5-3-2012

Ulrich v. Bach Clerk's Record v. 3 Dckt. 39318

Vol. 3 of 4

Supplemental Record

LAW CLERK

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

COPY

THOMAS H. ULRICH and MARY M. ULRICH, husband and wife
Plaintiffs / Respondents

vs.

JOHN NICHOLAS BACH and all parties claiming to hold title to the hereinafter described property, and all unknown claimants, heirs and devisees of the following property: (See File for Description)
Defendant / Appellant

Appealed from the District Court of the Seventh *Judicial*

District of the State of Idaho, in and for Teton *County*

Hon Darren B. Simpson *District Judge*

Charles A. Homer, Esq. PO Box 50130 Idaho Falls, Idaho 83405
Attorney for Plaintiffs/Respondents

John N. Bach P.O. Box 101, Driggs, Idaho 83422
Pro Se

FILED - COPY
MAY 03 2012
Supreme Court
State of Idaho

Filed this _____ *day of* _____, *20*_____

_____ *Clerk*

By _____ *Deputy*

39318

Supreme Court No. 39318-2011
Teton County No. CV 2010-329

Supplemented Record

THOMAS H. ULRICH and MARY M. ULRICH
husband and wife
Plaintiffs/Respondents

vs

JOHN N. BACH,
and all parties claiming to hold title to the hereinafter described property, and all unknown claimants, heirs, and devisees of the following property, (see file for description)
Defendant/Appellant

Charles A. Homer. Esq.
P.O. Box 50130
Idaho Falls, Idaho 83405
Attorney for Respondents

John N. Bach
PO Box 101
Driggs, Idaho 83422
Pro Se

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Thomas H Ulrich, Mary M Ulrich vs. John Nicholas Bach

Other Claims

Date		Judge
8/31/2010	New Case Filed - Other Claims	Gregory W Moeller
	Plaintiff: Ulrich, Thomas H Attorney Retained Charles A. Homer	Gregory W Moeller
	Plaintiff: Ulrich, Mary M Attorney Retained Charles A. Homer	Gregory W Moeller
	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Holden Kidwell Receipt number: 0045280 Dated: 8/31/2010 Amount: $88.00 (Check) For: Ulrich, Mary M (plaintiff) and Ulrich, Thomas H (plaintiff)	Gregory W Moeller
	Motion for Temporary Restraining Order	Gregory W Moeller
	Summons Issued	Gregory W Moeller
	Notice Of Hearing	Gregory W Moeller
	Hearing Scheduled (Motions 09/07/2010 02:00 PM) TRO	Gregory W Moeller
9/7/2010	Minute Entry Hearing type: Motions Hearing date: 9/7/2010 Time: 2:34 pm Courtroom: Court reporter: Minutes Clerk: PHYLLIS HANSEN Tape Number: Plaintiff's Attorney Charles Homer	Gregory W Moeller
	Hearing result for Motions held on 09/07/2010 02:00 PM: Continued TRO	Gregory W Moeller
	Hearing Scheduled (Motions 09/17/2010 10:00 AM) for preliminary injunction	Gregory W Moeller
	Affidavit of Service	Gregory W Moeller
9/9/2010	Motion for Preliminary Injunction	Gregory W Moeller
	Notice Of Hearing	Gregory W Moeller
9/10/2010	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: John Bach Receipt number: 0045375 Dated: 9/10/2010 Amount: $5.00 (Cash)	Gregory W Moeller
9/16/2010	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Bach, John Nicholas (defendant) Receipt number: 0045425 Dated: 9/16/2010 Amount: $58.00 (Cash) For: Bach, John Nicholas (defendant)	Gregory W Moeller
	Defendant John N. Bach's (Specially Appearing To Contest Lack Of Personal Service And Lack Of Personal Jurisdiction) Motion Per IRCP, Rule 12(b) (2) (4) (5); Rule 4(i) (2); Rule 3 (a) (1); Rule 3 (b); Rule (d) (1), etc., To Strike, Quash And/Or Void Any Purported Service Upon Him, For Sanctions Against Plaintiff & His Counsel, Etc.	Gregory W Moeller
	Motion By John N. Bach, Specially Appearing, Lack Of Personal Service & Jurisdidction, To Peremptorily Disqualify The Honorable Gregory W. Mueller, Per I.R.C.P., rule 40 (d) (1) (A) (B)	Gregory W Moeller

Other Claims

)ate		Judge
)/17/2010	Minute Entry Hearing type: Motions Hearing date: 9/17/2010 Time: 10:05 am Courtroom: Court reporter: Minutes Clerk: PHYLLIS HANSEN Tape Number: Charles Homer, Plaintiffs' Attorney John Bach, Pro Se	Gregory W Moeller
	Hearing result for Motions held on 09/17/2010 10:00 AM: Continued for preliminary injunction	Gregory W Moeller
	Order of Disqualification	Gregory W Moeller
9/20/2010	Order of Assignment	Gregory W Moeller
9/21/2010	Lis Pendens (Notice Of Pendency Of Action)	Darren Simpson
9/22/2010	Notice Of Hearing	Darren Simpson
	Hearing Scheduled (Motions 10/15/2010 10:00 AM) Preliminary Injuction	Darren Simpson
9/30/2010	Defendant John N. Bach's Specially Appearing Notice of Motions and Motions Re: 1. Motion to Dismiss with Prejudice, IRCP, Rule 12(b)(6), etc 2. Motion for Summary Judgment IRCP, Rule 56 (b) - (e); 3. Alternatively, Motion for More Definitive Statement, Rule 12(e) 4. Motion for Sanctions, Costs and Fees Against Plaintiffs & Their Counsel , ule 11(a)(1) All Forgoing Motions Re Requested Sua Sponte	Darren Simpson
	Affidavit Of Service	Darren Simpson
10/5/2010	Order Directing Copies of All Documents to be Transmitted to the Presiding Judge at his Resident Chambers	Darren Simpson
10/8/2010	Notice Of Intent To Take Default	Darren Simpson
	Amended Notice Of Hearing	Darren Simpson
10/13/2010	Motion for Order Shortening Time	Darren Simpson
	Petition for Order of Survey Pursuant to Idaho Code 6-405	Darren Simpson
10/15/2010	Minute Entry Hearing type: Motions Hearing date: 10/15/2010 Time: 10:03 am Courtroom: Court reporter: Sandra Bebee Minutes Clerk: PHYLLIS HANSEN Tape Number: Plaintifffs' Attorney Dale Storer Plaintiff Thoms Ulrich Defendant John Bach	Darren Simpson
	Hearing result for Motions held on 10/15/2010 10:00 AM: District Court Hearing Held Court Reporter: Sandra Beebe Number of Transcript Pages for this hearing estimated at:250	Darren Simpson
10/29/2010	Memorandum Decision Re: Plaintiffs' Motion for Preliminary Injunction and Denying Bach's Motion to Dismiss, Motion for Summary Judgment, Motion for more Definitive Statement, and Motion for Sanctions, Costs and Fees	Darren Simpson

Other Claims

Date		Judge
10/29/2010	Bond Posted - Cash (Receipt 45759 Dated 10/29/2010 for 500.00)	Darren Simpson
	Order Granting Preliminary Injunction	Darren Simpson
11/16/2010	Verified Answer and Counterclaim	Darren Simpson
12/3/2010	Reply To Counterclaim	Darren Simpson
12/23/2010	Order for Hearing	Darren Simpson
12/27/2010	Hearing Scheduled (Status Conference 01/07/2011 01:00 PM)	Darren Simpson
1/4/2011	Amended Notice Of Hearing	Darren Simpson
1/7/2011	Hearing Held (in Bingham County)	Darren Simpson
1/11/2011	Minute Entry	Darren Simpson
	Court Trial Scheduling Order	Darren Simpson
1/14/2011	Hearing Scheduled (Pre-Trial Conference 05/06/2011 01:30 PM)	Darren Simpson
	Hearing Scheduled (Court Trial 06/08/2011 10:00 AM)	Darren Simpson
2/4/2011	Plaintiffs' Expert Witness and Fact Witness Disclosure	Darren Simpson
2/9/2011	Defendant's John N. Bach's Expert Witness List And Percipient/Facts Witness List	Darren Simpson
3/10/2011	Notice Of Compliance	Darren Simpson
	Motion for Summary Judgment	Darren Simpson
	Motion for Summary Judgment	Darren Simpson
	Memorandum in Support of Motion for Summary Judgment	Darren Simpson
	Affidavit of Thomas H Ulrich in Support of Motion for Summary Judgment	Darren Simpson
	Notice Of Hearing	Darren Simpson
3/11/2011	Hearing Scheduled (Motions 04/08/2011 11:00 AM) for Summary Judgment	Darren Simpson
	Notice Of Service	Darren Simpson
3/25/2011	Defendant and Counterclaimant John N. Bach's Memorandum Of Points And Authorities In Opposition To Plaintiff's Summary Judgment Motion	Darren Simpson
	Affidavit Of John N. Bach, Defendant & Counterclaimant Pro Se, Re Objections And Opposition To Plaintiffs' Motion For Summary Judgment	Darren Simpson
	Affidavit Of John N. Bach Re; Receipt Of Plaintiffs' Motion For Summary Judgment And Other Documents, Sat., March 12, 2011	Darren Simpson
3/28/2011	Supplemental Memorandum of John N. Bach, Defendant & Counterclaimant in Opposition to Plaintiff's Motion for Summary Judgment	Darren Simpson
4/5/2011	Reply Memorandum In Support Of Plaintiffs' Motion For Summary Judgment	Darren Simpson
4/6/2011	Defendant & Counterclaimant John N. Bach's Objections and Refutations Authorities to Plaintiff's Thomas H. Ulrich's Motion for Summary Judgment	Darren Simpson

Other Claims

Date		Judge
4/8/2011	Minute Entry Hearing type: Motions Hearing date: 4/8/2011 Time: 11:05 am Courtroom: Court reporter: Minutes Clerk: PHYLLIS HANSEN Tape Number: Charles Homer, Plaintiff's Attorney John Bach Pro Se	Darren Simpson
	Hearing result for Motions held on 04/08/2011 11:00 AM: District Court Hearing Held Court Reporter: Sandra Beebe Number of Transcript Pages for this hearing estimated at: less than 100	Darren Simpson
4/22/2011	Defendant And Counterclaimant John N. Bach's Opposing And Counter Memorandum Brief To Plaintiff's "Replys Memorandum In Support Of Plaintiff's Motion For Summary Judgment," dated March 31, 2011	Darren Simpson
4/28/2011	Plaintiffs' Pre-Trial Memorandum	Darren Simpson
4/29/2011	Memorandum In Reply To Defendant And Counterclaimant John N. Bach's Opposing And Counter Memorandum Brief	Darren Simpson
5/3/2011	Defendant and Counter-Claimant John N. Bach's Pre-Trial Memorandum Part "1"	Darren Simpson
5/6/2011	Hearing result for Pre-Trial Conference held on 05/06/2011 01:30 PM: District Court Hearing Held Court Reporter:Sandra Beebe Number of Transcript Pages for this hearing estimated at: telephonic in Bingham County	Darren Simpson
5/10/2011	Minute Entry - Pre-Trial Conference	Darren Simpson
5/19/2011	Affidavit of Charles A Homer in Support of Motion in Limine and for Sanctions	Darren Simpson
	Motion in Limine and for Sanctions	Darren Simpson
	Memorandum in Support of Motion in Limine and for Sanctions	Darren Simpson
	Notice Of Hearing	Darren Simpson
5/23/2011	John N Bach's Notice of his use at Trial/Call ins as Witnesses all Those Persons Named in his List of Witnesses (Filed Feb. 09, 2011) will be Used; and Secondly, the Attached Proposed List of Exhibits to be used at Trial, is Presented until this Court Rules on the Present Motions Under its Consideration.	Darren Simpson
5/25/2011	Notice of Deposit of Plaintiffs' Exhibits with Clerk of Court	Darren Simpson
5/31/2011	Defendant and Counterclaimant John N. Bach's Memorandum Brief RE: Objection & Oppostions (With Motion to Strike, Quash & Preclude in all Aspects) Plaintiffs' (1) Motion in Limine & for Sanctions, Affidavit of Charles A. Homer, & Memorandum Offered in Support Thereof; and (2) Motion to: Compel Discovery, Etc.,	Darren Simpson
6/6/2011	Order Vacating Trial	Darren Simpson
	Judgment	Darren Simpson
	Order Granting Plaintiffs' Motion for Summary Judgment	Darren Simpson

Other Claims

Date		Judge
6/7/2011	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Ulrich, Mary M Receipt number: 0047703 Dated: 6/7/2011 Amount: $4.00 (Check)	Darren Simpson
	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Ulrich, Mary M Receipt number: 0047703 Dated: 6/7/2011 Amount: $1.00 (Check)	Darren Simpson
6/8/2011	Hearing result for Court Trial held on 06/08/2011 10:00 AM: Hearing Vacated	Darren Simpson
6/20/2011	Affidavit of Charles A Homer in Support of Memorandum of Attorney Fees and Costs	Darren Simpson
	Memorandum of Attorney Fees and Costs	Darren Simpson
	Defendant and Counterclaimant John N. Bach's Notice of Motions re/per IRCP, Rules 59 (a) 1, 3,4,5,6 & 7; 59 (e); and Rule 60 (b) (1) (2) (3) (4) & (6).	Darren Simpson
	Affidavit of John N Bach in Support of All Post Judgment Motions	Darren Simpson
7/1/2011	Hearing Scheduled (Motions 08/05/2011 10:00 AM) Post Trial	Darren Simpson
	Defendant & Counterclaimant John N. Bach's Notice of Motions and Motions Per Rule 54(d)(6), to Disallow any or all Parts of Plaintiffs' Attorney Fees and Cost; and per Rule 549e)(6), 54(e)(7), 54()(1) through 54(e)(8)	Darren Simpson
7/7/2011	Notice of Intent to File Responsive Pleadings	Darren Simpson
7/21/2011	Motion to Strike Affidavit of John N Bach in Support of All Post Judgment Motions	Darren Simpson
	Memorandum in Support of Motion to Strike Affidavit of John N Bach in Support of All Post Judgment Motiond	Darren Simpson
	Notice Of Hearing on Motion to Strike Affidavit of John N Bach and Memorandum of Attorneys' Fees and Costs	Darren Simpson
7/28/2011	Defendant and Counterclaimant John N. Bach's Objections, Oppositions & Motions to Vacate/Quash Plaintiffs - Untimely & Void in Form & Service - Motion to Strike Affidavit of John N. Bach and Memorandum of Attorneys' Fees and Costs."	Darren Simpson
	Memorandum in Opposition to All of Defendant john N. Bach's Post Judgment Motions	Darren Simpson
8/5/2011	Minute Entry Hearing type: Motions Hearing date: 8/5/2011 Time: 10:04 am Courtroom: Court reporter: Minutes Clerk: PHYLLIS HANSEN Tape Number: C. Timothy Hopkins, Plaintiffs' Attorney John N. Bach, Pro Se	Darren Simpson
	Hearing result for Motions scheduled on 08/05/2011 10:00 AM: Hearing Held Post Trial	Darren Simpson
8/12/2011	Hearing result for Motions scheduled on 08/05/2011 10:00 AM: District Court Hearing Held Court Reporter: Sandra Beebe Number of Transcript Pages for this hearing estimated at: Less than 100	Darren Simpson

Other Claims

Date		Judge
9/13/2011	Order Denying Defendant John Bach's Rule 59 and 60 Motion and Granting in Part Plaintiffs' Request for Attorney Fees and Costs	Darren Simpson
	Civil Disposition entered for: Bach, John Nicholas, Defendant; Ulrich, Mary M, Plaintiff; Ulrich, Thomas H, Plaintiff. Filing date: 9/13/2011	Darren Simpson
10/21/2011	First Amended Judgment	Darren Simpson
10/24/2011	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: John Bach Receipt number: 0048913 Dated: 10/24/2011 Amount: $101.00 (Combination) For: Bach, John Nicholas (defendant)	Darren Simpson
	Notice of Appeal and Appeal by Defendant Appellant John n Bach, Pro Per, IAR Rules 11,14,17	Darren Simpson
10/25/2011	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: John Bach Receipt number: 0048922 Dated: 10/25/2011 Amount: $4.00 (Cash)	Darren Simpson
	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: John Bach Receipt number: 0048922 Dated: 10/25/2011 Amount: $1.00 (Cash)	Darren Simpson
10/28/2011	Bond Posted - Cash (Receipt 48956 Dated 10/28/2011 for 200.00)	Darren Simpson
11/4/2011	Request for Additional Record	Darren Simpson
	Request for Additional Record	Darren Simpson
11/10/2011	Request For Additional Record	Darren Simpson
11/18/2011	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Holden Kidwell Hahn Crapo Receipt number: 0049138 Dated: 11/18/2011 Amount: $2.00 (Check)	Darren Simpson
	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Holden Kidwell Hahn Crapo Receipt number: 0049138 Dated: 11/18/2011 Amount: $1.00 (Check)	Darren Simpson
12/30/2011	Bond Posted - Cash (Receipt 49493 Dated 12/30/2011 for 260.60)	Darren Simpson
	Condition of Bond: preparation of the Clerk's Record	Darren Simpson
1/31/2012	Notice Of Hearing and Appellant John N. Bach's Motion for District Court's Order Granting Him Leave to have (1) Objectins Heard and Decided to Clerk's Transcript and Record Not prepared; (2) for Corrections, Aditions and Preparation of all Clerk's Received Filings from April 8, 2011 through January 3, 2012. (I.R.E. Rules 28 & 29)	Darren Simpson
2/1/2012	Hearing Scheduled (Motions 03/16/2012 10:00 AM)	Darren Simpson
2/16/2012	Notice of No Objection to Defendant John N Bach's Motion for District Court's Order Granting Him Leave to Have (1) Objections Heard and Decided to Clerk's Transcript and Record not Prepared; (2) For Corrections, Additions and Preparation of All Clerk's Received Filings From April 8, 2011 Through January 3, 2012	Darren Simpson
3/13/2012	Order Granting Defendant's Motion to Supplement the Clerk's Record on Appeal	Darren Simpson
	Order Granting Defendant's Motion to Supplement the Clerk's Record on Appeal	Darren Simpson
	Hearing result for Motions scheduled on 03/16/2012 10:00 AM: Hearing Vacated	Darren Simpson

COURT MINUTES

CV-2010-0000329

Thomas H Ulrich, etal. vs. John Nicholas Bach

Hearing type: Motions

Hearing date: 4/8/2011

Time: 11:17 am

Judge: Darren Simpson

Court reporter: Sandra Beebe

Minutes Clerk: PHYLLIS HANSEN

Charles Homer, Plaintiff's Attorney

John Bach Pro Se

J calls case; ids those present

Motion for Summary Judgment

J have read pleadings both in favor and in opposition

J – Bach objected on some time frames

Bach- if service by mail looking at 28 + 3

3 different envelopes on the same day

Pitney Bowles type of stamp – that is inadequate to start the time running

Occupied on four other matters

Only library that is adequate is in Blackfoot

Have been mostly concern that lack of access to library – terrible

Asking for opportunity to be prepared

Rush to Judgment

Received Memo from opposing council - read for first time page 7

Don't address verification of my counterclaim

Lay out motion from the get go

1125

PA – file will reflect certificate of mailing - all were mailed on March 08 which would give time for filing plus time for mailing

Bach didn't file response briefs timely

Filed reply brief on Thursday march 31

Have filed within 28 days with time for mailing

J – what about Bach's argument on new issues in reply brief

PA – 1 – we are allowed to

2 – I don't believe we have

J – would you have problem with Bach filing supplemental reply brief

Would object for additional filings of affidavits

1130

Bach responds -

How did I get three different envelopes

Where is counter affidavit that I received those on time

Got blindsided

1131

J – record does show were mailed on the 8th

Have been filed timely will allow to stand

Will allow time after this hearing to day to file memorandum

They will be able to respond

No additional affidavits

Bach need ten working days

PA – need five working days to respond

J – Additional briefing Due April 22 by 5:00 PM

Homers due by May 02 at 5:00 PM - mailed by then

1134

PA – if court grants relief, would dispose of all issues before the court

Including dismissing counterclaims filed by D

Alternative way to access his property

1141

Tried to respond to everything brought up

1148

Legal issues

1151

J is Coward case

PA – right three theories

1153

J – what bearing do the signs have on that analysis

1155

Bach – move to strike, quash and preclude following paragraphs

5, 15, 16, 17 or initial paragraphs

Renew objection to jurisdiction of this court

1211

PA – objection not factual things but legal matters

J – noted – raised some in affidavit so going to let him raise it

1224

PA responds

Motion to strike untimely and irrelevant at this time

Verified complaint speaks for itself

Not claiming this is a public easement; not asking to be public

Easement dealt with in brief

Miller case – bound by easement in the record

Easement on subdivision - issues are irrelevant

Court can take judicial notice

Bach indicated Ulrich never asked permission before 2009 - buttresses our position

We had alternate access – never needed anything else

Need did not arise until he stopped us prior to that time

J – have deadline schedules

1228

No irreparable harm

J – briefing scheduled is outlined

Once received will deem admitted

JOHN N. BACH, P.O. Box 101
Driggs, ID 83422/Tel: (208) 354-8303
Defendant/Counterclaimant Pro Se

SEVENTH JUDICIAL DISTRICT COURT, IDAHO, COUNTY OF TETON

THOMAS H. ULRICH AND MARY M. ULRICH, husband and wife,

Plaintiffs,

V.

JOHN N. BACH andall parties claiming to hold title to the hereinafter described proper pursuant to that certain warranty deed record in the records of Teton County, Idaho on June 14, 1994 as Instrument No. 116461 and all unknown claimants, heirs and devisees of the following property:

A portion of the South ½ South ½ Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89 50'12" East, 2630.05 feet to the true point of beginning; thence North 00 07'58" East, 813.70 feet to a point; thence North 01 37'48" East, 505.18 feet to a point; thence South 89 58'47" East, 1319.28 feet to a point; thence South 00 07'36" West, 1321.69 feet to a point on the Southern Section Line; thence North 89 51'01" West, 1320.49 feet along the Southern Section Line to the South ¼ Corner of said Section 6, a point; thence North 89 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning. SUBJECT TO a 60 foot road and utility easement along the Western Property lines. AND SUBJECT TO a 60 foot road and utility easement along the Southern Property Lines.

CASE No. CV 2010-329

DEFENDANT AND COUNTER-CLAIMANT JOHN N. BACH'S OPPOSING AND COUNTER MEMORANDUM BRIEF TO PLAINTIFF'S "Reply's Memorandum In Support of Plaintiff's Motion for Summary Judgment", dated March 31, 2011

I. PREFACE: Due to not just the late filing of Plaintiffs' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, but the fact, that such brief addresses in part for the first time some, but not all issues raised by John N. Bach

his Affirmative Defenses, as reincorporated (Per IRCP, Rule 10(c), his counts and causes of actions via his counterclaim, and due to John N. Bach's objections as to violations not only of the provisions of Rule 56(a) through 56(d), but both the violations of his constitutional procedural and substantive rights of due process and equal protections, this Court has allowed defendant and counterclaimant to file this additional opposing and counter memorandum to refute and address those issues and cited authorities by said Plaintiffs' Reply Memorandum which they never addressed nor raised in their initial memorandum in support of their motion for summary judgment,

Defendant and counterclaimant JOHN N. BACH, still reasserts and incorporates all his objections, motions to strike and refutations previously filed herein, still claiming and contending that in the first instance and even with said Reply Memorandum, plaintiffs have both untimely, improperly and in violations failed and ignored the mandatory requirements of said Rule 56 sections to even have the Court consider, let along hear and rule upon granting their said motion in any particulars, whatsoever. Sun Valley Potatoes v. Rosholt, Robertson & Tucker 133 Idaho 1, 5-6, 981 P2d 236 (1999)(No basis for granting Summary Judgment due to late untimely filing)

Even the rehashing by Plaintiffs of their previous arguments and the cases they cited for their arguments A, 1, 2, and 3, pages 3 through 9, are more than inapplicable, misrepresented and dispite their citations and reliances upon the three (3) cases (Suchan v. Rutherford, 90 Idaho 288, 295; Tower Asset Sub, Inc. v. Lawrence, 143 Idaho 710, 714, and Kolouch v. Kramer, 120 Idaho

65) such cases in fact, undermine Plaintiffs' contentions and arguments and in truth of their particular opinions, support, sustain and require the granting of summary judgment in favor of defendant and counterclaimant's positions perviously stated and now herein reevalutated and analyzed correctly.

A. JOHN N. BACH has raised, supported and presented previously and again now, that there are properly, adequate, complete and primary legal remedies which which preclude plaintiff's quiet title, declaratory and injunctive claims.

Plaintiffs admit, pages 4-5 of their Reply Memo, that John N. Bach has raised and presented more than legal, case authorities and support, especially per Defendant's Memo of Points and Auth. page 3, that legal remedies are more than available to Plaintiffs which preclude this Court's jurisdiction and even discretion to consider quiet title, declaratory relief, etc., herein.

The sole attack by Plaintiffs' to John Bach's objection of lack of equitable jurisdiction, discretion, justicibility and standing/capacity, is the statement with cited cases as follows:

> "A legal remedy, i.e. damages, is insufficient in this matter because real property is considered unique. As the Idaho Supreme Court has repeatedly recognized, 'a specific tract (of land) is unique and impossible of duplication by the use of any amount of money.' Suchan v. Rutherford, 90 Idaho 288, 295, 410 P.2d 434, 428 (1966) (discussing the uniqueness of land in context of specific performance of land contracts.) . .(Emph Added)

The Idaho Supreme Court, said nothing of the sort as quoted supra, but in point of law and fact stated/rules exactly to the contrary.

Here's what Taylor, Justice's opinion in Suchan accurately stated, held and is now controlling:

1. The remedy at law via damages is adequate, plain, speedy and complete!

2. Land involved was not unique, that sale of similar land involved was frequent,

3. Equity will not enforce a contract when to do so would be unjust, oppressive or unconscionable.

4. The land here involved is not unique. It is irrigated farm land common to the general area in which it is located and the court's haven't hesitated to determine market value of farm landsin breach of a contract cases and of lands in general in condemnation proceeding, nor have they hesitated to determine the damages to be allowed.

5. As to the speculation that the vendor may otherwise lose the opportunities for others to invest in it, is patent that such a reason is so remote and speculative as to have no standing in a court of law. (90 Idaho @0295-296) (Emphasis Added)

At pages 301 through 303, the Idaho Supreme Court further held, such not being related nor quoted by Plaintiffs' Reply Brief:

6. (Even) Equity will not strictly enforce a contract when to do so would be unjust, oppressive or unconscionable ---or would produce harship or injustice--not reasonably within contemplation of the parties at the inception of contract; such hardship or injustice need not arise from fraud or mistake and need not be such as will prevent the contract from becoming an obligation in point of law, but exists whenever the contract would produce a condition to the defendant followed by injurious consequences which could not be deemed to have been contemplated when the contract was executed. (Citing to 49 Amer. Jur, Spec. Performance Section 59) (Emphasis Added)
7. Remedy at law was adequate, plain, speedy and complete.

So besides Plaintiffs' counsel inaccurate representations of what principles Suchan hold and requires to be followed, he adds a personal accomodation/request to this Court: "Consequently, Defendant's argument regarding Plaintiffs' alleged failure to pursue their 'remedies at law' as listed by Defendant should be disregarded."

How blatantly obvious is plaintiffs' counsel's request of Suchan's holding principles? Judge ignore the law and principles enunciated clearly and required herein; do us a favor. . . look the other way and discriminate against defendant and counterclaimant's cited binding and controlling cases.

B. PLAINTIFFS' ARGUMENT AND CITED CASE AUTHORITY IS IS ALSO FRIVOLOUSLY. UTTERLY WITHOUT MERIT, THAT THEY HAVE REFUSED /FAILED TO JOIN ALL INDISPENSABLE PARTIES.

On pages 5 and 6 of their Reply Memorandum, Plaintiffs quote from the cited case, Tower Asset Sub Inc. v. Lawrence 143 Idaho 710, 714: "joinder of all parties with an interest in the subject matter of the suit is not required; rather, only those who have an interest in the object of the suit should be joined." At this second fundamental, without jurisdiction and justicibility issues, since Judge Simpson has made the defaulted defendants in Teton Civil Action 02-208 once again somehow parties in this action, Plaintiffs again, but so blatantly and patently-corruptly, makes a request: "Although the other property owners of the Bach Property may have an interest in the subject matter of the suit, as property owners, only Defendant Defendant has attempted to interfere with Plaintiffs' interest in the property. Consequently, the other property owners do not have an interest in the object of the suit. Therefore, the other owners of the Bach Property are not indispensible parties."

Attached hereto, is a complete copy of JOHN N. BACH's Appellant's Opening Brief in Idaho Supreme Court Docket No. 38370. The issues he raises/raised therein and to be determined in said appeal docket, necessitates that as to any reestablished fiduciary duties, obligations and/or possible future activites in this action,

of the positions, assertions of rights and consequences thereof, against them, that he has raised herein. Secondly, if they are in fact indispensible parties, which they are, they must, be served, so as to appear and any counts, causes of action or relief against them, must be presented herein, so that a complete, final and speedy resolution of all joint venturers differences, rights and partitioning of the Peacock Parcel be finalized. Tower cited Pro Indiviso, Inc. v. Mid-Mile Holding Trust 131 Idaho 741, 746 (Where the Bowles argued the district court should 've dismissed the suit as such trust, owner of the property was not a party, an indispensible party, to the suit. This Court, stated:"Had this been a quiet title action this argument would have merit."

The Tower Asset Sub Inc, case, miscited and deliberately misstated as to its principles, requires such joinder, 430 Idaho 713-715. (See Justice Eismann's concurring in part and in result Opinion In Tower, a tenant brought a declaratory and injunctive relief counts, claiming he had the right to use a road over the neighbor's property. Summary judgment was granted to him, but the Idaho Supreme Court vacated and remanded such order and judgment for him. (This was second of two cases involving the Basic questions: 1) Whether Tower has standing? 2)Is-was Hall an indispensible party? and 3) Did the district court error in declaring the existence of an express easement on summary judgment?

Starting at 403 Idaho 713, the Idaho Supreme Court held that: the issues of "Standing" is a subcateory of justiciability, a preliminary question to be determined by the Court before reaching any merits of the case. Held-since Hall's ownership of the easement not questioned he was not indispensible party since no quiet title sought re his ownership.

Herein Plaintiffs seek a quiet title against all the ownership held in four one-quarter (¼) undivided ownership in the spendthrift trusts forming a joint venture. Pro Indiviso, Inc., 131 Idaho 741, 746, and Tower, supra, hold that where quiet title is sought to Plaintiffs' claimed easement, all the undivided owners via said spendthrift trust joint venture, must be joined as indispensible parties, otherwise this action must be dismissed.

Thus, plaintiffs' own aforesaid cited cases require:

1. That the equitable counts of quiet title, injunctive relief be dismissed with prejudice as plaintiffs' have clear, adequate, plain, speedy and complete remedies at law. Suchan, supra.

2. That all party members of the Spendthrift Joint Venture trust (Exhibit "1" to John Bach's Affidavit In Opposition to Summary Judgment) are indispensible parties who must be made defendants to this current complaint, served and allowed to appear, raise their individual answers, affirmative defenses and counterclaims and/or cross complainants. Pro Indiviso, Inc. and Tower, supra. Also, Barlow v. International Harvester Co. (1994) 95 Idaho 881, 893 (inaccurately cited by Plaintiffs as 85 Idaho 881) 522 P.2d 1102, 1194, in which counts for slander and tort interference with contract issues were held to RAISE genuine issues of fact precluding summary judgment, the Idaho Supreme Court, specifically held: a) A contract voidable because of noncompliance may still be subject matter of action for interference with contract; and b) A Plaintiff cannot make a lack of mutuality of the contract to which he was not a party, available as an excuse for his wrongful and unjustiified conduct.(95 Idaho @ 893-895.); and

c) Failure to join indispensible party is of such importance such cannot be waived. Barlow, supra, also analyzed and applied the principles of d) violation of tortious interference with contract, and with prospective economic advantages, per which cause of action recovery is not limited to those damages within the contemplation of the parties to the contract as the probable and foreseeable result of a breach, citing to: W. L. Prosser, Handbook of the Law of Torts, sec.129, pp 948-949 (4th Ed. 1991); Rest (Second of Torts, Sec 774A, Comment A-C, pp 86-90, (Tentative Draft No. 14, 1969) Barlow, 95 Idaho @ 896) (See also, Akers v. D.L. White Construction Inc, 142 Idaho 293, 301, 127 P.3d 196, 2004 (2005), also miscited and misapplied by Plaintiffs. In Akers, A record land owner of reality brought actions against adjoining land owner for i) trespass, ii) negligence and iii) quiet title. Case was remanded for purpose of conducting additional fact finding re whether at time of serverance of alleged dominant and servient estate, use of access through servant easement "was reasonably necessary to enjoyment of alleged dominant estate.") Such is also a factual genuine issue of fact herein.

The misuse of equitable claims, such as quiet title and declaratory/injuncitve relief is exemplified by the holdings of not just the above citedlisted cases, but, National Bank v. Bliss Valley Foods, Inc. 121 Idaho 266, 272-289, 824 P2d 841, 862-868. The bank brought foreclosure proceedings and additional legal claims arising from loan to a partnership, general partners, and limited partners, all who raised several affirmative defenses and actions at law counterclaims. After the trial court realigned the parties, the case proceeded to a jury trial as a tort case

against the bank rather than as a foreclosure proceeding. The jury returned a verdict of $5.7 million dollars against the plaintiff and counterclaim defendants, especially on the torts of bad faith, violation of implied covenants of good faith and fair dealings, interferences with contractual relationships and with prospective economic advantages. The trial court failed to make its own findings as required by IRCP, Rule 52(a) re denial of equitable issues on foreclosure by the bank and gave several incorrect jury instructions re law and issues for jury to decide.

National Bank v. Bliss Valley Foods, Inc is significant herein along with Suchan , supra, that at law remedies took exclusive precedent to the omission of equitable foreclosure action brought by the bank. From 121 Idaho @ 283-89, the Idaho Supreme Court, citing a Washington State Case, and other out of state authorities to adopt the tort of wrongful interference of contractual relationships and prospective economic relationships or advantages, and, along with the implied covenant of good faith and fair dealings, citing therewith Badget v. Security State Bank 116 Wash 2d 563, 807 P.2d 356 (1991) applied said implied covenant repeating the conclusion: "A violation of the implied covent is a breach of the contract." Such covenant occurs "only when either party violates, nullifies or significantly impairs any benefit of the . . .contract." Barlow, pg 7-8, also precludes plts' S/j motion!

Thusly, even though the real estate purchase contract which defendant and his cojoint venturers purchased per their recorded spendthrift trust joint venture deed/agreement nowhere in negotations or in any purchase contract or deeds is/are the individual names of the Ulrich's, Thomas nor Mary stated, designated

nor disclosed. No one is disclosed in name, by entity or title whatsoever as to the purported 60 foot easement; no one!

As was the case in Coward v. Hadley (2010) 246 P.3d 991 the easement deed mentioned notihing about the easement benefiting no one's adjoining lot, notthe predecessor's of Ulrichs, nor how far back in time if at all such easement existed, and most certainly, not any trusts or trust which was immediately adjacent to the north, west or even south of Peacock Parcel.

Two main principles apply, supported by Coward, to wit:

1. "In construing an easement in a particular case, the instrument granting the easement is to be interpreted in connection with the intention of the parties, and the circumstances in existence at the time the easement was granted," Kolouch v. Kramer, 120 Idaho 65, 69, 813 P.2d 876, 880 (1991) . . . (and) If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact." . . . " (Herein no revellation existed in any contract or deed benefiting defendant and his undivided one quarter spendthrift trust owners, what person, nor even mention of an adjoining real property owner was a dominant or even implied, inferred to use exclusively the 60 foot right of way. Simply put no adjoining owners, nor tenants nor irrigation easement holders had standing nor capacity whatsoever to make a quiet title claim nor for equitable declaratory relief! Plaintiffs had not purchased their acreage to the north until two (2) years plus later.

2 An express easement does not grant rights in the easement to the parcels other than the dominant estate. Further, there can be no private dedication to a restrictd class of individuals, such as those only owning property abutting an right of way. The rule that a common-law dedication must be for public use has always been a part of Idaho jurisprudence. Requiring the dedicatin to be to the public, and not to individuals or to a class of private grantees, is a widely accepted principle. 246 Idaho @ 396-98

From not just the Coward v. Hadley case alone, even if a quiet title action by Plaintiffs had standing or the capacity justiciability to pursue their equitable claims, which are invalid

if not void, the Plaintiffs', even to this date, have never had, never claimed any form of actual or constructive possession of the 60 foot road right of way over the westerly boundary of the Peacock 40 acre parcel---NEVER!

Therefore, the Plaintiffs never had a dedicated easement for them as a dominent easement estate, never had an implied easement, even if they had earlier asserted they did, by the doctrine of not just waiver, abandonment, but agreement, by acquiesence and estoppel, promissory, in pais, quasi estoppel etc. They do not nor could they acquire any easement. What is there for them to bring other than a legal action at law, certainly never having possession over, on or using the 60 foot easement claimed on defendant's 40 acre parcel; no quiet title action can lie nor be pursued. Spears v. Dizick (Oregon, 2010)Or. App.) 234 P.3d 1037, 23 Or. App. 594, (A party who is not in possession of land may not maintain a quiet title action against a party in possession. Nor does an equitable remedy lie where there is an adequate remedy at law. (234 P.3d @ 1039.)

No showing has been made per any survey result or other relevant admissible civil engineer's plat or overview of the claimed Ulrich's 60 foot easement, that such Ulrich's easement abuts, adjoins and lies immediately upon the northern boundary line of the Peacock westerly 40 acre parcel. We are left to speculate, conjecture and assume that it does, but such is a genuine question of fact that is more than required to have been established without dispute per Plaintiffs' moving affidavits and all memos, Just on that fact alone, their summary judgment motion must be denied. They have no dominant easement estate. No standing!

II. IF PLAINTIFFS' VERIFIED COMPLAINT IS NOT DISMISSED BECAUSE THEIR LEGAL REMEDIES ARE ADEQUATE, COMPLETE, SPEEDY AND CLEAR, THEN COWARD v. HADLEY IS CONTROLLING AS DISPOSTIVE OF THE ISSUES IN THIS CASE, ALONG WITH SHELTON V. BOYSDSTEN BEACH ASS'N, CITED SURRA.

In Plaintiffs' REPLY MEMORANDUM, pages 6-10, they jump á chasm of issues unaddressed not subject to the granting in any form or degree the genuine issues of fact which they have not addressed. Plaintiffs failure to carry their burdens of showing the complete absence of any genuine fact issues is fatal.

Their so called and offered "trump card case decision" is Kolouch v. Kramer, 120 Idaho 65, 813 P.2d 816 (1991) now not only an anarchronism, but inapplicably distinquishable, unconstitutional and against the legal principles and controlling facts, issues add rulings of Coward v. Hadley, 246 P.3d 391, and Shelton v. Boysdesten Beach Ass'n (Ct.App, 1983)102 Idaho 818.[1]

In Plaintiffs' quoting from Kolouch re the distinquishing factors of Shelton, Reply Memo page 7-9, they show that Shelton is in fact the controlling case: (In Shelton) . . "The trial court found that the plaintiffs had prevent associated members from using the property for the express purpose of the easement and that the easement had therefore been extinquished by adverse possession. That holding was affirmed on appeal. . . . The record in Shelton reveals that the easement was in fact being used periodically for the purpose for whichit was designed and that the plaintiffs were forced on several occasions to actually chase people off the easement area. As the trial court noted in its Findings of Fact and Conclusions of Law, " It is also clear that this use of the property by the Sheltons prevented the use of that property by others for the express purpose of thie easement. . ." (Emphasis Added)

In Kolouch , @ p. 67 , the complaint was for declaratory relief; no objections were made that there was an adequate remedy at law which precluded any equitable issues or count within said declar-

1. See Pages 19-21 infra

atory relief complaint.

But the "rule" stated, at page 67 is now not only overturned, superseded and moreover, unconstitutional, having sloughed not accurately researched re subsequent Idaho Supreme Court cases, after the cited supporting cases of Quinn[2] v. Stone 75 Idaho 243, 245 (1954), (now over 55 years unaddressed) and the further cited New York Castle Associates v. Schwartz case, 407 N.Y.S.2d 717, 83 A.D.2d 481 (1978) (Kolouch 120 Idaho @ 67-68.)

These are the Kolouch rules, now inapplicable, overruled, inaccurately applied and more than voided by Coward v. Hadley, supra, and even earlier Trappett v. Davis, 102 Idaho 527, 633 P.2d 592.

One "rule" is held in Kolouch "is well settled that mere non-use of an easement by grant does not effect an abandonment of the easement." (Emphasis Added) What is well known, shown by a physical view of the Ulrich's acreage to the north of the Peacock 40 acres, is Ulrich's southern boundary, not shown to be the same as Defendant's northern boundary, is some eight and a half (8½) to ten (10) feet higher in elevation that the Peacock's northern boundary, which northern boundary is in a wash, couliee or drain area and creek bed originating from South Leigh Creek meandering southwesterly within the westerly portion of Peacock draining into Dry Creek, also known as Bear Creek, but traversing through the Idaho Department of Transportation 12 acre borrow, gravel and sand pit. About fifty (50) yards from Peacock's northwest corner is a very large agricultural irrigation well and electric pump with underground irrigation water pipes/conduits to irrigate parts of Ulrich's land and the Stillwater Ranch Subdivision to the west and north of Ulrich's and beyond. Peacock when purchased in 1994 did not

2. Decided same year. 1954, reported after Hadley, infra pp 17-18.

have irrigation rights from said big well and agricultural pump. However, approximately within 75 yards south of the north west corner, a pond bed of 2-3 acres would fill upn with subwaters to place pumps to irrigate approximately one quarter to one third of the northwest internal acreages of Peacock. Thusly, visually anyone claiming whatever easement of 60 feet for roadway purposes, as the Ulrich's now are had more than mere nonuse notice, that they could not use nor access said 60 foot right of way regardless if they claimed it was per grant or implied existence. Most critically brought to their attention of nonuse if that wanted a road constructed through such depressed, water well and subterranean seasonaly pond accumulations, they could not pass through it.

At the internal northwest corner of Peacock is where Defendant placed a fence, posts, rails and no trespassing, no entry, keep out signs and a large tractor front rake to prevent passage whatsoever. Such barriers, warning signs and obstacles were enforced by defendant personally, especially with regularity from March of 2003 through the present date, stopping, precluding and even removing persons trying to access through said northwest corner into the rest of the Peacock forty acres and especially all along the internal westerly 100 foot corridor of Peacock to the southerly boundary , along such westerly 100 foot corridor installing and maintaining three (3) separate fences and gates also with multiple no trespassing, no entry, keep out, etc., signs. He also planted multiple trees, over twenty five (25), over thirty (30) midsize to large schrubs, bushes. and annual flowers, farm and garden crops, and restricted completely access to said strip, other than upon personal request and individual permission granted

only for such person so requesting and on/for no other use, date or event whatsoever.

The Ulrich's saw, witnessed, observed, experienced Defendant's restrictions, control of very limited access and enforcement of preclusions of any unauthorized intrusions or attempts at trepassings without defendant's express permission, limited in purpose uses of access over any part of Peacock. They accepted, abided, agreed to and more than acquiesced to Defendant's restrictions. Trappett v. Davis 102 Idaho 527, 531-34; Coward v. Hadley,246 P.3d@ 395-98.

For the Plaintiffs to argue that Kolouch is dispositive and not Shelden, nor Coward v. Hadley, supra, without the trier of fact, "construing an easement, claimed by Ulrichs in this particular case, if they even have one and can proceed per quiet title claim,never having had nor still not having actual possession, nor their name revealled as granted to them at the time Peacock was purchased by Defendant via said Spendthrift Trust Joint Venture Agreement, ignores/avoids and prevents, interpreting all agreements, deeds and documents re determining the intention of the parties, which did not include the Ulrich's, and the circumstances at the time the easement was supposedly granted or created.

And further the like or ancillary question of whether a particular use of an easement is reasonable and commensurate with the parties intention when the easement was granted/created is a question of fact for the trier of fact in a constitutional jury trial ; a jury upon a required legal remedy at law. Barber v. Honorof 116 Idaho 767, 780 P.2d 89 (1989)

Thus, Kolouch isn't authority re precluding defendant to have inconsistently constructed and maintained a holding irrigation water pond, or any irrigation undergound pipes, conduits with

a very large agriculture deep well with large electrical pump supplying up to or more than 5000 gallons per minute water for/ with above ground aluminum pipes, sprinker irrigating dispensing outlets to irrigate the entire 40 acre Peacock Parcel, for crops, defendant's horse, farm and domestic stock animals, all within the 60 foot claimed easement.

Remember, the Ulrich's were not present or around, except for two (2) times during the summer to early fall, to service and tend to their beehives, from 2004 through end of summer 2010, a six (6) year period, they never occupied, possessed or used whatsoever the claimed 60 foot right of way. They didn't need it at all.

The case holding and analysis of Trappett v. Davis, 102 Idaho 527, 530-532, dealt with the quieting title of a boundary not just by adverse possession, prescription or adverse use, but "by acquiescense". At page 531 the Idaho Supreme Court set forth the premise of "Adverse Possession and Agreed boundary are distinct theories,"and at p. 532 held:

> "A third exception is not really an exception at all, but rather a different rule, having as its source a different doctrine. Idaho has recognized the doctrine of agreed boundary or boundary by acquiescence. . ." (Emphasis Added)

In a "NOTE", page 532, it referencedly stated:

> "Note, Boundaries by Agreement and Acquiescence in Utah, 1975, Utah L. Rev. 221 (1975) Although the doctrines are distinct, they have had some common attributes. For example, in Kesler v. Ellis, supra, this Court borrowed the statutory period from adverse possession theory and applied it to agreed boundary cases, holding that "it is but logical to say that such acequiescence must be for a period of less than five years, thus conforming to the period established by the statute of limitations in cases of adverse possession." Kesler v. Ellis, 47 Idaho at 744, 278 P. at 367. Subsequently, however, in Baurley v. Harris. 75 Idaho 112, 268 P.2d 351 (1954), this Court abandoned the five-year requirement for acquiescence, holding that the period of acquiescence, is merely regarded as competent evidence of the agreement. . ."Id. at 117, 261 P.3d at 353." (See also pages 533-34)

Paurley v. Harris, 75 Idaho 112, 268 P.2d 381 (1954), (decided same year as Quinn v. Stone, 75 Idaho 243, 250) was a legal action of ejectment of a boundary dispute. At page 117 of Paurley , especially pages 120-121, the dissenting opinion, succinctly evaluates and analyzes what the majority opinion then and therafter did not require for acquiescence.

Defendant's affidavit and even Plaintiffs' own incomplete and hearsay complaint's paragraphs and the further affidavit of Plaintiff Thomas Ulrich, have already admitted if not confessed defendant's proof of open, notorious, continuous and uninterrupted use of the claimed easement for all periods, if any there still be because of Trapper v. Davis, supra, at page 532, he is entitled to the presumption of adverse, acquiescence, waiver, and abandonment use and purposes of use, inconsistent with any of intentions or purpose in the alleged easement.

Kolouch's following sentence is senseless, contradictory and implausible in both form, intentions and application, at Pages 68-69: "Applied here, we may paraphrase this rule to read that where the easement was created, but no occasion has arisen for its use, the owner of the servient tenement may plant trees, erect a fence, etc., and such use will not be deemed to be adverse, until the need to use the easement arises (or inconsistent to use Shelton's term) until the need to use the easement arises, etc. We think this rule makes sense in light of the well established rule that the owner of the servient estate is entitled to use his land, even though encumbered by an easement for any purpose not inconsistent with the purpose reserved in the easement. . . ." (Emphasis Added)

The many so-called rules of Kolouch as cited, supra, are more than contradictory and ambiguously contrived, and misapplied to rewrite a written easement which is not applied with cognent clear, succint rules of the intention of the parties, and, most

MISTAKENLY, without mutuality of intention or meeting of the minds, gives to a nonexistent party or parties, here the Ulrichs, an unagreed condition of subjective condition precedent of when they can start the running of any applicable statute of limitations and further violates the statute of frauds. The more the Ulrich's deny or refuse to admit the precise date/time the "Ulrich's need to use the easement arose", Ulrich's can without impunity and without any admitted knowledge of inconsistent uses, purposes or actions of their claimed easement, simply snooze, sleep on their rights, ignore and evade all responsibilities of any statutes of limitations or of fraud, because under the Alice in Wonderland principles of Kolouch, the trial court can rewrite, reform and modify the true and mutality of agreement and meeting of the minds, at will of the servient easement holder, discriminating against him, without any semblance or application of all terms, conditions and covenants actually agreed upon. But Plaintiffs contend, if the easement in question inside defendant's western boundary was just for their future families spendthrift trusts' lots' splits. then by the doctrine of merger, there was no granted or otherwise easement. because of the doctrine of merger. Exactly, such merger is binding![3]

To allow arbitrary rules and uncertain implied terms, understandings and claimed rules of policy re reconstructing the intentions of the parties apart of original conveyances to create the easement, "ALLOWS" a trial court judge to ignore, misuse and act in excess of jurisdiction, without consistent rules of discretion, maliciously and biasedly violating any standards of permitted discretion or public policies enumerated, thus, engaging in arbitrary, capricious, whimsical and prejudicial favoritism.

3. O'Connor v. Harper Constr'n Inc. (Id. 2008) 188 P3d 846 Court has power to grant rescission whether pled specifically or not, no other party

III. IF PLAINTIFFS' CURRENT VERIFIED COMPLAINT IS NOT DISMISSED FOR BOTH OF THE REASONS, THAT THEY HAVE A CLEAR, IMMEDIATE, ADEQUATE, COMPLETE AND PLAIN REMEDIES AT LAW AND THE TOTAL FAILURE TO JOIN INDISPENSIBLE PARTIES, THEN DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, OF DUE PROCESS AND EQUAL PROTECTION TO A PUBLIC JURY TRIAL IS A STRUCTURAL DEFECT THAT ALSO REQUIRES THE ENTIRE PLAINTIFFS" COMPLAINT DISMISSED WITH PREJUDICE.

Plaintiffs' current complaint, which their counsel have framed in two (2) equity counts of quiet title, and of declaratory relief with injunctive issuance orders, is more than a deliberate tactic and ploy cuntenanced by this district court to not just prevent, but completely eliminate defendant's U.S. Constitutional, Fourtheenth Amendments rights of due process and equal protection to a public jury trial of required remedy at law issues that are required to be addressed and raised solely by Plaintiffs only herein. Suchan v. Rutherford, 90 Idaho 2888, 295; National Bank v. Bliss Valley Foods, Inc. 121 Idaho 266, 278-289; Spears v. Dizick, (Oregon 2010, Or. App) 234 P.3d 1037, 23 Or. App. 594; and Trappett 102 Idaho 527, 531-34 (see page 15, -18, supra); and Tower Asset Sub Inc., v. Lawrence, 143 Idaho 710, 714, and Pro Indiviso, Inc., v. Mid-Mile Holding Trust, 131 Idaho 746, 746 (Part B., pages 5-11, supra).

This Court has further violated the aforesaid U.S. Constitutional rights by bring in as equitable issues, supposedly reached with finality, but no so at all, when the Court took full judicial notice, knowledge and inserted it's Decision in Idaho Supreme Court Dkts #34712 and 35334 (Teton CV 01-265) as controlling the individually named truste, persons and entities who owned and still own the Peacock 40 acres. The district court judge who after remand rendered a SECOND AMENDED JUDGMENT in TEton CV 01-265, which was not then nor now final, but appealed by JOHN N. BACH herein and as appellant Complainant In Intervention, who has filed his Openino Brief in the Idaho Supreme Court's Docket 38370, is Judge Darren Simpson, the assigned jurist in this quiet title action. The facts as stated above, raised overtly and critically, not just the appearances, but the actuality of a biased trial judge herein, who to protect his SECOND AMENDED JUDGMENT, now on appeal in Teton CV 01-265, I.S.C. Docket 38370, has so far denied and overruled Defendant's requests to dismiss Plaintiffs' entire complaint herein for failure

and refusals to proceed solely on legal remedies at law causes of action and to join all indispensable parties. Such refusals and failures as currently allowed by Judge Simpson are in fact and constitutional effect, violations and deprivations of John Bach's said Fourteenth Amendment Rights to dueprocess and equal protection as set forth in State v. Perry 245 Idaho 961, 974-979. Although Perry dealt with proceedings and errors in a criminal trial, the citing and quoting of Chief Justice Rehnquist, writing in Arizona v. Fulminate, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d (1991), at Perry, starting page 974-top right, 975 is most relevant, applicable and controlling.

Herein and in Teton CV 01-265, upon remand before Judge Simpson, is appears that such jurist has followed, per under color of law, Idaho judicial custom, practice and procedures, to unconstitutionally favor and apply equitable actions of quiet title, declaratory and injunctive relief. when none of such equi table actions are allowed, nor mandated, but do short en and reduce involvments of the trial district court judge sitting without a jury, who under Idaho statutes will make almost impossible to overturn findings of fact and conclusions of law, rather than the verdict of a public trial jury who award damages as instructed, and whose verdict and the judgment thereon to be entered are given greater confirmations, verifications and validities by Idaho Statutes. (See Perry page 974, right column, as to such due process and equal protection rights violations which are structural defects.

The following reworded quote from Sullivan v. Louisiana 508 U.S. 275, 113 S.Ct. 2078. 124 L.Ed.2d 182 (1993) . ."the jury was given a defective . . instructions and the U.S. Supreme Courtfound that (the party's) Sixth Amendment right to a jury trial had., therefore been violated. . . such violation constituted a structural defect . as it 'vitiate (d) all the jury's findings' . ." Just on the Suchan case alone defendant's Fourteenth Amendment

AS SET forth. Perry245 P 3d @ 974 have been denied. violated. precluded and vitiated.

IV. CONCLUSION

Per all of JOHN N. BACH's motions, memos, affidavits and this most current OPPOSING AND COUNTER MEMORANDUM BRIFF, this Court should, especially for lack of or warrant of subject matter jurisdiction and failure of joining indispensible parties order the following:

1. Dismiss with Prejudice the Plaintiffs' Verified Complaint.

2. Recuse itself of decline to hear any matter further including Plaintiffs' deficient /unsupportableMotion for Summary Judgment

3. Grant defendant and counterclaimant's JOHN N. BACH motion and application per his filings and memoranda, complete summary judgment against both Plaintiffs Ulrichs.

4. Or Abate, Stay all proceedings in this action, until the resolution with Finality of all issues in the current appeal in Idaho Supreme Court docket 38370, Teton CV 01-265

5. Impose sanctions of costs, research fees, costs and expenses etc., attorney's 7 paralegal fees/expenses against both Plaintiffs and their two counsel, Mr. Homer and Mr. in violations of Rule 11(a)(1), et al for failure to do simply cases research to locate cite and advise the court of Suchan , Spears v. Dizick, Trappett v. Davis, Pauerlev v. Harris and Coward v. Hadley cases and for deliberate misstatements and misrepresentations of the principles and applications of the defective cases they did cite.

6. Terminate, abate and vacate any restraining order or preliminary injunction issued or further requested. (The Court has already found/held that there is no basis for any injunctive relief. (The ordered survey could have been handled per IRCP, Rule 34, per discovery rules and principles.)

DATED: April 22, 2011

John N. Bach

JOHN N. BACH. Pro Se

CERTIFICATE OF SERVIEF BY MAIL; I the undersign certify this April 22, 2011, that I did place this/a copy of the foregoing document in the U.S.Mail with first class postage affixed to separate envelopes addressed to: 1) Charles Homer. P.O. Box 5 0130 Idaho Falls, ID 83405; and The Honorable Darren Simpson. Bingham County Courthouse.501N.Maple #310, Blackfoot, Idaho 83221.

John N. Bach

ATTACHED COPY

JOHN N BACH APPELLANT'S OPENING APPEAL BRIEF

IN

IDAHO SUPREME COURT'S DOCKET NO. 38370, Teton CV 01-265

IN THE SUPREME COURT OF THE STATE OF IDAHO

JACK LEE McLEAN, Trustee and WAYNE DAWSON, Trustee, Plaintiffs/Respondent, v. CHEYOVICH FAMILY TRUST and VASA N. BACH FAMILY TRUST, Defendants.	Docket NO: 38370-2010 (Teton CV 01-265)
JOHN N. BACH , Intervenor/Appellant, v. JACK LEE McLEAN, Trustee, WAYNE DAWSON, Trustee, DONNA DAWSON, ALVA A. HARRIS, Individually and dba SCONA, INC., a fictitous entity, and KATHERENE M. MILLER, AND DOES 1-30, Inclusive, Third Party defendants	

APPELLANT JOHN N. BACH'S, PRO SE, OPENING BRIEF

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JOHN N. BACH's OPENING APPELLANT BRIEF

I.

NOTICE OF APPEAL, Filed Dec. 9, 2010
(C.T. 76-86)

Appellant JOHN N. BACH, filed a NOTICE OF APPEAL , Pro se, I.A.R., Rule 17, etc., from: 1.) ORDER GRANTING PLAINTIFF WAYNE DAWSON'S MOTION FOR RELIEF FROM JUDGMENT, dated October 29, 2010 (CT 11-31), 2.) SECOND AMENDED JUDGMENT, filed October 29, 2010 (CT 7 - 10) and 3) ORDER DENYING INTERVENOR-COMPLAINANT JOHN N. BACH's MOTION TO STRIKE, TO ALTER OR AMEND, OR RELIEF FROM FINAL JUDGMENT, 10 pages, filed directly with this Court. ATTACHMENT hereto is a copy of "3) ORDER."

Through the issues and motions made by Appellant during the REMAND of this Honorable Idaho Supreme Court to district court Judge, the Honorable Darren B. Simpson, no hearings were allowed by him either on what he was to consider on Remand, nor did he permit nor allow any hearings, in person or via telephone conferences, on Appellant's Re: 1.) To Strike, Quash & Vacate Court's Order Granting Wayne Dawson' For Relief from Judgment & Second Amended Complaint, I.R.C.P., Rule 12(f), 12(g),(2)(4), 19, et seq; 2) Order Granting New Hearing Before Unbiased, Qualified Judge, I.R.C.P., Rules 59(a)(6) (Insufficency of Evidence, error in law/against the law) & Rule 59(e)} and 3) Order Per I.R.C.P., Rule 60(b)(1)(2)(3)(4)(5) & (6), filed November 15, 2010. (CT 32-43) Appellant Notice for hearing all said three (3) motions on Friday, December 17, 2010, (CT 51-70).

III. STATEMENT OF THE CASE, REMANDED

A. Nature of the Case

The verified complaint brought by plaintiffs Jack Lee McLean and Wayne Dawsons, as trustees of their family trust labelled Quiet Tile and Partition Real Estate, filed December 18, 2001, (R.Vol 1, pp 1-5; R. Vol.II. p. 479, was served upon John N. Bach, as successor trustee of the defendant CASA N. BACH FAMILTURST. JOHN N. BACH, was not named nor served as an individual defendant, although he was one of the four joint venturers, dba as TARGHEE POWEDER EMPORIUM, LTD., who was a holder of an undivided one-fourth interest in the PEACOCK FORTY ACRE PARCEL, the sole real property involved.

B. Course of Proceedings

John Bach,, on February 26, 2002 was granted leave to intervene in the case asserting his personal interests therein. He filed a verified Complaint Intervention March 26, 2002 naming as Intervenor Third Party defendants: JACK LEE McLEAN, Trustee, WAYNE DAWSON, Trustee, DONNA DAWSON, ALVA A. HARRIS, individually and dba SCONA, INC., a sham Idaho entity, KATHERINE M. MILLER, and DOES 1-30, Inclusive.

No answer no other responsive pleading was filed by the Third Party Defendants, although Alva Harris as their attorney did file an appearance for them, but not for Katherine Miller.

Appellant made various motions to dismiss, for sanctions, etc., all being denied. Jan. 3, 2005 entered an Order dismissing Jack Lee McLean, who had died Dec.5, 2005 (R. Vol. I, pp 61-66. A DISMISSAL with PREJUDICE FOR LACK OF DILIGENT PROSECUTION of both Plaintiffs Complaint was granted by the district court, upon duly noticed motion brought by Appellant, heard on August 7, 2007 (R. Vol I, pp 61-66, 349-369.)

Appellant filed a Motion for Summary Judgment in this Action and companion action Teton CV 01-33, with numerous supporting affidavits, exhibits and memoranda of points and authorities; Respondent Dawson's attorney, Alva A. Harris filed no counteraffidavits, no memoranda opposing said summary judgment and did not argue, although he was present at the noticed hearing and oral argument by Appellant for his summary judgment motions. which the court granted without opposition, without objections and which the Court determined was stipulated and consented in full by the Third Party Defendants who had appeared but who had filed no responding valid pleading.

Respondent DAWSON's newly substituted counsel, Marvin Smith of Idaho Falls, filed Oct 17, solely a Motion for Reconsideration per Rule 11(a)(2)(B, IRCP, seeking reconsider-

ation of the Court's September 11, 2007 Joint Cases Opinion Memorandum, etc and the Quieting Title Judgment solely in favor of Appellant John N. Bach with permanent injunction provisions against all named third party defendants. The motion for reconsideration was not accompanied by any timely affidavits by DAWSON nor his two attorneys, Alva Harris as his first counsel, nor his then newly substituted counsel, Marvin Smith, nor any one explaining or trying to show under oath why there was any good, sufficient legal cause to reconder the said summary judgment granted and imposed. Without such timely 14 days period in which affidavits could have been filed, and per the holding of Jensen v. State 139 Idaho 202, (Idaho 2003) the trial court lost jurisdiction over DAWSON's motion for reconsideration. DAWSON's said void motion for reconsideration did not raise any basis of facts or law, that it extended or was sought to reverse, the Dismissal with Prejudice of Dawon's and also McLean's complint for lack of diligent prosecution.

February 8, Dawson and McLean's Estate and purported heirs, of which there were no estate or heris with standing or capcity fileda motion to set aside order and quieting title judgment per IRCP, Rule 60(b)(6) with a rambling affidavits and exhibits thereto, but premising said Rule 60(b)(6) motion on DAWSON's earlier filed motions for reconsideration, which failed to timely and properly be filed within the required 14 days, thus making it void ab initio. (R. Vol II, pp 617-628, 654-660)

April 8, 2008 a Memorandum Decision and Order Denying

Plaintiffs'/Third Party Defendants' Motion for Reconsideration was entered. R. Vol. II, 667-686. Among several April 10, 2008 orders granted was that of Denying As Moot Plaintiffs' Motion to Change Caption, R. Vol II, 686-697.

April 16, 2008 DAWSON filed a Motion to Alter or Amend a Judgment. which was denied July 2, 2008. R. Vol II, 710-717, 753-756.

The district court entered its First Amended Judgment altering the early judgment so it did not quiet title to John N. BAch in an 8 plus acre Zamona Casper parcel, and revising the language of the mandatory injunction provisions. R. Vol II, 730-738.

July 9, 2008, Respondents Dawsons and whoever should have been McLean's representatives, but weren't and dispite the absence of any probate representative or duly appointed estate, filed a Second Amended Notice of Appeal. R.Vol II 757-761.

C. IDAHO SUPREME COURT DECISION IN DOCKET 34712

DAWSON in his appeal, docket 34712, filed his APPELLANT"S BRIEF, 21 pages, June 19, 2009. The name of JACK LEE McLEAN, NOR HIS ESTATE NOR ANY REPRESENTATIVES OR DAUGHTERS were presented nor disclosed anywhere on the cover and in said brief as an named or interested party in said appeal. The five denominated issues on said appeal clearly were limited to appellant therein DAWSON and only DAWSON. Throughout the ARGUMENT portion and the Conclusion requested its was only DAWSON, so appealing and seeking relief. (DAWSON'S OPENING BRIEF, PP 5-20)

DAWSON admitted that his Rule 60(b)(6) motion which had not been ruled upon, could only be granted for "any other

reason justifying relief from the operation of the judgment."
. . ."only upon a showing of unique and compelling circumstances." He cited Palmer v. Spain, 138 798, 802, 69 P.3d 1059, 1062 (2003). In Dawson's quote from Palmer, he accepted its statement that: "it would be an idle exercise and a waste of judicial resources to to set aside a judgment if, in fact, there is no genuine justiciable controvery. (Citations omitted). While this requirement that a Rule 60(b) movant must show a meritorius defense has generally been applied in Idaho appellate decisions where the challenged judgment was taken by default, e. g. Reeves, its is equally applicable in the present circumstances where the judgment was rendered on the merits. It would be pointless to vacate a summary judgment and reopen the proceeding iif the party seeking relief has not shown taht it can raise genuine factual issues to defeat the summary judgment motion.' (Dawsons' AOP, Pg 6-7)

Respondent JOHN N. BACH's brief in opposition to DAWSON's cited two most recent cases which had cogent controlling application, to wit:

1. Esser Electric v, Lost River Ballistics Tech, Inc. decided May 20, 2008(30 days before Dawson's Opening Brief was filed) 145 Idaho 912, 916-920, 188 P.3d 854.

   (@ 917: "For over 110 years this Court has held that a party is not entitled to a relief from a judgment on the ground that judgment was entered due to the negligence or unskillfulness of the party's attorney. Esser Electric has not convinced us that we should change that policy. Therefore, it is not entitled to a new trial on the gounrd that its counsel committed misfeasance in failing to respond to the motion for summary judgment.")

   (@ 917-918: "we have not required the trial court to rule on the admissibility of the affidavit where there is no objection to it. If there is no timely objections, the trial court can grant summary judgment based upon an affidavit that does not comply with Rule 56 (e)."

2. United Student Aid Funds, Inc. v. Espinosa, U.S. Supreme Court decision Mar. 23, 2010, L.A. Daily Journal, D.A.R. 4307, 4309-4311. Re: A losing party can not rely on Rule 60(b)(4), Or 60(b)(6), as a substitute for a timely appeal. Rule 60(b) does not provided a licenses for sleeping or avoiding timely to perfect his rights as he's forfeited them on any basis via a claimed of 60(b) application.

Respondent John Bach's brief cited over 7 other Idaho case authorities which not just voided any application of Rule 60(b)(1) thourgh 60(b)(6), but held such efforts to seek relief per section 60(b)(4) through (b)(6 were beyond the court's jurisdiction and authority. ((These cases will be addressed under the appeal points, infra, all of which were either not cited or misapplied by Judge Simpson upon remand.)

The Idaho Supreme Court's Opinion by Justice Jones, in Docket 34712, overlooked and failed to apply any of the foregoing cited cases authorities but did affirm the denial of DAWONS' Motion for Reconsideration, per Rule 11(b)(2) The opinion REMANDED the case back to the district court, Judge Darren B. Simpson to rule upon Dawson's motion per Rule 60(b)(6) which Judge Simpson had failed to address and rule upon.

D. AFTER RECEIPT OF REMAND, TRIAL COURT REFUSED TO ALLOW GRANT OR SET HEARINGS AND ARGUMENTS ON THE ISSUE REMANDED TO IT ANF REFUSED ALL FURTHER INPUT FROM APPELLANT.

Upon receiving the file back July 30, 2010, the Court sua sponte issued a Status Order, Sept. 1, 2010, stating:

" . .this Court has requested the transcript of the oral argument before the Court on February 14, 2008, regarding he Plaintiff's Rule 60(b)(6) motion. Upon receipt . .the matter will be deemed submitted for purposes of this Court issuing its ruling upon said motion. The Court will review the previous and relevant pleadings and argument made in

support and opposition to said motion.

No additional brief may be submitted without a written order of the Court." Remand Clerk's Transcript" RCT P. 1-3

September 16, 15 days later, a Second Status Order, informed such FEb. 14, 2008 transcript has been received and the matter was submitted for purposes of the Court's consideration, reiterated no additional briefing without a written court order. RCT RCT: P 4-5. District Court Judge Simpson did not serve the partires with a copy of such transcript, nor was there any notice if, what documents would be given judicial notice per I.R.E., Rule 201(b)(c)(d)(e), etc. The trial court cited no local nor I.R.C.P, it was following.

October 29, 2010 a SECOND AMENDED JUDGMENT was filed at Blackfoot County, in Chambers (CRT: 7-10) along with an ORDER GRANTING PLAINTIFF WAYNE DAWSON'S MOTION FOR RELIEF FROM JUDGMENT. RCT: 11-31.

The pertinent parts of the SECOND AMENDED JUDGMENT read:

"THIS COURT, having granted Plaintiff Wayne Dawson's Motion for Relief from Judgment, finds that the First Amended Judgment, entered in this case on May 27, 2008, should be vacated and this Second Amended Judgment should be substituted therefor.

Plaintiff's Complaint, as it pertains to Wayne Dawson, is hereby dismissed with prejudice for failure to prosecute. Plaintiff Jack Lee McLean, Trustee, was previously dismissed with prejudice from this lawsuit.

Intervenor-Complaint John N. Bach's Motion for Summary Judgment is granted upon Dawson's failure to respond thereto. In accordance with his verified Complaint in Intervention, John N. Bach, individually, shall have quiet title to an undivided one-fourth (¼) interest in the forty (40)-acre parcel of land referred to as the "Peacock Parcel" or the "Peacock 40-Acre Parcel." The Peacock Parcel is described as:

(Legal Description omitted herefrom)

Defendant Cheyovich Family Trust, Milan and Diana Cheyovich shall have quiet title to an undivided one-fourth (¼) to the Peacock Parcel.[4]

This Court takes judicial notice that Plaintiff Dawson was granted an undivided one-fourth interest in the Peacock Parcel in Bach v. Miller, Teton County case no. CV-2008-202.[5]

This Court also takes judicial notice that Plaintiff McLean, deceased, by and through his representative Lynn McLean was granted an undivded one-fourth interest in the Peacock Parcel in Bach v. Miller, Teton County case no CV-2008-202.[6]

This is a final order, appealable as a matter of right pursuant to Idaho Appellate Rule 11(a)(1).

IT IS SO ORDERED." RCT: 7-9

The Order Granting Plaintiff Wayne Dawson's Motion for Relief from Judgment, states, in pertinent part "II. ISSUES":

McLean and Dawson's 60(b) Motion relief upon the arguments made in their Motion for Reconsideration.[7] All of the arguments raised in McLean and Dawson's Motion for Reconsideration were addressed in the Memorandum Decision and Order Denying Plaintiffs'/Third Party Defendants' Motion for Reconsideration.[8]

The Idaho Supreme Court directed this Court to consider relieving Dawson of the original judgment entered in this case.[9] as well as the First Amended Judgment,[10] on the basis of the inconsistency between the relief requested by Bach in his intervening complaint[11] and the relief granted in the Judgment and the First Amended Judgment.[12]

Based upon this Supreme Court's directive, the issues presented include:

1. Has Dawson shown unique and compelling circumstances justifying relief from the First Amended Judgment?

2. If Dawson meets the standard for Rule 60(b)(6) what relief is he entitled to received?

. . . RCT; 12-13

The rest of Order granting Dawson's motion, failed accurately to state, analyze, apply or quote the Joint MEMORANDUM issued by Judge Jon Shindirling controlling in the Quiet Title Judgements, in Teton CV 01-265 and CV 01-33. RCT: 16-17, 22-30.

November 15, 2010 Appellant filed three (3) motions, to wit: 1) To strike, quash & Vacate Court's Order Granting Plaintiff Wayne Dawson's for Relief from Judgment & Second Amended Judgment, I_R.C.P., Rules 12(f), 12(g)(2)*4), 19, et seq; 2) Order Granting New Hearing Before Unbiased, Qualified Judge, I.R.C.P., Rule 59(a)(6) insufficiency of Evidence, error in law/ against the law) & Rule 59(e); and 3) Order Per I.R.C.P. Rule 60(b)(1)(2)(3)(4)(5) & (6), RCT: 32-43

Respondent DAWSON, filed along with McLean, on Nov. 19, 2010 a series of Objections to Appellant's said motions. RCt: 44-50. Appellant , Dec. 3, noticed, called up, for hearing his said three (3) motions for Friday, Dec. 17, 2010 at 10:30 a.m., which included to strike McLean's/Dawson's objections, including voiding Marvin Smith's Dec. 1, 2010 letter to Judge Simpson, (RCT: 53), and setting forth further points and authorities in support of his three (3) motions. ((RCT:50-70.

After McLean and Dawson sought to appear telephonically, which included their request to deny Appellant oral argument and decide his motions on briefing, etc., (RCT: 71-75), Dec. 9, appellant filed his Notice of Appeal (RCT: 76-79) along with his Opposition and a motion to strike McLean's & Dawon's objections to the Dec. 17 hearing date. (RCT: 80-82. A second copy of Appellant's NOTICE OF APPEAL is set forth at RCT, Pages 83-86, wherein as ISSUE 7: he raises the Question: "DID THE TRIAL COURT ERROR FURTHER IN DENYING ALL OR ANY OF APPELLANT"S THREE (3) MOTIONS WHICH WERE (TO BE) HEARD ON OR ABOUT DECEM-17, 2010? (RCT: 85)

Dec. 13, 2010, four days before the notice Dec. 17 hearing McLean and Dawson brought a motion to strike Appellant's Reply Memorandum, along with an order shortening time for service. RCT: 87-95

December 14, 2010, the next day after McLean/Dawson's said filed motion and objectisn, Appellant his written Objections, opposition and refutations to McLean's/Dawson's reply memo, etc., raising again the McLean has no standing, capacity nor any basis of representation as he is dead, having no estate established legally, nor any duly appointed, recognized representative; and that even Dawson, lacks standing or capacity to make such objections or motions, that the October 28, 2010 said Order and Second Amended Judgemnt are VOID AB INITIO , per his several memos filed in support of his said three (3) motions and that "NO AFFIDAVIT IS FILED IN SUPPORT OF (Respondents') REQUESTED ORDER TO SHORTEN TIME, etc., "no could it be made, as DAWSON and his counsel,

> still seeking in violation of the basic rules of procedural and substantive due process and equal protection of JOHN N. BACH's said rights, special, baised and favorably judicial treatment and renderings by this Court, all in contravention of both the ORDER and SECOND AMENDED JUDGMENT which are void ab initio. Nor does Dawson and Mr. Smith address how McLean, etc., could be a party herein at this date, See. I.C. section 15-3-1600." (RCT: 96-98

Dated December 20, 2010, but itemized in the Remand Clerk's Transcript as filed without date is an Order Augmenting Appeal, Supreme Court Docekt No. 38370-2010 Teton County Docket No. 2001-265, filed May 05, 2009, at RCT, 99-100. Immediately following at RCT, 101-105, filed Dec. 14, 2010 filed at 5:00 p.m (filed one day after McLean/Dawson's -unsupported by an affidavit- motion to strike. etc., filed also at 5:00 p.m) Judge Simpson issed an ORDER DENYING ORAL ARGUMENT ON PENDING MOTIONS AND OBJECTIONS, (RCT: 101-105,) especially finding: " , , oral argument would not produce any additional benefit to the Court for purposes of rendering a decision on the various motions before this Court."

. . . All pending motions and objections thereto are hereby deemed submitted to his Court, A written decision will issue within thirty (30) days. " RCT: 101-104.

Thereafter, forty-four (44) days later, January 27, 2011, at 11:49 a.m., Judge simpson issued an ORDER DENYING INTERVENOR-COMPLAINT JOHN N. BACH'S MOTION TO STRIKE, TO ALTER OR AMEND, OR FOR RELIEF FROM FINAL JUDGMENT, consisting of nine pages, wherein at the last three (3) pages thereof, Judge Simpson Per IRCP, Rule 11, holds: McLean and Dawson's request for attorney fees pursuant to Rule 11 shal be granted." This Order is believed to have been filed directly with the Idaho Supreme Court although, the Order's proof of sevice by mail does not so indicate/state.

As ATTACHMENT NO. 1 , a complete copy of such ORDER DENYING, etc., Appellant's said three (3) motions, is made a part of the Remanded Clerk's Transcript on Appeal.

During the entire period of time, this matter was returned to the trial court judge, no oral hearing was allowed, recognized nor perfected as required by the decisions, orders and rulings of Judge Darren B. Simpson.

IV. ISSUES ON APPEAL

1. DID MCLEAN OR DAWSON HAVE ANY STANDING OR CAPACITY TO CHALLENGED JUDGE SHINDIRLING SEPT. 11, 2007 NUNC PRO TUNC JUDGMENT AND THE JOINT CASES MEMORANDUM?

2. WERE THE ISSUES REMANDED TO THE DISTRICT BARRED BY LACK OF JURISDICTION VIA MOOTNESS, ACQUIESENCE, INVITED ERROR OR WAIVER DOCTRINES?

3. DID THE DISTRICT COURT UPON REMAND VIOLATE BOTH PROCEDURAL AND SUBSTANTIVE RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF APPELLANT RENDERING THE ORDERS AND SECOND AMENDED JUDGMENT VOID AB INITIO?

4. WERE THE ORDER AND SECOND AMENDED JUDGMENT OCTOBER 29, 2010, PRECLUDED BY THE DOCTRINES OF JUDICIAL ESTOPPEL, QUASI-ESTOPPEL, RES JUDICATA, COLLATERAL ESTOPPEL OR CLAIM PRECLUSION?

5. DID THE TRIAL COURT UPON REMAND FAIL TO APPLY REASONABLE AND DILIGENT DUE DISCRETION IN RULAS IT DID, ESPECIALLY IN GRANTING RESPONDENT'S RULE 60(b)(6) MOTION AND TAKING JUDICIAL NOTICE?

6. DID THE TRIAL COURT ERROR IN DENYING ALL THREE (3) APPELLANT'S MOTIONS SET FOR NOTICED FOR HEARING DECEMBER 17, 2010?

I V. ARGUMENT

A. THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE FOR LACK OF PROSECUTION OF McLEAN'S AND DAWSON'S VERIFIED COMPLAINT & THEIR LACK OF FILING AN ANSWER TO INTERVENOR COMPLAINT BARRED THEIR STANDING OR CAPACITIES

The plaintiffs McLean and Dawson, herein, have not appealled nor attacked directly nor collaterally, nor can they at all, the district court's granting of John N. Bach's motion heard August 7, 2007, to dismiss with prejudice their verified complaint with prejudice; moreover, both of them, even if McLean as a deadman had any claim to assert, which he could not nor did he have any duly appointed appearing estate representative for him, he and Dawson had never filed an acceptable answer putting in issue the averments of John Bach's intervenor complaint. For all purposes of fact and law, they had defaulted and admitted all the averments of John N. Bach's said complaint in intervention and further as that complaint was expaned per the affidavits, exhibits and other admitted facts and evidence by the granting of John Bach's motion for summary judgment. Anderson-Blake, Inc. v. Los Caballerose, Ltd. (Ct. Appl991) 120 Idaho 660, 818 P.2d 775

Under such circumstances of dismissal with prejudice and default admissions by all appearing third party defendants, specifically DAWSON, and even McLean's lost all their titles, rights etc, via the affidavits, exhibits and even memos of points and authorities filed in support and referenced and judicially noticed. Among such irrefutable facts, determinations and

unassailable legal conclusions were the following by Judge Shindirling, at pages 9, 13-15 of his JOINT CASES (9-11-2007) MEMORANDUM AND ORDERS, ETC.:

> "JOHN N. BACH's initial memo brief in support of said motions for summary judgment and dismissal with prejudice for lack of diligent prosecution presented more than adequate, if not overwhelming case authorities, statutes, etc., for the Court's immediate granting of both motions on all grounds/basis. He further sought a permanent injunction. JOHN BACH in his EX 2: Affid-Teton CV 02-208 (testified) that he and DAWSON as to the ZAMONA and PEACOCK parcels had an oral agreement if JOHN BACH dissolved said joint ventures DAWSON (would) seel to JOHN BACH any interest at book value, such oral agreement being governed by Calif. law and authorities, Masterson v. Sine (1968) 68 C.2d 222. DAWSON never timely acted to attempt to enforce such oral agreement and against per Rule 13(a) as well as the two (2) year STATUTE OF LIMITATION for breach of oral agreements in Calif., DAWSON was barred and estopped by such statute (to) claim any moneys due him. (It is noted that said EXH. 2 Aff, incorporated other affidavits of JOHN BACH, along with several memos of authorities he filed in Teton CV 02-208, which this Court had previously considered and did so again in granting the motions herein)" (@ p.9)
>
> . . . . .
>
> "This Court is required per Rule 1, IRCP, to provide expeditious, fair, just and conclusive order and judgments when required. JOHN N. BACH has shown, proven and despite the intents of plaintiffs and their counsle in both CV 01-33 and CV 01-265 clear and convincing evidence and authorities for the granting of his motions for summary judgment."
>
> . . . .
>
> "The Court finds and determines that PLAINTIFFS and their COUNSEL have waived, abandoned (and by their violations of the provisions of Rule 11(a)(1), their answers, affirmative defenses and all/any opposition to the relief sought by JOHN N. BACH per his compaint in intervention in CV 01-265, which also applies to their complaint in CVol-33, per the express provisions of the Idaho Racketeering Statute, I.C. 18-7804(a)(b)(c),(d), (g)(1)(20 and (h) with

with Judgments and permanent injunctions to be issued in both said actions, CV 01-33 and 01-265, per I.C. 18-7805 (a),(c),(d)(1)(2)(3)(4)(5)(6) & (7).

The COURT ORDERS THE IMMEDIATE DISMISSAL WITH PREJUDICE OF BOTH CV 01-33 and CV 01-265 FOR UTTER LACK BY THE PLAINTIFFS AND THEIR COUNSEL OF DILIGENT PRSOECUTION, AND SEVERE PREJUDICE TO JOHN N. BACH, his witness to be called and to thie very Court." (@ P. 13)

By Appellant's said granted motions by Judge Shindirling, John Bach had both amended, expanded and been granted full relief including such expanded=amended issues and facts estblishing their inclusion in the summary judgment and Judgment September 11, 1007 Nunc Pro Tunc. As statd in 61B Am. Jur. 2d, Section 955, page 224:

" . . . the doctrine is that where the parties have attempted to joint an issue to be tried and it has been tried, however defective in form the pleadings may be a verdict for one or the other will beheld to cure such defective pleadings pleadings, that is cure them as to form and supply all omitted averments concerning essential facts, relief of, provided the proof of or admission of such facts was necessarily considered favor the verdict (or determining order of the court). The evidence presented to the (trial court) constitutes the claim of a party, superceding the party's description of the claim. Where a theory of recovery is tried fully by the parties, the court may base its decision on that theory and deem the pleadings amended accordingly.[68] . ." (N. 68-cites- Anderson-Blake Inc v. Los Caballeros Ltd, 120 Idaho 660, 818 P12 775 (Ct. App 1991).

It should be emphasized that "As a general rule, facts alleged by one party need not be pleaded by another. So, a defective pleading of one party may be aided by the pleading of his adversary for a party will not be heard to insist that his adversary has committed to allege the very facts which such party has supplied in his pleadings. Where the alleged defect is not only supplied by the adverse party, but where he has also obtained the benefit of a full, fair and impartial trial in which he was given full opportunity to offer every fact and circumstance tending to relief him from liability, he will not again be permitted to retry the cause." Geros v. Harries, 65 Utah 227, 236 P. 220, 39 A.L.R. 1297 (1925).

Therefore, Judge Shindirling had broad discretion in view of the total absence of any opposition, no argument at the hearing of the motions and no stated/voiced objections to the affidavits and memos submitted by Appellant, to frame his JOINT CASES MEMORANDUM and QUIET TITLE JUDGMENT herein, so that both conformed to the unopposed facts, law and circuustances proven Herrman v. Woodell, 107 Idaho 916, 693 P.2d 1118 (Ct. App. 1985) The issues expanded if such they were and the rulings thereon by Judge Shindirling were not misleading, nor unclear but with finality. (It is noted that Alva Harris DAWSON's counsel had over three (3) court hearings to present contravening evidence, but did nothing, made no opposition nor objections.

Even when Marvin Smith was substituted in to represent DAWSON and the without standing estate and heirs of McLean, no time, proper in form (under penalty of perjury) affidavits

were filed by Smith, nor Dawson and most conspicuously, not by Alva Harris, explaining a)why/reason he couldn't or didnt' file any opposition/counteraffidavits to summary judgment, nor b) Why Dawson didn't/couldn't file affdaivit denying John Bach's acquiring all his title, interests, etc., in Peacock. Parcel and c) possible abatement or stay of any statute of limitations which allows him to claim his original one fourth undivided interest in Peacock.

Appellant had thus obtained all of Dawson's ownership title, interests and benefits to Peacock. Dawson nor any of his attorneys have denied it via any relevant, factually detailing affidavits otherwise.

McLean via Teton Instrument No. 148042 , copy presented via John Bach's affidavits submitted in supported of summary judgment to Judge Shindirling, was never disputed/challenged. Appellant unquestionably had acquired any/all of McLean's former title/interests in Peacock even before his death. His daughers after were denied by Judge Simpson as substituted named successors to McLean, dismissed with prejudice their appeal. Such copy of dismissal is EXHIBIT "B", page 10, to Intervenor-Complainant JNBACH's three (e) motions. RCT: 41 Appellant's Affidavit in Support of said 3 motions further expanded and clarified the overlooked facts of these conveyed interests to him, by Judge Simpson, RCT: 33-37 All such facts were unassailable and without jurisdiction for reconsideration or Rule 60(b)(6) review and striking or setting aside by Judge Simpson. Coombs v. Churnow and Griffiths 2009 Opn 124, Oct 13. citing/applying Donaldson v. Henry 63 Idaho 467, 473, 121 P.2d 445

Among the controlling cases decisions cited by Appellant to this Idaho Supreme Court, and even Judge Simpson, (RCT: 57-70)(who refused to allow not just oral argument of said cases but failed to even acknowledge them, their application or the fact he never shepardized nor wanted to address them,) reveals a premindset of actual prejudice and bias against the appellant, The following cases are not mentioned at all by Judge Simpson's SECOND AMENDED JUDGMENT nor ORDER GRANTING DAWSON'S MOTION FOR RELIEF FROM JUDGMENT:

1. Esser Electric v. Lost River Ballistics Tech, Inc. (May 20, 2008) 145 Idaho 912, 916-20; 188 P.3d 854. "For over 100 years this Court has held that a party is not entitled to a relief from a judgment on the ground that judgment was entered due to the negligence or unskillfulness of the party's attorney. Esser Electric has not convinced us that we should change that policy. Therefore, it is not entitled to a new trial on the ground that its counsel committed misfeasance in failing to respond to the motion for summary judgment."

. . . .

"We have not required the trial court to rule on the admissibility of the affidavit where there is no objection to it. If there is not timely objections, the trial court can grant summary judgment based upon an affidavit that does not comply with Rule 56(e)." (See rest of opinion pages 918-920.)

2. United Student Aid Funds, Inc. v. Espinoza March 23, 2010, L.A. Daily Journal, D.A.R. 4307; Rule 60(b)(6) motion past 4 months from determinative order/judgment does not provide any basis for relief to reconsider/reopen original decision.

3. Hooper v. Bageley, Estate of Bageley, 117 Idaho 1091, 793 P.2d 1263 (Ct.App. 1990) Where plt uses a 60(b)(6) motion for substitute to amend judgment via reconsideration such 60(b)(6) motionis inappropriate and must be denied outright.

4. In Re Bli Farms Partnership (6th Cir.2006)465 F.3d 654 Late unsupported Rule 60(b) motion is without jurisdiction, a nullity.

Therefore, McLean, long deceased, without any probated estate nor personal representative duly appointed for any estate (Alva Harris having falsely/deceptively misled the court in Teton CV 02-208 that one of his daughters[1] had been so appointed when in fact she hadn't) had no interest in Peacock, nor did Dawson. Not having appealled the dismissal with prejudice of their complaint, and such transfer of their titles and interests in Peacock, being proven via Appellant's summary judgment motion granted by Judge Shindirling res judicata, collateral estoppel, claim and issue preclusion doctrines were sua sponte to be applied.

One point whic Judge Simpson overlooked or decided not to consider in attempting to return McLean, deceased, and DAWSON' titles and interests to Peacok: The facts, issues and his determinations in granting said summary judgment, 1) went far beyond the limited issues of the amended judgment in 02-208 re Dawson's interest, such issues now being decided with finality by him when 2) Teton CV 02-208 was on appeal in Docket No. 3717, not final and not involving the same issues which he had decided.

This Idaho Supreme Court held in Storey Const, Inc. v. Hanks, 224 P.3d, 468, 477 claim preclusion bars further adjudication not only on matters offered and received to defeat a claim but also "every matter which might and should have been litigated in the first suits." Therein, this Court noted sua sponte application re the "transactional concept of a claim is broad."; that claim preclusion "may apply even where

1. Whatever judicial noticed documents, filings, etc., Judge Simpson took of CV 02-208 he would have had to take notice that McLean had no estate representative duly appointed and sworn to administer the estate. Appellant so notified this Court in another appeal but was denied oral argument in the appeal which led to said REMAND.

there is not a substantial overlap between the theories advance in support of a claim or in the evidence relating to those theories." The holding of Storey bars both Dawson's motion for reconsideration, which was not supported by any affidavits either timely nor untimely, and further bars any other motion for relief per Rule 60(b)(4) through (6). What has been continually overlooked by non trial Judge Simpson is that Rule 11(b)(2)(B) motion for reconsideration has a 14 day mandatory time period from the entry of a final judgment of the entry of an interlocutory judgment which is made Final by a Rule 54(B) Certificate of Appealability.

The motion for reconsideration which Dawson and McLean's people rely upon required affidavits sworn under oath testimony to be filed within said 14 days mandatory period. No such affidavits were filed timely nor at any other time which could be accepted, considered or applied. The time requirement of Rule 11(a)(2(B) motion for reconsideration is like the 42 day limit for appealing from a final judgment; if the NOTICE OF APPEAL with filing fees/moneys is not filed and paid, the Appellate Court jurisdiction is lost. In Jensen v. State (Idaho 2003) 139 Idaho 202, cited by Appellant repeatedly, the motion there for reconsideration was not served nor filed within said mandatory 14 days. The trial court judge struck such reconsideration papers, as he had lost all jurisdiction to hear such late, untimely, and incomplete motion for reconsideration. The fact that firstly Judge Simpson denied Appellant's motion to strike the untimely motion to reconsider but denied the mo-

ion to reconsider on the merits, which was reviewed and affirmed by the Idaho Supreme Court before remand for him to rule on Dawson's 60(b)(6) motion, does not give either jurisdiction, nor any discretion nor any right of further review and analysis even by secretive judicial notice taken by current Judge Simpson of some aspects of the AMENDED JUDGMENT against DAWSON, in CV 01-28 . See Ponderoso Paint Mfg, v Yack(Id Ct.App 1994)195 P3d 745, 125 Idaho 310, 317-318

Whatever judicial notice and application of certain facts of ruling se taken was done in violation of the provisions of Idaho Rules of Evidence, Rule 201(a)(b) and especially 201(c)(d) and (e). No exact copies were ever presented nor served upon Appellant prior to such judicial notice, by Judge Simpson, nor by the Court Clerk, to have complaince with due process procedural and substantive rights; nor was any date, time and place of being heard allowed re whatever documents were judicial noticed and applied by Judge Simpson. In Ponderoso Paint Mfg v. Yack, supra, 125 Idaho @ 318 appellate Court said Rule 60(b) motion essential is for reconsideration of summary judgment motion and was properly denied.(see also Plg 319-320.) Thus where both an untimely without affidavits or relevant memo of points and authorities is not filed within said mandatory 14 days and a motion for Rule 60(b)(6) relief is likewise incomplete, inadequate, etc., but is based upon and incorporates whatever basis is presented per the motion for reconsideration, such motion per 60(b)(6) must be considered late, unsupported, a nullity and without-court having no-jurisdiction. In Re Bli Farms Partnership (6th Cir 2006) 465 F.3d 654, 657-78.

By virture of the foregoing analysis of refusals, failures and avoidances by McLean, Dawson and their attorneys, first Alva Harris and now Marvin Smith, NOT ONE HAVE A timely, admissible, based upon personal knowledge and testimonies of Dawson ever SHOWN a meritorius defense to Appellant's intervenor complaint as amended and expanded, all proven by his summary judgment granted him and quieting title to three - Quarter title, interests and rights, undivided, with the only other one quarter undivided owners, Milan and Diana Cheyovich.

What showing after the unappealable, unassailable and final dismissal with prejudice of Dawson's verified complaint, has even been attempted by DAWSON or his current counsel, that he can plead, show, present evidence of facts, etc., that he hasn't violated the Idaho Racketeering Statute, as Judge Shindirling rules and entered judgment that he had, along with McLean? All avoidances of the facts and law are established that both McLean, Dawson and even their counsel, Alva Harris have repeatedly and flagrantly violated such statute againt John Bach, his property titles, interests, developement and commerical uses, expansions and commercial benefits, etc., which the court reserved the award of damages, treble, attorneys fees, costs, etc., to be reset for trial upon return from the Idaho Supreme Court after reaffirming his Order and Judgment of Sept 11, 2007 Nunc Pro Tunc.

In Dawson's Appellant's Brief in Dkt No 34712, pages 6-7 he quotes from Ponderosa Paint Manfufacturing Inc. v. Yack 125 Idaho 310, 317-18, that even a Rule 60(b) movant "must show

what admissible, relevant still to be decided facts constituting both the capacity/standing to recover with and to defense of the expanded/amended intervenor complaint. As stated "This policy recognizes that it would be an idle exercise and a waste of judicial resources for a court to (allow the filing of an answer) if, in fact, there is no justiciable controversy."

The major second deceptive and frivolous contention in said Dawson's Oening Brief, Dkt 34712 is that "This case presents a set of unique and compelling circumstances",

No it doesn't! Dawson failed to answer John Bach's complaint in Teton CV 02-208. He failed to timely persoanlly and as required by Rule 56(c) through (e) timely execute and filed within the mandatory reconsideration motion period any affidavit that presented any factual showing to avoid the legal rule of liability application against him and Alva Harris as followed for over 100 years, as stated in Esser Electri, supra 1425 Idaho 912, 916-920., and the lack of both standing and jurisdiction issues decied in United Student Aid Funds, Inc. v.Espinoza 2010 L.A. Daily Journal, D.A.R. 4307

As a matter of law, Dawson is without standing or capacity to benefit from the Order and Second Amended Judgment of October 29, 2010 which now per Appellant's appeal must be reversed vacate/invalidated as void, and the JOINT CASES MEMORANDUM and ORDERs and QUIETING TITLE JUDGMENT WITH PREMANENT INJUNCTION of Sept. 11, 2007 Nunc Pro Tunc reinstated in full in every particular.

B. THE ISSUES REMANDED TO THE DISTRICT COURT WERE ALREADY RESOLVED IN APPELLANT'S FAVOR, BARRED BY LACK OF FUTHER JURISDICON VIA MOOTNESS, ACQUIESENCE, INVITED ERROR AND WAIVER DOCTRINES.

The issue or objection that a court lacks jurisdiction over the subject matter may be raised in any manner. Stanger v. Hunter 291 P. 1060, 49 Idaho 723. The corollary when some performance or condition of a judgment results in a lack of jurisdiction is that such is now moot or mootness.

There is a further corollary called the doctrine of invited error, which occurs to deny the court jurisdiction when a party such as Dawson and McLean acquiesced, invited or led the court into committing the error. Vendelin v. Costco Wholesale Corp. 95 P.3d 34, 140 Idaho 416.

For the further need to analyze this issue, Appellant refers hereto to all his points, authorities and arguments, etc., under Part A. supra and incorporates the same in full.

The Esser Electric v. Lost River Ballistics Tech case is a special form of not just invited error but waiver of any subsequent motions for reconsideration and Rule 60(b)(6), where there has also been a dismissal with prejudice of any affirmative defenses or mandatory counterclaim counts and causes of action, as was granted determined by Judge Jon Shindirling, which latter dismissal is final and without any appeal nor challenged whatsoever, at any time or stage. In Re Bli Farms Partnership (6th Cir. 2006) 465 F.3d 654, 657-78

There is also a lack of subject matter jurisdiction when a court violate both procedurally and substantively a party rights of due process and equal protection. Such rights are basically constitutional, U.S.Constitution and Idaho State Constution. These violations did not occur until Remand was ordered back to Judge Simpson. As Appellant was denied all allocution, notices of a meaningful hearing with specific day, time and place to present his argument and authorities, this is the first time that he has been able to raise such constitutional violations, besides his three (3)motions which were also denied any meaningful hearing and allocution, although notieed for hearing on Dec. 17, 2010. McGloon et al, vv. Gwynne, ISC Dkt 29450, 2004 Opn 113, Oct. 24, 2005; Dragotoius v. Dragotoius, 113 Idaho 644, 647, 991 P.2d 372 (1998).

As both said ORDER and SECOND AMENDED JUDGMENT of Oct. 29, 2010 were issued in violations of said due process and equal protection rights, they are void ab initio.

But another right of due process was violated by Judge Simpson, that of an unbiased and impartial judge to try the proceedings before him. He revealled that the reasons he did deny argument is that Appellant did not object to his two status order and therefore he waived his such rights.

No citation is made of any Idaho Civil Rule of Court that allows/presents such basis of the Judge's selfimposed waiver, but two I.R.C.P. Rules more than operate to the contai . to wit, Rule 1(c) and Rule 16(a). These two rules prohibit any local judges subjective unapproved rules of pro-

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cedure that has not been brought to the Idaho Supreme Court's attention with request for approval and a written enactment approval by this very Court for such rule. Rule 16(a) pertaining to status and procedural setting and motion orders, requires that all counsel be informed and their input received in advance or their objections. Such determination of Appellant's waive is unsupportable and not just unconstitutional but without authority, or judicial basis of jurisdiction.

A December 1, 2010 from Dawson's counsel, Marvin Smith is RCT: 53. It is written to Judge Simpson, informing him on a personal basis to make a correction for SMith on the written objection by Dawson to Bach's November 15, Motions. Smith sets forth the correction he requests be made and then states: "Please contact me if you have any questions about the foregoing." The direct request is of/for an ex parte contact from Judge Simspon. Such overture is not simply that of an innocent nor proper request. It violates the rules of professioanl and judicial conduct that an attorney and judge in a particula case cannot have personal ex parte contact and requests for more follow upof the same. Such is highly improper, unethical per se. Complaint of Judicial Misconduct (9th Cir. 2005) 425 F.3d 1179, 1187, Owlsey v. I.A.C. (2005) 141 Idaho 125, 132-38

No reply was received by Appellant with a copy or any copy or responding letter to Mr. Smith to stop his unethical ex parte contacts requests.

In such letter is revealled a personal relationship that does not adhere to judicial rules or principles of ex parte con-

contacts that are precluded from personal requests of a clerical nature which impact the objectivity and impartiality required of Judge Simpson.

A question is brought up which cannot be answered by the secretive and silent procedure followed by Judge Simpson re his taking whatever judicial notice that he did, relied upon and based his ORDER and SECOND AMENDED JUDGMENT of Oct. 29, 2010. Such unknown and how complete judicial notice, Judge Simpson did not declare specifically in advance to Appellant, did not provide him copies or an transcript on the record of as required, nor afforded Appellant the protections of I.R.E. Rule 201(b)(c) and (d) nor given any opportunity to be heard per (f).

If such lack of due process, procedurally and substantively produces VOID or VOIDNESS in Judge Simpson's order and Second Amended Judgment, the following statement he inserted in said ORDER, par. 12, page 9, RCT: 18 : "Nothing in the record show that McLean either sought or was granted a reversal of the 1-3-05 Order which dismissed McLean from the Lawsuit." McLean was dead by such time being deceased for over a year and almost two (2) months with no personal representative,

C. THE FOREGOING ANALYZE AND AUTHORITIES RESULT ON REMAND THAT JUDGE SIMPSON'S ORDER & SECOND AMENDED JUDGMENT ARE VOID AB INITIO

The same analysis under part A. and B. incorporated herein and more than result and establish the conclusion supra, under this Part C.

D. THE ORDER AND SECOND JUDGMENT OF OCT 29, 2010 ARE BARRED BY THE DOCTRINE S OF JUDICIAL ESTOPPEL, QUASI ESTOPPEL, RES JUDICATA, COLLATERAL ESTOPPEL OR CLAIM PRECLUSION

All foregoing analysis per PARTS A through C are incorporated herein as though set forth in full

Two cases already cited further support the foresaid conclusion: 1) Storey Const., Inc. v. Hanks 224 P.3d 468, 477 re claim preclusion is brought about by the finality of Dawson's verified complaint being dismissed with prejudice; any claims and every matter which might and should have been litigated by reason of said dismissed verified complaint results in all claim preclusiveness as to such included or related claims that could have been pursue with supporting evidece. Such evidence was not presented and is now barred further by res judicata and as a matter of law judicial estoppel, the latter to stop any repetitious regurgitation by DAWSON in any further attacks or motions to reopen the JOINT CASE MEMORANDUM, et., and QUIETING TITLE JUDGMENT, NUNC PRO TUNC issued by Judge Shirdling, September 11, 2007. 2) Coombs v. Churnow and Griffiths, 2009 Opn 124, applying Donaldson v. Henry, 63 Idaho 467, 473, that Judge Simpson had no jurisdiction nor authority regardless of what this Court on remand directed him to do, or so he thought he was to do, becuase he could not reopen the record nor redo whatever judicial notice and admission thereform, Judge Shindirling had accepted and inserted in his JOINT CAESE MEMORANDUM and ORDERs, etc. Judge Simpson neither had authority nor jurisdiction to attempt to correct what he believed were judicial errors guieting title to Zamora parcel.

The foregoing and incorporated authorities and arguments, supra, Parts A and C require the complete unaltered, reinstatement and binding effects of the JOINT CASES MEMORANDUM and ORDERS, along with the QUIETING TITLE JUDGMENT SOLELY IN JOHN N. BACH's favor with Permanent Injunction, being reinstated, of September 11, 2007 Nunc Pro Tunc.

E. THE TRIAL COURT UPON REMAND FAILED AND ERRORED GREATLY IN ATTEMPTING TO CONSTRUCT DUE DISCRETION WHICH IT DID NOT HAVE NOR PROPERLY EXERCISED IN GRANTING DAWSON'S RULE 60(b)(6) MOTION AND VIA TAKING UNDESIGNATED FACTS, JUDICIAL NOTICE.

The foregoing analysis and arguments per Parts A through D are referred to and incorporated herein as though set forth in each and every particular.

Judge Simpson's ORDER GRANTING DAWSON'S 60(b)(6) he misstates and misapplies what specific facts and evidence must be not demonstrated but include in establishing a unique and compelling unequivocal circumstances justifying relief. At his page 12 of said ORDER (RCT: 22) he cites First Security Bank of Idaho v. Stauffer, 112 Idaho 133 (Ct.App. 1986) because the district court amended its judgment without a hearing. But the facts and issues therein are far distance and none comparable to the issues raised by Judge Shindirling's wording of the JOINT CASES MEMORANDUM and ORDERS plus the QUIETING TITLE JUDGMENT, etc.,of Sept 11, 2007 Nunc Pro Tunc.

Without any such factual analysis of facts, issues and evidence involved, Judge Simpson leaps to Idaho Supreme Court case Berg v. Kendall, 147 at 579, 212 P.3 at 1009 re reversal

dismissal of a minor's personal injury action by the ineptitude of her guardian, that the representative of a minor lacking capacity to sue, "competely fails to prosecute a meritorious claim that results in the claim being dismissed with prejudice", granting relief under Rule 60(b)(6).

The facts and probable issues, along with the existence of a meritorious claim in Berg are clearly and immediate worlds apart and more than distinquishable from the facts and issues/evidence resolved by Judge Shindirling. Jst a few facts/issues to note in distinctions and without correlation herein: Dawson and McLean were not minors. They hired Alva Harris who did file a verified complaint. for Dawson and McLean, both experienced senior citizens and adults, who invested in developmental properties and Living JOINT VENTURER SPENDTHRIFT TRUSTS. It was juust Alva Harris who for some 6 and a half years dragged on said lawsuit, but both McLean and Dawson did nothing to have him bring it to fruition and resolution, which would have been via a court nonjury issues via final resolution of partition of the realty involved. The rest of the clearly distinquishable facts hav been set forth in A and B, incorpoated herein.

It wasn't just Alva Harris that was misfeasant and malfeasant, it was also Dawson, who even after said Quiet Title judgment issued in John Bach's favor, who never filed an affidavit or presented any relevant evidentiary showing to excuse under the other subparts of Rule 60(b)(1) through 4, why not

via a timely and sufficiently proper affiddavits showing a motion for reconsideration per Rule 11(a)(2)(b) wasn't filed. What parts of the evidence herein and the issues resolved per Judge Shindirling on Sept. 11, 2007 Nunc Pro Tunc are duplicative of any of the salient issues in Berg? Are aren't even close , nor did Judge Simpson in his said ORDER even attempt to make such identical facts, issues and procedural points in his said order. (See RCT: 22-25. The assertions Judge Simpson attempts to use as somehow a trump card is nonexistent, irrevlevant and against the public policy decisions of Esser Electric, supra, re the establishment of over 100 year precedent, "that a party is not entitled to relief from a judgment on the ground (it) was entered due to the negligence of unskillfulness of the party's attorney." Whether such negligence of unskillfulness be misfeasance, malfeasance or intentional deception, some criminal act or blackmail-extortion of his clients.

BERG's biggest and sole issue was to somehow stay or barred the running of the applicable statute of limitation to be able to file a lawsuit via a competent attorney to prosecute the minor's meritorius claim.

To determine whether a court abused its discretion involves a three part test: 1) Whether the trial court correctly perceived the issue as discretionary; 2) Whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and 3) Whether the trial court reach its determination through an exercise of reason. Campbell v.Kildew 141 Idaho 640, 645, 115 P.3d 731, 736 (2005)

However, Judge Simpson in failing to properly research and shepardize for the Esser Electric and U.S. Suprme Court case, United Student Aid Funds v. Espinoza, and the other cases citedd, supra, page 19, would not have utilized any discretion to abuse herein; he did not have any discretion whether to apply the principles of said above cases, as such was mandated by the very holdings of said Esser Electric and Espinoza cases- Espinoza specifically held that a litigatn cannot sleep on his appeal rights and utilize 60(b)(4)(5) and (6) in lieu of a timely perfected appeal.

Judge Simpson's ORDER DENYING INTERVENOR-COMPLAINT JOHN N. BACH's MOTION TO STRIKE, TO ALTER OR AMEND, OR FOR RELIEF FROM FINAL JUDGMENT (see copy of said Order in Attachment hereto. page 5-6 contains two very inaccurate statements of the law which he seeks to impose contrary to the above cited Esser Electric and Espinoza cases. He is in error when he states, "The Second Amended Judgment is neither again the law nor in conflict with the great weight of evidence as the relief granted tracks the very relief upon which Bach based his Complaint in Intervenion" and that "Rule 60(b)" . .provides a means for an aggrieved party to obtain relief from a "final judgment, order or proceeding" directly form the trial court without resorting to an appeal. These are not accurate and true correct perception of the issue as being discretinaly nor acting applying said inaccurate conclusions within the boundaries of a court's discretion herein if it had such discretion, which it did not. Finally even if there existed such

discretion the court did not utilize it through any exercise of reason, but revealled a predetermined and biased, partical and unopened mindset. Judge Simpson, besides violating Appellant's rights of due process, abusing his authority and position to not follow the Esser Electric case, further created both legal erros and perfunctorily undermines his entire analysis by his conclusion, Attachment page 6: Furthermore, Rule 60(b)(6) which is the catchall for the rule, was not intended to allow a court to reconsider the legal bais for its original decision." citing First Bank & Trust of Idaho v. Parker Bros, 112 Idaho at 32. Such cited case is now controlled and overruled if not invalidated by Esser Electric and the Espinosa cases, supra.

JUDGE SIMPSON ABUSED NOT JUST A NON EXISTENT AND INACCURATELY INSERTED DUE DISCRETION STARDARD INTENTIONALLY MISAPPLIED THE LEGAL PRINCIPLES AND LAW HOLDINGS OF ESEER ELECTRIC AND ESPINOZA.

A last point re Judge Simpson's repeated reliance on what Appellant's First Verified Complaint in Teton CV 02-208 and his Complaint in Intervention averred that Dawson and McLean, who non exitent estate and non existent representative dismissed themselves with prejudice from this Appeal, had originally an undivided one quarter interest in the JOint Venture Agreement. In paragraph 21 of such First Amended complaint, 02-208 he requested he be awarded more; in view of both Dawson's and McLean's default and the effect and required application of IRPC, Rule 13(a) the trial court acted without jurisdiction or authority to ordered such one quarter interests to Dawson and McLean. The Intervention complaint herein as amended, expanded and relief granted per the Idaho Racketeering Act, all error if any of which was invited by Alva Harris mslfeasance in not op[illegible] such summary judgment.

F. TRIAL COURT ERRORED IN DENYING ALL THREE (3) APPELANT'S MTIONS SET FOR/NOTICE FOR HEARING DECEMBER 17, 2010.

Appellant refers to all the issues, analysis and argument presented in A through E supra and incorporates the same herein as though set forth in full.

All of said incorporated parts A through E, reveal and Appellant contends more than sufficiently establishes the misapplication, miscitation, and misunderstanding of the issues, legal authorities and cases cited which required as a matter of law, especially per the violations of jurisdiction, due process rights denial and the prejudging and biased mindset and ulterior motive of Judge Simpson's ruling, Order and Second Amended Judgment, as being greatly in excess of and beyond his authority and judicial powers/process. Last-no attorneys fees are justified as awarded DAWSON and MCLEAN per Rule 11; appellant cited applicable and material case authorities which Judge Simpson voided-ignored.

CONCLUSION: Upon the limited record allowed by this Court, the cited case law precedents and issues analyzed and arguments presented, Appellant respectfully requests that this Court:

1. Reverse the district court's Oct. 29, 2010 ORDER and SECOND AMENDED JUDGMENT in its entirety

2. Reinstate, by granting this Appeal in full, and immediately reaffirm the JOINT CASES MEMORANDUM AND ORDER and JUDGE SHINDIR LING's QUIETING TITLE JUDGMENT with All Provisions of the Permanent Injunction, all filed Sept 11, 2007 Nunc Pro Tunc.

3. GRANT IN FULL AND EACH MOTION of the THREE MOTIONS AND ORDERS SOUGHT, REVERSING THE ORDER DENYING THEM OF JANUARY 27, 2011.

4. Reverse the district court's decision granting Dawson's and McLean's Rule 11 Award of any attorneys fees.

5. Awarding Costs and attorneys fees expenses to Appellant per I.C. 12-121, etc.

DATED: April 4, 2011

JOHN N. BACH PRO SE Appellant

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that i served two (2) copies of the foregoing document this date, April 4, 2010, via U.S. Mail, withthe necessary postage affixed thereto, to:

MARVIN M. SMITH, SMITH & BANKS, PLLC
591 Park Ave., Ste 202
Idaho Falls, ID 83402
Attorney for Respondents

A T T A C H M E N T "1"

FI) IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO
January 27, 2011
AT 11:19 a.m.
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO

IN AND FOR THE COUNTY OF TETON

JACK LEE MCLEAN, Trustee, and WAYNE DAWSON, Trustee, Plaintiffs, vs. CHEYOVICH FAMILY TRUST and VASA N. BACH FAMILY TRUST, Defendants. JOHN N. BACH, individually and dba TARGHEE POWDER EMPORIUM, LTD., Intervener-Complainant, vs. JACK LEE MCLEAN, Trustee, WAYNE DAWSON, Trustee, DONNA DAWSON, ALVA A. HARRIS, individually and dba SCONA, INC., KATHERINE M. MILLER, and DOES 1-30, inclusive, Third-Party Defendants.	Case No. CV-2001-265 **ORDER DENYING INTERVENER-COMPLAINANT JOHN N. BACH'S MOTION TO STRIKE, TO ALTER OR AMEND, OR FOR RELIEF FROM FINAL JUDGMENT**

BEFORE THIS COURT is the Motion by Intervener/Complainant John N. Bach (hereinafter "Bach") to strike the Second Amended Judgment, entered on October 29, 2010, for a

new hearing, or for relief from a final judgment.[1] In essence, Bach seeks reconsideration of this Court's *Order Granting Plaintiff Wayne Dawson's Motion for Relief from Judgment.*[2] Plaintiffs/Third-Party Defendants Jack Lee McLean, Trustee, and Wayne Dawson, Trustee (hereinafter "McLean & Dawson") objected to Bach's Motion and requested attorney fees under Idaho Rule of Civil Procedure 11(a)(1) (hereinafter "Rule 11").[3] Bach then moved to strike McLean & Dawson's Objection, for the same reasons argued in his Motion.[4] McLean & Dawson moved, pursuant to Rule 11, to strike Bach's Reply and Motion to Strike.[5]

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[1] See: Intervenor-Complainant John N. Bach's Motions re: 1.) to Strike, Quash & Vacate Court's Order Granting Plaintiff Wayne Dawson's for Relief [sic] from Judgment & Second Amended Judgment, I.R.C.P., Rules 12(f), 12(g)(2)(4), 19, et seq; 2) Order Granting New Hearing Before Unbiased, Qualified Judge, I.R.C.P. Rules 59(a)(1)(Order & Second Amended Judgment Abuse of Discretion &/or Prevented from Having any Fair Hearing) & 59(a)(6) (Insufficiency of Evidence, error in law/against the law) & Rule 59(e); 3) Order per I.R.C.P., Rule 60(b)(1)(2)(3)(4)(5) & (6), *McLean v. Cheyovich Family Trust*, Teton County case no. CV 2001-265 (filed November 15, 2010) (hereinafter **"Bach's Motion"**).

[2] Order Granting Plaintiff Wayne Dawson's Motion for Relief from Judgment, *McLean v. Cheyovich Family Trust*, Teton County case no. CV 2001-265 (filed October 29, 2010) (hereinafter the ***"60(b) Order"***).

[3] McLean's and Dawson's Objection to Bach's November 15, 2010 Motions and Motion for Attorney's Fees, *McLean v. Cheyovich Family Trust*, Teton County case no. CV 2001-265 (filed November 24, 2010) (hereinafter **"McLean & Dawson's Objection"**).

[4] Intervenor-Complainant John N. Bach's Motion to Strike/Opposition Response to McLean's & Dawson's Objection to Bach's Nov. 15, 2010 Motions and for Attorneys Fees' and Further Reply Memorandum by John N. Bach in Support of his Nov. 15, 2010 Motions, *McLean v. Cheyovich Family Trust*, Teton County case no. CV 2001-265 (filed December 7, 2010) (hereinafter **"Bach's Reply and Motion to Strike"**).

[5] McLean's and Dawson's Motion to Strike Bach's Reply Memorandum Dated December 7, 2010 and Response to Bach's Motion to Strike, *McLean v. Cheyovich Family Trust*, Teton County case no. CV 2001-265 (filed December 13, 2010) (hereinafter **"McLean & Dawson's Motion to Strike"**).

This Court shall not reconsider the *60(b) Order*. The findings therein are based largely upon Bach's own pleadings. Furthermore, Bach offers no authority for the applicability of Idaho Rule of Civil Procedure 12(f) (regarding motions to strike another party's pleading) to a judgment.

Neither does Bach explain the applicability of Idaho Rule of Civil Procedure 59(a)(1) allowing a new trial to be granted on the grounds of irregularity in the proceedings or abuse of discretion which prevented a fair trial. The Idaho Supreme Court issued its decision on June 4, 2010, and remitted the case back to this Court on July 30, 2010. This Court issued its Status Order on September 1, 2010, wherein the parties were informed:

> Based upon the Idaho Supreme Court's ruling, this Court has requested the transcript of the oral arguments made before the Court on February 14, 2008 regarding the Plaintiff's Rule 60(b)(6) motion. Upon receipt of the transcript the matter will be deemed submitted for purposes of this Court issuing its ruling upon said motion. The Court will review the previous and relevant pleadings and argument made in support and opposition to said motion.
>
> No additional briefing may be submitted without a written order of the Court.[6]

On September 16, 2010, this Court issued a Second Status Order, and informed the parties that the transcript of the February 14, 2008 hearing had been received and that the matter was submitted for purposes of this Court's consideration.[7] This Court reiterated that "No

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[6] Status Order, *McLean v. Cheyovich Family Trust*, Teton County case no. CV 2001-265 (filed September 2, 2010) (hereinafter the "***First Status Order***").

[7] Second Status Order, *McLean v. Cheyovich Family Trust*, Teton County case no. CV 2001-265 (filed September 16, 2010) (hereinafter the "***Second Status Order***").

additional briefing may be submitted without a written order of the Court."[8] The *60(b) Order* issued on October 29, 2010.

Bach never objected to the Court's *First* or *Second Status Order* or moved for additional briefing. Furthermore, he presented arguments against Dawson's motion for relief from judgment at the hearing held on February 14, 2008, which argument was reduced to a transcript and analyzed by this Court. For these reasons, Bach has not shown harm, nor has he overcome the inference of waiver created by his failure to object, when he had the opportunity, to the Court's communicated procedure.[9]

Bach's arguments under Idaho Rules of Civil Procedure 59(a)(6), 59(e), and 60(b)(1-6) reiterate the same positions Bach took in his pleadings and at oral argument. With regard to Bach's passing reference to Idaho Rule of Civil Procedure 59(a) and (e), a new trial may be granted where the evidence is insufficient to justify the verdict,[10] where the verdict "is against the law"[11] or if, after the court makes its own assessment of the credibility of the witnesses and the weight of the evidence, the court determines that the verdict is not in accord with the clear weight of the evidence.[12] A motion to alter or amend judgment, made pursuant to Idaho Rule of Civil Procedure 59(e) ("Rule 59(e)), provides a mechanism to correct legal and factual errors occurring in the proceedings.[13]

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[8] Id.
[9] See, e.g.: *Beale v. Speck*, 127 Idaho 521, 535, 903 P.2d 110, 124 (Ct. App. 1995).
[10] Idaho Rule of Civil Procedure 59(a)(6).
[11] *Tiegs v. Robertson*, 149 Idaho 482, 236 P.3d 474, 477 (Ct. App. 2010).
[12] *Johannsen v. Utterbeck*, 146 Idaho 423, 430, 196 P.3d 341, 348 (2008) [citing: *Hudelson v. Delta International Machinery Corporation*, 142 Idaho 244, 248, 127 P.3d 147, 151 (2005)].
[13] *Slaathaug v. Allstate Insurance Company*, 132 Idaho 705, 707, 979 P.2d 107, 109 (1999).

A trial court's decision to grant or deny a motion for new trial under Idaho Rule of Civil Procedure 59(a), or to alter or amend a judgment under Rule 59(e), is discretionary.[14] A court's discretion is examined under a three part test: (1) whether the court correctly perceived the issues as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable; and (3) whether the court reached its decision by an exercise of reason. [15]

In this case, the evidence upon which the *60(b) Order* is based comes from Bach's pleadings and the related lawsuits which Bach repeatedly referred to in his pleadings and in the orders he drew for Judge Shindurling's signature. The evidence is sufficient to justify the *60(b) Order* and the *Second Amended Judgment*.[16] The Second Amended Judgment is neither against the law nor in conflict with the great weight of the evidence, as the relief granted tracks the very relief upon which Bach based his Complaint in Intervention.[17] Therefore, neither a new trial, nor alteration of the *Second Amended Judgment*, is warranted.

Finally, Idaho Rule of Civil Procedure 60(b) (hereinafter "Rule 60(b)") provides a means for an aggrieved party to obtain relief from a "final judgment, order, or proceeding" directly from the trial court without resorting to an appeal.[18] The rule requires a showing of good cause and

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[14] *Tiegs v. Robertson*, 149 Idaho at ___, 236 P.3d at 477.
[15] *Sun Valley Shopping Center v. Idaho Power Company*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).
[16] See: Second Amended Judgment, *McLean v. Cheyovich Family Trust*, Teton County case no. CV 2001-265 (filed October 29, 2010) (hereinafter the "***Second Amended Judgment***").
[17] *60(b) Order*, at p. 13.
[18] *Matter of Estate of Bagley*, 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct. App. 1990) [citing: *First Security Bank of Idaho, N.A. v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986)].

specifies particular grounds upon which relief may be granted.[19] These grounds include mistake, excusable neglect, newly discovered evidence, fraud, misconduct, or satisfaction of the judgment.[20] In addition to listing specific grounds upon which relief can be granted, the rule contains a clause allowing reconsideration for "any other reason justifying relief from the operation of the law."[21] Like decisions under Rule 59(a) and (e), consideration of a motion under rule 60(b) involves an exercise of discretion.[22]

Bach's Motion does not reach any of the grounds for relief listed in Rule 60(b)(1), (2), (3), (4), or (5). Furthermore, Rule 60(b)(6), which is the catchall for the rule, was not intended to allow a court to reconsider the legal basis for its original decision.[23] Furthermore, a Rule 60(b)(6) must present 'unique and compelling circumstances' justifying relief.[24]

Bach's Motion is a reiteration of previous arguments, and, to the extent he criticizes the *60(b) Order* and the *Second Amended Judgment*, he does not present unique or compelling circumstances for granting relief under Rule 60(b)(6).

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[19] *Matter of Estate of Bagley*, 117 Idaho at 1093, 793 P.2d at 1265 [citing: *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982)].
[20] *Matter of Estate of Bagley*, 117 Idaho at 1093, 793 P.2d at 1265 [citing: *First State Bank & Trust of Idaho v. Parker Brothers, Inc.*, 112 Idaho 30, 730 P.2d 950 (1986)].
[21] Idaho Rule of Civil Procedure 60(b)(6).
[22] *Waller v. State Department of Health and Welfare*, 146 Idaho 234, 237, 192 P.3d 1058, 1061 (2008).
[23] *First Bank & Trust of Idaho v. Parker Brothers, Inc.*, 112 Idaho at 32, 730 P.2d at 952.
[24] *Villa Highlands, LLC v. Western Community Insurance Company*, 148 Idaho 598, 604, 226 P.3d 540, 546 (2010) [citing: *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996)].

McLean and Dawson's request for attorney fees is premised upon Rule 11.[25] Rule 11 requires that the signature of an attorney on any pleading or motion:

> ... constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> * * *
>
> If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.[26]

Rule 11(a) requires that the pleadings be: (1) well grounded in fact, (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (3) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increases in the costs of litigation.[27]

A decision whether to award sanctions under Rule 11(a) is discretionary.[28] Therefore, this Court must correctly perceive the issue as discretionary, act within the outer boundaries of its discretion consistent with consistently with the legal standards applicable to the consideration of an award, and through an exercise of reason.[29]

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[25] McLean & Dawson's Objection, at p. 5.
[26] Idaho Rule of Civil Procedure 11(a)(1) (relevant portions).
[27] *Riggins v. Smith*, 126 Idaho 1017, 1021, 895 P.2d 1210, 1214 (1995).
[28] *Gubler by and through Gubler v. Brydon*, 125 Idaho 112, 114, 867 P.2d 986, 988 (1994).
[29] *Gubler*, 125 Idaho at 114, 867 P.2d at 988 [citing: *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)].

Bach's Motion must be evaluated for reasonableness under the circumstances.[30] In other words, Rule 11(a) sanctions shall be assessed if the pleading is frivolous, legally unreasonable, or without factual foundation.[31] The appropriate focus is whether Bach conducted a "proper investigation upon reasonable inquiry" into the facts and legal theories of the case.[32]

The intent of Rule 11(a) is to grant to courts the power to impose sanctions for discrete pleading abuses or other types of litigative misconduct.[33] It is considered "a management tool for the district court to weed out, punish, and deter specific frivolous and other misguided filings" and should be exercised narrowly.[34]

McLean and Dawson contend that Bach's Motion is "not well grounded in fact and not warranted either by existing law or a good faith argument."[35] Since the *Rule 60(b) Order* is based upon Bach's own pleadings, as well as the judgment in *Bach v. Miller*, Teton County case no. CV-2002-208, upon which Bach relied as controlling precedent, Bach's attack upon the *Rule 60(b) Order* is without reasonable basis in fact or law.

Marvin Smith, counsel for the McLean and Dawson, shall file an affidavit, within fourteen (14) days of the date of this opinion, detailing those hours spent preparing his responses to Bach's Motion, and Bach's Reply and Motion to Strike. The issue will be submitted seven (7) days thereafter, in which interim Bach may file any written objections.

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[30] *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990).
[31] Id.
[32] *Riggins v. Smith*, 126 Idaho at 1021, 895 P.2d at 1214 [citing: *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 369, 816 P.2d 320, 325 (1991)].
[33] *Campbell v. Kildew*, 141 Idaho 640, 650, 115 P.3d 731, 741 (2005).
[34] Id., [citing: *Curzon v. Hansen*, 137 Idaho 420, 422, 49 P.3d 1270, 1273 (Ct. App. 2002)].
[35] McLean & Dawson's Objection, at p. 5.

Therefore, in consideration of the above premises, Bach's Motion is hereby **denied**. His Motion to Strike is likewise **denied**. McLean and Dawson's Motion to Strike is hereby **denied as moot**. McLean and Dawson's request for attorney fees pursuant to Rule 11 shall be granted. Counsel for McLean and Dawson shall file an attorney fee affidavit, as outlined above, within fourteen (14) days of the date of this Order.

IT IS SO ORDERED.

DATED this 27th day of January 2011.

Darren B. Simpson
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on 1/20/2011, I served a true copy of the foregoing Order Denying Intervener-Complainant John N. Bach's Motion to Strike, to Alter or Amend, or for Relief from Final Judgment on the persons listed below by mailing, first class, postage prepaid, or by hand delivery.

Marvin M. Smith, Esq. ANDERSON NELSON HALL SMITH, P.A. 490 Memorial Drive Post Office Box 51630 Idaho Falls, Idaho 83405-1630	☒ U.S. Mail	☐ Courthouse Box	☐ Facsimile
Kathleen M. Heimerl, Esq. P.O. Box 828 Victor, Idaho 83455	☒ U.S. Mail	☐ Courthouse Box	☐ Facsimile
John N. Bach 400 N, 152 E P.O. Box 101 Driggs, Idaho 83422	☒ U.S. Mail	☐ Courthouse Box	☐ Facsimile
Alva A. Harris, Esq. 171 S. Emerson Ave. P.O. Box 479 Shelley, Idaho 83274	☒ U.S. Mail	☐ Courthouse Box	☐ Facsimile

MARY LOU HANSEN, Clerk of the Court

By: Julie A. Freeman
Deputy Clerk

Charles A. Homer, Esq. (ISB No. 1630)
Dale W. Storer, Esq. (ISB No. 2166)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
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Idaho Falls, ID 83405
Telephone: (208) 523-0620
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

THOMAS H. ULRICH and MARY M. ULRICH, husband and wife,

Plaintiffs,

v.

JOHN N. BACH and all parties claiming to hold title to the hereinafter described property pursuant to that certain warranty deed recorded in the records of Teton County, Idaho on June 14, 1994, as Instrument No. 116461 and all unknown claimants, heirs and devisees of the following property:

A portion of the South ½ South ½ Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89 50'12" East, 2630.05 feet to the true point of beginning; thence North 00 07'58" East, 813.70 feet to a point; thence North 01 37'48" East, 505.18 feet to a point; thence South 89 58'47" East, 1319.28 feet to a point; thence South 00 07'36" West, 1321.69 feet to a point on the Southern Section Line; thence North 89 51'01" West, 1320.49 feet along the Southern Section Line to the South ¼ Corner of said Section 6, a point; thence North 89 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning. SUBJECT TO a 60 foot road and utility easement along the Western

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PLAINTIFFS' PRE-TRIAL MEMORANDUM

Property lines.
AND SUBJECT TO a 60 foot road and utility easement along the Southern Property Lines.

Defendants.

COME NOW Plaintiffs Thomas H. Ulrich and Mary M. Ulrich, husband and wife, (hereinafter "Ulrich"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and submit this Pre-Trial Memorandum pursuant to the Court Trial Scheduling Order entered in this Matter.

I. EXHIBITS

A. Deed transferring title to the Ulrich Property, as defined in the Verified Complaint (hereinafter the "Ulrich Property"), from Philip J. Sarasqueta and Marilyn R. Sarasqueta, husband and wife, and Louisa S. Sarasqueta, Trustee of the Sarasqueta Living Trust, dated October 30, 1990, to Thomas H. Ulrich and Mary M. Ulrich, husband and wife.

B. Deed transferring title to an additional 30 acres of property, adjacent and contiguous to the Ulrich Property (hereinafter "IRA Property"), from Philip J. Sarasqueta and Marilyn R. Sarasqueta, husband and wife, and Louisa S. Sarasqueta, Trustee of the Sarasqueta Living Trust, dated October 30, 1990, to the Bank of Commerce IRA Fund #8768 for the Benefit of Thomas H. Ulrich IRA.

C. Title insurance policy for the Ulrich Property.

D. Title insurance policy for the IRA Property.

E. Deed transferring title to the Ulrich Property from Teton West Corporation to Philip J. Sarasqueta and Marilyn R. Sarasqueta, husband and wife, and Joaquin F. Sarasqueta and

Louisa Sarasqueta, husband and wife (predecessors in interest to the Sarasqueta Living Trust, dated October 30, 1990).

F. Deed transferring title to the Bach Property, as defined in the Verified Complaint (hereinafter the "Bach Property"), from Teton West Corporation to, among others, Defendant John N. Bach's predecessor in interest, Targhee Powder Emporium, Ltd.

G. Copy of the final plat for Grouse Landing PUD approved by the Teton County Commissioners

Ulrich and Defendant John N. Bach (hereinafter "Bach") have not stipulated to the admission of any of the above exhibits because Bach is appearing *pro se*. At this time, Ulrich is unaware of any objections or any basis for any objections Bach may have to the above exhibits.

II. EVIDENCE IN LIEU OF LIVE TESTIMONY

No depositions have been conducted in this matter. Additionally, Ulrich does not plan to use any admissions, interrogatory responses or other discovery responses in lieu of live testimony at the trial of this matter.

III. DOCUMENTARY EVIDENCE SUPPORTING DAMAGES

Ulrich has not requested damages as part of the relief requested in this matter. Rather, Ulrich has requested that this Court quiet title of the Ulrich Property Easement in Ulrich, or, alternatively, issue a declaratory judgment regarding Ulrich's right, title and interest in the Ulrich Property Easement. Further, Ulrich has requested a permanent injunction prohibiting Bach from interfering with Ulrich's right, title and interest in the Ulrich Property Easement. Consequently, because Ulrich has not asked for damages, Ulrich will not submit any documentary evidence on that issue.

IV. WITNESSES PLAINTIFF MAY CALL TO TESTIFY AT TRIAL

A. EXPERT WITNESSES

1. Mike Quinn, c/o Nelson Engineering, 30 North First East, Driggs, Idaho 83422. Mr. Quinn is the lead engineer for Nelson Engineering, which conducted the survey of the Ulrich Property Easement, as defined in the Complaint in this matter. Mr. Quinn will provide testimony regarding the existence and location of the Ulrich Property Easement as described in the Ulrich Property Deed and Bach Property Deed. Mr. Quinn's testimony will be based upon his personal observations of the Ulrich Property Easement, the survey of the Ulrich Property Easement, and his review of Teton County land records.

2. Grant Moedl, or, alternatively, if Grant Moedl is not available, Chris Moss, c/o First American Title Insurance Company, 81 North Main Street, Driggs, Idaho 83422. Mr. Moedl is the manager of First American Title Insurance Company located in Driggs, Idaho. Mr. Moss is an officer in the title department of First American Title Insurance Company located in Driggs, Idaho. Mr. Moedl or Mr. Moss will testify regarding the chain of title of the Ulrich Property, the Ulrich Property Easement and the lack of any other legal access to the Ulrich Property. Mr. Moedl or Mr. Moss will also provide testimony regarding the chain of title of the Bach Property and the existence of the Ulrich Property Easement in both the Ulrich Property Deed and the Bach Property Deed. Mr. Moedl or Mr. Moss will base their testimony on their review of the Teton County land records.

B. FACT WITNESSES

1. Thomas H. Ulrich, 281 W. Harvest Run, Idaho Falls, Idaho 83404. Mr. Ulrich will testify as to all aspects of this matter.

2. Mary M. Ulrich, 281 W. Harvest Run, Idaho Falls, Idaho 83404. Ms. Ulrich will testify as to her knowledge regarding the routes Ulrich used to access the Ulrich Property.

Ulrich is not aware of any impeachment or rebuttal witnesses at this point in time, but reserves the right to present any rebuttal or impeachment witnesses not listed here if necessary during the trial, and to call any witnesses identified by Bach.

V. FACTUAL SUMMARY OF CASE

In December 1996, Ulrich purchased an approximately forty acre parcel of property located in Teton County, Idaho. At the time of purchase, the Ulrich Property was conveyed to Ulrich by Warranty Deed from Philip J. Sarasqueta & Marilyn R. Sarasqueta, husband and wife, and Louisa S. Sarasqueta, Trustee of the Sarasqueta Living Trust, dated October 30, 1990.[1] Such Warranty Deed gave Ulrich fee simple title to the Ulrich Property. The Warranty Deed contains an express grant of easement providing access to the Ulrich Property as follows:

> TOGETHER WITH a 60 foot road and utility easement being the 60 feet directly East of the following described lines: Beginning at a point North 89°50'12" West, 12.13 feet from the South ¼ Corner of said Section 6; thence North 00°07'58" East 813.70 feet to a point; thence North 01°37'48" East, 505.18 feet to the SW property corner.

(the "Ulrich Property Easement"). Access to the Ulrich Property was also guaranteed via a policy of title insurance. The Ulrich Property Easement traverses the western boundary of property allegedly owned partially by Bach. Additionally, the Ulrich Property Easement is reserved

[1] The Ulrich Property described herein contains approximately 10 acres. Ulrich bought the remaining 30 acres through the Bank of Commerce IRA Fund #8768 for the Benefit of Thomas H. Ulrich IRA. Pursuant to their deeds, the Ulrich Property and the IRA Property were required to be purchased together. Both the Ulrich Property and the IRA Property contain a grant of easement which traverses the western boundary of the Bach Property.

in the Corporation Warranty Deed granting title to Bach's predecessors-in-interest as follows:

SUBJECT TO a 60 foot road and utility easement along the Western Property lines.

Throughout the time that Ulrich has owned the Property, Ulrich has never demonstrated any intent to abandon the Ulrich Property Easement. Additionally, until late June, 2009, Bach permitted Ulrich to access Ulrich's property by traversing the Bach Property, albeit not via the Ulrich Property Easement, but via alternative routes.

Ulrich recently decided to develop the Ulrich Property and improve the Ulrich Property Easement by grading and paving the Ulrich Property Easement. On April 24, 2010, Plaintiff Thomas H. Ulrich telephoned Bach to inform him that surveyors would be present on the Ulrich Property Easement to survey the easement to prepare for the improvements. At such time, Bach repeatedly insisted that Ulrich has no easement and threatened Plaintiff Thomas Ulrich that if surveyors entered onto the easement that he would call the sheriff's office and charge the surveyors with trespass. Such insistence and threats by Bach prompted the filing of this current suit to quiet title in the Ulrich Property Easement in favor of Ulrich. On September 9, 2010, Ulrich filed a Motion for Preliminary Injunction, requesting that this Court permit the survey of the Ulrich Property Easement and to enjoin Bach from interfering in any way with such survey or removing any survey markers. On October 29, 2010, this Court entered an Order granting Ulrich's Motion for Preliminary Injunction. The survey of the Ulrich Property Easement was subsequently completed. Ulrich seeks to resolve all remaining issues regarding Ulrich's rights and interest in the Ulrich Property Easement.

VII. SETTLEMENT DISCUSSIONS

Because Bach is appearing in this matter *pro se*, the parties have not had a chance to attempt settlement discussions.

VIII. SUPPLEMENTAL RESPONSES TO INTERROGATORIES

Bach did not serve any interrogatories on Ulrich. Consequently, there is nothing upon which Ulrich would base a statement that all answers or supplemental answers to interrogatories under Rule 33 of the Idaho Rules of Civil Procedure reflect facts known to the date of this Memorandum.

IX. STATEMENT OF ALL CLAIMS

Ulrich has asserted the following claims which remain pending in this matter:

1. Quiet title in the Ulrich Property Easement in favor of Ulrich;
2. A declaratory judgment that Ulrich's right, title, claim and interest in the Ulrich Property Easement is dominant and superior to any right, title, claim or interest held by Bach in the Bach Property;
3. A permanent injunction and/or restraining order against Bach's interference with the Ulrich Property Easement; and
4. Costs and attorneys fees against Bach incurred by Ulrich in prosecuting this action.

X. ADMISSIONS OR STIPULATIONS OF THE PARTIES WHICH CAN BE AGREED UPON BY THE PARTIES

Because Bach is appearing in this matter *pro se*, the parties have not been able to confer regarding any admissions or stipulations which can be agreed upon by the parties.

XI. AMENDMENTS TO THE PLEADINGS AND ANY ISSUES OF LAW ABANDONED BY ANY OF THE PARTIES

Ulrich has not made any amendments to the pleadings or abandoned any issues of law. Ulrich is further unaware of any amendments to the pleadings by Bach. However, due to the nature of Bach's drafting of his pleadings, it is unclear whether Bach has abandoned any issues of law related to the claims made by Bach in this matter.

XII. ISSUES OF FACT AND LAW WHICH REMAIN TO BE LITIGATED AT TRIAL AND SUPPORTING LEGAL AUTHORITIES

1. **Whether Ulrich has right, title and interest in the Ulrich Property Easement through an express easement.**

"One who purchases land expressly subject to an easement or with notice, actual or constructive, that is burdened with an existing easement, takes the land subject to the easement." *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005). (citing *Checketts v. Thompson*, 65 Idaho 715, 721, 152 P.2d 585, 587 (1944)); *see also* I.C. § 55-603. "An express easement may be by way or reservation or exception." *Id.* (citing 7 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 60.03(a)(2)(I) (David A. Thomas ed., 1994). "An express easement by reservation reserves to the grantor some new right in the property being conveyed; an express easement by exception operates by withholding title to a portion of the conveyed property." *Id.*

"An express easement may be created by a written agreement between the owner of the dominant estate and the owner of the servient estate. It may also be created by a deed from the owner of the servient estate to the owner of the dominant estate." *Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710,714, 152 P.3d 581, 585 (2007). "Where the owner of the dominant estate is selling the property to be subjected to the servitude, an express easement may be created by reservation or exception." *Id.*, 143 Idaho at 714-15, 152 P.3d 585-86 (citing *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005)). "No particular forms or words of art are necessary [to create an express easement]; it is necessary only that the parties make clear their intention to establish a servitude." *See Combe v. Weeks*, 115 Idaho 433, 436, 767 P.2d 276, 279 (Ct. App. 1989)(disapproved of on other grounds, *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991)).

Teton West Corporation originally owned both the Ulrich Property and the Bach Property. When Teton West Corporation divided up the original property into what is now the Ulrich Property and the Bach Property, it expressly reserved the Ulrich Property Easement in the deed to the Bach Property and granted the Ulrich Property Easement in the deed to the Ulrich Property. Because the Ulrich Property Easement is an express easement, Ulrich is entitled to a declaratory judgment ordering that Ulrich has right, title and interest in the Ulrich Property Easement, and is entitled to an order quieting right, title and interest in the Ulrich Property Easement in Ulrich's favor.

2. **Whether Ulrich has abandoned the Ulrich Property Easement.**

Kolouch v. Kramer, 120 Idaho 65, 67, 813 P.2d 876, 878 (1991), is dispositive of the issues of abandonment and adverse possession in this case. The facts of *Kolouch* are nearly identical to the facts of the case at hand. In *Kolouch*, the Kolouchs owned a parcel of property. The deed to Kolouchs granted them an access easement over property owned by Kramer. *Id.*, 120 Idaho at 67, 813 P.2d at 878. When Kramer acquired the subject property, there was a utility pole, a board fence, and some trees in the easement area. *Id.* Subsequently, Kramer planted six spruce trees down the center of the easement, planted other trees within the easement, constructed a fence inside the northerly boundary of the easement, and a concrete irrigation diversion at the end of the easement. *Id.* Kramer also placed several large boulders at the east end of the easement. *Id.* Years later, Kolouch decided to develop the property and to pave an access road over the easement in order to service the property. *Id.* In pursuit of that goal, Kolouchs filed a complaint for declaratory relief requesting a declaration that they were the owners of the easement over the Kramer property, and further declaring that they were entitled to use the described easement for ingress and egress and for whatever further relief as the court deemed proper. *Id.*

The rule is well settled that mere non-use of an easement by grant does not affect an abandonment of the easement. *Id.* As the Idaho Supreme Court noted in *Kolouch*,

> [T]he present case involves an easement by written grant which has not been used by the Kolouchs (owners of the easement) since its creation. It was not until sometime around June of 1989 that the Kolouchs decided to use the easement by developing a road thereon for commercial purposes. That desire prompted their filing of the complaint for declaratory relief. Under the holding in *Quinn v. Stone, supra*, it is clear that no abandonment has taken place, as mere non-use is insufficient to work an abandonment.

Id. Likewise, in the current case, Ulrich has an easement by written grant which has not previously been used by Ulrich. It was not until some years after Ulrich purchased the Ulrich Property that Ulrich decided to use the easement by developing a road thereon for ingress to and egress from Ulrich's property. Prior to that time, Bach permitted Ulrich to access the Ulrich Property using alternative routes over the Bach Property. The Ulrich's non-use of the easement during the interim did not constitute an abandonment of the Ulrich Property Easement.

Further, "an abandonment of any right is dependent upon an intention to abandon and must be evidenced by a clear, unequivocal, and decisive act of the party." *O'Brien v. Best*, 68 Idaho 348, 357, 194 P.2d 608, 613 (1948). "[I]t requires very convincing and satisfactory proofs to support a forfeiture by abandonment of a real property right." *Id.* "[T]he acts claimed to constitute the abandonment of an easement must show the destruction thereof, or that its legitimate use has been rendered impossible by the owner thereof, or some other unequivocal act showing intention to permanently abandon and give up the easement." *Id.*, 68 Idaho at 357-58, 194 P.2d at 613-614. Ulrich has engaged in no such action. Consequently, pursuant to *Kolouch* and *O'Brien*, the Ulrich Property Easement has not been abandoned.

3. Whether Bach has adversely possessed the Ulrich Property Easement.

Bach has not adversely possessed the Ulrich Property Easement. "Where the defense to the claim is adverse possession, the party asserting such defense must prove by clear and satisfactory evidence that he or she has been in exclusive possession of the property for at least [20] years and that the possession has been actual, open, visible, notorious, continuous, and hostile to the party against whom the claim of adverse possession is made." *Kolouch,* 120 Idaho at 67-68, 813 P.2d at 878-79 (internal citations omitted). Since the owner of the servient estate owns the underlying fee, and has the right to use his entire land for any purposes not inconsistent with the rights of the holder of the dominant easement, the use by the servient estate must be truly inconsistent. *Id.*, 120 Idaho at 68, 813 P.2d at 879 (internal citations omitted). In *Kolouch*, the Idaho Supreme Court adopted the holding in *Castle Associates v. Schwartz*, 407 N.Y.S.2d 717, 63 A.D.2d 481 (1978), regarding the rule which covers situations where, as in *Kolouch* and the case at hand, the owner of the dominant estate had not had occasion to use the easement. The Idaho Supreme Court quoted *Castle Associates* as follows:

> [W]here an easement has been created but no occasion has arisen for its use, the owner of the servient tenement may fence his land and such use will not be deemed adverse to the existence of the easement until such time as (1) the need for the right of way arises, (2) a demand is made by the owner of the dominant tenement that the easement be opened and (3) the owner of the servient tenement refuses to do so.

Kolouch, 120 Idaho at 68, 813 P.2d at 879 (citing *Castle Associates*,407 N.Y.S.2d at 723, 63 A.D.2d at 487). The Idaho Supreme Court further stated:

> Applied here, we may paraphrase this rule to read that where the easement was created, but no occasion has arisen for its use, the owner of the servient tenement may plant trees, erect a fence, etc. and such use will not be deemed to be adverse (or inconsistent, to use *Shelton's* term), until the need to use the easement arises, etc. We think this rule makes sense in light of the well established rule that the owner of

> the servient estate is entitled to use his land, even though encumbered by an easement, for any purpose not inconsistent with the purpose reserved in the easement. Accordingly, Kramer's use of his property, which was subject to the easement has not been adverse or inconsistent with the Kolouchs' rights prior to the time the Kolouchs' need to use the easement arose, and the trial court's finding to that effect was not clearly erroneous.

Kolouch, 120 Idaho at 68-69, 813 P.2d at 879-80. Likewise, Bach's use of his property, which was subject to the Ulrich Property Easement, has not been adverse or inconsistent with the Ulrich's rights because Ulrich has not previously had a need to use the Ulrich Property Easement. Therefore, Bach has not adversely possessed the Ulrich Property Easement.

4. Whether the proper remedy in this action is quiet title, declaratory judgment and permanent injunction.

Bach has asserted that "if there is an adequate remedy at law, the equity action for quiet title and declaratory judgment is unavailable to plaintiff." First, both a quiet title action and an action for declaratory judgment *are* remedies at law. Idaho Code § 6-401 specifically provides for an action to quiet title. Idaho Code § 10-1201 specifically provides for an action for declaratory judgment. Second, even assuming that quiet title and declaratory judgment were not remedies at law, Bach has argued that Ulrich's proper "remedies at law" are "conversion, damages to plaintiffs' realty, interference with existing contractual relations or economic business relations and prospects of plaintiffs' developments commercially [sic] or their property [sic], negligence and even a claim for ejectment against defendant." While Ulrich may indeed be entitled to bring some or all of these causes of action, none of them accomplish what Ulrich ultimately seek to do in this matter - obtain from the Court an order stating definitively which party has right, title and interest in the Ulrich Property Easement. A legal remedy, i.e., damages, is insufficient in this matter because real property is considered to be unique. As the Idaho Supreme Court has repeatedly recognized, a

specific tract of land is unique and impossible of duplication by the use of any amount of money. *See, i.e., Fazzio v. Mason*, 2011 WL 941462, *6, *7 (March 21, 2011); *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000); *Perron v. Hale*, 108 Idaho 578, 582, 701 P.2d 198, 202 (1985); *Suchan v. Rutherford*, 90 Idaho 288, 295, 410 P.2d 434, 428 (1966)(noting the general common law principal that damages are insufficient in disputes over real property due to uniqueness of land). Only a quiet title action or declaratory judgment and permanent injunction can provide the relief requested by Ulrich. Consequently, Bach's argument regarding Ulrich's alleged failure to pursue "remedies at law" as listed by Bach should be disregarded.

5. Whether Ulrich has failed to join any indispensable parties.

With regard to Bach's assertion that Ulrich has failed to join indispensable parties, Ulrich has not sought to quiet title or requested a declaratory judgment and injunction against any party except any alleged interest Bach may have in the Ulrich Property Easement. Rule 19(a)(1) of the Idaho Rules of Civil Procedure provides that, "[a] person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Idaho R. Civ. P. 19(a)(1).

As the Idaho Supreme Court has stated, "joinder of all parties with an interest in the subject matter of the suit is not required; rather, only those who have an interest in the object of the suit should be joined." *Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 714, 152 P.3d 581, 585

(2007). In the current case, no other party, aside from Bach, has indicated any intent to interfere with Ulrich's interest in the Ulrich Property Easement. Further, the disposition of this matter in the absence of parties other than the Bach will not impair or impede the other parties' ability to protect their interests or leave them subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Although the other property owners of the Bach Property may have an interest in the *subject matter* of the suit, as property owners, only Bach has attempted to interfere with Ulrich's interest in the property. Consequently, the other property owners do not have an interest in the *object* of the suit. Therefore, the other owners of the Bach Property are not indispensable parties.

6. Whether Ulrich breached the implied covenant of good faith and fair dealing with regard to Bach.

Regarding the breach of the implied covenant of good faith and fair dealing, Bach has not alleged facts sufficient to bring the claim. In order for an implied covenant of good faith and fair dealing to exist, there must, at a minimum, be a contract between the parties. *See, i.e., Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 287-88, 824 P.2d 841, 862-63 (1991). Here, no contract has been alleged, nor was there ever any contract between the parties. Consequently, Bach has not even raised sufficient facts to state a claim upon which relief could be granted, and Bach's claim for breach of implied covenant of good faith and fair dealing must be dismissed.

7. Whether Ulrich intentionally interfered with contract or interfered with prospective economic advantage with regard to Bach.

Bach has not alleged sufficient facts for a cause of action for intentional interference with contract or interference with prospective economic advantage. The elements of intentional

interference with contract are (1) the existence of a contract; (2) knowledge of the contract on the part of the defendant; (3) intentional interference causing a breach of the contract; and (4) injury to the plaintiff resulting from the breach. *Barlow v. International Harvester Co.*, 85 Idaho 881, 803, 522 P.2d 1102, 1114 (1974). The elements of interference with prospective economic advantage are (1) the existence of a valid economic expectancy; (2) knowledge of the expectancy on the part of the interferer; (3) intentional interference inducing termination of the expectancy; (4) the interference was wrongful by some measure beyond the fact of the interference itself (i.e., that the defendant interfered for an improper purpose or improper means); and (5) resulting damage to the plaintiff whose expectance has been disrupted. *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999). Bach has pled none of the elements required for either intentional interference with contract or interference with prospective economic advantage. (*See* Verified Answer and Counterclaim). Therefore, such claims should be dismissed.

DATED this 28th day of April, 2011.

Charles A. Homer, Esq.
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by hand delivery, by mailing with the correct postage thereon, or by facsimile a true and correct copy thereof on this 28th day of April, 2011.

DOCUMENT SERVED: PLAINTIFFS' PRETRIAL MEMORANDUM

ATTORNEYS AND/OR INDIVIDUALS SERVED:

John Bach
PO Box 101
Driggs ID 83422

(X) Mail ( ) Hand Delivery ( )Facsimile

COURTESY COPY TO:

The Honorable Darren B. Simpson
IN CHAMBERS
Bingham County Courthouse
501 North Maple, #310
Blackfoot ID 83221-1700

(X) Mail ( ) Hand Delivery ( ) Facsimile

Charles A. Homer, Esq.
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

THOMAS H. ULRICH and MARY M. ULRICH, husband and wife,

Plaintiffs,

v.

JOHN N. BACH and all parties claiming to hold title to the hereinafter described property pursuant to that certain warranty deed recorded in the records of Teton County, Idaho on June 14, 1994, as Instrument No. 116461 and all unknown claimants, heirs and devisees of the following property:

A portion of the South ½ South ½ Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89 50'12" East, 2630.05 feet to the true point of beginning; thence North 00 07'58" East, 813.70 feet to a point; thence North 01 37'48" East, 505.18 feet to a point; thence South 89 58'47" East, 1319.28 feet to a point; thence South 00 07'36" West, 1321.69 feet to a point on the Southern Section Line; thence North 89 51'01" West, 1320.49 feet along the Southern Section

Case No. CV-2010-329

MEMORANDUM IN REPLY TO DEFENDANT AND COUNTERCLAIMANT JOHN N. BACH'S OPPOSING AND COUNTER MEMORANDUM BRIEF

Line to the South ¼ Corner of said Section 6, a point; thence North 89 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning. SUBJECT TO a 60 foot road and utility easement along the Western Property lines. AND SUBJECT TO a 60 foot road and utility easement along the Southern Property Lines.

Defendants.

COME NOW Plaintiffs Thomas H. Ulrich and Mary M. Ulrich, husband and wife, (hereinafter "Plaintiffs"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and submit this Memorandum in Reply to Defendant and Counterclaimant John N. Bach's Opposing and Counter Memorandum Brief, dated April 22, 2011.

I. INTRODUCTION

At the hearing on Plaintiffs' Motion for Summary Judgment, Defendant John N. Bach ("Defendant") requested that the Court permit him to file supplemental responsive briefing in addition to the Memorandum of Points and Authorities in Opposition to Plaintiffs' Summary Judgment Motion, dated March 25, 2011, and the Supplemental Memorandum of John N. Bach, dated March 28, 2011, already filed with the Court. The Court agreed to permit Defendant to submit additional supplemental briefing, giving Defendant a deadline of April 22, 2011, to serve briefing, and permitting Plaintiffs to file a reply to such supplemental briefing. On April 25, 2011, Plaintiffs received a memorandum filed by Defendant titled in part: "Defendant and Counterclaimant John N. Bach's Opposing and

Counter Memorandum Brief" ("Second Supp. Memo."). Plaintiffs now submit this Memorandum in reply to such briefing.

II. ARGUMENT

A. Defendant's argument that Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment was untimely should be disregarded.

On the first page of his Second Supp. Memo., Defendant states in his Preface that Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment was untimely. (Second Supp. Memo., p. 1-2). However, Plaintiffs did not receive Defendant's initial responsive summary judgment documents until the late afternoon of March 28, 2011, and did not receive Defendant's additional supplemental briefing until March 30, 2011. Plaintiffs served their Reply Memorandum in Support of Summary Judgment on March 31, 2011, as is reflected by the certificate of service attached to the pleading. Considering the late filing by Defendant of his responsive summary judgment pleadings, Plaintiffs prepared and served their Reply Memorandum as soon as was possible. Regardless, the fact that the Court has permitted Defendant to file a second supplemental memorandum in response to Plaintiffs' Reply Memorandum cures any prejudice to Defendant stemming from any alleged late filing of the Reply Memorandum.

B. THE PROPER REMEDY IN THIS MATTER IS QUIET TITLE OR DECLARATORY JUDGMENT

Defendant again asserts in his Second Supp. Memo. that Plaintiffs have an adequate remedy at law and argues that *Suchen* supports this argument. However, *Suchen* does not

support Defendant's assertions. First, *Suchen* was cited by Plaintiffs for the proposition that the general common law regarding disputes involving real property is that real property is unique and therefore equitable remedies, rather than remedies at law, are appropriate. This principle is not only noted by the Idaho Supreme Court in *Suchen*, but also in numerous other Idaho cases. *See, i.e., Fazzio v. Mason*, 2011 WL 941462, *6, *7 (March 21, 2011); *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000); *Perron v. Hale*, 108 Idaho 578, 582, 701 P.2d 198, 202 (1985). While it is true that in the particular case in *Suchen*, the Idaho Supreme Court found that the property involved warranted a rare exception to this widely accepted principal, it is important to note that *Suchen* involved a land sale contract of which a party sought specific performance, something that is not at issue here. *See Suchan v. Rutherford*, 90 Idaho 288, 295, 410 P.2d 434, 428 (1966). Regardless, the common law principle regarding the appropriateness of equitable remedies due to the uniqueness of land remains.

Additionally, as Plaintiffs mentioned in their Reply Memorandum, both a quiet title action and an action for declaratory judgment *are* remedies at law. Idaho Code § 6-401 specifically provides for an action to quiet title. Idaho Code § 10-1201 specifically provides for an action for declaratory judgment. Finally, again as Plaintiffs mentioned in their Reply Memorandum, even assuming that quiet title and declaratory judgment were not remedies at law, Defendant argues that Plaintiffs' proper "remedies at law" are "conversion, damages to plaintiffs' realty, interference with existing contractual relations or economic business

relations and prospects of plaintiffs' developments commercially [sic] or their property [sic], negligence and even a claim for ejectment against defendant." (Defendant's Memo. of Points and Auth., p. 3). While Plaintiffs may indeed be entitled to bring some or all of these causes of action, none of them accomplish what Plaintiffs ultimately seek to do in this matter - obtain from the Court an order stating definitively which party has right, title and interest in the Ulrich Property Easement. Only a quiet title action or declaratory judgment and permanent injunction can provide the relief requested by Plaintiffs.

C. PLAINTIFFS HAVE NOT FAILED TO JOIN ANY INDISPENSABLE PARTIES

Defendant argues that *Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 714, 152 P.3d 581, 585 (2007) provides support for his claim that not all indispensable parties have been joined in this suit. Plaintiffs already discussed the issue of indispensable parties at length in their Reply Memorandum, and will not revisit the issue at length here. However, Plaintiffs do provide that *Tower Asset Sub Inc.* supports Plaintiffs' arguments regarding indispensable parties, as is clear from Defendant's statement regarding *Tower Asset Sub Inc.*:

> Starting at 403 Idaho 713, the Idaho Supreme Court held that: the issues of "Standing" is a subcategory of justiciability, a preliminary question to be determined by the Court before reaching any merits of the case. *Held - since Hall's ownership of the easement not questioned he was not indispensable party since no quiet title action sought re his ownership.*

(Second Supp. Memo., p. 6). As in *Tower Asset Sub Inc.*, Plaintiffs have not sought quiet title against anyone but Defendant regarding Plaintiffs' right, title and interest in the Ulrich Property Easement. Plaintiffs only seek quiet title as against Defendant because Defendant

is the only individual who has interfered with Plaintiffs' right to use the Ulrich Property Easement. Plaintiffs are not asking for quiet title as against any other party. As is noted in *Pro Indiviso, Inc. v. Mid-Mile Holding Trust*, 131 Idaho 741, 963 P.2d 1178, (1998), a case cited by Defendant, "[i]t is not necessary that all persons with an interest in the subject matter of the suit be joined as parties, but only those who have an interest in the object of the suit." *Id.*, 131 Idaho at 746, 963 P.2d at 1183. Consequently, it is unnecessary to join any other party in this suit.

D. DEFENDANT HAS NOT RAISED ANY FACTS SUFFICIENT TO WITHSTAND SUMMARY JUDGMENT ON HIS COUNTERCLAIMS

In his Second Supp. Memo., Defendant states:

> Also, Barlow v. International Harvester Co. (1994) 95 Idaho 881, 893 (inaccurately cited by Plaintiffs as 85 Idaho 881) 522 P.2d 1102, 1194, in which counts for slander and tort interference with contract issues were held to RAISE genuine issues of fact precluding summary judgment, the Idaho Supreme Court, specifically held: a) A contract voidable because of noncompliance may still be subject matter of action for interference with contract; and b) A Plaintiff cannot make a lack of mutuality of the contract to which he was not a party, available as an excuse for his wrongful and unjustiified [sic] conduct. (95 Idaho @ 893-895.); and c) Failure to join indispensable party is of such importance such cannot be waived. Barlow, supra, also analyzed and applied the principles of d) violation of tortious interference with contract, and with prospective economic advantages, per which cause of action recovery is not limited to those damages within the contemplation of the parties to the contract as the probable and foreseeable result of a breach, citing to: W.L. Prosser, Handbook of the Law of Torts, sec. 129, pp 948-949 (4th Ed. 1991); Res (Second of Torts, Sec 774A, Comment A-C, pp 86-90, (Tentative Draft No. 14, 1969) Barlow, 95 Idaho @ 896). . .

Plaintiffs are unsure as to what argument Defendant is making with the above statements. However, given that Plaintiffs cited *Barlow* to show the elements necessary to bring claims

for intentional interference with contract, Plaintiffs will assume that the above are arguments made by Defendant to demonstrate that claim can survive summary judgment. However, Defendant has still failed to demonstrate *any* of the elements necessary to bring that claim in the first place, let alone survive summary judgment. Additionally, Defendant cites to *Akers v. D.L. White Construction Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 2004 (2005) [sic], stating:

> In *Akers*, A record land owner of reality brought actions against an adjoining land owner for i) trespass, ii) negligence and iii) quiet title. Case was remanded for purpose of conducting additional fact finding re whether at time of severance of alleged dominant and servient estate, use of access through servant [sic] easement "was reasonably necessary to enjoyment of alleged dominant estate." Such is also a factual genuine issue of fact herein.

(Second Supp. Memo., p. 8). Again, Plaintiffs are unsure as to what exactly Defendant is arguing here, but to the extent that Defendant is arguing that some fact finding has to occur regarding whether use of access through the servient estate "was reasonably necessary to enjoyment of the alleged dominant estate," such argument is irrelevant to the matter at hand. *Akers* was, in part, remanded, because there was an issue as to whether there was an implied easement by prior use. That was the purpose of the remand regarding whether access through the servient estate was reasonably necessary to enjoyment of the alleged dominant estate. *Akers*,142 Idaho at 305, 127 P.3d at 208. The case at hand does not deal with an implied easement by prior use. Rather, it concerns an express easement. Consequently, Defendant's arguments regarding easement by implied use are irrelevant, and there is no issue of fact in that regard.

Defendant next spends approximately a page and a half (from the bottom of page 8 through the top of page 10 of the Second Supp. Memo.) making statements regarding what he perceives to be the application of *First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 287-88, 824 P.2d 841, 862-63 (1991), to the case at hand. Plaintiffs cited to *Bliss Valley Foods* for the purpose of showing the elements necessary for claim for the breach of the covenant of good faith and fair dealing. (*See* Reply Memorandum, p. 10). Plaintiffs are unsure of how Defendants statements regarding *Bliss Valley Foods,* pertain to the matter at hand, in the context of Defendant's claim for breach of the covenant of good faith and fair dealing, or as to any other claim or defense raised by Defendant. Defendant closes this section of his argument by stating:

> Thusly, even though the real estate purchase contract which defendant and his cojoint venturers purchased per their recorded spendthrift trust joint venture deed/agreement nowhere in negotiations or in any purchase contract or deeds is/are the individual names of the Ulrich's, [sic] Thomas nor Mary stated, designated or disclosed. No one is disclosed in name, by entity or title whatsoever as to the purported 60 foot easement, no one!

(Second Supp. Memo., p. 9-10). Plaintiffs assume that Defendant is arguing that for the easement to be valid, it has to be personal to the users of the easement, or, in legal terms, an "easement in gross." However, this case does not deal with an easement in gross, but an express easement, which is presumed to be appurtenant. *Coward v. Hadley*, 150 Idaho 282, 246 P.3d 391, 396 (2010), reh'g denied (Feb. 8, 2011). An easement appurtenant "is one whose benefits serve a parcel of land. More exactly, it serves the owner of that land in a way that cannot be separated from his rights in the land. *Id.* (internal citations omitted). By

contrast, an easement in gross "benefits the holder of the easement personally, without connection to the ownership or use of a specific parcel of land." *Id.* (internal citations omitted). Again, as Plaintiffs provided in their Memorandum in Support of Motion for Summary Judgment, "[o]ne who purchases land expressly subject to an easement or with notice, actual or constructive, that is burdened with an existing easement, takes the land subject to the easement." *Akers v. D.L. White Const., Inc.,* 142 Idaho 293, 301, 127 P.3d 196, 204 (2005). (citing *Checketts v. Thompson*, 65 Idaho 715, 721, 152 P.2d 585, 587 (1944)); *see also* I.C. § 55-603. The Ulrich Property Easement was denoted in both the Bach Deed and the deed of Ulrich's predecessors in interest. (*See* Ulrich Aff., ¶¶ 6, 7, Ex. E and F). The Ulrich Property Easement was appurtenant to the land, and passed expressly with the deed when Plaintiffs purchased the Ulrich Property. (*See* Ulrich Aff., ¶ 2, Ex. A). Defendant had express notice of the Ulrich Property Easement in his deed. Defendant cannot contend that he did not have notice of the Ulrich Property Easement at the time of the purchase of the Bach Property because it did not expressly include the names Thomas or Mary Ulrich. There is no basis in law for this argument.

Defendant also argues that Plaintiffs "have never had, never claimed any form of actual or constructive possession of the 60 foot road right of way over the westerly boundary of the Peacock 40 acre parcel - - - NEVER!" (Second Supp. Memo., p. 10-11). Plaintiffs have no need to claim constructive possession of the Ulrich Property Easement due to the

existence of the express easement in the Bach Deed and Ulrich Deed. Consequently, Defendant's argument regarding constructive possession should be disregarded.

Additionally, Defendant argues "[n]o showing has been made per any survey result or other relevant admissible civil engineer's plat or overview of the claimed Ulrich's 60 foot easement, that such Ulrich's easement abuts, adjoins and lies immediately upon the northern boundary line of the Peacock westerly 40 acre parcel." (Second Supp. Memo., p. 11). First, even though it is not relevant, the legal description of the easement does indicate that the Ulrich Property Easement abuts the northern boundary line. This is evident not just from the metes and bounds description in the Ulrich Deed, but also from the description in the Bach Deed, which states the Bach Property is "Subject to a 60 foot road and utility easement along the Western Property lines." (Ulrich Aff., Ex. F). Clearly, if the easement runs along the entire western property line, it will abut the northern edge of the Bach Property. Regardless, however, Defendant himself has entered into the record evidence that the Ulrich Property Easement abuts the northern boundary line of the Bach Property in the form of a plat which clearly shows the Ulrich Property Easement traversing the northwest corner of the Bach Property and abutting the southwest corner of the Ulrich Property. (*See* Affidavit of John N. Bach Defendant and Counterclaimant Pro Se, Re Objections and Opposition to Plaintiffs' Motion for Summary Judgment, Ex. 2).

Finally, Defendant argues that *Coward v. Hadley,* 150 Idaho 282, 246 P.3d 391 (2010), controls the outcome of this case. The facts of *Coward* are nothing like the facts of

this case. In *Coward*, the Hadleys disputed the existence of an easement over their property benefitting the lot directly to the south of their property, owned by Cowards. The history of the easement discussed in *Coward* was as follows:

> Freeman Daughters, an individual, acquired lots 1, 2, and 11 together in 1907. In 1922, Daughters conveyed lots 1 and 2 to Ole Sleteger. That deed ("the 1922 deed") provided that Daughters and "his heirs and assigns shall have a permanent right of way over and across twelve feet on the east side [of lots 1 and 2] for the purpose of an alley." Daughters later conveyed away lot 11 with a deed noting that a permanent right-of-way existed over the alley on lots 1 and 2 benefiting lot 11.
>
> Both lots 1 and 2 apparently came to be owned simultaneously by Martin and Nellie Mushrow a few years later, and they conveyed the lots separately to different third parties. The deed first conveying away lot 1 to Hadley's predecessor did not reserve any easement rights benefiting lot 2, which is now the Cowards' lot. None of the deeds in either chain of title refer to such a right-of-way either. The easement did continue to benefit lot 11 until 1950, when the owner of lot 11 at that time quitclaimed the easement back to the owners of lots 1 and 2. The next day, Hadley and her now-deceased husband, Irvin, purchased lot 1. After that time, the alley was a grassy area occasionally used by occupants of lot 2 to reach an old garage at the back of the lot.

Coward v. Hadley, 150 Idaho 282, ___, 246 P.3d 391, 394 (2010). In *Coward*, the express easement was quit claimed back to the property owners over which the easement traversed. Further, the issue in that case pertained to whether lot 2 had an easement over lot 1. The court found that the no easement had ever been created for the benefit of lot 2 - rather the easement which traversed lot 1 and passed over lot 2 had purely existed for the benefit of lot 11. Consequently, the court found lot 2 had no express easement. The facts of this case are nothing like those of *Coward.* The Ulrich Property Easement was created when the Ulrich Property Easement was reserved in the Bach Deed and granted in the deed to the Ulrich

Property issued to Plaintiffs' predecessors in interest. (Ulrich Aff., Ex. E and F). The Ulrich Property Easement was additionally included in the Ulrich Deed. (Ulrich Aff., Ex. A). The easement was never quit claimed back to the owners of the Bach Property. Further, the Ulrich Property is the dominant estate in this matter, unlike lot 2 in *Coward*, which was not the dominant estate, but a mere piece of property over which the easement in question passed. Therefore, *Coward* has no effect on the outcome of this case.[1]

E. *KOLOUCH V. KRAMER* CONTROLS THE OUTCOME OF THIS CASE AND DEFENDANT HAS RAISED NO CONTRARY AUTHORITY

In his Second Supp. Memo., Defendant has failed to set forth any legitimate arguments against the application of *Kolouch v. Kramer,* 120 Idaho 65, 813 P.2d 876 (1991), to this matter. Defendant argues at length that various cases "overturn" *Kolouch*, making it inapplicable. However, the cases cited by Defendant, *Coward v. Hadley*, 150

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[1] Defendant also argues that "[t]wo main principles apply, supported by Coward, to wit: . . . 'In construing an easement in a particular case, the instrument granting the easement is to be interpreted in connection with the intention of the parties, and the circumstances in existence at the time the easement was granted.' *Kolouch v. Kramer*, 120 Idaho 65, 69, 813 P.2d 876, 880 (1991)" and "[a]n express easement does not grant rights in the easement to the parcels other than the dominant estate." (Second Supp. Memo., p. 10). Plaintiffs will not delve into the intention issue yet again, as this was addressed at length in Plaintiffs' Reply Memorandum. Plaintiffs refer the Court back to pages 15 through 16 of Plaintiffs' Reply Memorandum regarding this issue. Further, Plaintiffs do not understand the purpose of Defendant's statement that "an express easement does not grant rights in the easement to the parcels other than the dominant estate." The Ulrich Property is the dominant estate in question, so Plaintiffs are confused as to how that particular statement aids Defendant's argument. Regardless, nothing in either of the two principles above affect Plaintiffs' right and title to their express easement.

Idaho 282, 246 P.3d 391 (2010) and *Trappett v. Davis*, 102 Idaho 527, 633 P.2d 592 (1981), do not "overturn" or even contradict *Kolouch,* and Defendant provides no explanation as to how these cases support his argument.

Further, it appears Defendant is attempting to introduce new evidence into this matter via his Second Supp. Memo. regarding an alleged "water well and subterranean seasonaly [sic] pond accumulations." At this point in the proceedings, it is entirely inappropriate and improper for Defendant to put new evidence before the Court. Further, such "evidence" has not been submitted to the Court via affidavit, as required by Rule 56 of the Idaho Rules of Civil Procedure. Regardless, however, whether there is a "water well and subterranean seasonaly [sic] pond accumulations," such allegation is irrelevant to Ulrich's entitlement to the easement, as the Ulrich Property Easement is expressly established by deed.

Defendant also reasserts in his Second Supp. Memo. that he placed various objects, including farm implements, no trespassing signs, shrubs and bushes, and other barriers along the "internal westerly 100 foot corridor" of the Bach Property, and that because he erected these items, summary judgment based upon the law of *Kolouch v. Kramer* is precluded. To the extent that Defendant asserts new facts regarding any barriers he erected or where he placed the barriers, Plaintiffs object to the introduction of such information due to Defendant's failure to introduce the information in a timely manner via affidavit, pursuant to Rule 56 of the Idaho Rules of Civil Procedure. Any

facts which go beyond what was stated in Defendant's affidavit should be disregarded. Regardless, however, Defendant's arguments regarding his erection of barriers and signs actually support the application of *Kolouch* due to the factual similarity of Defendant's actions to those of Kramer in *Kolouch*:

> At the time Kramer acquired the subject property, there was a utility pole, a board fence, and some trees in the easement area. Subsequently, Kramer planted six spruce trees down the center of the easement, planted other trees within the easement, constructed a fence inside the northerly boundary of the easement, and a concrete irrigation diversion at the east end of the easement. Kramer also placed several large boulders at the east end of the easement. Kramer maintains that, although there were physical impediments within the easement area at the time he acquired the property, the easement was still open for ingress and egress, and it was only after he planted the trees, etc., that the easement was no longer open to use. On the limited occasions that respondents have sought access to their portion of Lot 10, they have used a private roadway over the Stephenson easement, immediately to the north of the subject property.

Kolouch, 120 Idaho at 67, 813 P.2d at 878. These facts are essentially identical to those in the matter at hand. Even assuming that Defendant placed the above obstacles in such a manner as to restrict access to the Ulrich Property Easement, Plaintiffs have been able to access the Ulrich Property without the need for use of the easement, including accessing the Ulrich Property via alternative routes over the Bach Property. The fact that Defendant erected "No Trespassing" signs in addition to planting trees, shrubs, farm implements and other barriers makes no difference. Plaintiffs were still able to access the Ulrich Property without use of the Ulrich Property Easement. It was only when Plaintiffs began the process for developing the Property that the need for the easement arose. Consequently,

pursuant to the law of *Kolouch*, Defendant has not adversely possessed the Ulrich Property Easement, and Plaintiffs still have right and title to the Ulrich Property Easement via the express grant and reservation of the Ulrich Property Easement in the Ulrich Deed and Bach Deed.

F. THE CASE LAW RELIED UPON BY DEFENDANT REGARDING BOUNDARY BY ACQUIESCENCE IS INAPPLICABLE TO THE CASE AT HAND

Defendant cites to *Trappett v. Davis*, arguing that it is controlling of the issues in this matter and that Plaintiffs somehow "acquiesced" in Defendant allegedly nullifying their rights to the Ulrich Property Easement. Any law related to boundary by acquiescence is completely inapplicable to the determination of the rights of a party to an express easement. Boundary by agreement or acquiescence has two elements: (1) there must be an uncertain or disputed boundary and (2) a subsequent agreement fixing the boundary. *Cox v. Clanton*, 137 Idaho 492, 494-95, 50 P.3d 987, 989-90 (2002). Neither of these elements is present in this case. Consequently, any arguments regarding boundary by acquiescence should be disregarded.

G. THE AWARD OF SUMMARY JUDGMENT FOR PLAINTIFFS WOULD NOT VIOLATE ANY OF DEFENDANT'S FOURTEENTH AMENDMENT RIGHTS

Defendant asserts that if the Court awards Plaintiffs the relief requested in the Complaint that he will be deprived of his Fourteenth Amendment rights. First, if a matter can be decided at the summary judgment phase, there is no need for a jury trial. The

province of the jury is that of fact-finder. Summary judgment is only permissible where there is no question of fact. Consequently, if a matter is decided via summary judgment, there are, by definition, no issues for the jury to decide. However, even assuming this matter was not decided on summary judgment, under Idaho law, there is no right to a jury in a quiet title action. *Loomis v. Union Pac. R. Co.*, 97 Idaho 341, 544 P.2d 299 (1975). Additionally, even if Defendant were entitled to a jury trial, pursuant to Rule 38 of the Idaho Rules of Civil Procedure, Defendant has already waived any such right. Rule 38(b) provides: "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than fourteen (14) days after the service of the last pleading directed to such issue." I.R.Civ.P. 38(b). "The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury." I.R.Civ.P. 38(d). Defendant made no demand for trial by jury in his Answer, or within fourteen days of filing such Answer. Consequently, Defendant is not entitled to a jury trial in this matter, and the denial of a jury trial is not a violation of his Fourteenth Amendment constitutional rights.

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that their Motion for Summary Judgment be granted.

DATED this 28th day of April, 2011.

Charles A. Homer, Esq.
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by hand delivery, by mailing with the correct postage thereon, or by facsimile a true and correct copy thereof on this 28th day of April, 2011.

DOCUMENT SERVED: PLAINTIFFS' PRETRIAL MEMORANDUM

ATTORNEYS AND/OR INDIVIDUALS SERVED:

John Bach
PO Box 101
Driggs ID 83422

(X) Mail ( ) Hand Delivery ( )Facsimile

COURTESY COPY TO:

The Honorable Darren B. Simpson
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Charles A. Homer, Esq.
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

G:\WPDATA\CAH\15313 - Ulrich, Thomas\Pldgs\MSJ.2ndREPLY.wpd:.

JOHN N. BACH, P.O. Box 101
Driggs, ID 83422/Tel: (208) 354-8303
Defendant/Counterclaimant Pro Se

SEVENTH JUDICIAL DISTRICT COURT, IDAHO, COUNTY OF TETON

THOMAS H. ULRICH AND MARY M. ULRICH, husband and wife,

Plaintiffs,

V.

JOHN N. BACH and all parties claiming to hold title to the hereinafter described proper pursuant to that certain warranty deed record in the records of Teton County, Idaho on June 14, 1994 as Instrument No. 116461 and all unknown claimants, heirs and devisees of the following property:

A portion of the South ½ South ½ Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89 50'12" East, 2630.05 feet to the true point of beginning; thence North 00 07'58" East, 813.70 feet to a point; thence North 01 37'48" East, 505.18 feet to a point; thence South 89 58'47" East, 1319.28 feet to a point; thence South 00 07'36" West, 1321.69 feet to a point on the Southern Section Line; thence North 89 51'01" West, 1320.49 feet along the Southern Section Line to the South ¼ Corner of said Section 6, a point; thence North 89 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning. SUBJECT TO a 60 foot road and utility easement along the Western Property lines. AND SUBJECT TO a 60 foot road and utility easement along the Southern Property Lines.

CASE No. CV 2010-329

DEFENDANT AND COUNTER-CLAIMANT JOHN N. BACH'S PRE-TRIAL MEMORANDUM PART "1"

COMES NOW Defendant and Counterclaimant JOHN N. BACH (hereafter "Bach", pro se) and submits this Pre-Trial Memorandum per the Court Trial's Scheduling Order entered in this action, PART "1"

I. PART "1"

There is currently under submission before this Court, not just Plaintiff's Motion for Summary Judgment but also, conversely, Defendant and Counrclaimant's renewed motion to dismiss with prejudice Plaintiffs' verfieid complaint because of the proper remedies by the plaintiffs are not for quiet title and declaratory relief but because (1) lack of justiciability by plaintiffs (standing); (2) No equitable actions are jurisdictinnal permissible as plaintiffs have clear proper, adequate, complete and primary legal remedies at law (Suchan v. Rutherford 90 Idaho @ 295-296; Spears v. Dizick (OregonApp 2010, 234 P 3d 1037. 23 Or App. 594)' and (3) Not all necessary and indispensible parties have been joined. (Pro Indiviso, Inc. 131 Idaho 741, 746).

II THIS COURT'S GRANTING OF THE FOREGOING MOTIONS WILL MORE THAN CONTROL THE ISSUES--IT WILL DICTATE THEM AND EVEN POSSIBLY DETERMINE THEM.

UNTIL the motions under submission before the Court are determined. it is unsettled as to what issues will remain, how and by whom triable, (burden of proof, probable exhibits, probable witnesses to be called. etc.): therefore, upon this Court's anticipated rulings, defendant/counterclaimant BACH seeks further leave to amend/supplement this Pre-Trial Memoranda, plus any clarification motions re orders per IRCP. Rule 16 et seq.

Therefore. defendant/counterclaimant Bach, reserves and seeks further leave of court to respond with not just objections, but further requests and motions upon thie Court's ruling and within the full time periods of IRCP, Rule 16 et seq.

DATED: May 2. 2011 Repectfully Submitted,

JOHN N. BACH

Certificate of Service by Mail:

I the undersigned hereby certify that on May 2, 2011 I did mail copies of this document via U. S. Mail in separate envelopes with first class postage affized to: Charles A. Homer. P.O. Box 50130, Idaho Falls. ID 83405; and The Honorable Darren B. Simpson Bingham County Courthouse, 501 N Maples, #310 Blackfoot, ID 83221.

DATED: May 2, 2011

0113

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO
May 10, 2011
AT 01:42 pm
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

THOMAS H. ULRICH and MARY M. ULRICH, husband and wife,

Plaintiffs,

-vs-

JOHN N. BACH and all parties claiming to hold title to the hereinafter described property, and all unknown claimants, heirs and devisees of the following property:

A portion of the South ½ South ½ Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89°50'12" East, 2630.05 feet to the true point of beginning; thence North 00° 07'58" East, 813.70 feet to a point; then North 01°37'48" East, 505.18 feet to a point; then South 89° 58'47" East, 1319.28 feet to a point; thence South 00°7'36" West, 1321.69 feet to a point on the Southern Section Line; then North 89°51'01" West, 1320.49 feet along the Southern Section Line to the South ¼ Corner of said Section 6, a point; thence North 89°50'13" West, 12.13 feet along the Southern Section Line to the point of beginning.

Defendants.

CASE No. CV-2010-329

MINUTE ENTRY - PRETRIAL CONFERENCE

This matter came before the Court on the 6th day of May 2011, for the purpose of a Pretrial Conference, being held telephonically, the Honorable Darren B. Simpson, presiding sitting in open Court in Bingham County.

Ms. Sandra Beebe, Court Reporter and Ms. Jaeme Freeman, Deputy Clerk each were personally present. Mr. Charles Homer, Esq., appeared telephonically on behalf of the plaintiffs and Mr. John N. Bach, appeared telephonically on his own behalf.

The Court confirmed that the matter was still on track for the scheduled trial date and the parties confirmed that three (3) days would be needed for the trial as previously-scheduled.

The Court inquired as to whether or not the parties had explored mediation. The parties confirmed they had not and agreed to meet and discuss if there could be any resolution to this matter.

The parties confirmed that there would be no need for a court interpreter during the course of the trial.

Mr. Homer requested that an adjustment be made to his previously-filed Expert Witness List allowing Mr. Chris Moss, of First American Title Insurance Company to testify in place of Mr. Grant Moedl, should Mr. Moedl be unavailable at the time of trial. There was no objection and the Court allowed the addition to the plaintiffs' expert witness list.

Mr. Homer also inquired about the fact that Mr. Bach had not disclosed his witness or exhibit list according to the deadlines listed in the Court's Scheduling Order. Mr. Bach remarked that the Court's pending decision on plaintiffs' Motion for Summary Judgment may influence the direction this matter may take, but said he would have his Witness and Exhibit List filed within ten (10) days.

Mr. Homer requested a copy of the Court's form for Exhibit Lists and the Court directed the clerk to send copies of said form to both parties.

The parties confirmed there were no other issues to address at this time.

Court was thus adjourned.

DATED this 10TH day of May 2011.

DARREN B. SIMPSON
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MINUTE HEARING – PRETRIAL CONFERENCE** was personally-delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 10th day of May 2011, to the following:

CHARLES A. HOMER, ESQ.
HOLDEN, KIDWELL, HAHN & CRAPO P.L.L.C.
PO BOX 50130
1000 RIVERWALK DR., SUITE 200
IDAHO FALLS, ID 83405

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

JOHN N. BACH
PO BOX 101
DRIGGS, ID 83422

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

MARY LOU HANSEN, CLERK

By: _____
Deputy Clerk

Charles A. Homer, Esq. (ISB No. 1630)
Dale W. Storer, Esq. (ISB No. 2166)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

THOMAS H. ULRICH and MARY M. ULRICH, husband and wife,

Plaintiffs,

v.

JOHN N. BACH and all parties claiming to hold title to the hereinafter described property pursuant to that certain warranty deed recorded in the records of Teton County, Idaho on June 14, 1994, as Instrument No. 116461 and all unknown claimants, heirs and devisees of the following property:

A portion of the South ½ South ½ Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89 50'12" East, 2630.05 feet to the true point of beginning; thence North 00 07'58" East, 813.70 feet to a point; thence North 01 37'48" East, 505.18 feet to a point; thence South 89 58'47" East, 1319.28 feet to a point; thence South

Case No. CV-2010-329

AFFIDAVIT OF CHARLES A. HOMER IN SUPPORT OF MOTION IN LIMINE AND FOR SANCTIONS

00 07'36" West, 1321.69 feet to a point on the Southern Section Line; thence North 89 51'01" West, 1320.49 feet along the Southern Section Line to the South ¼ Corner of said Section 6, a point; thence North 89 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning. SUBJECT TO a 60 foot road and utility easement along the Western Property lines. AND SUBJECT TO a 60 foot road and utility easement along the Southern Property Lines.

Defendants.

STATE OF IDAHO)
) ss.
County of Bonneville)

I, Charles A. Homer, do solemnly swear (or affirm) that the testimony given in this sworn statement is the truth, the whole truth, and nothing but the truth, that it is made on my personal knowledge, and that I would so testify in open court if called upon to do so.

And being so sworn I depose and say:

1. I am an attorney licensed in the state of Idaho and I am counsel for the Plaintiffs Thomas H. Ulrich and Mary M. Ulrich, husband and wife ("Ulrichs"), in the above captioned matter.

2. I have personal knowledge of the pleadings and documents filed by the parties and of correspondence exchanged by counsel.

3. On March 10, 2011, I served a copy of Ulrichs' first discovery requests on John N. Bach ("Bach"), a copy of which is attached to this affidavit as Exhibit A.

4. On April 12, 2011, Bach served his responses to Ulrichs' discovery requests. I have attached to this affidavit as Exhibit B a true and correct copy of Bach's responses.

5. Bach has not supplemented his discovery responses.

DATED this 18th day of May, 2011.

Charles A. Homer

SUBSCRIBED AND SWORN to before me this 18th day of May, 2011.

(SEAL)

MILDRED I. BULLOCK
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for State of Idaho
Residing at: Blackfoot, Idaho
My Commission Expires: 11/28/2013

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by hand delivery, by mailing with the correct postage thereon, or by facsimile a true and correct copy thereof on this 18th day of May, 2011.

Document Served: **AFFIDAVIT IN SUPPORT OF MOTION IN LIMINE AND FOR SANCTIONS**

Attorneys and/or Individuals Served:

John Bach
PO Box 101
Driggs ID 83422

(X) Mail ( ) Hand Delivery ( )Facsimile

COURTESY COPY TO:

The Honorable Darren B. Simpson
IN CHAMBERS
Bingham County Courthouse
501 North Maple, #310
Blackfoot ID 83221-1700

(X) Mail ( ) Hand Delivery ( ) Facsimile

Charles A. Homer, Esq.
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

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Charles A. Homer, Esq. (ISB No. 1630)
Dale W. Storer, Esq. (ISB No. 2166)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

THOMAS H. ULRICH and MARY M. ULRICH, husband and wife,

Plaintiffs,

v.

JOHN N. BACH and all parties claiming to hold title to the hereinafter described property pursuant to that certain warranty deed recorded in the records of Teton County, Idaho on June 14, 1994, as Instrument No. 116461 and all unknown claimants, heirs and devisees of the following property:

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Case No. CV-2010-329

PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUEST FOR PRODUCTION OF DOCUMENTS

EXHIBIT A

Southern Section Line; thence North 89 51'01" West, 1320.49 feet along the Southern Section Line to the South ¼ Corner of said Section 6, a point; thence North 89 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning. SUBJECT TO a 60 foot road and utility easement along the Western Property lines. AND SUBJECT TO a 60 foot road and utility easement along the Southern Property Lines.

Defendants.

TO: JOHN N. BACH, Defendant, appearing *pro se* in the above-entitled matter:

YOU WILL PLEASE TAKE NOTICE That the Plaintiffs requires the Defendant to answer the following discovery requests within thirty (30) days from the date of service herein, pursuant to Rules 33(a) and 34 of the Idaho Rules of Civil Procedure.

DEFINITIONS AND INSTRUCTIONS

In answering these discovery requests, furnish all information available to you, including information in the possession of your attorneys or investigators for your attorneys, and not merely information known of your own personal knowledge.

If you cannot answer the discovery requests in full, after exercising due diligence to secure the information to do so, so state, and answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information or knowledge you have concerning the unanswered portion.

If you are unable to produce the requested documents, after exercising due diligence to secure the documents, so state and identify the reason for your inability to produce the

EXHIBIT A

documents, the whereabouts of the documents if not in your control or possession, and the means whereby you lost control or possession of the documents. Identify any documents which once did exist if not now existing and state whatever information or knowledge you have concerning the information contained in those documents. If you object to answering any portion of any of the following discovery requests based on a claim of privilege or work product, please so state by providing a complete description of the basis for the privilege upon which you base your objection.

Prior to answering these discovery requests, note the following definitions:

1. "You" refers to Defendant, John N. Bach, as well as each of his employees, agents, representatives (including insurance carriers), investigators and attorneys.

2. As used herein "Plaintiff" refers to Thomas H. Ulrich and Mary M. Ulrich.

3. "And" includes "or" and "and/or."

4. "Facts" means all circumstances, events, and evidence pertaining to or touching upon the allegations set forth in the pleadings in this matter.

5. The term "document" or "documents" shall mean any kind of written, typed, printed, graphic, photographic, videotaped or computer-generated matter of any kind or nature, however produced or reproduced, including data or information that exists in electronic or data storage devices in any medium, any electronic files in their original format, as well as all mechanical or electronic sound recordings, and written transcripts thereof, however produced or reproduced, including all marginal notations, drafts, duplicates, and

carbon copies thereof, whether in your control or not, in the possession of you or your counsel. If a document exists in both a paper or "hard copy," as well as electronically, then a request to produce such documents shall be deemed to be a request to produce both the hard copy and the electronic copy of the document.

6. The term "electronic documents" shall mean any and all digital or electronic files, however stored, including, but not limited to, local or remote computer hard disk drive, floppy disc, CD-ROM, tape drive, zip disk, flash or thumb drive, or any other electronic storage format or medium. Additionally, requests for production of electronic documents means production of such documents or computer files in their native format.

7. The term "identify" when used with respect to documents, or the description or identification of a document, shall be deemed to request the nature and subject matter of the documents; the date thereof; the title or name thereof; the name, address, and job title or job capacity of the person who prepared the document or who has knowledge of it; and the name, address, job title or job capacity of the recipient(s) thereof.

8. The term "identify" when used with respect to a person shall be deemed to request the persons' full name, job title, last known business and residence addresses, and telephone numbers.

9. "Communicate" or "communication" refers to every manner or means of disclosure or transfer or exchange of information, whether orally or by document and whether face-to-face, by telephone, mail, e-mail, personal delivery, or otherwise.

10. The term "identify" when used with respect to oral communications shall be deemed to request whether said communication was in person or by telephone, an identification of each person who participated in or heard any part of said communication, and the substance of what was said by each person who participated in said communication, and when such communication took place.

11. "Evidencing" or "relating to" means consisting of summarizing, describing, referring to or mentioning.

12. Whenever the plural appears, the word shall include the singular, and vice versa.

13. All pronouns denoting gender which are in the masculine form shall be interpreted in light of the gender of the individual which the pronoun describes and vice versa.

14. Where knowledge or information in possession of a party is requested, such request includes information and knowledge either in your possession, under your control, within your dominion, or available to you regardless of whether this information is in your personal possession or is possessed by your agents, attorneys, servants, employees, independent contractors, representatives, insurers, or others with whom you have a relationship and from whom you are capable of deriving information, documents, or materials.

15. Each discovery request shall be accorded a separate answer, and each subpart

of a discovery request shall be accorded a separate answer.

16. PURSUANT TO RULE 26(e) OF THE IDAHO RULES OF CIVIL PROCEDURE, THESE DISCOVERY REQUESTS ARE CONTINUING IN NATURE, SO AS TO REQUIRE YOU TO FILE SUPPLEMENTARY ANSWERS IN A REASONABLE MANNER.

I.
INTERROGATORIES

INTERROGATORY NO. 1.: Please identify each individual who answered or provided information necessary to respond to the following interrogatories, requests for production and requests for admission served concurrently herewith.

INTERROGATORY NO. 2.: Please identify each and every person known to you who has any knowledge or who purports to have knowledge of any of the facts of this case.

INTERROGATORY NO. 3.: With respect to each person identified in response to Interrogatory No. 2, please set forth in detail the person's relationship to the facts of this case, and describe in detail the facts you believe are or may be known to such person.

INTERROGATORY NO. 4.: For each fact set forth in response to Interrogatory No. 3, above, identify any and all documents that describe, support, or otherwise reflect the facts known to each person.

INTERROGATORY NO. 5.: Please identify each person you expect to call as a lay witness in the trial of this matter, and provide an explanation of each such witness's intended

testimony.

INTERROGATORY NO. 6.: Please identify each person you expect to call as an expert witness in the trial of this matter. For each such expert, state the following:

(a) A complete statement of all opinions to be expressed by the expert and the basis and reasons therefore;

(b) The data or information considered by the expert in forming the opinions;

(c) The expert witnesses' qualifications, including a list of all publications authored by the expert within the preceding ten years;

(d) The compensation to be paid for the expert witness' testimony; and

(e) A listing of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years.

INTERROGATORY NO. 7.: Please identify and describe in detail the factual basis for each cause of action alleged against Plaintiffs in Defendant's Counterclaim, and identify each document Defendant contends constitutes evidence of or provides support for each cause of action Defendant alleges in this action.

INTERROGATORY NO. 8.: Please identify any and all documents or other tangible evidence which supports or tends to support the denials, the assertions and/or affirmative defenses set forth in Defendant's Answer in this matter.

INTERROGATORY NO. 9.: Please identify any and all documents or other tangible evidence which supports or tends to support the allegations set forth in Defendant's

Counterclaim in this matter.

INTERROGATORY NO. 10.: Please identify in full and complete detail any statements, affidavits, photographs, drawings, illustrations, written documents, electronic messages, diaries, calendars, notes, journals, tape recordings and/or video tapes of which you are aware that pertain to any issues in this litigation.

INTERROGATORY NO. 11.: Identify and describe each exhibit which you intend to introduce at the trial of this matter.

INTERROGATORY NO. 12.: Identify and describe in detail the factual basis for each affirmative defense Defendant asserts in his Answer, and identify each document Defendant contends constitutes evidence of or provides support for each affirmative defense Defendant asserts in this action.

INTERROGATORY NO. 13.: Identify any information that Defendant, or anyone acting on Defendant's behalf, has that Plaintiffs or anyone acting on Plaintiffs' behalf made any admission or declaration against interest in any way that would tend to support Defendant's version of the facts of this case. If you contend such information or statements exist, please state: the time and place where such admission or declaration was made, the substance of the admission or declaration and the names, addresses, and phone numbers of all persons present when such admission or declaration was made.

INTERROGATORY NO. 14.: If you denied any of the Requests for Admission

served herewith, identify each and every fact upon which you base your denial and identify any witness with knowledge of such facts.

INTERROGATORY NO. 15.: If you have withheld any document from production on the basis of a claim of privilege, please state the following:

(1) identify the document, including the author, date, number of pages, recipient and topic; and

(2) identify the privilege claimed.

II.
REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1.: Please produce each and every document which supports or tends to support allegations set forth in the denials, assertions and/or affirmative defenses set forth in Defendant's Answer in this matter.

REQUEST FOR PRODUCTION NO. 2.: Please produce each and every document which supports or tends to support allegations set forth in Defendant's Counterclaim in this matter.

REQUEST FOR PRODUCTION NO. 3: Please provide copies of all exhibits, documents and witness statements which you intend or expect to utilize at trial of this cause.

REQUEST FOR PRODUCTION NO. 4: Please produce any and all expert reports prepared by any expert retained by you in this matter.

REQUEST FOR PRODUCTION NO. 5: Please produce any and all documents

identified in response to the above Interrogatories or used to derive the information for your answers to Plaintiffs' First Discovery Requests.

REQUEST FOR PRODUCTION NO. 6: If you denied any of the following Requests for Admissions, please produce any and all documents on which you base your denial.

III.
REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1.: Admit that Exhibit A attached hereto is a true and correct copy of the deed granting title to the therein described property from Teton West Corporation to Jack Lee McLean, Trustee of the Jack Lee McLean Family Trust, as to an undivided one-fourth interest; Milan Cheyovich and Diana Cheyovich, Trustees of the Cheyovich Family Trust, as to an undivided one-fourth interest; Wayne Dawson, Trustee of the Dawson Family Trust, as to an undivided one-fourth interest; and Targhee Powder Emporium, LTD, as to an undivided one-fourth interest.

REQUEST FOR ADMISSION NO. 2: Admit that the original of the Deed attached hereto as Exhibit A was recorded in the records of Teton County, Idaho, prior to the time Defendant, John Bach, acquired an interest in the property described in such Deed.

REQUEST FOR ADMISSION NO. 3: Admit that Exhibit B attached hereto is a true and correct copy of the deed granting title to the therein described property from Philip J. Sarasqueta and Marilyn R. Sarasqueta, husband and wife, and Louisa F. Sarasqueta,

EXHIBIT A

Trustee of the Sarasqueta Living Trust dated October 30, 1990, to Thomas H. Ulrich and Mary M. Ulrich, husband and wife.

REQUEST FOR ADMISSION NO. 4: Admit that Exhibit C attached hereto is a true and correct copy of the deed granting title to the therein described property from Teton West Corporation to Philip J. Sarasqueta and Marilyn R. Sarasqueta, husband and wife, and Louisa F. Sarasqueta, Trustee of the Sarasqueta Living Trust dated October 30, 1990.

Dated this 10th day of March. 2011.

Charles A. Homer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by hand delivery, by mailing with the correct postage thereon, or by facsimile a true and correct copy thereof on this 11th day of March, 2011.

Document Served: **PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUEST FOR PRODUCTION OF DOCUMENTS**

Attorneys and/or Individuals Served:

John Bach
PO Box 101
Driggs ID 83422

(X) Mail ( ) Hand Delivery ( )Facsimile

Charles A. Homer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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EXHIBIT A

JUN 14 1994

116461

TETON Co. Id
Clerk Recorder

CORPORATION WARRANTY DEED

THIS INDENTURE is made this 9th day of June, 1994, between TETON WEST CORPORATION, a Nevada corporation duly authorized to do business in the State of Idaho, and having its principal office in Idaho at Driggs in the County of Teton, State of Idaho, the "GRANTOR", and JACK LEE NELSON, Trustee of the JACK LEE NELSON FAMILY TRUST, as to an undivided one-fourth interest; MILAN CHERVICH and DIANA CHERVICH, Trustees of the CHERVICH FAMILY TRUST, as to an undivided one-fourth interest; DAVID DAWSON, Trustee of the DAWSON FAMILY TRUST, as to an undivided one-fourth interest; and TARGHEE REGION PARTNERSHIP, LTD, as to an undivided one-fourth interest whose mailing address is P.O. BOX 98, DRIGGS, IDAHO 83422, the "GRANTEE".

WITNESSETH, that GRANTOR, having been duly authorized by resolution of its Board of Directors, for and in consideration of the sum of Ten Dollars ($10.00) lawful money of the United States of America, and other good and valuable consideration, to it in hand paid by GRANTEE, receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and confirm unto GRANTEE and to GRANTEE's heirs and assigns forever, all the following described property in the County of Teton, State of Idaho, to-wit:

(See Attached Exhibit "A" attached hereto and by this reference incorporated herein)

EXCEPTING therefrom any and all water rights, or any portions thereof, presently appurtenant to the real property above described, including, but not limited to all or any portion of the Water Right No(s). 22-07261 which are hereby reserved to the Seller and not conveyed hereby.

SUBJECT to all existing easements or claims of easements, patent reservations, rights of way, protective covenants, zoning ordinances, and applicable building codes, laws and regulations, encroachments, overlaps, boundary line disputes and other matters which would be disclosed by an accurate survey or inspection of the premises.

TOGETHER with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, also any reversions, remainders, rents, issues and profits therefrom, and all estate, right, title and interest in and to said property, as well in law as in equity, of the GRANTOR.

116461
FILED
AT THE REQUEST OF
First American
25 min past 4 PM
June 14 1994
Ola M. Drake
Ex-Officio Recorder
Lisa Ripley
Deputy

EXHIBIT A

TO HAVE AND TO HOLD, the above described premises and appurtenances unto the GRANTEE and to GRANTEE's heirs and assigns forever. The GRANTOR shall warrant and defend said premises in the quiet and peaceable possession of the GRANTEE against GRANTOR and GRANTOR's successors, and against every person whomsoever who lawfully holds (or who later lawfully claims to have held) rights in the premises as of the date hereof.

In construing this deed and where the context so requires, the singular includes the plural.

IN WITNESS WHEREOF, the GRANTOR has caused its corporate name to be affixed by its duly authorized officer.

TETON WEST CORPORATION

By: George C. Hatch
Its President

ATTEST: Diane G. Orr
Assistant Secretary

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On this 9th day of June, in the year 1994, before me, the undersigned, a notary public in and for said State, personally appeared George C. Hatch and Diane G. Orr, known or identified to me to be the President and Assistant Secretary, respectively, of Teton West Corporation, and the persons who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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

NOTARY PUBLIC
[illegible]

Notary Public for Utah
Residing at Salt Lake City, Utah
My Commission Expires: 7/11/95

EXHIBIT A

116461

EXHIBIT "A"

A portion of the South 1/2 South 1/2 Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89 degrees 50'12" East, 2630.05 feet to the true point of beginning: thence North 00 degrees 07'58" East, 813.70 feet to a point: thence North 01 degrees 57'48" East, 505.18 feet to a point: thence South 89 degrees 58'47" East, 1319.28 feet to a point: thence South 00 degrees 07'36" West, 1321.69 feet to a point on the Southern Section Line; thence North 89 degrees 51'01" West, 1320.49 feet along the Southern Section Line to the South 1/4 Corner of said Section 6, a point: thence North 89 degrees 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning.

Subject to a 60 foot road and utility easement along the Western Property Lines.

And subject to a 60 foot road and utility easement along the Southern Property Lines.

EXHIBIT A

DEC 11 1996

TETON CO., ID
CLERK RECORDER

125858

193

WARRANTY DEED

For Value Received PHILIP J. SARASQUETA & MARILYN R. SARASQUETA, husband and wife, and LOUISA S. SARASQUETA, Trustee of the SARASQUETA LIVING TRUST, dated October 30, 1990

Hereinafter called the Grantor, hereby grants, bargains, sells and conveys unto

THOMAS H. ULRICH and MARY M. ULRICH, husband and wife
whose address is: 281 W. HARVEST RUN, IDAHO FALLS, ID, 83404

Hereinafter called the Grantee, the following described premises situated in Teton County, Idaho, to-wit:

SEE ATTACHED EXHIBIT A

SUBJECT TO THE RESTRICTION THAT THIS PARCEL CANNOT BE SOLD SEPARATELY OR SUBDIVIDED WITHOUT BEING JOINED TOGETHER WITHT EH FOLLOWING DESCRIBED PROPERTY: A portion of the North 1/2 South 1/2 Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho being further described as: From the SW Corner of said Section 6, North 0 degrees 17'55" East, 1312.45 feet and South 89 degrees 58'22" East 2639.46 feet to the true point of beginning; thence North 00 degrees 04'52" East, 1318.71 feet to a point on the East-West 1/4 Line of said Section 6; thence North 89 degrees 53'27" East, 1320.33 feet along the East-West 1/4 Section line to a point; thence South 00 degrees 07'36" West, 1321.69 feet to a point; thence North 89 degrees 58'47" West, 1319.28 feet to the point of beginning; LESS a portion of the North 1/2 South 1/2 Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho being further described as: From the SW Corner of said Section 6, North 0 degrees 17'55" East, 1312.45 feet and South 89 degrees 58'22" East 2639.46 feet; thence North 00 degrees 04'52" East, 659.35 feet to the true point of beginning; thence North 00 degrees 04'52" East, 659.36 feet to a point on the East-West 1/4 Line of said Section 6; thence North 89 degrees 53'27" East, 660.16 feet along the East-West 1/4 Section line to a point; thence South 00 degrees 04'52 West, 659.36 feet; thence South 89 degrees 53'27" West, 660.16 feet to the point of beginning **AND MUST COMPLY WITH THE TETON COUNTY SUBDIVISION ORDINANCE.**

Subject to reservations in United States and State Patents; existing and recorded Right-of-ways, Easements, Zoning, Building and Subdivision ordinances; Taxes and Assessments as prorated between the parties hereto.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee and to the Grantee's heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that the Grantor is the owner in fee simple of said premises; that said premises are free from all encumbrances except current years taxes, levies, and assessments, and except U. S. Patent reservations, restrictions, easements of record, and easements visible upon the premises, and that Grantor will warrant and defend the same from all claims whatsoever.

Dated:

SARASQUETA LIVING TRUST DATED OCTOBER 30, 1990

Louisa S. Sarasqueta
LOUISA S. SARASQUETA, Trustee

Philip J. Sarasqueta
PHILIP J. SARASQUETA

Marilyn R. Sarasqueta
MARILYN R. SARASQUETA

STATE OF IDAHO, COUNTY OF TETON

On this 6th day of December, in the year 1996, before me, a Notary Public in and for said State, personally appeared PHILIP J. SARASQUETA and MARILYN R. SARASQUETA, known or identified to me to be the person(s) whose name(s) are subscribed to the within Instrument, and acknowledged to me that they executed the same.

MARILYN DIMAGGIO NOTARY PUBLIC STATE OF IDAHO

125858
FILED
AT THE REQUEST OF
First American
AT 08 MINUTES PAST 10 o'clock A M
DATE Dec. 11, 1996
Ada J. Drake
CLERK OF RECORD
BY Nora Rigby
DEPUTY

Marilyn DiMaggio
Notary Public of Idaho
Residing at TWIN FALLS, ID
Commission Expires 9-15-99

EXHIBIT

STATE OF IDAHO } ss
County of Teton }

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of the original thereof, on file in my office
Dated . . . 9/1/2000 . . .

Ex-Officio Auditor & Recorder
Clerk of the District Court
By . . . . .

EXHIBIT A

STATE OF CALIFORNIA)
: ss
COUNTY OF STANISLAUS)

On this 9th day of December, in the year 1996, before me, a Notary Public in and for said State, personally appeared LOUISA S. SARASQUETA, known or identified to me to be the Trustee of the Trust that executed the instrument or the person who executed the instrument on behalf of said Trust and acknowledged to me that such Trust executed the same.

Evelyn E. Silva
Notary Public
Residing at
Commission Expires: 02-01-2000

EVELYN E. SILVA
COMM. #1088838
NOTARY PUBLIC-CALIFORNIA
STANISLAUS COUNTY
My Comm. Expires Feb. 1, 2000

STATE OF IDAHO }
County of Teton } ss

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of the original thereof on file in my office

Dated . . . . 9/1/2010 . .

Ex-Officio Auditor & Recorder
Clerk of the District Court

By . . . . . Deputy Clerk

125858

EXHIBIT A

RECEIVED

JUN 17 1994

TETON Co Id
Clerk Recorder

116576

CORPORATION WARRANTY DEED

THIS INDENTURE is made this 9th day of June, 1994, between TETON WEST CORPORATION, a Nevada corporation duly authorized to do business in the State of Idaho, and having its principal office in Idaho at Driggs in the County of Teton, State of Idaho, the "GRANTOR", and PHILIP J. SARASQUETA and MARILYN R. SARASQUETA, husband and wife, and JOAQUIN F. SARASQUETA and LOUISA SARASQUETA, husband and wife, whose mailing address is 1205 Galena, Twin Falls, Idaho 83301, the "GRANTEE".

WITNESSETH, that GRANTOR, having been duly authorized by resolution of its Board of Directors, for and in consideration of the sum of Ten Dollars ($10.00) lawful money of the United States of America, and other good and valuable consideration, to it in hand paid by GRANTEE, receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and confirm unto GRANTEE and to GRANTEE's heirs and assigns forever, all the following described property in the County of Teton, State of Idaho, to-wit:

(The legal description of the real property is set forth in Exhibit "A" attached hereto and by this reference incorporated herein)

SPECIFICALLY INCLUDING the following described portions of the following described water rights appurtenant thereto:

Water Right No.	Priority Date	Source	Total Amount	Proportion of Right Allocated to above described property
22-07261	09/16/77	Groundwater	18.0cfs	.39cfs

SUBJECT to all existing easements or claims of easements, patent reservations, rights of way, protective covenants, zoning ordinances, and applicable building codes, laws and regulations.

EXHIBIT

1

EXHIBIT A

encroachments, overlaps, boundary line disputes and other matters which would be disclosed by an accurate survey or inspection of the premises.

TOGETHER with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, also any reversions, remainders, rents, issues and profits therefrom, and all estate, right, title and interest in and to said property, as well in law as in equity, of the GRANTOR.

TO HAVE AND TO HOLD, the above described premises and appurtenances unto the GRANTEE and to GRANTEE's heirs and assigns forever. The GRANTOR shall warrant and defend said premises in the quiet and peaceable possession of the GRANTEE against GRANTOR and GRANTOR's successors, and against every person whomsoever who lawfully holds (or who later lawfully claims to have held) rights in the premises as of the date hereof.

In construing this deed and where the context so requires, the singular includes the plural.

IN WITNESS WHEREOF, the GRANTOR has caused its corporate name to be affixed by its duly authorized officer.

TETON WEST CORPORATION

By: _____
Its: President

ATTEST: _____
Assistant Secretary

STATE OF UTAH)
)ss.
County of Salt Lake)

On this 9th day of May, in the year 1994, before me, the undersigned, a notary public in and for said state, personally appeared [illegible] and [illegible], known or identified to me to be the President and Assistant Secretary, respectively, of Teton West Corporation, and the persons who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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

(seal)

Notary Public for Utah
Residing at SLC, Utah
My Commission Expires: 2/11/95

G:\WPDATA\KWF\0852\SARASQ01.CWD:SJW

3 - CORPORATION WARRANTY DEED

EXHIBIT A

116576

EXHIBIT "A"

A portion of the North 1/2 South 1/2 Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho being further described as: From the SW Corner of said Section 6, North 0 degrees 17'55" East, 1312.45 feet and South 89 degrees 58'22" East 2639.46 feet to the true point of beginning; thence North 00 degrees 04'52" East, 1318.71 feet to a point on the East-West 1/4 Line of said Section 6; thence North 89 degrees 53'27" East, 1320.33 feet along the East-West 1/4 Section line to a point; thence South 00 degrees 07'36" West, 1321.69 feet to a point; thence North 89 degrees 58'47" West, 1319.28 feet to the point of beginning.

Together with a 60 foot road and utility easement being the 60 feet directly East of the following described lines: Beginning at a point North 89 degrees 50'12" West, 12.13 feet from the South 1/4 corner of said Section 6; thence North 00 degrees 07'58" East, 813.70 feet to a point; thence North 01 degrees 37'48" East, 505.18 feet to the SW property corner, and subject to a 60 foot road and utility easement being the 60 feet directly east of the following described line: Beginning at the Southwest Property Corner and running North 00 degrees 04'52" East, 60 feet to a point.

SUBJECT TO Grant of Easements recorded in Teton County, Idaho, Recorder's Numbers 115883, 116087, 116079, 115907, and 116078.

116576

Filmed
Indexed
Plotted

FILED
AT THE REQUEST OF
First American
AT 22 MINUTES PAST 10 A M
DATE Aug. 17 1992
Lisa J. Drake
CLERK OF RECORDER
BY Gayle Kressler
DEPUTY

EXHIBIT A

JOHN N. BACH, P.O. Box 101
Driggs, ID 83422/Tel: (208) 354-8303
Defendant/Counterclaimant Pro Se

SEVENTH JUDICIAL DISTRICT COURT, IDAHO, COUNTY OF TETON

THOMAS H. ULRICH AND MARY M. ULRICH, husband and wife,

Plaintiffs,

V.

JOHN N. BACH andall parties claiming to hold title to the hereinafter described proper pursuant to that certain warranty deed record in the records of Teton County, Idaho on June 14, 1994 as Instrument No. 116461 and all unknown claimants, heirs and devisees of the following property:

A portion of the South ½ South ½ Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89 50'12" East, 2630.05 feet to the true point of beginning; thence North 00 07'58" East, 813.70 feet to a point; thence North 01 37'48" East, 505.18 feet to a point; thence South 89 58'47" East, 1319.28 feet to a point; thence South 00 07'36" West, 1321.69 feet to a point on the Southern Section Line; thence North 89 51'01" West, 1320.49 feet along the Southern Section Line to the South ¼ Corner of said Section 6, a point; thence North 89 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning. SUBJECT TO a 60 foot road and utility easement along the Western Property lines. AND SUBJECT TO a 60 foot road and utility easement along the Southern Property Lines.

CASE No. CV 2010-329

DEFENDANT AND COUNTER-CLAIMANT JOHN N. BACH'S ASSERTIONS OF PRIVILEGES, OBJECTIONS TO, ALTERNATE REFERENCED RESPONSES, and ANSWERS, ALTERNATIVELY TO:

Plaintiffs' First Set of Interrrogatories, Requests For Admission and Request For Production of Documents.

EXHIBIT B

COMES NOW JOHN N. BACH, "Defendant, appearing pro se in the above entitled matter", having only been served in that restricted capacity, with Plaintiffs' First Set of Interrogatories, Reuquest for Admission and Request for Production of Documents, purportedly on Thursday, March 10, 2011, but which First Set was not received in his mail until Saturday, March 12, 2011, and does hereby, this Tuesday, April 12, 2011, within and on the 33rd day raise, state, assert and respond with his: 1.) Privileges, attorney client, work product and accoutant-client/rights of privacy-confidentialities as to all Interrogatories Numbers 1 through 15 and all subparts thereof; 2.) Reiterating all afores said Privileges and Rights of Privacy, Confidentialities to all Requests for production, Numbered Requests 1 through 6; and 3.) Reiterating and incorporating also herein, all saidi privileges, rights of confidentialities, etc., to Reuests for Adimission No. 1, through Admission No. 4, and, wherever appropriate, per the provisions of I.R.C.P. refer to and incorporate alternatively, the designated public records, files and documents as answers and responses as set forth in EXHIBIT "I", all stated, identified or designated public records, files, actions, etc.,

ANSWER TO INTERROGATORY NO. 1: John N. Bach is the only individual who has provided the afore stated objections, privileges, referenced/incorporated public records, files, etc., and all responses to the said FIRST SET of said combined interrogatories, request for adimission and production.

ANSWER TO INTERROGATORY NO. 2, Each person known to John N. Bach who has any knwoledge or purpopts to have knowledge of the facts

EXHIBIT B

of the Plaintiffs' cases are set forth already in the Defendant's statement already filed and served in with the court re the witnesses, defendant intends to call at time of trial.

ANSWER TO INTERROGATORY NO. 3: Other than my sister, Diana Cheyovich, and her husband, my brother in law, Milan Cheyovich, all other named individuals, on said list of persons I may call, are friends, neighbors or visitors and associates of mine and my deceased wife, Cindy, who have been on our forty acre parcel, and seen, observed, assisted in enforcing or prohibiting any trespassing violations, incursions or intrusions on said 40 acre parcel, etc.

ANSWER TO INTERROGATORY NO. 4: First, objections is raised, made and asserted to this interrogatory as violating the provisions of IRCP, Rule 33(a)(3), when counting the sub-parts of Interrogatories Nos 1, 2, and 3, exceeds 40 interrogatories, However, without any of the aforesaid objections and this objection to interrogatories and all subparts exceeding 40, Defendant refers to EXIBIT "I" and incorporates the same in full per IRCP, Rule 33(c)

ANSWER TO INTERROGATORY 5: As I understand "a lay witness is not an expert one but a percipient witness to the events, occurrences, etc., Thus, all witnesses I already named prior are lay witnesses except possibly Travins Thompson, a realtor and developer.

ANSWER TO INTERROGATORY 6: Possibley Travis Thompson but I haven't made that decision yet depending on the matters under consideration by the Court. I also renew and assert the objections I raised to Interrogatory 4, supra which is incorporated herein,

EXHIBIT B

I may have to decide during the trial whether I may be called as an expert witness; in the event, such information as may be requested per subparts (a) through (e), which are also objected as in violation of teh 40 limit interrogatories will be established by foundational prooof and showing.

ANSWER TO INTERROGATORY NO. 7: Again all objections as to the excess of 40 interrogatories is raised, asserted and presented. Such detailed and pedantic basis is already set forth not only in all those public files in EXHIBIT "I", incorporated herein, but per IRCP, Rule 65 by all filings, presentations, etc., and offered objections and evidence/cross examination by myself epposing Plaintiffs' hearing re restraining order and preliminary injunction, the lack of any foundational showing to issuance of any preliminary or permanent injunction as found by the Court's memorandum decision thereafter. However, the verified answer with affiramtive defends and the counterclaim counts, along with the affidavits filed sofar by defendant and still to be filed on or before April 22, 2011, cover the same.

ANSWER TO INTERROGATORY NO. 8: Same objections and privileges as asserted to all previous interrogatories are raised and asserted herein. See also Exhibt "I" which is incorporated herein and the answer to interrogatory No. 7.

ANSWER TO INTERROGATORY NO. 9: SAME OBJECTIONS, PRIVILEGES & Responses as raised supra and per Interrogatories 1 through 8.

ANSWER TO INTERROGATORY 10: Same objections, privileges and response as raised ininterrogatories 1 through 9. Further, all such documents, photographs are alreayd contained in each of said public files, records and affidavits, etc., in this

EXHIBIT B

action. Any photographs not produced or attached per any Affidavits filed herein by myself as defendant will be made available for inspection and photocopying at plaintiffs' expense upon arraignments made re sight of inspection and copying or duplicating. The letter I received from Thomas Ulrich in July 2009 will not be produced as under the privileges raised hereine supra and infra, its use is for purposes of cross-examination of the plaintiffs. Plaintiffs should have a copy thereof per their own records and correspondence.

ANSWER TO INTERROGATORY NO. 11.: Same objectiions, privileges, and alternate answerssaas set forth in Interrogatories 1 through 10. Ihave not decided which exhibit or exhibits, other than on cross-examinations I intend to interoduce at time of trial other than those exhibits aleady presented to the court at all hearings to date or attached as exhibits to my affidavits filed with the court.

ANSWER TO INTERROGATORY NO. 12: Same objections, privileges, alternate answers as set forth in Interrogatories 1 through 11, supra.

ANSWER TO INTERROGATORY NO. 13. Same objections, privileges and alternative anwers as set forth to interrogatories 1 through 12.

ANSWER TO INTERROGATORY NO. 14: Same objections, privileges and alternate answers as set forth in Interrogatories 1 thourgh 13, Moreso, I have stated my objections on the record at several hearings and in memoranda filed with the Court, The rulings of the court are a matter of record, I do not admit any requests for admission but stand by my objections to preserve the issues in the event of any appeal.

EXHIBIT B

ANSWERS TO INTERROGATORY NO. 15: All objections, privileges asserted/raised and alternative answers to all previous interrogatories are reasserted, raised and incorporatated herein. The particular privilege of work product is well knwon to counsel for Plaintiffs and such privilege along with all other privileges are set forth in the Idaho Rules of Evidence.

The letter of July, 2009 from Plaintiff Thomas Ulrich, being in his own hardwriting, contains admissions, declarations against interests and confirmation of a personal agreement, understanding and executed in fact, along with waiver and abandonment basis, novation, estoppel in different forms, but are objected to as within any request for production of documents under thise interrogatory nor subsequent request for production, the latter which is not in the proper required format per I.R.C.P., Rule 34(b)(1)(2), and is further not discoverable, unless and until such letter/document is covered during cross examination, rebuttal, or denied accurately by the plaintiffs', their witnesses or counsel, at time of trial. This letter has not been produced, not been included nor disclosed in any of plaintiffs' affidavits nor purported verified complaint herein.

Most inadequate and without foundational showing or chronology as in fact having occurred, both by plaintiffs' failure and deficiency of wording of this Interrogatory NO. 15, are the two (2) subparts (1) and (2). Additionally, the hereafter REQUESTS FOR PRODUCTION, NUMBERED 1 through 6, particularly No 6, is a disquised form of interrogatory, which seeks to reinsert each previous improper request for production as multiple interrogatories in place of requests for production 1 through 5, making them uncertain, vague, compound, complex and not understandable.

EXHIBIT B

II. REQUEST FOR PRODUCTION

Defendant JOHN N. BACH refers to all his objections, privileges, or alternate answers/responses to the foregoing Interrogatories No. 1 through 15, and incorporates all of the same herein in direct response and denial of each of the Requests for Productions, #1 through 6.

Under I.R.C.P. Rule 34(b)(2), Plaintiffs were required ("shall ") to set forth the items to be inspected either by individual item or by category and (to) describe the each item and category with reasonable particularity." Also required which was not complied with by Plaintiffs and therefore objected to as void and invalid requests for production was: "The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts." Without any waiver of each and all of the foregoing objections, Defendant Responds:

DENIES REQUEST FOR PRODUCTION NO. 1. Alternatively, see answers per EXHIBIT "I", IRCP, Rule 33(c).

DENIES REQUES FOR PRODUCTION NO. 2. Incorporates Exhibit "I"

DENIES REQUEST FOR PRODUCTION NO. 3. Incorporates Exhibit "I"

DENIES REQUEST FOR PRODUCITON NO. 4. Incorporates Exhibit "I"

DENIES REQUEST FOR PRODUCITON NO. 5. Incorporates Exhibit "I"

DENIES REQUEST FOR PRODUCTION NO. 6. Incorporates Exhibit "I"

Moreoever most of the documents, materials apparently desired or sought have already been produced, offered and received by the Court re motions already had or still be fore the court to be further briefed and submitted by April 22, 2011.

EXHIBIT B

III. REQUESTS FOR ADMISSIONS

Request for Admission No. 1: Denied in part, because there is the Warrant Deed which is attached to Defendant JOHN N. BACH's affidavit in opposition to Thomas Ulrich's motions for summary judgment; moreover there is a corrected or correction deed, not mentioned which was recorded.

Request fo Admission No. 2: Based upon the grammatical structure of this request and in view of the aforesaid denial in part to No 1, this Request for amdission No 2, is also denied. See and as they are incorporated herein, Denials to Request for Production Nos 1 through 6, supra.

Request for Admission No. 3: Denied, as per the answers to interrogatores and denials of Request for Prodcution. Defendant objected to the admission of said Exhibit B and stands by his objections and denial of the validity of said Exhibit B. Moreover, the Denials to the aforesaid Admissions No. 1 through 2 are reasserted herein and the denial of Request for Admission No. 4, infra.

Request for Admission No. 4: Denied. The uncertainty and and lack of notarization of the purported EXHIBIT "A" and the statements of said EXHIBIT "A" as to the "SUBJECT TO GRANT OF Easements record in Teton County, Idaho, Recorder's Numbers 115883, 116087, 116079, and 116078, followed by the stamp of FILED AT THE REQUEST OF First American on June 17, 1992 when purportedly the previous pages and said EXHIBIT "A" was filed about almost two (2) years later, casts more than incompleteness of said deed being true and correct in granting any title.

EXHIBIT B

E X H I B I T " I "

Per the provisions of I.R.C.P. Rule 33(c), as and for an optional sufficient answer to each of the 15 Interrogatories and alternate answer/response to the incomplete and deficient Requests for Production, 1 through 6, defendant does hereby designate the public and business recordsfrom which the answers responses may be derived and/or ascertained. Such records are:

1. The rezoning and subdivision application by the Barlows of the STILLWATER RANCH SUBDIVISION, Tetonia, Teton County.
2. The rezoning and subdivsion application by the Ulrich's of Carrington Crossing and GROUSE LANDING, Tetonia, Teton County.
3. State of Idaho v. John Nicholas Bach, TEton CR 04- filed in Teton County, BUT venue granted transferred to Bonneville County, containing preliminary hearing transcripts, etc., of the trespasses of Blake Lyle and Shauna Crandall over the westerly portion of Peacock 40 acres. Dismissed for lack of credibility by Lyle/Crandall.
4. Cheyovich & Bach v. State of Idaho, Dept of Lands, Idaho Transportation Dept, Teton County, CV 06-091 & I.S.C. DKTs 33838 & 34711, # Clerk's Volumes
5. Teton County Public Roads/Rights of Way, Hearings and County Road/Easements Map, 2004 through present.
6. Dawson v. John N. Bach, Intervenor Appeal Dkts with Trasncripts, ISC Dkts 31712 and 38370. (Appeal from Judge Darren Simpson's Second Amended Judgment, Oct 2010.

EXHIBIT B

VERIFICATION OF JOHN N. BACH,

STATE OF IDAHO)

COUNTY OF TETON)

I, JOHN N. BACH, of Driggs, Idaho, have read and given/stated the foregoing Assertions of Privileges, Objections to, Alternate ~~Referenced~~ Responses, and Answers, Alternatively to, Plaintiffs' First Set of Interrogatories, Requests for Admission and Request for Production of Documents, and do hereby state of my own personal knowledge, particpation and understanding, that the foregoing are true and correct as I understand the same statements, of whatever nature given they are.

DATED: April 12, 2011

John N. Bach 4:45 P.M

JOHN N. BACH

I, the undersigned Notary of Idaho, hereby attest, affirm and state that on this date April 12, 2011, appeared before me, JOHN N. BACH, personally known to me, did give the foregoing privileges, objections and referenced reponses and answers, signing the same in my presence and witnessing thereof.

SWORN TO AND SUBSCRIBED TO BY ME.

Tiera Parker 4:45pm

Notary's Signature

Notary Seal

TIERA PARKER NOTARY PUBLIC STATE OF IDAHO

Address:

Expiration Date:

Residing in Teton County
Commission Expires on 06/08/2013

EXHIBIT B

Charles A. Homer, Esq. (ISB No. 1630)
Dale W. Storer, Esq. (ISB No. 2166)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

THOMAS H. ULRICH and MARY M. ULRICH, husband and wife,

Plaintiffs,

v.

JOHN N. BACH and all parties claiming to hold title to the hereinafter described property pursuant to that certain warranty deed recorded in the records of Teton County, Idaho on June 14, 1994, as Instrument No. 116461 and all unknown claimants, heirs and devisees of the following property:

A portion of the South ½ South ½ Section 6, Township 5 North, Range 46 East, Boise Meridian, Teton County, Idaho, being further described as: From the SW corner of said Section 6, South 89 50'12" East, 2630.05 feet to the true point of beginning; thence North 00 07'58" East, 813.70 feet to a point; thence North 01 37'48" East, 505.18 feet to a point; thence South 89 58'47" East, 1319.28 feet to a point; thence South 00 07'36" West, 1321.69 feet to a point on the

Case No. CV-2010-329

MOTION IN LIMINE AND FOR SANCTIONS

Southern Section Line; thence North 89 51'01" West, 1320.49 feet along the Southern Section Line to the South ¼ Corner of said Section 6, a point; thence North 89 50'13" West, 12.13 feet along the Southern Section Line to the point of beginning. SUBJECT TO a 60 foot road and utility easement along the Western Property lines. AND SUBJECT TO a 60 foot road and utility easement along the Southern Property Lines.

Defendants.

COME NOW Plaintiffs Thomas H. Ulrich and Mary M. Ulrich, husband and wife, (hereinafter "Ulrichs"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and hereby move this Court for an order:

1. Precluding defendant John N. Bach ("Bach") from introducing any exhibits at trial in this matter because exhibits were not appropriately produced in response to discovery requests and were not disclosed in defendant's pre-trial memorandum entitled "Pre-trial Memorandum Part "1" dated May 2, 2011 ("Pre-Trial Memorandum");

2. Excluding all fact witness testimony of witnesses at trial in this matter because they were not disclosed in defendant's Pre-trial Memorandum.

3. Excluding all testimony of expert witnesses at trial in this matter because expert witness opinions were not appropriately produced in response to discovery requests, and as required by the Court Trial Scheduling Order entered January 11, 2011 by the court ("Scheduling Order"), and excluding all testimony of expert witnesses at trial in this matter because expert witnesses were not disclosed in defendant's Pre-Trial Memorandum.