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Smith By and Through Smith v. Treasure Valley Seed Company, LLC Clerk's Record Dckt. 45543

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IN THE SUPREME COURT OF THE STATE OF IDAHO

VICTORIA H. SMITH, by and through her attorney in fact, Vernon K. Smith, by and through his Durable and Irrevocable Power of Attorney,

Supreme Court Case No. 45543

Plaintiff-Appellant,

vs.

TREASURE VALLEY SEED COMPANY, LLC, and Don Tolmie in his individual capacity, and as an owner, representative and authorized agent of Treasure Valley Seed Co., LLC,

Defendants-Respondents.

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE RICHARD D. GREENWOOD

VERNON K. SMITH

RICHARD B. EISMANN

ATTORNEY FOR APPELLANT

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

NAMPA, IDAHO

In the Supreme Court of the State of Idaho

VICTORIA H. SMITH, by and through her
attorney in fact, VERNON K. SMITH, by and
through his Durable and Irrevocable Power of
Attorney,

Plaintiff-Appellant,

v.

TREASURE VALLEY SEED COMPANY,
LLC, and DON TOLMIE, in is individual
capacity, and as owner, representative and
authorized agent of TREASURE VALLEY
SEED COMPANY, LLC,

Defendants-Respondents.

ORDER AUGMENTING APPEAL

Supreme Court Docket No. 45543-2017
Ada County No. CVOC-2013-22179

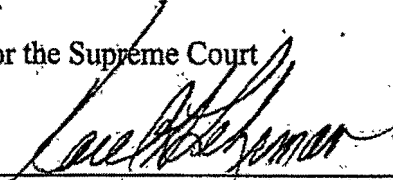
WHEREAS, a Clerk's Record and Reporter's Transcripts having been filed with this Court in prior appeal No. 42596, *Smith v. Treasure Valley Seed Company*, Ada County No. CVOC-2013-22179; therefore,

IT HEREBY IS ORDERED that this Record on Appeal shall be AUGMENTED to include the Clerk's Record and Reporter's Transcripts filed in prior appeal No. 42596, *Smith v. Treasure Valley Seed Company*, Ada County No. CVOC-2013-22179.

IT FURTHER IS ORDERED that the District Court Clerk shall prepare and file a LIMITED CLERK'S RECORD with this Court, which shall contain the documents requested in this Notice of Appeal together with a copy of this Order, but shall not duplicate any document included in the Clerk's Record filed in prior appeal No. 42596. The LIMITED CLERK'S RECORD shall be filed with this Court by January 30, 2018.

DATED this 28th day of November, 2017.

For the Supreme Court


Karel A. Lehrman, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Richard D. Greenwood

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2013-22179

Victoria H Smith
vs.
Treasure Valley Seed Company Llc, Don Tolmie

§
§
§
§
§

Location: Ada County District Court
Judicial Officer: Greenwood, Richard D.
Filed on: 12/13/2013
Appellate Case Number: 42596

CASE INFORMATION

Statistical Closures
01/20/2015 Closed

Case Type: AA- All Initial District Court Filings (Not E, F, and H1)

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	CV-OC-2013-22179
Court	Ada County District Court
Date Assigned	12/13/2013
Judicial Officer	Greenwood, Richard D.

PARTY INFORMATION

Plaintiff

Smith, Victoria H

Lead Attorneys
Smith, Vernon Kenneth, Jr
Retained
208-345-1125(W)

Defendant

Tolmie, Don

Eismann, Richard B.
Retained
208-467-3100(W)

Treasure Valley Seed Company Llc

Eismann, Richard B.
Retained
208-467-3100(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX

12/13/2013	New Case Filed Other Claims <i>New Case Filed - Other Claims</i>	
12/13/2013	Complaint Filed <i>Complaint Filed</i>	
12/13/2013	Summons Filed <i>Summons Filed</i>	
01/24/2014	Affidavit <i>Affidavit Establishing Service Of Summons And Complaint Upon Defendants</i>	
01/24/2014	Affidavit of Service <i>(2) Affidavit Of Service 01.02.2014</i>	
01/24/2014	Motion <i>Motion For Entry Of Default</i>	
01/24/2014	Affidavit in Support of Motion <i>Affidavit In Support Of Motion Of Entry Of Default</i>	
01/27/2014	Notice of Appearance <i>Notice Of Appearance (Eismann for Treasure Valley Seed Company LLC and Don Tolmie)</i>	

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2013-22179

01/28/2014	Answer <i>Answer with Counterclaims and Demand for Jury Trial (Eismann for Treasure Valley Seed Company)</i>
01/28/2014	Answer <i>Answer (Eismann for Dan Tolmie)</i>
01/28/2014	Motion <i>Defendant's Motion for Change of Venue</i>
01/28/2014	Miscellaneous <i>First Declaration of Don Tolmie</i>
01/28/2014	Miscellaneous <i>First Declaration of James L. Stein</i>
01/29/2014	Notice of Service <i>Notice Of Service</i>
02/05/2014	Hearing Scheduled <i>Hearing Scheduled (Scheduling Conference 03/03/2014 04:45 PM)</i>
02/05/2014	Notice <i>Notice to the Court of Service of 2nd Request for Admissions by Defendants</i>
02/10/2014	Order <i>Order for Scheduling Conf. and Order Re: Motion Practice</i>
02/12/2014	Notice of Hearing <i>Notice Of Hearing re Motion for Change of Venue (3.24.14@3pm)</i>
02/12/2014	Hearing Scheduled <i>Hearing Scheduled (Motion for Change of Venue 03/24/2014 03:00 PM)</i>
03/03/2014	DC Hearing Held: Court Reporter: # of Pages: <i>Hearing result for Scheduling Conference scheduled on 03/03/2014 04:45 PM: District Court Hearing Held Court Reporter: None Number of Transcript Pages for this hearing estimated: held in chambers</i>
03/03/2014	Hearing Vacated <i>Hearing result for Motion for Change of Venue scheduled on 03/24/2014 03:00 PM: Hearing Vacated</i>
03/03/2014	Hearing Scheduled <i>Hearing Scheduled (Hearing Scheduled 04/02/2014 04:30 PM) issue of status of plaintiff</i>
03/03/2014	Scheduling Conference (4:45 PM) (Judicial Officer: Greenwood, Richard D.)
03/04/2014	Certificate of Mailing <i>Certificate Of Compliance to Defendants Second Set of Requests for Admissions</i>
03/04/2014	Certificate of Mailing <i>Certificate Of Compliance to Defendants First Set of Requests for Admissions</i>
03/18/2014	Motion to Dismiss <i>Defendant's Motion To Dismiss</i>
03/18/2014	Memorandum <i>Memorandum In Support Of Motion</i>

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2013-22179

03/24/2014 **CANCELED Motion for Change of Venue (3:00 PM)** (Judicial Officer: Greenwood, Richard D.)
Vacated

04/01/2014 **Objection**
Response & Objection To Defendant's Motion To Dismiss And Motion To Substitute Parties With Vernon K. Smith, As Real Party In Interest

04/01/2014 **Motion**
Motion For Joinder Of Real Party In Interest And Permissive Joinder of Parties, Pursuant To Rules 17(a) and 20(a), IRCP

04/02/2014 **DC Hearing Held: Court Reporter: # of Pages:**
Hearing result for Hearing Scheduled scheduled on 04/02/2014 04:30 PM: District Court Hearing Held
Court Reporter: FRAN CASE&
Number of Transcript Pages for this hearing estimated: issue of status of plaintiff LESS THAN 100 pages

04/02/2014 **Hearing Scheduled (4:30 PM)** (Judicial Officer: Greenwood, Richard D.)
issue of status of plaintiff Hearing result for Hearing Scheduled scheduled on 04/02/2014 04:30 PM: District Court Hearing Held
Court Reporter: FRAN CASE&
Number of Transcript Pages for this hearing estimated:

04/04/2014 **Judgment**
Judgment Dismissing Case

04/04/2014 **Civil Disposition Entered**
Civil Disposition entered for: Tolmie, Don, Defendant; Treasure Valley Seed Company Llc., Defendant; Smith, Victoria H, Plaintiff. Filing date: 4/4/2014

04/04/2014 **Status Changed**
STATUS CHANGED: Closed

04/17/2014 **Memorandum**
Memorandum of Costs

04/17/2014 **Affidavit**
Affidavit of Richard B Eismann in Support of Memorandum

04/30/2014 **Response**
Response and Objection to Defendants Request for Attorney Fees

06/23/2014 **Notice of Hearing**
Notice Of Hearing RE: Defendants Memorandum of Costs and Plaintiffs Response and Objection 7.9.14 @ 3:00PM

06/23/2014 **Hearing Scheduled**
Hearing Scheduled (Objection to Attorney Fees and Costs 07/09/2014 03:00 PM)

06/23/2014 **Status Changed**
STATUS CHANGED: Closed pending clerk action

06/30/2014 **Motion**
Motion to Vacate and Reset Oral Argument for Objection to Attorney Fees and Costs

07/02/2014 **Continued**
Continued (Objection to Attorney Fees and Costs 07/28/2014 03:00 PM)

07/03/2014 **Amended**
Amended Notice Of Hearing on Defendants Memorandum Of Costs & Plaintiffs Response &

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2013-22179

Objection (7.28.14 at 3:00 PM)

07/28/2014 DC Hearing Held: Court Reporter: # of Pages:
*Hearing result for Motion for Attorney fees and Costs scheduled on 07/28/2014 03:00 PM: District Court Hearing Held
Court Reporter: Fran Casey
Number of Transcript Pages for this hearing estimated: less than 50 pages*

07/28/2014 **Motion for Attorney Fees and Costs (3:00 PM)** (Judicial Officer: Greenwood, Richard D.)
*objection to atty's fees And Plaintiffs Response & Objection Hearing result for Motion for Attorney fees and Costs scheduled on 07/28/2014 03:00 PM: District Court Hearing Held
Court Reporter: Fran Casey
Number of Transcript Pages for this hearing estimated: less than 50 pages*

08/28/2014 Judgment
Judgment \$15,826.50

08/28/2014 Civil Disposition Entered
Civil Disposition entered for: Tolmie, Don, Defendant; Treasure Valley Seed Company Llc., Defendant; Smith, Victoria H, Plaintiff. Filing date: 8/28/2014

08/28/2014 Status Changed
STATUS CHANGED: Closed

08/28/2014 **Amended Judgment - Money**
Converted Disposition:
 \$15,826.50 (Cost and Fees)
Party (Smith, Victoria H)
Party (Treasure Valley Seed Company Llc)
Party (Tolmie, Don)

10/08/2014 Appeal Filed in Supreme Court
Appealed To The Supreme Court

10/08/2014 Notice of Appeal
NOTICE OF APPEAL

10/23/2014 Notice of Appeal
NOTICE OF CROSS-APPEAL

12/15/2014 Objection
Defendants' Objection to Clerk's Record on Appeal

01/16/2015 Hearing Scheduled
Hearing Scheduled (Hearing Scheduled 02/25/2015 03:00 PM) Defendant's Objection to Clerk's Record on Appeal

01/16/2015 Status Changed
STATUS CHANGED: Closed pending clerk action

01/16/2015 Notice of Hearing
Notice Of Hearing











02/25/2015 DC Hearing Held: Court Reporter: # of Pages:
*Hearing result for Hearing Scheduled scheduled on 02/25/2015 03:00 PM: District Court Hearing Held
Court Reporter: Fran Casey
Number of Transcript Pages for this hearing estimated: less than 50 pages*

02/25/2015 **Hearing Scheduled (3:00 PM)** (Judicial Officer: Greenwood, Richard D.)
Defendant's Objection to Clerk's Record on Appeal Hearing result for Hearing Scheduled scheduled on 02/25/2015 03:00 PM: District Court Hearing Held

000006

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE NO. CV-OC-2013-22179

Court Reporter: Fran Casey
Number of Transcript Pages for this hearing estimated: less than 50 pages

09/10/2015	Objection <i>Objection To Defendant/Respondent's Objection To Clerk's Record On Appeal</i>
09/30/2015	Order <i>Order Granting In Part and Denying in Part Defendant's Objection to Clerk's Record on Appeal</i>
10/19/2015	Notice <i>Notice of Transcript Lodged - Supreme Court No. 42596</i>
11/07/2016	 Decision or Opinion <i>- Opinion - Vacated and Remanded - Supreme Court No. 42596</i>
12/09/2016	 Remittitur <i>- Supreme Court No. 42596</i>
06/06/2017	 Notice of Hearing
07/17/2017	Status Conference (3:00 PM) (Judicial Officer: Greenwood, Richard D.)
07/17/2017	 Court Minutes
08/03/2017	 Affidavit <i>Affidavit of Vernon K. Smith</i>
08/03/2017	 Response <i>Response and Objection to Defendant's Request for Attorney Fees</i>
08/03/2017	 Notice <i>re: Attorney's Fees</i>
10/04/2017	 Order <i>Memorandum Decision and Order Re: Attorneys Fees</i>
10/04/2017	 Judgment
11/15/2017	 Notice of Appeal
11/15/2017	Appeal Filed in Supreme Court

DATE

FINANCIAL INFORMATION

Defendant Tolmie, Don	
Total Charges	66.00
Total Payments and Credits	66.00
Balance Due as of 1/10/2018	0.00
Defendant Treasure Valley Seed Company Llc	
Total Charges	146.00
Total Payments and Credits	146.00
Balance Due as of 1/10/2018	0.00
Other Party Unknown Payor	
Total Charges	14.25

000007

ADA COUNTY DISTRICT COURT
CASE SUMMARY
CASE No. CV-OC-2013-22179

Total Payments and Credits	14.25
Balance Due as of 1/10/2018	0.00
Plaintiff Smith, Victoria H	
Total Charges	591.15
Total Payments and Credits	591.15
Balance Due as of 1/10/2018	0.00

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Victoria H Smith
vs.
Treasure Valley Seed Company Llc,
Don Tolmie

Case No. CV-OC-2013-22179
Notice of Status Conference
Event Code: NOTH

NOTICE IS GIVEN That the above-entitled case is set for:

<u>Hearing Type</u>	<u>Date</u>	<u>Time</u>	<u>Judge</u>
Status Conference	July 17, 2017	3:00 PM	Richard D. Greenwood

at the: Ada County Courthouse 200 W. Front Street Boise ID 83702

CHRISTOPHER D. RICH
Clerk of the Court

Dated: June 06, 2017

By: *Kathy Pataro*
Deputy Clerk

CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the attached to:

Vernon Kenneth Smith
Richard Eismann

vvs1900@gmail.com
rbe@eismannlaw.com

By email
 By email

Dated: June 06, 2017

By: *Kathy Pataro*
Deputy Clerk

Description	Greenwood Pataro 07.17.17 F Casey		
Date	7/17/2017	Location	1A-CRT504
Time	Speaker	Note	
02:45:35 PM		CVOC13.22179 Victoria Smth v. Treasure Valley Seed	
03:01:00 PM	Court	Calls case. VK Smith for plaintiff. Mr. Martinet for the deft.	
03:01:21 PM	Court	Addresses the parties regarding the Supreme Court decision.	
03:01:38 PM	Personal Attorney	Argument regarding the atty fees and costs.	
03:02:35 PM	Plaintiff Attorney	Argument regarding the motion - has not received anything.	
03:02:49 PM	Court	Addresses the parties - will take the request in open court.	
03:03:30 PM	Plaintiff Attorney	Response to the Court's statement - by motion and then he can respond.	
03:03:46 PM	Court	Addresses counsel regarding the re-decision regarding the decision by the Supreme Court.	
03:04:09 PM	Plaintiff Attorney	Response.	
03:04:32 PM	Personal Attorney	Response - has already made the request for fees.	
03:04:55 PM	Court	Agrees that there does not to be a new motion. Mr. Smith will have 14 days to file a brief in response to the original motion taking into account of the supreme court. Defense can file a response brief after plaintiff files his - limited to 15 pages.	
03:06:26 PM	Court	Just taking further argument - will not require new motions or new proofs. Supreme Court reversed original decision. Addresses the parties.	
03:07:50 PM	Personal Attorney	Response.	
03:07:52 PM	Court	Addresses the parties.	
03:09:10 PM	Court	Defense has 14 days to file the reply brief upon the filing of the plaintiff. After that - the file will be considered under advisement. No further oral argument is needed at this time. If need additional arguments the Court will advise the parties.	
03:10:18 PM	End.		

VERNON K. SMITH
ATTORNEY AT LAW
1900 W. Main Street
Boise, Idaho 83702
Idaho State Bar No. 1365
Telephone: (208) 345-1125
Fax: (208) 345-1129

Attorney for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

VICTORIA H. SMITH, by and through
her attorney in fact, Vernon K. Smith,
by and through his Durable and
Irrevocable Power of Attorney,

Plaintiff,

vs.

TREASURE VALLEY SEED
COMPANY, LLC, and Don Tolmie
in his individual capacity, and as an
owner, representative and authorized
agent of Treasure Valley Seed Co., LLC

Defendant(s).

)
) CASE NO.: CV OC 13-22179
)
)
) **AFFIDAVIT OF**
) **VERNON K. SMITH**

STATE OF IDAHO)
) : ss
County of Ada)

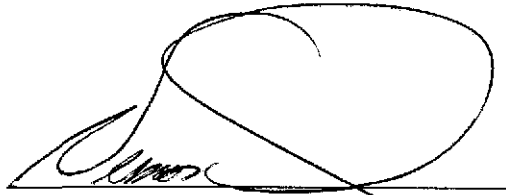
COMES NOW Vernon K. Smith, and being first duly sworn upon oath, deposes and states as follows:

1. That Affiant is the attorney of record for the above named Plaintiff, Victoria H. Smith, who became deceased on September 11, 2013; that Affiant is the individual upon whom was bestowed certain irrevocable powers pursuant to a Power granted to Affiant on July 15, 1999, and an Irrevocable Power of Attorney granted to Affiant on April 11, 2008; that Affiant is the

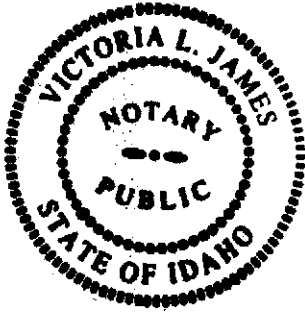
aggrieved party in this case that has taken the lower court's award of attorney fees to the Supreme Court of the State of Idaho; that the appeal taken to the Supreme Court was upon that oral presentation announced by this lower court on July 28, 2014, thereafter reduced to a judgment of record on August 28, 2014; that Affiant currently is an aggrieved party in this action and currently brought back before the lower court to take part in a status conference that was held July 17, 2017, to determine what action, if any, is hereafter to be taken by this lower court, with respect to the remand from the Idaho Supreme Court and whether any further determination is to be made by the lower court with respect to attorney fees; that Affiant is over the age of majority; competent to testify; and does provide a true and correct copy of the Power granted to him on July 15, 1999, and the Irrevocable Power of Attorney granted to him on April 11, 2008; that Affiant does state that the attached copies of the Powers of Attorney are each true and correct copies of those Powers of Attorney, and that the Irrevocable Power of Attorney granted April 11, 2008 is the Power referred to in the caption of this case that is being made a relevant issue in this action; that this Irrevocable Power of Attorney was at all times believed by the Grantor and the Grantee to be exempt and excluded from any operative effects of the Uniform Power of Attorney Act (UPOAA) that was thereafter adopted by the Idaho Legislature on July 1, 2008, and specifically, this Irrevocable Power of Attorney was created, crafted, and designed to establish an irrevocable power of attorney that would lawfully continue on and transcend the death of the Grantor-Principal, Victoria H. Smith, in the unfortunate event of her death, as this Irrevocable Power of Attorney was intended to be perpetual effects in all matters and transaction that may be transacted and carried on following the death of Victoria H. Smith.

Further your Affiant sayeth not.

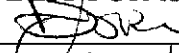
Dated this 31st day of July, 2017.


Vernon K. Smith

SUBSCRIBED AND SWORN TO before me this 31st day of July, 2017.




NOTARY PUBLIC FOR IDAHO

Residing at 

My commission expires: 6/3/20

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 24th day of October, 2016, I caused a true and correct copy of the above and foregoing to be delivered to the following persons at the following addresses as follows:

Clerk of the Court	()	U.S. Mail
Fourth Judicial District	()	Fax
Ada County	()	Hand Delivered
200 W Front Street	(X)	E-Filed
Boise, Idaho 83702		

Darrell G. Early	()	U.S. Mail
Deputy Atty. Gen. DEQ	(X)	Fax
1410 N. Hilton, 2 nd Floor	()	Hand Delivered
Boise, Idaho 83706		


Vernon K. Smith



00028248201400816030010010

DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That I, Victoria H. Smith, of 5933 Branstetter St., Boise, Idaho 83714, do hereby make, constitute and appoint, and by these presents has therefore made, constituted and appointed my son, Vernon K. Smith Jr., of 1900 W. Main St., Boise, Idaho 83702, as my true, lawful and exclusive agent, representative and attorney to act for me, in my name and in my place and stead, pursuant to this durable power of attorney, with full authorization to act in my behalf, for any and all purposes, with the same force and effect as though undertaken by me.

That my grant of this Durable Power of Attorney is intended to convey unto my son, Vernon K. Smith Jr., full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done, as fully to all intents and purposes as I might or could do if personally present, and I do hereby ratify and confirm all that my said attorney has done by virtue of these presents.

This Power of Attorney is durable in all respects, and shall endure the event of disability and death, and shall never be affected by any event of disability or death of the undersigned for any reason, manner or purpose.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15th day of July, 1999.

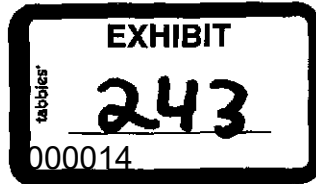
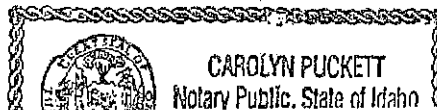
Victoria H. Smith
Victoria H. Smith

STATE OF IDAHO)
 : ss
County of Ada)

This is to certify that on this 15th day of July, 1999, before me, the undersigned Notary Public, in and for the said Ada County, State of Idaho, personally appeared Victoria H. Smith, known and identified to me to be the individual whose name is subscribed to the within instrument, and acknowledged to me that she has read and executed the same as her own voluntary free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official notarial seal the day and year in this certificate first above written.

Carolyn Puckett
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 6-14-03





Durable and Irrevocable Power of Attorney

I, Victoria H. Smith, residing at 5933 Branstetter Street, Boise, Ada County, Idaho, [REDACTED] does herewith reaffirm, reconfirm and continue the ongoing appointment of my son, Vernon K. Smith Jr., [REDACTED] from the original appointment I made in 1999, and to remain authorized to act as my unconditional attorney in fact and agent under this Durable and Irrevocable Power of Attorney, and he is authorized to exercise all powers and authority I otherwise possess and could exercise in my own name and on my own behalf.

The power and authority vested in him is unconditional, unlimited and all inclusive, and he shall have the full and exclusive power and authority to manage and conduct all of my affairs, and to exercise all of my legal rights and powers, including any rights and powers I may acquire in the future, and specifically including, but without any intended limitation, to collect all funds, hold, maintain, improve, invest, lease, or otherwise manage or dispose of any or all of my real or personal property, or any interest therein; purchase, sell, mortgage, encumber, grant, option or otherwise deal in any way in any real property or personal property, tangible or intangible, or any interest therein; to borrow funds, to execute promissory notes, and to secure any obligation by mortgage, deed of trust or pledge; to conduct any and all business and banking needs, of any nature or kind, including the right to sign checks and draw funds on any and all my accounts, with the same authority as my own signature, to sign any and all agreements and documents in my behalf, to continue any corporations, limited liability companies and venture entities I presently have, and to organize, reorganize, merge, consolidate, capitalize, recapitalize, close, liquidate, sell, or dissolve any business interest, and to vote all stock, including the exercise of any stock options and any buy-sell agreements; to receive and to endorse checks and other negotiable paper, to deposit and to withdraw funds from any accounts, by check or by withdrawal slips, or otherwise, to transfer funds from any account and to do so from any bank, savings and loan, or any other financial institution in which I have funds now or in the future; to prepare, sign and file any and all tax returns and other governmental reports and documents, and to represent me in all matters before the Internal Revenue Service or State Tax Commission; to have access to all certificates of deposit, and any safety deposit box registered in my name, whether alone or with others, and to remove any property or papers located therein; to act unconditionally with regard to any funds, stocks, bonds, shares, investments, interests, rights, benefits or entitlements I may now have or hereafter come to have and hold; to engage in any administrative or legal proceedings or lawsuits regarding any rights and interests I have on matters therein; to create trusts and to transfer any interest I may have in property, whether real or personal, tangible or intangible, to the trustee of any trust, to engage and to dismiss agents, counsel, and employees, in connection with any matter, and for purposes, this power and authority vested in my son, Vernon K. Smith Jr., is unlimited, unconditional and all inclusive, and with the same authority and effect as though I had caused the action to be undertaken.

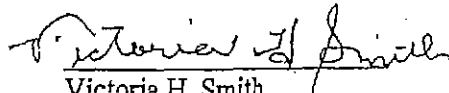
This instrument filed as an accomodation only.
has not been examined as to its execution,
insurability or effect on Title.
First American Title Company
900 Pier View Dr., Suite 110
Idaho Falls, ID 83402

STATE OF IDAHO
COUNTY OF JEFFERSON
I HEREBY CERTIFY THAT THE ABOVE AND FOREGOING
IS A FULL, TRUE AND CORRECT COPY OF THE
ORIGINAL, THEREON FILED FOR RECORD IN MY
OFFICE.
DATED 10/6/2014
CHRISTINE BOULTER
EX-OFFICIO CLERK AND RECORDER

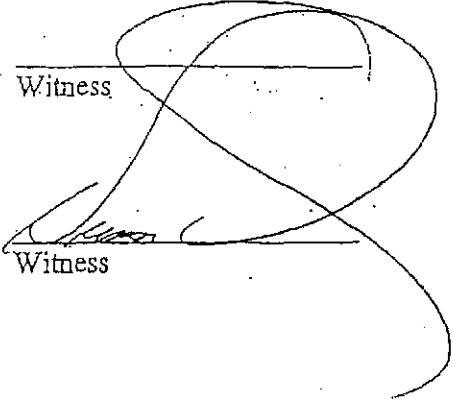


This Durable Power of Attorney is irrevocable and shall remain in full force and effect, having been coupled with adequate consideration, and shall not be affected, altered or impaired by the event of my death or disability, and shall continue in effect for all time, as it has been my long-standing intention and desire that my son, Vernon K. Smith Jr., shall be the sole and exclusive heir of my entire estate, as I have so declared openly in the past many years, because of his commitment, dedication, and devotion to my best interests, welfare, and financial well being.

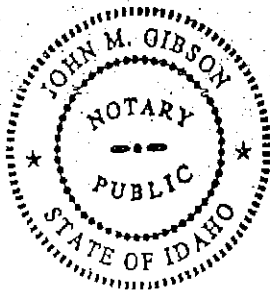
Dated This 11th day of April, 2008.

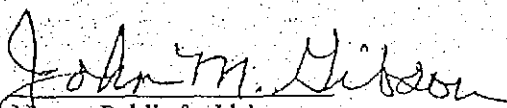

Victoria H. Smith

Witness


Witness

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Idaho
this 11th day of April 2008.




Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires: 10/16/13.

VERNON K. SMITH
ATTORNEY AT LAW
1900 West Main Street
Boise, Idaho 83702
Idaho State Bar No. 1365
Telephone: (208) 345-1125
Fax: (208) 345-1129

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

VICTORIA H. SMITH, by and through)	
her attorney in fact, Vernon K. Smith,)	
by and through his Durable and)	Case No. CV OC 13-22179
Irrevocable Power of Attorney,)	
)	RESPONSE AND OBJECTION
Plaintiff,)	TO DEFENDANTS' REQUEST
)	FOR ATTORNEY FEES UPON
vs.)	REMAND FROM THE
)	SUPREME COURT
TREASURE VALLEY SEED)	
COMPANY, LLC, and Don Tolmie)	
in his individual capacity, and as an)	
owner, representative and authorized)	
agent of Treasure Valley Seed Co., LLC)	
)	
Defendant(s).)	

COMES NOW the Plaintiff, Victoria H. Smith, deceased, though appearing by and through Vernon K. Smith, pursuant to his Irrevocable Power of attorney, and as the Aggrieved Party in this case and on appeal, and in response to the status conference held at the request of the court on July 17, 2017, following the remand and remittitur from the Idaho Supreme Court Decision entered on November 3, 2016, does herewith respond to the oral presentation and contents of the arguments presented through the discussions conducted with court and counsel at that hearing on July 17, 2017, and as directed by this lower court, in relation to the remand and the course of action to be undertaken, if any, by this lower court following the remittitur.

The Defendants, through their counsel appearing at the hearing, have expressed no desire to file any other or further motion with the lower court, seeking no other or any additional relief or request from the court, but instead stated to the lower court they relied upon their original motion and arguments they presented to the lower court on July 28, 2014, relating to their claim to an award for attorney fees. The lower court had ruled upon their motion, and entered its order on August 28, 2014, which therein awarded attorney fees only under I. C. §12-121. This lower court declined to award any attorney fees under any other statutory provision, and absent an appeal and reversal of that determination, that portion of the order entered by the court that was not appealed, the contents of which is reflected in the oral presentation contained in the Reporter's Transcript, that declaration remains the order of this court. The Defendants did not appeal any aspect of the lower court's refusal to award attorney fees under any other statutory provision or procedural rule. Having failed to appeal that refusal, asserting that decision to be an abuse of discretion, these Defendants are bound by the finality of that decision as to the other statutory provisions and procedural civil rules, and cannot go behind it in the nature of the suggestion made by the Defendants at the status conference. These Defendants have relied upon that former motion and that former decision of the lower court, and there has been no request that would serve to amend, alter, or expand upon the effects of the remand from the Supreme Court, and the decision of the lower court decision, to the extent it was not appealed, must stand as it was entered, as nothing about it was appealed by Defendants from which any modification of the lower court's ruling could be made with respect to Rule 11, IRCP or I. C. §12-120, as the effects of res judicata and collateral estoppel have application to the decision reached by the lower court on July 28, 2014.

It is from this remand and remittitur from the Idaho Supreme Court Decision entered November 3, 2016, that the lower court has initiated this status conference (over eight months later), to inquire as to the intention of the parties, and the Defendants, through their counsel, have suggested the court act once again upon their original motion, requesting the lower court to disregard its former refusal, and to enter a new

order, using a different statutory provision that the lower court before declined to apply to now grant an award. Plaintiff, and the aggrieved Party, Vernon K. Smith, does specifically object to that invitation, and does object to the lower court's ability/jurisdiction to violate the decision of the lower court that refused to award attorney fees (except under I. C. §12-121), as Defendants motion/request was previously decided on July 28, 2014, and the controlling effects of res judicata and collateral estoppel must be held to apply to the former decision of the lower court, as these Defendants did not pursue any cross appeal, and within Defendants' Response Brief, they expressly explained why they abandoned any request for any attorney fees on appeal or as was declined below, as their briefing and argument so confirmed.

This lower court ruled that upon the death of the party identified in the Complaint, Victoria H. Smith, there was no real party in interest, and the court had no *in personam* jurisdiction to proceed further with the case, and it was upon that basis the lower court determined it could not go forward upon the merits, but did have subject matter jurisdiction to dismiss the action. Accordingly, the lower court dismissed the case, refusing to allow the amendment/substitution as requested.

By virtue of the lower court's decision there was no real party in interest, and upon the dismissal, though the lower court determined Defendants were the prevailing party, absent a real party in interest from which to proceed with the case. The Supreme Court ruled that even though the lower court had ruled there was no real party in interest below, there was still a sufficient grounds (3-2 Decision on right to appeal) for the aggrieved party to proceed to challenge the wrongful award of attorney fees, as Vernon K. Smith was the actual aggrieved party in the appeal. The Supreme Court stated:

"We address as a preliminary matter whether there is a real party in interest for this appeal. TVSC contends this appeal should be dismissed because Victoria is deceased, and consequently, there is no real party in interest for this appeal. We disagree.

On the one hand, TVSC correctly argues there is no real party in interest to appeal the dismissal of the case. Idaho Rule of Civil Procedure 17(a) requires that actions be prosecuted in "the name of the real party in interest." An exception permits "a party authorized by statute" to sue in that capacity without joining the real party interest. I.R.C.P. 17(a)(1)(H). Vernon contends he is authorized to sue on Victoria's behalf, citing his power

of attorney. We are not persuaded. A power of attorney terminates once the principal dies. [1] I.C. § 15-12-110(1)(a). Vernon's power of attorney, therefore, terminated at Victoria's death--roughly three months before the complaint was filed. Even if Vernon had timely appealed the dismissal of the case, there would be no real party in interest for that issue.

On the other hand, TVSC incorrectly argues Victoria's death affects whether there is a real party in interest to appeal the award of attorney fees. Idaho Appellate Rule 4 allows a "party aggrieved" by a judgment to file an appeal. We have long defined a party aggrieved "as any person injuriously affected by the judgment." *Roosma v. Moots*, 62 Idaho 450, 455, 112 P.2d 1000, 1002 (1941) (citing *In re Blades*, 59 Idaho 682, 684, 86 P.2d 737, 738 (1939)). Because the district court assessed attorney fees jointly and severally against Victoria and Vernon, Vernon is an aggrieved party entitled to appeal the award of attorney fees. We conclude there is a real party in interest for this appeal.

Our dissenting colleagues maintain that dismissal is proper because the Notice of Appeal is insufficient under Idaho Appellate Rule 17. That rule requires a notice of appeal to "contain substantially" the information designated therein, including the appellant's identity. I.A.R. 17(d). The dissent notes that the Notice of Appeal does not identify Vernon as appellant, but rather states Victoria H. Smith, " acting through Vernon K. Smith, at the time the cause of action arose, through his Durable and Irrevocable Power of Attorney, does appeal against the above-named respondents to the Idaho Supreme Court from that Judgment awarding attorney fees and costs in the above entitled action, as entered on August 28, 2014" According to the dissent, the Notice of Appeal is insufficient because TVSC "had no way of knowing that [Vernon] was appealing on his own behalf."

We disagree. As the dissent acknowledges, Idaho Appellate Rule 17 requires only substantial compliance. "Generally, substantial compliance does not require absolute conformity with the form prescribed in the statute, but does require a good faith attempt to comply, and that the general purpose detailed in the statute is accomplished." *In re Doe*, 155 Idaho 896, 901, 318 P.3d 886, 891 (2014) (citation omitted). In this case, we conclude the Notice of Appeal substantially complies with Idaho Appellate Rule 17 because it identifies the parties and the attorney involved, and the issue raised. The Notice of Appeal clearly states one issue is raised: "Was the award of attorney fees and costs, as entered by the court, supported in fact, and law under the Statutes and Rules of Procedure in Idaho." Contrary to the dissent's position, the Notice of Appeal is sufficient because it represents a good faith attempt to comply with Idaho Appellate Rule 17 and, therefore, accomplishes the purposes of the rule--putting TVSC on notice of the issues raised on appeal.

Because we conclude there is a real party in interest and the Notice of Appeal is sufficient, this appeal is not subject to dismissal."

The Supreme Court determined, for purposes of the appeal, there was sufficient notice who was the aggrieved party in interest through the Notice of appeal and issue raised in the Opening Brief to decide the issue as to the award of attorney fees against counsel under that statute used by the lower court.

The lower court chose to award attorney fees against Plaintiff's counsel, from what was expressed by the lower court, to be the lower court's opinion that *all* powers of attorney are subject to termination upon death of the grantor-principal. That proposition is not supported by case law or by Idaho's statutory authority. The lower court stated its belief within this record by announcing that: "*a power of attorney simply does not and cannot survive the grantor. That's just so fundamental that it is hard to find even authority that says so.*" (See Transcript of lower court ruling; See quoted excerpt in *Smith v. Treasure Valley Seed Company, LLC*, 161 Idaho 107, 383 P.3d 1277 (2016), Part B. ¶ 2) (as cited above). The lower court's reference to death as causing termination of all powers, however, is not a correct statement of the law, and death does not terminate all powers, (the Supreme Court declined to rule upon Appellant's grant of irrevocable power, as a copy of that irrevocable power was not contained in the record, and its declarations/provisions directing its transcending death was not made an issue in this appeal).

It is to be noted that the Uniform Power of Attorney Act (UPOAA) adopted in Idaho on July 1, 2008, approximately 3 months after the Irrevocable Power of Attorney was created, makes express declarations within the UPOAA that the UPOAA does not control or affect certain powers/authority, stating that exemption/exception in two specific areas within the Act. Termination does not apply to powers coupled with an interest (which is typically characterized in judicial decisions to be those powers coupled with "an interest" or with "adequate consideration") Those particular powers are typically/commonly known as "irrevocable" powers, and do not terminate upon death, and the grant within the power may also expressly declare transcending capabilities, declaring that the authority within the power survives and transcends death.

In reviewing the limiting effects of the application of the Uniform Power of Attorney Act (UPOAA), adopted in Idaho on July 1, 2008, the court will note that Act applies to "Durable" powers (those which transcend incapacity, but not death) (I. C. §15-12-104; I. C. §15-12-102(2)&(5)), and the Act then specifically *exempts* the UPOAA's provisions altogether with respect to powers coupled with an interest

(adequate consideration) (I. C. §15-12-103(1)) (that exemption is specifically designed to exempt Irrevocable powers, as was Vernon's power) and those powers that within them declare the continuation of the authority to be as otherwise provided (I. C. §15-12-110(3) (as was Vernon's power). See specifically I. C. §15-12-103(1) and I. C. §15-12-110(3) below.

The terminal effects that are otherwise caused by death that apply to durable powers are identified in I. C. §15-12-110(1)(a)&(b). The terminal effects of a durable power do not affect any aspect of an irrevocable power that is coupled with an interest (adequate consideration as the courts also refer to it) (as was Vernon's power).

I. C. §15-12-103(1) specifically states:

15-12-103. Applicability. This chapter applies to all powers of attorney except:

(1) A power to the extent it is coupled with an interest in the subject of the power, including, but not limited to, a power given to or for the benefit of a creditor in connection with a credit transaction;

I. C. §15-12-110(3) specifically states:

“(3) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the power of attorney terminates, notwithstanding a lapse of time since the execution of the power of attorney.

The power granted to Vernon K. Smith by Victoria H. Smith was specifically identified in the pleadings to have been an **Irrevocable Power**, stated in the caption of the case, as well as within the allegations of the pleadings, and as any irrevocable power, they are created by virtue of the fact they are coupled with an interest/adequate consideration, and the language contained within this particular Irrevocable power additionally stated that the grant of authority within it transcends death. Consequently such a power is not precluded by the terminal effects of I.C. § 15-12-110(1)(a)or(b), as identified in the UPOAA adopted by the Idaho Legislature on July 1, 2008.

The lower court's statement and legal conclusion regarding the power granted to Vernon would have ended (never has this court indicated it has ever seen the actual power), and therefore this lower court make the unfounded conclusion that the filing of the case was frivolous and without foundation in law or in fact, and for that rationale, the lower court felt justified to enter an award of attorney fees. The basis for that award was factually unsupported, and the statement made by the lower court was unsupported factually and as a matter of law. The lower court will have the opportunity to review the actual Irrevocable Power, and shall then be in a position to render a finding of fact and a conclusion of law, from which this lower court may then enter that determination, in conjunction with any other disposition or determination it may find appropriate to make in this matter, following remand from the Supreme Court, and with respect to the issue of any aspect of attorney fees.

Because this Irrevocable Power of Attorney now appears to have become relevant to this case and for the potential of another appeal, (the concept of which was addressed in passing by the Supreme Court without having had the benefit of reviewing the actual Power/or made an issue on the appeal) and now has a direct bearing and potential impact whether this lower court is inclined to once again consider a further basis to award attorney fees, or because the Power of Attorney that was given to Vernon K. Smith was in fact Irrevocable, was coupled with adequate consideration, was said to transcend death, and was said to be unaffected by the event of death, and therefore was exempt from the UPOAA, in was made exempt and excluded in several respects, it was therefore not terminated upon the death of Victoria H. Smith, and therefore there was a factual and a legal basis to bring the action as it was brought, and for those reasons it is important to demonstrate to this court as to the non-terminated status of that power, even upon the event of death, as it was designed and crafted to unconditionally be and remain unaffected by the event of death, to be specifically exempt from the UPOAA, as it was being especially created at the request of the Bank and was granted and executed on April 11, 2008, in contemplation of the adoption of the UPOAA, which was to occur on July 1, 2008, knowing the specific contents of the Act, and the specific desire to qualify

under two of its specific exemptions, thereby allowing for the continuation of all existing banking arrangements that had been established for many years, and to allow for the continuation of the business operations and to systematically and statutorily avoid the undesirable effects of bank accounts being frozen until a probate was otherwise opened, all of which is effectively avoided by the effects of any irrevocable power that within it also declared the authority provided for therein did transcend the event of death. The Grantor-Principal and the Grantee-Agent did not want to encounter any disruption in either the farming operations or the continuing use of the long established bank accounts that were to be used and maintained by Vernon under his irrevocable power from mid-2008 on, without any disruptive effects that otherwise would cause operational and banking complications without the exempt effects to the UPOAA.

Therefore, in order to set forth a record that may serve to encourage this lower court to take a different view than what was announced by this court on July 28, 2014, the reason for which attorney fees were being awarded in the first place and as reflected in the judgment entered of record on August 28, 2014, upon what this lower court relied upon an unfounded conclusion of law that all powers cease and terminate upon death, the opportunity for the court to perceive a different view is now being presented to this lower court with a true and correct copy of the actual Irrevocable Power of Attorney that now has direct relevance to this case at this juncture of the proceedings. Should this court grant any attorney fees against either the Plaintiff or the counsel of record who has been declared to be the aggrieved party appellant, then this Irrevocable Power of Attorney will be physically within the record of this matter, to support any further appeal that may then need to be taken to the Supreme Court, either as it relates to the Power of Attorney itself and/or to any further award that may be made by this lower court regarding attorney fees, as the lower court will have a record from which to re-consider its reasoning announced on July 28, 2014.

This lower court addressed the motion and argument that was presented to it for attorney fees on July 28, 2014, and denied any award of attorney fees, other than to grant attorney fees under I. C. §12-121, which was the only issue appealed to the Supreme Court with respect to any award and/or denial of any

award of attorney fees, as Defendants did not appeal the lower court's denial of fees under any of the other provisions that were argued to the lower court on July 28, 2014.

It was thought to be unnecessary to raise the power's Irrevocability status and right announced within it that it transcended death as an issue on appeal, as that subject was not directly relevant to the merits of the error the lower court made with respect to the award of attorney fees being made against an attorney under I. C. §12-121; and that the Irrevocable Power of Attorney was not in the record from which to read and apply its contents to the exempted effects of the UPOAA. The idea of a power was addressed in the discussion during oral argument proceedings before the Supreme Court, but was not an issue to be addressed or ruled upon by the appellate court as it was not raised as an issue in that appeal, since the irrevocability of Vernon's power of authority was not required to be raised as an essential element to address the error the lower court made with the award of those attorney fees under the statute in question. In light of that discussion, the appellate court observed and stated in a footnote:

“[1]At oral argument, Vernon contended Victoria's death did not terminate his power of attorney because his power of attorney was coupled with an interest. See I.C. § 15-12-103(1). Because Vernon did not raise that argument below, we will not address it on appeal. See, e.g., *Obenchain v. McAlvain Const., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) ("[A]ppellate courts will not consider new arguments raised for the first time on appeal.").”

As the matter currently stands, the Defendants, through their counsel, want this lower court to again consider awarding them attorney fees, using their original motion, their original argument, this court's original oral decision, and to overlook the finality effects of res judicata and collateral estoppel with regard to what the lower court before ruled. Below is what the lower court has specifically ruled as of July 28, 2014:

So, I do have jurisdiction, and the defendant is clearly the prevailing party. The determination or prevailing party is generally held to be a discretionary call with the court based upon the facts and circumstances of the case, that discretion is not unbounded. And there is a case –I can't cite it all the top of my head – – but there is a case that says a court abuses its discretion when it declines to find a defendant is the prevailing party where the

defendant has obtained the most relief the defendant could get, and that's dismissal of the case.

So in this case, where I do hold there is no prevailing party, I believe the Idaho cases and the Idaho Supreme Court would say that I had abused my discretion. So there is a prevailing party.

And, frankly I think attorney's fees are awardable, would be awardable on this case under all three theories put forth. It has its origins in a commercial transaction as contrasted to being a tort or being a consumer transaction; that is, a transaction related to or a transaction for personal or household purposes.

But more fundamentally this case is a case that should never have been brought in the fashion that was brought. It was not proper the party. Victoria Smith is no longer with us. She cannot in person or through a power of attorney be party to a court action. It's just pretty much that simple and black letter law. This matter, if it is to be pursued on behalf of Victoria Smith upon her passing, it needs to be pursued by the estate of Victoria Smith. And that was never commenced, at least not as of the time this case was brought. And at the time it was argued, Mr. Eismann represents that it has not been... Probate has not been started to this date. I don't know. That's not in my record. I don't rely on that. I look at the case as it was at the time it was terminated-- or actually at the time it was commenced.

This case was brought without foundation. Idaho code section 12 – 121 says that attorney's fees are awardable in the case is brought, pursued, or defended frivolously, unreasonably, without foundation. I won't go so far as to say the case is frivolous because underlying it there appears to be genuine dispute of some variety that needs to be decided at some point by a proper forum. But it was certainly pursued in this case without foundation because there is no foundation for commencing a lawsuit on behalf of someone who is deceased and then doing it through the -- as a properly appointed personal representative or otherwise authorized person. And a power of attorney simply does not and cannot survive the death of the grantor. That's just so fundamental that is hard to find even authority that says so.

So, I will award attorney fees. The costs requested are costs as a matter of right. The attorney's fees -- or the costs requested will be awarded. And I'm going to award attorney's fees in this case under Idaho code section 12 – 121 is a lawsuit that was brought or pursued without foundation-- unreasonably and without foundation.

As an alternative for attorney's fees under 12 – 120(3), although I do not think that reaches counsel. I am not comfortable that the procedure required Rule 11, that is, the opportunity -- the notice and opportunity to withdraw a pleading and get out from under the potential sanction was followed in this case. Or if it was in my record was clear that it was followed,

so at this time I'm going to decline to award fees under Rule 11. But I will rule -- award them under 12 -- 121 against the party and counsel because it is counsel's responsibility, frankly, in a case like this to know the law and to follow it.

Questions?

MR. EISMANN: Our observation, Judge, is, in view of the fact that Mrs. Smith was deceased and no estate had been established through a probate proceeding, that she would really be a party and would be liable for anything that her son, the attorney, did.

THE COURT: I am awarding it against -- the plaintiff in this case is said to be Victoria Smith by and through her attorney, in fact. And I am awarding fees against her counsel, Mr. Smith, personally.

How you said about collecting these fees, Mr. Eismann, is beyond the scope of my decision. And what the effect is when you have a decedent who is put into a lawsuit such as this, obviously without her consent because she is not around to give it, I don't know. That's something to be addressed at a future date. I hesitate to give legal advice with the limited knowledge that I have.

MR. EISMANN: We couldn't find anything on that.

THE COURT: Pardon?

MR. EISMANN: We couldn't find anything on that specific question.

THE COURT: I am at this point making the ruling that I have ruled that the party and her counsel are responsible for these fees. And beyond that, I express no opinion as to how they get collected or paid or how one might enforce them against the decedent.

The authority relating to Irrevocable powers of attorney is rather extensive, and before addressing the other available case law, we begin with the provisions of the UPOAA. There is no provision in the UPOAA (enacted July 1, 2008) that declares any *prior* granted Powers granted under certain circumstances to become subsequently restricted by the enactment, and no prior powers possessing all-inclusive and unlimited authority, with full-authorization to act for any and all purposes, with the same force and effect as though undertaken by the grantor, even to be done following death, was never intended to be eliminated, as

identified above, as the irrevocable power (coupled with an interest/adequate consideration) was expressly preserved and the effects of the UPOAA excluded from its application. Rather, and to the contrary, the UPOAA specifically recognized, as a matter of law, that all prior Powers were preserved, and retained their existence, consistent with the authority and validity upon which they were created (I.C. 15-12-106(2)). The all-inclusive and unlimited authority, vesting full-authorization to act for any and all purposes, with the same force and effect as though undertaken by the grantor, remained the authority within each of the Powers granted to Vernon K. Smith, and nothing set forth in the UPOAA, or any case law nationwide, presented any basis for this lower Court to infer the power ceased upon death when that was not the intent of the Powers granted, nor the objective to be achieved by the enactment of the UPOAA, as the exception was created to preserve those situations that were provided for within the Power. It was for that reason the UPOAA specifically states any Power created and made to be irrevocable, when “coupled with an interest (adequate consideration) in the subject of the power”, it is *specifically excluded from UPOAA operation, and excepted from the application of UPOAA*. This declaration was designed to recognize “irrevocable” Powers created in that fashion, regardless of the enactment, were exempt from its application, the consequence of that exception serves to make clear no retroactive intent was addressed to limit prior irrevocable powers, as the Act itself undertook to inform the judiciary that if Powers are made “irrevocable”, they are exempted from the operation of the Act. The 2008 Power granted to Vernon K. Smith was both durable and irrevocable, coupled with adequate consideration from the present interest, and coupled with a future interest derived from him being the exclusive benefactor by the intentions of Victoria H. Smith’s holographic Will (now an issue on appeal), thereby having all the safeguards existing before and after the Act, as the Act retained that exemption.

One provision within UPOAA that should be of concern to this lower court declares the following:

15-12-103. APPLICABILITY. This chapter *applies to all powers* of attorney *except:*

(1) *A power to the extent it is coupled with an interest in the subject of the power,*

The concept of “coupled with an interest” is the basis for establishing the “irrevocability” of a power, and in the case of the 2008 Power, the irrevocability of the Power granted to Vernon K. Smith was coupled with adequate consideration by virtue of the present interest Vernon had in the properties through his years of continual service, and future interest by virtue of being the sole beneficiary of the Principal.

The provision that confirmed powers in existence prior to the UPOAA would remain intact with their authority specifically states:

15-12-106. Validity of power of attorney. (2) A power of attorney executed in this state before the effective date of this chapter is valid if its execution complied with the law of this state as it existed at the time of execution.

Vernon was granted two powers over the years, commencing with the all-inclusive unlimited authority granted to him on July 15, 1999, and the Irrevocable Power thereafter granted to him April 11, 2008. Both Powers complied with the existing laws when created.

The July 15, 1999 Power, a durable power, specifically stated the authority to be as follows:

DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That I, Victoria H. Smith, of 5933 Branstetter St., Boise, Idaho 83714, do hereby make, constitute and appoint, and by these presents has therefore made, constituted and appointed my son, Vernon K. Smith Jr., of 1900 W. Main St., Boise, Idaho 83702, as my true, lawful and exclusive agent, representative and attorney to act for me, in my name and in my place and stead, pursuant to this durable power of attorney, with full-authorization to act in my behalf, for any and all purposes, with the same force and effect as though undertaken by me.

That my grant of this Durable Power of Attorney is intended to convey unto my son, Vernon K. Smith Jr., full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done, as fully to all intents and purposes as I might or could do if personally present, and I do hereby ratify and confirm all that my said attorney has done by virtue of these presents.

This Power of Attorney is durable in all respects, and shall endure the event of disability and death, and shall never be affected by any event of disability or death of the undersigned for any reason, manner, or purpose.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15th day of July, 1999.

Victoria H. Smith

Victoria H. Smith

STATE OF IDAHO)

:SS

County of Ada)

This is to certify that on this 15th day of July, 1999, before me, the undersigned Notary Public in and for the said Ada County, State of Idaho, personally appeared Victoria H. Smith, known and identified to me to be the individual whose name is subscribed to the within instrument, and acknowledged to me that she has read and executed the same as her own voluntary free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official notarial seal the day and year in this certificate first above written.

Carolyn Puckett

Notary Public for Idaho

Residing at Boise, Idaho

My Commission Expires: 6-14-03

(italic, dark and underlined lettering)

The April 11, 2008 Power specifically made Irrevocable, stated the authority as follows:

DURABLE AND IRREVOCABLE POWER OF ATTORNEY

I, Victoria H. Smith, residing at 5933 Branstetter Street, Boise, Ada County, Idaho, [REDACTED] [REDACTED] [REDACTED] does herewith reaffirm, reconfirm and continue the ongoing appointment of my son, Vernon K. Smith Jr., [REDACTED] [REDACTED] from the original appointment I made in 1999, and to remain authorized to act as my unconditional attorney in fact and agent under this Durable and Irrevocable Power of Attorney, and he is authorized to exercise all powers and authority I otherwise possess and could exercise in my own name and on my own behalf.

The power and authority vested in him is unconditional, unlimited and all inclusive, and he shall have the full and exclusive power and authority to manage and conduct all of my affairs, and to exercise all of my legal rights and powers, including any rights and powers I may acquire in the future, and specifically including, but without any intended limitation, to collect all funds, hold, maintain, improve, invest, lease, or otherwise manage or dispose of any or all of my real or personal property, or any interest therein; purchase, sell, mortgage, encumber, grant, option or otherwise deal in any way in any real property or personal property, tangible or intangible, or any interest therein; to borrow binds, to execute promissory notes, and to secure any obligation by mortgage, deed of trust or pledge; to conduct any and all business and banking needs, of any nature or kind, including the right to sign checks and draw funds on any and all my accounts, with the same authority as my own signature, to sign any and all agreements and documents in my behalf, to continue any corporations, limited liability companies and venture entities I presently have, and to organize, reorganize, merge, consolidate, capitalize, recapitalize, close, liquidate, sell, or dissolve any business interest, and to vote all stock, including the exercise of any stock options and any buy-sell agreements; to receive and to endorse checks and other negotiable paper, to deposit and to withdraw funds from any accounts, by check or by withdrawal slips, or otherwise, to transfer funds from any account and to do so from any bank, savings and loan; or any other financial institution in which I

have funds now or in the future; to prepare, sign and file any and all tax returns and other governmental reports and documents, and to represent me in all matters before the Internal Revenue Service or State Tax Commission; to have access to all certificates of deposit, and any safety deposit box registered in my name whether alone or with others; and to remove any property or papers located therein; to act unconditionally with regard to any funds, stocks, bonds, shares, investments, interests, rights, benefits or entitlements I may now have or hereafter come to have and hold; to engage in any administrative or legal proceedings or lawsuits regarding any rights and interests I have on matters therein; to create trusts and to transfer any interest I may have in property, whether real or personal, tangible or intangible, to the trustee of any trust, to engage and to dismiss agents, counsel, and employees, in connection with any matter, and for purposes, this power and authority vested in my son, Vernon K. Smith Jr. is unlimited, unconditional and all inclusive, and with the same authority and effect as though I had caused the action to be undertaken.

This Durable Power of Attorney is IRREVOCABLE and shall remain in full force and effect, HAVING BEEN COUPLED WITH ADEQUATE CONSIDERATION, AND SHALL NOT BE AFFECTED, ALTERED OR IMPAIRED-BY THE EVENT OF MY DEATH OR DISABILITY, AND SHALL CONTINUE IN EFFECT FOR ALL TIME, AS IT HAS BEEN MY LONG-STANDING INTENTION AND DESIRE THAT MY SON, VERNON K. SMITH JR., SHALL BE THE SOLE AND EXCLUSIVE HEIR OF MY ENTIRE ESTATE, AS I HAVE SO DECLARED OPENLY IN THE PAST MANY YEARS, BECAUSE OF HIS COMMITMENT, DEDICATION, AND DEVOTION TO MY BEST INTERESTS, WELFARE, AND FINANCIAL WELL BEING.

Dated this 11th day of April, 2008.

Vernon K. Smith

Victoria H. Smith

witness

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Idaho this 11th of April 2008.

John M. Gibson

Notary Public for Idaho

Residing at Boise; Idaho

Commission expires: 10/16/13

(italic, bold coloring, underlining and capitalization is added emphasis).

This Court must choose to review the history regarding agency relationships that are made irrevocable, and what creates the basis for an irrevocable Power, which, by their nature, are coupled with an interest (by adequate consideration), and to understand that such an interest may be either a present interest, a future interest, or a combination of the two. The history behind the enactment of the UPOAA is of significance as well, as it was intended to address durable powers only, and to be used as an estate planning tool as well. Only a handful of states initially participated in that “uniform” enactment when it first came

into being, and that history is addressed in the University of Richmond law review article the Court will find of interest, written November, 2009, as the enactment in Virginia and Idaho was fundamentally the same.

The Review article discussed the history relating to Durable Powers of Attorney (“DPAs”) which largely evolved from the common law of agency and steadily moving toward a statutory framework. The driving force behind the trend was the increased acceptance and use of DPAs. DPAs were relatively new legal tools, and Case law and statutes regarding their interpretation and construction continue to develop and vary, to some degree, from state to state.

The Uniform Power of Attorney Act (“UPOAA”) was promulgated in 2006 by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in an attempt to bring uniformity to “durable” powers, which are rapidly emerging as a significant and vital estate planning tool. The UPOAA was introduced in Idaho in 2008 and in Virginia in 2009 and become effective there in 2010.

As of 2009, the states that adopted it were Idaho, New Mexico, Nevada, Maine, and Colorado, with Illinois, Indiana, Maryland, Minnesota, Montana, Oregon, and Virginia then having legislation pending to adopt the UPOAA.

Where the UPOAA is silent, it remains recognized by all discussion that the common law rules of agency still apply. The UPOAA specifically declares it does not apply to powers that are irrevocable, and therefore coupled with an interest in the subject of the power, or to medical powers of attorney, or to proxy or voting rights for an entity, or powers created on a government form for a government purpose.

It remains fundamental for this Court to accept the legal consequence the 2008 Power was specifically made irrevocable, was coupled with adequate consideration for a present interest under common law, and had a declared future interest, making it “coupled with an interest” as defined by applicable law, and consequently that Power is never subject to any provision of the UPOAA, and does not terminate upon death, as the powers further declared, and this Court previously suggesting that such a

Power terminates upon death is not embraced in the UPOAA (as it is specifically exempted from any effective application) and contradicted by the established case law, and would therefore be an incorrect application of controlling law.

A review of the long established history of agency law is appropriate for the Court to appreciate what is not controlled by the UPOAA.

HISTORIC ANALYSIS OF POWERS OF ATTORNEY

In 2 C.J.S., Agency, § 75, p. 1159, it states: ‘* * * where the authority given the agent is supplemented with an interest or estate in the subject matter of the agency itself, the rule is well established both at common law and by statute that both the right and the power to revoke the agency without the agent's consent is taken away; * * *’

As to what constitutes a power “coupled with an interest” the rule is: ‘The person clothed with the power must derive, under the instrument creating it or from the nature of the relation, a present or future interest in the thing or subject itself on which the power is to be exercised.’ 2 Am.Jur., Agency, Sec. 78, pages 62–63.

In *D’Amato v. Donatoni*, 105 Vermont 496, 168 A. 564 (1933) the general rule of the law was there discussed and states the long established proposition:

“It is a general rule of law that a principal may revoke a mere naked authority at any time. A revocation of the agent's authority is subject to the will and even caprice of the principal. 21 R. C. L. 887. There is, however, a well-recognized exception to this general rule to the effect that, where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, unless there is an express stipulation that it shall be revocable, it is, from its very nature and character, in contemplation of the law, irrevocable. Note, 7 A. L. R. 947. To constitute a power coupled with an interest, the person clothed with it must derive, under the instrument creating it, or otherwise, a present or future interest in the subject itself, on which the power is to be exercised, and not

merely in that which is produced by the exercise of the power. *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76; *Hunt v. Rousmanier*, 8 Wheat. 174, 204, 5 L. Ed. 589; *Hartley and Minor's Appeal*, 53 Pa. 212, 91 Am. Dec. 207; *Gilbert v. Holmes*, 64 Ill. 548; *Taylor v. Burns*, 203 U. S. 120, 27 S. Ct. 40, 51 L. Ed. 116; Annotation, 64 A. L. R. 380. In *Hunt v. Rousmanier*, supra (a leading case on the subject), Chief Justice Marshall said: “ ‘A power coupled with an interest,’ is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. 105 Vt. At p.499; 168 A. at pgs. 566-67.

As stated in the very recent decision as announced in *Evanston Insurance Company v. Premium Assignment Corp.* 935 F. Supp. 2d 1300 (Florida) (2013), the present or future interest identified in the Power makes the grant to become one that is “coupled with an interest”, as was the 2008 Power of Attorney granted to Vernon, evidenced further by the fact that the Power also acknowledged the interest was coupled with adequate consideration:

The power of attorney contained in the Premium Finance Agreement was coupled with an interest and was irrevocable, even upon the death of the grantor, Dr. Dave. See *Atkin v. Baier*, 12 F.2d 766, 767 (5th Cir.1926); *McGriff v. Porter*, 5 Fla. 373, 379 (Fla.1853) (“A power is simply collateral and without interest, or a naked power, when, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor has by the instrument creating the power, any estate whatsoever; but when the power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest.”; *Goeke v. Goeke*, 613 So.2d 1345, 1347 (Fla. 2d DCA 1993) see also 2 FLA. JUR. 2D, Agency § 31, Power coupled with an interest. (Footnote 2 cited in the case).

In *Harper v. Little*, 2 Greenl 14, 2 Me. 14, 11 Am Dec. 25 (1822), the established rule of law on the issue of *an interest coupled with adequate consideration*, and its effects *on the survivability of the authority*

beyond the agency relationship upon death, was cited back then, just as it remains to be cited today. It states:

**2 As to the first question;--the ancient and general rule of law is, that a power of attorney expires with the life of the constituent. Lit. sec. 66. Co. Lit. 52. b. 181.b. 1 Bac. Abr. Authority, E. And the only exception is where the power is coupled with an interest, or where the instrument conveying the power, conveys also to the attorney a present or future interest in the land. Bergen v. Bennett, 1 Caines' Cas. 3.

In *Hilliard v. Beattie*, 67 N.H. 571, 39 A. 897 (1894) this well-established rule of law is again cited in the following language:

“When power is given to a person, who derives under the instrument creating the power, or otherwise, a present or future interest in the subject-matter over which the power is to be exercised, it is then a power coupled with an interest” (*Mansfield v. Mansfield*, 6 Conn. 559), **and is irrevocable by the grantor, and survives to the representatives of the deceased grantee.** See, generally, *Bergen v. Bennett*, 1 Caines, Cas. 1, 2 Am. Dec. 281, and note, 291; *Hunt v. Rousmaniere*, 2 Mason, 342, Fed. Cas. No. 6,898; *Dartmouth College v. Woodward*, 4 Wheat. 700; *Hutchins v. Hebbard*, 34 N. Y. 24; *Knapp v. Alvord*, 10 Paige, 205; *Raymond v. Squire*, 11 Johns. 47; *Goodwin v. Bowden*, 54 Me. 524; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Cassiday v. McKenzie*, 39 Am. Dec. 82, note, 83, 11 Pac. 820; *Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635; *Robinson v. Allison*, 74 Ala. 254; *Loring v. Marsh*, 2 Cliff. 311, Fed. Cas. No. 8,514; *Davis v. Lane*, 10 N. H. 156, 160; *Jordan v. Gillen*, 44 N. H. 424, 427; 18 Am. & Eng. Enc. Law, 888-891, and authorities cited.

In *Jackson ex dem. Henderson v. Davenport*, 18 Johns 295, Supreme Court of New York, (1820), the general rule was therein discussed and stated: “it was to every beneficial purpose such a power; it was to be exercised for his benefit, was under his control, and came within the spirit of the rule laid down in 1 Caines's Cases in Error, 15. “That when power is given to a person, who derives under the instrument creating the power, a present or future interest, it is, then, a power coupled with an interest.” The power, in this case, was well executed, and inured to the benefit of the lessor of the plaintiff, who became seised of an estate in fee, and was entitled to recover.”

In *Meyer v. Reif*, 217 Wisconsin 11, 258 N.W. 391 (1935) The Court again described the law with respect to the assignable and transferable interests, when coupled with an interest:

It is stated in 3 Pomeroy, Equity Jurisprudence, § 1285, after saying that “modern English statutes have so far changed the common law as to permit the assignment at law of contingent and future interests, expectancies and possibilities coupled with an interest in real estate,” that “the American legislation has generally been broader, and authorizes the assignment at law of such future expectancies and possibilities, when coupled with an interest, whether connected with real or personal estate.” The future expectancy of Miles, even if considered as a possibility, is certainly coupled with an interest. The case of Lawrence v. Bayard, 7 Paige (N. Y.) 70, is referred to in the text of Pomeroy as illustrating the type of statutes supporting the statement last above quoted. This case gives the statutes referred to as supporting the latter proposition. They are the same as our statutes above stated. It is, moreover, to the precise point that such an interest in personalty as is here involved is assignable.

And by an examination of the several provisions of the revised statutes it will be seen that by the term ‘expectant estates’ the legislature intended to include every present right or interest, either vested or contingent, which may by possibility vest in possession at a future day. The mooted question, whether a mere possibility coupled with an interest is capable of being conveyed or assigned at law, is therefore forever put at rest in this state.” And it is further there pointed out that “there never was a doubt that any interest whatever in personal property, or a mere possibility coupled with an interest in real estate, was assignable in equity.”

In *Power v. Reynaud*, 7 Conn. L. Rptr. 636 (1992), 1992 WL 134889, it states:

“[W]hen power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the subject over which the power is to be exercised, it is then a power coupled with an interest...”

In *Stewart's Estate v. Caldwell*, 271 So. 2d 754 (Florida 1972) The Court recited the established law on the definition of “coupled with an interest”, by stating:

“25 Fla.Jur. Powers s 3: ‘A power simply collateral and without interest, or a naked power, exists when authority is given to a mere stranger to dispose of an interest that he neither has nor acquires in any estate whatsoever. But when the power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest.” (Footnote 4 therein).

In a recent decision in Virginia, rendered before the UPOAA was adopted in 2010, entitled *Whitley v. Lewis*, 55Va. Cir.485, (2000) WL 33316882, the Court addressed the *irrevocability of a Power*, confirming the established law:

Agency Coupled With an Interest

Both Virginia decisional law and other authorities recognize that the coupling of a power with an interest makes the power irrevocable. *Hunt v. Rousmanier's Adm'r.*, 21 U.S. (8 Wheat.) 174 (1823), 3 Am.Jur.2d Agency §§ 63 et seq. Generally, a power coupled with an interest is described as follows: **“In order that a power may be irrevocable because coupled with an interest, it is**

necessary that the interest be in the subject matter of the power. In other words, the person clothed with the power must derive, under the instrument creating it or from the nature of their relationship, a present or future interest in the thing or subject itself on which the power is to be exercised, ...” Am.Jur.2d Agency § 65. Here, it is plain that the Whitley Power of Attorney applied to the Old Ox Road Property, since Mr. Boston was seized of that real estate when he signed the Whitley Power of Attorney and he expressly delegated authority to Ms. Whitley pursuant to her power of attorney to dispose of the Property. In a separate letter to counsel, I raised the issue of whether the fact that Ms. Whitley's deed from Mr. Boston, by which she received a joint tenancy interest in the Old Ox Road Property, predated her power of attorney negated her power of attorney as being a power coupled with an interest. I invited counsel for the parties to explore the early English common law which became part of the American common law and other authorities which might shed light on this issue. (Letter from J. Viereggs to R. Adams and C. Jorgenson of 8/2/2000.) I received no authorities, persuasive or otherwise, which would disqualify the Whitley Power of Attorney as being a power coupled with an interest. Moreover, in Agency-Power Coupled With an Interest, 28 A.L.R.2d § 2, it is stated: “However, it is also held that the interest need not be derived from the instrument creating the power, and other cases recognize a power coupled with an interest where the interest is not derived from the principal” (emphasis added). The early American case, Bergen v. Bennett (1804, N.Y.), 1 Caines Cas. 1, 2 Am. Dec. 281 is cited for the first proposition that the interest and power need not be derived from the same instrument.I conclude, therefore, that the Whitley Power of Attorney constituted a power coupled with an interest and was irrevocable.

Vernon had all-inclusive, unlimited authority, exclusively granted him from his Mother since 1999, who made transfers at times thereafter. Vernon had dedicated his energy, time, financial resources, and continuous management efforts to save all property interests throughout the many years following the death of his father (1966), which his brother, Joseph H. Smith, proved to be less willing, less inclined, and otherwise unable to do, in part resulting from his disastrous relationship with their Mother Victoria H. Smith, being regarded by her that he was considered to be a thief and a liar in her ever watchful eyes. Vernon had not only a present interest through his financial contributions, reflected by the “coupled with adequate consideration”, but also was and had been for almost two decades the long declared sole beneficiary of all property interests of Victoria since February 14, 1990. Their interests were merged with Vernon’s present and future interests, the reason for the irrevocability of the Power, which came into being following Victoria’s fall and physical frailty developing from the needed hospital stay in March, 2008, and transition in the financial record keeping and accommodation given to the bank with a current and

irrevocable Power, which, being durable before, allowing that Power to transcend incapacity, but then, with the irrevocability, to also transcend death. The soon to be enacted UPOAA did not affect the perpetually of all-inclusive authority under the Powers. Both Powers allowed transfers of any real and personal property interests of Victoria to be made by Vernon, and as a matter of law, and with the 2008 Power being irrevocable, coupled with adequate consideration of the past activities and resource contributions, being also her sole beneficiary, it met the long established law regarding “coupled with an interest”, excepted from the UPOPAA, and transcended death, as it stated.

This lower court has chosen to adopt a general conclusion that all powers of attorney terminate at death. That is untrue, as some powers are specifically designed to transcend death, as this 2008 Power was so designed and declared to be. This lower court has now able to review the Power, and if this lower court wants to take the position the case was filed wrongfully and frivolously because Victoria was deceased, and should this lower court then still believe that attorney fees are justified, then we have a new issue for appeal, and that course of action is reserved within these further proceedings. This lower Court’s authority that all powers terminate upon death is not supported by the UPOAA, as that Act expressly exempted the application to certain powers; it is not supported by the common law on the subject of irrevocable powers that transcend death, as identified above.

This Court has failed to review the common law and the exclusionary effects identified within the UPOAA itself, and this lower court was told the power in question was Irrevocable, identified as such in the caption and in the allegations, but possibly unfamiliar with the common law, as well as the exclusionary effects of the UPOAA to powers coupled with an interest (adequate consideration), and for that failure of familiarity, the lower court took the position that filing the action with the use of the Irrevocable power was frivolous, in the absence of a live party Plaintiff.

Vernon always had full and continuous authority under his Power, transcending death, and no statute or common law authority ever restricted that power, pre or post UPOAA, and not only does the

prospective application of the UPOAA **not** undermine the authority granted in prior powers, but expressly preserved the common law pertaining to “irrevocable” powers, as the UPOAA has codified use of “durable” powers only, not “irrevocability” granted powers that serve to transcend death.

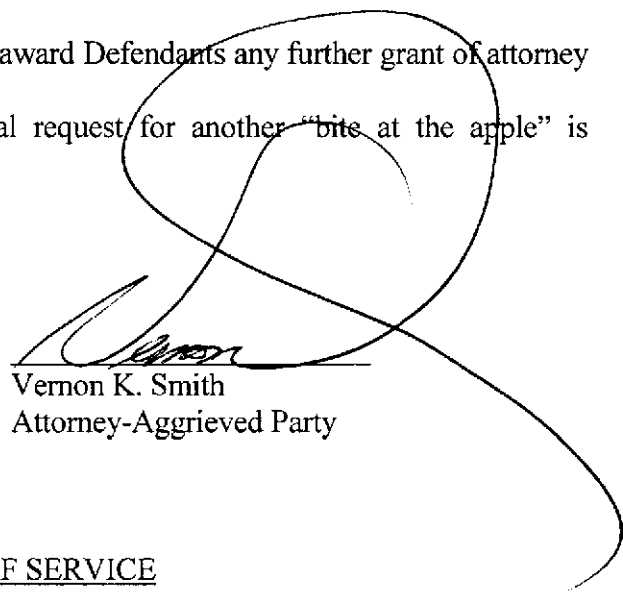
The UPOAA maintained this clear distinction, and carried into the enactment that unconditional exemption to past/future powers with coupled interests. Notwithstanding that statutory aspect, the undisputed statutory interpretation is UPOAA does not apply to *irrevocable* powers, as remains the case here, as this April 11, 2008 Power has a present interest, coupled with adequate consideration because of his present interest, and coupled with a future interest, as Vernon was declared to be her sole beneficiary.

This lower Court is now presented the Powers referred to from within the record of this case, as well as the Objection to any award of attorney fees. This Court is now aware the 2008 Power was expressly made irrevocable, coupled with adequate consideration, confirming Vernon’s present interest and his future interest, among the very reason the grant was made *irrevocable*, as it was *coupled with adequate consideration by his present interest and coupled with a future interest in the same subject matter by the long established bequeath*, declared the sole beneficiary of the Principal, *constituting a Power grant recognized as coupled with an interest, as a matter of law*.

Interests and authority in *irrevocable* powers are specifically excluded from the UPOAA, as *irrevocable* powers are always coupled with either a present and/or future interest, and because recognized as more than a durable power, are exempt from the statute, by I.C. §15-12-103(1) specifically *excepting application of the UPOAA* to such powers, and transcend death, and was specifically so declared within the Power itself. The only statutory authority affecting powers in Idaho is the UPOAA,, and it has declared itself inoperative to this Power by virtue of I.C. §15-12-103(1), as common law deems irrevocable powers to survive death of the Principal, and not terminate upon death, and that was a declaration made also by the Grantor-Principal as addressed in this Power, stating that the authority survived death of the Grantor, not just incapacity or disability.

It would be a further act of injustice for this court to award Defendants any further grant of attorney fees, as nothing was frivolous in this filing, and the oral request for another "bite at the apple" is inappropriate for all of the reason addressed above.

Dated this 31st day of July, 2017.



Vernon K. Smith
Attorney-Aggrrieved Party

CERTIFICATE OF SERVICE

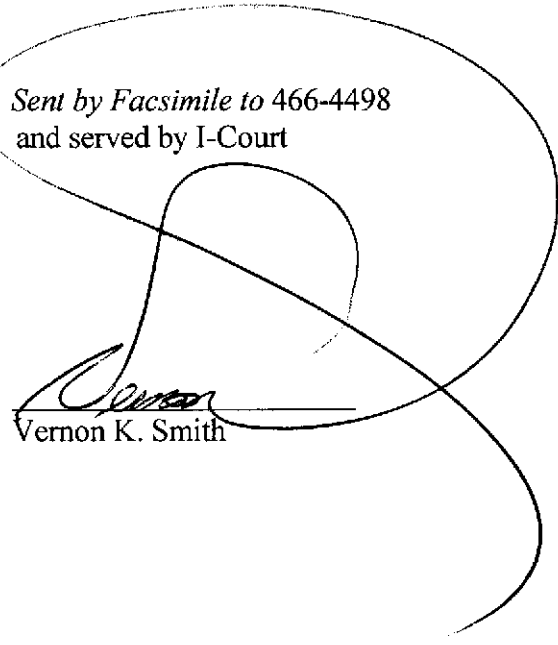
I HEREBY CERTIFY That on the this 31st day of July, 2017, I caused a true and correct copy of the above and foregoing to be delivered to the following persons at the following addresses as follows:

Clerk of the Court () U.S. Mail
Fourth Judicial District (x) I-Court
Ada County () Hand Delivered
200 West Front Street
Boise, Idaho 83702

Richard B. Eismann
Eismann Law Offices
3016 Caldwell Blvd.
Nampa, Idaho 83651

*Sent by Facsimile to 466-4498
and served by I-Court*

Dated this 31st day of July, 2017.



Vernon K. Smith

Richard B. Eismann, ISB # 557
Ryan Martinat, ISB #8789
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3016 Caldwell Blvd.
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Facsimile: (208) 466-4498
rbe@eismannlaw.com
ryan@eismannlaw.com

Attorney for the Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

VICTORIA H. SMITH, by and through)
her attorney in fact, Vernon K. Smith,)
by and through his Durable and)
Irrevocable Power of Attorney,)
)
Plaintiff,)
)
-vs-)
)
TREASURE VALLEY SEED)
COMPANY, LLC, and DON TOLMIE)
in his individual capacity, and as an)
owner, representative and authorized)
agent of Treasure Valley Seed Co., LLC,)
)
Defendants.)

Case No. CV 0C 13-22179

NOTICE RE: ATTORNEY'S FEES

On July 17, 2017, a status conference was held with the Court. At that hearing, the Court orally ordered the parties to submit briefs on the issue of attorney's fees. The Court ordered that counsel for the plaintiff was to file and serve a brief within fourteen days of the July 17, 2017 hearing. That

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

VICTORIA H. SMITH, by and through her
attorney in fact, Vernon K. Smith, by and through
his Durable and Irrevocable Power of Attorney,

Plaintiff,

vs.

TREASURE VALLEY SEED COMPANY, LLC,
and Don Tolmie in his individual capacity, and as
an owner, representative and authorized agent of
Treasure Valley Seed Co., LLC,

Defendants.

Case No. CV-OC-2013-22179

MEMORANDUM DECISION AND
ORDER RE: ATTORNEY FEES

This matter is before the Court following remand from the Idaho Supreme Court. Earlier this Court awarded attorney fees to Defendant Treasure Valley Seed jointly and severally against Plaintiff Victoria Smith and her counsel Vernon K. Smith. This Court committed legal error in awarding the fees against Mr. Smith as the statute relied upon by the Court does not authorize a fee award against the lawyer, only the client. The Supreme Court vacated the award against Mr. Smith and remanded the case for further proceedings consistent with the opinion. In doing so the Supreme Court instructed that its opinion “in no way limits the district court from considering all legal bases for awarding attorney fees.”

At the outset, it is necessary to note that the Supreme Court did not reverse the fee award against Plaintiff Victoria H. Smith. Further, the Supreme Court upheld this Court’s determination that Mr. Smith’s authority to act for his mother under the power of attorney terminated upon her death. The Supreme Court declined to consider Mr. Smith’s argument that

the power of attorney survived the death of Victoria Smith because it was a power coupled with an interest. Those determinations are now law of the case and will not be revisited.¹

The matter was eventually set for hearing following remand. At the hearing Mr. Smith contended that a new request or motion for attorney fees was required to which he could object and the matter go from there. The Court decided at the hearing that a new motion was not required. The Court determined the matter would go forward on the original record and motion. At the hearing the Court mischaracterized the procedural history of the case. The matter originally proceeded on the Defendant's Memorandum of Costs filed April 17, 2014. That Memorandum contained the request for attorney fees and set forth the legal grounds upon which the request was made. Mr. Smith thereafter filed an objection to the request and the matter proceeded to hearing on the objection. Regardless of the procedural posture, the Court determined it is unnecessary to require a new motion or request for fees to satisfy the mandate of the remittitur.

The Court gave Mr. Smith fourteen days to file a brief setting forth any arguments he had regarding the request for fees and costs as originally filed. Defendants were given fourteen days to respond to Plaintiff's brief. No brief was timely filed. Mr. Smith filed an untimely brief together with an affidavit on August 3, 2017. On the same day, Defendants filed a Notice with the Court that no brief had been filed within the time allowed by the Court. No further response was made to the untimely filed brief, nor is one required.

The untimely brief makes essentially one argument regarding the requested attorney fees. That, since the Defendants did not appeal the original order where the Court limited the grounds for awarding attorney fees to I.C. § 12-121, no other grounds may be considered. This argument flies directly in the face of the decision by the Supreme Court which expressly held that this Court is in no way limited "from considering all legal bases for awarding attorney fees." The remainder of the brief is an attempt to revisit and issue that is already final and is the law of the

¹ The Court expresses no opinion on how or when the judgment against Victoria H. Smith may be enforced given that the Plaintiff is deceased and was deceased at the time of the original filing in this case.

case. The affidavit is also directed to the issue of the survival of the power of attorney following the death of Victoria H. Smith. It will not be further discussed here.

Turning to the issue on remand, the Court first notes that, as the Supreme Court stated, before July 1, 2016, Rule 11 of the Idaho Rules of Civil Procedure did not require a separate motion or opportunity to cure a violation before sanctions could be imposed. Although Rules of procedure are generally held to be effective on all cases pending at the time of adoption unless otherwise stated, in this case the Court determines that to do so would work and injustice. The Defendants made a proper request for attorney fees based on Rule 11 as it existed at the time the request was made. It was the legal error of the Court that led to the fees not being granted on the grounds that counsel violated Rule 11 in bringing this case. The Court adheres to the sentiments made at the initial hearing on the request for attorney fees. This case should not have been brought in the fashion it was. The claims and other legal contentions were warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law to the extent the claim was based on the power of attorney of a decedent. Mr. Smith's newly discovered theory that he held a power coupled with an interest is of no avail at this point. To now require the Defendants to serve a separate motion but not file it for 21 days while Mr. Smith has an opportunity to withdraw or correct the challenged paper or claim in this case would be an exercise in futility. The offending paper in this case is the complaint and the contentions contained within the complaint the Mr. Smith could proceed by way of his Power of Attorney. The complaint has been dismissed. It cannot be corrected at this stage to avoid the harm sought to be prevented. The harm to be avoided here is the unnecessary expense and inconvenience of dealing with litigation having no legal basis. The conduct to be sanctioned is the fostering of litigation without legal grounds by a person trained in the law. Absent the Court's error, this case would be long concluded. It serves no purpose to prolong the proceedings further and increase the burden of legal fees on the parties to call upon Mr. Smith to do that which he cannot now do, that is to voluntarily dismiss the case.

The Court will enter judgment for the attorney fees and costs against Mr. Smith in his personal capacity in the amount of \$15,826.50 as previously determined.

IT IS SO ORDERED.

Dated: _____

Signed: 10/4/2017 09:49 AM



RICHARD D. GREENWOOD
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of October 2017, I mailed (served) a true and correct copy of the within instrument to:

VERNON K. SMITH
LAW OFFICE OF VERNON K. SMITH, LLC
1900 W. MAIN STREET
BOISE, ID 83702
VIA EMAIL: vls59@live.com

RICHARD B. EISMANN
RYAN MARTINAT
EISMANN LAW OFFICES
3016 CALDWELL BLVD.
NAMPA, ID 83651-6416
VIA EMAIL: rbe@eismannlaw.com
ryan@eismannlaw.com

CHRISTOPHER D. RICH
Clerk of the District Court

Signed: 10/4/2017 02:24 PM

By: K. Platus
Deputy Court Clerk



NO. 1148 FILED _____
A.M. _____ P.M. _____

VERNON K. SMITH
ATTORNEY AT LAW
1900 West Main Street
Boise, Idaho 83702
Idaho State Bar No. 1365
Telephone: (208) 345-1125
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NOV 15 2017

CHRISTOPHER D. RICH, Clerk
By AUSTIN LOWE
DEPUTY

Attorney for Appellant

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

VICTORIA H. SMITH, by and through)	
her attorney in fact, Vernon K. Smith,)	
by and through his Durable and)	Case No. CV OC 1322179
Irrevocable Power of Attorney,)	
)	
Plaintiff, and)	
)	
VERNON K. SMITH,)	
)	
Appellant,)	NOTICE OF APPEAL
)	
vs.)	Fee:
)	
TREASURE VALLEY SEED)	
COMPANY, LLC, and Don Tolmie)	
in his individual capacity, and as an)	
owner, representative and authorized)	
agent of Treasure Valley Seed Co., LLC)	
)	
Defendants-Respondents.)	

TO: THE ABOVE NAMES RESPONDENTS, Treasure Valley Seed Company, LLC, and Don Tolmie, and Respondents' attorneys, Richard B. Eismann and Ryan Martinat, Eismann Law offices, 3016 Caldwell Blvd., Nampa, Idaho, 83605, and the Clerk of the above entitled court.

NOTICE IS HEREBY GIVEN THAT:

ORIGINAL

1. The above-named Appellant, Vernon K. Smith, does appeal against the above-named Respondents to the Idaho Supreme Court from that Judgment awarding attorney fees and costs in the above entitled action, as entered on October 4, 2017, by the Honorable Richard D. Greenwood, District Judge, presiding, as provided by Idaho Appellate Rule 17e(1).

2. That the above-named Appellant has a right to appeal to the Idaho Supreme Court, and the judgment or order described in paragraph 1 above, is identified as an appealable order under and pursuant to Rule 11(a)(2).

3. A preliminary statement of the issue on appeal which the Appellant intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal:

a.) Was the award of attorney fees and costs, as entered by the court, supported in fact, and in law under the Statutes and Idaho Rules of Civil Procedure, or constitutes an abuse of discretion?

4. Has an order been entered sealing all or any portion of the record? No.

5. Is a reporter's transcript requested? No.

6. A Standard Record as provided under I.A.R. 28(b), is requested and as provided by I.A.R. 28(b)(1), together with all subsequent documents that have been filed with the district court, following the remittitur issued from the Idaho Supreme Court on November 28, 2016, all of which shall be included within the clerk's record on this appeal, including, but not limited to, the response filed by Appellant, entitled Response and Objection to Defendant's' Request for Attorney fees Upon Remand From The Supreme Court, dated and submitted for I-Court filing on August 31, 2017; the Memorandum

Decision and Order Re: Attorney Fees, entered by the lower court, dated and filed on October 4, 2017; and the Judgment by the lower court, dated and filed on October 4, 2017.

7. I certify:

(a) That a copy of this Notice of Appeal has been filed through the I-Court system, as instructed, and would be served on each reporter of whom any transcript would be requested as named and at the address set out below:

Name and address: Fran Casey, Trial Court Administrator, Ada County Courthouse, 200 W. Front Street, Boise, Idaho 83702

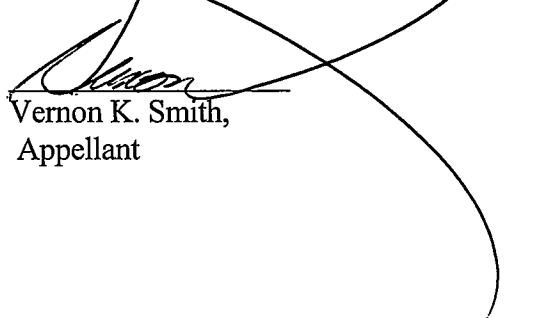
(b) That the Clerk of the District Court will be paid any estimated fee for preparation of any reporter's transcript, if such transcript were to be requested.

(c) That the estimated fee for preparation of the Clerk's Record will be paid upon receiving the estimation for the preparation thereof.

(d) That the Appellant filing fee has been paid through the I-Court system.

(e) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R, through the I-Court system, and to opposing counsel by Fax.

Dated this 14th day of November, 2016.



Vernon K. Smith,
Appellant

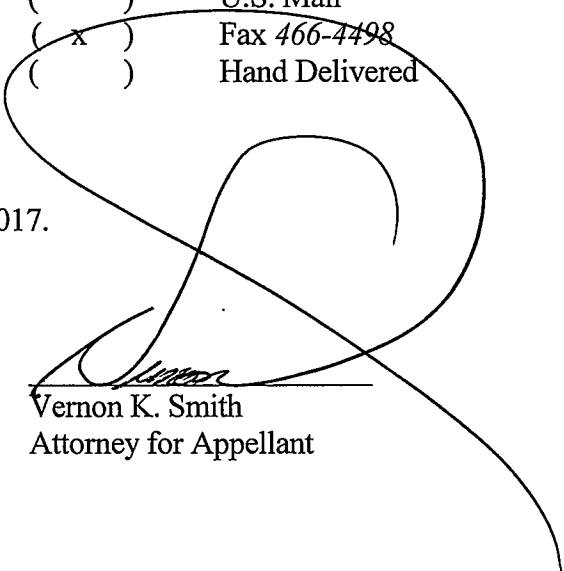
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 8th day of October, 2014, I caused a true and correct copy of the above and foregoing to be delivered to the following persons at the following addresses as follows:

Clerk of the Court	()	U.S. Mail
Fourth Judicial District	()	Fax 287-6919
Ada County	(x)	Hand Delivered
200 West Front Street		
Boise, Idaho 83702		

Richard B. Eismann	()	U.S. Mail
Eismann Law Offices	(x)	Fax 466-4498
3016 Caldwell Blvd.	()	Hand Delivered
Nampa, Idaho 83651		

Dated this 14th day of November, 2017.



Vernon K. Smith
Attorney for Appellant

CERTIFICATE OF MAILING

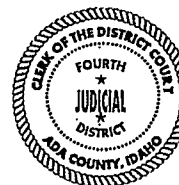
I hereby certify that on this 4th day of October 2017, I mailed (served) a true and correct copy of the within instrument to:

VERNON K. SMITH
LAW OFFICE OF VERNON K. SMITH, LLC
1900 W. MAIN STREET
BOISE, ID 83702
VIA EMAIL: vls59@live.com

RICHARD B. EISMANN
RYAN MARTINAT
EISMANN LAW OFFICES
3016 CALDWELL BLVD.
NAMPA, ID 83651-6416
VIA EMAIL: rbe@eismannlaw.com
ryan@eismannlaw.com

CHRISTOPHER D. RICH
Clerk of the District Court
Signed: 10/4/2017 02:28 PM

By: K. Peters
Deputy Court Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

VICTORIA H. SMITH, by and through her
attorney in fact, Vernon K. Smith, by and
through his Durable and Irrevocable Power
of Attorney,

Plaintiff-Appellant,

vs.

TREASURE VALLEY SEED
COMPANY, LLC, and Don Tolmie in his
individual capacity, and as an owner,
representative and authorized agent of
Treasure Valley Seed Co., LLC,

Defendants-Respondents.

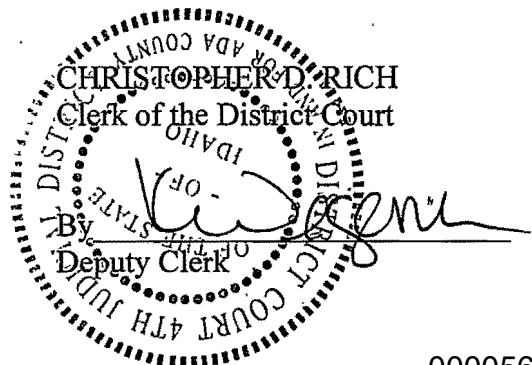
Supreme Court Case No. 45543

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of
the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the
course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 10th day of January, 2018.



CERTIFICATE OF EXHIBITS

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

VICTORIA H. SMITH, by and through her
attorney in fact, Vernon K. Smith, by and
through his Durable and Irrevocable Power
of Attorney,

Plaintiff-Appellant,

vs.

TREASURE VALLEY SEED
COMPANY, LLC, and Don Tolmie in his
individual capacity, and as an owner,
representative and authorized agent of
Treasure Valley Seed Co., LLC,

Defendants-Respondents.

Supreme Court Case No. 45543

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

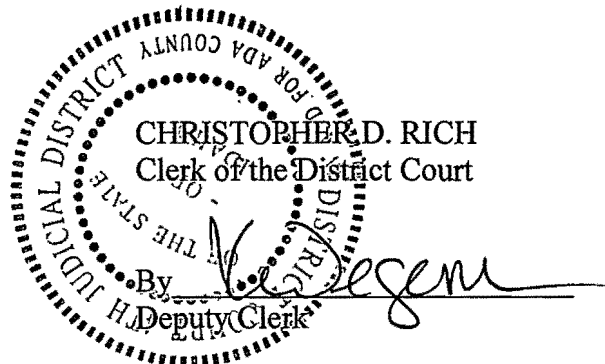
CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

VERNON K. SMITH
ATTORNEY FOR APPELLANT
BOISE, IDAHO

RICHARD B. EISMANN
ATTORNEY FOR RESPONDENT
NAMPA, IDAHO

Date of Service: JAN 10 2018



CERTIFICATE OF SERVICE

000057

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

VICTORIA H. SMITH, by and through her
attorney in fact, Vernon K. Smith, by and
through his Durable and Irrevocable Power
of Attorney,

Supreme Court Case No. 45543

CERTIFICATE TO RECORD

Plaintiff-Appellant,

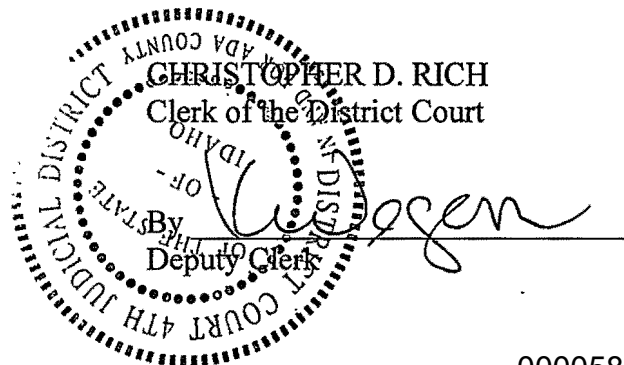
vs.

TREASURE VALLEY SEED
COMPANY, LLC, and Don Tolmie in his
individual capacity, and as an owner,
representative and authorized agent of
Treasure Valley Seed Co., LLC,

Defendants-Respondents.

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 15th day of November, 2017.



CERTIFICATE TO RECORD

000058