interest or principal serve to restart the statute of limitations on all installments on the note pursuant to IC § 5-238. *Horkley v. Horkley*, 144 Idaho 879, 881, 173 P.3d 1138, 1140 (2007). There is no dispute in this case that on November 8, 2012, the Plaintiffs “received a payment on the Deed of Trust Note in the amount of \$38,472.24 and applied that payment to the principal due on the obligation.” (Mem. Opposing Mot. for Reconsideration at 10; *see also*, Supplemental Aff. in Supp. of Pls.’ Foreclosure Decree, May 8, 2017, ¶ 3.) As such, the partial payment made on the Deed of Trust in this case on November 8, 2012, restarted the five-year statute of limitations, extending the maturity date of the obligations secured by the Deed of Trust, including the right to foreclose that Deed of Trust, to November 8, 2017. The Complaint to Judicially Foreclose the Deed of Trust was filed on October 7, 2016, within the five-year limit. Furthermore, there is no dispute that the partial payment extending the maturity date was made after Wildlife Ridge had acquired the subject property and was therefore made with the

Memorandum Decision and Order

Case No. CV-2016-3588-OC

Re: Defendant’s Motion for Reconsideration/Plaintiffs’ Motion for Summary Judgment

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Defendant's full knowledge and consent. Thus, under the provisions of IC § 5-238, the partial payment to the Plaintiffs constituted "a new promise in writing", extending the statute of limitations found in IC §§ 5-214A and 45-1515 for an additional five years. As such, the Plaintiffs' action to foreclose the Deed of Trust, filed on October 7, 2016, was timely filed, and the Plaintiffs are not barred by the statute of limitations from commencing this action. Therefore, the Defendant's statute of limitation argument does not provide a valid basis for this Court to reconsider its prior decision granting partial summary judgment in favor of the Plaintiffs.

Motion for Summary Judgment

The Plaintiffs have moved for summary judgment seeking a Judgment and Decree of Foreclosure against Wildlife Ridge. As set forth above, the Plaintiffs' request is supported by this Court's previous entry of partial summary judgment and the subsequent Default entered against Defendant M & S Development, LLC, for failure to appear or answer the Plaintiffs' Complaint. Defendant Pioneer Title Company of Bannock County has also consented to the entry of a Judgment and Decree of Foreclosure as sought by Monitor and First Capital pursuant to the Amended Complaint. Based on that procedural history, the Plaintiffs argue this Court need now only make a determination that there remains an unpaid debt secured by the Deed of Trust, and make a further finding as to the description and reasonable value of the property still encumbered by that Deed of Trust. (Mem. in Supp. of Summ. J. Mot., April 13, 2017, 4.)

a. Standard of Review

Summary judgment shall be rendered “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” IDAHO R. CIV. P. 56(c)(2016). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

If the moving party challenges an element of the non-moving party’s case on the basis that no genuine issue of material fact exists, the burden now shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Tingley*, 125 Idaho at 90, 867 P.2d at 964. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party’s case upon which that party bears the burden of proof at trial. *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The party opposing the summary judgment motion “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must *set*

forth specific facts showing that there is a genuine issue for trial.” IDAHO R. CIV. P. 56(e)(2016) (emphasis added).

b. Analysis

In opposing the Motion for Summary Judgment, the Defendant argued the amount of the debt cannot be relitigated because the amount of the debt was already raised and litigated in the First Action. (Mem. in Supp. of Mot. for Reconsideration at 4.) The Defendant stated: “[T]he amount of the debt was raised and litigated in the first quiet title action the result was a joint stipulation dismissing the action.” (*Id.*) Relying on the doctrine of *res judicata*, the Defendant contends that the issue of whether a debt was owed was already litigated in the First Action, and based on the joint stipulation entered there, the Plaintiffs are now barred from relitigating the debt owed.⁵

This Court has already extensively set forth the law regarding *res judicata* in the proceeding sections, as well as in its prior Memorandum Decision and Order. There is no need to repeat that discussion in great depth here. It is sufficient to note that under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. A judgment, “once rendered, is treated as the full measure of relief to be accorded between the same parties on the same ‘claim’ or ‘cause of action.’” *Aldape*, 105 Idaho at 256, 668 P.2d at 132(quoting *Kaspar Wire Works, Inc.*, 575 F.2d at 535–36).

⁵ Outside of the Motion for Reconsideration, the Defendant did not raise any factual issues challenging summary judgment, and the Defendant did not submit any affidavits or other evidence to challenge summary judgment.

Monitor and First Capital were defendants in the First Action. One defense raised by Monitor and First Capital was the denial that the obligation owed by Michael Millward and M&S Development had been satisfied. Mr. Millward and M&S were the makers of the Deed of Trust Notes. However, Monitor and First Capital did not pursue any claims for relief in the First Action because they were prohibited from doing so under applicable bankruptcy laws. As makers of the Deed of Trust Notes, as modified, Mr. Millward and M&S were necessary parties to any claim to foreclose the Deed of Trust and enforce the Deed of Trust Note and Modification. See IDAHO R. CIV. P. 20(a)(2)(2016).⁶ However, at the time of the First Action, Mr. Millward had already filed for bankruptcy. Pursuant to Title 11, Section 362 of the United States Code⁷, an automatic stay commenced on September 10, 2012. The Plaintiffs submit they were

⁶ **Rule 20. Permissive joinder of parties**

(a) Persons Who May Join or be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* Persons may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

⁷ (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

....

11 U.S.C.A. § 362 (West).

Memorandum Decision and Order

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Re: Defendant's Motion for Reconsideration/Plaintiffs' Motion for Summary Judgment

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prohibited by that bankruptcy stay from taking any action to enforce the Trust Deed Note, as amended, and foreclose the Deed of Trust securing that Trust Deed Note. According to the Plaintiffs, the automatic stay existed until the bankruptcy case was closed on June 23, 2016. Thus, the pending Chapter 7 bankruptcy prevented Monitor and First Capital from asserting any foreclosure claims against Defendants Millward, M&S Development, and Wildlife Ridge in the First Action, and the amount of Monitor and First Capital's debt still owed was therefore never actually litigated. In responding to the Motion for Summary Judgment, the Defendant offered no evidence to dispute the fact that Monitor and First Capital could not have actually litigated a claim for foreclosure in the First Action because they were prohibited from pursuing such a claim against the makers of the Note based on the bankruptcy stay. As *res judicata* is only a bar to the relitigation of claims that have already been decided, and the Plaintiffs made no "claim" for foreclosure in the First Action, *res judicata* cannot now prevent the Plaintiffs from pursuing litigation regarding the amount of debt still owed.

Furthermore, notwithstanding the proceeding discussion regarding *res judicata*, no factual issues have been raised by the Defendant in challenging summary judgment. Under the governing standards, the party opposing the motion for summary judgment must produce "evidence by way of affidavit or deposition ... to contradict the assertions of the moving party." *Ambrose By & Through Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Idaho Ct. App. 1994)(internal citations omitted). Such evidence must be anchored in something more than mere speculation. *See id.* A non-moving party's failure to make a

showing sufficient to establish the existence of an element essential to that party's case, on which

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Re: Defendant's Motion for Reconsideration/Plaintiffs' Motion for Summary Judgment

that party will bear the burden of proof at trial, requires the entry of summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 295 (1986). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 322–23, 106 S. Ct. at 2552. Thus, where the non-moving party has failed to make a showing of proof on any element for which it bears the burden at trial, summary judgment must be granted. *Id.* at 323, 106 S.Ct. at 2552-53; see also, *Sparks v. St. Luke's Reg'l Med. Ctr., Ltd.*, 115 Idaho 505, 509, 768 P.2d 768, 772 (1988). The Defendant here has failed to present any affidavits or evidence to challenge summary judgment or to support any defense to the foreclosure relief sought by the Plaintiffs. On the other hand, the Plaintiffs have submitted affidavits in support of summary judgment. Therefore, based on the governing standards, the Plaintiffs’ Motion for Summary Judgment must necessarily be granted.

CONCLUSION

The Plaintiffs’ Motion for Summary Judgment is hereby GRANTED. This Court further finds there remains an unpaid debt secured by the Deed of Trust. Pursuant to the affidavit filed in support of the Plaintiffs’ motion, “[a]s of the 1st day of April, 2017, there will be due, owing and unpaid upon the Trust Deed Note, as modified, the sum of \$6,814,076.41, together with interest thereafter accruing at the default rate of 35% per annum until date of Judgment herein, together with costs, foreclosure expenses, attorney’s fees and expenses necessary to preserve

Plaintiffs’ interest in the property heretofore advanced or hereafter accruing.” (Aff. in Supp. of
Memorandum Decision and Order 20
Case No. CV-2016-3588-OC
Re: Defendant’s Motion for Reconsideration/Plaintiffs’ Motion for Summary Judgment

Pls.' Foreclosure Decree at 6:6.) Based on that undisputed affidavit, this Court finds there remains an unpaid debt secured by the Deed of Trust and owing to the Plaintiffs in the amount of \$6,814,076.41.

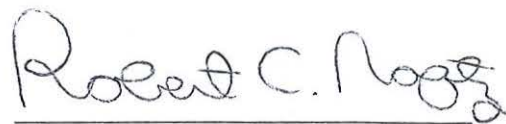
Counsel for the Plaintiffs shall submit a proposed Judgment and Decree of Foreclosure detailing the amount remaining on the unpaid debt and the description and reasonable value of the property still encumbered by that Deed of Trust for this Court's consideration and signature.

Counsel for the Plaintiffs may also submit an appropriate memorandum detailing the grounds for any claimed award of litigation costs and attorney fees. However, any decision regarding costs and fees will be made in a separate order after this Court is provided an opportunity to review such a request in detail.

Based on the preceding discussion and this Court's findings, no claims remain. As such, this case is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 13 day of June 2017.



ROBERT C. NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of June, 2017, I served a true and correct copy of the foregoing document upon each of the following in the manner indicated.

Ron Kerl
Cooper & Larsen
PO Box 4229
Pocatello, ID 83205-4229

E-Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

A. Bruce Larsen
155 S. 2nd Ave.
Pocatello, ID 83201

E-Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

ROBERT POLEKI, Clerk

By: Keri Povey
KERI POVEY
Deputy Clerk

Ron Kerl, Esq. - ISB #1768
 COOPER & LARSEN, CHARTERED
 151 North Third Avenue, Second Floor
 P.O. Box 4229
 Pocatello, ID 83205-4229
 Telephone: (208) 235-1145
 Facsimile: (208) 235-1182
 Email: ron@cooper-larsen.com

2017 JUN 20 PM 3:06
 BY: [Signature]
 DEPUTY CLERK

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
 company; and FIRST CAPITAL FUNDING, L.C., a
 Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an
 Idaho limited liability company;
 M&S DEVELOPMENT, LLC, an
 Idaho limited liability company; and
 PIONEER TITLE COMPANY OF
 BANNOCK COUNTY, INC.,

Defendants.

CASE NO. CV-2016-3588-OC

**JUDGMENT, DECREE OF
 FORECLOSURE AND ORDER
 OF SALE**

WILDLIFE RIDGE ESTATES, LLC, an Idaho
 limited liability company,

Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability
 company; and FIRST CAPITAL FUNDING, L.C., a
 Utah limited liability company,

Counter-defendant,

This matter having come on regularly before the Court, the Honorable Robert C. Naftz presiding, and finding good cause therefore;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Pursuant to the parties stipulation and this Court's Stipulated Order Approving Stipulations Consenting to the Sale of Real Property dated April 28, 2017, Pioneer Title Company is hereby ordered to turn over to Monitor Finance, L.C. and First Capital Funding, L.C., in care of their attorney of record, Ron Kerl of the firm of Cooper & Larsen, Chtd., 151 N. 3rd Ave., Second Floor, Pocatello, Idaho, the net proceeds from the sale of the below described property, totaling \$256,761.67. Said funds are currently deposited in the trust account of Pioneer Title Company. The net proceeds from the sale of the following property:

Lot 2, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 - \$44,195.82
Lot 5, Block 3 WILDLIFE RIDGE ESTATES DIVISION 2 - \$44,928.14
Lot 7 & Lot 9, Block 3 WILDLIFE RIDGE ESTATES DIVISION 2 - \$86,749.80
Lot 4, Block 3, WILDLIFE RIDGE ESTATES DIVISION 2 - \$45,433.92
Lot 6, Block 3, WILDLIFE RIDGE ESTATES DIVISION 1 - \$35,453.99

2. The Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005 ("Deed of Trust"), executed and delivered by M&S Development LLC, to Monitor Finance, L.C. and First Capital Funding, L.C., recorded on the 30th day of December, 2005, under Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho, is a valid first lien on the below described real property securing an indebtedness of \$6,828,907.39, as of June 19, 2017, plus any additional attorney fees and costs awarded by the Court pursuant to I.R.C.P. Rule 54, and costs related to the enforcement of this Decree by Sheriff's Foreclosure Sale, plus legal interest on the entire sum of the aforesaid indebtedness from the date of this Decree to and including the date of Sheriff's sale at the highest rate allowed by law;

Judgement and Decree of Foreclosure and Order of Sale - pg. 2

The real property encumbered by the Deed of Trust is situated in the County of Bannock, State of Idaho, is more particularly described as follows:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2; and
Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1

3. The Deed of Trust described in paragraph 2 is foreclosed, and all interests which the Defendants Wildlife Ridge Estates, LLC, Michael J. Millward, M&S Development LLC, and Pioneer Title Company have in the above described real property, and any fixtures on the property, shall be sold by the Sheriff of Bannock County, Idaho, in the manner provided by law, payable in cash lawful money of the United States of America and in accordance with the practice of this Court.

The reasonable value of said property as of the date of this Decree is as follows:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 - \$50,000.00
Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1 - \$50,000

4. The proceeds of sale shall be applied as follows: First, to the costs of sale; second, towards the satisfaction of the indebtedness owing to Monitor Finance, L.C. and First Capital Funding, L.C. as set forth in paragraph 2 above; and third, any surplus thereafter remaining shall be paid into the District Court for further determination regarding priority among those parties to this litigation whose rights are subordinate to Monitor Finance, L.C. and First Capital Funding, L.C..

5. The Defendants Wildlife Ridge Estates, LLC, Michael J. Millward, M&S Development LLC, and Pioneer Title Company, and all persons claiming through or under them as purchasers, encumbrancers, or otherwise and all persons claiming to have acquired any equity or interest in said premises are foreclosed of all interests, liens, or claims in the real property herein above described, and every portion thereof, save and except such statutory rights of redemption as said parties or any of them may have.

6. The Plaintiff, with either a cash bid or a credit bid against the sum herein found to be due it, or any party to this suit may become the purchaser at the sale of said property, and the purchaser thereof shall be entitled to all of the rights and privileges of such a purchaser under the laws of the State of Idaho.

DATED This 30 day of June, 2017.



Hon. Robert C. Naftz
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 20 day of June, 2017, I served a true and correct copy of

the foregoing document as follows:

A. Bruce Larson
Hearn Law, PLLP
~~P.O. Box 70~~ 1655 2nd Ave
Pocatello, ID 83201

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile - 208-932-1083
- Email to: bruce@hwlawpro.com

Ron Kerl
Cooper & Larsen, Chtd.
P.O. Box 4229
Pocatello, ID 83205

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile - 208-932-1083
- Email to: ron@cooper-larsen.com

CLERK OF THE DISTRICT COURT

By: Kent Porey
Deputy

RECEIVED
JUN 26 2017

No. 21708981
Recorded at Request of:
Cooper & Larsen
Date: 6-26-17 Time: 2:36 pm
Official Record Book: 1016
Bannock County Recorder
Fee 22.00 Deputy KA

2017 JUN 20 PM 3:06
Time / Date

5-1

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an
Idaho limited liability company;
M&S DEVELOPMENT, LLC, an
Idaho limited liability company; and
PIONEER TITLE COMPANY OF
BANNOCK COUNTY, INC.,

Defendants.

CASE NO. CV-2016-3588-OC

**JUDGMENT, DECREE OF
FORECLOSURE AND ORDER
OF SALE**

WILDLIFE RIDGE ESTATES, LLC, an Idaho
limited liability company,

Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Counter-defendant,

COPY

5-2

21708981

This matter having come on regularly before the Court, the Honorable Robert C. Naftz presiding, and finding good cause therefore;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Pursuant to the parties stipulation and this Court's Stipulated Order Approving Stipulations Consenting to the Sale of Real Property dated April 28, 2017, Pioneer Title Company is hereby ordered to turn over to Monitor Finance, L.C. and First Capital Funding, L.C., in care of their attorney of record, Ron Kerl of the firm of Cooper & Larsen, Chtd., 151 N. 3rd Ave., Second Floor, Pocatello, Idaho, the net proceeds from the sale of the below described property, totaling \$256,761.67. Said funds are currently deposited in the trust account of Pioneer Title Company. The net proceeds from the sale of the following property:

Lot 2, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 - \$44,195.82
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Lot 6, Block 3, WILDLIFE RIDGE ESTATES DIVISION 1 - \$35,453.99

2. The Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005 ("Deed of Trust"), executed and delivered by M&S Development LLC, to Monitor Finance, L.C. and First Capital Funding, L.C., recorded on the 30th day of December, 2005, under Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho, is a valid first lien on the below described real property securing an indebtedness of \$6,828,907.39, as of June 19, 2017, plus any additional attorney fees and costs awarded by the Court pursuant to I.R.C.P. Rule 54, and costs related to the enforcement of this Decree by Sheriff's Foreclosure Sale, plus legal interest on the entire sum of the aforesaid indebtedness from the date of this Decree to and including the date of Sheriff's sale at the highest rate allowed by law;

Judgement and Decree of Foreclosure and Order of Sale - pg. 2

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21708981

The real property encumbered by the Deed of Trust is situated in the County of Bannock, State of Idaho, is more particularly described as follows:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2; and
Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1

3. The Deed of Trust described in paragraph 2 is foreclosed, and all interests which the Defendants Wildlife Ridge Estates, LLC, Michael J. Millward, M&S Development LLC, and Pioneer Title Company have in the above described real property, and any fixtures on the property, shall be sold by the Sheriff of Bannock County, Idaho, in the manner provided by law, payable in cash lawful money of the United States of America and in accordance with the practice of this Court.

The reasonable value of said property as of the date of this Decree is as follows:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 - \$50,000.00
Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1 - \$50,000

4. The proceeds of sale shall be applied as follows: First, to the costs of sale; second, towards the satisfaction of the indebtedness owing to Monitor Finance, L.C. and First Capital Funding, L.C. as set forth in paragraph 2 above; and third, any surplus thereafter remaining shall be paid into the District Court for further determination regarding priority among those parties to this litigation whose rights are subordinate to Monitor Finance, L.C. and First Capital Funding, L.C..

5. The Defendants Wildlife Ridge Estates, LLC, Michael J. Millward, M&S Development LLC, and Pioneer Title Company, and all persons claiming through or under them as purchasers, encumbrancers, or otherwise and all persons claiming to have acquired any equity or interest in said premises are foreclosed of all interests, liens, or claims in the real property herein above described, and every portion thereof, save and except such statutory rights of redemption as said parties or any of them may have.

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6. The Plaintiff, with either a cash bid or a credit bid against the sum herein found to be due it, or any party to this suit may become the purchaser at the sale of said property, and the purchaser thereof shall be entitled to all of the rights and privileges of such a purchaser under the laws of the State of Idaho.

DATED This 20 day of June, 2017.

Robert C. Naftz

Hon. Robert C. Naftz
DISTRICT JUDGE

ss.
of Blainock

that the foregoing is a full, true and correct copy of an instrument as the same now on file of record in my office.

my hand and official seal hereto affixed
day of June, 20 17



CLERK OF THE DISTRICT COURT,
OFFICE OF THE CLERK AND RECORDER.

By Deputy *[Signature]*

5-5

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 20 day of June, 2017, I served a true and correct copy of

the foregoing document as follows:

A. Bruce Larson
 Hearn Law, PLLP
~~P.O. Box 70~~ 1555 2nd Ave
 Pocatello, ID 83201

- U.S. Mail, postage prepaid
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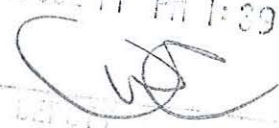
Ron Kerl
 Cooper & Larsen, Chtd.
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 Pocatello, ID 83205

- U.S. Mail, postage prepaid
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- Facsimile - 208-932-1083
- Email to: ron@cooper-larsen.com

CLERK OF THE DISTRICT COURT

By: Keri Finley
 Deputy

A. Bruce Larson (ISB#2093)
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CLERK OF DISTRICT COURT
 2017 JUL 11 PM 1:39
 BY: 

Attorney for Wildlife Ridge Estates, LLC

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
 company; and FIRST CAPITAL FUNDING, L.C., a
 Utah limited liability company,

Plaintiffs/Respondents,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
 liability company; Defendant/Appellant
 M&S DEVELOPMENT, LLC, an Idaho limited liability
 company, Defendant.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
 liability company;

Counter-claimant/Appellant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability
 company; and FIRST CAPITAL FUNDING, L.C., a
 Utah limited liability company,

Counter-defendants/Respondents,

CASE NO. CV-2016-3588-OC

NOTICE OF APPEAL

pd. \$129.00 L4

TO: THE ABOVE-NAMED RESPONDENTS, MONITOR FINANCE, L.C. a Utah limited liability company, FIRST CAPITAL FUNDING, L.C., a Utah limited liability company, THEIR COUNSEL OF RECORD, RON KERL OF THE FIRM COOPER & LARSEN, CHARTERED AND THE CLERK OF THE ABOVE-ENTITLED COURT;

NOTICE IS HEREBY GIVEN THAT:

1. Designation of Appeal: That the above-named Appellant, Wildlife Ridge Estates, an Idaho limited liability company, appeals against the above-named Respondents to the Idaho Supreme Court from the following appealable judgments and orders issued by the District Court in this matter pursuant to I.A.R. 11(a):

- a. Memorandum Decision and Order (3/27/2017);
- b. Memorandum, Decision & Order (6/13/2017);
- c. Judgment, Decree of Foreclosure and Order of Sale (6/20/2017).

2. Issues:

a. Whether the District Court erred in granting summary judgment to the Respondent, dismissing Appellant's Affirmative Defenses and Counterclaim and in issuing its subsequent orders referenced hereinabove;

b. The District Court erred in granting Respondents' Motion for Summary Judgment dismissing the Affirmative Defenses and Counterclaim of Appellant in that there are disputed material issues of fact and issues of law;

c. The District Court's determinations on the Respondents' Motions for Summary Judgment were not based upon a proper legal basis or supported by substantial undisputed evidence;

d. The District Court erred in determining that the Respondents' Trust Deed should be judicially foreclosed, in that there are legal issues and disputed materials issues of fact that would precluded the entry of summary judgment allowing the foreclosure; and,

e. Such other issues that may be identified subsequent to the filing of this Notice of Appeal.

3. Jurisdictional Statement: Under and pursuant to I.A.R. 11, Appellant has the right to appeal to the Idaho Supreme Court the aforementioned appealable orders under and pursuant to I.A.R. 11(a).

4. Transcript: There was no trial or recorded testimony and, therefore, Appellant does not request a reporter's transcript of any court proceedings.

5. Record: The documents to be included in the clerk's record in addition to those automatically included pursuant to I.A.R. 28 are:

a. Respondents' two Motions for Summary Judgment and Supporting Memoranda;

b. Respondents' Affidavits and affidavit exhibits filed in support of the motions for Summary Judgment;

c. Appellant's Memoranda in opposition to the motions for Summary Judgment;

d. Appellant's Motion to Reconsider and Memorandum in Opposition to Motion for Summary Judgment and in Support of Motion for Reconsideration;

6. Exhibits: No exhibits were offered or admitted.

7. No order has been entered sealing any part of the record or transcript.

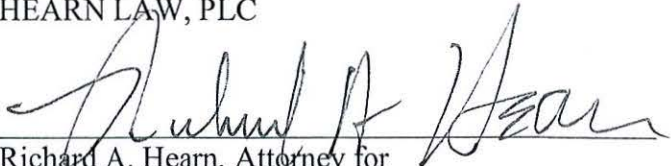
8. I hereby certify that:

a. A copy of this Notice of Appeal has been served on the Court Reporter of these proceedings, **no reporter's transcript has been requested;**

- b. The Clerk of the District Court has been paid the estimated fee for the preparation of the reporter's transcript pursuant to I.A.R. 24;
- c. That all appellate filing fees have been paid; and
- d. That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 17th day of July, 2017.

HEARN LAW, PLC


 Richard A. Hearn, Attorney for
 Appellant, Wildlife Ridge Estates, LLC

CERTIFICATE OF SERVICE

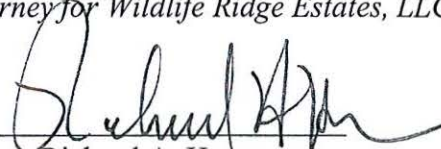
I HEREBY CERTIFY that on the 17th day of July, 2017, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Ron Kerl
 COOPER & LARSEN, Chartered
 151 North Third Avenue, 2nd Floor
 P.O. Box 4229
 Pocatello, ID 83205-4229
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HEARN LAW PLC

Attorney for Wildlife Ridge Estates, LLC

By: 
 Richard A. Hearn

Designation of Appeal – 1 (a)

2017 MAR 27 PM 2:00

BY KP
DEPUTY CLERK

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,
Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,
Defendants.

Case No. CV-2016-3588-OC

**MEMORANDUM DECISION
AND ORDER**

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company;
Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,
Counter-defendant.

NATURE OF THE ACTION

This case was initiated by a Complaint to Judicially Foreclose Deed of Trust filed by the Plaintiffs/Counterdefendants Monitor Finance, L.C. ("Monitor") and First Capital Funding, L.C.

(“First Capital”).¹ Defendant/Counterclaimant Wildlife Ridge Estates, LLC², filed an Answer and also brought a counterclaim against Monitor and First Capital for fraud and declaratory and injunctive relief. The Plaintiffs have now submitted a Motion for Partial Summary Judgment seeking dismissal of the affirmative defenses raised by Wildlife Ridge in its Answer, as well as dismissal of the Counterclaim. The Plaintiffs also submitted a Motion to Amend the Complaint, which was scheduled for a hearing date separate from the motion for partial summary judgment. In support of partial summary judgment, the Plaintiffs submitted a written brief and the Affidavit of Ron Kerl, including exhibits. Defendant/Counterclaimant Wildlife Ridge responded with an opposing brief and the Affidavit of Richard A. Hearn, with attached exhibits. The Plaintiffs then followed up with a reply brief and the Second Affidavit of Ron Kerl, including exhibits.

Oral arguments were conducted on February 21, 2017. At the outset of the hearing, the parties addressed the Plaintiffs’ Motion to Amend the Complaint. Although that motion was set to be heard at a later date, counsel for the Defendants indicated they had no objection to the amendment of the Complaint. Therefore, in a ruling from the bench, this Court granted the Plaintiffs’ request to add a new defendant based upon stipulation of the parties.

Having reviewed the entire file and the relevant law, and after consideration of the arguments made by the parties, this Court now issues this Memorandum Decision and Order.

ISSUE

1. Whether to grant the Plaintiffs’ Motion for Partial Summary Judgment.

¹ Collectively referred to herein as “the Plaintiffs”.

² Referred to herein as “Wildlife Ridge” or “the Defendant”.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment shall be rendered “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Idaho R. Civ. P. 56(c)(2016). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

If the moving party challenges an element of the non-moving party’s case on the basis that no genuine issue of material fact exists, the burden now shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Tingley*, 125 Idaho at 90, 867 P.2d at 964. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party’s case upon which that party bears the burden of proof at trial. *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The party opposing the summary judgment motion “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must *set*

forth specific facts showing that there is a genuine issue for trial.” Idaho R. Civ. P. 56(e)(2016) (emphasis added).

STATEMENT OF FACTS

The following pertinent facts are found by a preponderance of the evidence, with all reasonable inferences drawn in favor of the Defendant. *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694, 698 (2009) (“All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006)).³

Wildlife Ridge is the owner in fee simple of certain real property described in the Deed of Trust attached as Exhibit A to the Plaintiffs’ Complaint to Judicially Foreclose Deed of Trust. On December 3, 2014, Wildlife Ridge filed its initial Complaint seeking to quiet title in that property against the same plaintiffs in this case, Monitor Finance and First Capital (“the First Action”).⁴ (See Exs. A and B, attached to Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor and First Capital (“Kerl Aff.”), Jan. 6, 2017.) That Complaint was amended on March 12, 2015. (Exs. A and C, attached to Kerl Aff.) By its Complaint and Amended Complaint, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from

³ The background information was extracted from the parties’ briefs and the submitted affidavits and exhibits.

⁴ Based on stipulation of the parties at oral arguments, this Court takes judicial notice of the filings and outcome of the First Action.

the district court that the sums due under the Deed of Trust Note and the Modification of Trust Deed Note (“the Modification”) secured by the Monitor and First Capital Deed of Trust had been satisfied. (Exs. B and C, attached to Kerl Aff.) On June 14, 2016, a Judgment dismissing the First Action with prejudice was entered. (Ex. E, attached to Kerl Aff.)

DISCUSSION

As explained above, the case presently before this Court was initiated by a Complaint to Judicially Foreclose Deed of Trust filed against Defendants Wildlife Ridge Estates, LLC and M&S Development, LLC. Wildlife Ridge filed an Answer to Complaint and a Counterclaim against the Plaintiffs for fraud and declaratory and injunctive relief. In an earlier action, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from the district court that the sums due under the Deed of Trust Note and Modification had been satisfied. That case was dismissed with prejudice. In seeking partial summary judgment, the Plaintiffs argue that all defenses and claims now raised by Wildlife Ridge in response to the current lawsuit are barred by the doctrine of *res judicata*.

a. Law

Under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. The Idaho Supreme Court explained the doctrine of *res judicata*, or claim preclusion, as follows:

Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action.

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (citations omitted, emphasis added). Thus, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. *Elliot v. Darwin Neibaur Farms*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). As such, “in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.” *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436–37, 849 P.2d 107, 109–10 (1993)(emphasis added); see also *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922). As further explained by Idaho courts, because the transactional concept of a claim is broad, “the bar of claim preclusion may apply even where there is not a substantial overlap between the theories advanced in support of a claim, or in the evidence relating to those theories.” *Aldape v. Akins*, 105 Idaho 254, 259, 668 P.2d 130, 135 (Idaho Ct. App. 1983)(cited with approval by *Kolouch*, 123 Idaho at 437, 849 P.2d at 110.) Thus, “a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose.” *Kolouch*, 123 Idaho

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Re: Plaintiffs' Motion for Partial Summary Judgment

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at 437, 849 P.2d at 110; *see also Diamond v. Farmers Ins.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990).

Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805 (quoting *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct.App.1983)).

Ticor Title Co. v. Stanion, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007).

b. Analysis

The Plaintiffs argue the First Action already addressed the enforceability of the same Deed of Trust Note, Modification, and Deed of Trust at issue here. Because that lawsuit was dismissed with prejudice, the Plaintiffs maintain that the Defendants are now prevented from presenting any defense or claim challenging the enforceability of the debt which might have and should have been litigated in that First Action. (Mem. in Supp. of Summ. J. Mot. Filed by Monitor and First Capital (“Mem. in Supp. of Summ. J.”), Jan. 6, 2017, 3-4.) The Plaintiffs have therefore asked this Court to strike and dismiss the affirmative defenses and the Counterclaim raised by the Defendant.

In response, the Defendant argues *res judicata* is not a bar to the defenses and/or counterclaim it has raised in the present lawsuit because none of those issues were “actually litigated in the Quiet Title Action and they could not have been litigated.” (Def. Wildlife Ridge’s Resp. to Pls. Monitor Finance L.C.’s and First Capital L.C.’s Mot. for Partial Summ. J. (“Def.’s Resp.”), Feb. 6, 2017, 12.) For example, Wildlife Ridge first argues that “[t]he entity

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that appeared in the Quiet Title Action as Monitor Financial L.C. was not a real party in interest to the transactions that were the subject matter of that action or the present action.” (Def.’s Resp. at 6.) In support of that allegation, the Defendant points to the fact that the Monitor Finance, L.C. that was named as a party to the Note and Deed of Trust expired on September 17, 2012, and was never renewed. Instead, “[a] new entity bearing the same name Monitor Financial L.C. was established on January 23, 2015 nearly two months after the Quiet Title Action was filed on December 3, 2014.” (*Id.*) Thus, the Defendant argues that one of the plaintiffs in this case, Monitor Finance, L.C., which entity was named as a defendant in the First Action to quiet title filed by Wildlife Ridge, was not a real party in interest in that case because it had been administratively dissolved before the First Action was filed. The Defendant further argues that its pending counterclaim and affirmative defenses for fraud were not raised and could not have been litigated in the quiet title action because neither M&S Development, LLC (“M&S”), or Michael Millward were named parties.⁵ (*See id.*) While the Defendant notes that M&S and Mr. Millward were referenced in both the initial complaint and the amended complaint to quiet title, the Defendant argues that neither M&S nor Mr. Millward were named parties in the quiet title action and “there were no allegations made by any party in the Quiet Title Action that either M&S or Millward had done anything wrong.” (*Id.*) The Defendant thus argues: “As Millward and M&S would have been necessary parties to any fraud claim brought against Plaintiffs,

⁵ “On December 30, 2005, M&S Development, LLC and Michael Millward signed a promissory note with First Capital Funding, L.C. and Monitor Finance, L.C. for \$244,000.00.” (Ex. C, attached to Kerl Aff., Am. Compl. to Quiet Title (“First Action”), March 16, 2016, ¶7; *see also* Ex. B, attached to Kerl Aff., Compl. to Quiet Title, Dec. 1, 2014, §§7-8.)

Wildlife Ridge had no duty to bring its claim for fraud against Plaintiffs, Millward and M&S in association with its Quiet Title Action.” (Def.’s Resp. at 8.) Finally, the Defendant argues that the Modification of Trust Deed Note was never mentioned in the pleadings filed in the quiet title action. (*Id.* at 7.) The Defendant argues the Modification is “central” to the foreclosure action and Wildlife Ridge’s counterclaim for fraud, and is another example of a claim that could not have been brought in the First Action. (*Id.*)

First, this Court must reject the Defendant’s argument that Monitor Finance, L.C., while a named defendant in the First Action, was nonetheless not a real party in interest to that lawsuit because it had been previously administratively dissolved. Dissolution of a corporation does not prevent the commencement of legal proceedings against that corporation in its corporate name.

Arndt v. First Interstate Bank of Utah, N.A., 1999 UT 91, ¶ 14, 991 P.2d 584, 587; *see also*

UTAH CODE ANN. § 16-10a-1405 (West).⁶ Because the debt owed existed prior to any

⁶ § 16-10a-1405. Effect of dissolution

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

- (a) collecting its assets;
- (b) disposing of its properties that will not be distributed in kind to its shareholders;
- (c) discharging or making provision for discharging its liabilities;
- (d) distributing its remaining property among its shareholders according to their interests; and
- (e) doing every other act necessary to wind up and liquidate its business and affairs.

(2) Dissolution of a corporation does not:

- (a) transfer title to the corporation’s property;
- (b) prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation’s share transfer records;
- (c) subject its directors or officers to standards of conduct different from those prescribed in Part 8, Directors and Officers;
- (d) change:
 - (i) quorum or voting requirements for its board of directors or shareholders;
 - (ii) provisions for selection, resignation, or removal of its directors or officers or both; or
 - (iii) provisions for amending its bylaws or its articles of incorporation;
- (e) **prevent commencement of a proceeding by or against the corporation in its corporate name;**

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Re: Plaintiffs’ Motion for Partial Summary Judgment

dissolution and Monitor Finance was sued during the winding down process to invalidate that debt, Monitor Finance was a legitimate party in interest and a named defendant in the First Action.

This Court further rejects the Defendant's argument that M&S and Michael Millward were indispensable parties for a complete resolution regarding Wildlife Ridge's claim that the debt due to the Plaintiffs was unenforceable. Whether a party is "indispensable" is governed by IRCP 19(a)(1).⁷ Under that rule, a party shall be joined if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Idaho R. Civ. P. 19(a). In this case, complete relief could have been granted to Wildlife Ridge if the court in the quiet title action had determined that the debt had been satisfied. If that had been

-
- (f) abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
 - (g) terminate the authority of the registered agent of the corporation.

UTAH CODE ANN. § 16-10a-1405 (West)(emphasis added).

⁷ **Rule 19. Required joinder of parties**

(a) Persons Required to be Joined if Feasible.

(1) *Required Party.* A person who is subject to service of process must be joined as a party in the action if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Memorandum Decision and Order

Case No. CV-2016-3588-OC

Re: *Plaintiffs' Motion for Partial Summary Judgment*

the outcome, the Plaintiffs' Deed of Trust would have no debt to secure, and title to the premises could have been quieted in Wildlife Ridge, free and clear of that encumbrance. No matter the basis for such a finding, that outcome would not have adversely affected either M&S or Mr. Millward since the debt they were personally liable for would no longer be enforceable. In addition, there was no risk of double, multiple or otherwise inconsistent obligations since M&S and Mr. Millward would have been bound by a decree finding that the debt owed was unenforceable, no matter whether the basis of such a decree was that the debt had been satisfied or that the debt was unenforceable based on a statute of limitations or fraud argument. As such, M&S and Mr. Millward were not indispensable parties to Wildlife Ridge's quiet title action and/or Wildlife Ridge's attempt to have the debt deemed unenforceable.

This Court must also reject the Defendant's arguments regarding the Modification. The Defendant argued the Modification dated March 3, 2008, was fraudulent and the "statute of limitations claim is related directly to the validity and effect of the claimed Modification." (Def.'s Resp. at 10.) The Defendant argued that because the Modification of Trust Deed Note was "never mentioned" in the pleadings filed in the quiet title action, the issues surrounding the Modification could not have been litigated and therefore cannot now be barred by *res judicata*. However, the record shows the Defendant was aware of the Modification during the First Action, since the Modification was produced to Wildlife Ridge through discovery. (Ex. 2, First Capital Funding, L.C.'s Resp. to Pl.'s First Set of Discovery, attached to Second Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor Finance, L.C. and First Capital Funding, L.C., ¶¶4-5,

Feb. 14, 2017.) As such, any claims pertaining to the Modification could have been raised in the **Memorandum Decision and Order** 11
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Re: Plaintiffs' Motion for Partial Summary Judgment

First Action, and this Court has also already determined that M&S and Mr. Millward were not indispensable parties to the Quiet Title Action necessary to any fraud allegation attempting to show the debt owed to the Plaintiffs was unenforceable.

Therefore, based on the above findings and the undisputed facts in this case, all of the Defendant's claims that could have challenged the enforceability of the debt secured by the Deed of Trust should have been litigated in the quiet title action. There is no dispute that in the First Action Wildlife Ridge sought a decree quieting title to the property described in Monitor Finance's and First Capital's Deed of Trust free and clear of that Deed of Trust by claiming there was no enforceable debt which could be secured because the applicable promissory note had been satisfied by previous payments made to the Plaintiffs. Thus, the gravamen of the first quiet title action was that there was no enforceable debt left to be secured by the Plaintiffs' encumbering the Deed of Trust. Furthermore, there is no question that both the First Action and this matter involve the same parties and the same Deed of Trust. There is also no question that the First Action was finally resolved and dismissed with prejudice by entry of a final judgment rejecting the Defendant's attempt to challenge the enforceability of the Deed of Trust Note, the Modification, and the Deed of Trust. As explained, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made *or which might have been made*. No matter the theory advanced by the Defendant in its original quiet title action, the dismissal of the First Action serves as a dismissal with prejudice of every matter that was

available in the First Action to challenge the enforceability of the Deed of Trust Note, the

Memorandum Decision and Order

Case No. CV-2016-3588-OC

Re: Plaintiffs' Motion for Partial Summary Judgment

Modification, and the Deed of Trust in this case. A careful reading of Wildlife Ridge's Answer and Counterclaim show that the affirmative defenses and claim of fraud all challenge the enforceability of the same Monitor and First Capital Deed of Trust Note, Modification and Deed of Trust at issue in the First Action; therefore, those claims should have been litigated in the First Action. The Defendant has not demonstrated that it was in any way prevented from presenting in the First Action any of the claims it has now raised. This Court has found there to be no question of fact that those claims, including any statute of limitations defense, the equitable doctrines of laches and unclean hands, and the claim of fraud all relate to and arose prior to the dismissal of the First Action.

Therefore, because the First Case ended in a final judgment on the merits, because this case involves the same parties as the First Case, and because all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Case, the affirmative defenses and counterclaim now raised by the Defendant are barred by the doctrine of *res judicata*.

CONCLUSION

The Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED. This Court has determined the Defendant's affirmative defenses and fraud claim are barred by the doctrine of *res judicata*. Therefore, all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud are hereby stricken and dismissed.

IT IS SO ORDERED.

DATED this 27 day of March 2017.


ROBERT C. NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of March, 2017, I served a true and correct copy of the foregoing document upon each of the following in the manner indicated.

Ron Kerl
Cooper & Larsen
PO Box 4229
Pocatello, ID 83205-4229

^E U.S. Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

A. Bruce Larsen
155 S. 2nd Ave.
Pocatello, ID 83201

^E U.S. Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

ROBERT POLEKI, Clerk

By: Keri Povey
KERI POVEY
Deputy Clerk

Designation of Appeal – 1 (b)

FILED
BANNOCK COUNTY
CLERK
2017 JUN 14 AM 8:20
BY KP
DEPUTY CLERK

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendants.

Case No. CV-2016-3588-OC

**MEMORANDUM DECISION
AND ORDER**

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company,

Counterclaimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Counterdefendants,

NATURE OF THE ACTION

This case was initiated by a Complaint to Judicially Foreclose Deed of Trust filed by the Plaintiffs/Counterdefendants Monitor Finance, L.C. ("Monitor") and First Capital Funding, L.C.

Memorandum Decision and Order

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Re: Defendant's Motion for Reconsideration/Plaintiffs' Motion for Summary Judgment

("First Capital").¹ Defendant/Counterclaimant Wildlife Ridge Estates, LLC², filed an Answer and also brought a counterclaim against Monitor and First Capital for fraud and declaratory and injunctive relief.

On January 6, 2017, the Plaintiffs submitted a Motion for Partial Summary Judgment seeking dismissal of the affirmative defenses raised by Wildlife Ridge in its Answer, as well as dismissal of the Counterclaim. The Plaintiffs' Motion for Partial Summary Judgment was granted, and all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud were stricken and dismissed. (Mem. Decision and Order, March 27, 2017, 13.)

On April 13, 2017, the Plaintiffs filed the pending Motion for Summary Judgment, along with a brief and affidavits. Defendant Wildlife Ridge opposed the Motion for Summary Judgment by submitting a Motion for Reconsideration, seeking reversal of this Court's prior entry of summary judgment granting the Plaintiffs' request to strike the Defendant's affirmative defenses and Counterclaim. The Defendant's brief addressed both the Motion for Reconsideration and opposed the Plaintiffs' Motion for Summary Judgment. The Defendant did not submit any affidavits or other evidence.

Oral arguments regarding both motions were heard on May 15, 2017. Having reviewed the entire file and the relevant law, and after consideration of the arguments made by the parties, this Court now issues this Memorandum Decision and Order.

¹ Collectively referred to herein as "the Plaintiffs".

² Referred to herein as "Wildlife Ridge" or "the Defendant".

STATEMENT OF FACTS

Wildlife Ridge is the owner in fee simple of certain real property described in the Deed of Trust attached as Exhibit A to the Plaintiffs' Complaint to Judicially Foreclose Deed of Trust. On December 3, 2014, Wildlife Ridge filed a Complaint seeking to quiet title in that property against the same plaintiffs in this case, Monitor Finance and First Capital ("the First Action").³ (See Exs. A and B, attached to Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor and First Capital ("Kerl Aff."), Jan. 6, 2017.) That Complaint was amended on March 12, 2015. (Exs. A and C, attached to Kerl Aff.) By its Complaint and Amended Complaint, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from the district court that the sums due under the Deed of Trust Note and the Modification of Trust Deed Note ("the Modification") secured by the Monitor and First Capital Deed of Trust had been satisfied. (Exs. B and C, attached to Kerl Aff.) On June 14, 2016, pursuant to a stipulation by the parties, a Judgment dismissing the First Action with prejudice was entered. (Ex. E, attached to Kerl Aff.) The dismissal of the First Action was followed by the Plaintiffs' present lawsuit to judicially foreclose the Deed of Trust.

As explained, this Court previously granted the Plaintiffs' Motion for Partial Summary Judgment. In seeking partial summary judgment, the Plaintiffs argued that all of the defenses and claims raised by Wildlife Ridge in response to the current lawsuit were barred by the

³ Based on stipulation of the parties at oral arguments, this Court takes judicial notice of the filings and outcome of the First Action.

doctrine of *res judicata* based on the dismissal of the First Action. In granting that motion, this Court determined that the First Action ended in a final judgment on the merits and that the present case involves the same parties as the First Action. (Mem. Decision and Order, March 27, 2017, 13.) This Court further determined that because all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Action, the affirmative defenses and counterclaim raised by the Defendant were barred by *res judicata*. (*Id.*) Therefore, all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud were stricken and dismissed. (*Id.*) A Judgment to that effect was entered on March 27, 2017. Then, on March 30, 2017, Default was entered against Defendant M & S Development, LLC ("M&S"), for failure to appear or answer the Plaintiffs' Complaint. Subsequently, Defendant Pioneer Title Company of Bannock County filed a waiver of its right to respond further to the Plaintiffs' Amended Complaint and consented to the entry of a Judgment and Decree of Foreclosure as sought by Monitor and First Capital pursuant to the Amended Complaint.

The Plaintiffs then filed the pending Motion for Summary Judgment. By that motion, the Plaintiffs are seeking a Judgment and Decree of Foreclosure against Defendant Wildlife Ridge on the basis of this Court's prior Memorandum Decision and Order dismissing Wildlife Ridge's affirmative defenses and counterclaim against the Plaintiffs, as well as the fact that Defendant Pioneer Title Company waived its right to respond and consented to the entry of a Judgment and Decree of Foreclosure.

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ISSUES

1. Whether to grant the Defendant's Motion for Reconsideration.
2. Whether to grant the Plaintiffs' Motion for Summary Judgment.

DISCUSSION

It is necessary for this Court to first address the Defendant's Motion for Reconsideration, as resolution of that motion necessarily resolves the question of summary judgment.

Motion for Reconsideration

a. Standard of Review

Rule 11.2(b)(1)⁴ of the Idaho Rules of Civil Procedure ("IRCP") governs motions for reconsideration. Under that rule, "[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."

In explaining motions for reconsideration, the Idaho Supreme Court has stated: "A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order." *Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012). "[T]he most important consideration is the correctness of the interlocutory order." *Id.* Thus, "[a]fter a final judgment, a party has one more chance under [Rule 11.2(b)(1)] to ask the court to decide the law and facts correctly." *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 913, 332 P.3d 815, 825 (2014). That rule "allows

⁴ Prior to 2016, this rule was labeled as Idaho Rule of Civil Procedure 11(a)(2)(B).

the trial court to reconsider facts in light of any new or additional facts that are submitted in support of the motion. This ensures the district court decides a case on the proper law and facts.” *Id.* (internal citation omitted.) Therefore, the district court should consider any new facts and new evidence presented by the moving party bearing on the correctness of the interlocutory order. *Coeur d’Alene Mining Co. v. First Nat’l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990); *Kepler-Fleenor v. Fremont Cty.*, 152 Idaho 207, 210, 268 P.3d 1159, 1162 (2012). “The burden is on the moving party to bring the trial court’s attention to the new facts.” *Coeur d’Alene Mining Co.*, 118 Idaho at 823, 800 P.2d at 1037. A trial court is not required “to search the record to determine if there is any new information that might change the specification of facts deemed to be established.” *Id.* However, while Rule 11.2(b)(1) “permits a party to present new evidence when a motion is brought under that rule, [the rule] does not require that the motion be accompanied by new evidence.” *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Idaho Ct.App. 2006). Thus, this Court is not precluded from reconsidering an interlocutory decision on the grounds of the initial evidence. *Id.* at 473, 147 P.3d at 105.

“When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). This Court is being asked to reconsider the granting of a partial motion for summary judgment. Therefore, this Court “must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.” *Id.*

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b. Analysis

As explained, this Court previously dismissed the Defendant's affirmative defenses and counterclaim on the basis of *res judicata*. This Court specifically determined that the First Action between the parties ended in a final judgment on the merits, that case involved the same parties as the First Action, and all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Action. (Mem. Decision and Order at 13.) Because "the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made", this Court ruled that "[n]o matter the theory advanced by the Defendant in its original quiet title action, the dismissal of the First Action serves as a dismissal with prejudice of every matter that was available in the First Action to challenge the enforceability of the Deed of Trust Note, the Modification, and the Deed of Trust in this case." (*Id.* at 12.) This Court further determined that all of the affirmative defenses and the counterclaim raised by Wildlife Ridge challenged "the enforceability of the same Monitor and First Capital Deed of Trust Note, Modification and Deed of Trust at issue in the First Action; therefore, those claims should have been litigated in the First Action." (*Id.* at 13.) This Court found that the Defendant had "not demonstrated that it was in any way prevented from presenting in the First Action any of the claims it has now raised." (*Id.*) As such, this Court found there were no questions of fact regarding the Defendant's defenses or counterclaim, and the defenses and counterclaim were necessarily stricken and dismissed. (*Id.*)

Through the Motion for Reconsideration, the Defendant specifically challenges the dismissal of the statute of limitations defense, arguing that defense was not available in the First Action and therefore should not have been barred by this Court under the theory of *res judicata*. (Mem. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Def.'s Mot. for Reconsideration ("Mem. in Opp'n"), May 1, 2017, 2.) Wildlife Ridge, the Defendant in this action, was the Plaintiff in the First Action to quiet title filed against Monitor and First Capital, now the Plaintiffs in the present case. The Defendant argues that during the time of the First Action, Wildlife Ridge had no standing to quiet title *and* raise a claim that the statute of limitations prohibited Monitor and First Capital from enforcing the debt secured by, and foreclosing, the Deed of Trust. (*See id.* at 2-3.) In support of that argument, the Defendant cited to Idaho Code § 5-214A, which provides a five-year statute of limitations for the commencement of an action for the foreclosure of a mortgage. The Defendant also cited to one sentence from a 1952 Idaho Supreme Court case pertaining to that statute of limitations. Quoting from *Trusty v. Ray*, 73 Idaho 232, 249 P.2d 814 (1952), the Defendant argued: "In Idaho, a 'mortgagor or his successor in interest cannot quiet title against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run against the right to foreclose the mortgage.'" (*Id.* at 2.)

The Plaintiffs dispute the Defendant's analysis of *Trusty* as being too broad. The Plaintiffs agree that the Idaho Supreme Court in the *Trusty* case concluded that the "mortgagor or his successor in interest *cannot quiet title* against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run against the right to foreclose the mortgage."

(Mem. Opposing Mot. for Reconsideration and Reply Mem. in Supp. of Summ. J. Mot. ("Mem.

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Opposing Mot. for Reconsideration”), May 8, 2017, 4.) However, the Plaintiffs argue that “simple statement” did not prohibit Wildlife Ridge “from bringing all available claims for relief *other than one for quieting title to the property*” in the First Action. (*Id.*) Thus, the Plaintiffs argue that even if quiet title was not available to Wildlife Ridge in the First Action, there is nothing about the *Trusty* case that prevented the Defendant from pursuing other, still available avenues of relief, such as seeking a permanent injunction stopping any enforcement of the deed of trust by foreclosure. The Plaintiffs point out, for example, that the Defendant raised different forms for relief other than quiet title in responding to this action. (*See id.*) The Plaintiffs argue that because Wildlife Ridge did not pursue those other avenues of relief in the First Action, the Defendant is barred under the theory of *res judicata* from “now rais[ing] additional claims for relief which could have been raised in the First Quiet Title Action.” (*Id.*) Therefore, the Plaintiffs maintain that this Court was correct in its decision granting partial summary judgment because “[*r*]es judicata’s subparts, issue and claim preclusion, ... cover not only the theory of recover[y] advanced in the first action (here, ‘Quiet Title’) but any theory of recovery at law or inequity [sic] which could have been raised in the first action.” (*Id.*)

Under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. “[*R*]es judicata is an umbrella term for different but related concepts: claim preclusion and issue preclusion.” Steve Wieland, *Don't Let the Ttab Decide Your Next*

Infringement Dispute, 59 ADVOCATE 38 (2016); *see also*, *Taylor v. Sturgell*, 553 U.S. 880, 892,

128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008). “Separate tests are used to determine whether

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claim preclusion or issue preclusion applies.” *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007)(internal citation omitted).

Pursuant to the doctrine of claim preclusion, a final judgment bars a party from re-litigating that same claim, regardless of whether the subsequent litigation involves new or different issues. *Sturgell*, 553 U.S. at 892, 128 S. Ct. at 2171. The Idaho Supreme Court further explained claim preclusion as follows:

Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action.

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (citations omitted, emphasis added). Thus, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. *Elliot v. Darwin Neibaur Farms*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). As such, “in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.” *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436–37, 849 P.2d 107, 109–10 (1993)(emphasis added); see also *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553,

208 P. 241, 242-43 (1922). Similarly, “[i]ssue preclusion ... bars ‘successive litigation of an

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issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Sturgell*, 553 U.S. at 892, 128 S. Ct. at 2171 (internal citation omitted). Thus, when a court finally determines an issue in one case that is essential to that judgment, a litigant is barred from raising the issue again in another lawsuit.

Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805 (quoting *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct.App.1983)).

Stanion, 144 Idaho at 123, 157 P.3d at 617; *see also*, *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008).

Whether claim preclusion or issue preclusion bars relitigation between the same parties of a prior litigation is a question of law upon which this Court exercises free review. *Lohman v. Flynn*, 139 Idaho 312, 319, 78 P.3d 379, 386 (2003). *Res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence. *Foster v. City of St. Anthony*, 122 Idaho 883, 890, 841 P.2d 413, 420 (1992).

Id. at 122, 157 P.3d at 616.

In its decision granting partial summary judgment, this Court determined that the doctrine of *res judicata* applied to not only the theory of recovery advanced by Wildlife Ridge in the First Action, but to any theory of recovery at law or equity which *could have* been raised in that First Action. Thus, Wildlife Ridge should have asserted every legal rule and/or equitable remedy to establish that the Deed of Trust Note was unenforceable. The Defendant's new reliance on the

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Trusty case does not support the Defendant's argument that it was prohibited in the First Action from bringing all available claims for relief other than a claim for quieting title. Wildlife Ridge was not required to limit its requested relief to simply seeking a decree quieting title to the land. However, having selected that solitary claim for relief, the doctrine of *res judicata* prohibits Wildlife Ridge from now adding new or additional claims for relief that were available at the time of the First Action, which action was indisputably litigated to a final judgment. When the First Action was dismissed, Wildlife Ridge lost the ability to relitigate any other theories of recovery arising out of the same transaction or series of transactions which were actually made or which might have been made in the First Action. Unfortunately, Wildlife Ridge limited itself by seeking a relief that was too narrow, and this Court can find no error of fact or law in its previous decision to that effect.

The Defendant additionally argued reconsideration should be granted because the Plaintiffs are simply barred from "the commencement of a foreclosure action in this matter" because "[a]n action for the foreclosure of a mortgage on a real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage." (Mem. in Opp'n at 3.) Citing to the Trust Deed Note attached to the Plaintiffs' Complaint, the Defendant argued:

The Deed of Trust being foreclosed is subject to the mandatory maturity date contained in the Trust Deed Note. The note specifically states that "**2. The term of this Trust Deed Note shall be one hundred eighty (180) days. This Trust Deed Note shall fully mature on June 28, 2006 (the 'Maturity Date').**"

(*Id.* at 3.) The Defendant argues there was no stay on the statute of limitations, and the five-year timeframe for commencing an action for the foreclosure of the subject mortgage has expired based on the maturity date of June 28, 2006. Therefore, the Defendant claims the Plaintiffs are now time-barred from enforcing their rights under the Deed of Trust Note and Modification. (*See Mem. in Opp'n* at 3.) The Plaintiffs dispute that contention, arguing that “the record before the Court and applicable law supports a finding that the subject obligation is not time barred by any applicable statute of limitations.” (*Mem. Opposing Mot. for Reconsideration* at 9.)

As mentioned earlier, Idaho Code § 5-214A provides a five-year statute of limitations for the commencement of an action for the foreclosure of a mortgage. That statute states:

An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness.

IDAHO CODE ANN. § 5-214A (West). Idaho Code § 45-1515 adopts the same five-year statute of limitations for the foreclosure of deeds of trust. That statute states:

The foreclosure of a trust deed by advertisement and sale shall be made and the foreclosure of a trust deed by judicial procedure shall be commenced within the time limited by the same period and according to the same provisions including extensions as provided by law for the foreclosure of a mortgage on real property.

IDAHO CODE ANN. § 45-1515 (West). The Defendant points to the maturity date stated in the Deed of Trust Note, which is June 28, 2006. (*See Ex. A, Trust Deed Note, attached to Compl. to Judicially Foreclose Deed of Trust, Oct. 7, 2016.*) That date is not in dispute, and the Complaint to foreclose the Deed of Trust was not filed until 2016. However, the Plaintiffs argue the statute

of limitations was restarted by a partial payment made on November 8, 2012, “extending the maturity date of the obligations secured by the Deed of Trust, and the right to foreclose that Deed of Trust, to November 8, 2017.” (Mem. Opposing Mot. for Reconsideration at 10.)

In support of the extension argument, the Plaintiffs direct this Court to Idaho Code § 5-238, which pertains to the effect of partial payments. That statute provides:

No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; *but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.*

IDAHO CODE ANN. § 5-238 (West)(emphasis added). The Idaho Supreme Court has found that payments of interest or principal serve to restart the statute of limitations on all installments on the note pursuant to IC § 5-238. *Horkley v. Horkley*, 144 Idaho 879, 881, 173 P.3d 1138, 1140 (2007). There is no dispute in this case that on November 8, 2012, the Plaintiffs “received a payment on the Deed of Trust Note in the amount of \$38,472.24 and applied that payment to the principal due on the obligation.” (Mem. Opposing Mot. for Reconsideration at 10; *see also*, Supplemental Aff. in Supp. of Pls.’ Foreclosure Decree, May 8, 2017, ¶ 3.) As such, the partial payment made on the Deed of Trust in this case on November 8, 2012, restarted the five-year statute of limitations, extending the maturity date of the obligations secured by the Deed of Trust, including the right to foreclose that Deed of Trust, to November 8, 2017. The Complaint to Judicially Foreclose the Deed of Trust was filed on October 7, 2016, within the five-year limit. Furthermore, there is no dispute that the partial payment extending the maturity date was made

after Wildlife Ridge had acquired the subject property and was therefore made with the

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Defendant's full knowledge and consent. Thus, under the provisions of IC § 5-238, the partial payment to the Plaintiffs constituted "a new promise in writing", extending the statute of limitations found in IC §§ 5-214A and 45-1515 for an additional five years. As such, the Plaintiffs' action to foreclose the Deed of Trust, filed on October 7, 2016, was timely filed, and the Plaintiffs are not barred by the statute of limitations from commencing this action. Therefore, the Defendant's statute of limitation argument does not provide a valid basis for this Court to reconsider its prior decision granting partial summary judgment in favor of the Plaintiffs.

Motion for Summary Judgment

The Plaintiffs have moved for summary judgment seeking a Judgment and Decree of Foreclosure against Wildlife Ridge. As set forth above, the Plaintiffs' request is supported by this Court's previous entry of partial summary judgment and the subsequent Default entered against Defendant M & S Development, LLC, for failure to appear or answer the Plaintiffs' Complaint. Defendant Pioneer Title Company of Bannock County has also consented to the entry of a Judgment and Decree of Foreclosure as sought by Monitor and First Capital pursuant to the Amended Complaint. Based on that procedural history, the Plaintiffs argue this Court need now only make a determination that there remains an unpaid debt secured by the Deed of Trust, and make a further finding as to the description and reasonable value of the property still encumbered by that Deed of Trust. (Mem. in Supp. of Summ. J. Mot., April 13, 2017, 4.)

a. Standard of Review

Summary judgment shall be rendered “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” IDAHO R. CIV. P. 56(c)(2016). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

If the moving party challenges an element of the non-moving party’s case on the basis that no genuine issue of material fact exists, the burden now shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Tingley*, 125 Idaho at 90, 867 P.2d at 964. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party’s case upon which that party bears the burden of proof at trial. *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The party opposing the summary judgment motion “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must *set*

forth specific facts showing that there is a genuine issue for trial.” IDAHO R. CIV. P. 56(e)(2016) (emphasis added).

b. Analysis

In opposing the Motion for Summary Judgment, the Defendant argued the amount of the debt cannot be relitigated because the amount of the debt was already raised and litigated in the First Action. (Mem. in Supp. of Mot. for Reconsideration at 4.) The Defendant stated: “[T]he amount of the debt was raised and litigated in the first quiet title action the result was a joint stipulation dismissing the action.” (*Id.*) Relying on the doctrine of *res judicata*, the Defendant contends that the issue of whether a debt was owed was already litigated in the First Action, and based on the joint stipulation entered there, the Plaintiffs are now barred from relitigating the debt owed.⁵

This Court has already extensively set forth the law regarding *res judicata* in the proceeding sections, as well as in its prior Memorandum Decision and Order. There is no need to repeat that discussion in great depth here. It is sufficient to note that under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. A judgment, “once rendered, is treated as the full measure of relief to be accorded between the same parties on the same ‘claim’ or ‘cause of action.’” *Aldape*, 105 Idaho at 256, 668 P.2d at 132(quoting *Kaspar Wire Works, Inc.*, 575 F.2d at 535–36).

⁵ Outside of the Motion for Reconsideration, the Defendant did not raise any factual issues challenging summary judgment, and the Defendant did not submit any affidavits or other evidence to challenge summary judgment.

Monitor and First Capital were defendants in the First Action. One defense raised by Monitor and First Capital was the denial that the obligation owed by Michael Millward and M&S Development had been satisfied. Mr. Millward and M&S were the makers of the Deed of Trust Notes. However, Monitor and First Capital did not pursue any claims for relief in the First Action because they were prohibited from doing so under applicable bankruptcy laws. As makers of the Deed of Trust Notes, as modified, Mr. Millward and M&S were necessary parties to any claim to foreclose the Deed of Trust and enforce the Deed of Trust Note and Modification. *See* IDAHO R. CIV. P. 20(a)(2)(2016).⁶ However, at the time of the First Action, Mr. Millward had already filed for bankruptcy. Pursuant to Title 11, Section 362 of the United States Code⁷, an automatic stay commenced on September 10, 2012. The Plaintiffs submit they were

⁶ **Rule 20. Permissive joinder of parties**

(a) Persons Who May Join or be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

- (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- (B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* Persons may be joined in one action as defendants if:

- (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- (B) any question of law or fact common to all defendants will arise in the action.

⁷ (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

....

11 U.S.C.A. § 362 (West).

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prohibited by that bankruptcy stay from taking any action to enforce the Trust Deed Note, as amended, and foreclose the Deed of Trust securing that Trust Deed Note. According to the Plaintiffs, the automatic stay existed until the bankruptcy case was closed on June 23, 2016. Thus, the pending Chapter 7 bankruptcy prevented Monitor and First Capital from asserting any foreclosure claims against Defendants Millward, M&S Development, and Wildlife Ridge in the First Action, and the amount of Monitor and First Capital's debt still owed was therefore never actually litigated. In responding to the Motion for Summary Judgment, the Defendant offered no evidence to dispute the fact that Monitor and First Capital could not have actually litigated a claim for foreclosure in the First Action because they were prohibited from pursuing such a claim against the makers of the Note based on the bankruptcy stay. As *res judicata* is only a bar to the relitigation of claims that have already been decided, and the Plaintiffs made no "claim" for foreclosure in the First Action, *res judicata* cannot now prevent the Plaintiffs from pursuing litigation regarding the amount of debt still owed.

Furthermore, notwithstanding the proceeding discussion regarding *res judicata*, no factual issues have been raised by the Defendant in challenging summary judgment. Under the governing standards, the party opposing the motion for summary judgment must produce "evidence by way of affidavit or deposition ... to contradict the assertions of the moving party." *Ambrose By & Through Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Idaho Ct. App. 1994)(internal citations omitted). Such evidence must be anchored in something more than mere speculation. *See id.* A non-moving party's failure to make a showing sufficient to establish the existence of an element essential to that party's case, on which

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that party will bear the burden of proof at trial, requires the entry of summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 295 (1986). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 322–23, 106 S. Ct. at 2552. Thus, where the non-moving party has failed to make a showing of proof on any element for which it bears the burden at trial, summary judgment must be granted. *Id.* at 323, 106 S.Ct. at 2552-53; see also, *Sparks v. St. Luke's Reg'l Med. Ctr., Ltd.*, 115 Idaho 505, 509, 768 P.2d 768, 772 (1988). The Defendant here has failed to present any affidavits or evidence to challenge summary judgment or to support any defense to the foreclosure relief sought by the Plaintiffs. On the other hand, the Plaintiffs have submitted affidavits in support of summary judgment. Therefore, based on the governing standards, the Plaintiffs’ Motion for Summary Judgment must necessarily be granted.

CONCLUSION

The Plaintiffs’ Motion for Summary Judgment is hereby GRANTED. This Court further finds there remains an unpaid debt secured by the Deed of Trust. Pursuant to the affidavit filed in support of the Plaintiffs’ motion, “[a]s of the 1st day of April, 2017, there will be due, owing and unpaid upon the Trust Deed Note, as modified, the sum of \$6,814,076.41, together with interest thereafter accruing at the default rate of 35% per annum until date of Judgment herein, together with costs, foreclosure expenses, attorney’s fees and expenses necessary to preserve

Plaintiffs’ interest in the property heretofore advanced or hereafter accruing.” (Aff. in Supp. of

Memorandum Decision and Order

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Case No. CV-2016-3588-OC

Re: Defendant’s Motion for Reconsideration/Plaintiffs’ Motion for Summary Judgment

Pls.' Foreclosure Decree at 6:6.) Based on that undisputed affidavit, this Court finds there remains an unpaid debt secured by the Deed of Trust and owing to the Plaintiffs in the amount of \$6,814,076.41.

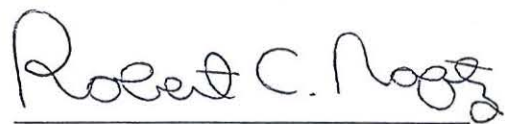
Counsel for the Plaintiffs shall submit a proposed Judgment and Decree of Foreclosure detailing the amount remaining on the unpaid debt and the description and reasonable value of the property still encumbered by that Deed of Trust for this Court's consideration and signature.

Counsel for the Plaintiffs may also submit an appropriate memorandum detailing the grounds for any claimed award of litigation costs and attorney fees. However, any decision regarding costs and fees will be made in a separate order after this Court is provided an opportunity to review such a request in detail.

Based on the preceding discussion and this Court's findings, no claims remain. As such, this case is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 13 day of June 2017.



ROBERT C. NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of June, 2017, I served a true and correct copy of the foregoing document upon each of the following in the manner indicated.


Ron Kerl
Cooper & Larsen
PO Box 4229
Pocatello, ID 83205-4229

E-Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

A. Bruce Larsen
155 S. 2nd Ave.
Pocatello, ID 83201

E-Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

ROBERT POLEKI, Clerk

By: 
KERI POVEY
Deputy Clerk

Designation of Appeal – 1 (c)

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

2017 JUN 20 PM 3:06

DEPUTY CLERK

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,
Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an
Idaho limited liability company;
M&S DEVELOPMENT, LLC, an
Idaho limited liability company; and
PIONEER TITLE COMPANY OF
BANNOCK COUNTY, INC.,
Defendants.

CASE NO. CV-2016-3588-OC

**JUDGMENT, DECREE OF
FORECLOSURE AND ORDER
OF SALE**

WILDLIFE RIDGE ESTATES, LLC, an Idaho
limited liability company,
Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,
Counter-defendant,

COPY

This matter having come on regularly before the Court, the Honorable Robert C. Naftz presiding, and finding good cause therefore;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Pursuant to the parties stipulation and this Court's Stipulated Order Approving Stipulations Consenting to the Sale of Real Property dated April 28, 2017, Pioneer Title Company is hereby ordered to turn over to Monitor Finance, L.C. and First Capital Funding, L.C., in care of their attorney of record, Ron Kerl of the firm of Cooper & Larsen, Chtd., 151 N. 3rd Ave., Second Floor, Pocatello, Idaho, the net proceeds from the sale of the below described property, totaling \$256,761.67. Said funds are currently deposited in the trust account of Pioneer Title Company. The net proceeds from the sale of the following property:

Lot 2, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 - \$44,195.82
Lot 5, Block 3 WILDLIFE RIDGE ESTATES DIVISION 2 - \$44,928.14
Lot 7 & Lot 9, Block 3 WILDLIFE RIDGE ESTATES DIVISION 2 - \$86,749.80
Lot 4, Block 3, WILDLIFE RIDGE ESTATES DIVISION 2 - \$45,433.92
Lot 6, Block 3, WILDLIFE RIDGE ESTATES DIVISION 1 - \$35,453.99

2. The Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005 ("Deed of Trust") , executed and delivered by M&S Development LLC , to Monitor Finance, L.C. and First Capital Funding, L.C. , recorded on the 30th day of December, 2005, under Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho, is a valid first lien on the below described real property securing an indebtedness of \$6,828,907.39, as of June 19, 2017, plus any additional attorney fees and costs awarded by the Court pursuant to I.R.C.P. Rule 54, and costs related to the enforcement of this Decree by Sheriff's Foreclosure Sale, plus legal interest on the entire sum of the aforesaid indebtedness from the date of this Decree to and including the date of Sheriff's sale at the highest rate allowed by law;

Judgement and Decree of Foreclosure and Order of Sale - pg. 2

The real property encumbered by the Deed of Trust is situated in the County of Bannock, State of Idaho, is more particularly described as follows:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2; and
Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1

3. The Deed of Trust described in paragraph 2 is foreclosed, and all interests which the Defendants Wildlife Ridge Estates, LLC, Michael J. Millward, M&S Development LLC, and Pioneer Title Company have in the above described real property, and any fixtures on the property, shall be sold by the Sheriff of Bannock County, Idaho, in the manner provided by law, payable in cash lawful money of the United States of America and in accordance with the practice of this Court.

The reasonable value of said property as of the date of this Decree is as follows:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 - \$50,000.00
Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1 - \$50,000

4. The proceeds of sale shall be applied as follows: First, to the costs of sale; second, towards the satisfaction of the indebtedness owing to Monitor Finance, L.C. and First Capital Funding, L.C. as set forth in paragraph 2 above; and third, any surplus thereafter remaining shall be paid into the District Court for further determination regarding priority among those parties to this litigation whose rights are subordinate to Monitor Finance, L.C. and First Capital Funding, L.C..

5. The Defendants Wildlife Ridge Estates, LLC, Michael J. Millward, M&S Development LLC, and Pioneer Title Company, and all persons claiming through or under them as purchasers, encumbrancers, or otherwise and all persons claiming to have acquired any equity or interest in said premises are foreclosed of all interests, liens, or claims in the real property herein above described, and every portion thereof, save and except such statutory rights of redemption as said parties or any of them may have.

6. The Plaintiff, with either a cash bid or a credit bid against the sum herein found to be due it, or any party to this suit may become the purchaser at the sale of said property, and the purchaser thereof shall be entitled to all of the rights and privileges of such a purchaser under the laws of the State of Idaho.

DATED This 20 day of June, 2017.



Hon. Robert C. Naftz
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 20 day of June, 2017, I served a true and correct copy of

the foregoing document as follows:

A. Bruce Larson
Hearn Law, PLLP
P.O. Box 70: 1555 S. 2nd Ave
Pocatello, ID 83201

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: bruce@hwlawpro.com

Ron Kerl
Cooper & Larsen, Chtd.
P.O. Box 4229
Pocatello, ID 83205

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: ron@cooper-larsen.com

CLERK OF THE DISTRICT COURT

By: Ken Pavey
Deputy

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
 151 North Third Avenue, Second Floor
 P.O. Box 4229
 Pocatello, ID 83205-4229
 Telephone: (208) 235-1145
 Facsimile: (208) 235-1182
 Email: ron@cooper-larsen.com

BANNOCK COUNTY
 CLERK OF DISTRICT COURT
 2017 JUL 19 PM 3:31
 BY *[Signature]*
 DEPUTY CLERK

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability)
 company; and FIRST CAPITAL FUNDING, L.C., a)
 Utah limited liability company,)
)
 Plaintiffs/Respondents,)

vs.)

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited)
 liability company,)
)
 Defendant/Appellant,)

M&S DEVELOPMENT, LLC, an)
 Idaho limited liability company; and PIONEER TITLE)
 COMPANY OF BANNOCK COUNTY, INC.,)
)
 Defendants.)

CASE NO. CV-2016-3588-OC

**RESPONDENTS'
 DESIGNATION OF
 ADDITIONAL RECORD ON
 APPEAL**

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited)
 liability company, Counter-claimant/Appellant,)
)

vs.)

MONITOR FINANCE, L.C., a Utah limited liability)
 company; and FIRST CAPITAL FUNDING, L.C., a)
 Utah limited liability company,)
)
 Counter-defendants/Respondents.)

COME NOW the Plaintiffs and Respondents Monitor Finance, L.C. ("Monitor") and First Capital Funding, L.C. ("First Capital"), by and through their attorneys of record, and pursuant to I.A.R. 28 designate the following additional documents for inclusion in the Clerk's Record on Appeal, in addition to the documents automatically included in the Clerk's Record pursuant to I.A.R. 28 and those documents identified in paragraph 5. of the Appellant's Notice of Appeal filed on July 11, 2017:


1. Third Affidavit of Ron Kerl in Support of Summary Judgment and Opposing Motion for Reconsideration filed on May 8, 2017; and
2. Memorandum Opposing Motion for Reconsideration and Reply Memorandum in Support of Summary Judgment Motion filed on May 8, 2017.

Respectfully submitted this 18 day of July, 2017.

COOPER & LARSEN, CHTD

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

By: _____


Ron Kerl

CERTIFICATE OF SERVICE

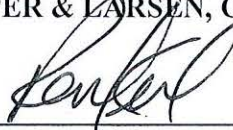
I HEREBY CERTIFY on the 18th day of July, 2017, I served a true and correct copy of the foregoing document as follows:

A. Bruce Larson
Richard A. Hearn
HEARN LAW PLC
P.O. Box 70
Pocatello, ID 83204

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-904-1816
 Email to:
larson@hearnlawyers.com
hern@hearnlawyers.com

COOPER & LARSEN, CHTD

By: _____



Ron Kerl, of the firm

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited)
 Liability company; and FIRST CAPITAL)
 FUNDING, L.C., a Utah limited liability)
 Company,)

Plaintiffs/Respondents,)

vs.)

WILDLIFE RIDGE ESTATES, LLC, an)
 Idaho limited liability company;)
 Defendant/Appellant M&S DEVELOPMENT)
 LLC, an Idaho limited liability company,)

Defendant)

Supreme Court No.

CLERK'S CERTIFICATE

OF

APPEAL

WILDLIFE RIDGE ESTATES, LLC, an)
 Idaho Limited liability company;)

Counter-Claimant/Appellant,)

vs.)

MONITOR FINANCE, L.C., a Utah limited)
 Liability company; and FIRST CAPITAL)
 FUNDING, L.C., a Utah limited liability)
 Company,)

Counter-Defendants/Respondents))

Appealed from: Sixth Judicial District, Bannock County

Honorable Judge Robert C. Naftz presiding

Bannock County Case No: CV-2016-3588-OC

Order of Judgment Appealed from: Memorandum Decision and Order filed the 27th day of March, 2017, Memorandum Decision and Order filed the 14th day of June, 2017 and Judgment, Decree of Foreclosure and Order of Sale filed the 20th day of June, 2017.

Attorney for Appellant: Richard A. Hearn, Attorney HEARN LAW PLC, Pocatello

Attorney for Respondent: Ron Kerl, Attorney COOPER & LARSEN, Chartered, Pocatello

Appealed by: Wildlife Ridge Estates, LLC, an Idaho limited liability company; Defendant/Appellant M&S Development, LLC, an Idaho limited liability company, Defendant.

Appealed against: Monitor Finance, L.C., a Utah limited liability company; and First Capital Funding, L.C., a Utah limited liability company.

Notice of Appeal filed: **July 11, 2017**

Notice of Cross-Appeal filed: No

Appellate fee paid: Yes

Request for additional records filed: No

Request for additional reporter's transcript filed: No

Name of Reporter: N/A

Was District Court Reporter's transcript requested? No

Estimated Number of Pages: N/A

Dated July 21, 2017

ROBERT POLEKI,
Clerk of the District Court

(Seal)



By [Signature]
Deputy Clerk

Ron Kerl, Esq., ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Suite 210
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

CLERK OF DISTRICT COURT
2017 AUG -1 PM 3:23
BY: [Signature]
DEPT. [Signature]

Attorneys for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

WILDLIFE RIDGE ESTATES, LLC, an
Idaho limited liability company,

Counter-claimant,

v.

MONITOR FINANCE, L.C., a Utah limited
liability ,

Counter -defendants.

Case No. CV-2016-3588-OC

WILDLIFE RIDGE ESTATES, LLC, an
Idaho limited liability company,

Counter-claimant,

v.

MONITOR FINANCE, L.C., a Utah limited
liability company; and FIRST CAPITAL
FUNDING, L.C., a Utah limited liability
company,

Counter -defendants.

**NOTICE OF SHERIFF'S SALE IN
FORECLOSURE**

UNDER AND BY VIRTUE of a Judgment, Decree of Foreclosure and Order of Sale
entered in the above entitled action in the District Court of the Sixth Judicial District of the State

of Idaho, in and for the County of Bannock on the 20th day of June, 2017, in which said action Plaintiffs Monitor Finance, L.C. and First Capital Funding, L.C. obtained a Judgment, Decree of Foreclosure and Order of Sale for the sum of \$6,828,907.39 as of June 20, 2017, plus any additional attorney fees and costs awarded by the Court pursuant to I.R.C.P. Rule 54, and costs related to the enforcement of this Decree by Sheriff's Foreclosure Sale, plus legal interest on the entire sum of the aforesaid indebtedness from the date of this Decree to and including the date of Sheriff's sale at the highest rate allowed by law; and

Pursuant to a Writ of Execution issued by the Clerk of the above entitled Court on the 27th day of June, 2017, I, the Sheriff of Bannock County, Idaho, am commanded to sell certain lots, pieces or parcels of land situated and lying and being in Bannock County, State of Idaho, said property being more particularly described as follows, to-wit:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 and

Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1

PUBLIC NOTICE IS HEREBY GIVEN that on Wednesday, the 30th day of August, 2017, at the hour of 10:00 a.m., at the Bannock County Sheriff's Office, 5800 S. 5th Ave., in Pocatello, Idaho, I will, in obedience to said Judgment, Decree of Foreclosure and Order of Sale and Execution issued pursuant thereto, sell the said property above described, or so much thereof as may be necessary to satisfy the indebtedness due the Plaintiffs, with interest, costs and accruing costs at public auction to the highest bidder for cash, lawful money of the United States of America.

You are notified that the Plaintiffs, Monitor Finance, L.C. and First Capital Funding, L.C., may purchase the property by making a credit bid against the amount due to them pursuant to the Judgment.

You may contact Ron Kerl, whose address 151 N. Third, Pocatello, Idaho 83205, and whose telephone number is (208) 235-1145, for specific information regarding the location of the property and the foreclosure.

As of June 20, 2017, there remained unpaid upon said Judgment a total amount due of \$6,828,907.39, plus accrued and accruing legal interest at the rate of 5.375% per annum from June 20, 2017 and costs permitted by law.

DATED This 31st day of July, 2017.

BANNOCK COUNTY SHERIFF

By D. Armstrong
Deputy Sheriff

In the Supreme Court of the State of Idaho

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2017 SEP 20 PM 3:44
BY DEPUTY CLERK

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs-Counterdefendants-Respondents,

v.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company,

Defendant-Counterclaimant-Appellant,

and

M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendant.

ORDER DISMISSING APPEAL

Supreme Court Docket No. 45275-2017
Bannock County No. CV-2016-3588-OC

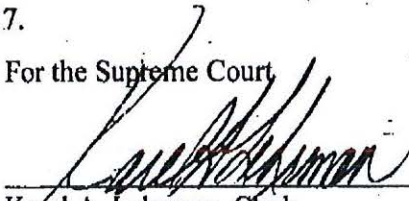
An ORDER CONDITIONALLY DISMISSING APPEAL was issued by this Court on August 22, 2017, as it appeared the JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE entered by District Judge Robert C. Naftz and filed on June 20, 2017, did not comply with I.R.C.P. 54(a). This appeal was suspended for entry of a final judgment in the District Court, pursuant to I.R.C.P. 54(a).

WHEREAS, there having been no final judgment entered in the District Court, pursuant to I.R.C.P. 54(a), and Appellant having filed no Response with this Court to the Order Conditionally Dismissing Appeal entered by this Court on August 22, 2017; therefore,

IT HEREBY IS ORDERED that this appeal be, and hereby is, DISMISSED.

DATED this 18th day of September, 2017.

For the Supreme Court

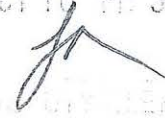

Karel A. Lehrman, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Robert C. Naftz

ORDER DISMISSING APPEAL – Docket No. 45275-2017

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

2017 OCT 10 PM 3:06



Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
liability company; M&S DEVELOPMENT, LLC, an
Idaho limited liability company; and PIONEER TITLE
COMPANY OF BANNOCK COUNTY, INC.,

Defendants.

CASE NO. CV-2016-3588-OC

JUDGMENT

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
liability company,

Counter-claimant,

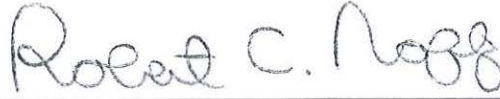
vs.

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Counter-defendant,

Judgment is entered against M & S Development, LLC for the sum of \$6,728,907.39, as of June 19, 2017, with interest accruing thereafter at the rate set by I.C. § 28-22-104, to wit: 5.625% per annum.

DATED This 10 day of October, 2017.



Hon. Robert C. Naftz
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 11 day of October, 2017, I served a true and correct copy

of the foregoing document as follows:

A. Bruce Larson
Hearn & Wood LLP
155 S. 2nd Ave.
Pocatello, ID 83201

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: bruce@hwlawpro.com

Ron Kerl
Cooper & Larsen, Chtd.
P.O. Box 4229
Pocatello, ID 83205

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: ron@cooper-larsen.com

M&S Development, LLC
c/o Michael Millward, Registered Agent
9716 W. Bighorn Drive
Pocatello, ID 83204

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: ron@cooper-larsen.com

CLERK OF THE DISTRICT COURT

By: 
Deputy

A. Bruce Larson (ISB#: 2093)
Richard A. Hearn (ISB# 5574)
HEARN LAW PLC
P.O. Box 70
Pocatello, Idaho 83204
Telephone: (208) 904-0004
Facsimile: (208) 904-1816
Email: larson@hearnlawyers.com
hearn@hearnlawyers.com

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2017 OCT 19 PM 2:36
COURT CLERK

*Attorney for Defendant/Appellant,
Wildlife Ridge Estates, LLC*

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Plaintiffs/Respondents,

v

WILDLIFE RIDGE ESTATES, LLC, an Idaho
limited liability company, Defendant/Appellant;
M&S DEVELOPMENT, LLC, an Idaho limited
liability company, Defendant.

WILDLIFE RIDGE ESTATES, LLC, an Idaho
limited liability company,

Counter-Claimant/Appellant;

v

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Counter-defendants/Respondents.

Case No. CV-2016-3588-OC

NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENTS, Monitor Finance, L.C., a Utah limited liability company, First Capital Funding, L.C., a Utah limited liability company, AND THEIR COUNSEL OF RECORD, Ron Kerl of the firm Cooper & Larsen, Chartered, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

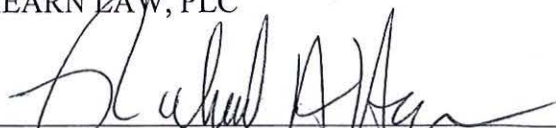
1. Designation of Appeal: That the above-named Appellant, Wildlife Ridge Estates, an Idaho limited liability company, appeals against the above-named Respondents to the Idaho Supreme Court from the following appealable judgments and orders, attached hereto, issued by the District Court in this matter pursuant to I.A.R. 11(a):
 - a. Memorandum Decision and Order dated March 27, 2017, Honorable Robert C. Naftz presiding;
 - b. Memorandum, Decision & Order dated June 13, 2017, Honorable Robert C. Naftz presiding;
 - c. Judgment, Decree of Foreclosure and Order of Sale dated June 20, 2017, Honorable Robert C. Naftz presiding; and,
 - d. Judgment dated October 10, 2017, Honorable Robert C. Naftz presiding.
2. Issues:
 - a. Whether the District Court erred in granting summary judgment to the Respondent, dismissing Appellant's Affirmative Defenses and Counterclaim and in issuing its subsequent orders referenced hereinabove;

- b. The District Court erred in granting Respondents' Motion for Summary Judgment dismissing the Affirmative Defenses and Counterclaim of Appellant in that there are disputed material issues of fact and issues of law;
 - c. The District Court's determinations on the Respondents' Motions for Summary Judgment were not based upon a proper legal basis or supported by substantial undisputed evidence;
 - d. The District Court erred in determining that the Respondents' Trust Deed should be judicially foreclosed, in that there are legal issues and disputed materials issues of fact that would preclude the entry of summary judgment allowing the foreclosure; and,
 - e. Such other issues that may be identified subsequent to the filing of this Notice of Appeal.
3. Jurisdictional Statement: Under and pursuant to I.A.R. 11, Appellant has the right to appeal to the Idaho Supreme Court the aforementioned appealable orders under and pursuant to I.A.R. 11(a).
4. Transcript: There was no trial or recorded testimony and, therefore, Appellant does not request a reporter's transcript of any court proceedings.
5. Record: The documents to be included in the clerk's record in addition to those automatically included pursuant to I.A.R. 28 are:
 - a. Respondents' two Motions for Summary Judgment and Supporting Memoranda;
 - b. Respondents' Affidavits and affidavit exhibits filed in support of the motions for Summary Judgment;
 - c. Appellant's Memoranda in opposition to the motions for Summary Judgment;

- d. Appellant's Motion to Reconsider and Memorandum in Opposition to Motion for Summary Judgment and in Support of Motion for Reconsideration;
6. Exhibits: No exhibits were offered or admitted.
7. Sealed Record: No order has been entered sealing any part of the record or transcript.
8. I hereby certify that:
- a. A copy of this Notice of Appeal has been served on the Court Reporter of these proceedings, **no reporter's transcript has been requested;**
 - b. The Clerk of the District Court has been paid the estimated fee for the preparation of the reporter's transcript pursuant to I.A.R. 24;
 - c. That all appellate filing fees have been paid; and,
 - d. That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 18 day of October, 2017.

HEARN LAW, PLC



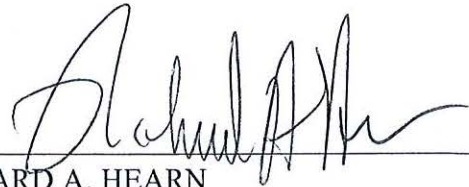
RICHARD A. HEARN, Attorney for Appellant,
Wildlife Ridge Estates, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of October, 2017, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Ron Kerl
COOPER & LARSEN, Chartered
151 North Third Avenue, 2nd Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145

- U.S. Mail – Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile: 208-235-1182
- Email: ron@cooper-larsen.com



RICHARD A. HEARN

Designation of Appeal – 1 (a)

2017 MAR 27 PM 2:00

BY KP
DEPUTY CLERK

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,)

Plaintiffs,)

vs.)

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,)

Defendants.)

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company;)

Counter-claimant,)

vs.)

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,)

Counter-defendant.)

Case No. CV-2016-3588-OC

**MEMORANDUM DECISION
AND ORDER**

NATURE OF THE ACTION

This case was initiated by a Complaint to Judicially Foreclose Deed of Trust filed by the Plaintiffs/Counterdefendants Monitor Finance, L.C. ("Monitor") and First Capital Funding, L.C.

(“First Capital”).¹ Defendant/Counterclaimant Wildlife Ridge Estates, LLC², filed an Answer and also brought a counterclaim against Monitor and First Capital for fraud and declaratory and injunctive relief. The Plaintiffs have now submitted a Motion for Partial Summary Judgment seeking dismissal of the affirmative defenses raised by Wildlife Ridge in its Answer, as well as dismissal of the Counterclaim. The Plaintiffs also submitted a Motion to Amend the Complaint, which was scheduled for a hearing date separate from the motion for partial summary judgment. In support of partial summary judgment, the Plaintiffs submitted a written brief and the Affidavit of Ron Kerl, including exhibits. Defendant/Counterclaimant Wildlife Ridge responded with an opposing brief and the Affidavit of Richard A. Hearn, with attached exhibits. The Plaintiffs then followed up with a reply brief and the Second Affidavit of Ron Kerl, including exhibits.

Oral arguments were conducted on February 21, 2017. At the outset of the hearing, the parties addressed the Plaintiffs’ Motion to Amend the Complaint. Although that motion was set to be heard at a later date, counsel for the Defendants indicated they had no objection to the amendment of the Complaint. Therefore, in a ruling from the bench, this Court granted the Plaintiffs’ request to add a new defendant based upon stipulation of the parties.

Having reviewed the entire file and the relevant law, and after consideration of the arguments made by the parties, this Court now issues this Memorandum Decision and Order.

ISSUE

1. Whether to grant the Plaintiffs’ Motion for Partial Summary Judgment.

¹ Collectively referred to herein as “the Plaintiffs”.

² Referred to herein as “Wildlife Ridge” or “the Defendant”.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment shall be rendered “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Idaho R. Civ. P. 56(c)(2016). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

If the moving party challenges an element of the non-moving party’s case on the basis that no genuine issue of material fact exists, the burden now shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Tingley*, 125 Idaho at 90, 867 P.2d at 964. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party’s case upon which that party bears the burden of proof at trial. *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The party opposing the summary judgment motion “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set

forth specific facts showing that there is a genuine issue for trial.” Idaho R. Civ. P. 56(e)(2016) (emphasis added).

STATEMENT OF FACTS

The following pertinent facts are found by a preponderance of the evidence, with all reasonable inferences drawn in favor of the Defendant. *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694, 698 (2009) (“All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” *Lockheed Martin Corp. v. Idaho State Tax Comm’n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006)).³

Wildlife Ridge is the owner in fee simple of certain real property described in the Deed of Trust attached as Exhibit A to the Plaintiffs’ Complaint to Judicially Foreclose Deed of Trust. On December 3, 2014, Wildlife Ridge filed its initial Complaint seeking to quiet title in that property against the same plaintiffs in this case, Monitor Finance and First Capital (“the First Action”).⁴ (See Exs. A and B, attached to Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor and First Capital (“Kerl Aff.”), Jan. 6, 2017.) That Complaint was amended on March 12, 2015. (Exs. A and C, attached to Kerl Aff.) By its Complaint and Amended Complaint, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from

³ The background information was extracted from the parties’ briefs and the submitted affidavits and exhibits.

⁴ Based on stipulation of the parties at oral arguments, this Court takes judicial notice of the filings and outcome of the First Action.

the district court that the sums due under the Deed of Trust Note and the Modification of Trust Deed Note (“the Modification”) secured by the Monitor and First Capital Deed of Trust had been satisfied. (Exs. B and C, attached to Kerl Aff.) On June 14, 2016, a Judgment dismissing the First Action with prejudice was entered. (Ex. E, attached to Kerl Aff.)

DISCUSSION

As explained above, the case presently before this Court was initiated by a Complaint to Judicially Foreclose Deed of Trust filed against Defendants Wildlife Ridge Estates, LLC and M&S Development, LLC. Wildlife Ridge filed an Answer to Complaint and a Counterclaim against the Plaintiffs for fraud and declaratory and injunctive relief. In an earlier action, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from the district court that the sums due under the Deed of Trust Note and Modification had been satisfied. That case was dismissed with prejudice. In seeking partial summary judgment, the Plaintiffs argue that all defenses and claims now raised by Wildlife Ridge in response to the current lawsuit are barred by the doctrine of *res judicata*.

a. Law

Under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. The Idaho Supreme Court explained the doctrine of *res judicata*, or claim preclusion, as follows:

Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action.

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (citations omitted, emphasis added). Thus, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. *Elliot v. Darwin Neibaur Farms*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). As such, “in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim *but also as to every matter which might and should have been litigated in the first suit.*” *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436–37, 849 P.2d 107, 109–10 (1993)(emphasis added); *see also Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922). As further explained by Idaho courts, because the transactional concept of a claim is broad, “the bar of claim preclusion may apply even where there is not a substantial overlap between the theories advanced in support of a claim, or in the evidence relating to those theories.” *Aldape v. Akins*, 105 Idaho 254, 259, 668 P.2d 130, 135 (Idaho Ct. App. 1983)(cited with approval by *Kolouch*, 123 Idaho at 437, 849 P.2d at 110.) Thus, “a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose.” *Kolouch*, 123 Idaho

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at 437, 849 P.2d at 110; *see also Diamond v. Farmers Ins.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990).

Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805 (quoting *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct.App.1983)).

Ticor Title Co. v. Stanion, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007).

b. Analysis

The Plaintiffs argue the First Action already addressed the enforceability of the same Deed of Trust Note, Modification, and Deed of Trust at issue here. Because that lawsuit was dismissed with prejudice, the Plaintiffs maintain that the Defendants are now prevented from presenting any defense or claim challenging the enforceability of the debt which might have and should have been litigated in that First Action. (Mem. in Supp. of Summ. J. Mot. Filed by Monitor and First Capital (“Mem. in Supp. of Summ. J.”), Jan. 6, 2017, 3-4.) The Plaintiffs have therefore asked this Court to strike and dismiss the affirmative defenses and the Counterclaim raised by the Defendant.

In response, the Defendant argues *res judicata* is not a bar to the defenses and/or counterclaim it has raised in the present lawsuit because none of those issues were “actually litigated in the Quiet Title Action and they could not have been litigated.” (Def. Wildlife Ridge’s Resp. to Pls. Monitor Finance L.C.’s and First Capital L.C.’s Mot. for Partial Summ. J. (“Def.’s Resp.”), Feb. 6, 2017, 12.) For example, Wildlife Ridge first argues that “[t]he entity

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that appeared in the Quiet Title Action as Monitor Finance L.C. was not a real party in interest to the transactions that were the subject matter of that action or the present action.” (Def.’s Resp. at 6.) In support of that allegation, the Defendant points to the fact that the Monitor Finance, L.C. that was named as a party to the Note and Deed of Trust expired on September 17, 2012, and was never renewed. Instead, “[a] new entity bearing the same name Monitor Finance L.C. was established on January 23, 2015 nearly two months after the Quiet Title Action was filed on December 3, 2014.” (*Id.*) Thus, the Defendant argues that one of the plaintiffs in this case, Monitor Finance, L.C., which entity was named as a defendant in the First Action to quiet title filed by Wildlife Ridge, was not a real party in interest in that case because it had been administratively dissolved before the First Action was filed. The Defendant further argues that its pending counterclaim and affirmative defenses for fraud were not raised and could not have been litigated in the quiet title action because neither M&S Development, LLC (“M&S”), or Michael Millward were named parties.⁵ (*See id.*) While the Defendant notes that M&S and Mr. Millward were referenced in both the initial complaint and the amended complaint to quiet title, the Defendant argues that neither M&S nor Mr. Millward were named parties in the quiet title action and “there were no allegations made by any party in the Quiet Title Action that either M&S or Millward had done anything wrong.” (*Id.*) The Defendant thus argues: “As Millward and M&S would have been necessary parties to any fraud claim brought against Plaintiffs,

⁵ “On December 30, 2005, M&S Development, LLC and Michael Millward signed a promissory note with First Capital Funding, L.C. and Monitor Finance, L.C. for \$244,000.00.” (Ex. C, attached to Kerl Aff., Am. Compl. to Quiet Title (“First Action”), March 16, 2016, ¶7; *see also* Ex. B, attached to Kerl Aff., Compl. to Quiet Title, Dec. 1, 2014, §§7-8.)

Wildlife Ridge had no duty to bring its claim for fraud against Plaintiffs, Millward and M&S in association with its Quiet Title Action.” (Def.’s Resp. at 8.) Finally, the Defendant argues that the Modification of Trust Deed Note was never mentioned in the pleadings filed in the quiet title action. (*Id.* at 7.) The Defendant argues the Modification is “central” to the foreclosure action and Wildlife Ridge’s counterclaim for fraud, and is another example of a claim that could not have been brought in the First Action. (*Id.*)

First, this Court must reject the Defendant’s argument that Monitor Finance, L.C., while a named defendant in the First Action, was nonetheless not a real party in interest to that lawsuit because it had been previously administratively dissolved. Dissolution of a corporation does not prevent the commencement of legal proceedings against that corporation in its corporate name.

Arndt v. First Interstate Bank of Utah, N.A., 1999 UT 91, ¶ 14, 991 P.2d 584, 587; *see also*

UTAH CODE ANN. § 16-10a-1405 (West).⁶ Because the debt owed existed prior to any

⁶ § 16-10a-1405. Effect of dissolution

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

- (a) collecting its assets;
- (b) disposing of its properties that will not be distributed in kind to its shareholders;
- (c) discharging or making provision for discharging its liabilities;
- (d) distributing its remaining property among its shareholders according to their interests; and
- (e) doing every other act necessary to wind up and liquidate its business and affairs.

(2) Dissolution of a corporation does not:

- (a) transfer title to the corporation's property;
- (b) prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;
- (c) subject its directors or officers to standards of conduct different from those prescribed in Part 8, Directors and Officers;
- (d) change:
 - (i) quorum or voting requirements for its board of directors or shareholders;
 - (ii) provisions for selection, resignation, or removal of its directors or officers or both; or
 - (iii) provisions for amending its bylaws or its articles of incorporation;
- (e) prevent commencement of a proceeding by or against the corporation in its corporate name;

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dissolution and Monitor Finance was sued during the winding down process to invalidate that debt, Monitor Finance was a legitimate party in interest and a named defendant in the First Action.

This Court further rejects the Defendant's argument that M&S and Michael Millward were indispensable parties for a complete resolution regarding Wildlife Ridge's claim that the debt due to the Plaintiffs was unenforceable. Whether a party is "indispensable" is governed by IRCP 19(a)(1).⁷ Under that rule, a party shall be joined if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Idaho R. Civ. P. 19(a). In this case, complete relief could have been granted to Wildlife Ridge if the court in the quiet title action had determined that the debt had been satisfied. If that had been

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- (f) abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
 - (g) terminate the authority of the registered agent of the corporation.

UTAH CODE ANN. § 16-10a-1405 (West)(emphasis added).

⁷ **Rule 19. Required joinder of parties**

(a) Persons Required to be Joined if Feasible.

(1) *Required Party.* A person who is subject to service of process must be joined as a party in the action if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

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the outcome, the Plaintiffs' Deed of Trust would have no debt to secure, and title to the premises could have been quieted in Wildlife Ridge, free and clear of that encumbrance. No matter the basis for such a finding, that outcome would not have adversely affected either M&S or Mr. Millward since the debt they were personally liable for would no longer be enforceable. In addition, there was no risk of double, multiple or otherwise inconsistent obligations since M&S and Mr. Millward would have been bound by a decree finding that the debt owed was unenforceable, no matter whether the basis of such a decree was that the debt had been satisfied or that the debt was unenforceable based on a statute of limitations or fraud argument. As such, M&S and Mr. Millward were not indispensable parties to Wildlife Ridge's quiet title action and/or Wildlife Ridge's attempt to have the debt deemed unenforceable.

This Court must also reject the Defendant's arguments regarding the Modification. The Defendant argued the Modification dated March 3, 2008, was fraudulent and the "statute of limitations claim is related directly to the validity and effect of the claimed Modification." (Def.'s Resp. at 10.) The Defendant argued that because the Modification of Trust Deed Note was "never mentioned" in the pleadings filed in the quiet title action, the issues surrounding the Modification could not have been litigated and therefore cannot now be barred by *res judicata*. However, the record shows the Defendant was aware of the Modification during the First Action, since the Modification was produced to Wildlife Ridge through discovery. (Ex. 2, First Capital Funding, L.C.'s Resp. to Pl.'s First Set of Discovery, attached to Second Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor Finance, L.C. and First Capital Funding, L.C., ¶¶4-5,

Feb. 14, 2017.) As such, any claims pertaining to the Modification could have been raised in the
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First Action, and this Court has also already determined that M&S and Mr. Millward were not indispensable parties to the Quiet Title Action necessary to any fraud allegation attempting to show the debt owed to the Plaintiffs was unenforceable.

Therefore, based on the above findings and the undisputed facts in this case, all of the Defendant's claims that could have challenged the enforceability of the debt secured by the Deed of Trust should have been litigated in the quiet title action. There is no dispute that in the First Action Wildlife Ridge sought a decree quieting title to the property described in Monitor Finance's and First Capital's Deed of Trust free and clear of that Deed of Trust by claiming there was no enforceable debt which could be secured because the applicable promissory note had been satisfied by previous payments made to the Plaintiffs. Thus, the gravamen of the first quiet title action was that there was no enforceable debt left to be secured by the Plaintiffs' encumbering the Deed of Trust. Furthermore, there is no question that both the First Action and this matter involve the same parties and the same Deed of Trust. There is also no question that the First Action was finally resolved and dismissed with prejudice by entry of a final judgment rejecting the Defendant's attempt to challenge the enforceability of the Deed of Trust Note, the Modification, and the Deed of Trust. As explained, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made *or which might have been made*. No matter the theory advanced by the Defendant in its original quiet title action, the dismissal of the First Action serves as a dismissal with prejudice of every matter that was

available in the First Action to challenge the enforceability of the Deed of Trust Note, the

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Modification, and the Deed of Trust in this case. A careful reading of Wildlife Ridge's Answer and Counterclaim show that the affirmative defenses and claim of fraud all challenge the enforceability of the same Monitor and First Capital Deed of Trust Note, Modification and Deed of Trust at issue in the First Action; therefore, those claims should have been litigated in the First Action. The Defendant has not demonstrated that it was in any way prevented from presenting in the First Action any of the claims it has now raised. This Court has found there to be no question of fact that those claims, including any statute of limitations defense, the equitable doctrines of laches and unclean hands, and the claim of fraud all relate to and arose prior to the dismissal of the First Action.

Therefore, because the First Case ended in a final judgment on the merits, because this case involves the same parties as the First Case, and because all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Case, the affirmative defenses and counterclaim now raised by the Defendant are barred by the doctrine of *res judicata*.

CONCLUSION

The Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED. This Court has determined the Defendant's affirmative defenses and fraud claim are barred by the doctrine of *res judicata*. Therefore, all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud are hereby stricken and dismissed.

IT IS SO ORDERED.

DATED this 27 day of March 2017.


ROBERT C. NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of March, 2017, I served a true and correct copy of the foregoing document upon each of the following in the manner indicated.

Ron Kerl
Cooper & Larsen
PO Box 4229
Pocatello, ID 83205-4229

E
 U.S. Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

A. Bruce Larsen
155 S. 2nd Ave.
Pocatello, ID 83201

E
 U.S. Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

ROBERT POLEKI, Clerk

By: Keri Povey
KERI POVEY
Deputy Clerk

Designation of Appeal – 1 (b)

FILED
CLERK OF DISTRICT COURT
2017 JUN 16 AM 8:20
BY KP
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendants.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company,

Counterclaimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Counterdefendants,

Case No. CV-2016-3588-OC

MEMORANDUM DECISION
AND ORDER

NATURE OF THE ACTION

This case was initiated by a Complaint to Judicially Foreclose Deed of Trust filed by the Plaintiffs/Counterdefendants Monitor Finance, L.C. ("Monitor") and First Capital Funding, L.C.

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Re: Defendant's Motion for Reconsideration/Plaintiffs' Motion for Summary Judgment

("First Capital").¹ Defendant/Counterclaimant Wildlife Ridge Estates, LLC², filed an Answer and also brought a counterclaim against Monitor and First Capital for fraud and declaratory and injunctive relief.

On January 6, 2017, the Plaintiffs submitted a Motion for Partial Summary Judgment seeking dismissal of the affirmative defenses raised by Wildlife Ridge in its Answer, as well as dismissal of the Counterclaim. The Plaintiffs' Motion for Partial Summary Judgment was granted, and all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud were stricken and dismissed. (Mem. Decision and Order, March 27, 2017, 13.)

On April 13, 2017, the Plaintiffs filed the pending Motion for Summary Judgment, along with a brief and affidavits. Defendant Wildlife Ridge opposed the Motion for Summary Judgment by submitting a Motion for Reconsideration, seeking reversal of this Court's prior entry of summary judgment granting the Plaintiffs' request to strike the Defendant's affirmative defenses and Counterclaim. The Defendant's brief addressed both the Motion for Reconsideration and opposed the Plaintiffs' Motion for Summary Judgment. The Defendant did not submit any affidavits or other evidence.

Oral arguments regarding both motions were heard on May 15, 2017. Having reviewed the entire file and the relevant law, and after consideration of the arguments made by the parties, this Court now issues this Memorandum Decision and Order.

¹ Collectively referred to herein as "the Plaintiffs".

² Referred to herein as "Wildlife Ridge" or "the Defendant".

STATEMENT OF FACTS

Wildlife Ridge is the owner in fee simple of certain real property described in the Deed of Trust attached as Exhibit A to the Plaintiffs' Complaint to Judicially Foreclose Deed of Trust. On December 3, 2014, Wildlife Ridge filed a Complaint seeking to quiet title in that property against the same plaintiffs in this case, Monitor Finance and First Capital ("the First Action").³ (See Exs. A and B, attached to Aff. of Ron Kerl in Supp. of Summ. J. Mot. Filed by Monitor and First Capital ("Kerl Aff."), Jan. 6, 2017.) That Complaint was amended on March 12, 2015. (Exs. A and C, attached to Kerl Aff.) By its Complaint and Amended Complaint, Wildlife Ridge sought a decree quieting title in its name to the lands described in the Deed of Trust free and clear of the Monitor and First Capital Deed of Trust, along with a declaration from the district court that the sums due under the Deed of Trust Note and the Modification of Trust Deed Note ("the Modification") secured by the Monitor and First Capital Deed of Trust had been satisfied. (Exs. B and C, attached to Kerl Aff.) On June 14, 2016, pursuant to a stipulation by the parties, a Judgment dismissing the First Action with prejudice was entered. (Ex. E, attached to Kerl Aff.) The dismissal of the First Action was followed by the Plaintiffs' present lawsuit to judicially foreclose the Deed of Trust.

As explained, this Court previously granted the Plaintiffs' Motion for Partial Summary Judgment. In seeking partial summary judgment, the Plaintiffs argued that all of the defenses and claims raised by Wildlife Ridge in response to the current lawsuit were barred by the

³ Based on stipulation of the parties at oral arguments, this Court takes judicial notice of the filings and outcome of the First Action.

doctrine of *res judicata* based on the dismissal of the First Action. In granting that motion, this Court determined that the First Action ended in a final judgment on the merits and that the present case involves the same parties as the First Action. (Mem. Decision and Order, March 27, 2017, 13.) This Court further determined that because all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Action, the affirmative defenses and counterclaim raised by the Defendant were barred by *res judicata*. (*Id.*) Therefore, all of the affirmative defenses listed in the Defendant's Answer, as well as the Defendant's Counterclaim for fraud were stricken and dismissed. (*Id.*) A Judgment to that effect was entered on March 27, 2017. Then, on March 30, 2017, Default was entered against Defendant M & S Development, LLC ("M&S"), for failure to appear or answer the Plaintiffs' Complaint. Subsequently, Defendant Pioneer Title Company of Bannock County filed a waiver of its right to respond further to the Plaintiffs' Amended Complaint and consented to the entry of a Judgment and Decree of Foreclosure as sought by Monitor and First Capital pursuant to the Amended Complaint.

The Plaintiffs then filed the pending Motion for Summary Judgment. By that motion, the Plaintiffs are seeking a Judgment and Decree of Foreclosure against Defendant Wildlife Ridge on the basis of this Court's prior Memorandum Decision and Order dismissing Wildlife Ridge's affirmative defenses and counterclaim against the Plaintiffs, as well as the fact that Defendant Pioneer Title Company waived its right to respond and consented to the entry of a Judgment and Decree of Foreclosure.

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Re: Defendant's Motion for Reconsideration/Plaintiffs' Motion for Summary Judgment

ISSUES

1. Whether to grant the Defendant's Motion for Reconsideration.
2. Whether to grant the Plaintiffs' Motion for Summary Judgment.

DISCUSSION

It is necessary for this Court to first address the Defendant's Motion for Reconsideration, as resolution of that motion necessarily resolves the question of summary judgment.

Motion for Reconsideration

a. Standard of Review

Rule 11.2(b)(1)⁴ of the Idaho Rules of Civil Procedure ("IRCP") governs motions for reconsideration. Under that rule, "[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."

In explaining motions for reconsideration, the Idaho Supreme Court has stated: "A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order." *Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012). "[T]he most important consideration is the correctness of the interlocutory order." *Id.* Thus, "[a]fter a final judgment, a party has one more chance under [Rule 11.2(b)(1)] to ask the court to decide the law and facts correctly." *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 913, 332 P.3d 815, 825 (2014). That rule "allows

⁴ Prior to 2016, this rule was labeled as Idaho Rule of Civil Procedure 11(a)(2)(B).

the trial court to reconsider facts in light of any new or additional facts that are submitted in support of the motion. This ensures the district court decides a case on the proper law and facts.” *Id.* (internal citation omitted.) Therefore, the district court should consider any new facts and new evidence presented by the moving party bearing on the correctness of the interlocutory order. *Coeur d’Alene Mining Co. v. First Nat’l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990); *Kepler-Fleenor v. Fremont Cty.*, 152 Idaho 207, 210, 268 P.3d 1159, 1162 (2012). “The burden is on the moving party to bring the trial court’s attention to the new facts.” *Coeur d’Alene Mining Co.*, 118 Idaho at 823, 800 P.2d at 1037. A trial court is not required “to search the record to determine if there is any new information that might change the specification of facts deemed to be established.” *Id.* However, while Rule 11.2(b)(1) “permits a party to present new evidence when a motion is brought under that rule, [the rule] does not require that the motion be accompanied by new evidence.” *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Idaho Ct.App. 2006). Thus, this Court is not precluded from reconsidering an interlocutory decision on the grounds of the initial evidence. *Id.* at 473, 147 P.3d at 105.

“When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). This Court is being asked to reconsider the granting of a partial motion for summary judgment. Therefore, this Court “must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.” *Id.*

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b. Analysis

As explained, this Court previously dismissed the Defendant's affirmative defenses and counterclaim on the basis of *res judicata*. This Court specifically determined that the First Action between the parties ended in a final judgment on the merits, that case involved the same parties as the First Action, and all of the claims in this case arise out of the same transaction or series of transactions as decided in the First Action. (Mem. Decision and Order at 13.) Because "the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made *or which might have been made*", this Court ruled that "[n]o matter the theory advanced by the Defendant in its original quiet title action, the dismissal of the First Action serves as a dismissal with prejudice of every matter that was available in the First Action to challenge the enforceability of the Deed of Trust Note, the Modification, and the Deed of Trust in this case." (*Id.* at 12.) This Court further determined that all of the affirmative defenses and the counterclaim raised by Wildlife Ridge challenged "the enforceability of the same Monitor and First Capital Deed of Trust Note, Modification and Deed of Trust at issue in the First Action; therefore, those claims should have been litigated in the First Action." (*Id.* at 13.) This Court found that the Defendant had "not demonstrated that it was in any way prevented from presenting in the First Action any of the claims it has now raised." (*Id.*) As such, this Court found there were no questions of fact regarding the Defendant's defenses or counterclaim, and the defenses and counterclaim were necessarily stricken and dismissed. (*Id.*)

Through the Motion for Reconsideration, the Defendant specifically challenges the dismissal of the statute of limitations defense, arguing that defense was not available in the First Action and therefore should not have been barred by this Court under the theory of *res judicata*. (Mem. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Def.'s Mot. for Reconsideration ("Mem. in Opp'n"), May 1, 2017, 2.) Wildlife Ridge, the Defendant in this action, was the Plaintiff in the First Action to quiet title filed against Monitor and First Capital, now the Plaintiffs in the present case. The Defendant argues that during the time of the First Action, Wildlife Ridge had no standing to quiet title *and* raise a claim that the statute of limitations prohibited Monitor and First Capital from enforcing the debt secured by, and foreclosing, the Deed of Trust. (*See id.* at 2-3.) In support of that argument, the Defendant cited to Idaho Code § 5-214A, which provides a five-year statute of limitations for the commencement of an action for the foreclosure of a mortgage. The Defendant also cited to one sentence from a 1952 Idaho Supreme Court case pertaining to that statute of limitations. Quoting from *Trusty v. Ray*, 73 Idaho 232, 249 P.2d 814 (1952), the Defendant argued: "In Idaho, a 'mortgagor or his successor in interest cannot quiet title against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run against the right to foreclose the mortgage.'" (*Id.* at 2.)

The Plaintiffs dispute the Defendant's analysis of *Trusty* as being too broad. The Plaintiffs agree that the Idaho Supreme Court in the *Trusty* case concluded that the "mortgagor or his successor in interest *cannot quiet title* against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run against the right to foreclose the mortgage."

(Mem. Opposing Mot. for Reconsideration and Reply Mem. in Supp. of Summ. J. Mot. ("Mem. Memorandum Decision and Order
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Opposing Mot. for Reconsideration”), May 8, 2017, 4.) However, the Plaintiffs argue that “simple statement” did not prohibit Wildlife Ridge “from bringing all available claims for relief *other than one for quieting title to the property*” in the First Action. (*Id.*) Thus, the Plaintiffs argue that even if quiet title was not available to Wildlife Ridge in the First Action, there is nothing about the *Trusty* case that prevented the Defendant from pursuing other, still available avenues of relief, such as seeking a permanent injunction stopping any enforcement of the deed of trust by foreclosure. The Plaintiffs point out, for example, that the Defendant raised different forms for relief other than quiet title in responding to this action. (*See id.*) The Plaintiffs argue that because Wildlife Ridge did not pursue those other avenues of relief in the First Action, the Defendant is barred under the theory of *res judicata* from “now rais[ing] additional claims for relief which could have been raised in the First Quiet Title Action.” (*Id.*) Therefore, the Plaintiffs maintain that this Court was correct in its decision granting partial summary judgment because “[*r*]es judicata’s subparts, issue and claim preclusion, ... cover not only the theory of recover[y] advanced in the first action (here, ‘Quiet Title’) but any theory of recovery at law or inequity [sic] which could have been raised in the first action.” (*Id.*)

Under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. “[*R*]es judicata is an umbrella term for different but related concepts: claim preclusion and issue preclusion.” Steve Wieland, *Don't Let the Ttab Decide Your Next*

Infringement Dispute, 59 *ADVOCATE* 38 (2016); *see also*, *Taylor v. Sturgell*, 553 U.S. 880, 892,

128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008). “Separate tests are used to determine whether

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claim preclusion or issue preclusion applies.” *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007)(internal citation omitted).

Pursuant to the doctrine of claim preclusion, a final judgment bars a party from re-litigating that same claim, regardless of whether the subsequent litigation involves new or different issues. *Sturgell*, 553 U.S. at 892, 128 S. Ct. at 2171. The Idaho Supreme Court further explained claim preclusion as follows:

Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action.

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (citations omitted, emphasis added). Thus, the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. *Elliot v. Darwin Neibaur Farms*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). As such, “in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.” *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436–37, 849 P.2d 107, 109–10 (1993)(emphasis added); see also *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553,

208 P. 241, 242-43 (1922). Similarly, “[i]ssue preclusion ... bars ‘successive litigation of an

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issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Sturgell*, 553 U.S. at 892, 128 S. Ct. at 2171 (internal citation omitted). Thus, when a court finally determines an issue in one case that is essential to that judgment, a litigant is barred from raising the issue again in another lawsuit.

Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805 (quoting *Aldape v. Akins*, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct.App.1983)).

Stanion, 144 Idaho at 123, 157 P.3d at 617; *see also*, *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008).

Whether claim preclusion or issue preclusion bars relitigation between the same parties of a prior litigation is a question of law upon which this Court exercises free review. *Lohman v. Flynn*, 139 Idaho 312, 319, 78 P.3d 379, 386 (2003). *Res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence. *Foster v. City of St. Anthony*, 122 Idaho 883, 890, 841 P.2d 413, 420 (1992).

Id. at 122, 157 P.3d at 616.

In its decision granting partial summary judgment, this Court determined that the doctrine of *res judicata* applied to not only the theory of recovery advanced by Wildlife Ridge in the First Action, but to any theory of recovery at law or equity which *could have* been raised in that First Action. Thus, Wildlife Ridge should have asserted every legal rule and/or equitable remedy to establish that the Deed of Trust Note was unenforceable. The Defendant's new reliance on the

Trusty case does not support the Defendant's argument that it was prohibited in the First Action from bringing all available claims for relief other than a claim for quieting title. Wildlife Ridge was not required to limit its requested relief to simply seeking a decree quieting title to the land. However, having selected that solitary claim for relief, the doctrine of *res judicata* prohibits Wildlife Ridge from now adding new or additional claims for relief that were available at the time of the First Action, which action was indisputably litigated to a final judgment. When the First Action was dismissed, Wildlife Ridge lost the ability to relitigate any other theories of recovery arising out of the same transaction or series of transactions which were actually made or which might have been made in the First Action. Unfortunately, Wildlife Ridge limited itself by seeking a relief that was too narrow, and this Court can find no error of fact or law in its previous decision to that effect.

The Defendant additionally argued reconsideration should be granted because the Plaintiffs are simply barred from "the commencement of a foreclosure action in this matter" because "[a]n action for the foreclosure of a mortgage on a real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage." (Mem. in Opp'n at 3.) Citing to the Trust Deed Note attached to the Plaintiffs' Complaint, the Defendant argued:

The Deed of Trust being foreclosed is subject to the mandatory maturity date contained in the Trust Deed Note. The note specifically states that "**2. The term of this Trust Deed Note shall be one hundred eighty (180) days. This Trust Deed Note shall fully mature on June 28, 2006 (the 'Maturity Date').**"

(*Id.* at 3.) The Defendant argues there was no stay on the statute of limitations, and the five-year timeframe for commencing an action for the foreclosure of the subject mortgage has expired based on the maturity date of June 28, 2006. Therefore, the Defendant claims the Plaintiffs are now time-barred from enforcing their rights under the Deed of Trust Note and Modification. (*See Mem. in Opp'n* at 3.) The Plaintiffs dispute that contention, arguing that “the record before the Court and applicable law supports a finding that the subject obligation is not time barred by any applicable statute of limitations.” (*Mem. Opposing Mot. for Reconsideration* at 9.)

As mentioned earlier, Idaho Code § 5-214A provides a five-year statute of limitations for the commencement of an action for the foreclosure of a mortgage. That statute states:

An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness.

IDAHO CODE ANN. § 5-214A (West). Idaho Code § 45-1515 adopts the same five-year statute of limitations for the foreclosure of deeds of trust. That statute states:

The foreclosure of a trust deed by advertisement and sale shall be made and the foreclosure of a trust deed by judicial procedure shall be commenced within the time limited by the same period and according to the same provisions including extensions as provided by law for the foreclosure of a mortgage on real property.

IDAHO CODE ANN. § 45-1515 (West). The Defendant points to the maturity date stated in the Deed of Trust Note, which is June 28, 2006. (*See Ex. A, Trust Deed Note, attached to Compl. to Judicially Foreclose Deed of Trust, Oct. 7, 2016.*) That date is not in dispute, and the Complaint to foreclose the Deed of Trust was not filed until 2016. However, the Plaintiffs argue the statute

of limitations was restarted by a partial payment made on November 8, 2012, “extending the maturity date of the obligations secured by the Deed of Trust, and the right to foreclose that Deed of Trust, to November 8, 2017.” (Mem. Opposing Mot. for Reconsideration at 10.)

In support of the extension argument, the Plaintiffs direct this Court to Idaho Code § 5-238, which pertains to the effect of partial payments. That statute provides:

No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; *but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.*

IDAHO CODE ANN. § 5-238 (West)(emphasis added). The Idaho Supreme Court has found that payments of interest or principal serve to restart the statute of limitations on all installments on the note pursuant to IC § 5-238. *Horkley v. Horkley*, 144 Idaho 879, 881, 173 P.3d 1138, 1140 (2007). There is no dispute in this case that on November 8, 2012, the Plaintiffs “received a payment on the Deed of Trust Note in the amount of \$38,472.24 and applied that payment to the principal due on the obligation.” (Mem. Opposing Mot. for Reconsideration at 10; *see also*, Supplemental Aff. in Supp. of Pls.’ Foreclosure Decree, May 8, 2017, ¶ 3.) As such, the partial payment made on the Deed of Trust in this case on November 8, 2012, restarted the five-year statute of limitations, extending the maturity date of the obligations secured by the Deed of Trust, including the right to foreclose that Deed of Trust, to November 8, 2017. The Complaint to Judicially Foreclose the Deed of Trust was filed on October 7, 2016, within the five-year limit. Furthermore, there is no dispute that the partial payment extending the maturity date was made

after Wildlife Ridge had acquired the subject property and was therefore made with the

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Defendant's full knowledge and consent. Thus, under the provisions of IC § 5-238, the partial payment to the Plaintiffs constituted "a new promise in writing", extending the statute of limitations found in IC §§ 5-214A and 45-1515 for an additional five years. As such, the Plaintiffs' action to foreclose the Deed of Trust, filed on October 7, 2016, was timely filed, and the Plaintiffs are not barred by the statute of limitations from commencing this action. Therefore, the Defendant's statute of limitation argument does not provide a valid basis for this Court to reconsider its prior decision granting partial summary judgment in favor of the Plaintiffs.

Motion for Summary Judgment

The Plaintiffs have moved for summary judgment seeking a Judgment and Decree of Foreclosure against Wildlife Ridge. As set forth above, the Plaintiffs' request is supported by this Court's previous entry of partial summary judgment and the subsequent Default entered against Defendant M & S Development, LLC, for failure to appear or answer the Plaintiffs' Complaint. Defendant Pioneer Title Company of Bannock County has also consented to the entry of a Judgment and Decree of Foreclosure as sought by Monitor and First Capital pursuant to the Amended Complaint. Based on that procedural history, the Plaintiffs argue this Court need now only make a determination that there remains an unpaid debt secured by the Deed of Trust, and make a further finding as to the description and reasonable value of the property still encumbered by that Deed of Trust. (Mem. in Supp. of Summ. J. Mot., April 13, 2017, 4.)

a. Standard of Review

Summary judgment shall be rendered “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” IDAHO R. CIV. P. 56(c)(2016). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party’s favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

If the moving party challenges an element of the non-moving party’s case on the basis that no genuine issue of material fact exists, the burden now shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Tingley*, 125 Idaho at 90, 867 P.2d at 964. Summary judgment is properly granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party’s case upon which that party bears the burden of proof at trial. *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The party opposing the summary judgment motion “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set

forth specific facts showing that there is a genuine issue for trial.” IDAHO R. CIV. P. 56(e)(2016) (emphasis added).

b. Analysis

In opposing the Motion for Summary Judgment, the Defendant argued the amount of the debt cannot be relitigated because the amount of the debt was already raised and litigated in the First Action. (Mem. in Supp. of Mot. for Reconsideration at 4.) The Defendant stated: “[T]he amount of the debt was raised and litigated in the first quiet title action the result was a joint stipulation dismissing the action.” (*Id.*) Relying on the doctrine of *res judicata*, the Defendant contends that the issue of whether a debt was owed was already litigated in the First Action, and based on the joint stipulation entered there, the Plaintiffs are now barred from relitigating the debt owed.⁵

This Court has already extensively set forth the law regarding *res judicata* in the proceeding sections, as well as in its prior Memorandum Decision and Order. There is no need to repeat that discussion in great depth here. It is sufficient to note that under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. A judgment, “once rendered, is treated as the full measure of relief to be accorded between the same parties on the same ‘claim’ or ‘cause of action.’” *Aldape*, 105 Idaho at 256, 668 P.2d at 132(quoting *Kaspar Wire Works, Inc.*, 575 F.2d at 535–36).

⁵ Outside of the Motion for Reconsideration, the Defendant did not raise any factual issues challenging summary judgment, and the Defendant did not submit any affidavits or other evidence to challenge summary judgment.

Monitor and First Capital were defendants in the First Action. One defense raised by Monitor and First Capital was the denial that the obligation owed by Michael Millward and M&S Development had been satisfied. Mr. Millward and M&S were the makers of the Deed of Trust Notes. However, Monitor and First Capital did not pursue any claims for relief in the First Action because they were prohibited from doing so under applicable bankruptcy laws. As makers of the Deed of Trust Notes, as modified, Mr. Millward and M&S were necessary parties to any claim to foreclose the Deed of Trust and enforce the Deed of Trust Note and Modification. See IDAHO R. CIV. P. 20(a)(2)(2016).⁶ However, at the time of the First Action, Mr. Millward had already filed for bankruptcy. Pursuant to Title 11, Section 362 of the United States Code⁷, an automatic stay commenced on September 10, 2012. The Plaintiffs submit they were

⁶ **Rule 20. Permissive joinder of parties**

(a) Persons Who May Join or be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* Persons may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

⁷ (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

....

11 U.S.C.A. § 362 (West).

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prohibited by that bankruptcy stay from taking any action to enforce the Trust Deed Note, as amended, and foreclose the Deed of Trust securing that Trust Deed Note. According to the Plaintiffs, the automatic stay existed until the bankruptcy case was closed on June 23, 2016. Thus, the pending Chapter 7 bankruptcy prevented Monitor and First Capital from asserting any foreclosure claims against Defendants Millward, M&S Development, and Wildlife Ridge in the First Action, and the amount of Monitor and First Capital's debt still owed was therefore never actually litigated. In responding to the Motion for Summary Judgment, the Defendant offered no evidence to dispute the fact that Monitor and First Capital could not have actually litigated a claim for foreclosure in the First Action because they were prohibited from pursuing such a claim against the makers of the Note based on the bankruptcy stay. As *res judicata* is only a bar to the relitigation of claims that have already been decided, and the Plaintiffs made no "claim" for foreclosure in the First Action, *res judicata* cannot now prevent the Plaintiffs from pursuing litigation regarding the amount of debt still owed.

Furthermore, notwithstanding the proceeding discussion regarding *res judicata*, no factual issues have been raised by the Defendant in challenging summary judgment. Under the governing standards, the party opposing the motion for summary judgment must produce "evidence by way of affidavit or deposition ... to contradict the assertions of the moving party." *Ambrose By & Through Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Idaho Ct. App. 1994)(internal citations omitted). Such evidence must be anchored in something more than mere speculation. *See id.* A non-moving party's failure to make a

showing sufficient to establish the existence of an element essential to that party's case, on which

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that party will bear the burden of proof at trial, requires the entry of summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 295 (1986). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 322–23, 106 S. Ct. at 2552. Thus, where the non-moving party has failed to make a showing of proof on any element for which it bears the burden at trial, summary judgment must be granted. *Id.* at 323, 106 S.Ct. at 2552-53; see also, *Sparks v. St. Luke's Reg'l Med. Ctr., Ltd.*, 115 Idaho 505, 509, 768 P.2d 768, 772 (1988). The Defendant here has failed to present any affidavits or evidence to challenge summary judgment or to support any defense to the foreclosure relief sought by the Plaintiffs. On the other hand, the Plaintiffs have submitted affidavits in support of summary judgment. Therefore, based on the governing standards, the Plaintiffs’ Motion for Summary Judgment must necessarily be granted.

CONCLUSION

The Plaintiffs’ Motion for Summary Judgment is hereby GRANTED. This Court further finds there remains an unpaid debt secured by the Deed of Trust. Pursuant to the affidavit filed in support of the Plaintiffs’ motion, “[a]s of the 1st day of April, 2017, there will be due, owing and unpaid upon the Trust Deed Note, as modified, the sum of \$6,814,076.41, together with interest thereafter accruing at the default rate of 35% per annum until date of Judgment herein, together with costs, foreclosure expenses, attorney’s fees and expenses necessary to preserve

Plaintiffs’ interest in the property heretofore advanced or hereafter accruing.” (Aff. in Supp. of

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Pls.' Foreclosure Decree at 6:6.) Based on that undisputed affidavit, this Court finds there remains an unpaid debt secured by the Deed of Trust and owing to the Plaintiffs in the amount of \$6,814,076.41.

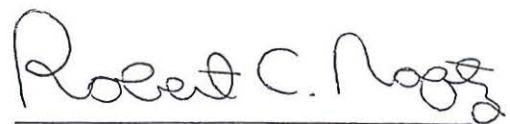
Counsel for the Plaintiffs shall submit a proposed Judgment and Decree of Foreclosure detailing the amount remaining on the unpaid debt and the description and reasonable value of the property still encumbered by that Deed of Trust for this Court's consideration and signature.

Counsel for the Plaintiffs may also submit an appropriate memorandum detailing the grounds for any claimed award of litigation costs and attorney fees. However, any decision regarding costs and fees will be made in a separate order after this Court is provided an opportunity to review such a request in detail.

Based on the preceding discussion and this Court's findings, no claims remain. As such, this case is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 13 day of June 2017.



ROBERT C. NAFTZ
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of June, 2017, I served a true and correct copy of the foregoing document upon each of the following in the manner indicated.

Ron Kerl
Cooper & Larsen
PO Box 4229
Pocatello, ID 83205-4229

E-Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

A. Bruce Larsen
155 S. 2nd Ave.
Pocatello, ID 83201

E-Mail
 Overnight Delivery
 Hand Delivery
 Facsimile

ROBERT POLEKI, Clerk

By: 
KERI POVEY
Deputy Clerk

Designation of Appeal – 1 (c)

Ron Kerl, Esq. - ISB #1768
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151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
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Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

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DEPUTY CLERK

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company; M&S DEVELOPMENT, LLC, an Idaho limited liability company; and PIONEER TITLE COMPANY OF BANNOCK COUNTY, INC.,

Defendants.

CASE NO. CV-2016-3588-OC

JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company,

Counter-claimant,

vs.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Counter-defendant,

COPY

This matter having come on regularly before the Court, the Honorable Robert C. Naftz presiding, and finding good cause therefore;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Pursuant to the parties stipulation and this Court's Stipulated Order Approving Stipulations Consenting to the Sale of Real Property dated April 28, 2017, Pioneer Title Company is hereby ordered to turn over to Monitor Finance, L.C. and First Capital Funding, L.C., in care of their attorney of record, Ron Kerl of the firm of Cooper & Larsen, Chtd., 151 N. 3rd Ave., Second Floor, Pocatello, Idaho, the net proceeds from the sale of the below described property, totaling \$256,761.67. Said funds are currently deposited in the trust account of Pioneer Title Company. The net proceeds from the sale of the following property:

Lot 2, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 - \$44,195.82
Lot 5, Block 3 WILDLIFE RIDGE ESTATES DIVISION 2 - \$44,928.14
Lot 7 & Lot 9, Block 3 WILDLIFE RIDGE ESTATES DIVISION 2 - \$86,749.80
Lot 4, Block 3, WILDLIFE RIDGE ESTATES DIVISION 2 - \$45,433.92
Lot 6, Block 3, WILDLIFE RIDGE ESTATES DIVISION 1 - \$35,453.99

2. The Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing dated December 30, 2005 ("Deed of Trust") , executed and delivered by M&S Development LLC , to Monitor Finance, L.C. and First Capital Funding, L.C. , recorded on the 30th day of December, 2005, under Recorder's Instrument No. 20528398 in the records of Bannock County, Idaho, is a valid first lien on the below described real property securing an indebtedness of \$6,828,907.39, as of June 19, 2017, plus any additional attorney fees and costs awarded by the Court pursuant to I.R.C.P. Rule 54, and costs related to the enforcement of this Decree by Sheriff's Foreclosure Sale, plus legal interest on the entire sum of the aforesaid indebtedness from the date of this Decree to and including the date of Sheriff's sale at the highest rate allowed by law;

Judgement and Decree of Foreclosure and Order of Sale - pg. 2

The real property encumbered by the Deed of Trust is situated in the County of Bannock, State of Idaho, is more particularly described as follows:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2; and
Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1

3. The Deed of Trust described in paragraph 2 is foreclosed, and all interests which the Defendants Wildlife Ridge Estates, LLC, Michael J. Millward, M&S Development LLC, and Pioneer Title Company have in the above described real property, and any fixtures on the property, shall be sold by the Sheriff of Bannock County, Idaho, in the manner provided by law, payable in cash lawful money of the United States of America and in accordance with the practice of this Court.

The reasonable value of said property as of the date of this Decree is as follows:

Lot 1, Block 2, WILDLIFE RIDGE ESTATES DIVISION 2 - \$50,000.00
Lot 2, Block 3, WILDLIFE ESTATES DIVISION 1 - \$50,000

4. The proceeds of sale shall be applied as follows: First, to the costs of sale; second, towards the satisfaction of the indebtedness owing to Monitor Finance, L.C. and First Capital Funding, L.C. as set forth in paragraph 2 above; and third, any surplus thereafter remaining shall be paid into the District Court for further determination regarding priority among those parties to this litigation whose rights are subordinate to Monitor Finance, L.C. and First Capital Funding, L.C..

5. The Defendants Wildlife Ridge Estates, LLC, Michael J. Millward, M&S Development LLC, and Pioneer Title Company, and all persons claiming through or under them as purchasers, encumbrancers, or otherwise and all persons claiming to have acquired any equity or interest in said premises are foreclosed of all interests, liens, or claims in the real property herein above described, and every portion thereof, save and except such statutory rights of redemption as said parties or any of them may have.

6. The Plaintiff, with either a cash bid or a credit bid against the sum herein found to be due it, or any party to this suit may become the purchaser at the sale of said property, and the purchaser thereof shall be entitled to all of the rights and privileges of such a purchaser under the laws of the State of Idaho.

DATED This 20 day of June, 2017.



Hon. Robert C. Naftz
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 20 day of June, 2017, I served a true and correct copy of

the foregoing document as follows:

A. Bruce Larson
Hearn Law, PLLP
~~P.O. Box 70~~ 1555 2nd Ave
Pocatello, ID 83201

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: bruce@hwlawpro.com

Ron Kerl
Cooper & Larsen, Chtd.
P.O. Box 4229
Pocatello, ID 83205

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: ron@cooper-
larsen.com

CLERK OF THE DISTRICT COURT

By: Keri Povey
Deputy

Designation of Appeal – 1 (d)

SCANNED

10-13-17

2017 OCT 10 PM 3:06

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
151 North Third Avenue, Second Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Email: ron@cooper-larsen.com

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Plaintiffs,

vs.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
liability company; M&S DEVELOPMENT, LLC, an
Idaho limited liability company; and PIONEER TITLE
COMPANY OF BANNOCK COUNTY, INC.,

Defendants.

CASE NO. CV-2016-3588-OC

JUDGMENT

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited
liability company,

Counter-claimant,

vs.

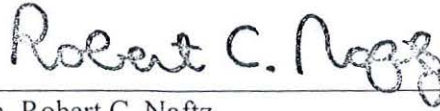
MONITOR FINANCE, L.C., a Utah limited liability
company; and FIRST CAPITAL FUNDING, L.C., a
Utah limited liability company,

Counter-defendant,

COPY

Judgment is entered against M & S Development, LLC for the sum of \$6,728,907.39, as of June 19, 2017, with interest accruing thereafter at the rate set by I.C. § 28-22-104, to wit: 5.625% per annum.

DATED This 10 day of October, 2017.

A handwritten signature in black ink that reads "Robert C. Naftz". The signature is written in a cursive style and is positioned above a horizontal line.

Hon. Robert C. Naftz
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 11 day of October, 2017, I served a true and correct copy of the foregoing document as follows:

A. Bruce Larson
Hearn & Wood LLP
155 S. 2nd Ave.
Pocatello, ID 83201

U.S. Mail, postage prepaid
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 Facsimile - 208-932-1083
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Ron Kerl
Cooper & Larsen, Chtd.
P.O. Box 4229
Pocatello, ID 83205

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: ron@cooper-larsen.com

M&S Development, LLC
c/o Michael Millward, Registered Agent
9716 W. Bighorn Drive
Pocatello, ID 83204

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile - 208-932-1083
 Email to: ron@cooper-larsen.com

CLERK OF THE DISTRICT COURT

By: Ken Parley
Deputy

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited
Liability company; and FIRST CAPITAL)
FUNDING, L.C., a Utah limited liability)
Company,)

Plaintiffs/Respondents,)

vs.)

WILDLIFE RIDGE ESTATES, LLC, an)
Idaho limited liability company;)
Defendant/Appellant M&S DEVELOPMENT)
LLC, an Idaho limited liability company,)

Defendant)

WILDLIFE RIDGE ESTATES, LLC, an)
Idaho Limited liability company;)

Counter-Claimant/Appellant,)

vs.)

MONITOR FINANCE, L.C., a Utah limited)
Liability company; and FIRST CAPITAL)
FUNDING, L.C., a Utah limited liability)
Company,)

Counter-Defendants/Respondents))

Supreme Court No.

CLERK'S CERTIFICATE

OF

APPEAL

Appealed from: Sixth Judicial District, Bannock County

Honorable Judge Robert C. Naftz presiding

Bannock County Case No: CV-2016-3588-OC

Order of Judgment Appealed from: Memorandum Decision and Order filed the 27th day of March, 2017, Memorandum Decision and Order filed the 14th day of June, 2017, Judgment, Decree of Foreclosure and Order of Sale filed the 20th day of June, 2017 and Judgment filed the 10th day of October, 2017.

Attorney for Appellant: Richard A. Hearn, Attorney HEARN LAW PLC, Pocatello

Attorney for Respondent: Ron Kerl, Attorney COOPER & LARSEN, Chartered, Pocatello

Appealed by: Wildlife Ridge Estates, LLC, an Idaho limited liability company; Defendant/Appellant M&S Development, LLC, an Idaho limited liability company, Defendant.

Appealed against: Monitor Finance, L.C., a Utah limited liability company; and First Capital Funding, L.C., a Utah limited liability company.

Notice of Appeal filed: **October 19, 2017**

Notice of Cross-Appeal filed: No

Appellate fee paid: Yes

Request for additional records filed: No

Request for additional reporter's transcript filed: No

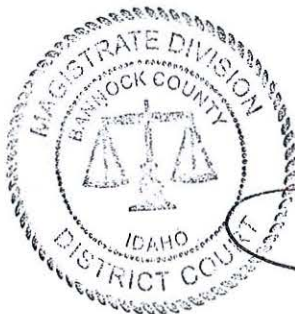
Name of Reporter: N/A

Was District Court Reporter's transcript requested? No

Estimated Number of Pages: N/A

Dated October 23, 2017

(Seal)



ROBERT POLEKI,
Clerk of the District Court

By 
Deputy Clerk

FILED
2017 NOV 22 10:17
CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO

STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs,

v

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company, Defendant/Appellant; M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendants.

Case No. CV-2016-3588-OC

RULE 54(b) CERTIFICATE

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company,

Counter-Claimant;

v

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,


Counter-defendants.

With respect to the issues determined by the Judgment dated October 10, 2017, and all prior partial Judgments and Orders entered in this action, it is hereby CERTIFIED, in accordance with Rule 54(b), LR.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above

judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

DATED this 22 day of November, 2017.



Robert C. Naftz
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of November, 2017, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Ron Kerl
COOPER & LARSEN, Chartered
151 North Third Avenue, 2nd Floor
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145

- U.S. Mail – Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile: 208-235-1182
- Email: ron@cooper-larsen.com

A. Bruce Larson
HEARN LAW, PLC
155 S. 2nd Avenue
P.O. Box 70
Pocatello, ID 83201
Telephone: (208) 904-0004

- U.S. Mail – Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile: 208-904-1816
- Email: bruce@hearnlawyers.com



Deputy Clerk

Ron Kerl, Esq. - ISB #1768
COOPER & LARSEN, CHARTERED
 151 North Third Avenue, Second Floor
 P.O. Box 4229
 Pocatello, ID 83205-4229
 Telephone: (208) 235-1145
 Facsimile: (208) 235-1182
 Email: ron@cooper-larsen.com

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2017 OCT 24 PM 2:54
 BY _____
 DEPUTY CLERK

Attorney for Monitor Finance, L.C. and First Capital Funding, L.C.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited liability)
 company; and FIRST CAPITAL FUNDING, L.C., a)
 Utah limited liability company,)
)
 Plaintiffs/Respondents,)

vs.)

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited)
 liability company,)
)
 Defendant/Appellant,)

M&S DEVELOPMENT, LLC, an)
 Idaho limited liability company; and PIONEER TITLE)
 COMPANY OF BANNOCK COUNTY, INC.,)
)
 Defendants.)

CASE NO. CV-2016-3588-OC

**RESPONDENTS'
 DESIGNATION OF
 ADDITIONAL RECORD ON
 APPEAL**

_____)
 WILDLIFE RIDGE ESTATES, LLC, an Idaho limited)
 liability company, Counter-claimant/Appellant,)

vs.)

MONITOR FINANCE, L.C., a Utah limited liability)
 company; and FIRST CAPITAL FUNDING, L.C., a)
 Utah limited liability company,)
)
 Counter-defendants/Respondents.)

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MONITOR FINANCE, L.C., a Utah limited)
 Liability company; and FIRST CAPITAL)
 FUNDING, L.C., a Utah limited liability)
 Company,)
)
)
 Plaintiffs-Counterdefendants,)
 Respondents)
 v.)
)
 WILDLIFE RIDGE ESTATES, LLC, an)
 Idaho limited liability company;)
)
 Defendant-Counterclaimant-Appellant,)
)
)
)
 and)
)
)
 M&S DEVELOPMENT, LLC, an Idaho)
 Limited liability company)
 _____)

Supreme Court No.

CLERK'S CERTIFICATE
OF SERVICE

I, ROBERT POLEKI, Clerk of the District Court of the Sixth Judicial District,
 of the State of Idaho, in and for the County of Bannock, do hereby certify that I
 have personally served or mailed, by United States mail, one copy of the
 CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

Bruce Larson
 Richard A. Hearn
 Hearn Law PLC
 P.O. Box 70
 Pocatello, Idaho 83204

Ron Kerl
 Cooper & Larsen, Chartered
 P.O. Box 4229
 Pocatello, Idaho 83205-4229

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal
of said Court at Pocatello, Idaho, this 17 day of January, 2018.

(Seal)



ROBERT POLEKI,
Clerk of the District Court
Bannock County, Idaho Supreme Court

By [Signature]
Deputy Clerk