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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

VERONIKA O. PAPIN,

Petitioner/Appellee,

vs.

JERRY A. PAPIN,

Respondent/Appellant.

Supreme Court Docket NO. 45277

Bonneville County No. CV-14-4449

RESPONDENT/APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR BONNEVILLE COUNTY

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District Judge, presiding

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<u>ARGUMENT</u>

The primary reasons for this appeal are to set aside the lower courts' erroneous division of property and debt and to gain the proper determination of the separate property nature of Jerry's investment management business and home. In this case, the lower courts simply disregarded the facts and law supporting Jerry's claims to his life's work leading up to his twelve-year marriage to Veronika. Jerry is not seeking to take from Veronika her fair share of a substantial community property estate. However, all of Jerry's accomplishments did not occur during the marriage. A significant amount of Jerry's assets was accumulated as separate property prior to their marriage. Veronika should not be entitled to one-half of everything (including those separate property assets) plus spousal maintenance, plus attorney fees, and so on. It is a stunningly biased decision that should be overturned.

I. <u>Veronika's claims are largely unsupported and without cites to the record.</u>

Throughout her response brief, Veronika makes a wide variety of conclusory and unsubstantiated claims. The law requires more than conclusory statements from which the trial court's resolution of disputed issues and legal reasoning can be inferred. *See*, *Jasso v. Camas County*, 151 Idaho 790, 795-96, 264 P.3d 897, 902-03 (2011). It is not the role of the reviewing court to scour the record to come up with proper substantial and competent evidence and to provide sound legal theories to support the trial court's decision. *Id.* In this case, the lower courts also engaged in similar behavior and often did not cite to the evidence or legal reasoning to support their conclusions.

II. <u>The lower courts erred by failing to give effect to the *Covenant* and granting summary judgment.</u>

A central issue to the entire appeal is the validity of the *Covenant*. R. Vol. I, pp. 275-80.

The *Covenant* bears upon the tracing issues and the separate property issues alike. It must be given legal effect. I.C. § 32-916. The District Court acknowledged, "The intent of the Covenant was to avoid any determination, under I.C. § 32-906, that any portion of Straight Line or its income and profits were community property." R., Vol. I, p. 977. As set forth in the initial brief from Jerry, the lower courts clearly erred on this issue by granting summary judgment and disregarding the parties' clear intent set forth by the Covenant. Additionally, the lengths to which the Magistrate went to defend Veronika's position were alarming and are a significant demonstration of the bias she showed against Jerry from the beginning of the case. The District Court acknowledged some of those legal errors but nevertheless affirmed the Magistrate on some issues and ruled the Covenant invalid on separate grounds.

A. <u>The fact that Jerry also moved for summary judgment does not change the legal standard applicable to those proceedings</u>.

This Court has repeatedly recognized that "the mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact" nor does it "change the applicable standard of review ...." *Intermountain Forest Mgmt., Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). The courts must evaluate each party's motion on its own merit. *Id*. As the trier of fact, the Magistrate was entitled to arrive at the most probable inferences if those inferences were based on <u>undisputed</u> evidence properly before it. *Id*. Veronika's argument that Jerry was at risk of having summary judgment entered against him under *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001), is misplaced. In *Harwood*, this Court affirmed that the record is to liberally construed "in favor of the party against whom summary judgment is entered." *Id*. In any event, both parties moved for summary judgment. The legal standard does not change just because one party moved or even on cross

motions for summary judgment. In this case, each of the lower courts misapplied the legal standards applicable to summary judgment.

B. The District Court erred by granting summary judgment on a new basis.

Jerry acknowledges that the District Court sitting on intermediate appeal had the authority to exercise free review over questions of law. *Melaleuca, Inc. v. Foeller*, 155 Idaho 920, 923-24, 318 P.3d 910, 913-14 (2013). The interpretation and the legal effect of an unambiguous contract are questions of law over which the appellate courts exercise free review. *Id.* The interpretation of a statute and its application to the facts are similarly questions of law subject to free review on appeal. *State v. Doe*, 156 Idaho 243, 245, 322 P.3d 976, 978 (2013).

As set forth in his initial briefing, Jerry maintains that the District Court erred in interpreting the provisions of I.C. § 32-917. The passage in the *Chavez* case cited by the District Court, and now Veronika in support of her defense of this appeal, was dictum. *Chavez v. Barrus*, 146 Idaho 212, 219-20, 192 P.3d 1036, 1043-44 (2008). While it is an accurate recitation of I.C. § 55-601, the operative phrase in the statue applicable here is that such an agreement must be ". . . in writing, and executed and acknowledged or proved in like manner as conveyances of land are required by be executed and acknowledged or proved." *Id.*; I.C. § 32-917 (emphasis added). The clear language of the parenthetical phrase within the statute is focused on the manner of execution and acknowledgment, i.e., signed before a notary public. *See*, *Ada Cnty Prosecuting Attorney v. 2007 Legendary Motorcycle*, 154 Idaho 351, 354, 298 P. 3d 245, 248 (2013) (holding the courts should give weight to the legislative intent evidenced by the choice of grammar). By the placement of the comma itself, the legislature did not intend that the entire marriage settlement agreement had to be in the "exact manner" or even "same manner" or any other phrase evidencing the hyper technical exactitude for compliance with I.C. § 55-601 applied by the District Court and now urged

by Veronika. The address requirement is simply inapplicable here.

Even if the legislature intended that phrase to apply to marriage settlements, the District Court never acknowledged or cited to the line of cases announced by this Court regarding completeness of a mailing address cited in Jerry's initial briefing. Thus, it seems self-evident that the District Court did not perform a thorough analysis of the applicable law. As the trier of fact, no facts or reasonable inferences were found by the Magistrate regarding the address because the issue was never raised below. To the extent there was or is any factual ambiguity about the completeness of the address, those determination should have been resolved in favor of Jerry at the summary judgment stage. *Intermountain Forest Mgmt., Inc.*, 136 Idaho at 235, 31 P.3d at 923.

C. The District Court erred by permitting the Magistrate's *sua sponte* issues to stand.

The District Court also erred by finding no error by the Magistrate in raising new issues on summary judgment. R., Vol. I., pp. 976-77; *Thomson v. Idaho Ins. Agency, Inc.,* 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994); *Sales v. Peabody*, 157 Idaho 195, 335 P.3d 40 (2014). In *Sales*, this Court again noted:

> It is not clear how the intervening, superseding cause theory made its way into the proceedings on Peabody's second motion for summary judgment. The theory does not appear in Peabody's memorandum supporting her motion for summary judgment on the negligence issue. The district court appears to have raised the issue *sua sponte* during the argument on the second summary judgment motion. The district court may not grant summary judgment on a ground raised *sua sponte.*

Id., 157 Idaho at 201, 335 P.3d at 46.

It is simply undisputed that at the hearing on March 13, 2015, the Magistrate raised new and different arguments than those advanced by Veronika. The Magistrate specifically acknowledged it by saying:

> *One of the interesting and probably odd things about motions for summary judgment is that counsel who are fighting in the trenches and looking at all of these*

things present their –their best facts and argument to the judge, who doesn't have an axe to grind in it and is not dealing with this case on a daily basis. And things that occur to the judge as being issues sometimes never appear to counsel. And as I read through – in preparation for today, I read through a great deal of the information with regards to the summary judgment motion. ***And I had some screaming issues that neither of you have addressed***.

. . .

Tr. Vol. I., p. 238, Ll. 6-18. (emphasis added). The Magistrate went on to spell out various "concerns" about the *Covenant*. Tr. V. I., p. 238, l. 18-p. 243, l. 23. Essentially, —regrettably again demonstrating the considerable bias against Jerry that was pervasive throughout the case, the Magistrate was providing a road map of additional arguments for Veronika to bolster her claims and then gave her additional time to brief those suggestions. The Magistrate even dropped hints as to the other jurisdictions she had independently researched to find helpful cases. *Id.* The District Court acknowledged the Magistrate's conduct but found no error. R. Vol. I, pp. 974-77.

Jerry accepts the District Court's contention that the harm of raising new issues could have potentially been cured by advance notice as set forth in *Mason v. Tucker & Assocs.*, 125 Idaho 429, 431-32, 871 P.2d 846, 848-49 (Ct.App.1994). The Magistrate's rolling dialogue was hardly a concise statement of additional legal issues cured by a specific request for briefing on a distinct issue. *Id*. Even if raising the issues and the resulting continuance of the summary judgment hearing were ostensibly born out of fairness –the Magistrate again went beyond the arguments raised by it or by Veronika even in the supplemental briefing, which was essentially ignored by the District Court. R. Vol. I, pp. 512-16, 980. The additional issues included whether there was a specific statement about assignment of rents and profits and whether the Covenant was entered into in contemplation of divorce (which was never even raised by Veronika nor the Magistrate on March 13, 2015). The District Court erred by permitting those evolving arguments to stand. R. Vol. I,

pp. 974-77.

On the consideration issue, Jerry had some notice that the argument was floating out there for the Magistrate and he provided some briefing on the issue in his *Supplemental Reply Brief* dated April 17, 2015 (again, Veronika never raised that issue). Tr. Vol. I, p. 239, Ll. 17-22; R. Vol. I, pp. 542-543. However, the Magistrate erred by ignoring the applicable law. The District Court went on to uphold the Magistrate's determination of the consideration issue and also ignored the applicable law in doing so. R. Vol. I, p. 981. Where an agreement is expressed in writing, "a presumption arises that it is supported by consideration." I.C. § 29-103; *Weisel v. Beaver Springs Owners Ass'n*, 152 Idaho 519, 526, 272 P.3d 491, 498 (2012). The party that asserts consideration is lacking bears the burden of proving that proposition by a preponderance of the evidence. *Id.*; I.C. § 29-104. Here, the District Court ignored that legal presumption and shifted the burden to Jerry to prove consideration just as the Magistrate did. R. Vol. I, pp. 980-81. Again, Veronika did not even make that argument let alone carry the burden of proof (or even provide a single fact to raise the issue). R. Vol. I, pp. 512-16.

Even if consideration is deemed to be required, consideration was given. The Covenant itself recognizes the need for the memorialization to continue and expand the business. R. Vol. I, pp. 275-80. Jerry and Melissa both testified in their respective affidavits that they would not have continued their business together but for the *Covenant*. R. Vol. I, pp. 467-69, 489-90. Likewise, they both testified that they were able to increase their wages, which is a direct benefit to the respective communities. *Id*. Although not raised by the lower courts, it was proper to consider the evidence submitted by Jerry regarding that intent in addition to the Covenant. *See*, *Barrett v. Barrett*, 149 Idaho 21, 24, 232 P.3d 799, 802 (2010) (recognizing courts could consider evidence of intent in certain contexts). The written agreement itself evidenced consideration to both Partners

and their respective spouses implicitly in its numerous recitals about the need to memorialize the agreements in order to continue to operate the business. Both lower courts failed to construe the evidentiary record in the light most favorable to Jerry when evaluating the summary judgment motions. *Intermountain Forest Mgmt., Inc.*, 136 Idaho at 235, 31 P.3d at 923. Because of the applicable presumption, the cases that have dealt with post-marital conveyances have not required evidence of consideration. *See, Barrett*, *supra*; *Suchan v. Suchan*, 106 Idaho 654, 682 P.2d 607 (1984) (1984); *Bliss v. Bliss*, 127 Idaho 170, 898 P.2d 1081 (1995); *Hall v. Hall*, 116 Idaho 483, 484, 777 P.2d 255, 256 (1989); *Reed v. Reed*, 137 Idaho 53, 44 P.3d 1108 (2002); *Wolford v. Wolford*, 117 Idaho 61, 785 P.2d 208 (Ct.App. 1990).

In the context of prenuptial agreements, Idaho law expressly does not require consideration. I.C. § 32-922. It seems more logical that the Magistrate would have followed the intent of the UPAA regarding prenuptial agreements where such agreements are "enforceable without consideration." I.C. § 32-922. The Magistrate in fact relied heavily on the UPAA in bolstering her unconscionability arguments but simply ignored it when it came to the consideration issue. R. Vol. I, pp. 563-65. This was a clear abuse of discretion by the Magistrate that was upheld by the District Court. The UPAA arguably does not apply at all in this case, but if it does, it should apply fairly to each party.

D. <u>The District Court erred by not ruling on the other summary judgment issues raised on intermediate appeal.</u>

The District Court erred failing to consider Jerry's other issues on intermediate appeal. R. Vol. I, p. 980. The District Court said it need not decide those issues based on its finding of the lack of a complete mailing address. *Id*. Cognizant of the fact that those arguments are key to this Court's consideration of the Covenant, Jerry maintains those arguments and respectfully submits

this Court should review the Magistrate's handling of the summary judgment motions.

The District Court made an unequivocal finding that if the Covenant was an instrument of conveyance, only one signature was required. R. Vol. I, p. 979. The Covenant is an instrument of conveyance. I.C. § 32-906(2); R. Vol. I, pp. 275-80. The Magistrate's determination that the *Covenant* was not a conveyance is belied by the document itself, which provides specific passages stating that Veronika and Adam agree to disclaim and waive all right title and interest to the Enterprise including "all revenues, proceeds, property, assets and other things of value." R. Vol. I, p. 562, ¶ 26; R. Vol. I, p. 278; *See*, I.C. § 6-402 (disclaimer effective to bar recovery of costs in quiet title action); *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 719, 330 P.3d 1067, 1077 (2014) (holding a waiver is a voluntary, intentional relinquishment of a known right or advantage).

The Magistrate also erred in determining that the Covenant did not specifically state an intent to waive future income. I.C. § 32-906(2); R. Vol. I, p. 562, ¶ 26. The Covenant specifically provides, in one of the pertinent parts:

> Notwithstanding any of the previous acknowledgements we individually and collectively agree to forever disclaim and waive all rights, title, and interest which may be vested in either or both of us by virtue of our respective marriages to the Partners in and to all revenues, proceeds, property, assets and other things of value of the Enterprise, or of the Partners individually and collectively, which is now owned by them or of which they shall become possessed. This disclaimer and waiver specifically includes any subsequent finding by a jurisdictional authority of any community property or joint interest. Such interest is herewith expressly and forever disclaimed and waived.

R. Vol. I, p. 278. Revenue is synonymous with income. The disclaimer and waiver are a relinquishment of "all rights, title and interest which may be vested in either or both of us by virtue of our respective marriages to the partners" and, thus, are a conveyance. *Id*.

The Magistrate also erred in determining that the *Covenant* was not in contemplation of divorce. R. Vol. I, pp. 556-57, ¶ 9. The document provides "[Adam and Veronika] collectively recognize the Partners must be free to operate the Enterprise without fear or risk that their respective marriages to each of us . . .." R. Vol. I, p. 277. The recitals on the first page also reference the fact that the *Covenant* is done to deal with the parties' respective marriages (and implicitly their potential divorces). R. Vol. I., p. 275. Again, at a minimum, this is a factual issue that should have been construed in Jerry's favor on summary judgment but was not. *Intermountain Forest Mgmt., Inc.*, 136 Idaho at 235, 31 P.3d at 923.

With regard to the unconscionability argument, the Magistrate also contrived facts to support her decision even though those arguments were not made by Veronika. R. Vol. I, pp. 563-64. Veronika did at least raise the issue of unconscionability in her initial summary judgment filing. R. Vol. I, p. 288. However, the sum and substance of Veronika's argument was that she had never seen the *Covenant*, did not believe she signed the *Covenant* and it was "one-sided." R. Vol. I, pp. 284-89. However, having painted herself into the corner of feigned ignorance, Veronika was without standing to argue any facts supporting her claimed unconscionability. R. Vol. I, p. 271, ¶ 12; *Lovey v. Regence Blue Shield of Idaho*, 139 Idaho 37, 42, 72 P.3d 877, 882 (2003); *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 273, 833 P.2d 128, 131 (Ct. App. 1992); *Liebelt v. Liebelt,* 118 Idaho 845, 801 P.2d 52 (Ct.App.1990).

Veronika couldn't claim that she didn't understand it, that she had no chance to talk with an attorney, or that it was vague and/or confusing. She instead said she simply had no knowledge of it. R. Vol. I, pp. 321-23 (specifically the deposition passages at p. 107, Ll. 2-4; p. 109, Ll. 11-14). Veronika argues in her briefing before the Court that, "Melissa handed [her] the Coveant together with other business documents with no explanation of what it was or the provisions it

contained." *Respondent's Brief*, p. 10. However, Veronika never once made that claim and it does not appear in the factual record on summary judgment. R. Vol. I, pp. 269-72. The actual factual record was that Veronika received the *Covenant* (without any other documents) a week before she signed it. R. Vol. I, p. 333. Veronika had ample time to read the six-page document. Because of her feigned ignorance, Veronika could not produce any evidence about any impropriety on Jerry's behalf. The Magistrate went on to construct arguments that she did not receive any disclosure, was not on an equal footing, did not voluntarily waive her rights, etc. R. Vol. I, pp. 563-64. The *Covenant* specifically states otherwise. The Magistrate even relied upon an alleged statement from one of the attorneys regarding the business value –which is clearly not evidence at all. R. Vol. I, p. 555. Veronika did not offer substantive testimony on any of those issues to support the Magistrate's findings. R. Vol. I, pp. 355-56. Even if she had, those conflicting inferences should have been construed in Jerry's favor at the summary judgment stage. *Intermountain Forest Mgmt., Inc.,* 136 Idaho at 235, 31 P.3d at 923. Accordingly, the Magistrate's findings were contrary to Idaho law.

Before the lower courts, Veronika relied heavily upon *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980). R. Vol. I, pp. 350, 918. *Compton* discusses the fiduciary nature of the relationship between spouses and the duty to disclose. *Id*. 101 Idaho at 335-36, 612 P.2d at 1182-83. *Compton* is just like this case in that, "No such overreaching has been proven or even alleged . . .." *Id.* The *Covenant* itself specifically refers to the business going back to 1991, Straight Line Investment Group, LLC, all property, assets, etc. R. Vol. I, pp. 275-80. Again, Veronika does not claim she was denied information, was provided false information, that Jerry told her lies, etc. She simply claims she does not recall executing the document that she clearly did. The *Compton* decision actually upholds a property settlement agreement by denying an independent action to set

it aside. *Id.* 101 Idaho at 337, 612 P.2d at 1184. The Court found that the husband discharged his obligation by disclosing the assets and thus putting wife on notice to inquire about the value of the assets. The Court stated, "Her inadvertence or misjudgment in failing to do so when the opportunity was ripe is an excellent example of the type of conduct which the independent action to relieve a party from judgement will not lie to correct." *Id.* The *Covenant* itself identifies the assets and businesses comprising the Enterprise. The failure to disclose argument cannot be sustained.

As to the claim that Veronika was not represented by counsel or was coerced as set forth in *Golder v. Golder*, 110 Idaho 57, 714 P.2d 26 (1986) or *Sande v. Sande*, 83 Idaho 233, 360 P.2d 998 (1961), the evidence is again to the contrary. R. Vol. I, p. 919. The *Covenant* on its face indicates that Veronika was notified of the opportunity to seek counsel – not once, but twice. R. Vol. I, pp. 278, 280. Jerry further testified he spoke with her about it in his affidavit and that she specifically inquired about talking to an attorney about it. R. Vol. I, pp. 306-09. Veronika denies this –but again, if that is a factual dispute, it should have been resolved by the Magistrate in Jerry's favor on summary judgment. Jerry was on the other side of the world on active duty at the time and not capable of coercing Veronika. R. Vol. I, pp. 307-08. There is no factual basis to assert that Veronika's signature was coerced or obtained under duress. *Liebelt*, 118 Idaho 848, 801 P.2d 55.

E. The Magistrate went beyond the "four corners" and erred by only considering and interpreting evidence favorable to Veronika.

Veronika argues that it was Jerry that put the validity of the Covenant at issue and the Magistrate only looked at the four corners of the document in rendering its decision on summary judgment. *Respondent's Brief*, p. 20. The record clearly indicates to the contrary. This consistent disregard for facts clearly in evidence exists throughout the Magistrate's findings and rulings. It

was obvious at the time, and seems more so now upon review, that the Magistrate harbored a deeply felt bias against Jerry. The lower courts erred not only for the reasons set forth above but the Magistrate also considered a wide variety of "evidence" –some of which appears in the record and some that does not. R. Vol. I, pp. 553-65. Again, disputed facts and inferences should have been resolved in favor of Jerry on summary judgment. *Intermountain Forest Mgmt., Inc.*, 136 Idaho at 235, 31 P.3d at 923. The District Court acknowledged that legal tenet but then failed to apply it.

Among the unsupported or erroneous findings the Magistrate claims supports its decision are the following:

1) "There is no evidence showing Veronika can read or write English, or that she would have any means to understand A Covenant." R. Vol. I, pp. 554-55, ¶ 3, p. 564, ¶ 34. It is true that Veronika said she speaks English as a "second language." R. Vol. I, p. 269. However, nowhere in her Affidavits did she state she could <u>not</u> read, write and understand English. Veronika never requested an interpreter before, during or after trial. There is no evidence to support the Magistrate's finding. In fact, Veronika specifically admitted that her position was not that she couldn't understand the Covenant but that she had never seen it. R. Vol. I, pp. 321-23 (specifically the deposition passages at p. 107, Ll. 2-4; p. 109, Ll. 11-14). Any inference in that regard should have been in Jerry's favor at summary judgment.
2) "[Straight Line] may be worth $600,000.00." R. Vol. I, p. 555, ¶ 6. There was no evidence submitted at all – by either party- at the summary judgment stage as to the value of the business. Yet, the Magistrate said that was an undisputed fact. Her perception of the value of the business clearly played a part in her ruling on

unconscionability. R. Vol. I, p. 564. At the subsequent trial, the Magistrate determined a significantly lower —over 80% lower, business value.

3) "Jerry said that when he returned to Idaho he believes he discussed A Covenant with Veronika, though she denies this." R. Vol. I, p. 556, ¶ 8. Jerry testified in his deposition –an excerpt of which was provided to the Magistrate by opposing counsel during summary judgment, that he discussed it with Veronika many times. R. Vol. I, p. 527, (Depo. p. 97, l. 6 – p. 98, l. 15). Jerry further testified he spoke with her about it several times in 2013. R. Vol. I, pp. 307-09. Veronika implicitly acknowledged she must have talked to Jerry about it because she testified in her deposition that she would not sign anything like the *Covenant* without Jerry ". . . talking to me about it." R. Vol. I, p. 322. She further testified that she had been given other business documents to sign during the marriage. *Id.* On summary judgment, the disputed facts surrounding this should have been resolved in Jerry's favor –but clearly were not. R. Vol. I, pp. 556-57, 563-64.

4) "There is no allegation made by Jerry of any prenuptial agreement or marriage settlement agreement related to the business sold in 2011, 15% of which was used to begin Straight Line." R. Vol. I, p. 555. It should be noted that the Magistrate's assertions that a total business was sold in 2011 and 15% of that business was used to start Straight Line is both erroneous and contradictory. If the whole thing was sold, then a piece of it would not have been available to start a new business. In the alternative (and what actually occurred), if in fact a piece of the book of business was retained then this is self-evident proof that Jerry's vigorous and unrelenting testimony is true that he only sold part of the separate property business and retained the rest. In

the first place, Jerry testified that his client relationships and "book of business" was acquired pre-marriage beginning in 1991. R. Vol. I, pp. 523-25 (Depo. p. 80, Ll. 8-17, p. 82, Ll. 15-21, p. 88, Ll. 12-17, p. 93, Ll. 5-16, p. 94, Ll. 1-10). Secondly, the intent of the Covenant was to affirm the separate property nature of the client relationships and the pre-existing business (and any subsequent companies created with Enterprise assets) that serviced Jerry's clients remain his separate property, which it does. R. Vol. I, pp 275-80. Again, any factual discrepancy about when the clients were acquired should have been resolved in Jerry's favor at the summary judgment stage.

5) "The prospect of termination to the Papin's [sic] marriage or the Davis' marriage is not discussed in the body of A Covenant . . .." R. Vol. I, p. 556, ¶ 9. The *Covenant* itself clearly states in the body that, *inter alia,* ". . . the Partners must be free to operate the Enterprise without fear or risk that their respective marriages . . .." R. Vol. I, p. 277. Page 4 of the *Covenant* goes on to ". . . disclaim and waive all rights, title, and interest . . ." to include ". . . any subsequent finding by a jurisdictional authority of community property or joint interest . . .." R. Vol. I, p. 278; *Stevens v. Stephens*, 135 Idaho 224, 228, 16 P.3d 900, 904 (2000) (noting marital settlement agreements "refer not only to prenuptial agreements, but also to agreements made with an eye towards separation and/or divorce"). The Magistrate's findings on these issues are thus clearly erroneous.

6) "Since both parties did not sign A Covenant, it is not a premarital or marriage settlement agreement." R. Vol. I, p. 563. The *Covenant* has never purported to be a "premarital" agreement although it does memorialize the premarital separate property nature of Jerry's investment management business. There is also no dispute that Jerry and Melissa were parties to the agreement. They are referenced in the very first line and

throughout the body of the agreement, and the document was undeniably prepared by Jerry. R. Vol. I, pp. 275-80. In point of fact, all parties did eventually sign a written manifestation to be bound by the agreement. Both Jerry and Melissa executed *An Acknowledgement of Covenant* dated February 17, 2015. R. Vol. I, p. 471. The fact that Jerry and Melissa assented to the *Covenant* was made clear not only be their signatures but also by their conduct and testimony. R. Vol. I, pp. 467-69, 488-90. Any factual inference in that regard should have been resolved in favor of Jerry at the summary judgment stage. As set forth more fully below, two signatures are not necessarily required under Idaho law or under "ordinary" rules of contract law.

F. <u>Two signatures are not required to have an enforceable agreement</u>.

In her *Supplemental Memorandum* following the Magistrate's suggestive comments, Veronika only raised two "new" issues – 1) Jerry and Melissa had not signed it; and 2) the *Covenant* was between the wrong parties which cited to I.C. § 32-909. R. Vol. I, pp. 512-14. As pointed out by Jerry, I.C. § 32-909 was deemed unconstitutional forty (40) years ago. *Suter v. Suter*, 97 Idaho 461, 467, 546 P.2d 1169, 1175 (1976) (holding I.C. § 32-909 was unconstitutional as it violated the equal protection clause of the 14th Amendment of the United States Constitution). Regarding the signature issue, Jerry and Melissa both signed a document affirming the *Covenant* on February 17, 2015 – prior to either Veronika or the Magistrate raising that issue. R. Vol. I, pp. 466-71, 488-90. The signatures were summarily cast aside by the Magistrate without any legal basis. R. Vol. I, p. 557, ¶ 11, p. 561, ¶ 25.

The District Court never ruled on these issues other than to affirm that if the Covenant was an instrument of conveyance, only one signature was required. R. Vol. I, p. 979. Neither Veronika nor the Magistrate cite to any legal authority stating that two signatures are required on a post

marital agreement or even under "ordinary contract principles." *See*, Respondent's Brief, p. 22; R. Vol. I, p. 563. Idaho Code § 32-906(1) does not expressly state that requirement.

In his initial briefing and at summary judgment, Jerry submitted a number of cases that are contrary to the Magistrate's holding. In fact, this Court noted (albeit in a UCC case regarding contract formation), "The mere fact that the customer's purchase order remained unsigned does not, however, absolutely preclude the formation of a binding agreement." *Smith v. Boise Kenworth Sales, Inc.*, 102 Idaho 63, 67, 625 P.2d 417, 421 (1981). Idaho's version of the Uniform Commercial Code requires that in order to form a contract there must be ". . . some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party *against whom enforcement is sought* . . .." I.C. § 28-2-201. (Emphasis added). Similarly, Idaho's Statute of Frauds renders an agreement for the sale of real property unenforceable unless there is a written agreement of memorandum signed by the party *against whom enforcement is sought*. *Bauchman-Kingston Partnership, LP v. Haroldsen*, 149 Idaho 87, 91, 233 P.3d 18, 22 (2008) (citing I.C. § 9-505) (Emphasis added). The key element under contract law is whether the party against whom enforcement is sought signed the agreement. In this case, there is simply no doubt that Veronika and the other business partner's spouse did just that.

Numerous other jurisdictions have held that two signatures are not required to form a contract. *See, e.g., Wright v. Hernandez*, 469 S.W.3d 744, 758 (Tex. App. 2015) (holding "failure to sign the agreement does not render the agreement unenforceable, as long as it appears that the parties otherwise gave their consent to the terms of the agreement."); *CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc.*, 201 So. 3d 85, 95-96 (Fla. Dist. Ct. App. 2015) (finding "a document executed by the party against whom the contract is sought to be enforced is presumptively valid even in the absence of the enforcing party's signature . . .."); *Wilson v.*

Willis, 416 S.C. 395, 411, 786 S.E.2d 571, 579 (Ct. App. 2016), reh'g denied (June 24, 2016) (upholding agreement to arbitrate even though only signed by one party).

This issue touches on the mutuality arguments raised by Veronika for the first time on this appeal. *See, Respondent's Brief,* pp. 23-25. Jerry has steadfastly maintained that the Covenant was a document that affirmed the separate property nature of his business that started in 1991 and further that if there were any community property interests in Straight Line Investments Group, LLC or any other "revenues, proceeds, property, assets . . .." that they were disclaimed and waived. R. Vol. I, p. 278. As set forth above, this was and is a valid conveyance under I.C. § 32-906(2). In the alternative, if the Covenant falls under I.C. § 32-906(1), Jerry is a party to that agreement as the Partners are referenced throughout the document. R. Vol. I, pp. 275-80. The consideration and mutuality of obligation is set forth therein. Both partners continued to operate the business enterprise and increased their incomes, as set forth above. Lastly, the partners did in fact sign an Acknowledgement prior to the signature issue being raised by Veronika. R. Vol. I, p. 471.

G. The Court should give effect to the *Covenant*.

The courts' role is to give effect to the intent of the parties. *Taylor v. Just*, 138 Idaho 137, 140, 59 P.3d 308, 311 (2002). The intent of the parties must be ascertained by the written agreement. *AED, Inc. v. KDC Investments, LLC*, 155 Idaho 159, 165, 307 P.3d 176, 182 (2013); *Bliss*, 127 Idaho at 174, 898 P.2d at 1085. In *Taylor*, this Court held:

> A contract must be construed to give effect to the intention of the parties. In order to ascertain that intent, the contract must be construed as a whole. If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law, and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words.

Taylor, 138 Idaho at 140, 59 P.3d at 311.

The terms of the *Covenant* are clear. The *Covenant* should be given effect as a valid instrument. Jerry started his business in 1991 and developed client relationships over twelve years prior to his marriage. R. Vol. I, p. 305, pp. 523-25 (Depo. p. 80, Ll. 8-17, p. 82, Ll. 15-21, p. 88, Ll. 12-17, p. 93, Ll. 5-16, p. 94, Ll. 1-10). *Inter alia*, the *Covenant* memorializes and confirms that separate property nature of the "Enterprise". R. Vol. I, pp. 275-80. Notwithstanding the summary judgment ruling on the Covenant, Jerry introduced it at trial to rebut the presumption In her own initial affidavits, Veronika repeatedly acknowledged the business was Jerry's. R. Vol. I, p. 43. As such, there is simply no dispute that the business was and is Jerry's sole and separate property. I.C. § 32-903. The *Covenant* evidences the intent of the parties to not only acknowledge that fact but to:

> . . .
> forever disclaim and waive all rights, title, and interest which may be vested in either or both of us by virtue of our respective marriages to the Partners in and to all revenues, proceeds, property, assets and other things of value of the Enterprise, or of the Partners individually and collectively,
> . . .
> This disclaimer and waiver specifically includes any subsequent finding by a jurisdictional authority of any community property or other joint interest. Such interest is herewith expressly forever disclaimed and waived.

R. Vol. I, p. 278. Thus, the Covenant effectively disclaims, waives and by implication conveys any community property interest in that business that may have existed back to the Partners. This Court should give legal effect to the parties' agreement as a matter of law. Not only should the lower courts' grant of summary judgment be reversed but this Court on appeal should rule as a matter of law that the *Covenant* is a valid instrument. If this Court were to do so, the remaining assignments of error would largely follow and the matter could be retried simply on remand.

Lastly, despite the summary judgment ruling, Jerry introduced the Covenant and the Acknowledgement at trial to rebut the presumption of community property set forth by Idaho Code § 32-906. *Reed*, 137 Idaho at 58, 44 P.3d at 1113; Exhibits G, SS; Tr. Vol. II, p. 1293, l. 17 – p. 1298, l. 22. The Magistrate simply ignored it in her ruling. R. Vol. I, p. 684. Jerry unsuccessfully raised it on intermediate appeal to the District Court but the argument again fell on deaf ears. R. Vol. I, pp. 874, 983-85. In its haste to affirm the Magistrate, the District Court never ruled on that issue either. At a minimum, the lower courts should have considered the Covenant as evidence proving with "reasonable certainty and particularity" that Jerry's business was his separate property. *Baruch v. Clark*, 154 Idaho 732, 737, 302 P.2d 357, 362 (2013). It was error for them not to do so.

III. <u>The lower courts erred in its analysis of Jerry's separate property business and tracing.</u>

As set forth in his initial briefing, the lower courts simply fail to acknowledge the facts surrounding Jerry's business and his clients. *Appellant's Brief*, pp. 21-30. Veronika continues to confound those issues while ignoring the evidence to the contrary in her response brief. Incredibly, despite the District Court holding it was error for the Magistrate to do so, Veronica again cites to Jerry's deposition testimony in her response brief. *Respondent's Brief*, p. 12. The District Court held, "No doubt exists that the business founded by Jerry in 1991 was separate property when the parties married in 2003." R. Vol. I, p. 984. Veronika did not appeal that finding. However, the District Court then goes down the incorrect path of analyzing the incorrect increase or decrease of the clients' AUM, which is not the property at issue in the divorce. R. Vol. I, 984-85. Veronika states in her briefing that this was "harmless error" but —to the contrary, it was actually the *foundation* of the lower courts' erroneous decisions. *Respondent's Brief*, p. 32. Those wrongful

determinations are not harmless at all.

Both lower courts and Veronika wrongfully contend that these assets were transferred into SLG, which quite simply never happened. *Id.*; R. Vol. I., pp. 981-82; Tr. Vol. I, p. 392, l. 21 – p. 395, l. 18; Tr. Vol. I, p. 406, l. 19- p. 407, l. 20. The clients transferred their assets to an alternate platform, so they could continue to receive Jerry's services. *Id.* As an example of one of her more dubious claims, Veronika argues that, "If Jerry were to leave Straight Line, the clients and their accounts could remain at Straight Line without interruption." *Respondent's Brief,* p. 31. No evidence exists in the record to support this contention. To the contrary, Jerry has changed names and business structures repeatedly and maintained his core group of clients. Tr. Vol. II, p. 1285, L. 18 – p. 1288, L. 15. Veronika herself acknowledged that Jerry was "a nationally recognized investment professional with 23 years of experience." R. Vol. I, p. 269.

B. Jerry properly identified the clients to the extent permitted by law.

Both the lower courts and Veronika rely heavily upon the fact that only redacted lists were provided by Jerry in evidence. Aug. pp. 27-29; *Respondent's Brief,* p. 11. However, Jerry testified that he could not legally disclose the un-redacted information. Tr. Vol. I, p. 370, Ll. 8-15; p. 371, Ll. 22-24; p. 409, Ll. 18-24. That is not a fabrication or a dodge. Such disclosures are prohibited by the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. 6801-6831. Specifically, Section 502 of the GLBA prohibits disclosure from any financial institution of any nonpublic personal information.

Subsequent to this federal law both the Securities Exchange Commission (SEC), in the form of "Regulation S-P", and the Federal Trade Commission (FTC), in the form of the "Safeguards Rule", adopted regulations further defining the restrictions on the financial services industry regarding client privacy. 17 CFR 248.1-248.30 and 16 CFR 314. The regulation set forth at17 CFR 248.3(a) makes the GLBA applicable to an investment adviser having a relationship

with a customer as set forth in 17 CFR 248.3(k)(2)(B). The "Personally identifiable financial information" prohibited from disclosure includes not only the account number but also any identifying information such as name, address, telephone number, etc. *See*, 12 CFR 332.3(o). The GLBA is the federal law that causes Americans to receive a multitude of Privacy Act Notices from our banks, financial advisors and lenders. It applies to Jerry and he cannot divulge the information in un-redacted form. Tr. Vol. I, p. 368, Ll. 9-24; p. 370, Ll. 8-15; p. 371, Ll. 22-24; p. 409, Ll. 18-24. The disclosures even in redacted form were only made after the Magistrate's erroneous ruling on the *Covenant*. Jerry was faced with the Hobson's choice of having to disclose something to verify when the clients were obtained or providing nothing at all. At no time did Jerry refuse to provide "reliable evidence" as argued by Veronika. *Respondent's Brief*, p. 31-32.

Mr. Smith also testified there was nothing improper about the redacted information and it happened routinely in other industries such as the medical field because of HIPAA. Tr. Vol. II., p. 1433, l. 1 – p. 1234, l. 8. Ms. Gazdik also testified about redaction being commonplace. Tr. Vol. I., p. 605, Ll. 11-25. It was essentially the same redacted client list that was used in the partial sale to Mr. Webb (which the Magistrate had no problem with using) but the Magistrate refused to accept its validity when it came to tracing the acquisition of clients. Again, this "cherry picking" of information and only accepting the information favorable to Veronika repeatedly evidences a clear abuse of discretion. The Magistrate's insistence that Jerry produce information that he is not legally authorized to produce should in and of itself be grounds for setting aside her decision as a matter of public policy. The District Court wrongfully affirmed this finding as set forth in Jerry's initial briefing. R. Vol. I, p. 984.

C. <u>The business was not sold and then re-solicited.</u>

"The determination of the parties' intent with respect to a contract provision 'is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.'" *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011) (quoting *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 167 P.3d 748, 750 (2006)); *see also*, *Taylor, supra*.

At all times, Jerry denied that he sold his entire business to Britton Webb because it never happened. Tr. Vol. I, p. 376, Ll. 4-6, p. 382, l. 22 – p. 383, l. 1; p. 384, Ll. 3-11. No other witnesses were called to refute his testimony. The circumstance regarding the partial sale to Mr. Webb was completely distinctive because the client assets were commonly held at Ameriprise, formerly American Express Financial Advisors, i.e., an institutional firm. Tr. Vol. II, p. 1278, Ll. 7-17. The core group that left with Jerry went with him because they wanted to stay with him individually. Tr. Vol. I., p. 407, Ll. 4-20. The common broker-dealer platform of Ameriprise made the client assets relatively simple to transfer. However, the "business" identified in the contracts was not so easily transferred. A review of the entire Agreement – including the simultaneously executed Amendment, clearly shows that the parties would use best efforts to effectuate a transfer of good will and relationships with the clients. Exhibit 1. No such language would be necessary if it were only a simple list of names that were sold.

To effect the transition, Ameriprise had a form document that it required to implement internal transfers on its systems. *See*, Exhibit 1. That form document did not accurately capture the nature of the Agreement between Jerry and Mr. Webb. Tr. Vol. I, p. 365, l. 23 – p. 429, l. 20. Therefore, they both agreed to simultaneously execute an Amendment to Ameriprise's form document that more accurately defined their transaction. *Id*. Clause 3 of the Amended Agreement

specifically contemplates that certain core clients will be remaining with Jerry and, as a result, the client assets will be leaving Ameriprise. *Id.;* Exhibit 1. The documents were simultaneously executed and dependent on each other. In that very limited context, the book of business was valued in assets under management ("AUM") because Ameriprise, internally, uses that terminology what is moving around on its systems. *Id*. Additionally, the Amendment contemplated that –despite those best efforts, some additional clients might choose to stay with Jerry and ultimately the parties agreed upon a discount if that happened. In fact, that did happen, which further illustrates the point that the client relationships and the client's independent judgment are genuine. As set forth at length in Jerry' initial briefing, clients can't be sold if they don't want to be. *Appellant's Brief*, pp. 22-27. A simple list has no value.

In her briefing, Veronika sets forth a partial and self-serving timeline. *Respondent's Brief*, pp. 28-29. However, the timeline belies the factual record in several key areas. First, even though acknowledged in the paragraph preceding the timeline, Veronika continues to refute that Jerry's business predated the marriage by twelve years. She essentially maintains that Jerry's success as an investment manager happened only during the marriage. Second, Veronika contends that Jerry's whole business was sold to Britton Webb in 2011 and identifies that JPSS was started after the marriage. However, Veronika ignores the fact that despites JPSS being in existence at the time of Webb sale, it is not mentioned anywhere in Exhibit 1. Third, Veronika (as do the lower courts) continues to maintain that the client assets were actually transferred to JPSS and subsequently SLG, which did not and could not have ever happened. Neither JPSS nor SLG are custodian platforms. They are simply administrative and tax constructs for Jerry's use. They are legally incapable of holding client funds. Finally, those client assets become the bedrock for the analysis provided by the Magistrate and, in turn, the District Court. Each of these incongruent arguments

directly show that the transaction found by the Magistrate and upheld by the District Court is not supported by substantial and competent evidence. Accordingly, those findings are "clear error" and must be set aside. *Barton v. Barton*, 132 Idaho 394, 396, 973 P.2d 746, 748 (1999).

A more complete and factually supported timeline is as follows:

1991 Jerry establishes an independent financial advisory practice as a sole-proprietorship. Affiliates, as an independent contractor, with IDS to provide custodianship of client funds and arms-length account and tax reporting. (IDS is a corporately owned subsidiary of American Express.) Tr. Vol. II, p. 1279, l. 4 – p. 1280, l. 9; p. 1276, l. 19 – p. 1278, l. 5; Exhibit FF.

1995 IDS changed its name to American Express Financial Advisors ("AEFA"). Tr. Vol. II, p. 1278, Ll. 6-9.

1999 AEFA changes its affiliation policy (effective March 2000). An affiliate either has to be an employee or a franchisee. Tr. Vol. II, p. 1280, l. 20 – p. 1284, l. 23; p. 1278, Ll. 10-13; Exhibit EE (Exhibits, p. 624) Jerry choices franchisee to maintain his business's independent nature. Jerry continues to use AEFA as custodian of his clients' funds. Tr. Vol. II, p. 1281, Ll. 1-6.

2003 Jerry and Veronika marry. R. Vol. I, p. 28. Most of clients have by then been acquired prior to marriage. Tr. Vol. II, p. 1291, Ll. 7-23; Exhibits 3, 4, 11.

2005 AEFA changes its name to Ameriprise. Tr. Vol. II, p. 1283. Ll. 1-24; Exhibit DD. Jerry continues to use Ameriprise as custodian of his clients' funds. Tr. Vol. II, p. 1284, Ll. 2-9. Jerry creates 'Jerry Papin Support Services, LLC' ("JPSS") for tax and administrative purposes. Tr. Vol. II, p. 1284, Ll. 17-22 Tr. Vol. II, p 1285, l. 16 – p. 1286, l. 25; p. 1287, Ll. 7-19.

2010 Jerry returns from a one-year deployment to Afghanistan. Tr. Vol. II, p. 1121, Ll. 6-7. His daughter is born. Tr. Vol. II, p. 1121, Ll. 5-7; p. 1288, L. 3. He determines that he would like to downsize to spend more time with his family. Tr. Vol. II, p. 1184, l. 14 – p. 1187, l. 11; p. 1286, Ll. 8-10; p. 1288, Ll. 3-6.

2011 Jerry decides to sell the majority of his client base to a fellow Ameriprise affiliate but keep his core clients (approximately 15% of the total client list). Tr. Vol. I. p. 365, l. 21 – p. 409, l. 25; Tr. Vol. II, p. 1287, l. 24 – p. 1288, l. 2. Exhibits 1, 2, 3, 4, 11. He decides to make Melissa Davis his partner in return for her running the day-to-day operation so that he can semi-retire. Tr. Vol. I, p. 416, Ll. 1-14; Tr. Vol. II, p. 1288, Ll. 5-18. He changes the name of his LLC to 'Straight Line Investment Group' ("SLG"). Tr. Vol. I, p. 425, Ll. 3-5; p. 1290, Ll. 4-13; Exhibit 7. As it turns out, more clients ended up staying with Jerry than either he or Mr. Webb had intended. As a result, Jerry ended up keeping approximately 38% of the total client list. Tr. Vol. I, p. 406, Ll. 3-10; Exhibit 4. Mr.

Webb begins making a series of payments to Jerry that are subsequently fully traced at trial by Jerry's expert, David Smith. Tr. Vol. II, p. 1292, l. 10 – p. 1293, l. 6; p. 1367, l. 10 – p. 1407, l. 8. The clients that remained with Jerry transferred their investments to TD Ameritrade. Tr. Vol. I, p. 408, l. 1 – p. 409, l. 2.

2013 Before going into combat again, Jerry and Melissa agree to attend to some business loose ends. They amended the SLG Operating Agreement to reflect that each partner's business interest was worth $105,413.34 only in the event of "death, catastrophic disability or adjudicated incompetence of any member", which the Magistrate ultimately concluded was the business value based on unfounded expert testimony. Exhibit 10; Tr. Vol. I, p. 422, l. 5 – p. 424, l. 23; Tr. Vol. I, p. 581, l. 2 – p. 587, l.2; Tr. Vol. II, p. 1379, l. 12 – p. 1381, l. 19. They also prepare and circulate the Covenant. Exhibit G; R. Vol. I, pp. 306-08, 332-33, 467-68, 489.

2014 In January Jerry returns from his last military deployment. Tr. Vol. II, p. 1124, Ll. 17-18, p. 1252, Ll. 13-14. He is eager to spend more time with his wife and their four-year-old daughter. Tr. Vol. II, p. 1255, l. 20 – p. 1256, l. 10; Exhibits 76, KKK.

In March, SLG is dissolved as an Idaho company because it is redundant with SLG also being a Nevada company. Exhibit 6; Tr. Vol. II, p. 1290, Ll. 14-18.

Jerry notices that Veronika has become very distant and secretive. Tr. Vol. II, p. 1256, l. 11 – p. 1257, l. 16; p. 1260, l. 11 – p. 22; p. 1262, l. 9 – p. 1265, l. 22; p. 1267, l. 13 – p. 1273, l. 24. After observing a number of changes over the following months he becomes suspicious of an affair. Tr. Vol. II, p. 1273, Ll. 3-10. They agree to divorce on or about July 28, 2014. Tr. Vol. II, p. 964, Ll. 11-13; p. 1235, Ll. 20-22.

Not only is the timeline depicted above supported by the evidence, it is supported by evidence that is uncontradicted in the record. Veronica presented no competing witnesses or evidence to refute Jerry's testimony on each factual point. The only adverse testimony that was presented was that of Veronika's expert witness, Ms. Gazdik, who admitted on cross-examination she was not qualified to render those opinions. See, *Appellant's Brief*, pp. 30-32, 34. Thus, the Magistrate did not weigh competing evidence. *See*, *Stewart v. Stewart*, 143 Idaho 673, 677-79, 152 P.3d 544, 548-50 (2007). The District Court erred in upholding the Magistrate's findings.

D. The tracing performed by Mr. Smith was accurate and should not have been disregarded by the Magistrate.

Despite the Magistrate and Veronika's position that there was no objective proof, David Smith reviewed years' worth of statements that corroborated Jerry's testimony and traced essentially two things: 1) the clients; and 2) the stream of income from the partial sale to Britton Webb. Exhibit BBB, Exhibit CCC, Exhibit 11; Tr. Vol. II, p. 1374, Ll. 7-14; p. 1389, l. 23 - p. 1407, l. 18.

With regard to the clients, Jerry was able to compile a list of clients which included their date of acquisition. The list, identified as Exhibit 11, was compiled by taking the current list off of the TD Ameritrade platform website and adding information regarding date of inception of the relationship pulled from the former Ameriprise platform "group list" retained by Jerry. Client "Personal Identifiable Information" was redacted as required by federal law. To facilitate individual tracing each client was given a unique four-letter identifier. Tr. Vol. I, p. 368, l. 9 – p. 371, l. 24; p. 426, l. 24 – p. 429, l. 20. There was simply no other way it could have been done. *See*, Paragraph III.B, supra. Using that information, Mr. Smith was able to determine that even without the Covenant, 97% of the client list predated the marriage and was Jerry's separate property. Tr. Vol. II, p. 1392, l. 6 – p. 1393, l. 11; Exhibit CCC. With regard to the partial sale to Mr. Webb, Mr. Smith was able to trace those assets through various accounts and determine and identify specifically a significant portion of the property in the divorce was, and is, Jerry's separate property. CCC. Tr. Vol. II, pp. 1368-1438. Those issues were briefed extensively in Jerry's initial Brief and there is no need to restate them here. *Appellant's Brief*, pp. 32-36. On this appeal, Veronika acknowledges that the sale to Britton Webb was of a portion of Jerry's separate property business. *Respondent's Brief*, p. 31.

Veronika argues that Ms. Gazdik could not trace funds from the sale to Mr. Webb "in any discernable fashion." *Respondent's Brief,* p. 35. Quite frankly, that is because Ms. Gazdik was

not –by her own admission, qualified to do so. The following are some excerpts of her testimony on the topic:

Q: [Mr. Anderson] Sure. So you're not a certified fraud examiner, correct?

A: [Ms. Gazdik] That's correct.

Q: And you're not a certified forensic accountant, correct?

A: Correct.

Q: So you're not qualified to give those opinions regarding tracing, are you?

A: Tracing, no, I am not.

Tr. Vol. I, p. 567, Ll. 9-17.

Q: [Mr. Anderson] Okay. And with regard to the exhaustion method and the tracing, you're not qualified to do that tracing, correct?

A: [Ms. Gazdik] Correct.

Q: And you made no effort to do any tracing, did you?

A: I did not make an effort to trace. I reviewed documents.

Tr. Vol. I, p. 611, Ll. 9-14.

Despite these clear shortcomings of expertise, the Magistrate erred by permitting Ms. Gazdik to testify on tracing issues over the objection of Jerry's counsel. Tr. Vol. I., p. 613, l. 15 – p. 617, l. 4; Tr. Vol. I., p. 465, l. 23 – p. 469, l. 3; p. 469, l. 12 – p. 471, l. 20. Thus, the evidence the Magistrate considered was not competent. Tr. Vol. I, p. 483, Ll. 1-7. The District Court wrongfully upheld the Magistrate's determinations based on that incompetent testimony. R. Vol. I, p. 984. Veronika continues to argue that Ms. Gazdik's tracing was proper. *Respondent's Brief*, p. 35.

E. The District Court erred in upholding the Magistrate's determination of the value of SLG.

Jerry briefed the issues regarding the business valuation in his initial submission to the Court. *Appellant's Brief*, pp. 30-32. In Exhibit A, Jerry did value the business at "0.00." Exhibit A. It is his genuine belief that the business has no independent value without him. As set forth in his initial submissions, the client list is not owned and was never transferred to SLG. If the Court grants the Covenant its proper legal effect, the business valuation issue is moot.

F. Enough about FINRA.

It is unclear why Veronika would raise this matter again and again. It was and is wholly irrelevant to any issue at trial nor any issue on Appeal. It was error for both the lower courts to rely upon this information. Veronika frankly misrepresented the facts regarding the FINRA matter at each stage of this litigation. R. Vol. I, p. 270. It appears Veronika brings up this matter only as a cheap shot to try to discredit Jerry. Like so many other issues, Veronika deliberately obfuscates and confuses the actual factual record. Veronika was very much complicit in Jerry being censured by that association –and then tries to hold it against him!

The Financial Industry Regulatory Authority (FINRA) is not a government agency. Tr. Vol. I, p. 410, l. 20 – p. 411, l.9; Tr. Vol. II, p. 1283, l. 25- p. 1284, l. 9. It is a private association of broker-dealers that self-regulates its own niche of brokerage firms. *Id*. As the record clearly shows, Jerry voluntarily resigned from FINRA in August 2011. Tr. Vol. II, p. 1284, Ll. 1-7; p. 1299, Ll. 10-11. He received a clean "report card" from FINRA form U-5 at that time. Tr. Vol. II, p. 1299, l. 8 - p. 1302, l. 25; Exhibit W. Thereafter, he pursued monies owed him by the firm with whom he had previously held his client's investment assets, Ameriprise. Tr. Vol. I, p. 1303, l. 8 – p. 1304, l. 12; Exhibit Y. After he made that claim, he and

Ameriprise traded correspondence for months and eventually Ameriprise pursued his dismissal from FINRA. *Id.* FINRA's decision to prevent him from rejoining their organization was made in December 2013, more than two years after he left of his own deliberate choice. Veronika lied and said it was the impetus for him selling a portion of his business more than two years prior. R. Vol. I, p. 270. In point of fact, FINRA pursued the default judgment while Jerry was on deployment in Afghanistan. Exhibit 8. Veronika intentionally concealed the default from Jerry for over a year and only produced it in the context of the discovery. Tr. Vol. II, p. 1304, l. 7 – p. 1305, l. 11. As Jerry testified, he is not affiliated with any of those broker-dealers, and –as a result, he is totally ambivalent about their effort to bar him from associating with them. *Id*. It had no bearing on the case and the topic was introduced over Jerry's objection. Tr. Vol. I., p. 411, l. 20 – p. 414, l. 118. If Jerry was in fact being disciplined, how could he (or why would he have been permitted to) retain his core clients? Sadly, the Magistrate again sided with Veronika on her unsubstantiated and chronologically impossible version of the facts. This Court should not be distracted from the merits of the case and should disregard the FINRA issue in its entirety.

V. The evidentiary findings regarding the community property interest in Jerry's house are erroneous.

Veronika's arguments with regard to the alleged community interest in Jerry's separate property home are misplaced. *Respondent's Brief*, pp. 35-37. The District Court already found that the Magistrate erred when she shifted the burden to Jerry to prove the value of the community interest. R. Vol. I, p. 996. The error made by the District Court is in permitting the evidence of the amount of alleged community property equity to stand. R. Vol. I, pp. 994-95. There are two aspects to the alleged community property interest found by the Magistrate and upheld by the District Court: 1) paydown of mortgage; and 2) reimbursement for taxes.

This Court has long adhered to an equitable evaluation of the competing separate and community property estates. *Gapsch v. Gapsch*, 76 Idaho 44, 53, 277 P.2d 278 (1954). "As a general rule where the separate property of the husband is improved or his equity therein enhanced by community funds the community is entitled to be reimbursed from such separate estate . . .." *Id*. "[T]he measure of the compensation generally is the increased value of the property due to the improvement; in instances where his equity therein has been increased through the application of community funds to the payment of the debt thereon the measure should be the amount by which such equity is enhanced." *Id*. In further clarifying those competing interests, this Court has recognized that the community is not entitled to consume the separate property estate. *Vanwassenhove v. Vanwassenhove*, 134 Idaho 198, 200, 998 P.2d 505, 507 (Ct.App.2000) (citing *Malone v. Malone*, 64 Idaho 252, 130 P.2d 674 (1942)). In *Malone*, this Court held that property taxes were properly deducted from gross farm income and in doing so noted, "To hold otherwise would cause the community to, in time, entirely consume the separate estates of the members thereof and nullify § [32-903] and § [32-906]." *Malone*, 64 Idaho at 261, 130 P.2d at 678. "The party seeking such reimbursement to the community carries the burden of demonstrating that the community expenditures have enhanced the value of the separate property, and the amount of the enhancement." *Bliss*, 127 Idaho at 173, 898 P.2d at 1084 (citing *Hooker v. Hooker,* 95 Idaho 518, P.2d 800, (1972)). Veronika bore the burden of proving not just that there was an interest but also the amount.

As to the amount of alleged equity, Jerry has already briefed that in his initial submission. *Appellant's Brief,* pp. 36-39. Jerry also maintained that the house payments were made from his separate property account if the Covenant is valid but the Court permitted the evidence to the contrary in over his objection. Tr. Vol. I, p. 549, l. 18 – p. 553, l. 15. Ms. Gazdik admitted on

cross examination that her opinions were estimates or assumptions based largely on a single bank statement. Tr. Vol. I., p. 621, l. 20 – p. 631, l. 2. Her opinion regarding the taxes is based on an instruction she received from Veronika's counsel. *Id*. That is hardly substantial and competent evidence. I.R.E. 702, 705. Again, this evidence was provided to Jerry on June 29, 2015 -just two days before the start of trial and introduced over his objection. Exhibit VVV.

With regard to the property tax issue, the logic in the *Malone* case is persuasive. *Malone*, 64 Idaho at 261, 130 P.2d at 678. It isn't equitable that if the community is awarded any interest in the separate property home, that the separate property estate should foot the tax bill. In that manner, the separate property estate would eventually be consumed by the community. The community would get the use and enjoyment of the residence while living there and thus preventing it from an independent rental income (where the property taxes would be deducted to deduce net income) —all the while gaining equity in the form of paying down the mortgage, only to have the separate property estate reimburse the entire property tax bill in the event of divorce. It would be more equitable to apportion a percentage of the annual property taxes to the community based on its share of equity due to the paydown in the mortgage, if any is proven.

VI. The Magistrate's division of property and debt is not based on substantial and competent evidence.

The factual findings upon which the Magistrate bases a decision regarding an award of community property must be based on substantial and competent evidence. *Tisdale v. Tisdale*, 127 Idaho 331, 333, 900 P.2d 807, 809 (Ct.App. 1995); *Smith v. Smith*, 124 Idaho 431, 436, 860 P.2d 634, 639 (1993). As set forth in Jerry's initial Brief, in this case the Magistrate's decision was not. Not only as a result of the many errors but also because the Magistrate considered only illustrative exhibits on the majority of personal property items. This resulted in several accounts

and other assets being counted twice as Jerry pointed out in his written closing argument. R. Vol. I., pp. 626-27, 632-33. The reason neither party submitted any substantive evidence is because the Magistrate concluded the trial at just after 5:00 p.m. on the last scheduled day. Tr. Vol. II, p. 1444, Ll. 22-25; p. 1446, l. 23 – p. 1447, l. 9. The parties shared the available time equally but had no time to go over the property lists. Jerry asked for additional time to attempt to reconcile the personal property lists but was denied the opportunity to do so. R. Vol. I, p. 634. In fairness to the Magistrate, the parties asked for a certain number of trial days and the Court scheduled it for that many days. However, it was clear that evidence was not complete at the conclusion of the trial. The District Court erred in upholding that decision. R. Vol. I, pp. 1004-05.

VII. The District Court erred in upholding the Magistrate's finding that Veronika did not commit adultery.

The District Court upheld the Magistrate's finding that Veronika did not commit adultery. R. Vol. I, p. 1005. Jerry fully understands the burden of proof by clear and convincing evidence and the Magistrate's conclusion regarding the grounds for divorce. However, as set forth in his initial briefing, the lower courts applied the finding on adultery not just to grounds but also to the issues of spousal maintenance and attorney fees. *Appellant's Brief*, pp. 40, 44, 46. Veronika's only response was to try and discredit Jennifer Kiel by presenting a very small sample of her testimony. *Respondent's Brief*, p. 39. Again, this is another attempt to distract the Court from the overwhelming evidence and the truth. As the trier of fact, the Magistrate erred by rejecting the uncontradicted testimony of a credible witness unless that testimony is inherently improbable or impeached. *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998). The District Court erred by failing to fully review the evidence regarding Veronika's affair. R. Vol. I, pp. 1005-06. Jerry had absolutely no intention of seeking a divorce upon his return from Afghanistan. *See*,

Exhibit KKK; Tr. Vol. II, p. 1273, l. 22 – p. 1274, l. 1.

If this Court reviews the entirety of Ms. Kiel's testimony, it is clear that Ms. Kiel's early opinions about Jerry were formed as a result of the propoganda Veronika was spreading about him. Tr. V. II, p. 1031, l. 14 – p. 1063, l. 22. Ms. Kiel testified not only that Veronika told details about a sexual relationship she began with Palo Lasky in December 2013, Tr. V. II, p. 1034, l. 17 – p. 1042, l. 22, but also that Veronika had attempted to get Ms. Kiel to commit immigration fraud and marry Palo so he could gain citizenship. Tr. V. II, p. 1040, l. 2 – p. 1041, l. 16. Ms. Kiel further testified that Veronika had intentionally and falsely submitted receipts belonging to Ms. Keil to the Magistrate and to the court-appointed receiver as evidence of Veronika's monthly expenses. Exhibit RRR; Tr. V. II., p. 1042, l. 23 – p. 1046, l. 17; Tr. V. II., p. 1022, l. 7 – p. 1024, l. 5. Ms. Keil's testimony was offered not only as substantive evidence but to impeach Veronika's prior testimony about the affair, the arranged marriage and the false receipts. Tr. V. II, p. 965, Ll. 14-22; p. 966, Ll. 15-17; p. 967, Ll. 4-14; p. 981, l. 23 – p. 982, l. 7; p. 997, Ll. 3-16.

While trying to convince her best friend, Ms. Keil, to marry Palo so that he could become a US citizen and Veronika would not have to give up spousal maintenance payments, Veronika confessed to Ms. Kiel in a conversation on or about November 12, 2014 that she had been in a sexual relationship with Palo for about a year. Tr. Vol. II, p. 1031, L. 14 – p. 1063, L. 23. Ms. Kiel had a clear recollection and described the conversation between them at the Great Harvest parking lot in detail. Tr. Vol. II, p. 1038, L. 17 – p. 1042, L. 22. During that conversation, Veronika described to Ms. Kiel in detail that the first sexual encounter occurred in Palo's cabin during the time period that Veronika was ferrying her close friend from the Czech Republic, Katcha, back and forth to Driggs in late December 2013 – early January 2014 while Jerry was still deployed to Afghanistan. Tr. Vol. II, p. 1038, L. 17 – p. 1039, L. 24; p. 1041, L. 17 – p. 1042, L. 18. Veronika

told her details of how she was worried her and Palo would get caught having sex in the open on the futon in the downstairs living room. *Id*. Jerry and Veronika's then three-year-old daughter, J.P., was present in the cabin during the encounter. *Id*.

The e-mail to Jerry verifies the time frame that Veronika described to Ms. Kiel. Exhibit KKK; Tr. V. II, p. 1259, L. 21 – p. 1261, L. 10. Katcha was in town and leaving on January 15, 2014. Other circumstantial evidence that support Ms. Kiel's testimony and Veronika's affair include, without limitation: the distinct change in Veronika's demeanor after she met Palo around Christmas 2013 (Tr. Vol. II, p. 1273, Ll. 4-19); Veronika's sudden and frequent trips to Driggs (where Palo has a cabin) to "visit friends" beginning upon Jerry's return from Afghanistan in January 2014 (Tr. Vol. II, p. 1269, L. 13 – 1270, L. 18); Veronika stopped depositing her paychecks into the joint checking account in Spring 2014 (Tr. Vol. II, p. 1268, L. 14 – p. 1269, L. 12); Veronika's attempt to get Jerry's adult son Aaron's friend to marry "a friend from Boston" in May 2014 in return for a $10,000 payment (Tr. Vol. II, p. 1136, L. 18 – p. 1138, L. 19); Veronika changing plans made prior to Jerry's 2013 deployment and choosing instead to spend her 40th birthday in Prague, without Jerry, in May 2014 (Tr. Vol. II, p. 1265, Ll. 3-22); Spending Thanksgiving and Christmas 2014 with Palo (Tr. Vol. II, p. 1271, Ll. 17-20); Veronika's July 2014 planning a trip to Prague, with their daughter, including a side trip to Boston to "watch a hockey game" in March 2015 (Tr. Vol. II, p. 1267, L. 14 – p. 1268, L. 6); Palo loaning Veronika the money to pay her retainer, which she lied about at her deposition (Tr. Vol. II, p. 970 Ll. 3-10); and Veronika copying Palo in on the e-mail correspondence with Ms. Gaffney's office at the onset of the divorce (Exhibit 76; Tr. Vol. II, p. 971, Ll. 15-24). Most telling of all is the fact that Veronika never even got back on the stand to refute the testimony of Ms. Keil, Aaron Papin, Jerry or Judge Linda Cook nor any of the evidence submitted. She couldn't without further perjuring herself. As

the trier of fact, the Magistrate erred by disregarding Ms. Keil's testimony. *Wood*, 131 Idaho at 703, 963 P.2d at 386; Aug. p. 7, ¶ 15.

Jerry suspected an affair but only discovered evidence sufficient to prove the actual affair during the pendency of the divorce when Ms. Kiel came forward. Tr. Vol. II, p. 1271, L. 21 – p. 1271, L. 1. Ms. Kiel's uncontroverted information provided Jerry an understanding of the immediate change in Veronika's behavior that occurred at the end of January 2014. R. Vol. II, p. 1259, L. 25 – p. 1262, L. 17; p. 1255, L. 13 – p. 1257, L. 16. It helped put in context her actions which were the immediate cause of the divorce. And, upon acquiring proof of the adultery, Jerry properly amended his pleadings to include the claim. Aug., pp. 71-82.

In *Smith v. Smith,* 124 Idaho 431, *supra*, the Idaho Supreme Court found that the statute of limitations had not run on the wife's action for adultery. In so ruling, the court noted:

> The [trial] court found that Sharon did not "discover" Vernon's affair with Kelly Doyle until May of 1989, within two years of the time she filed the divorce action. The court also found that Sharon *never* discovered many of Vernon's other acts of adultery. ...
> After reviewing the record, we find that substantial and competent evidence supports the trial court's finding that Sharon brought this action within two years of discovering Vernon's adultery. Accordingly, the trial court did not err in granting the divorce on that basis.

Smith, 124 Idaho at 442, 860 P.2d at 645 (emphasis added).

Jerry testified that while the marriage had problems, he did not want a divorce until Veronika's change of behavior – her frequent trips to Prague and Driggs, and her lavish spending intensified in the spring of 2014. Tr. Vol. II, p. 1264, L. 17 – p. 1270, L. 16. He later learned, after the onset of the divorce proceedings and prior to trial, that this coincided with Veronika's adulterous affair with Palo. The January 2014 e-mail shortly before Jerry returned from Afghanistan was warm and loving.[1] R. Vol. II, p. 1259, L. 25 – p. 1262, L. 17. Despite their past

1 Exhibit KKK

difficulties, the e-mail very much indicates that Jerry remained committed to the marriage. Upon his return, Jerry noted that Veronika had "checked out". Tr. Vol. II, p. 1262, Ll. 9-20. It was after the initiation of the adulterous affair that the marriage fell apart.[2] Veronika told Jerry that she wanted to take J.P. and move back to Prague or the "East Coast" (we now know to Boston, where Palo lived at the time). R. Vol. II, p. 970, Ll. 20-25. The Magistrate should have concluded that the parties were entitled to a divorce on the grounds of adultery perpetrated by Veronika, which subsequently should have factored into the Magistrate's further determination of spousal maintenance and fees. The District Court compounded the error by failing to review the overwhelming and uncontradicted evidence pointed out by Jerry. R. Vol. I, p. 1006.

Remarkably, the Magistrate essentially ignored the direct falsification of documents submitted in discovery and lying under oath by Veronika –and went on to find throughout her *Memorandum Decision* that it was Jerry who was not credible. Veronika did not even subsequently refute Ms. Kiel's testimony on any of these issues. The Magistrate also gave little credence to the testimony of the Honorable Linda Cook and Aaron Papin regarding the attempted arranged marriage. Tr. V. II., p. 1071, Ll. 12-24, p. 1081, Ll. 6-9; Tr. V. II., p. 1137, l. 9 – p. 1138, l. 19. As the trier of fact, the Magistrate erred by rejecting the positive, uncontradicted testimony of a credible witness unless that testimony is inherently improbable or impeached. *Wood*, 131 Idaho at 703, 963 P.2d at 386; Aug. pp. 06-07. As set forth in Jerry's initial briefing, Veronika's adultery was an integral factor in what the Magistrate's analysis should have been under I.C. §§ 32-704 and 32-705. *Appellant's Brief*, pp. 40, 44, 46. At a minimum, the lower courts erred by failing to consider the evidence of Veronika's adultery in the context of her fees request. *Pelayo v. Pelayo*, 154 Idaho 855, 860, 303 P.3d 214, 219 (2013). It was error for the lower courts to

2 Exhibit 76

disregard it. As an aside, Veronika arrogantly claims that “such a finding could have little or no impact on the case.” *Respondent’s Brief*, p. 46.

VIII. The District Court erred in affirming the Magistrate’s award of spousal maintenance.

Jerry recognizes the broad discretion that the Magistrate has in awarding spousal maintenance. This issue has been briefed extensively in Jerry’s initial submission. *Appellant’s Brief*, pp. 41-44. Integral to almost every consideration in family cases is the exercise of the trial court’s discretion. In *Sheets v. Agro-W., Inc.*, 104 Idaho 880, 887, 664 P.2d 787, 794 (Ct. App. 1983) the Court of Appeals looked at discretion in earnest:

> “Discretion” has been defined as a power or privilege to act unhampered by legal rule. BLACK'S LAW DICTIONARY at 553 (rev. 4th ed. 1968). However, “judicial discretion” is a more restrained concept. Lord Coke is said to have defined judicial discretion as an inquiry into “what would be just according to the laws in the premises.” *Id.* Judicial discretion “requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair, and just determination, and a knowledge of the facts upon which the discretion may properly operate.” 27 C.J.S. *Discretion* at 289 (1959). Discretion which violates these restraints is discretion abused.

Sheets v. Agro-W., Inc., 104 Idaho 880, 887, 664 P.2d 787, 794 (Ct. App. 1983) (J. Burnett specially concurring); *see also*, *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 755-56, 331 P.3d 491, 497-98 (2014). It is an abuse of discretion for the court not to “identify and apply the law to the facts found.” *Southern Idaho Production Credit Ass’n v. Astorquia*, 113 Idaho 526, 528, 746 P.2d 985, 987 (1987). In short, the power is not boundless. In recent years, this Court has rebuked Magistrates for abusive use of “discretion” in custody cases. *See, e.g., Allbright v. Allbright*, 147 Idaho 752, 755, 215 P.3d 472, 475 (2009) (holding “A court presiding over a child custody matter does not become a family czar with unlimited authority to order the parents to do anything that the court believes is in the best interests of the child.”). Clearly, this is a different issue but the Supreme Court’s logic regarding supposedly unfettered discretion is sound.

In this case, the Magistrate certainly abused its discretion and the District Court erred in permitting it to stand. R. Vol. I, p. 1008. Awards of spousal maintenance are discretionary but must be based on substantial and competent evidence. *Mulch v. Mulch*, 125 Idaho 93, 96-101, 867 P.2d 967, 970-75 (1994). Incredibly, Veronika appears to be representing to this Court that she received a "net of $119,879.59 after debts." *Respondent's Brief,* p. 42. To the contrary, the Magistrate's Exhibit A attached to her Memorandum Decision divides in excess of Two Million Dollars in personal property including a long list of investment and retirement accounts. Aug. pp. 059-068. That list doesn't even include the value of the Prague apartment, which had an estimated value at trial of $681,000. Exhibit HH. Jerry did not gloss over the "sufficient property to meet her reasonable needs" prong of the statute. It is one of the cornerstones of his argument. After a nearly 1.2 Million dollar property award, the Magistrate went on to award maintenance! Aug. p. 057, ¶ 180. Although Jerry specifically challenged that finding to the District Court, his challenge and evidence were simply noted and disregarded. R. Vol. I, p. 1008.

The Magistrate's analysis disregarded much of the pertinent evidence and quite simply fabricated other evidence to justify the award. For example, Veronika never testified she had plans to go back to school but the Magistrate opined that she would do so. Aug. pp. 40-41, ¶ 111. Veronika doesn't even deny this happened. "Veronika may not have previously voiced plans to go to school or receive training, but that does not preclude the Court from providing her a path to do so." *Respondent's Brief*, p. 42. Veronika never testified that she wanted to go back to school. Tr. Vol. II, p. 1275, Ll. 4-10; Tr. Vol. II, p. 977, Ll. 19-25; Tr. Vol. II, p. 982, Ll. 8-20. The Magistrate also found she was suffering from anxiety. Aug. p. 041. Veronika testified that she was not taking any medications for anxiety and had never been diagnosed with anxiety. Tr. Vol. II, p. 964, Ll. 11-21. Veronika never testified about needing additional money for

retirement or wanting to preserve her money for retirement (which is at least 25 years away). Aug. p. 057, ¶ 180. In point of fact, the Magistrate awarded Veronika an unknown value of Jerry's military retirement if she qualified –but then never addressed that in the context of Veronika's other retirement needs. Aug. p. 057, ¶ 180. There was also no evidence about Veronika being prevented from accessing her share of the property. Jerry was court ordered and did pay Veronika a cash equalization payment and attorney fees immediately following the *Final Decree* in excess of $83,000. The Prague Apartment was to be sold immediately (and subsequently has been for almost exactly the appraised value).

The Magistrate's findings were not based on substantial and competent evidence but were rather fabricated by the Magistrate to justify the award. Aug. pp. 040-41, 056-57, ¶¶ 108-116, 170, 180. The District Court simply ignored the facts presented by Jerry. This was clearly an abuse of discretion because there was not substantial and competent evidence to support the award. *See*, *Mulch*, *supra*. This is an extremely important issue because the lower courts did not do any independent analysis to justify an award of fees but merely cross-referenced the same conclusory findings. R. Vol. I, pp. 1006, 1011.

IX. <u>The District Court erred in upholding the Magistrate's award to Veronika of attorney fees and costs.</u>

These issues have already been extensively briefed in Jerry's initial submission. *Appellant's Brief*, pp. 44-47. Veronika's arguments in response do little more than refer to the record. *Respondent's Brief*, pp. 43-45. Essentially, Veronika's argument is that she submitted detailed billing entries and that was good enough. *Id*. The *Clark v. Sage* 102 Idaho 261, P.2d 657 (1981) case cited by Veronika was an Industrial Commission case dealing with a contingent fee and was analyzed under a different statutory framework. *Id*., 102 Idaho 261, 629 P.2d 657

(1981). The case does not stand for the proposition Veronika proposes at all. *Id.* The passage quoted by Veronika is from a footnote referencing *Dykstra v. Dykstra*, 94 Idaho 797, 498 P.2d 1270 (1972). In *Dykstra*, the Court recognized in a "relatively simple situation" before the trial court, the trial court may take judicial notice of what constitutes a reasonable fee. *Id*., 94 Idaho at 800, 498 P.2d at 1273. *Dykstra* is hardly applicable to the case at bar. This case is far from simple.

CONCLUSION

Based on the foregoing, Jerry respectfully asks that the Court grant his appeal. As set forth herein, the District Court erred by upholding the Magistrate's decisions. The District Court failed to hold the Magistrate's findings of fact are not supported by substantial and competent evidence. The District Court committed its own errors of law and failed to recognize that the Magistrate's conclusions of law that yielded the judgment do not flow logically from those facts. Additionally, there are numerous instances where the Magistrate abused her discretion by failing to follow the law and fairly apply it to the evidence, which the District court wrongfully upheld. Accordingly, Jerry is entitled to have his appeal granted, the post-marital *Covenant* affirmed, and the remaining issues remanded for a new trial on those issues.

ATTORNEY FEES AND COSTS ON APPEAL

Jerry refutes Veronika's statement that he made a cursory request for attorney fees and costs on appeal. *Respondent's Brief*, pp. 45-46. As set forth in his initial briefing, the *Covenant* provides that if any party takes action to declare the Covenant invalid, that party will be liable for attorney fees and costs. Exhibit G. In accordance with the contractual term of the agreement, Jerry is entitled to recover his attorney fees and costs related to this appeal and all prior actions in this matter specifically related to his defense of the *Covenant*. *Id*.

Jerry also requests attorney fees and costs pursuant to I.C. § 12-121 and other applicable law based on the facts as set forth herein based on the clearly erroneous findings of the lower courts. *Pelayo*, 154 Idaho at 865-66, 303 P.3d at 224-25. Any defense of this appeal is inherently unreasonable. As set forth above, the lower courts committed a number of legal errors.

In *Idaho Military Historical Soc'y Inc. v. Maslen*, 156 Idaho 624, 329 P.3d 1072 (2014) this Court reiterated the standard for an award of fees under I.C. § 12-121, as follows:

> This Court has held that an award of attorney fees under I.C. § 12–121 is not a matter of right, and is appropriate only when the Court, in its discretion, is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation. When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12–121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. The award of attorney fees rests in the sound discretion of the trial court and the burden is on the person disputing the award to show an abuse of discretion. In determining whether the trial court has abused its discretion, we again turn to the three-factor test articulated in *Sun Valley Shopping Center, Inc. v. Idaho Power Co.,* 119 Idaho 87 at 94, 803 P.2d 993 at 1000 (1987).

Idaho Military Historical Soc'y Inc. v. Maslen, 156 Idaho 624, 631, 329 P.3d 1072, 1079 (2014) (citing *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 20 P.3d 702 (2001)) (internal citations and quotation omitted).

This Court went on to address the prevailing party analysis, as follows:

> Idaho Rule of Civil Procedure 54(d)(1)(B) guides a court's inquiry on the prevailing party question. Rule 54(d)(1)(B) provides as follows:
>
> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court

> in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained. I.R.C.P. 54(d)(1)(B). The prevailing party question is examined "from an overall view [of the action], not a claim-by-claim analysis." The district court's determination of who is a prevailing party will not be disturbed absent an abuse of discretion.

Id. (citations omitted).

In this case, Veronika has steadfastly contested the Covenant and its impact on the property division despite having clearly signed the document. Furthermore, she has contested other factual issues including, without limitation, her adultery, and she repeatedly submitted false testimony and evidence to the Magistrate. On appeal, Veronika continues to assert her unsubstantiated and erroneous claims -largely without any cites to the record, and has even cited to Jerry's deposition, which the District Court held to be in error. Accordingly, Jerry maintains that her defense of the appeal is frivolous, unreasonable and without foundation. Thus, Jerry maintains his request for attorney fees and costs pursuant to I.A.R. 40, 41, I.C. § 12-121 and the Covenant. Furthermore, Jerry objects to an award of attorney fees and costs in Veronika's favor pursuant to I.C. § 12-121 as set forth above.

Jerry further objects to an award of fees in favor of Veronika under I.C. § 12-123 as his claims are not "plainly fallacious" but to the contrary, genuine and legally valid. The standards for an award of fees and costs pursuant to I.C. § 12-123 were set forth by the this Court in *Urrutia v. Harrison*, 156 Idaho 677, 681, 330 P.3d 1035, 1039 (2014).

Idaho Code § 12–123(2)(a) provides:

> (2)(a) In accordance with the provisions of this section, at any time prior to the commencement of the trial in a civil action or within twenty-one (21) days after

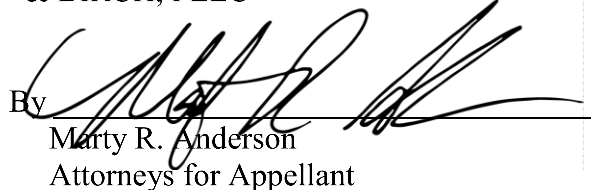
> the entry of judgment in a civil action, the court may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct.

I.C. § 12–123. "Conduct" under this provision "means filing a civil action, asserting a claim, defense, or other position in connection with a civil action, or taking any other action in connection with a civil action." I.C. § 12–123(1)(a). "Frivolous conduct" means conduct of a party or his attorney that either: (i) "obviously serves merely to harass or maliciously injure another party to the civil action;" or (ii) "is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." I.C. § 12–123(1)(b).

In the case at bar, there is nothing frivolous about the merits of this appeal. As such, the appeal cannot be deemed to be frivolous conduct that would warrant an award of attorney fees as a sanction or otherwise. Furthermore, the Court would have to conduct a hearing to determine frivolous conduct. I.C. § 12-123(2)(b). Such a request is simply not supported by the record herein and should be denied.

DATED this 4th day of September, 2018.

THOMPSON SMITH WOOLF
ANDERSON WILKINSON
& BIRCH, PLLC



By ______________________
Marty R. Anderson
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 4th day of September, 2018, I served a true and correct copy of the following-described document on the parties listed below, by mailing, with the correct postage thereon, faxed, or by causing the same to be hand delivered.

DOCUMENT SERVED: **APPELLANT'S REPLY BRIEF**

PARTIES SERVED:

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