IN THE SUPREME COURT OF THE STATE OF IDAHO

The Christopher W. James Trust, UDT February 7, 1979, Christopher W. James, Trustee, Plaintiff/Respondent, vs. **Helmut Robert "Bob" Tacke**, an individual, Defendant/Appellant.	Supreme Court Docket No. 47041-2019 Lemhi County No. CV-2017-16

APPELLANT'S REPLY BRIEF

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

HONORABLE JOEL E. TINGEY, DISTRICT JUDGE, PRESIDING

Steve Wieland, ISB No. 8282
MOONEY WIELAND PLLC
802 W. Bannock St., Ste 500
Boise, Idaho 83702

Attorneys for Defendant/Appellant

Bryan D. Smith, ISB No. 4411
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
Idaho Falls, Idaho 83405

Attorneys for Plaintiff/Respondent

TABLE OF CONTENTS

I. TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

II. INTRODUCTION

Understandably desperate to divert attention from the merits of Tacke's appeal, the Trust mainly contests jurisdiction. The Trust primarily asserts that the August 21, 2018 Judgment (the "**2018 Judgment**") was a final judgment that started the time to initiate an appeal, rendering Tacke's Notice of Appeal untimely. By contrast, Tacke contends that the January 24, 2019 Amended Judgment (the "**2019 Judgment**") was a final judgment. As explained below, the 2019 Judgment was the first judgment to resolve the Trust's $136k breach-of-contract claim for unpaid interest. Thus, only upon entry of the 2019 Judgment had judgment been entered on all claims for relief (other than costs and fees) asserted by or against the parties, making the 2019 Judgment a final judgment. Since Tacke filed a motion to reconsider within fourteen days of the 2019 Judgment and a Notice of Appeal within forty-two days of the order resolving the motion to reconsider, this Court has jurisdiction and the issues presented have been properly preserved.

III. BACKGROUND

Tacke incorporates the Background portion of his opening brief (Part III) herein as supplemented or modified below. Capitalized terms herein are the same as those in the opening brief.

Jurisdiction in this case depends primarily on when a final judgment was entered. To help the Court understand the timeline as to when a final judgment was entered, the following events are most germane:

2/9/17 The Trust filed its **Amended Complaint**, which includes a single cause of action for breach of contract. In addition to a repayment of $500,000, it seeks "prejudgment interest" based on the terms of the Agreement. (R. at 31.)

5/16/18 The district court entered a **Memorandum Decision and Order** granting the Trust's essentially unopposed motion for summary judgment on its breach-of-contract claim, holding that the Trust was entitled to $500,000 with interest at 5% per year. (R. at 93.)

8/21/18 The district court entered an **Order** granting the Trust's second unopposed motion for summary judgment. The Order dismissed all of Tacke's counterclaims. (R. at 152.) On that same day, the Court issued the **2018 Judgment**, which awarded $500,000 in damages plus post-judgment interest and dismissed Tacke's counterclaims. (R. at 154.)

8/29/18 The Trust filed its **Motion for Prejudgment Interest** seeking $136,027.40 in interest. (R. at 200.) The Motion was supported by a declaration by the Trust's attorney, which included an exhibit calculating the amount claimed. (R. at 186, 196.)

1/23/19 The district court granted the Trust's motions for costs and fees as well as the Motion for Prejudgment Interest. (R. at 221–22.)

1/24/19 The district court entered the **2019 Judgment**, which included for the first time an award of "[p]rejudgment interest" of $136,027.40. (R. at 224.)

2/7/19 Tacke, through his newly appeared attorney (undersigned) filed the **Second Motion for Reconsideration**. (R. at 226.)

2/12/19 The district court entered an interlocutory **Order** stating that some but not all of the issues in the Second Motion for Reconsideration were untimely raised. (R. at 295–96.)

2/15/19 The Trust filed an opposition brief to the Second Motion for Reconsideration. (R. at 298.)

2/27/19 The district court held a hearing on the Second Motion for Reconsideration and allowed the parties to submit supplemental briefing.

3/5/19 The Trust filed a supplemental brief opposing the Second Motion for Reconsideration. (R. at 332.)

3/26/19 The district court entered an **Order** finally resolving the Second Motion for Reconsideration. (R. at 354.)

5/6/19 Tacke filed his **Notice of Appeal**. (R. at 358.)

In his opening brief, Tacke commented that three motions for reconsideration had been filed in this case, but the Trust correctly pointed out that this is untrue. References to the "Third Reconsideration Motion" in the opening brief should be read to refer to the Second Motion for Reconsideration. Undersigned apologizes for the confusion.

IV. ARGUMENT

A. This Court Has Jurisdiction

An appellant must file a notice of appeal within forty-two days of an appealable judgment. I.A.R. 14(a). In a civil case, a Rule 54(a) final judgment is an appealable judgment. I.A.R. 11(a)(1). The January 24, 2019 Amended Judgment (the "**2019 Judgment**"), if it was a final judgment, would have caused the appeal period to expire on March 7, 2019. However, if a motion is filed that could "affect any findings of fact, conclusions of law or any judgment in the action," the forty-two-day period starts on the day the district court enters an order resolving the motion. I.A.R. 14(a). In this case, Tacke filed the Second Motion for Reconsideration on February 7, 2019, and the district court did not enter an order resolving the motion until March 26, 2019. (R. at 226, 354.) Measured from that date, Tacke had until May 7, 2019, to appeal. *See Stibal v. Fano*, 157 Idaho 428, 433, 337 P.3d 587, 592 (2014) (citing I.A.R. 14(a)). The question, therefore, is whether the 2019 Judgment was a final judgment. As explained below, it was a final judgment because it was the first judgment to resolve the Trust's claim for relief seeking allegedly unpaid interest under the Agreement.

1. The 2019 Judgment Was a Final Judgment

The first step in identifying a final judgment is to determine which documents in the record are judgments. To be a judgment, a document must comply with Civil Rule 54(a), which requires that a judgment:

(1) Be set forth in a separate document. I.R.C.P. 58.

(2) Be entitled "Judgment" or "Decree" and begin with the words "JUDGMENT IS ENTERED AS FOLLOWS." *Doe v. Doe*, 155 Idaho 660, 663–64, 315 P.3d 848, 851–52 (2013) (citing I.R.C.P. 54(a)).

(3) Not contain "a recital of pleadings, the report of a master, the record of prior proceedings, the court's legal reasoning, findings of fact, or conclusions of law." *Estate*

of Holland v. Metro. Prop. & Cas. Ins. Co., 153 Idaho 94, 99, 279 P.3d 80, 85 (2012) (quoting I.R.C.P. 54(a)).

(4) State the relief granted "on its face." *Roesch v. Klemann*, 155 Idaho 175, 180, 307 P.3d 192, 197 (2013) (quotation omitted).

Applying these rules, there are only two documents in the record that could possibly qualify as judgments: the 2018 Judgment and the 2019 Judgment. While it may appear at first glance that both might be final judgments, only the 2019 Judgment is a final judgment because, until its entry, judgment had not been entered on all claims for relief asserted by or against the parties. Specifically, no judgment yet stated the relief to which the Trust was entitled on its claim for unpaid interest under the Agreement.

"The title of a document alone does not determine whether it is a final judgment. *Camp v. E. Fork Ditch Co.*, 137 Idaho 850, 867, 55 P.3d 304, 321 (2002). Instead, a judgment is "final" if "judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action." I.R.C.P. 54(a). In other words, there need not be a single judgment that enters relief on all claims for relief. However, a judgment is not final unless relief has been entered on all the claims in the action by documents that each separately qualify as judgments (known as "partial judgments"). *Taylor v. Riley*, 162 Idaho 692, 704–05, 403 P.3d 636, 648–49 (2017). This Court strictly requires that *all* claims for relief asserted by every party be resolved in one or more judgments before a judgment is final. *E.g. Camp*, 137 Idaho at 868, 55 P.3d at 322 (holding that no final judgment was entered until all claims in the complaint were resolved); *Goldman v. Graham*, 139 Idaho 945, 947, 88 P.3d 764, 766 (2004) (holding that an order was not a final judgment because the plaintiff's negligence claim remained unresolved); *Taylor*, 162 Idaho at 647, 403 P.3d at 647 (holding that a series of partial judgments became final only after all claims were dismissed); *Cook v. Arias*, 164 Idaho 766, 767, 435

P.3d 1086, 1087 (2015) (noting that an order could not be a final judgment because judgment had not been entered on certain remaining issues).

The 2018 Judgment was a partial judgment. Upon its entry, there remained an unresolved substantive claim for relief: the Trust's claim for interest accruing under the Agreement. The 2018 Judgment was a partial judgment because it did not address this claim at all. *See* I.R.C.P. 54(a)(1) (referring to a "partial judgment" as a judgment that does not resolve all outstanding claims for relief).

The 2019 Judgment was the final judgment because it was the first judgment to resolve the remaining unresolved claim for relief: the Trust's damages claim for unpaid contractual interest. Everyone agrees that the Amended Complaint sought damages for "prejudgment interest" under the Agreement. (R. at 33 ¶ 11.) The only other judgment in the record, the 2018 Judgment, clearly did not award any contractual interest as damages, only post-judgment interest. (R. at 154.) Since the 2019 Judgment granted relief on that claim for the first time, it was a final judgment. Every order preceding it was either an interlocutory order (*e.g.* summary-judgment orders) or a partial judgment (*i.e.* the 2018 Judgment). Tacke then filed the Second Motion to Reconsider on February 7, 2019, fourteen days later. (R. at 226.) That motion reset the appeal clock until the district court resolved it on March 26, 2019, forty-one days before Tacke filed the Notice of Appeal on May 6, 2019. This appeal was therefore timely. I.A.R. 14(a).

2. The 2018 Judgment Was Not a Final Judgment

The Trust advances several arguments that seem to suggest the 2018 Judgment was the final judgment. First, the Trust argues that the 2019 Judgment "did not alter the material terms" of the 2018 Judgment but merely fixed an "omission," and fixing a minor omission does not extend the time to appeal. (Resp. Br. 14.) This argument is a red herring because the 2018 Judgment is not a final

judgment. The only thing that matters is whether the 2018 Judgment entered judgment on all claims for relief in the action. I.R.C.P. 54(a)(1). The finality of the 2018 Judgment does not depend on whether it was materially altered by the 2019 Judgment.

Even if it did matter whether the 2019 Judgment materially altered the 2018 Judgment, thereby renewing the time to file a motion to reconsider or an appeal, the 2019 Judgment dramatically amended the previous judgment. An amended judgment extends the time to file an appeal if it affects the substance of the earlier judgment; it does not extend the appeal window when it is "substantively identical to the original judgment." *State v. Ciccone*, 150 Idaho 305, 308, 246 P.3d 958, 961 (2010). Examples of immaterial changes that do not extend the appeal window include "deleting unnecessary and repetitive provisions," *Vierstra v. Vierstra*, 153 Idaho 873, 874, 292 P.3d 264, 265 (2012), adding a corrected filing stamp, *Ciccone*, 150 Idaho at 308, 246 P.3d at 961, changing the spelling of a litigant's name, *First Nationwide Bank v. Summer House Joint Venture*, 902 F.2d 1197, 1200 (5th Cir. 1990) (cited in *Ciccone*), or correcting an execution date, *U.S. v. Lewis*, 921 F.2d 563, 565 (5th Cir. 1991) (also cited in *Ciccone*). In each case, the change did not affect the relief granted on any claim, and the relief granted is the most substantive component of a judgment. *Cf. Harrison v. Certain Underwriters at Lloyd's, London*, 149 Idaho 201, 205, 233 P.3d 132, 136 (2010) (noting that a judgment must describe the relief granted, not merely award "judgment" to one party). In this case, by contrast, the 2019 Judgment granted a new award of $136,027.40 in contract damages. Such an award is undoubtedly a material alteration (although, again, this question is irrelevant).

The Trust asserts that the district court had already awarded "prejudgment interest" in the May 16, 2018 Memorandum Decision and Order, the order deciding the Trust's first Motion for Summary Judgment. (Resp. Br. 15–16.) According to the Trust, interest damages were already

"apparent on the record" and the 2019 Judgment merely "spoke the truth" about them. This argument ignores the fact that all claims for relief must be resolved ***in a judgment***, not an order on a summary-judgment motion, which is merely interlocutory. I.R.C.P. 54(a)(1). This Court has repeatedly held that orders granting summary judgment do not constitute judgments because relief must be entered in a separate document that complies with Rule 54(a). *E.g. Idaho First Nat'l Bank v. David Steed & Assocs., Inc.*, 121 Idaho 356, 361, 825 P.2d 79, 84 (1992); *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 619–20, 226 P.3d 1263, 1266–67 (2010); *Capstar Radio Operating Co. v. Lawrence*, 149 Idaho 623, 625–26, 238 P.3d 223, 225–26 (2010). Thus, the fact that prejudgment interest may have been addressed in an interlocutory order does not make the 2018 Judgment a final judgment.[1]

Next, the Trust confusingly suggests that the Motion for Prejudgment Interest was actually a Rule 60(a) or 60(b) motion that did not extend the time to file an appeal. (Resp. Br. 14–16.) This argument can be dismissed out of hand because it does not matter what kind of motion may have prompted the district court to enter the 2019 Judgment. All that matters is whether the 2019 Judgment was a final judgment under Rule 54, which it was.

Last, the Trust quotes extensively from two intermediate appellate court cases from other states: one from Minnesota, *Geckler v. Samuelson*, 438 N.W.2d 740 (Minn. Ct. App. 1989), and one from Florida, *Leila Corp. of St. Pete v. Ossi*, 230 So. 3d 488 (Fla. Dist. Ct. App. 2017). This Court can ignore these authorities because they do not apply legal standards that substantially resemble Idaho law. *Compare* I.R.C.P. 54(a)(1) *with* Minn. R. Civ. P. 54.01 *and Hillsboro Plantation v. Plunkett*, 55 So.

[1] Tacke does not mean to suggest that the May 16, 2018 order resolved the prejudgment interest issue. It did not fix a dollar amount or address the fact that the Trust did not prove the value of the Commodity Basket upon which interest was to be calculated. (R. at 95.)

2d 534, 536 (Fla. 1951) (setting forth a different standard for identifying a final judgment). On their face, the governing standards are simply not the same.

The Trust's cases are also readily distinguishable. The Trust's claim for interest is a ***substantive*** claim for relief arising from a contract; by contrast, it appears the prejudgment interest awards in the Minnesota and Florida cases were ***procedural***, that is, automatically applied by operation of law. In Idaho, a final judgment must adjudicate all claims for relief asserted by every party, with the only exceptions being "costs and fees." I.R.C.P. 54(a)(1). Damages for unpaid interest are simply a breach-of-contract claim like any other, especially in this case since interest was to be computed based on facts outside the contract, namely commodity prices that changed over time. Accordingly, this Court ruled in an analogous context that prejudgment interest is not an expense of litigation but rather the subject of a claim for relief. *See Jackson Hop, LLC v. Farm Bureau Mut. Ins.*, 158 Idaho 894, 897, 354 P.3d 456, 459 (2015) (stating that prejudgment interest "is not an expense incurred by [a] party in the conduct of the arbitration" (quotation omitted)).

On the other hand, the prejudgment interest awards in the out-of-state cases were procedural. In Minnesota, interest automatically accrues from the time of a verdict until judgment is entered. *See* Minn. Stat. § 549.09(a) (West. 1988) (in effect at the time of the *Geckler* case). Likewise, in Florida, every prevailing party is entitled to prejudgment interest. *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985). Unlike damages in this case, the prejudgment interest in Florida "is merely a mathematical computation. There is no 'finding of fact' needed. Thus, it is a purely ministerial duty of the trial judge or clerk of the court to add the appropriate amount of interest to the principal amount of damages." *Id.* Thus, even if the out-of-state cases applied a standard similar to Idaho, the

prejudgment interest in those cases was not a substantive claim for relief like the Trust's claim for unpaid contractual interest damages.

Although the Trust would have this Court believe that jurisdiction in this case is complicated, it is not. No judgment resolved the Trust's claims for contract damages until the 2019 Judgment, making it the final judgment. Tacke timely appealed from an order resolving his motion to reconsider, which was filed within fourteen days of the final judgment.

3. The District Court's Initial Order on the Second Motion for Reconsideration Did Not "Resolve" the Motion and Start the Appeal Clock

On February 12, 2019, just five days after Tacke filed his Second Motion for Reconsideration, the district court entered an order stating that the Second Motion was untimely except as to "prejudgment interest, costs, and attorney fees" because the district court mistakenly believed 2018 Judgment was a final judgment. (R. at 295–96.) The Trust seemingly argues that if this Court determines the 2019 Judgment to be a final judgment, the district court's order resolved the Second Motion for Reconsideration, starting Tacke's appeal clock on February 12, 2019. (Resp. Br. 18–19.) If the Court accepts this argument, the appeal window closed on March 26, 2019, rendering the May 2019 Notice of Appeal untimely. This argument holds no water because the district court did not resolve the Second Motion for Reconsideration in the February 12, 2019 Order.

Again, a timely filed motion that could affect factual findings, legal conclusions, or judgments in a case will terminate the appeal period. I.A.R. 14(a). The forty-two-day period restarts "upon the date of the clerk's filing stamp on the order *deciding* such motion." *Id.* The question is whether the February 12, 2019 Order "decided" the Second Motion for Reconsideration, thereby starting the appeal period.

The February 12, 2019 Order did not "decide" the Second Motion for Reconsideration, the March 26, 2019 Order did. Although the February 12 Order stated the Second Motion for Reconsideration was untimely as to some issues, it did not purport to deny the Second Motion entirely. (R. at 295–96.) Instead, it mentioned that a hearing would occur on February 27, 2019, on prejudgment interest, costs, and fees. (R. at 296.) After entry of the February 12, 2019 Order, the Trust filed an opposition brief, belying its claim that the Second Motion had already been decided. (R. at 298.) Then, at the hearing, the district court solicited further briefing from both parties on the issues that remained unaddressed in the briefs. (*See* R. at 354.) The Trust filed its extensive supplemental opposition brief on March 5, 2019. (R. at 332.) It was not until March 26, 2019, that the district court entered an order addressing all the issues in the Second Motion and finally denying it. (R. at 354–56.)

In short, the Trust is arguing that the Second Motion was decided on February 12, 2019, even though the Trust appeared at a hearing and filed two briefs in opposition to the Second Motion *after* that date. Similarly, the district court did not behave as if the Second Motion had been decided until March 26, 2019, when it issued an order deciding the motion. The appeal clock therefore did not start until that day, March 26, 2019, rendering the May 6, 2019 Notice of Appeal timely.

B. The Agreement Unambiguously Does Not Allow the Trust to Recover Money Damages for Missing the March 2015 Payment Because the Debt Converted to Equity

Tacke stands by his argument in Section VI.B of his opening brief that the Agreement unambiguously states that the Trust is entitled to equity in IMS, not money damages, for Tacke's alleged failure to make the March 2015 payment. This is because the Trust's remedy for nonpayment is to receive equity in IMS, not cash. (*See* Appellant's Br. 19–21.)

The Trust responds that it cannot be compelled to accept equity as "specific performance" if it does not want the equity. (Resp. Br. 23–24.) The Trust misunderstands Tacke's argument. Tacke does not contend that the Trust must accept specific performance. Instead, Tacke contends that, at most, the Trust is entitled to damages for not receiving equity in IMS, the remedy it agreed to accept in exchange for nonpayment. The Trust has never sought or proven such damages. Accordingly, the Court's damages award for "principal" and "interest" should be overturned.

C. Alternatively, If the Agreement Does Not Unambiguously Convert the Debt to Equity, the Agreement Is Ambiguous

The Trust asserts that Tacke raised the ambiguity argument for the first time in his Second Motion for Reconsideration. The Trust contends that it is impermissible to raise a new "claim" in a motion to reconsider. (Resp. Br. 24–25.)

On the contrary, arguing that a contract is ambiguous is not a new claim for relief but merely an argument. Motions to reconsider are exactly the mechanism by which new evidence and arguments should be raised. "When considering a motion for reconsideration under Rule [11.2], the district court should take into account any new facts, law, or information presented by the moving party that bear on the correctness of the district court's interlocutory order. However, new evidence is not required and the moving party can re-argue the same issues ***in addition to new arguments***." *Arregui v. Gallegos-Main*, 153 Idaho 801, 808, 291 P.3d 1000, 1007 (2012) (emphasis added).

Moreover, the ambiguity issue was already before the district court because the First Motion for Reconsideration contended that debt would convert to equity. (R. at 158–59, 210–11.) For the district court to enter summary judgment on the Trust's contract claims, it necessarily had to first determine whether the Agreement was ambiguous. *See State v. Partee*, 165 Idaho 511, ___, 448 P.3d 316, 320 (2019) ("In the absence of ambiguity, the document must be construed in its plain, ordinary

and proper sense, according to the meaning derived from the plain wording of the instrument."). For a similar reason, the ambiguity issue is necessarily before this Court as well. To affirm the district court's interpretation of the Agreement, this Court will also have to decide whether the Agreement is unambiguous in the first place. Consequently, the ambiguity issue is squarely before this Court.

The Trust only half-heartedly resists Tacke's main argument that the Agreement at most is ambiguous. Most notably, the Trust does not address the sentence on page 2 of the Agreement providing that the debt is "***secured by***" 80% of IMS. (R. at 276 (emphasis added).) *See* I.C. § 28-9-203(b)(3) (stating that a security interest can be created by an agreement that describes the collateral). The Trust also fails to address the standalone sentence on the same page that simply says the "Trust's ownership will remain at 40% until March 15, 2023 or Bob's passing" without stating whether the debt will extinguish thereafter. (R. at 276.) Nor does the Trust address the fact that, under its interpretation, 80% of IMS would transfer gradually to the Trust between 2015 and 2023 even if the debt were repaid a single day late in March 2015. The Court should therefore hold that the Agreement is ambiguous as to whether the debt converts to equity.

D. The Court Should Permit Tacke to Present a Mutual-Mistake Defense at Trial

The Trust does not dispute that there are strong grounds for a mutual-mistake defense in this case. Instead, the Trust merely asserts that mistake was not properly pled under I.R.C.P. 9(b). (Resp. Br. 26–27.)

The Trust's argument ignores that "pleadings should be liberally construed in the interest of securing a just, speedy and inexpensive resolution of the case." *Brown v. City of Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010) (quotation omitted). In *Brown v. Greenheart*, 157 Idaho 156, 335 P.3d 1 (2016), the plaintiffs sought to reform a deed but failed to plead mutual mistake or to request

reformation. *Id.* at 6, 335 P.3d at 160. The issue apparently did not come up until the summary-judgment phase. *Id.* The district court nonetheless denied the plaintiff's request to amend the complaint to add a mutual-mistake claim, reasoning that the issues had been adequately pled anyway, and this Court affirmed. *Id.* at 9, 335 P.3d at 164. This Court reasoned that the pleadings put the defendant on notice of the claim. *Id.* Similarly, in this case, Tacke's Answer and Counterclaim: (1) denied that the Agreement called for repayment by March 15, 2015; (2) denied that IMS had failed to pay its debt on the grounds that it had transferred ownership interest; and (3) asserted that the Trust was to receive equity if the debt was not paid. (R. at 51 ¶¶ 6–7; 54 ¶ 8.) The matter was therefore sufficiently pled. Even if it were not, the Trust is well aware of the issue and can prepare for trial, as depositions into the meaning of the contract have occurred and the Trust could be given more time for discovery if needed.

E. The Damages and Prejudgment Interest Awards Should Be Overturned Because the Trust Did Not Prove the Value of the Commodity Basket

As Tacke argued in his opening brief, the debt was to be repaid and interest calculated based on the value of a Commodity Basket, but the Trust has never proven such value. Desperate to avoid this issue, the Trust asserts that Tacke waited until this Second Motion for Reconsideration to raise a new "claim" or "defense" that the Trust failed to prove damages. (Resp. Br. 27.) However, Tacke does not assert a claim for relief or an affirmative defense, he merely argues that the Trust failed to prove an essential element of its breach-of-contract claim. Again, new arguments are permissible on a motion for reconsideration. *Arregui v. Gallegos-Main*, 153 Idaho 801, 808, 291 P.3d 1000, 1007 (2012).

The Trust also contends that, if this Court believes the 2018 Judgment was a final judgment, Tacke could not challenge the prejudgment interest award in his Second Motion for Reconsideration. This argument rests on the premise that the Motion for Prejudgment Interest was a motion to amend

or alter a judgment under Rules 59(e), 60(a), or 60(b). (Resp. Br. 20.) An order cannot be reconsidered if it resolves a motion under one of those rules. *See* I.R.C.P. 11.2(b)(2) (stating that the Court cannot reconsider orders deciding motions brought under certain rules).

This argument fails for a logical reason: the Trust essentially asserts that the district court could immunize a damage award by failing to include the award in a judgment, enabling a party to file a Rule 59(e) or 60 motion to correct the judgment. Following the Trust's logic, the order granting such a motion could not be reconsidered under Rule 11.2(b).

The law does not work that way. Tacke could seek reconsideration of the award regardless of what rule the Trust relied upon in filing the Motion for Prejudgment Interest. (R. at 226.) This Court has repeatedly held that a motion to reconsider filed within fourteen after a final judgment can reach back in time to challenge ***any interlocutory order*** of the trial court, whenever entered. *E.g. Agrisource, Inc. v. Johnson*, 156 Idaho 903, 912, 332 P.3d 815, 824 (2014); *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 106–07, 294 P.3d 1111, 1118–19 (2013); *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 784–85, 69 P.3d 1032, 1045–46 (2003). The Second Motion challenged all the substantive rulings in the case, including the May 16, 2018 summary-judgment order that granted damages for unpaid interest in the first place. (R. at 93–95, 226.) If the Motion for Prejudgment Interest merely sought to codify the Court's substantive award in the form of a judgment (such as a Rule 59(e) or 60 motion), then there was nothing to codify if the original summary judgment is overturned. If the Motion for Prejudgment Interest was instead a substantive motion for interest damages (*i.e.*, a Rule 56 summary-judgment motion), then the March 26, 2019 Order granting that motion would be vulnerable to a motion for reconsideration. I.R.C.P. 11.2(b)(1). Either way, the award can be overturned.

Regarding the substance of Tacke's argument that the Trust never proved the value of the Commodity Basket, the Trust simply contends that Tacke is trying to force the Trust to accept specific performance. (Resp. Br. 27–28.) Again, the Trust misunderstands Tacke's position. He is not suggesting that the Court should actually award gold, silver, and AUD as a remedy. Instead, Tacke argues that the Trust has not proven in U.S. Dollars the damages it suffered for Tacke's alleged failure to pay the debt and interest, both of which are measured solely by the value of the Commodity Basket. This Court should vacate all damages and remand the issue to the district court.

F. The Award of Costs and Fees Below Should Be Overturned Because the Trust Should Not Be a Prevailing Party

In defense of its award of costs and fees in the district court, the Trust contends that Tacke failed to file a motion to disallow costs and fees within fourteen days of the Trust's Memorandum of Costs and Fees, which it filed on August 29, 2018. (R. at 197.) The trust points out that a motion to disallow costs and fees must be filed within fourteen days of service of the memorandum. (Resp. Br. 21–22.) I.R.C.P. 54(d)(5) and 54(e)(6). The glaring problem with this argument is that Tacke filed a motion to reconsider, which again allows review of "***any order of the trial court***." I.R.C.P. 11.2(b)(1). Rule 11.2 states that there can be no reconsideration of orders resolving motions under certain rules, but does not include a request for costs or fees among them. I.R.C.P. 11.2(b)(2).

Even if Rule 11.2 did not clearly permit Tacke to challenge the award of costs and fees directly in his Second Motion for Reconsideration, logic dictates that he could do so indirectly. If this Court overturns the damages awards in favor of the Trust, then the Trust will not be the prevailing party on its only cause of action. Consequently, it will no longer be clear that the Trust is a "prevailing party," and only prevailing parties are entitled to costs and fees. I.R.C.P. 54(d)(1)(A) and 54(e)(1). It would be anomalous not to overturn the district court's award of costs and fees in that scenario. Accordingly,

if this Court overturns either component of the Trust's damage awards, it should also vacate the award of costs and fees pending outcome of proceedings on remand.

G. The Trust Is Not Entitled to Attorney Fees on Appeal

The Trust is not entitled to attorney fees on appeal under I.C. § 12-120(3) because it should not be the prevailing party on appeal for the reasons stated throughout Tacke's briefing. Specifically, the damages and interest award should be overturned, and since those claims are central to the Trust's lawsuit, the Trust should not be the prevailing party.

The Trust also is not entitled to attorney fees under I.C. § 12-121. "This Court has held that attorney fees can be awarded on appeal under Idaho Code section 12-121 only if the appeal was brought or defended frivolously, unreasonably, or without foundation." *Crawford v. Guthmiller*, 164 Idaho 518, 525, 432 P.3d 67, 74 (2018) (quotation omitted). "But attorney fees are not awardable as a matter of right. . . . Attorney fees will not be awarded for arguments that are based on a good faith legal argument." *Campbell v. Kvamme*, 155 Idaho 692, 697, 316 P.3d 104, 109 (2013). In this case, Tacke has pressed good-faith arguments that no final judgment existed until the district court entered a judgment awarding $136k in damages; that the Agreement is at best ambiguous as to what happens in case of nonpayment; and that the Trust has not proven the value of the commodities against which Tacke's alleged debts are measured. This Court should therefore not award fees on appeal under § 12-121.

V. CONCLUSION

The Trust seems to believe that whether a document is a final judgment is determined by the motion that prompted the judgment to be entered. Instead, the only thing that matters is whether the document complies with I.R.C.P. 54(a)(1). Since the 2019 Judgment was the first document to resolve

all claims for relief, it was the final judgment that started the clock on Tacke's Second Motion for Reconsideration, and indirectly this appeal. Since the Trust has not proven that it was owed the damages it has been awarded, the 2019 Judgment should be vacated and this case remanded.

Dated January 10, 2020

MOONEY WIELAND PLLC

Steve Wieland

Certificate of Service

I certify that on January 10, 2020, I caused a true and correct copy of the foregoing Appellant's Brief to be served on the parties to this action or their counsel via the Idaho iCourt System as set forth below.

Bryan D. Smith
SMITH, DRISCOLL & ASSOCIATES, PLLC
bds@eidaholaw.com
Attorneys for Plaintiff/Respondent

Steve Wieland